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# Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres

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# Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres

Mark D. Rosen<sup>1</sup>

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## INTRODUCTION

The first wave of religious freedom claims was asserted by individuals complaining that governmental action interfered with their ability to act pursuant to their religion's dictates. The doctrinal and cultural response to these claims has been well documented, and there is a contemporary consensus in the United States favoring strong protections for individual religious liberty.<sup>1</sup> Controversially, these protections largely come now from legislatures, not from courts' enforcement of constitutional rights. Judicial constitutional protections nearly disappeared following the Court's widely criticized opinion twenty years ago in *Employment Division v. Smith*,<sup>2</sup> which upheld a law that substantially burdened religious practice because the law was neutral and generally applicable. But after *Smith*, Congress and more than a dozen states enacted statutes that aimed to restore strong protections for individuals.<sup>3</sup> As a result of this legislative action, as well as (or, more accurately, mostly due to) the widespread popular sentiment that gave rise to it, individual religious liberty remains strong in the United States.<sup>4</sup>

A second wave of religious freedom claims has been asserted with increasing frequency, in both judicial courts and the court of public opinion, on behalf of an array of religiously affiliated institutions. Unlike the first wave, there is not presently a normative consensus as to what if any protections these institutions – originally churches, schools, hospitals, and social service organizations, but more recently corporations run by religious individuals -- should receive. Evidence of this undecidedness can be found in the federal government's chaotic responses in three recent arenas. In a decidedly unsympathetic decision, the Supreme Court ruled that a public law

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<sup>1</sup> See, e.g., NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM – AND WHAT WE SHOULD DO ABOUT IT 235 (observing that Americans “all believe in religious liberty”).

<sup>2</sup> 494 U.S. 872 (1990). There is an extraordinarily deep opus of critiques. For a particularly powerful example, see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

<sup>3</sup> Congress enacted the Religious Freedom Restoration Act (RFRA), which was overturned insofar as it applied to states in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and thereafter enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). More than a dozen states have passed legislation that mirrors the federal act that was declared to have beyond Congress' powers in *City of Boerne*. See generally Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRA's*, 55 S. DAKOTA L. REV. 466 (2010).

<sup>4</sup> See generally Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 Cardozo L. Rev. 1755, 1756 (2011) (concluding that “religious liberty remains relatively vibrant and robust in the United States.”). I do not mean to be polyanish; there is troubling evidence that Muslims' success of religious liberty claims is substantially less than other religious groups. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence From the Federal Courts*, 98 IOWA L. REV. 231 (2012). But this unfortunate pattern is the exception proving the rule that, in the main, Americans are strongly supportive of religious liberty claims advanced by individuals.

school can refuse to register a Christian students' organization that denied membership to gay students who would not agree to comply with the organization's "Statement of Faith,"<sup>5</sup> which forbade homosexual relations. Two years later the Court issued a strong institution-protecting decision, finding a "ministerial exception" that exempts churches from anti-discrimination laws when making decisions to hire, retain, or discharge their ministers.<sup>6</sup> Finally, last year the Obama administration tacked in the other direction, issuing regulations under the Affordable Care Act that required many religious employers -- including Catholic hospitals, universities, and colleges -- to provide health insurance to their employees that includes contraceptive devices and morning-after pills, the use of which is contrary to the Catholic Church's tenets.<sup>7</sup> Tens of lawsuits have been filed against this so-called "contraception mandate."<sup>8</sup> The Administration's recent proposed amendments to the regulations have been rejected by American bishops for not going far enough.<sup>9</sup>

The governmental decisions described above all have generated considerable controversy, and there is not yet anything approaching a popular consensus as to how such disputes should be resolved. Scholars have intervened, staking out two diametrically opposed positions. One group has argued that churches are jurisdictionally independent of the state, and therefore beyond government's regulatory authority, vis-à-vis matters within their domain.<sup>10</sup> Scholars in this group have argued that churches have "prerogatives of sovereignty,"<sup>11</sup> are "sovereign within their own spheres,"<sup>12</sup> are "entitled to legal autonomy,"<sup>13</sup> and are properly conceptualized

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<sup>5</sup> Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010).

<sup>6</sup> See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012).

<sup>7</sup> See Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. COLLOQUY 151 (2012).

<sup>8</sup> See Ethan Bronner, *A Flood of Suits Fights Coverage of Birth Control*, THE NEW YORK TIMES A1 (January 27, 2013).

<sup>9</sup> See Robert Pear, *Bishops Reject Birth Control Compromise*, THE NEW YORK TIMES (February 7, 2013).

<sup>10</sup> See, e.g., Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harv. C.R.-C.L. L. Rev. 79, 125 (2009) (concluding that "any exercise of statute authority that falls within the proper scope of a coordinate sovereign sphere, like a religious entity, is beyond the state's powers unless one of a limited set of exceptions applies"); Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL OF RIGHTS J. 43, 65 (2008) ("some matters lie within an exclusive sphere of religion that is off limits to governmental regulation"); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 55-56 (1998) (arguing that "the status of religious entities is acknowledged by the Establishment Clause, and a sphere is reserved in which religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission").

<sup>11</sup> Mark DeWolfe Howe, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 92 (1953).

<sup>12</sup> Horwitz, *supra* note 10, at 83; see also Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1387 (church and state are "coexisting sovereigns" with distinct "spheres of interest").

<sup>13</sup> *Id.* at 119.

as foreign embassies.<sup>14</sup> Several scholars in this group have begun extending these jurisdictional conclusions to religious institutions beyond churches.<sup>15</sup> I shall call this the “Separate Spheres” approach.

The second group of scholars is well represented by an excellent forthcoming article by Professors Richard Schragger and Micah Schwartzman.<sup>16</sup> They sharply critique the Separate Spheres claim, concluding instead that the state is the singular and supreme source of legal authority in modern polities.<sup>17</sup> Grounding their approach in Locke, they instead argue that the church’s status is entirely derivative of the rights of its members, and that “general principles of freedom of association, privacy, and conscience are sufficient to protect all conscience-based associations, including churches.”<sup>18</sup> Because this group of scholars essentially reduces churches to their individual members, thereby eliminating religion as a distinct sphere, I shall refer to theirs as the “Individualism” approach.

Drawing on John Rawls, this Article proposes a third framework for determining the appropriate relationship between religious institutions (*i.e.*, not only churches) and the state. Like Individualism, my approach rejects the Separate Spheres view that religious institutions are jurisdictionally independent of the modern state. In contrast to the Individualism, however, I argue that religious institutions’ status in liberal societies is best justified not on grounds of voluntary association, but individual self-actualization. This provides a principled approach for determining what counts as a religious institution, and what protections such institutions are entitled to. It further shows why, *pace* Individualism, religious institutions cannot be reduced to the individuals who compose them, but instead can be ‘greater than the sum of the parts’ of their constituent members.<sup>19</sup> Concepts and legal doctrines

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<sup>14</sup> Steve D. Smith, *Freedom of Religion or Freedom of the Church*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1911412](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412).

<sup>15</sup> See, e.g., Thomas C. Berg, *Freedom of the Church, Religious Nonprofits, and Progressivism: Comments on the HHS Mandate*, 21 J. L. & CONTEMP. LEGAL ISSUES xx (forthcoming 2013) (“non-church institutions certainly have a sphere of exclusive authority over some internal decisions that affect their faith and mission”) (internal citation omitted); Robert K. Vischer, *Do For-Profit Businesses Fit Within the Freedom of the Church?* (draft on file with author).

<sup>16</sup> See Richard Schragger & Micah Schwartzman, *Against The Religious Institution Principle*, 98 VA. L. REV. x (forthcoming 2013) (page references made to draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2152060](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152060)).

<sup>17</sup> *Id.* at 22 (“identifying religious institutions as presiding over a uniquely sovereign sphere clashes dramatically with our republican and democratic political commitments”).

<sup>18</sup> *Id.* at 5.

<sup>19</sup> I am grateful to Michael Paulsen for this metaphor. See also Esbeck, *supra* note 10, at 54 (suggesting churches are “not the mere sum of the derivative rights of their individual members.”); Richard W. Garnett, *Religious Freedom, Church Autonomy, and Constitutionalism*, 57 DRAKE L. REV. 901, 907 (2009) (“an understanding of religious faith, and religious freedom, that stops with the liberty of individual conscience, and neglects institutions and communities, will be incomplete. And, so will the legal

developed in relation to individuals and expressive associations accordingly do not seamlessly transfer over to, and cannot adequately guard, religious institutions.<sup>20</sup> I refer to my approach as the “Religious Institution Principle.”<sup>21</sup>

The Article unfolds in five parts. The first two parts elucidate and critique the approaches developed to date. Part One addresses the Separate Spheres account of church autonomy. The intellectual driver behind Separate Spheres has been sectarian theological suppositions that cannot reasonably be expected to be accepted by all citizens. Further, Separate Spheres is unworkable because government’s legitimate interests necessarily overlap with legitimate interests of religious institutions.

Part Two describes and critiques Individualism. Schragger and Schwartzman’s article, the most detailed explication of Individualism to date, ground their approach on John Locke’s *Letter on Toleration*. Part Two shows Locke’s unsuitability for this task. Locke’s justification is premised on theological assumptions not shared by many religions. Further, critical analysis shows that Locke’s argument generates either virtually no protections for religious institutions, or problematically insulates them from all government supervision. Finally, Part Two argues that, Locke aside, Individualism under-protects religious institutions.

Parts Three and Four develop and apply an alternative account, the Religious Institution Principle, that I derive from John Rawls’ monumental works on political theory.<sup>22</sup> The Religious Institution Principle has three fundamental implications. First, religious institutions appropriately have a different status in society from most, possibly all, other associations. Second, the principle provides a basis for determining what qualifies as a religious institution. Third, religious institutions do not have any inherent autonomy: some religions’ institutions fall outside the Religious Institution Principle’s protections, and those coming under the principle still may be subject to substantial government regulation.

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arrangements and constitutional structures that such an understanding produces.”)

<sup>20</sup> Cf Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371,421-22, 428-41 (2012) (explaining why individual rights doctrines cannot adequately protect structural constitutional interests).

<sup>21</sup> To be clear, the “the Religious Institutionalism” that is the object of Schragger and Schwartzman’s critique is what I call “Separate Spheres,” not my “Religious Institution Principle.”

<sup>22</sup> I draw primarily on JOHN RAWLS, *POLITICAL LIBERALISM* (1996), but also from JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, JOHN RAWLS, *THE LAW OF PEOPLES (AND PUBLIC REASON REVISITED)*, and JOHN RAWLS, *A THEORY OF JUSTICE*.



Parts III and IV flesh out these considerations, generating a robust normative framework for evaluating religious institutions' claims. In the process, the Article illustrates the framework's analytic utility by applying it to many challenging issues past and present, including the polygamy decision in *Reynolds v. United States*,<sup>23</sup> sexual abuse lawsuits against clergy, the ministerial exception, the contraception mandate, the church autonomy cases, and many difficult hypotheticals. The Article does not suggest that courts, legislatures, or the executive branch necessarily should use the entire framework; considerations of institutional competency and efficiency conceivably could demand that a particular institution use simpler prophylactic rules. But familiarity with the complete framework is crucial if responsible simplifications are to be made, and for there to be meaningful assessments of implemented simplifications.

Part V anticipates, and responds to, an array of difficult challenges that might be leveled against the Religious Institution Principle.

It is important to explain at the outset why and how this Article uses Rawls. I invoke Rawls because his work is deeply powerful: as the Article explains, Rawls starts with minimal starting assumptions that can be affirmed by virtually everyone, and then generates a framework that provides substantial guidance to fairly structuring society's political and social institutions. For these reasons, Rawls unquestionably is among our most important modern political theorists, and literally has shaped the way people world-wide think about political theory.<sup>24</sup> By invoking Rawls I deliberately intend to engage with this international community, for this Article's analysis has application to all liberal polities, not just the United States.

But membership in the community of Rawls scholars does not entail treating Rawls' writings as an unchallengeable canon of truth. To the contrary, his work serves as the starting point for critical analysis and, not infrequently, refinement. Rawls thus becomes a focal point around which a sustained scholarly conversation occurs, which holds out the promise of generating deeper understandings than would emerge if each scholar aimed to develop her own approach *ex nihilo*.<sup>25</sup>

This 'focal point' perspective has informed some of my own Rawls scholarship in the past, where I have critiqued and reworked aspects of

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<sup>23</sup> 98 U.S. 145 (1878).

<sup>24</sup> See, e.g., *Religion and the Limits of Liberalism*, PHILOSOPHIA VOL. 40, ISSUE 2 (June 2012) (symposium with worldwide contributors focused on Rawls).

<sup>25</sup>This aspiration is grounded in the Condorcet jury theorem, which concludes that increasing numbers of independent decisionmakers can improve decisional quality. For a critical discussion, see DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 222-36.

Rawls' work in the hope of better realizing his foundational objectives.<sup>26</sup> It informs this one as well, for this Article suggests two ways in which the Rawlsian framework can be improved. Though virtually all the Article's conclusions are unaffected even if the reader rejects this Article's two proposed emendations, the Article explains why their adoption would strengthen Rawls' project.<sup>27</sup>

## I. SEPARATE SPHERES

### A. Description and Intellectual Origin

Separate Spherists state that churches are “sovereign within their own spheres”<sup>28</sup> and “entitled to legal autonomy.”<sup>29</sup> Churches “preexisted the state, are transnational, and would continue to exist if the state were suddenly dissolved or destroyed.”<sup>30</sup> The state's capabilities and domain are distinct from the sacred domain that is the church's,<sup>31</sup> and church and state accordingly are “barred from intruding into one another's realms.”<sup>32</sup> While most Separate Spherists recognize that “there are some appropriate occasions for state intervention,” these are said to be the “exception.”<sup>33</sup> Separate Spherists have been encouraged by the Supreme Court's recently decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>34</sup> which recognized a “ministerial exception” barring employment discrimination claims against churches in relation to employment decisions concerning church ministers, though a careful reading of the opinion discloses that the Court did not adopt a Separate Spheres rationale.<sup>35</sup>

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<sup>26</sup> See, e.g., Mark D. Rosen, *The Educational Autonomy of Perfectionist Religious Groups in a Liberal State*, 1 J. OF LAW, RELIGION & STATE 1 (2012); Mark D. Rosen, *The Outer Limits of Community Self-Governance: A Liberal Theory*, 84 VA. L. REV. 1053 (1998).

<sup>27</sup> See *infra* Parts IV.B.3(b) & V.C.

<sup>28</sup> Horwitz, *supra* note 10, at 83; see also Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1387 (church and state are “coexisting sovereigns” with distinct “spheres of interest”).

<sup>29</sup> *Id.* at 119.

<sup>30</sup> Esbeck, *supra* note 10, at 55; see also Smith, *supra* note 14, at xx.

<sup>31</sup> See, e.g., Kalscheur, *supra* note 10, at 64; Pope Benedict XVI, *God and Caesar* (July 3, 2012) (last viewed at <http://www.thecatholicthing.org/notable/2012/god-and-caesar.html> on 2/20/2013) (“Fundamental to Christianity is the distinction between what belongs to Caesar and what belongs to God, in other words, the distinction between Church and State, or, as the Second Vatican Council puts it, the autonomy of the temporal sphere.”)

<sup>32</sup> Horwitz, *supra* note 10, at 84.

<sup>33</sup> *Id.* at 112.

<sup>34</sup> 132 S. Ct. 694, 710 (2012).

<sup>35</sup> The Court held that the ministerial exception functioned as an “affirmative defense” rather than a “jurisdictional bar,” meaning that churches are not jurisdictionally independent of the state. See *id.* at 709 & n.4. Further, the Court “express[ed] no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers,” indicating once again that the Court was not treating churches as beyond government's

There is little doubt about what has been the intellectual engine that has driven Separate Spheres. Separate Spheres has a conceptual connection to, and has grown from, Christian theology.<sup>36</sup> Prominent in many accounts, and not far from the surface in others, is the New Testament's instruction that people are to "[r]ender therefore to Caesar the things that are Caesar's; and to God the things that are God's."<sup>37,38</sup> Another prominent, though unlikely, influence on many Sovereign Spherists is the nineteenth century Dutch theologian, journalist, and politician Abraham Kuyper.<sup>39</sup> As Kuyper-inspired Separate Spherist Robert Cochran correctly observes while explaining his view of church autonomy in contemporary America, Kuyper believed that "God delegates authority to the state, but He also delegates authority to other entities, each of which is sovereign in its sphere."<sup>40</sup> Interestingly, Kuyper believed that what he called the "social spheres" – that is to say, "the family, the business, science, art, and so forth"<sup>41</sup> – actually have an ontological priority to the state: whereas the social spheres arose from "the order of creation," the state is a product of human sin.<sup>42</sup> No sphere's

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regulatory powers. *Id.* at 710. Other parts of the decision, however, invoked language suggestive of Separate Spheres. *See, e.g., id.* at 709 (ministerial exception "ensures that the authority to select and control who will minister to the faithful – a matter strictly ecclesiastical – is the church's alone.") (internal citation and quotation omitted).

<sup>36</sup> *See* Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1887 (2009) ("the commitment to church-state separation . . . arose in--and acquired their sense and their urgency from--a classical, Christian world view in which the spiritual and temporal were viewed as separate domains within God's overarching order").

<sup>37</sup> LUKE 20:25. *See, e.g., supra* note 31; Steven D. Smith, *American Religious Freedom: The Revised Version 24-6* (describing Luke as implying "two different and independent *authorities* or *jurisdictions*," which gave rise to "Augustine with the imagery of the 'two cities'" and "Luther and Calvin with the imagery of the 'two kingdoms'", explaining that Luke 22:38's reference to "two swords" "came to signify the distinct and separate temporal and spiritual powers," and concluding that "[t]he idea of two separate and independent jurisdictions, temporal and spiritual, was a distinctively Christian notion").

<sup>38</sup> This is not to suggest that this verse *only* can be interpreted as recognizing (or creating) separate temporal and sacred spheres, but that most of the advocates of Separate Spheres are Christians whose approach has been shaped, and sometimes explicitly justified, by their theological commitments.

<sup>39</sup> Separate Spherists who draw on Kuyper include Paul Horwitz, *supra* note 10, at 83-84, 91-107, and Robert Cochran, Jr., *see* Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights* 486, 487 in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* (MICHAEL W. MCCONNELL, ROBERT F. COCHRAN, JR., AND ANGELA C. CARMELLA, EDs., 2001). Kuyper has been drawn on by many recent commentators who have sought to defend religious institutions. *See, e.g.,* William E. Thro & Charles J. Russo, *Preserving Orthodoxy on Secular Campuses: The Right of Student Religious Organizations to Exclude Non-Believers*, 250 ED. LAW REP. 497, 507 & n. 63 (2010); Stanley W. Carlson-Thies, *Beyond Right of Conscience to Freedom to Live Faithfully*, 24 REGENT U. L. REV. 351 (2011-2012).

<sup>40</sup> Cochran, *supra* note 39. Kuyper explained Calvinism's "dominating principle" as being "cosmologically, the Sovereignty of the Triune God over the whole Cosmos, in all its spheres and kingdoms, visible and invisible. A primordial Sovereignty which radiates in mankind in a threefold deduced supremacy, viz., 1. The Sovereignty in the State; 2. The Sovereignty in Society; and 3. The Sovereignty in the Church." ABRAHAM KUYPER, *LECTURES ON CALVINISM* (photo. Reprint 2007) (1931), at 79, quoted in Horwitz, *supra* note 10, at 94.

<sup>41</sup> Horwitz, *supra* note 10, at 95 & n. 118 (quoting KUYPER, *LECTURES ON CALVINISM*, *supra* note 40, at 27).

<sup>42</sup> Horwitz, *supra* note 10, at 96 & n. 129 (quoting Abraham Kuyper, *Sphere Sovereignty*, in ABRAHAM

“God-given authority . . . is subordinate to [any] other” sphere,<sup>43</sup> though Kuyper thought the state to be responsible for “compel[ling] mutual regard for the boundary-lines of each” sphere and for “defend[ing] individuals and the weak ones, in those spheres, against the abuse of power of the rest.”<sup>44</sup>

Separate Sphere’s close connections to sectarian theology is important for two reasons. First, Separate Spherists cannot plausibly expect that their theological-based justifications will convince citizens who are not their co-religionists.<sup>45</sup> In the other direction, the fact that Separate Spheres is part of, and arises from, its advocates’ understanding of the nature of reality and ultimate truth is relevant to determining the range of political arrangements that Separate Spherists plausibly can be expected to accept.<sup>46</sup> Later I will explain how Rawls’ account, from which the Religious Institution Principle is derived, has the conceptual resources for bridging these two observations: The Religious Institution Principle provides a justification for religious institutions that plausibly can be thought to be acceptable to both religious Separate Spherists and to citizens who do not share their theological presuppositions.

#### B. From Separate to Overlapping Spheres

But what do modern Separate Spherists concretely want? Schragger and Schwartzman suggest that Separate Spherists’ invocations of the language of sovereignty are “[f]or the most part . . . metaphorical,”<sup>47</sup> and this may be largely correct, at least for now. After all, Separate Spheres advocates have not taken the position that “churches are literal and co-equal juridical entities with the power to exercise coercive authority.”<sup>48</sup> Nor have they advocated for a restoration of the “benefit of the clergy, which exempted clergy charged with criminal offenses from secular courts and instead allowed them to be tried by far more lenient ecclesiastic courts,”<sup>49</sup> or “for the return of a religious law that is of equal weight and runs parallel to the civil law, enforced by religious courts under religious auspices.”<sup>50</sup> It is possible, though, that Separate Spherists may push in these directions if their present claims are successful.

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KUYPER: A CENTENNIAL READER 1, 469 (James D. Bratt ed., 1998)).

<sup>43</sup> COCHRAN, *supra* note 40, at 488.

<sup>44</sup> KUYPER, LECTURES ON CALVINISM, *supra* note 40, at 97, quoted in Horwitz, *supra* note 10, at 96-7.

<sup>45</sup> For a point-by-point analysis and critique of several of the affirmative claims Separate Spherists have propounded, see Schragger and Schwartzman, *supra* note 16 (recounting and critiquing arguments based on pre-United States history and metaphysical “organic” claims).

<sup>46</sup> Rawls is particularly attuned to questions such as this, and we shall return to it later.

<sup>47</sup> Schragger and Schwartzman, *supra* note 16, at 49.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 51.

<sup>50</sup> *Id.*

Professor Richard Garnett has offered what might be thought to be a suitably modest version of Separate Spheres, the “core” (though not the outer limits) of which he describes as “the freedom of the church to govern and order itself and the limits on the secular power to interfere with that governance”<sup>51</sup> and the “independence of the church from secular control.”<sup>52</sup> Garnett also speaks more broadly about religion having an “existence” that is “outside, and meaningfully independent of” political authority.<sup>53</sup>

But is even this normatively defensible? The answer turns on what precisely Garnett means by the church having the “freedom” to “govern and order itself.” In conversation, Garnett has expressed an absolutist understanding of this freedom,<sup>54</sup> which is consistent both with the metaphor of separate spheres and the approach advocated by some other Separate Spherists. But such an approach is undesirable, and to see why just consider the following six hypotheticals. Separate Spheres

1. insists that the state not interfere with a church whose rules of internal governance provide that its adult high priests are to self-immolate, or are to be sacrificed by other priests;
2. precludes government from interfering with the corporal or capital punishments a church meted out to its priests, and perhaps its adult members too;<sup>55</sup>
3. prevents government from stepping in to resolve competing claims that were issued by different churches, for instance Church A’s efforts to punish Priest Z with Church B’s claim that Priest Z is a member in good standing of *its* church;
4. condemns imprisoning a child molester if he belongs to a religion whose church wants him to serve as a minister to a congregation not confined to a penitentiary;
5. maintains that government must allow the “church of the avenger” to stock whatever weaponry they deem to be necessary to its mission, regardless of the dangers this might pose to neighboring non-church communities; and
6. prevents government from imposing zoning and land use restrictions on a church whose self-understood mission requires skyscraping spires or loud public calls to prayer (like Islam’s *adhan*).

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<sup>51</sup> Richard W. Garnett, “*The Freedom of the Church*”: (*Towards an Exposition, Translation, and Defense*), at 6-8 (draft on file with author).

<sup>52</sup> *Id.* at 10 (emphasis supplied); see also *id.* at 32 (arguing on behalf of “the church’s independence from state oversight and control over internal matters”).

<sup>53</sup> *Id.* at 10 (emphasis supplied).

<sup>54</sup> Garnett’s phrase need not be so understood, as is proven by freedom of speech’s coexistence with substantial regulation of speech. Garnett’s statement that religion must be “*meaningfully* independent” of the state is best understood as being consistent with some state regulation.

<sup>55</sup> Cf. LAWRENCE WRIGHT, GOING CLEAR: SCIENTOLOGY, HOLLYWOOD, AND THE PRISON OF BELIEF.

We can generalize from these six examples. As hypotheticals 1-2 indicate, Separate Spheres insists that government categorically withdraw its protective, paternalistic function from churches and priests, allowing churches to do whatever they wish to their priests. As example 3 shows, Separate Spheres overlooks the fact that there are multiple churches today, each of which can simultaneously assert conflicting claims. As examples 4-6 illustrate, Separate Spheres requires that government categorically ignore the spillover effects that churches have on non-members.<sup>56</sup>

If we (or Garnett) agree that society could intervene in even one of these circumstances, that would mean that the state could – sometimes, at least – intervene in the governance and ordering of churches. This, in turn, means that the metaphor of “separate spheres” (as well as sovereign spheres, church autonomy, church sovereignty, and sphere sovereignty) misdescribes the political architecture of church/state relations: instead of separate spheres, there are *overlapping* spheres. And the spheres are overlapping because it is not possible, either in fact or normatively, to draw non-porous borders around churches that separate their actions from non-church society’s legitimate interests.

To be sure, overlapping spheres is considerably messier than separate spheres. Overlapping spheres – the conclusion that some things (like what religious acts a priest can do) are matters of church governance *and* state regulation -- opens the door to conflicts because each institution could have a different view of what should be done. Separate Spheres eliminates this possibility of inter-institutional conflict since, under it, only one institution has power to govern. But the messiness of conflicts cannot responsibly be solved through *ipse dixit* assertions of separate spheres if two institutions properly exercise power. And the six examples provided above show that church “governance and ordering” is not appropriately treated as a separate jurisdictional sphere.

Not surprisingly, the Separate Spherists do not have the conceptual resources to resolve inter-institutional conflicts; Separate Spheres, after all, does not even recognize the possibility of conflicts. The Religious Institution Principle does have the resources to deal with conflicts, as will be explained later.<sup>57</sup>

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<sup>56</sup> See Schragger & Schwartzman, *supra* note 16, at 28-29 (making similar argument).

<sup>57</sup> See *infra* Part IV.B(3).

### C. Overlapping Spheres in Federalism and Separation of Powers

The conclusion that the relationship between church and state is better described as one of overlapping rather than separate spheres should not be surprising. To see why, let us return once again to Professor Garnett. He plausibly suggests that the structural relationship between church and state is analogous to two well-known political structures within the American tradition, federalism and separation of powers. Like federalism and separation of powers, Garnett says, the “differentiation of religious and political authorities” is both a “structure of our Constitution and an arrangement that contributes to its success.”<sup>58</sup> Other Separate Spherists likewise have drawn parallels between their approach and these mainstay American political structures.<sup>59</sup>

But this analogy suggests a valuable lesson that cuts against an absolutist understanding of church freedom: despite a seemingly natural tendency to first conceptualize distinctive institutions (the sister states, the federal government’s three branches) as having separate spheres, these institutions have a structural relationship of overlapping powers.

#### 1. *Federalism*

First consider horizontal federalism, in particular the relationship among states’ regulatory authority.<sup>60</sup> The early approach, expressed by Justice Story in his *Commentaries on the Conflict of Laws*, was precisely equivalent to the Separate Spherists’ understanding of the relationship between church and state. Justice Story averred that “the laws of every state affect and bind directly all property . . . within its territory [. . . and all persons who are resident within it,” and wrote that “no state . . . can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein.”<sup>61</sup> Insofar as each state’s power extended to its physical borders, and no further, Story had described a political architecture of separate jurisdictional spheres. Early Supreme Court cases echoed Justice Story’s approach. An 1881 decision declared that “[n]o State can legislate except with reference to its own jurisdiction,” meaning within its own physical

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<sup>58</sup> Garnett, *supra* note 51, at 10-11.

<sup>59</sup> See, e.g., Horwitz, *supra* note x, at 109 (stating that sphere sovereignty “is consistent with our larger system of federalism, which divides various regulatory matters among a multitude of competing and cooperating sovereigns.”). Others have made the connection as well. See, e.g., Kwame Anthony Appiah, *Global Citizenship*, 75 *Fordham L. Rev.* 2375, 2388-90 (2007) (discussing connection between Kuyper’s sovereign spheres, federalism, and separation of powers).

<sup>60</sup> The next three paragraphs draw from Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 *NOTRE DAME L. REV.* 1133, 1145-47 (2010).

<sup>61</sup> JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* §§ 18, 20 (2d ed. 1841).

borders, and that “[e]ach State is independent of all the others in this particular.”<sup>62</sup> An opinion eleven years later asserted that “[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them.”<sup>63</sup>

This separate spheres approach to state regulatory powers, however, never squared with actual practice. States early-on applied their laws to persons, transactions, and occurrences that lay beyond their physical borders, with the result that state regulatory authority was overlapping rather than separate. For example, in 1819 the General Court of Virginia held that a Virginia statute which criminalized “all felonies committed by citizen against citizen, in any such place” supported the Virginia Attorney General’s prosecution of a Virginia citizen for having stolen a fellow Virginian’s horse in the District of Columbia, despite the fact that the Virginia citizen’s conduct also violated the District’s law.<sup>64</sup> Consider also a nineteenth-century Texas law that provided that “[p]ersons out of the State may commit, and be liable to indictment and conviction for committing, any of the offenses enumerated in this chapter, which do not in their commission necessarily require a personal presence in this State.”<sup>65</sup> Interpreting this law, an 1882 Texas decision upheld the application of Texas’s criminal law to an act of forgery of a land certificate for Texas property even though all criminal acts had occurred in Louisiana and hence were also covered by Louisiana law.<sup>66</sup>

In the twentieth century, the Supreme Court formally recognized the power of states to regulate persons and things that lay beyond their physical borders. In *Strassheim v. Daily*, the Court permitted Michigan to prosecute a non-Michiganer for acts defrauding Michigan that were undertaken in Illinois.<sup>67</sup> Writing for the Court, Justice Holmes wrote that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect.”<sup>68</sup> Today’s restatements and model codes explicitly acknowledge that states have the power to apply their laws extraterritorially,<sup>69</sup> and the Supreme Court has observed that “a set of facts

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<sup>62</sup>*Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

<sup>63</sup>*Huntington v. Attrill*, 146 U.S. 657, 669 (1892); see also *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (stating “it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority.”).

<sup>64</sup> See *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 174 (1819).

<sup>65</sup>1879 Tex. Crim. Stat. 454 (emphasis added).

<sup>66</sup>*Hanks v. State*, 13 Tex. Ct. App. 289, 305–09 (1882).

<sup>67</sup>*Strassheim v. Daily*, 221 U.S. 280, 281 (1911).

<sup>68</sup>*Id.* at 285.

<sup>69</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 reporters’ note 5 (1986) (states within the United States “may apply at least some laws to a person



giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.”<sup>70</sup> In short, although the states originally were conceptualized as having separate regulatory spheres, the Court now acknowledges that they have overlapping regulatory authority.

The relationship between the federal and state governments, typically referred to as “vertical federalism,” also is characterized as one of overlapping rather than separate spheres. First consider regulatory power from the federal perspective: as to most matters the federal government regulates, the states *also* have constitutional power to regulate. For instance, both the federal and state governments have the power to regulate, and have regulated, such things as the environment, securities, automobile safety, the relationship between employers and employees, and unions.<sup>71</sup> Indeed, the federal government even regulates some subjects that traditionally are viewed as falling exclusively within the domain of the states, like education<sup>72</sup> and the family.<sup>73</sup>

The significant regulatory overlap between the federal and state governments is most easily seen by considering preemption doctrine. Preemption questions arise whenever Congress enacts a statute that addresses matters that the states previously have regulated. The conclusion that state law has not been preempted means that both federal and state law simultaneously govern -- a clear confirmation of overlapping regulatory authority.<sup>74</sup> The contrary conclusion that state law has been preempted is not an indication that the states lacked regulatory authority before Congress legislated. It instead indicates that (1) the regulated matter fell within both federal and state regulatory authority, (2) both the federal and state governments regulated the matter, and (3) the federal government’s regulation displaces the state’s, via the Supremacy Clause, because the state law is in sufficient “tension” with federal law.<sup>75</sup> Since the acknowledgment

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outside [State] territory on the basis that he is a citizen, resident, or domiciliary of the State.”); MODEL PENAL CODE § 1.03(1)(f) (1962) (State *A* may impose liability if “the offense is based on a statute of this State that expressly prohibits conduct outside the State.”)

<sup>70</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981).

<sup>71</sup> See generally Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 783-92 (2008).

<sup>72</sup> See, e.g., Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994); Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518; No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425).

<sup>73</sup> See Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (showing extensive federal regulation of family law throughout our country’s history).

<sup>74</sup> See, e.g., *Altria Group, Inc. v. Good*, 555 U.S. 70, 91 (2008) (holding that the Federal Cigarette Labeling and Advertising Act and Maine’s Unfair Trade Practices Act governed cigarette manufacturers’ advertising).

<sup>75</sup> Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 743 (2008).

and resolution of conflict between governing authorities presupposes that both had regulatory power, preemption doctrine confirms the existence of extensive overlapping regulatory authority between the federal and state governments.

Next, consider things from the states' perspective: as to many (though not all) matters that the Constitution empowers Congress to regulate, states *also* have the power to regulate. For example, though the Constitution provides that "Congress shall have Power To . . . regulate Commerce . . . among the several States,"<sup>76</sup> the United States Supreme Court has recognized that states *also* can sometimes regulate interstate commerce.<sup>77</sup> Similarly, though the Constitution grants Congress the power to "establish an uniform Rule of Naturalization,"<sup>78</sup> this constitutional grant and "[t]he pervasiveness of federal regulation do[] not diminish the importance of immigration policy to the States."<sup>79</sup> Accordingly, states are not without the constitutional authority to enact laws concerning immigration,<sup>80</sup> though in fact there may be little room left for them to regulate, under preemption doctrine, on account of the federal government's "extensive and complex" immigration laws.<sup>81</sup>

In short, while there are some areas of exclusive federal regulatory authority, the political architecture of state/federal regulatory authority is overwhelmingly characterized by overlapping rather than separate spheres.

## 2. *Separation of Powers*

Madison adopted a separate spheres understanding in the famed Pacificus-Helvidius exchange with Hamilton, where Madison argued that President Washington could not interpret a mutual defense treaty that potentially required America to join battle with France. Madison thought only Congress could interpret the treaty on account of its power to declare war, reasoning that "the same specific function or act, cannot possibly belong to the two departments and be separately exerciseable by each. . . . A concurrent authority in two independent departments to perform the same

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<sup>76</sup> U.S. CONST. art. I, § 8.

<sup>77</sup> See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319–20 (1851) (noting that the states have the authority to regulate interstate commerce in some circumstances).

<sup>78</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>79</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012).

<sup>80</sup> See, e.g. *id.* at 2507-10 (upholding provision of Arizona law requiring state officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States") (quoting *Ariz. Rev. Stat. Ann.* § 11-1051(B) (West 2012)).

<sup>81</sup> *Arizona*, 132 S. Ct. at 2499.

function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory.”<sup>82</sup>

The extent to which Madison’s embrace of separate spheres was shared by other Framers and by the early Court is an interesting question that need not detain us here. (It certainly wasn’t shared by all: Hamilton disagreed, and President Washington acted on Hamilton’s advice and interpreted the treaty<sup>83</sup>). What *is* central for present purposes is the contemporary consensus that the branches’ powers substantially overlap. Justice Jackson’s *Youngstown Steel* concurrence is the accepted modern understanding,<sup>84</sup> and Jackson’s second category comprises the President’s and Congress’ “concurrent authority,”<sup>85</sup> which refers to overlapping presidential and congressional authority. For example, there is broad agreement that the President’s Commander-in-Chief powers allowed him to collect foreign intelligence, and that Congress likewise has the power to regulate the collection of foreign intelligence under its powers to regulate the land and naval forces.<sup>86</sup> Similarly, though the Constitution gives the President the “Power to grant Reprieves and Pardons,”<sup>87</sup> Congress can grant amnesties that, according to the Supreme Court, are functionally equivalent to pardons.<sup>88</sup> Probably most important of all, however, is the rule-making undertaken by the executive branch’s administrative agencies. The vast majority of contemporary federal law consists of agency generated regulations that, as many Supreme Court Justices and most commentators agree, are functionally equivalent to congressionally enacted statutes.<sup>89</sup> The

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<sup>82</sup> JAMES MADISON, HELVIDIUS NUMBER II (1793), reprinted in ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 68–69 (Morton J. Frisch ed., 2007).

<sup>83</sup> For a discussion, see Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1073-76 (2010).

<sup>84</sup> See Mark D. Rosen, *Revisiting Youngstown: Against the View That Jackson’s Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1711-16 (2007).

<sup>85</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring; see Rosen, *Revisiting Youngstown*, *supra* note 84, at 1704-05 (explaining that Jackson’s second category reflects the understanding that presidential and congressional powers can overlap).

<sup>86</sup> See Rosen, *Revisiting Youngstown*, *supra* note 84, at 1711-12.

<sup>87</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>88</sup> *Brown v. Walker*, 161 U.S. 591, 601 (1896) (recognizing this and noting that the difference between pardons and amnesties is “one rather of philological interest than of legal importance” (quoting *Knote v. United States*, 95 U.S. 149, 153 (1877))).

<sup>89</sup> See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 488 (2001) (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment) (criticizing the Court for “pretend[ing] . . . that the authority delegated” to an administrative agency “is somehow not ‘legislative power,’” advocating instead that “it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’”); *INS v. Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting) (explaining that “by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation”); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive*

Congress and executive branch hence have substantial overlapping authority to make the rules that govern citizen behavior.

### 3. Judge and Jury

The pattern documented above regarding horizontal federalism -- an initial expectation of separate spheres giving way to overlapping powers -- is found in lesser known contexts as well. For instance, whereas early Supreme Court case law understood that only juries -- and not judges -- had the power to find facts, judges today share significant fact-finding powers with juries.<sup>90</sup>

To simplify a complicated story, the early twentieth-century decision of *Slocum v. New York Life Insurance Co.* found unconstitutional a federal judge's judgment that disregarded a jury's verdict for insufficient evidence and directly entered judgment for the other party.<sup>91</sup> The sole problem, according to the Supreme Court, was that the federal court had "pass[ed] on the issues of fact" by issuing a judgment for the other party.<sup>92</sup> This was problematic on account of the Supreme Court's separate spheres understanding of the relationship between judge and jury:

In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the coöperation of the two, *each acting within its appropriate sphere*, can the constitutional right be satisfied.<sup>93</sup>

The *Slocum* Court cited considerable precedent dating back to the early nineteenth century that supported the view that juries alone had the power to find facts.<sup>94</sup>

But separate spheres soon gave way to overlapping powers. In *Galloway v. United States*,<sup>95</sup> the Supreme Court upheld the directed verdict under the newly adopted Federal Rules of Civil Procedure, permitting judges to enter judgment after trial, but before verdict, on the ground of insufficient evidence.<sup>96</sup> And in *Baltimore & Carolina Line v. Redman*,<sup>97</sup> the Court held that

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*Delegation*, 104 COLUM. L. REV. 2097, 2165, 2181 (2004) (concluding that administrative agencies exercise federal legislative powers).

<sup>90</sup> See Rosen, *From Exclusivity to Concurrence*, *supra* note 83, at 1080-87.

<sup>91</sup> *Slocum v. New York Life Insurance Co.*, 228 U.S. 364, 387-88 (1913).

<sup>92</sup> *Id.* at 387-88.

<sup>93</sup> *Id.* at 382 (emphasis added).

<sup>94</sup> See *id.* at 379-86.

<sup>95</sup> 319 U.S. 372.

<sup>96</sup> See *id.* at 389-90; see also Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 599-613 (2003) (showing that earlier decisions had upheld directed verdicts

federal judges could not only disregard a jury's verdict on grounds of insufficient evidence, but also enter a verdict for the other party -- the equivalent of a judgment notwithstanding the verdict, which had been held to be beyond a judge's powers only twenty years before in *Slocum*.<sup>98</sup>

A careful look at *Galloway* demonstrates the extensive factfinding that the federal judges had performed. Three dissenting Justices comprehensively reviewed the documentary and testimonial evidence adduced at trial and showed that the majority opinion, as well as the trial judge, had "weigh[ed] conflicting evidence" and made credibility assessments.<sup>99</sup> The trial judge had issued a directed verdict against a veteran who had sued for benefits due under a war risk insurance policy. The veteran had the burden of proving "total and permanent" disability no later than May 31, 1919.<sup>100</sup> The veteran's guardian introduced testimony from a doctor who had diagnosed the veteran as suffering from a form of dementia that had been triggered by the shock of conflict on the battle field before 1919.<sup>101</sup> The veteran also had offered the testimony of two fellow soldiers, a friend who had known him both before and after the war, and his commanding officer, all of whom testified to behaviors that were consistent with the symptoms of insanity that the testifying doctor had identified.<sup>102</sup> In deciding against the veteran, the majority "re-examine[d] testimony offered in a common law suit [and] weigh[ed] conflicting evidence,"<sup>103</sup> thereby engaging in the type of factfinding performed by juries.<sup>104</sup>

Finally, and probably of greatest importance, federal courts deciding motions for summary judgment today determine if there is a "genuine issue as to any material fact"<sup>105</sup> by asking whether "a reasonable jury could return a verdict for the nonmoving party."<sup>106</sup> Under these standards, federal judges now "decide[] whether factual inferences from the evidence are reasonable,"

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where one of the parties had offered no evidence at all or where the court was asked to apply undisputed facts to the law).

<sup>97</sup> 295 U.S. 654 (1935).

<sup>98</sup> See *id.* at 661.

<sup>99</sup> See *Galloway*, 319 U.S. at 397 (Black, J., dissenting).

<sup>100</sup> *Id.* at 383–84 (majority opinion).

<sup>101</sup> *Id.* at 408 (Black, J., dissenting).

<sup>102</sup> *Id.* at 408–12.

<sup>103</sup> *Id.* at 397.

<sup>104</sup> See Sward, *supra* note 96, at 603 ("The issue in *Galloway* could not be classified as anything other than a question of fact: was Galloway permanently and totally disabled by reason of mental illness as of May 31, 1919, or not?").

<sup>105</sup> FED. R. CIV. P. 56(c)(2).

<sup>106</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

with the result that “[c]ases that would have been decided by a jury under the common law are now dismissed by a judge under summary judgment.”<sup>107</sup>

To be clear, the jury’s fact-finding powers have not been eliminated. We now have a legal regime in which judges *also* have fact-finding powers, and hence a system in which two institutions – judges and juries -- exercise fact-finding powers.

#### 4. *The Lessons*

What lessons are to be drawn from federalism, separation of powers, and the relationship between judge and jury? All are contexts where power is divided among multiple institutions as a structural mechanism for achieving effective governance while checking against tyranny-threatening concentrations of power. To the extent that there is a structural analogy between these and church-state relations, as Garnett and other Separate Spherists plausibly have suggested,<sup>108</sup> it is instructive to see that the architecture of separate spheres has not fared well. Rather, initial expectations of separate spheres have given way to overlapping powers.

Elsewhere I have fully explained the forces behind, and benefits of, the shift from separate spheres to overlapping powers in the separation of powers, federalism, and judge/jury contexts.<sup>109</sup> These forces and benefits consist of pragmatic considerations,<sup>110</sup> many of which transfer to the church-state context. This Article does not explore these, but provides in Parts III-V a normative justification for overlapping powers that is distinctive to the realm of church-state relations.

The final lesson from federalism, separation of powers, and the judge/jury relationship concerns conflict. Overlapping powers opens the door to inter-institutional conflicts. The history of overlapping powers in federalism, separation of powers, and between judge and jury shows that such conflicts can be successfully managed.<sup>111</sup> Fear of conflict need not herd us into an embrace of Separate Spheres.

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<sup>107</sup> Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007).

<sup>108</sup> Garnett, *supra* note 51, at 10-11.

<sup>109</sup> *See* Rosen, *From Exclusivity to Concurrence*, *supra* note 83 at 1121-34.

<sup>110</sup> *See id.* (noting that overlapping powers can lead to greater efficiencies, allows tasks to be accomplished when one institution is paralyzed, can capture inter-institutional synergies, and may be necessary to address emergencies).

<sup>111</sup> *See id.* at 1135-40; Rosen, *Revisiting Youngstown*, *supra* note 84, at 1717-31.

## B. Republicanism

In an important but undertheorized part of their article, Schragger and Schwartzman argue that Separate Spheres “clashes dramatically with our republican and democratic political commitments.”<sup>112</sup> They argue as follows:

Republicanism demands that the people, acting through their legislatures, constitute the sovereign. It is skeptical of the exercise of unaccountable corporate power – whether by nobles, monopolies, labor unions, churches, universities, or cities. In short, it does not tolerate corporate entities that operate outside of and in defiance of the state. Group entities cannot constitute a separate law unto themselves.<sup>113</sup>

I agree, but think it could be more fully justified argument. The Religious Institution Principle does this.<sup>114</sup>

## C. Unavailing Arguments Against Separate Spheres

Schragger and Schwartzman propound three additional interconnected criticisms against Separate Spheres. They argue that (1) Separate Spherists have offered no principled way to determine what religious institutions aside from churches are deserving of protection,<sup>115</sup> (2) religion is not unique, with the result that many other non-religious institutions also would have to receive protections if churches are,<sup>116</sup> and (3) proponents of separate spheres have not offered principled limits to church freedom.<sup>117</sup> These three arguments together generate a giant slippery slope: Separate Sphere’s lack of limits concerning what institutions receive protections and the scope of these protections would lead to large numbers of institutions that are independent of state control, which presumably would be undesirable and unworkable.

In fact, some Separate Spherists have aimed to provide answers to each of Schragger and Schwartzman’s three critiques, though none has offered a systematic, internally consistent response.<sup>118</sup> While I am uncertain

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<sup>112</sup> Schragger & Schwartzman, *supra* note 16, at 22.

<sup>113</sup> *Id.* at 25-6.

<sup>114</sup> *See infra* Part III.A.

<sup>115</sup> *See* Schragger & Schwartzman, *supra* note 16, at 35 (noting that “a number of current-day religion clause battles revolve around competing characterizations of groups – around the question of whether a hospital, student group, a university, or an elementary school is a *religious institution* deserving of protection for religion clause purposes”).

<sup>116</sup> *See id.* at 31-37.

<sup>117</sup> *See id.* at 27-30.

<sup>118</sup> For instance, as to their first critique, Steve Smith has argued that only churches appropriately receive protection. *See x*. As to the second, Rick Garnett has justified the special treatment accorded to religious institutions vis-à-vis non-religious institutions on grounds of constitutional text and history.

whether Separate Spheres has the conceptual resources to provide an internally consistent and normatively attractive response to these three critiques, the Religious Institution Principle does, as I will show below.<sup>119</sup>

## II. INDIVIDUALISM

### A. Description

The Individualism position, ably articulated by Schragger and Schwartzman, is that religious institutions do not have inherent autonomy, but only those rights that derive from the conscience and associational rights of their members.<sup>120</sup> “[C]hurch autonomy is a function of individual autonomy,” claims Individualism, and “general principles of freedom of association, privacy, and conscience are sufficient to protect all conscience-based associations, including churches.”<sup>121</sup> It follows that churches do not have free exercise rights<sup>122</sup> independent of their members, but can assert free exercise claims only if individual members of the church “have been burdened in their free exercise of religion.”<sup>123</sup>

As indicated above, I think Schragger and Schwartzman get it half right: the status of religious institutions does indeed derive from individuals, but religious institutions neither are reducible to their members nor are adequately protected by the concepts and doctrines that apply to people. This section critiques Individualism, while Parts III-IV construct my affirmative account of the Religious Institution Principle.

### B. Critique

#### 1. *Inadequacies of the Lockean Justification*

Schragger and Schwartzman ground Individualism on what they conclude to be the “best justification” for church autonomy, Locke’s position in the *Letter on Toleration* that churches are voluntary associations.<sup>124</sup> After first reviewing the Lockean argument on which they rely, this section provides three reasons why it cannot ground a general account of religious institutional autonomy in the modern era.

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See Garnett, *supra* note 51, at 30. Less attention has been paid to their third criticism, though Paul Horwitz has noted limit that Kuyper placed on churches and the other social spheres. See Horwitz, *supra* note 10, at 111-13.

<sup>119</sup> See *infra* Parts III & IV.

<sup>120</sup> See Schragger & Schwartzman, *supra* note 16, at 5.

<sup>121</sup> *Id.*

<sup>122</sup> Or statutory rights under the RFRA or RLUIPA. See *supra* note 3.

<sup>123</sup> *Id.* at 63.

<sup>124</sup> *Id.* at 38.



Schragger and Schwartzman quote a crucial paragraph in the *Letter on Toleration* that provides a two-step argument for church autonomy.<sup>125</sup> The first is an assumption concerning law's necessity: every "society" -- by which Locke means any group of persons united by some interest, such as "philosophers for learning," "merchants for commerce," or a "church or company" -- "will presently dissolve and break in pieces unless it be regulated by some law."<sup>126</sup> The second step is church-specific: "since the joining together of several members into this church-society . . . is absolutely free and spontaneous, it necessarily follows that the right of making its laws can belong to none but the society itself; or, at least (which is the same thing), to those whom the society by common consent has authorized thereunto."<sup>127</sup>

According to Schragger and Schwartzman, the second step provides the conceptual justification for church autonomy. As they explain it, the "grounding of church autonomy in voluntary association" means that churches have authority to rule not because they are "good, or benefit[] the wider society, or help[] individuals actualize themselves, *but rather because it is a product of free association*. In other words, the institutional church -- understood as a 'voluntary society' -- derives the right to choose, govern, and rule its own members from the voluntary nature of the association, i.e., from *consent*."<sup>128</sup> Throughout their article Schragger and Schwartzman shorthandedly refer to Locke's justification for church autonomy as being based on "voluntarism,"<sup>129</sup> and I shall call Locke's second step the "Voluntarism Argument."

There are three problems with relying on the Voluntarism Argument as a justification for church autonomy. (As I soon explain, Schragger and Schwartzman may have abbreviated Locke's full argument for church autonomy, which is relevant only to the third problem I identify).

a. Contingency

First, the Voluntarism Argument is factually contingent, and indeed is inconsistent with the many religions and individuals who do not conceptualize or experience the "joining together" of co-religionists into a church as "absolutely free and spontaneous."<sup>130</sup> Call this the "Empirical Critique" of the Voluntarism Argument.

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<sup>125</sup> See *id.* at 41.

<sup>126</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 16 (Mark Goldie, Ed.).

<sup>127</sup> *Id.*

<sup>128</sup> Schragger and Schwartzman, *supra* note 16, at 41-42 (emphasis supplied).

<sup>129</sup> See, e.g., *id.* at 40.

<sup>130</sup> Schragger and Schwartzman themselves note this. See *id.* at 39. Though they think the challenge

But is the Empirical Critique empirically valid – are there individuals for whom, and religions for which, the Voluntarism Argument is inapplicable? Most definitely yes. For example, under Judaism’s self-understanding, all human beings are commanded by God to observe God’s instructions.<sup>131</sup> Furthermore, as to those who are born Jewish, there is no opt-in: Jews are divinely “commanded” (in the words of the Bible<sup>132</sup>) to obey an extensive set of laws, which includes the duty to worship as part of a religious community.<sup>133</sup> One of the paradigmatic marks of membership for males in the Jewish community – circumcision – is commanded by religious law to take place on the eighth *day* of life, which self-evidently is years before a child can consent to joining a community.<sup>134</sup> Jewish Scriptures consistently premises a Jew’s obligation to obey God’s law on God’s historical act of redeeming the Israelites from Egypt.<sup>135</sup> Moreover, there is no possibility of exit from the religious community on the self-understanding of Judaism.<sup>136</sup> And, finally, the conformance to religious command that Locke describes as being against conscience<sup>137</sup> is thought by Judaism to be a habituating first step that can lead to ideal religious worship.<sup>138</sup> All these crucial facets of Judaism are inconsistent with the voluntarism assumption. While even one counterfactual suffices, Judaism is not the sole exception; much the same can be said of Islam.<sup>139</sup>

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“need[s] to be taken seriously,” they quickly conclude that “for our purposes their implications are limited [because t]he acceptance of a non-voluntarist conception of religious institutions is virtually unthinkable.” *Id.* at 40. Rawls helps us to see the problem with both Locke and Schwartzman and Schragger’s defense of Locke: Locke’s account is premised on sectarian theological premises (i.e., only one of many “reasonable comprehensive views” in Rawls’ terminology), and the relevant question is whether a justification for church autonomy can be generated on the basis of a *political* (i.e., non-comprehensive) view that all reasonable persons can plausibly be expected to accept. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 22, at xvi. This is precisely what Rawls aims to accomplish in “Political Liberalism,” *see id.*, and what the Religious Institution Principle hopes to accomplish as well.

<sup>131</sup> See generally NAHUM RAKOVER, *LAW AND THE NOAHIDES*.

<sup>132</sup> See, e.g., DEUTERONOMY 6:17 (“You surely shall keep the commandments . . . that your God has commanded you”).

<sup>133</sup> See LEVITICUS 16:29-34 (reciting obligations pertaining to Yom Kippur, the Day of Atonement, applicable to “all Jews” for “all time”); EXODUS 12:14-15 (same as to Passover); Deuteronomy 5:26 (speaking of an “eternal” obligation of the entire nation of Israel to “keep [God’s] commandments”).

<sup>134</sup> See GENESIS 16:9-14.

<sup>135</sup> See, e.g., DEUTERONOMY 6:12-25; *id.* 10:2-9.

<sup>136</sup> See generally Michael Gillette, *Jewish Excommunication*, <http://www.chavurahmasarti.org/Spinoza.htm>.

<sup>137</sup> See *infra* text and note 163.

<sup>138</sup> This concept is expressed by the phrase in Jewish law that “*mitoch she lo leshma, ba le’shma*,” which means “after initially performing the religious obligations without proper religious intent, the person will come to perform them with the appropriate religious intent.” See BABYLONIAN TALMUD PESACHIM 50b. It is used to explain why religious obligations must be performed even by a person who does not understand herself to be religiously obligated, or who does not understand the obligation to be a religious duty.

<sup>139</sup> See, e.g., TALAL ASAD, *GENEALOGIES OF RELIGION* 1 (noting that “while religion is integral to

Locke's voluntarism assumption is an artifact of his distinctive theological commitments, more specifically his Protestantism. Voluntarism flows from the centrality of faith and conscience to Locke's religious understandings.<sup>140</sup> The commanded nature of membership and participation found in other religious traditions reflects the fact that conscience and consent function differently across religious:<sup>141</sup> action can be religiously meaningful in the absence of faith or intent under these non-Protestant theologies, even as each deems religiously sincere action to be the *highest* form of religious activity.<sup>142</sup>

To be sure, the Empirical Critique does not devastate Locke's argument, but only limits its applicability to religions that conceptualize churches in the voluntaristic fashion Locke describes. But this limitation is important for two reasons. First, it means that Locke's account cannot provide a general justification for church autonomy in a religiously heterogeneous society.<sup>143</sup> Locke's voluntarism assumption applies to Protestants, and perhaps some other Christians. But assuming that these are not the only appropriate beneficiaries of church autonomy, the Lockean account is incomplete. Second, because Locke's account is premised on contestable theological premises, it cannot reasonably be expected to be acceptable to all reasonable citizens.<sup>144</sup>

#### b. Limited Institutions to Which it Applies

There is a second respect in which the Voluntarism Argument has problematically limited scope: even as to those religions to which the voluntarism assumption is applicable, its protections extend only to institutions that have a "free and spontaneous" membership. Locke says that the "church-society" so qualifies, but what else? For instance, have employees of a religious hospital freely and spontaneously joined that institution? Ambulance drivers, and the patients they transport? Ambulatory patients in circumstances where no comparable medical care is available

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modern Western history, there are dangers in employing it as a normalizing concept when translating Islamic traditions"); SABA MAHMOOD, *POLITICS OF PIETY* (providing detailed ethnographic study showing how liberal division between religion and state fails to map onto Islam).

<sup>140</sup> See *infra* note 160.

<sup>141</sup> The statement above in text is true for today's religionists. The fact that Judaism may believe that earlier generations consented to God's laws, and that this consent is binding on subsequent generations, is fundamentally different from the individual consent Locke contemplates.

<sup>142</sup> See *supra* note 138.

<sup>143</sup> It should be noted that Locke understood that he was generating a justification that applied to a "Christian Commonwealth," and recognized that other religions' theological commitments led them to adopt a different relationship between religion and state. See *id.* at 42 (explaining why "the Commonwealth of the Jews, different in that from all others, was an absolute *Theocracy*").

<sup>144</sup> This is a Rawlsian criticism. See *supra* note 130.

nearby? Insofar as “free and spontaneous” is, for Locke, a proxy for a person consenting to give coercive authority to the institution, the answer to most if not all these questions probably is “no.”

At this point in our discussion it is not yet possible to establish that such limited scope is normatively problematic; that requires a normative baseline that indicates what *should* be included, which must await Part III’s account of the Religious Institution Principle. However, it is worth noting that Schragger and Schwartzman do not limit protections to churches. For instance, when analyzing the contraception mandate, Schragger and Schwartzman do not say that Catholic hospitals are flatly beyond the scope of protection for the simple reason that they are not churches.<sup>145</sup> There accordingly seems to be a disconnect between their approach and the Lockean ground on which they rely.

### c. Proves Either Nothing or Too Much

While the first and second critiques of Locke’s Voluntarism Argument provided above address the scope of the Lockean claim for church autonomy, the third critique presented now devastates the argument: the Lockean justification for church autonomy either (1) proves nothing or (2) proves too much by carrying unsettling implications that thereby undermine the argument’s validity.

My claim that the Lockean justification simultaneously proves nothing or too much may sound puzzling, so let me explain. I mentioned above that Schragger and Schwartzman treat the Voluntarism Argument as if it constituted the entirety of Locke’s argument for church autonomy, but that it may not.<sup>146</sup> This section first shows that the Voluntarism Argument, on its own, cannot provide an adequate justification for church autonomy (i.e., that it proves nothing). But while my critique applies to Schragger and Schwartzman’s *treatment* of Locke’s argument, it may not apply to Locke’s *full* argument; Locke has the conceptual resources, beyond the paragraph in the *Letter on Toleration* relied on by Schragger and Schwartzman, for answering my critique of the Voluntarism Argument. But Locke’s full justification for church autonomy runs into other profound difficulties: it proves too much in the sense that it leads to problematic conclusions, thereby undermining the full argument’s validity. As a result, neither Schragger and Schwartzman’s abbreviation of Locke, nor Locke’s full justification, provides a satisfactory account of church autonomy.

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<sup>145</sup> See *id.* at 62.

<sup>146</sup> See *supra* text accompanying note 129.

i. *Proves Nothing*

Locke states in the *Letter on Toleration* that because the joining together of members into a “church-society” is “absolutely free and spontaneous, *it necessarily follows that the right of making its laws can belong to none but the society itself.*”<sup>147</sup> But how does it “necessarily follow[]” from the fact that a church is composed of (or created by) members who freely and spontaneously join together that “the right of making its laws can belong to none but the society itself”? After all, why couldn’t individuals freely and spontaneously decide to join an already existing church, some of whose laws had been created in the past by the state? Or, why couldn’t individuals freely and spontaneously decide to join an already existing church, with the knowledge that some of the church’s laws might be amended, or later created, by the state? In short, who authors a church’s laws is logically independent of the voluntariness of joining that church. Call this the “Voluntarism Critique.”

The Voluntarism Critique remains valid even if the members of a church never consented to the state’s law, never delegated rule-making authority to the state, and at all times reject the legitimacy of a state-made law. For example, polygamy was a central part of the early Mormon Church’s practice and theology, viewed as “a means to celestial glory.”<sup>148</sup> Congress banned polygamy in 1862, and the mainstream Mormon Church officially abandoned polygamy in 1890.<sup>149</sup> During the 28 years between, did the fact that the government in effect made some of the Mormon Church’s laws by forbidding polygamy obviate the voluntariness of those individuals who decided to join the Mormon Church during that time?<sup>150</sup> It is not at all obvious why it should. If it did not – if, in other words, we are prepared to say that individuals voluntarily joined the church at a time when the state but not the church forbade polygamy -- then there is no necessary connection between an individual’s “free and spontaneous” joining of a church and the church’s “right of making its laws.” *Pace* Locke, the latter does not “necessarily follow[]” from the former.

The following response might be offered: the state’s law forbidding polygamy did not constitute the *church’s* law – the polygamy prohibition at all times was simply the *state’s* law. Accordingly, the Mormon example is not a

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<sup>147</sup> LOCKE, *supra* note 126, at 16.

<sup>148</sup> See THOMAS F. O’DEA, *THE MORMONS* 60 (1957).

<sup>149</sup> See *id.* at 110-11.

<sup>150</sup> As explained below, Locke’s answer to this challenge is to say that polygamy falls within the exclusive domain of state regulatory authority, i.e., that it is not a matter of church law. See *infra* text accompanying note 170. I critique that solution below. See *id.* at text and accompanying notes 166-175. Accepting my critique leaves one facing the objection raised above in text.

counter-example after all insofar as Locke's conclusion – that “the right of making its laws can belong to none but the society itself” – was not violated. This response is logically sound; it reduces the Mormon example to a choice-of-law problem in which state law applies but does not displace or rewrite church law. But this response renders Locke's church autonomy claim inconsequential: it places no limits on what the state can do, apart from preventing the state from literally writing church law. Once again, we are left with the conclusion that Locke's argument effectively proves nothing vis-à-vis church autonomy.

ii. *Proves too Much*

While Schragger and Schwartzman reduce Locke's church autonomy argument to “voluntarism,”<sup>151</sup> and are vulnerable to the Voluntarism Critique, Locke's theory of church autonomy may comprise an additional element that can answer the Voluntarism Critique. For Locke, government only has the powers that it has been delegated by citizens' consent, and certain powers are non-delegable to the state. If Locke thought that religious matters were non-delegable to the state, then his response to the Voluntarism Critique would be as follows: (1) the state could not have made any of the religion's laws in my examples above because the state could not have been delegated such powers and, therefore, (2) “the right of making its laws can belong to none but the [church] itself”<sup>152</sup> pursuant to the powers delegated to the church by its consenting members. These two propositions responding to the Voluntarism Critique *together* constitute a non-trivial argument for church autonomy.

In short, Locke's argument for church autonomy is non-trivial only if the Voluntarism Argument is paired with what might be called the “State Non-Delegation Assumption” that the state cannot be delegated power to enact laws concerning religion. I dub it the *State Non-Delegation Assumption* because it doesn't imply that religious matters are categorically non-delegable – only that they cannot be delegated to the state (though, according to Locke, they can be delegated to churches).

Does Locke incorporate the State Non-Delegation Assumption? Almost certainly yes, as I shortly will show. But there is a rub: Locke's assumption rests on a theory of Separate Spheres, *i.e.*, the notion that there is

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<sup>151</sup> See Schragger and Schwartzman, *supra* note 16, at 40-41 (claiming that Locke's Voluntarism Argument “provides the association with liberty from political constraints on its internal governance,” which “provides the basis for church autonomy.”).

<sup>152</sup> LOCKE, *supra* note 126, at 16.

a jurisdictional sphere that naturally belongs to religion and lies beyond the state.

Three things emerge from this. First, we can immediately understand why Schragger and Schwartzman disregard Locke's State Non-Delegation Assumption; their entire article, after all, is a frontal attack on Separate Spheres.<sup>153</sup> Second, as the Voluntarism Critique establishes, Locke's argument for church autonomy becomes trivial without the State Non-Delegation Assumption, rendering Schragger and Schwartzman's reconstitution of Locke inadequate to the task of grounding meaningful church autonomy.

Third, though the State Non-Delegation Assumption answers the Voluntarism Critique, the assumption fatally undermines Locke's argument for church autonomy. This is because Locke's State Non-Delegation Assumption establishes a jurisdictional realm beyond state control. This renders his full church autonomy an example of Separate Spheres, which accordingly must be rejected for the reasons explained above.<sup>154</sup> (Indeed, analysis of Locke's argument provides additional evidence of Separate Spheres' inadequacy as political architecture.) Stated formally: Locke's full argument 'proves too much' by establishing a Separate Spheres realm of exclusive church jurisdiction, thereby undermining the full argument's validity under the principle of propositional logic known as *modus tollens*.<sup>155</sup>

But is Locke really a Separate Spherist? Yes. In fact, carving out separate spheres for government and church lies at the core of Locke's argument for toleration. Locke begins the *Letter on Toleration* by explaining that he "esteem[s] it above all things necessary to distinguish exactly the Business of Civil Government from that of Religion, and to settle the just Bounds that lie between the one and the other."<sup>156</sup> As to the state, Locke tells us that "the whole Jurisdiction of the Magistrate reaches only to these civil Concernments; and that all Civil Power, Right, and Dominion is bounded and confined to the only care of promoting these things" – by which Locke means "the just Possession of these things belonging to this Life" -- "and that it neither can nor ought in any manner to be extended to the Salvation of Souls."<sup>157</sup> By contrast, "[t]he end of a Religious Society . . .

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<sup>153</sup> Schragger & Schwartzman, *supra* note 16, at 6-36.

<sup>154</sup> See *supra* Part I.B-C.

<sup>155</sup> Under *modus tollens*, if *P* implies *Q*, and *Q* is false, then *P* also is false. See generally VIRGINIA KLENK, UNDERSTANDING SYMBOLIC LOGIC. For present purposes, *P* is Locke's full argument for church autonomy, and the (false) *Q* it implies is that "the right of making its laws can belong to none but the [church] itself," *i.e.*, Separate Spheres. LOCKE, *supra* note 126, at 16.

<sup>156</sup> LOCKE, *supra* note 126, at 12.

<sup>157</sup> *Id.* at 12-13. Locke famously believed that civil government's role was quite limited. See *id.* at 46.

is the Publick Worship of God, and by means thereof the acquisition of Eternal Life. All discipline ought therefore to tend to that End, and all Ecclesiastical Laws to be thereunto confined. Nothing ought, nor can be transacted in this Society, relating to the Possession of Civil and Worldly Goods.”<sup>158</sup>

Interestingly – and revealing once again the sectarian character of Locke’s argument<sup>159</sup> – Locke justifies the separateness of the religious and civil spheres on the theological ground that meaningful religious acts must be done according to one’s conscience, not compulsion. “All the life and Power of true Religion consists in the inward and full persuasion of the mind: And Faith is not Faith without believing.”<sup>160</sup> From this it follows that “[i]n vain therefore do Princes compel their Subjects to come into their Church-communion, under pretense of saving their Souls. If they believe, they will come of their own accord; if they believe not, their coming will nothing avail them.”<sup>161</sup> Indeed, Locke goes so far as to say that religious acts undertaken pursuant to state compulsion “far from being any furtherance, are indeed great Obstacles to our Salvation,”<sup>162</sup> and that for a state to command its citizens to religious worship “in effect [is] to command them to offend God.”<sup>163</sup> Continues Locke, “[a]s the magistrate has no power to *impose* by his

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Limited state jurisdiction may have made separate jurisdictional spheres more possible than what is possible in today’s world of more extensive governmental regulation. This would constitute a reason for questioning the degree to which Locke’s approach can be applied today. The discussion above in text shows, however, that Locke’s Separate Spheres approach was problematic even under his assumption of limited civil jurisdiction.

<sup>158</sup> *Id.* at 18.

<sup>159</sup> Consistent with the observation above that conscience and voluntarism play different roles in Protestantism than in Judaism and Islam, the idea that religion cannot by its nature be the subject of the state’s law is a sectarian – most certainly not a universal – perspective. Judaism and Islam have no analogue of Luke’s distinction between God and Caesar, and their Scriptures permit, and histories include, state exercise of religious authority. See, e.g., ASAD, *supra* note 139, at 205-36 (contrasting “the forcible redefinition of religion as belief, and of religious belief, sentiment, and identify as personal matters that belong to the newly emerging space of private (as opposed to public) life” in Christian Europe with the Islamic concept of *umma*, “a religious-political space . . . within which rational discussion, debate, and criticism can be conducted. It is also a space of power and of punishment”).

<sup>160</sup> *Id.* at 13; see also *id.* at 14 (“The care of the Salvation of Mens Souls cannot belong to the Magistrate; because, though the rigour of Laws and the force of Penalties were capable to convince and change Mens minds, yet would not that help at all to the Salvation of their Souls”); see also *id.* (“For laws are of no force at all without Penalties, and Penalties in this case are absolutely impertinent; because they are not proper to convince the mind.”); *id.* at 31 (“No way whatsoever that I shall walk in, against the Dictates of my Conscience, will every bring me to the Mansions of the Blessed. I may grow rich by an Art that I take not delight in; I may be cured of some Disease by Remedies that I have not Faith in; but I cannot be saved by a Religion that I distrust, and by a Worship that I abhor. It is in vain for an Unbeliever to take up the outward shew of another Mans Profession. Faith only, and inward Sincerity, are the things that procure acceptance with God.”).

<sup>161</sup> *Id.* at 32.

<sup>162</sup> *Id.* at 13.

<sup>163</sup> *Id.* at 33.



laws the use of any rites and ceremonies in any church, so neither has he any power to *forbid* the use of such rites and ceremonies as are already received, approved, and practiced by any church; because, if he did so, he would destroy the church itself . . .”<sup>164</sup>

In short, it is the jurisdictional distinctiveness between civil and religious matters that is the foundation of Locke’s argument for “toleration,” by which Locke means that the state should not regulate matters that fall within the realm of religion.<sup>165</sup> “[T]herefore,” concludes Locke, “when all is done, [men] must be left to their own Consciences” regarding religion’s domain.<sup>166</sup> In light of the theological presuppositions that give rise to Locke’s Separate Spheres theory, it is likely that he embraced the State Non-Delegation Assumption, according to which religious matters simply could not be delegated to the state insofar as they fall outside of government’s competency.

Predictably, the problems that attend Separate Spheres explained in the previous section<sup>167</sup> are on full display in Locke. Separate Spheres requires that activities be placed in one, but only one, sphere.<sup>168</sup> Locke concludes that matters concerning the “Publick good” fall within the state’s realm.<sup>169</sup> Though he unsurprisingly concludes that polygamy and divorce implicate the public good, and accordingly can be regulated by the state, it surely would be surprising to many religions (say Mormonism and Catholicism) to be told that polygamy and divorce are *not* religious matters. Yet this is what Locke concludes.<sup>170</sup> Surely it is more plausible to say that polygamy and divorce

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<sup>164</sup> *Id.* at 37 (emphasis in original).

<sup>165</sup> *Id.* at 26. As indicated above, Locke also discusses the toleration that should be exercised by private individuals, *see id.* at 20, and churches, *see id.* at 19-20.

<sup>166</sup> *Id.* at 32.

<sup>167</sup> *See supra* Part I.B-I.C.

<sup>168</sup> At one point deep into the *Letter* Locke appears to acknowledge jurisdictional overlap when he concedes that “[m]oral actions” concerns both “Religion [and] also the Commonwealth.” *Id.* at 45. But he quickly reverts to his Separate Spheres framework, averring that “if what has been already said concerning the Limits of both these Governments be rights considered, it will easily remove all difficulty in this matter” so that neither of the two “Jurisdictions intrench upon the other . . .” *Id.* Continues Locke, “[f]or the Political Society is instituted for no other end but only to secure every mans Possession of the things of this life. The care of each mans Soul, and of the things of Heaven, which neither does belong to the Commonwealth, nor can be subjected to it, is left entirely to every mans self.” *Id.* at 48. Locke’s confident assertion here in no way solves the problem that he himself recognizes.

<sup>169</sup> *Id.* at 34.

<sup>170</sup> Locke concludes that the state has jurisdiction over “indifferent things.” *See id.* at 33. Locke differentiates between, on the one hand, “[t]hings in their own nature indifferent,” which he says “cannot, by any human Authority, be made any part of the Worship of God . . . because they are indifferent,” and, on the other hand, “[t]hings never so indifferent in their own nature,” which, “when they are brought into the Church and Worship of God, are removed out of the reach of the Magistrate’s Jurisdiction.” *See id.* at 33-34. As a consequence of Locke’s understanding of indifferent

implicate *both* the state's and religion's interests. But Locke's Separate Spheres framework does not allow for such a conclusion.

Further evidence of Separate Spheres' weakness is that, when confronting concrete hard cases, Locke abandons the Separate Spheres that grounded his argument for toleration. For instance, though a church's rituals might include child sacrifice, Locke concludes that the state can ban the practice.<sup>171</sup> But because Separate Spheres provided the conceptual grounds for Locke's argument for toleration, he has no resources for explaining why the overlapping jurisdiction, and conflict, between state and church should be resolved as he claims. Locke instead falls back on a conclusory assertion that "those things that are prejudicial to the commonweal of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rites."<sup>172</sup>

This merits two critical observations. First, given Locke's conception of the church, why wouldn't the state ban have the effect of "destroy[ing] the church itself"?<sup>173</sup> Locke doesn't tell us.<sup>174</sup> Second, if Locke really means to abandon Separate Spheres, and instead to embrace the proposition that the state can proscribe church rituals that the state deems to be "prejudicial to the commonweal of a people in their ordinary use,"<sup>175</sup> then we are left once again with the previous subsection's conclusion that Lockean church autonomy doesn't amount to much at all. And, indeed, at this point in the *Letter* the best Locke can do is to caution that the magistrate be "very careful that he does not misuse his authority to the oppression of any church, under pretense of public good."<sup>176</sup>

To quickly summarize, Locke's argument for church autonomy fails for one of two reasons: it is either trivial because it proves too little, or it proves too much by establishing a church realm that is utterly beyond state

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things, all matters, at any given point in time, fall into either the magistrate's or religion's sphere. Locke concludes that polygamy and divorce are indifferent things, *see* JOHN LOCKE, AN ESSAY CONCERNING TOLERATION II, at 110, thereby placing them outside the church's realm and into the exclusive sphere of the magistrate.

<sup>171</sup> *Id.* at 37. Locke also states that "if some congregations should have a mind to . . . lustfully pollute themselves in promiscuous uncleanness, or practice any other such heinous enormities," the state can ban these things because "[t]hese things are not lawful in the ordinary course of life, nor in any private house; and therefore neither are they so in the worship of God, or in any religious meeting." *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 37.

<sup>174</sup> Similarly, Locke acknowledges that slaughter of an animal can be a religious ritual, but nonetheless concludes that the state can ban slaughter "for some while, in order to the increasing of the stock of cattle that had been destroyed by some extraordinary" disease. *Id.*

<sup>175</sup> *Id.* at 37.

<sup>176</sup> *Id.*

regulatory authority. Either way, Locke cannot provide an adequate grounding for church autonomy. An alternative framework is required.

## 2. *Under-Protects*

A second problem with Individualism is that it under-protects religious institutions. Because identifying what constitutes under-protection requires a normative baseline that indicates the proper level of protection, I shall delay explanation of this shortcoming until after developing my affirmative account of religious institution autonomy.<sup>177</sup>

### III. THE RELIGIOUS INSTITUTION PRINCIPLE

This Part III derives what I call the “Religious Institution Principle” from Rawls’ political theory and fleshes out its contents. Part IV identifies limitations on the Religious Institution Principle that flow from other parts of Rawls’ theory. Part V anticipates, and responds to, several difficult challenges that might be posed to the Religious Institution Principle.

#### A. The Original Position

John Rawls’s project in *Political Liberalism* is to describe the basic structure of a stable and enduring democratic constitutional regime that can win the wholehearted support of a citizenry having a plurality of incompatible, yet reasonable, comprehensive religious, philosophical and moral doctrines.<sup>178</sup> Rawls famously elucidates the basic structure of political society using the heuristic device of the “original position.” Under the original position, people are to identify the fair political structure by conceiving themselves as being under a “veil of ignorance” under which they “do not know the social position, or the conception of the good (its particular aims and attachments), or the realized abilities and psychological propensities, and much else, of the persons they represent.”<sup>179</sup> Because

the parties do not know whether the beliefs espoused by the persons they represent is a majority or a minority view ... [t]hey cannot take chances by permitting a lesser liberty of conscience to minority religions, say, on the possibility that those they represent espouse a majority or dominant religion and will therefore have an even greater liberty. For it may also happen that these persons belong to a minority faith and may suffer accordingly. If the parties were to gamble in this way, they would show that they did not take the religious, philosophical or moral convictions of persons seriously, and, in effect, did not know what a religious,

<sup>177</sup> See *infra* Part III.E.2(b).

<sup>178</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 22, at xvi. The next three paragraphs draw from Rosen, *Outer Limits*, *supra* note 26, at 1090-91.

<sup>179</sup> *Id.* at 305.

philosophical, or moral conviction was.<sup>180</sup>

The veil of ignorance is a heuristic for enabling people to transcend their self-interests so as to identify a fair (and hence just) political structure. The veil of ignorance aims to transform personal self-interest into society-wide interest: People in the original position choose a political structure that maximally accommodates everybody's religious, philosophical and moral convictions because they do not know whom they actually represent, and accordingly do not want to risk creating a polity that did not accommodate whomever it is *they* happened to represent.

It follows that people in the original position would not select a political structure that might preclude themselves from living in accordance with their religious, philosophical or moral convictions. In Rawls's words, allowing autonomy for only select persons' conceptions of the good would constitute a "gamble [that would] show that [the person in the original position] did not take the religious, philosophical or moral convictions of persons seriously and, in effect, did not know what a religious, philosophical, or moral conviction was."<sup>181</sup>

More specifically, Rawls concludes that people in the original position would agree upon two principles of justice that determine society's political institutions. Only the first is relevant for present purposes. It provides that "[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all."<sup>182</sup> "The basic liberties (freedom of thought and liberty of conscience, and so on). . . are the background institutional conditions necessary for the development and the full informed exercise of the two moral powers,"<sup>183</sup> one of which is the capacity to formulate a conception of the good.<sup>184</sup>

Rawls' first principle of justice is stated at a high level of abstraction. What concretely does it call for? To begin, Rawls understands that there are multiple institutional arrangements that are consistent with the principles of justice for two reasons. First, there are differences across societies – in terms of population, history, and geography – such that an institutional arrangement that satisfies the principles of justice in one society might not in another. Second, even within a single society, there may be multiple institutional arrangements that would be consistent with the principles of

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<sup>180</sup> *Id.* at 311 (emphasis supplied).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 291.

<sup>183</sup> *Id.* at 308.

<sup>184</sup> *Id.* at 19.

justice. For these two reasons, Rawls' theory does not demand a single set of institutional arrangements.

But Rawls' theory would have only limited utility if its guidance ended there. Importantly, Rawls describes a four stage process by which people can draw on the principles of justice to generate substantially detailed institutional arrangements for their society. "Each stage is to represent an appropriate point of view from which certain kinds of questions are considered."<sup>185</sup> The first stage is the above described veil of ignorance, which generates the two principles of justice. In each subsequent stage the veil is "partially lifted" until, at stage four "everyone has complete access to all facts."<sup>186</sup> In the second stage, which Rawls calls the "constitutional convention," parties "now know the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on."<sup>187</sup> At the second stage, people thus know the size of their society's population as well as the degree of its heterogeneity, including "a knowledge of the beliefs and interests that men in the system are liable to have and of the political tactics that they will find it rational to use given their circumstances."<sup>188</sup> Though this is a significant amount of culture-specific and time-specific information, Rawls plausibly insists that "[p]rovided they have no information about particular individuals including themselves, the idea of the original position" – by which he means its ability to serve as a heuristic in the design of society's institutions -- "is not affected."<sup>189</sup> Rawls calls the third the "legislative stage,"<sup>190</sup> and the fourth the "administrative stage."

When I use the original position to infer specific institutional arrangements, I sometimes will be operating at the first stage, frequently at the second, and occasionally the third. Differentiating between the stages is not important for the purely internal purpose of determining what contemporary American institutions should be like insofar as "the idea of the original position is not affected" so long as the persons in the original position do not know the specific people they represent.<sup>191</sup> Differentiating between the first and subsequent stages is important, however, to distinguish

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<sup>185</sup> RAWLS, *THEORY OF JUSTICE*, *supra* note 22, at 196.

<sup>186</sup> *Id.* at 197, 199; *see also* RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 22, at 48 ("Limitations on knowledge available to the parties are progressively relaxed in the next three stages").

<sup>187</sup> RAWLS, *THEORY OF JUSTICE*, *supra* note 22, at 197.

<sup>188</sup> *Id.* at 198.

<sup>189</sup> *Id.*

<sup>190</sup> RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 22, at 48.

<sup>191</sup> *Id.*

between conclusions that apply to all liberal polities and those that are specific to the United States.<sup>192</sup>

#### B. Preliminary Statement of the Religious Institution Principle

The first principle of justice has important implications for religious institutions. For many people, the freedom to develop and fully exercise a conception of the good requires that they be able to live in accordance with their religious convictions, which in turn presupposes the existence of certain religious institutions. The political structure chosen under the original position accordingly would be one that afforded such religious institutions special protections.

How extensive would those protections be? My basic conclusion is this:

A person in the original position, not knowing whether she represents a non-religious person, a religious person who belongs to a majority religion, or a religious person who belongs to a minority religion, would not consent to a political structure that had the power to prevent her religion's religious institutions from doing what is necessary, from the internal perspective of the religious community, for its adherents to develop and fully exercise the religion's conception of the good.

I call this the "Religious Institution Principle." After clarifying the Religious Institution Principle in the rest of this subpart, the Article works out the principle's important implications in today's United States.

##### 1. *"what is necessary"*

The Religious Institution Principle's presumptive protections extend to "what is necessary" for a religion's adherents. Two objections may be posed. First, it might be objected that this turns the Religious Institution Principle into a null set for any religion that believes it has benefitted from adversity, including confrontational relations with secular authorities.<sup>193</sup> For example, the biblical figure Joseph explained his kidnapping and imprisonment as divinely guided events that ultimately led him to becoming the second in command in Egypt, allowing him to save the Jewish and Egyptian people from famine.<sup>194</sup> The Jewish community has similarly understood painful historical periods (such as exile from the land of Israel two thousand years ago, the Spanish Inquisition, and even the Holocaust) as

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<sup>192</sup> Differentiating among the stages also is relevant to determining what contemporary American institutional features could justifiably be altered as society shifts over time.

<sup>193</sup> I am grateful to Steve Smith for raising this point.

<sup>194</sup> See GENESIS 44:4-8.

part of a divine plan,<sup>195</sup> and Mormons have similarly conceptualized the persecutions they suffered.<sup>196</sup>

More generally, the “nullity challenge” can be formulated as follows: from the perspective of a religion that believes in divine providence, nothing can be said to be “necessary” from the political authorities. Whatever happens is divinely guided, and the religion’s adherents will be able to cope, and may even be better off for it.

The nullity challenge is readily answered. The fact that a religion has the theological resources to explain disasters *ex post* does not mean that the religion voluntarily invites disasters *ex ante*. The original position concerns *ex ante* decision-making: what political arrangements would individuals think it fair to select, not knowing whom they actually represent? I know of no religion that advises its adherents to opt for persecution. It is only in relation to such a religion, if any exists, that the nullity challenge would be valid, and partial validity would not undermine the Religious Institution Principle’s valid application in respect of all other religions.

Having disposed of the nullity challenge, let us proceed to consider the contents of the Religious Institution Principle’s “necessity” requirement. To begin, there is an ambiguity: does necessary mean ‘merely useful’, or ‘indispensable’ in the sense that without it an adherent would be unable to develop and fully exercise her religion’s conception of the good?<sup>197</sup> The answer likely turns on basic facts of the society in question, and hence is answerable only at Rawls’ second stage. In the large heterogeneous society that is contemporary America, the Religious Institution Principle’s necessity requirement can extend only to protecting what is indispensable. Interpreting necessity to include what is “useful” would be too costly, and would lead to too many problematic conflicts with the legitimate interests of non-religious citizens. More on this soon.<sup>198</sup>

This leads to the second possible objection to the Religious Institution Principle’s necessity requirement: is it under-protective? Put differently, why would a person in the original position, knowing that she might represent a religious person, agree to the Religious Institution Principle, insofar as it provides only the minimal protections as to what was indispensable for religious adherents’ self-realization? It is best to address

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<sup>195</sup> See generally ELIEZER BERKOVITZ, FAITH AFTER THE HOLOCAUST.

<sup>196</sup> See, e.g., Ronald E. Poelman, *Adversity and the Divine Purpose of Mortality*, ENSIGN, at 23 (May 1989).

<sup>197</sup> Cf. *McCulloch v. Maryland*, 17 U.S. 316, 413-14 (1819).

<sup>198</sup> See *infra* Part IV.B.3.

this important question later, after having fully worked out the Religious Institution Principle's contents.<sup>199</sup>

2. *“from the internal perspective of the religious community”*

Under the Religious Institution Principle, necessity is determined from the religious community's internal perspective.<sup>200</sup> This “Internal Perspective” requirement follows from the veil of ignorance: a person in the original position, not knowing whether she represented a person belonging to a majority or minority religion, would not agree to allowing what is religiously necessary to be determined by the societal majority, which might have different religious understandings.

The Internal Perspective requirement carries a second important implication: what matters is the perspective of the religion's formal leaders, not its lay members. The principle presupposes the continued existence of necessary religious institutions, and religious institutions can survive only if the formal leaders' understandings of the institution's requirements are determinative.<sup>201</sup> So long as dissenters are free to exit from one church and join (or establish) another – a requirement discussed below<sup>202</sup> – people in the original position accordingly would agree that the religion's formal leaders determine the religion's internal perspective.<sup>203</sup>

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<sup>199</sup> See *infra* Part V.C.

<sup>200</sup> This is consistent with what has come to be known as the church autonomy doctrine. See *Watson v. Jones*, 13 Wall. 679, 727 (1872) (stating that “whenever the questions of discipline, or of faith, or ecclesiastic rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the [state's] legal tribunals must accept such decisions as final . . .”); see also *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (speaking of the power of “religious organizations” to “decided for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”).

<sup>201</sup> This can be satisfied by a rule that gave weight to lay sensibilities, so long as such a rule of recognition were identified by the institution's leaders. More generally, religious institutions require law, cf. LOCKE, *supra* note 126, at 16, law presupposes a rule of recognition, see H.L.A. HART, *THE CONCEPT OF LAW* 100-110 (1961), and a non-governmental institution's rule of recognition must come from its formal leaders, or else law and the institution will “dissolve and break in pieces.” LOCKE, *supra* note 126, at 16.

<sup>202</sup> See *infra* Part IV.B.2.

<sup>203</sup> This does not mean that society must automatically accept whatever it is that one of the institution's spokespersons says is its internal perspective. Absolute deference to the institution's spokesperson would not be selected in the original position because such a rule self-evidently would be liable to abuse by religious institutions, and for that reason could not be generalized as a rule that would be applicable to all religions (as all rules chosen in the original position must be). Accordingly, government necessarily must be involved in determining what constitutes the religious institution's internal perspective for purposes of the Religious Institution Principle. A rule of absolute deference to the “decisions] by the highest of the] church judicatories to which the matter has been carried” is one possibility. See *Watson*, 80 U.S. at 727. A full exploration of how government is to determine the religion's internal perspective is an important question that lies beyond this Article's scope.



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I shall now proceed to a discussion of several of the many implications that flow from the Religious Institution Principle.

C. What Counts as a Religious Institution?

What counts as a ‘religious institution’ for purposes of the Religious Institution Principle? The guiding criterion is whether a particular institution is necessary, from the religion’s internal perspective, for its adherents to fully develop and exercise their conception of the good. Churches, synagogues, and mosques readily qualify.

1. *What Does Not: Against the Slippery Slope*

Before considering what other institutions might qualify as religious institutions, it will be helpful to clarify some that would not. Illuminating in its own right, this discussion also provides a response to one of Schragger and Schwartzman’s arguments, referred to above,<sup>204</sup> against the proposition that churches deserve “a special constitutional status.”<sup>205</sup> Though directed to Separate Spherists, their argument also applies to the Religious Institution Principle since it too grants religious institutions special protections.

Schragger and Schwartzman cite Robert Putnam for the proposition that “there do not appear to be decisive differences between churches, bowling leagues, and coffee houses.”<sup>206</sup> After initially qualifying this equivalence,<sup>207</sup> Schragger and Schwartzman conclude “it is extraordinarily problematic to recognize and distinguish some conscience-based organizations over others” and that “[a]s a matter of political theory, such a distinction violates a central principle of equality.”<sup>208</sup> This equivalence is the ground for two conclusions that are crucial to their position. First, is their slippery slope conclusion that churches cannot be given special protection; protecting churches, they suggest, would demand that special protections also be granted to all these other organizations as well, an impossibility on pragmatic and normative grounds. Second is their doctrinal conclusion that churches should be treated interchangeably with the Boy Scouts, political parties, and newspapers; they assimilate churches into the doctrinal categories

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<sup>204</sup> See *supra* text accompanying notes 115-117.

<sup>205</sup> Schragger and Schwartzman, *supra* note 16, at 5.

<sup>206</sup> *Id.* at 35 & n. 154.

<sup>207</sup> See *id.* at 35 (“It is certainly possible that religious institutions are sociologically significant – akin to state, market, and family as an organizing principle of social life” such that “our lives may revolve around churches to such a degree that they are deserving of special treatment.”).

<sup>208</sup> *Id.* at 36.

of freedom of association and expressive association that govern these other institutions, and conclude that religious institutions are entitled to no additional constitutional protections.<sup>209</sup>

The Religious Institution Principle, however, provides a basis for distinguishing among these institutions. What matters is whether an institution is viewed by participants in the original position, or those at the second stage, as being part of the “background institutional conditions necessary for the development and the full informed exercise of” a conception of the good.<sup>210</sup> While some non-religious institutions may qualify,<sup>211</sup> most of Schragger and Schwartzman’s examples would not – it is inconceivable that bowling leagues, the Boy Scouts, or newspapers would count, and political parties probably also would not. So while Schragger and Schwartzman might be correct that churches are “not unique,”<sup>212</sup> their argument that treating churches specially would entail extending the same protections to all these other institutions is answerable from Rawls’ perspective.

The Religious Institution Principle sheds light on another criticism propounded by Schwartzman and Schragger. They assert that religious institutionalists must “claim not only that religion is good but that *organized* religion facilitates, promotes, or is constitutive of that good.”<sup>213</sup> Not so from Rawls’ social contractarian perspective. What matters is not the *truth* of whether religion is good (and the *truth* of organized religion’s connection to that good), but the likely *perception* of the person behind the veil of ignorance (or at the second stage) who participates in the original position; the person behind the veil recognizes that she might be religious, so the truth of religion’s relation to goodness is not relevant. Stated differently, what matters is the empirical (rather than ontological) question of whether religious persons in the society that is the object of the original position or second stage think religious institutions are necessary for their religious flourishing. The answer certainly is “yes” for people in today’s United States.

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<sup>209</sup> As to freedom of association, Schragger and Schwartzman state that *Boy Scouts* and *Hosanna-Tabor* “appear to be justified by a similar set of arguments and are grounded in a similar concern for freedom of conscience.” See *id.* at 56. As to expressive associations, Schartzman and Schragger argue against church exemption from labor laws on the ground that “[t]here is no reason that firms or corporations with expressive or conscientious missions (for example newspapers or political parties) cannot also offer good reasons to be immune from employment laws.” *Id.* at 59.

<sup>210</sup> *Id.* at 19.

<sup>211</sup> As explained later, the Religious Institution Principle does not negate the possibility of what might be called a “Non-Religious Institution Principle.” See *infra* Part V.D.1.

<sup>212</sup> *Id.* at 30.

<sup>213</sup> *Id.* (emphasis in original).

## 2. *Beyond Churches*

So what institutions beyond churches, synagogues and mosques would count as religious institutions?

### a. Educational Institutions

To begin, some educational institutions almost certainly would be included, though difficult questions quickly arise. The Religious Institution principle requires the existence of institutions that allow for the formulation of a conception of the good, and while this undoubtedly demands some educational autonomy for religious groups,<sup>214</sup> it does not automatically follow that there must be separate parochial schools for each religion's children, or religious universities for its young adults. If a religion does not believe that separate schools are necessary for its adherents to develop and live in accordance with the religion's conception of the good, then schools are not a religious institution for that religion.

### b. The "Differentiated Approach"

This suggests that what counts as a religious institution may vary across religions, on the reasonable assumption that different religions have differing understandings of what institutions are necessary for their adherents to flourish. Call this the 'Differentiated Approach' to identifying religious institutions. It might be thought that the Differentiated Approach constitutes a floor, not a ceiling, meaning that a state could conclude that all religions should be treated equally for purposes of identifying religious institutions.<sup>215</sup> Call this the 'Undifferentiated Approach.'

Though counterintuitive, the first principle of justice requires the Differentiated Approach in societies with heterogeneous populations. As explained later, there are legitimate limits on the degree to which justice requires that a liberal state accommodate the needs of religious groups, one of which is political stability.<sup>216</sup> Now consider this: it is conceivable that (1) one religion could, from its internal perspective, require a particular institution that no other religions need, and that (2) accommodating that particular religious institution would be consistent with political stability only in small doses, *i.e.*, that accommodating the religious institution would *not* be possible if like accommodations had to be extended to all religions. This

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<sup>214</sup> See Rosen, *Educational Autonomy*, *supra* note 26.

<sup>215</sup> It is not hard to imagine arguments for the Undifferentiated Approach. It might be thought that the Differentiated Approach is fundamentally unfair because it treats different religions differently, or that the Undifferentiated Approach is administratively simpler.

<sup>216</sup> See *infra* Part IV.B.1.

shows that the Undifferentiated Approach unnecessarily limits the range of religions that could be accommodated in the liberal society. This possibility would lead people in an original position to reject the Undifferentiated Approach because it might mean that the person they represent would not be able to realize her conception of the good. The Differentiated Approach to determining what counts as a religious institution is preferable, in other words, because it expands the range of citizens with reasonable comprehensive views that the liberal state can accommodate, thereby increasing the extent to which the first principle of justice can be realized.

### c. Hospitals and Economic Enterprises

Let us return to the question of what if any institutions apart from churches and (some) educational institutions may qualify as a religious institution from the religion's Internal Perspective. Some religions (Judaism and Islam, for example) have highly developed systems of courts and business law.<sup>217</sup> Does the Religious Institution Principle demand that they be allowed to function as parallel, independent legal systems outside of the state's contract and business law? No. Both Judaism and Islam have the functional equivalent of choice-of-law rules that permit religious contract and business law to be displaced by state law.<sup>218</sup> As such, it cannot be said that, from these religions' internal perspectives, their systems of contract law are necessary for their adherents to live in accordance with their conception of the good. Accordingly, their courts and business law would not qualify as religious institutions.

To be clear, this conclusion does not mean it would be wrongful for a state to accommodate them, as the United States currently does by allowing religious tribunals to resolve disputes pursuant to religious law among people who voluntarily submit to their jurisdiction and then allowing state mechanisms to help enforce the tribunals' judgments.<sup>219</sup> From the perspective of the Religious Institution Principle, however, this is a policy choice, not a requirement of the first principle of justice.

Would hospitals qualify as religious institutions? The answer turns on whether religious hospitals are necessary, from the religion's internal

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<sup>217</sup> See generally SHULCHAN ARUKH, *Hoshen Mishpat*; Mohammad Fadel, *Islamic and American Law: Between Concordance and Dissonance*, 57 N.Y.L.S. L. REV. 231, 232-36 (2012-2013).

<sup>218</sup> See, e.g., Michael J. Brody, *The Role of Secular Law in Halakha: A Brief Response to Gerald Blidstein and a Note on Jewish Legal Theory*, 2 MEOROT 6, 10 (2008) (treating the Jewish legal category of *dina de'malchuta dina* as a choice-of-law provision); Fadel, *supra* note 217, at 236-37 (discussing "treaty" approach to legal obligations of Muslims who live in non-Muslim majority countries).

<sup>219</sup> See Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011).

perspective, for its adherents to fully develop and exercise their conception of the good. This question probably is most pressing vis-à-vis Catholicism. While I am not in a position to answer it from that tradition's internal perspective, a few observations can be made. Even assuming that "service lies at the core" of Catholicism,<sup>220</sup> need service be provided in a *religious* hospital (or in a religious social service organization)? On the one hand, the religious individual may equally be able to provide service in a public hospital, and thereby fulfill her vocational calling. On the other hand, the religion might understand the provision of service through a religiously identified organization to be a necessary means of providing witness of God to the world. An internal perspective of this sort would suggest that the hospital (or other social service organization) is a religious institution for that religion, under the Differentiation Approach. Under this logic, some corporations also may qualify as religious institutions.<sup>221</sup>

#### D. Overlapping Spheres

Even if a Catholic hospital (or other organization) qualified as a religious institution, that would not mean that governmental regulation of that institution (for instance the contraception mandate) necessarily would be wrongful, for two reasons. First, as explained immediately below in Section E, the Religious Institution Principle does not protect religious institutions from all laws, but has finite "coverage." Second, as explained in the next Part IV, even as to those laws to which the Religious Institution Principle applies, its protections are not absolute. For these two reasons, the Religious Institution Principle does not generate a political architecture of Separate Spheres in which religious institutions are jurisdictionally separate from, or otherwise independent of, the government. Instead, the Religious Institution Principle leads to a system of overlap between government and religious institutions.

#### E. Coverage: The Scope of Presumptive Protections

##### 1. *Why Many Laws Fall outside the Principle's Coverage*

The scope of the laws to which the Religious Institution Principle extends is determined by the logic that gives rise to the principle: the principle's coverage extends only to laws that threaten to disable religious institutions from facilitating adherents' abilities to develop and live in accordance with the religion's conception of the good. Most governmental laws do not, and for that reason do not fall within the Religious Institution

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<sup>220</sup> Berg, *supra* note 15, at 5.

<sup>221</sup> See, e.g., Vischer, *supra* note 15.

Principle's coverage. This is true, for instance, of tax laws, and most labor and zoning laws.<sup>222</sup> More generally, the Religious Institution Principle does not protect religious institutions from governmental laws that address behaviors about which a religion does not take a position, or laws that prohibit behavior that the religion also proscribes (such as sexual abuse). The only caveat is this: the Religious Institution Principle would be triggered if such laws were administered in a way that undermined the institution's ability to facilitate adherents' development and living in accord with the religion's conception of the good. For instance, while tax laws are not *per se* problematic, an excessive tax that risked bankrupting religious institutions would come under the Religious Institution Principle's coverage.

Perhaps surprisingly, the Religious Institution Principle does not extend to laws simply because they are contrary to the religion's commitments. Instead, the principle applies only if the law's application threatens to undermine the institution's capability of facilitating adherents' ability to formulate and live in accordance with the religion's conception of the good. This has particular relevance to the contraception mandate. Assume for present purposes that Catholic hospitals are religious institutions. The relevant question for determining the scope of the Religious Institution Principle's coverage is not whether Catholicism supports the use of contraception. Instead, the question is whether a Catholic hospital's compliance with a law requiring that they provide their employees with insurance covering contraception undermines the role hospitals play in facilitating Catholics' abilities to formulate and live in accordance with Catholicism's conception of the good. While fully answering this question from an internal Catholic perspective lies beyond this Article's scope, this much can be said: it is not self-evident that the contraception mandate come within the Religious Institution Principle's coverage.

Importantly, coverage is not a function of individual conscience, the institution's "conscience,"<sup>223</sup> or members' free exercise claims.<sup>224</sup> This is not to suggest that the Religious Institution Principle displaces an individual's free exercise claim; it does not.<sup>225</sup> But free exercise should not be run

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<sup>222</sup> To be clear, the first principle of justice does not indicate that exemptions from these sorts of laws (for example tax exemptions for clergy) are unjust, just that they are not required as a matter of first principles.

<sup>223</sup> In a characteristically thoughtful and carefully reasoned piece, Kent Greenawalt analyzes religious institutional autonomy using the paradigm of conscience. See Kent Greenawalt, *Religious Tolerance and Claims of Conscience* (draft on file with author). Such an approach is in tension with the Religious Institution Principle for the reasons explained above.

<sup>224</sup> Pace Schragger and Schwartzman, who argue that the *only* constitutional claims that institutions can assert are free exercise claims of their members. See Schragger & Schwartzman, *supra* note 16, at 62.

<sup>225</sup> For example, the claim available to the priest who has to sign the check for insurance under the

together with the question of whether application of a law threatens to undermine a religious institution's capability of facilitating adherents' development and realization of the good. Institutions are different from individuals, and the protections that are appropriate for institutions may be greater, or lesser, than what is owed to individuals, depending upon the circumstance.

These guidelines have important implications for the nascent ministerial exception doctrine. The Supreme Court recently ruled in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*<sup>226</sup> that employment discrimination claims cannot be asserted against churches in relation to employment decisions concerning the church's ministers. This is far more expansive (and narrower in some respects as well, as explained immediately below) than what the Religious Institution Principle endorses. Under the principle, religious institutions do not have blanket immunity from governmental laws that bear on the hiring of its ministers. Rather, the Religious Institution Principle covers only those laws affecting the employment of ministers -- and potentially non-ministers as well -- that threaten to undermine the religious institution's ability to enable their adherents to develop and live in accordance with the religion's conception of the good.<sup>227</sup> It is hard to see why the American with Disabilities Act -- the federal law at issue in *Hosanna-Tabor*, which prohibits discrimination on the basis of disability -- would come under the principle's coverage.<sup>228</sup>

There are two possible arguments under the Religious Institution Principle in support of the ministerial exception. First is a claim that the ADA is administered in a manner that endangers the religious institution's ability to facilitate adherents' development of, and ability to live in accordance with, the religion's conception of the good. This would be true if, for instance, hiring and termination decisions regularly led to costly and lengthy lawsuits that interfered with a religious institution's ability to be led by its members' preferred leader.<sup>229</sup> But this would mean that a ministerial

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HHS mandate should not be confused with whatever claim the hospital may have as a religious institution.

<sup>226</sup> 132 S. Ct. 694, 710 (2012).

<sup>227</sup> It is quite possible that non-ministers -- indeed, that all employees in a religious institution -- could satisfy this requirement. Cf. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-40 (1987) (interpreting statutory exemption for religious organizations to employ "individuals of a particular religion" to include a janitor for church-owned gymnasium).

<sup>228</sup> To be sure, it is not inconceivable that a religion could have commitments inconsistent with the Americans with Disabilities Act. For example, the Pentateuch prohibits priests with enumerated physical infirmities from working in the Temple in Jerusalem. See LEVITICUS 21:16-24. But this limitation has never been understood as carrying over to rabbis, or to have operation outside of the Temple, and accordingly has no practical application to Jewish religious practice in the United States.

<sup>229</sup> For such an argument, see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N. CAROL.

exception might be required as a pragmatic matter, though not as a matter of first principles. Accordingly, pragmatic steps that remedied administrability concerns for religious institutions would then permit the law to be applied.

Second, it might be claimed that the ministerial exception is an appropriate simplifying prophylactic rule for purposes of courts. This would require elaboration of a sort that has not yet been provided, and about which I am initially skeptical.

## 2. *Laws Falling Within the Principle's Coverage*

### a. Some examples

What types of laws *would* fall within the Religious Institution Principle's coverage? Consider first a New York law that required every Russian Orthodox church in the state to treat as authoritative the determinations of the governing body of North American churches, rather than the Patriarch *locum tenens* of Moscow.<sup>230</sup> That law threatened the ongoing integrity of the Russian Orthodox church, from that religion's internal perspective.<sup>231</sup> The Supreme Court overturned this law in the 1950s, a disposition that is consistent with the Religious Institution Principle.<sup>232</sup>

A surprising number of laws similarly have interfered with particular churches' internal governance. For example, many nineteenth century property laws applicable to churches "reflected a Protestant democratic perspective on ecclesiastical structure under which congregants are the foundation of a church, own church property, and contract with clergy."<sup>233</sup> These statutes "restricted the amount of land a religious organizations could possess," "limited the annual value and income of real or personal property held by religious organizations," and "regulated the structure of religious organizations, often in ways that empowered the laity."<sup>234</sup> Scholars have concluded that such laws were "fundamentally inconsistent with Catholic doctrine holding that ownership lies in the Church itself which determines

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L. REV. 1, 23 (2011).

<sup>230</sup> See *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 96-102 (1952) (striking down this law). This case is frequently discussed by scholars under the rubric of "church autonomy." See generally Douglas Laycock, *Church Autonomy Revisited*, 7 GEORGETOWN J. OF LAW & PUB. POL'Y 253 (2009).

<sup>231</sup> See *id.* at 258 ("Differences in church governance reflect deep theological disagreements"); see also *supra* note 201.

<sup>232</sup> See *Kedroff*, 344 U.S. at 116. The statement above in text assumes that there are no sufficiently important countervailing reasons that could justify infringement of the Religious Institution Principle.

<sup>233</sup> See Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions* (draft on file with author, at 37); Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, and Church Property*, 12 J. CONTEMP. L. ISSUES 693, 709-10 (2002).

<sup>234</sup> Brownstein, *supra* note 233, at 34-36.



the rights of its parishioners.”<sup>235</sup> These laws would come under the Religious Institution Principle’s coverage if, as likely is true, undercutting concentration of power and authority in priests were viewed by the Catholic Church as imperiling the institution’s capability of facilitating its adherents’ ability to develop and live in accordance with the Catholic Church’s conception of the good.

A more recent example can be seen in Professor Barak Richman’s campaign to apply antitrust laws to the clergy hiring practices of the movement for Conservative Judaism.<sup>236</sup> The Conservative movement requires member congregations to hire from a list of rabbis drawn up by the movement. Richman argues that this constitutes an unlawful cartel, and that congregations should be able to hire whomever they wish. The Conservative movement claims that such control is necessary for the Conservative movement to “set standards for worship, ritual and religious law, and to ensure that only rabbis committed to those standards lead congregations.”<sup>237</sup> “If each congregation is deciding for itself, some of these decisions will dilute the ability of this worldwide group of people to promote its vision worldwide.”<sup>238</sup> Assuming that the Conservative movement constitutes a religious institution, the Religious Institution Principle’s coverage would extend to the antitrust laws.<sup>239</sup>

#### b. How Individualism Under-Protects

Property laws restricting church’s property ownership and antitrust laws interfering with clergy appointment give rise to one type of harm that Individualism overlooks. Recall that Schragger and Schwartzman argue that “general principles of freedom of association, privacy, and conscience are sufficient to protect all conscience-based associations, including churches,”<sup>240</sup> and that free exercise claims can be asserted only if individual members of the church “have been burdened in their free exercise of religion.”<sup>241</sup> It is not at all clear that these individual-based concepts and doctrines would condemn the abovementioned applications of property restrictions and

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<sup>235</sup> *Id.* at 37.

<sup>236</sup> See Samuel G. Freedman, *Seeing and Battling a ‘Cartel’ in the Hiring of Rabbis*, THE NEW YORK TIMES (August 24, 2012).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* (quoting Rabbi Julie Schonfeld, Executive Vice President of the Conservative movement’s Rabbinical Assembly).

<sup>239</sup> As explained above, the Religious Institution Principle’s contents are determined on the basis of the internal perspective of the religion’s leaders. See *supra* Part III.B.2. For this reason, what matters is the Conservative Movement’s views of what their movement requires, not the views of a lay member like Professor Richman.

<sup>240</sup> Schragger & Schwartzman, *supra* note 16, at 5.

<sup>241</sup> *Id.* at 63.

antitrust law.<sup>242</sup> But the Religious Institution Principle does: such laws interfere with a religious institution's capability, from its internal perspective, of facilitating its adherents' development and living in accordance with the religion's conception of the good. People in the original position would want to guard against such harms to religious institutions, even if such laws do not harm identifiable individuals through the causation mechanisms utilized to adjudicate individuals' claims.

Two hypotheticals shed additional light on how Individualism underprotects religious institutions. Imagine first a federal law that requires large employers to make federally funded and provided contraceptive devices available in their bathrooms, to be stocked by federal workers for employers with ideological objections. Would it be proper for the first law to be applied to Catholic hospitals? To Churches? Second, consider a law aimed at combatting unsupervised binge drinking that compels all colleges to allow alcoholic bars on their campuses, to be funded and operated by the government for any colleges with ideological objections. Can this law be applied to a Mormon or Islamic university, though each religion prohibits the consumption of alcohol by its co-religionists?

As with the property ownership and antitrust laws, it is not clear why any of these applications would be problematic under Individualism. After all, Schragger and Schwartzman parry objections to the contraception mandate on the ground that “[u]nless churches have their own consciences (and we have already argued that they do not), the institutional context does not add anything to the plaintiffs’ claim,” and they conclude that the only sort of claim that properly can be asserted is that “the individuals comprising those groups have been burdened in their free exercise of religion.”<sup>243</sup> Since the abovementioned hypothetical laws do not compel any religious person to do anything, no individual would appear to have a free exercise claim to press.<sup>244</sup> This conclusion is symptomatic of the Individualism’s shortcomings. The two proposed laws impose a real harm that ought to matter to political theory and law, but that is not captured by Individualism’s reduction of religious institutions to its members.

More generally, there are two types of harms overlooked by Individualism, but protected by the Religious Institution Principle. The first

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<sup>242</sup> Perhaps the priest in whom the property otherwise would have vested could assert an individual-based free exercise or statutory claim. In any event, an individual-focused claim misconceives the crux of the law’s harms, which are to the institution rather than the individual priest.

<sup>243</sup> Schragger and Schwartzman, *supra* note 16, at 63.

<sup>244</sup> See also Corbin, *supra* note 7, at 158 (arguing that the contraception mandate is legally unproblematic because “genuine and independent decisions of private individuals . . . br[eak] the chain of attribution linking the religious conduct and the state”).

might be called “sacred space” harms. Many religions believe that they require sacred spaces, which are created by physical attributes (such as size, beauty, and materials) as well as the persons and behaviors that are present -- and absent -- from the space. Sacred spaces may be important even if no individual has a duty to visit, and if the space is forbidden to some co-religionists. Restricting a church’s property ownership threatens harm to a religion’s sacred space if a priest-apexed hierarchy is, from the religion’s internal perspective, a necessary element of its sacred space. Likewise, a law requiring government-stocked contraceptive devices to be available in church restrooms likely would violate a religion’s understanding of sacred space. For these reasons, there can be meaningful harm even if a law does not impose harms on identifiable individuals that are ascertainable by the causation analysis used to evaluate individuals’ claims.

Second, Individualism overlooks what might be called “witnessing” harms. Imagine a law that threatened the continued existence of religious hospitals or charitable organizations, but that did not interfere with the ability of religious individuals to work for non-religious hospitals and charities. It is not clear why such a law would be problematic under Individualism insofar as individual doctors would be able to continue their social service work. The Religious Institution Principle, by contrast, has the conceptual resources for explaining why such a law may be problematic. A religion’s conception of the good may include obligations that fall on the entire religious community rather than only individuals. One such obligation may be bearing witness of the fact of God to non-coreligionists, and the religious hospitals and charitable organizations may be deemed indispensable to accomplishing this; good works undertaken by large groups of religious individuals united by religion may communicate God’s presence in a way that an individual’s good works cannot. People in an original position would want to protect their religious community’s capability of realizing this aspect of their conception of the good, just as they would want to protect the individual’s ability to formulate and live in accordance with their religion’s conception of the good.

#### IV. LIMITS TO THE RELIGIOUS INSTITUTION PRINCIPLE

Even as to laws fall within the Religious Institution Principle’s coverage, the principle does not provide absolute protections for two reasons. First, the members of some religious traditions may not be permitted to ‘sit at the table’ and participate in the original position, and therefore the chosen basic political structure may not accommodate them or their religious institutions. I discuss the criteria for drawing the line between participating and excluded religious traditions in Part IV.A. Second, as

regards participating religious traditions, Rawls' first principle of justice gives religious institutions generous, but non-absolute, protections. I explore these substantive limitations on religious institutions in Part IV.B.

#### A. Threshold Eligibility Requirements

Rawls carefully defines who it is that is imagined to be a participant in the original position: only people who satisfy the “the political conception of the person.”<sup>245</sup> Defining the political conception of the person is therefore critical, for it is only people who satisfy the conditions of the political conception of the person whose interests must be taken into account when setting up the basic structure of the just state. Persons who fall outside the political conception of the person are not guaranteed that their interests will be protected because people in the original position need not consider that they may represent such persons.<sup>246</sup> Accordingly, the political structure chosen under the original position will not extend protections to all religions nor, by extension, to all religions' religious institutions.

We now are in a position to see a crucial distinction between Separate Spherists and the Religious Institution Principle. The logic of Separate Sphere suggests that its conclusions apply to all churches. From the perspective of the Religious Institution Principle, by contrast, religious institutions do not have inherent autonomy simply by virtue of the fact that they are religious institutions. Further, what makes a religion eligible is not a function of age; the fact that a church may have “preexisted the state”<sup>247</sup> does not trigger the Religious Institution Principle. Instead, eligibility is determined by the characteristics of the religious community.

What are those characteristics? According to Rawls, the political conception of the person “begins from our everyday conception of persons as the basic units of thought, deliberation, and responsibility.”<sup>248</sup> Under it, people are “seen as capable of revising and changing [their conception of the good] on reasonable and rational grounds, and they may do this if they so desire.”<sup>249</sup> Rawls clearly thinks that most religions' understanding of personhood satisfy the political conception of the person, and hence that participants in the original position would have to consider that they might

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<sup>245</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 22, at 29.

<sup>246</sup> *Id.* at 103.

<sup>247</sup> Esbeck, *supra* note 10, at 55.

<sup>248</sup> *Id.* at 20. Elsewhere I have argued that this is narrower than necessary, and that maximally broadening participants in the original position better realizes Rawls' foundational objectives. See Rosen, *Educational Autonomy*, *supra* note 26, at 12-20.

<sup>249</sup> *Id.* at 30; *see also id.* at 31-32 and 302.

represent a religious person.<sup>250</sup> Some religions (and non-religious comprehensive views), however, do not satisfy the political conception of the person, and hence would not be represented at the original position. Below I will explore in detail the characteristics of excluded religions, and explain why such exclusion is justifiable.<sup>251</sup> For now, it is sufficient to note that the Religious Institution Principle does not protect all religions simply by virtue of the fact that they are religions.

B. Permissible Substantive Limits on Religious Institutions

Rawls concludes that participants in the original position will select two principles of justice. As explained above, the Religious Institution Principle is derived from the first principle of justice. But the first principle of justice imposes many other requirements, some of which apply to the Religious Institutional Principle itself.

To review, the first principle of justice is that “[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.” “Fully adequate scheme” refers to the “criterion . . . to specify and adjust the basic liberties so as to allow the adequate development and the full and informed exercise of both moral powers in the social circumstances under which the two fundamental cases arise in the well-ordered society in question.”<sup>252</sup> Relevant for present purposes is the “second fundamental case,” which “is connected with the capacity for a (complete) conception of the good (normally associated with a comprehensive religious, philosophical, or moral doctrine), and concerns the exercise of citizens’ powers of practical reason in forming, revising, and rationally pursuing such a conception over a complete life.”<sup>253</sup>

The first principle accordingly provides three limitations that operate on the Religious Institution Principle itself: the first principle of justice (1) presumes a “well-ordered society,” (2) demands that the scheme of liberty be “compatible with a similar scheme of liberties for all,” and (3) understands that the basic liberties will be “specif[ied] and adjust[ed]” to allow for the full and informed exercise of all citizens’ two moral powers.

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<sup>250</sup> Evidence of this pervades Rawls’ work. One of Rawls’ aims is to explain why people holding various “comprehensive views,” which for him includes religious persons, would agree to structure government on the basis of “political” (rather than their comprehensive) views that all citizens can reasonably be expected to endorse. See generally *id.* at 3-130; 212-54.

<sup>251</sup> See *infra* Part V.C.

<sup>252</sup> RAWLS, POLITICAL LIBERALISM, at 333.

<sup>253</sup> *Id.*

### 1. The “Well-Orderedness” Requirement

The first principle of justice presumes a “well-ordered society,” meaning a polity in which “citizens have a normally effective sense of justice” such that “they generally comply with society’s basic institutions, which they regard as just.”<sup>254</sup> Well-orderedness requires conditions that permit and promote an “enduring and secure” political regime,<sup>255</sup> thereby avoiding sectarian conflicts of the sort found in the centuries-long European wars of religion.<sup>256</sup>

The well-orderedness requirement has many implications. First, liberalism can only accommodate religions committed to peace with non-coreligionists in the sense that the religion does not aspire to use government to coerce conversion or religious practice.<sup>257</sup> This requirement, like the political conception of the person, means that liberalism cannot accommodate all religions. The absence of such a limit would threaten to reintroduce the sectarian conflicts that liberalism has largely eliminated.<sup>258</sup>

More than this, well-orderedness imposes important limitations on those religious institutions (and individuals) that can be accommodated by a liberal state. The Religious Institution Principle does not protect practices that threaten general society’s well-orderedness. The well-orderedness requirement thus justifies the Court’s approach, though not necessarily its outcome, in *Reynolds v. United States*.<sup>259</sup> The Court in *Reynolds* upheld a polygamy ban on the ground that polygamy threatened to undermine general society’s moral fabric.<sup>260</sup> Of course, whether the Court was *correct* that polygamy presented such a danger is an empirical question that the well-orderedness requirement cannot answer.<sup>261</sup> Further, even if the Court was correct when the case was decided, the answer to what well-orderedness demands necessarily turns on time-specific cultural sensibilities and practices. *Reynolds*’s holding accordingly cannot be assumed to be eternally valid.

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<sup>254</sup> *Id.* at 35.

<sup>255</sup> *Id.* at 38.

<sup>256</sup> *See id.* at xxviii.

<sup>257</sup> Kent Greenawalt has suggested to me in conversation that this might be overly restrictive, and that the size of the religious group and the threat it likely poses ought to be taken into account when applying front-end restrictions. I respectfully disagree. Religions can grow quickly, and it is reasonable to assume that people in the original position would not want to create a political structure that so directly sowed the seeds of its own instability.

<sup>258</sup> *See* RAWLS, POLITICAL LIBERALISM, *supra* note 22, at xxiii-xxvi.

<sup>259</sup> 98 U.S. 145 (1878).

<sup>260</sup> *Id.* at 168.

<sup>261</sup> This does not undermine well-orderedness’s utility, but only illustrates that difficult application questions invariably will arise.

What other practices would run afoul of well-orderedness? This can only be answered at Rawls' second stage, and any answer must be determined on the basis of interlocking empirical and normative considerations. To explain, it is an empirical question as to what (if any) practices in a religious institution threaten the stability of larger society, and it is to be expected that the answer will vary across societies and time. But what empirically is destabilizing undoubtedly depends in part on a society's views as to whether accommodating minority comprehensive views is normatively desirable. As explained above, people in the original position would be wary of selecting a political structure that precluded them from developing and living in accordance with the conception of the good that was held by the person they represented. So the normative view that shapes the empirics must be as welcoming to minority views as is possible.

To be more concrete, the following non-exhaustive list of practices – all of which have been endorsed by some religions at some time – certainly would run afoul of well-orderedness in today's United States: child sacrifice, adult sacrifice, sexual rituals involving children, corporal punishment, and slaveholding. Discrimination on the basis of race may be a slightly harder question, but I think it also would.<sup>262</sup> Discrimination on the basis of gender, sexual orientation, or religion, it seems to me, would not.

Importantly, well-orderedness also imposes affirmative obligations on religious institutions. For example, well-orderedness creates educational obligations that necessarily will fall on religious schools that qualify as religious institutions. Students taught in religious schools must be educated in a manner that encourages them to understand the justice of the polity in which they live so that they willingly comply with the basic institutions of society. It also is essential to equip them with the attitudes and habits required to achieve and secure a stable democratic polity.<sup>263</sup> In the end, what education is required by well-orderedness is an empirical determination that inevitably turns on human psychology and context-specific factors.

## 2. *The Compatibility Requirement*

The first principle of justice calls for a basic structure that is “*compatible with a similar scheme of liberties for all.*” This is another important internal limitation to the Religious Institution Principle. To satisfy the compatibility requirement, persons must have the right to opt-out of the environment in which they find themselves.

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<sup>262</sup> Cf. *Bob Jones University v. United States*, 461 U.S. 574 (1983).

<sup>263</sup> I owe this formulation to a suggestion from Michael Walzer.

To understand why, imagine a church that sought to flatly prohibit its members from exiting. Persons living in a such a religious community who did not share its adherents' commitments and who felt that remaining in the community impeded their ability to develop and realize their conception of the good would not enjoy the same liberty enjoyed by a person who lived outside the church and was satisfied by it. To make the liberty of members of religious communities "compatible with a similar scheme of liberties" for those who do not identify with religious communities, people in religious communities must have the ability to opt-out and leave the community into which they happened to be born.

The exit requirement means that religious institutions are severely constrained in the respects in which they deal with people they deem to be heretics. While some manner of informal communal censuring of heterodox behavior is to be expected and would not be problematic, actions that hindered adherents from leaving the community – like seizing their property, or utilizing a communal property regime that did not afford fair compensation for exiting members – could not be tolerated.

Many other practices could function as constraints on exit and hence run afoul of the compatibility requirement. This has significant educational ramifications: adherents must know something about life outside of their religious community, and must have sufficient education to be able to survive outside their community.<sup>264</sup> For another example, consider a religion that deemed its family laws, which did not permit divorce, to be necessary for its adherents' development and living in accordance with the religion's conception of the good. Even if its family law otherwise qualified as a religious institution, the compatibility requirement would not allow the religious community to be immune from the state's family law and to live in accordance with its own. The same would be true of a religion whose family laws permitted child marriage. Even if divorce were permitted, the cost of divorce for persons who had entered into marriage at a young age probably would be too great a constraint on free exit. (Of course child marriage might be barred on the independent ground of well-orderedness).

As a final example, practices that unduly interfered with an adherent's ability to live a full and meaningful life outside the religious community would violate compatibility's exit requirement. Extreme forms of circumcision that disabled a person from reproducing, or that unduly limited the chances that she would be able to find a mate outside the community, would run afoul of this.

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<sup>264</sup> For a fuller discussion, see Rosen, *Educational Autonomy*, *supra* note 26.



### 3. *Accommodating Competing Liberties*

#### a. Rawls' Approach

The first principle of justice states that the basic liberties must be “specif[ie]d and adjust[ed]” to allow for the full and informed exercise of all citizens’ two moral powers.<sup>265</sup> As a result, “[n]o basic liberty is absolute . . .”<sup>266</sup> Instead, basic “liberties may conflict in particular cases and their claims must be adjusted to fit into one coherent scheme of liberties.”<sup>267</sup> Such adjustments mean that one “basic liberty can be limited or denied [only] for the sake of one or more other basic liberties.”<sup>268</sup>

This set of understandings importantly sets the Religious Institution Principle apart from both Separate Spherists and Individualism. As to the former, whereas the Separate Spherists spoke of church autonomy and jurisdictional independence, Rawls understands that there can be competing fundamental commitments that accordingly require adjustments and limitations of all. Although the Religious Institution Principle is derived from the basic liberties (insofar as religious institutions are necessary to allow the full and informed development and exercise of a complete conception of the good), the Religious Institution Principle cannot be absolute, *pace* the Separate Spherists.

Second, whereas Lockean-premised Individualism provides neither a principled justification for churches’ non-absolute protections nor guidance for how churches’ interests should be reconciled with competing commitments, the Religious Institution Principle does both. Churches’ protections cannot be absolute because there are multiple foundational commitments that people would select behind a veil of ignorance: they desire to create a well-ordered society in which everyone – regardless of what comprehensive view they happen to have – has an opportunity to develop and live in accordance with their complete conception of the good. Further, original position participants’ choice of multiple basic liberties provides substantial guidance in determining how liberties should be specified and adjusted.

Rawls’ approach for specifying and adjusting (when they conflict) the basic liberties can be usefully illustrated by considering the contraception mandate controversy. Let us assume for present purposes that Catholic

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<sup>265</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 22, at 333.

<sup>266</sup> RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 22, at 104.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 111.

hospitals qualify as a religious institution, and also that the contraception mandate falls within the Religious Institutional Principle's coverage.<sup>269</sup> These assumptions do not automatically lead to the conclusion that the contraception mandate was wrong, because there are two countervailing considerations.

First, Rawls notes that the first principle of justice "may be preceded by a lexically prior principle requiring that basic needs be met, at least insofar as their being met is a necessary condition for citizens to understand and to be able fruitfully to exercise the basic rights and liberties."<sup>270</sup> What qualifies as basic needs invariably must be determined at the second stage, and supporters of the contraception mandate claim that women's ability to determine if and when they are to be pregnant is a basic need for women in the United States. As was true of determining the scope of the Religious Institution Principle, what matters is not the truth of this claim, but the anticipated perception of people behind the veil of ignorance at either the first or second stage.<sup>271</sup>

Second, the contraception mandate may implicate another basic liberty at the stage of the first principle of justice itself. Rawls refers to the "liberty and integrity (physical and psychological) of the person" as a basic liberty.<sup>272</sup> Women's access to contraception may implicate this physical and psychological liberty. Rawls explains that physical and psychological integrity are a basic liberty insofar as they "are necessary if the other basic liberties are to be properly guaranteed."<sup>273</sup> Contraception may be a prerequisite to these physical and psychological liberties, which presume a "capacity for a (complete) conception of the good (normally associated with a comprehensive religious, philosophical, or moral doctrine), and concerns the exercise of citizens' powers of practical reason in forming, revising, and rationally pursuing such a conception over a complete life."<sup>274</sup> People in the original position or second stage would recognize that reasonable people could think that a woman's ability to control her reproductive life is necessary if she is to live in accordance with her conception of the good, and

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<sup>269</sup> As discussed above, neither of these assumptions is self-evidently correct.

<sup>270</sup> See RAWLS, JUSTICE AS FAIRNESS, *supra* note 22, at 44 & n. 7.

<sup>271</sup> See *supra* text and accompanying note 213.

<sup>272</sup> *Id.* at 113. Consider as well Rawls' justification for the proposition that "[a]mong the basic rights is the right to hold and to have the exclusive use of personal property." He states that "[o]ne ground of this right is to allow a *sufficient material basis for personal independence and a sense of self-respect*, both of which are *essential for the adequate development and exercise of the moral powers*." *Id.* at 114 (emphasis supplied). This too might be grounds to conclude that access to contraception is a basic liberty.

<sup>273</sup> *Id.* at 113.

<sup>274</sup> *Id.*

hence would understand that the basic liberties include access to contraception.

It might be responded that women do not need contraception to control their reproductive lives because they instead can be abstinent. But this violates what Rawls calls the “strains of commitment,” which requires that “those they represent [in the original position] can reasonably be expected to honor the principle agreed to in the manner required by the idea of an agreement.”<sup>275</sup> Insofar as “[t]he original position is framed to rule out all excuses,”<sup>276</sup> participants must choose arrangements (including specifications of liberty) which people plausibly can be expected to both agree to and abide by. Accordingly, the suggestion that people behind a veil would choose an arrangement that required sexual abstinence must be rejected because it violates the strains of commitment.

If women’s access to contraception is a basic liberty, and if the contraception mandate implicate the Religious Institution Principle, then the mandate controversy involves a conflict among basic liberties. Rawls provides substantial guidance as to how such conflicts should be managed. “[A] liberty is more or less significant depending on whether it is more or less essentially involve in, or is a more or less necessary institutional means to protect, the full and informed exercise of the moral powers,” which presumes a person’s “capacity for a (complete) conception of the good (normally associated with a comprehensive religious, philosophical, or moral doctrine), and concerns the exercise of citizens’ powers of practical reason in forming, revising, and rationally pursuing such a conception over a complete life.”<sup>277</sup> “The more significant liberties mark out the central range of application of a particular basic liberty; and in cases of conflict we look for a way to accommodate the more significant liberties within the central range of each.”<sup>278</sup>

Two additional points bear mention. First, determining the degree to which the contraception mandate implicates these two liberties is non-obvious and controversial. As to the Religious Institution Principle, to what degree does a requirement that Catholic hospitals fund health insurance covering their employees’ contraceptive devices threaten Catholics’ ability to develop and live in accordance with their religion’s conceptions of the good? As to women employees’ liberty interests, to what degree is bodily and psychological liberty undermined if a woman’s employer did not pay for

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<sup>275</sup> *Id.* at 103.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

contraception, given the fact that until enactment of the Affordable Care Act nobody was guaranteed that their employer would pay for contraception? These and other considerations, which involve analysis at Rawls' third and fourth stages, are relevant to determining the degree to which the contraception mandate controversy implicates countervailing basic liberties, which is the first step to resolving conflicts among basic liberties. Further analysis of these important issues necessarily lies beyond this Article's scope.

Second, when conflicts among basic liberties are present, the preferred approach is to eliminate the conflicts, if possible. To the extent the Obama Administration's recently proposed revisions of the HHS regulations succeed in dissolving the conflict – they all are mechanisms under which institutions apart from the religious hospitals fund contraception for employees<sup>279</sup> – the proposals are not just 'smart politics,' but are necessary as a matter of the first principle of justice.

#### b. Contemporary Constitutional Practice

Up to this point, this Article's account of the Religious Institution Principle has remained fully consistent with Rawls' political theory. It is important, however, to identify one significant respect in which Rawls diverges sharply from contemporary United States constitutional practices, and indeed the practices of virtually all other constitutional democracies. As indicated above, Rawls identifies a category of "basic liberties" that are lexically prior to other liberties in the sense that tradeoffs are permissible only among basic liberties, but not between a basic and non-basic liberty.<sup>280</sup> Contemporary constitutional practice, by contrast, does not have a hierarchy of constitutional liberties. Even more importantly, the ordinary practice is to allow constitutional commitments to be traded off against competing *sub-constitutional* commitments of sufficient importance in certain circumstances. For instance, in the United States, constitutional principles of free speech and equal protection allow for regulations that are narrowly designed to realize interests that are "compelling" but not of constitutional dimension.<sup>281</sup>

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<sup>279</sup> See Robert Pear, *Compromise Idea for the Insuring of Birth Control*, THE NEW YORK TIMES A1 (February 2, 2013).

<sup>280</sup> See RAWLS, JUSTICE AS FAIRNESS, *supra* note 22, at 111 (noting that "none of the basic liberties . . . is absolute, as they may be limited when they conflict with one another."); *id.* at 105 (rejecting the approach that a basic liberty is "commensurable" with other "human interests" such that "for any two interests, given the extent to which they are satisfied, there is always some rate of exchange at which a rational person is willing to accept a lesser fulfillment of the one in return for a greater fulfillment of the other, and vice versa").

<sup>281</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. But that observation says nothing about the ultimate validity of any particular law; that determination is the job of the court

In most other countries, constitutionally protected interests may be regulated if there are sufficiently important sub-constitutional interests that satisfy “proportionality” analysis.<sup>282</sup>

I cannot hope in this Article to consider whether Rawls’ more restrictive approach to accommodating competing liberties is correct and, if it is not, how it should be refitted.<sup>283</sup> If Rawls’ approach merits refashioning, however, then the Religious Institution Principle’s protections are even less absolute, and the legitimate occasions for accommodating countervailing interests are even more extensive, than the analysis in the preceding subsection suggests.

### C. Summary of the Religious Institution Principle

The Religious Institution Principle gives rise to a four-step inquiry in analyzing the normative strength of religious institutional claims: (1) Is the proposed beneficiary a protected religion?, If so, (2) is it a religious institution? If so, (3) does the governmental regulation fall within the coverage of the Religious Institution Principle? And finally, if so, (4) are there sufficiently important countervailing considerations that nonetheless can justify a compromise of the religious institution’s interests?

## V. ANTICIPATING OBJECTIONS

This final Part considers, and replies to, some difficult questions that may be leveled at the Religious Institution Principle.

### A. What counts as a “Religion”?

It might be objected that the Religious Institution Principle is problematic insofar as it requires government to define religion. The answer is that such a demand already is made by the Constitution’s free exercise and establishment clauses and the many statutes<sup>284</sup> that reference religion, and

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applying strict scrutiny.”); *Roe v. Wade*, (holding that although fetuses are not a constitutional life interest, the state has a sufficiently important interest in protecting the fetus that it may prohibit a woman from exercising her constitution right to abort under certain conditions); see generally Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429 (1993).

<sup>282</sup>See generally AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012); Jamal Greene, *The Rule of Law as a Law of Standards*, 99 GEO. L.J. 1289, 1291 (2011) (“[M]any of the world’s most respected constitutional courts, including the courts of Canada, Germany, Israel, India, and South Africa, in addition to the European Court of Human Rights and the European Court of Justice, incorporate balancing into forms of proportionality analysis.”)

<sup>283</sup> With one exception: below I suggest one reason for questioning Rawls’ approach. See infra text accompanying notes 290-292.

<sup>284</sup> Including but not limited to, the Religious Freedom Restoration Act, the Religious LUIPA, state-RFRAs, employment laws, and tax code exemptions for houses of worship.

that American law has successfully determined what counts as religion when pressed to do so.<sup>285</sup> Furthermore, definitional problems of religion may be less acute under this Article's proposal than the aforementioned constitutional and statutory provisions insofar as non-religious commitments also are entitled to protection (through the Non-Religious Institution Principle<sup>286</sup>), thereby reducing the significance of religion's definition.

A related objection asks how the Religious Institution Principle would apply to a series of hypothetical religions, such as the "Church of Gold" (which thought all its adherents had to be multi-millionaires or that its churches had to be paved in gold) or the "Church of the Smokestack" (whose mission embraced allowing its members to spew air pollution in their professional lives).<sup>287</sup> To begin, many hypotheticals of this sort likely would not be accorded the status of legitimate religions for purposes of the law. But what if there *were* a legitimate religion whose mission either required massive subsidies from government (as with the Church of Gold) or demanded that government ignore the religion's spillover effects (as with the Church of the Smokestack)?

The answer is that the first principle of justice does not provide absolute protections, and would not categorically require accommodation of these religious institutions' demands. As to the Church of Gold, the Religious Institution Principle would not require government to give millions of dollars to members of the Church of Gold because each person is only entitled to "an equal right to a fully adequate scheme of equal basic liberties *which is compatible with a similar scheme of liberties for all.*"<sup>288</sup> Simply stated, the liberty of being a multimillionaire is not compatible with a similar scheme of liberties for all other citizens.<sup>289</sup>

As to the Church of the Smokestack, it seems that if it indeed were a legitimate religion, then Rawls would conclude it must be accommodated insofar as Rawls grants the liberty to live in accordance with one's conception of the good strict lexical priority to non-basic liberties.<sup>290</sup>

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<sup>285</sup> See ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY7 ("The question of what 'religion' means is theoretically intractable but, as a practical matter, barely relevant. We know it when we see it.").

<sup>286</sup> See *supra* text and note 306.

<sup>287</sup> I am thankful to Professor Tushnet and Professor Vermeule for these hypotheticals.

<sup>288</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 22, at 291 (emphasis supplied).

<sup>289</sup> A contrary conclusion would lead to the predictable (and impossible to accommodate) result of a massive influx of converts to the Church of Gold. If that church sought to limit membership, then offshoot independent churches undoubtedly would immediately sprout, leading to the same untenable situation.

<sup>290</sup> It seems unlikely that the protections afforded by the environmental regulations from which the

This conclusion may constitute cause for reworking Rawls lexical approach to basic liberties. As Rawls writes, “we can, of course, check the priority of liberty [that Rawls endorses] by looking for counterexamples, and consider whether, on due reflection, the resulting priority judgment can be endorsed . . . . [I]f careful search uncovers no counter-cases, the priority of liberty would be so far perfectly reasonable.”<sup>291</sup> Accordingly, if the Church of the Smokestack constitutes a “counter-case” that strikes us upon reflection as a mistaken priority judgment, then retaining the priority of liberty is no longer “perfectly reasonable.” A plausible alternative is the approach taken by today’s constitutional democracies of permitting regulations of constitutional commitments when there are sufficiently important countervailing considerations.<sup>292</sup> Under it, the Church of the Smokestack’s claim could be rejected on the ground that environmental laws advance the sufficiently important governmental interest of protecting the environment and guarding human health.

#### B. Religious Persons and the Original Position

Why would a person in the original position, recognizing she might represent an orthodox Catholic who believed that the Church has an ontological institutional reality that precedes and is independent of the state,<sup>293</sup> agree to the Religious Institution Principle, which permits some secular interference with the Church? Instead, why wouldn’t a person in the original position, recognizing she might represent an orthodox Catholic, select a political structure that accorded churches the independence taught by her religious tradition (or, following the differentiation principle, granted independent status to those churches that, from their internal point of view, have this ontological status)?

The answer is this: the person in the original position would not select rules that allowed self-selecting churches to be independent of the state because she recognizes that she might represent someone who were not an orthodox Catholic. Granting *carte blanche* to any institution is never a free lunch; it always comes at the expense of some individuals or other institutions. For instance, a religious institution might reject the idea that persons it deems to be members can exit from the church, and the person in the original position might represent someone born into the church who

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Church of the Smokestack seeks exemptions implicate a basic liberty. If it did – if the absence of environmental protections could plausibly be said to violate citizens’ liberty of bodily integrity – then its claims could be compromised even under Rawls’ framework.

<sup>291</sup> RAWLS, JUSTICE AS FAIRNESS, *supra* note 22, at 105-6.

<sup>292</sup> See *supra* text and accompanying notes 26-27 and notes 282-285.

<sup>293</sup> See *supra* text and accompanying note 30.

wanted to leave. It is not sufficient to respond “but the Catholic Church would not do this,” because granting independence to the Catholic Church would entail granting independence to *other* churches as well.<sup>294</sup> Recognizing this, a person in the original position would not select a political structure that allowed churches to be wholly independent of secular oversight.

Against this response, it might be asked why an orthodox Catholic would agree to participate in the original position in the first place. Before proceeding with an answer, it is important to observe that this is a challenge that goes to the heart of Rawlsian political theory. I cannot provide a full response here – Rawls spends literally hundreds of pages providing what in effect is an answer<sup>295</sup> – though I momentarily will provide an executive summary. But any response I give cannot hope to be complete insofar as rejecting Rawls’ answer amounts to a wholesale rejection of Rawlsian political theory, and fully defending Rawls’ political theory naturally lies beyond this Article’s scope.

The core of the Rawlsian project is to equate justice with fairness,<sup>296</sup> and to posit that fair political institutions are those that would be chosen by people if they were not self-interested. The problem is that everyone *is* self-interested. The original position, as explained above, is a heuristic designed to allow people to imagine what a non-self-interested perspective would be.<sup>297</sup> This is not to suggest that there is no place for hardball politics of self-interest under Rawls’ approach. There certainly is. But it comes after fair democratic ‘rules of the road’ have been selected at the original position and second stage; fair institutions and starting rules ensure that the results of hardball politics themselves are fair. And Rawls’ heuristic is intended to aid with the prior steps of establishing fair baseline institutions and procedures.

So the answer to as to why an orthodox Catholic would agree to participate in the original position is this: it’s only fair to do so. It’s only fair to choose those political institutions and arrangements that would be chosen by people behind a veil of ignorance, who accordingly did not who it was they represented.

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<sup>294</sup> See RAWLS, JUSTICE AS FAIRNESS, *supra* note 22, at 111 (noting that “however these liberties are adjusted, that final scheme is to be secured equally for all citizens.”).

<sup>295</sup> See RAWLS, POLITICAL LIBERALISM, *supra* note 22, at 3-172.

<sup>296</sup> As the title of Rawls’ final book-length summary of his life’s work suggests: Justice as Fairness: A Restatement.

<sup>297</sup> See *supra* Part III.A.



### C. The Adequacy of the Religious Institution Principle

Even if one were to accept the answers provided in the immediately preceding subsection (and thereby accept the original position and the first principle of justice), the following objection still might be propounded: are the protections afforded by the Religious Institution Principle adequate, such that people in the original position would agree to them? This would amount to a critique of this Article's derivation of the Religious Institution Principle, rather than the previous subsection's wholesale attack on Rawls.

There are three respects in which the Religious Institution Principle may be thought to inadequately protect religious institutions. First, the Religious Institution Principle does not apply to all religions. Second, the principle only covers matters that are "indispensable" for religious institutions' capabilities of facilitating adherents' abilities to develop, and live in accordance with, the religion's conception of the good; it does not extend to matters that are "helpful" for religious institutions. Third, even as to covered matters, the Religious Institution Principle's protections are not absolute.

As a result of these three considerations, some religions' religious institutions may not be in a position to do what is necessary, from their internal perspective, to allow their adherents to develop and live in accordance with the religion's conception of the good. If so, why would people in the original position, understanding that they might represent a person who belonged to such a religion, agree to the Religious Institution Principle?

The answer must start with an acknowledgment that no single polity can realistically accommodate *all* people. For instance, the United States cannot tolerate the Taliban. Rawls operationalizes permissible exclusions through the political conception of the person (PCP) insofar as only people who satisfy the PCP participate in the original position.<sup>298</sup> Those religious traditions that reject the PCP's assumptions that individuals are the "basic units of thought and responsibility" are likely to embrace a commitment to using political power to compel religious practice.<sup>299</sup> The point of the

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<sup>298</sup> See *supra* Part IV.A.

<sup>299</sup> Elsewhere I have explained the connection between Rawls' definition of the PCP and governmental compulsion of religious practices, and also suggested that Rawls' definition of the PCP is unnecessarily (and therefore problematically) broad. See Rosen, *Educational Autonomy*, *supra* note 26, at 12-20. What matters for present purposes is not the precise scope of the PCP's exclusion, but the fact that the polity created by Rawlsian theory (as well as my reworking of it) does not purport to accommodate every religious tradition.

original position's thought experiment is to identify political institutions that would accommodate the broadest range of people -- but not everybody.

To this the following might be asked: why does the original position try to identify political institutions that would be acceptable to the broadest range of people? Stated differently, why would people in the original position select a large, heterogeneous polity, rather than small, homogeneous polities? This is a difficult question because there likely are costs to heterogeneous polities. For example, the need to accommodate diverse cultural groups limits the degree to which governmental institutions can support (or at least not undermine) each distinct cultural group. For example, the size and diversity of the United States account for the fact that the Religious Institution Principle only applies to matters that are *indispensable* for American religious institutions.<sup>300</sup>

While there clearly are benefits to large diverse polities that require no elaboration here, there is no reason to think that all people in an original position would agree that one type of polity – small and homogeneous, or large and diverse – would be preferred by every reasonable person. Rather, some individuals, on account of their personal preferences and comprehensive views, can be expected to prefer large, heterogeneous polities, and others to prefer small, homogeneous polities. This suggests that rather than running the original position's thought experiment on a country-by-country basis – as Rawls does -- it ought to be performed on an international basis.<sup>301</sup> Doing so leads to the following conclusion: people in the original position would choose to create a diverse set of countries in the world from which people could choose – both large heterogeneous and small homogeneous polities.<sup>302</sup> It also might mean that large heterogeneous polities like the United States, from which exit is particularly costly, should allow for substantially empowered sub-federal (and probably sub-state) polities within which people who prefer small homogeneous polities can be substantially free to govern themselves.<sup>303</sup>

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<sup>300</sup> This is true because not all commitments can be simultaneously realized. See generally GUIDO CALABRESI & PHILLIP BOBBIT, TRAGIC CHOICES. For instance, well-orderedness can come into conflict with the Religious Institution Principle, and the Religious Institution Principle can conflict with individual liberties, as discussed above. See supra Part IV.B.3.

<sup>301</sup> To be clear, this constitutes a reworking of Rawls' framework, not a mere application of it. See supra text accompanying notes 26-27 (justifying this). A full exposition of this idea, though beyond the scope of this Article, is the subject of a work-in-progress. See Mark D. Rosen, *Is a Non-Neutral Liberal State an Oxymoron?* (copy on file with author).

<sup>302</sup> See id.

<sup>303</sup> For a full defense of this position, see Rosen, *Outer Limits*, supra note 26.

We are now in a position to explain the adequacy of the Religious Institution Principle. People in the original position would want to create both large heterogeneous polities (like the United States) and small homogeneous polities. This Article has focused on articulating the Religious Institution Principle and fleshing out its (stage 2 and 3) implications in large heterogeneous polities. People in the original position would agree to the contents of the Religious Institution Principle described here, even though some religions' religious institutions would not be accommodated, for three interlocking reasons: (1) only applications of the Religious Institution Principle described here would be workable in a large, diverse polity; (2) size and diversity offers benefits that may appeal to some religious people, notwithstanding the limitations that diversity necessarily imposes on realizations of the Religious Institution Principle; and (3) there also would be options of small, homogeneous polities.

D. Does the Religious Institution Principle Create Problematic Asymmetries?

It might be objected that the Religious Institution Principle is normatively undesirable because it creates two asymmetries. First, the Religious Institution Principle may be thought to lead to an asymmetry between religions and non-religious commitments insofar as it provides special protections only for religious institutions (the "Religion/Non-Religion Asymmetry Critique"). Second, the Religious Institution Principle may be thought to lead to an asymmetry between religious institutions and the state insofar as the principle imposes significant limits on what the state can do to influence religious institutions, but does not constrain religious institutions' efforts to influence laws (the "State/Religion Asymmetry Critique").<sup>304</sup>

1. *The Religion/Non-Religion Asymmetry Critique*

The "Religion/Non-Religion Asymmetry Critique" builds on an extensive contemporary literature claiming that it is normatively problematic to favor religion over non-religious commitments.<sup>305</sup> But even assuming that religion is not meaningfully different from non-theological commitments for purposes of politics,<sup>306</sup> the Religion/Non-Religion Asymmetry Critique is unfounded. The Religious Institution Principle is implied by the first

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<sup>304</sup> Cf. Micah Schartzman, *What if Religion Isn't Special?*, 79 U. CHI. L. REV. 1351 (2012).

<sup>305</sup> See, e.g., CHRISTOPHER L. EISGRUBER AND LAWRENCE W. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION.

<sup>306</sup> Many do not accept this assumption. For powerful arguments as to why religion appropriately is treated differently in the United States, see KOPPELMAN, *supra* note 285, at 120-65.

principle of justice on account of the role that religion plays in developing, and facilitating actualization of, peoples' conceptions of the good. But Rawls makes no claim that religion *alone* does this. To the contrary, his explanation of the original position (which refers to the need to "take the religious, philosophical or moral convictions of persons seriously"<sup>307</sup>) proves otherwise. For this reason, the Religious Institution Principle does not imply that *religious* institutions alone demand protection. Simply stated, the existence of the Religious Institution Principle does not preclude what might be called a 'non-Religious Institution Principle.'

One who claims the existence of a non-Religious Institution Principle, however, properly bears two burdens. First, she must identify what non-religious systems would be viewed by people behind the veil (or at the second stage) as aiming to develop and facilitate the fully informed exercise of the capacity to formulate a conception of the good, and hence qualifying under the first principle of justice. Second, she must identify what non-religious institutions would be seen by people behind the veil (or second stage) as being necessary for the non-religious system to accomplish the above aim.

In making the argument on behalf of the non-Religious Institution Principle, it is not sufficient to say that "bowling leagues are really important to some people," or even that "bowling *is* what allows some people to fully self-actualize in their view." While both may be true, the question instead is whether it plausibly can be maintained that people behind the veil of ignorance, reasoning in an original position or at the second stage, would identify bowling leagues as the sorts of institutions that would receive special protection under the first principle of justice.

To be clear, this Article does not claim that the non-Religious Institution Principle comprises a null set. That principle's contents instead turn on empirical considerations that are society-dependent. But, as explained earlier, it *is* unquestionably true that the Religious Institution Principle is *not* a null-set in contemporary America. If the non-Religious Institution Principle happens to protect no institutions in a particular society, this would not be a justifiable basis for condemning the fact that the Religious Institution Principle does. Any such asymmetry merely would reflect the fact that religions are different from non-religious systems in a respect that matters for people reasoning from behind a veil of ignorance or at the second stage in a particular society.

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<sup>307</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 22, at 19 (emphasis supplied).

## 2. *The State/Religion Asymmetry Critique*

Micah Schwartzman recently has done yeoman's work articulating a case for symmetry between the state and religion, inveighing against "claims that religious convictions *are not special* for justifying political and legal decisions, but that they *are special* for purposes of obtaining accommodations."<sup>308</sup> Schwartzman argues that such a position is internally inconsistent, if not self-servingly hypocritical. He instead argues that either (1) religions are special, and hence they appropriately receive special protections *but also* cannot aim to influence state laws, or that (2) religions are *not* special, and hence can aim to influence state laws but are not entitled to special protections either. I shall dub this the State/Religion Asymmetry Critique.

It might be thought that the Religious Institution Principle is problematic because it is susceptible to the State/Religion Asymmetry Critique. But there are two reasons why the State/Religion Asymmetry Critique does not undermine the Religious Institution Principle.

### a. Public Reason

First, the State/Religion Asymmetry Critique may not apply to the Religious Institution Principle, as a matter of internal Rawlsian political theory, because Rawls *does* impose constraints on how religions behave toward the state through what he calls the "public reason" requirement. Public reason refers to the constraints that are placed upon the types of reasons that can be drawn upon, by those to whom public reason applies, in setting a polity's decisions concerning "fundamental political questions," which comprise "constitutional essentials and matters of basic justice."<sup>309</sup> One requirement that is "expressed in" public reason is what Rawls calls the "criterion of reciprocity."<sup>310</sup> The "criterion of reciprocity" is more expansive in application than public reason insofar as the former applies not only to fundamental political questions but also to "particular statutes and laws enacted."<sup>311</sup> Under the criterion of reciprocity, "[o]ur exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials

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<sup>308</sup> Schwartzman, *supra* note 304, at 1359 (emphasis in original).

<sup>309</sup> RAWLS, *LAW OF PEOPLES*, *supra* note 22, at 133.

<sup>310</sup> *See id.* at 141 (stating that "[t]he limiting feature of these forms [of public reason] is the criterion of reciprocity . . ."). For a full discussion of public reason's complex requirements, *see id.* at 133-52.

<sup>311</sup> *See id.*

– are sufficient, and we also reasonably think other citizens could accept those reasons.”<sup>312</sup>

Public reason’s constraints plausibly could defeat the State/Religion Asymmetry Critique. If so, it would have to be determined whether public reason’s norms already are present and operative in the United States. For example, the Establishment Clause’s neutrality requirement already may serve this role.<sup>313</sup> If not, adoption of the Religious Institution Principle in American politics would have to be joined with adoption of public reason’s requirements.

However, it ultimately is uncertain, for two reasons, whether public reason successfully defuses the State/Religion Asymmetry Critique. First, it is unclear precisely what symmetry requires, and hence whether public reason satisfies it. Second, it is not clear how much constraint public reason actually imposes. Many Rawlsians sharply criticized public reason for limiting the extent to which religious persons could bring their convictions to politics,<sup>314</sup> and Rawls reworked public reason to include several caveats, most importantly the proviso,<sup>315</sup> which collectively may mean (according to esteemed Rawlsian Samuel Freeman) that “majority democratic decision by itself is sufficient ‘public reason’ for restricting conduct.”<sup>316</sup> While this probably is an overstatement, Freeman’s observation suggests public reason may have only limited bite. If so, public reason might not satisfy a plausibly defined symmetry. Though these are important questions, it is neither possible<sup>317</sup> nor necessary (due to the next subsection) to finally settle public reason’s scope in this Article.

#### b. Why Symmetry Is Unnecessary

Though aesthetics and intuition frequently generate strong initial expectations for symmetry, asymmetry is sometimes acceptable if not

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<sup>312</sup> See RAWLS, *LAW OF PEOPLES*, *supra* note 22, at 137.

<sup>313</sup> See, e.g., *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 860-61 (2005) (Establishment Clause bars laws with the “ostensible and predominant purpose of advancing religion;” the Clause “mandates governmental neutrality between religion and religion, and between religion and nonreligion”). For a discussion of some of the complexities of contemporary establishment clause doctrine, see Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 672-80 (2003).

<sup>314</sup> See, e.g., PAUL J. WEITHMAN, *RELIGION AND THE OBLIGATIONS OF CITIZENSHIP* (Cambridge 2006); CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (Cambridge 2002); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

<sup>315</sup> See Martha Nussbaum, *Rawls’s Political Liberalism: A Reassessment*, 24 *RATIO JURIS* 1, 11-19 (2011) (discussing the proviso and other modifications Rawls made in response to critics to the “duty of civility” and “public reason”).

<sup>316</sup> SAMUEL FREEMAN, *RAWLS* 80 (2007). I am indebted to Andy Koppelman for directing me to this.

<sup>317</sup> Public reason is a complex subject that has generated a cottage industry of high quality analysis. See, e.g., *supra* note 314.

preferable; consider what Picasso did to classical conceptions of symmetry-premised beauty.<sup>318</sup> In short, the need for symmetry cannot be assumed.

In fact, deeper reflection shows there is no reason to think that State/Religion Asymmetry is illogical, reflects bad faith, or is otherwise condemnable. From within an internal Rawlsian analysis,<sup>319</sup> this can be seen by thinking back to first principles, and considering the incentives that are faced by persons in the original position. Participants are not philosophers striving toward maximal theoretical consistency, but ordinary (albeit imagined) people, acting under a veil of ignorance, who are choosing the fairest political system to which they will voluntarily submit themselves over time. The first principle of justice reflects an understanding that participants behind the veil can be expected to have a hierarchy of concerns, with the result that they would be willing to allow political processes to decide some matters but not others; falling into the latter category is the formation and realization of the conception of the good of the persons they might represent. It is this reasoning process that gives rise to limitations on the state, including the Religious Institution Principle and the Non-Religious Institution Principle.

Public reason's constraints on religion and other comprehensive views, however, are generated by an entirely different set of considerations. There accordingly is no reason to expect that public reason's limitations will be "symmetrical" to the limitations imposed by the Religious and non-Religious Institution Principles. Rawls tells us that "[t]he idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government's relation to its citizens and their relation to one another."<sup>320</sup> In other words, public reason helps determine the circumstances that justify government's exercise of coercive political authority over citizens.<sup>321</sup> Public reason reflects the understanding that that "[o]ur exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also

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<sup>318</sup> For the classical view, see HERMANN WEYL, SYMMETRY. For a discussion of Picasso's rejection of then-prevailing symmetry norms, see JOHN RICHARDSON, A LIFE OF PICASSO: THE TRIUMPHANT YEARS, 1917-32.

<sup>319</sup> This part of my argument is designed to show that the Religious Institution Principle is not a mistaken inference, but is consistent with the rest of Rawls' framework. It does not on its own defeat the asymmetry critique insofar as it presumes the appropriateness of the original position. It shows, though, that any asymmetry critique must be spelled out, and cannot tautologically be assumed problematic simply due to an absence of symmetry.

<sup>320</sup> Rawls, *supra* note 179, at 132.

<sup>321</sup> *Id.* ("In short, [public reason] concerns how the political relation is to be understood.")

reasonably think that other citizens might also reasonably accept those reasons.”<sup>322</sup>

In short, since the considerations that give shape to public reason are fundamentally different from those that give rise to the Religious Institution Principle, there is no reason to expect symmetry in their scope. The State/Religion Asymmetry Critique accordingly falls away.

#### CONCLUSION

The Religious Institution Principle’s derivation reveals why it is fair, and why it plausibly can be thought to be acceptable to both religious and non-religious citizens. The Religious Institution Principle has the conceptual resources for determining (a) to what religions it does not apply, (b) what qualifies as a religious institution, (c) to what laws it applies, and (d) why and under what circumstances its protections are non-absolute. The Religious Institution Principle instantiates the political architecture of overlapping spheres, and gives rise to a robust framework for analyzing the claims of religious institutions.

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<sup>322</sup> See *id.* at 137.