

## ESSAY

### DEFENDING (RELIGIOUS) INSTITUTIONALISM

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#### INTRODUCTION

FOR those of us who champion the autonomy of churches and other institutions under the First Amendment, Professors Richard Schragger and Micah Schwartzman's article, *Against Religious Institutionalism*, comes as a valuable contribution because, and not in spite of, its deep skepticism about the enterprise.<sup>1</sup> Every scholarly movement needs skeptics and critics to help clarify and refine its arguments. In criticizing religious institutionalism, Schragger and Schwartzman have done the idea a useful service. Whether they have refuted it is another question entirely.

Much of what they have to say is not new. Many of the current arguments in favor of an institutionally-oriented view of the First Amendment echo those made in the late nineteenth and early twentieth centuries by a group of writers, often labeled the "British pluralists," who emphasized the importance of churches and other non-state institutions, and warned of the "pulverising, macadamising tendency" of the state toward those institutions.<sup>2</sup> These ideas return to prominence every scholarly generation or so<sup>3</sup> and are criticized in similar terms each time.

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<sup>1</sup> Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 Va. L. Rev. 917, 919 (2013).

<sup>2</sup> F.W. Maitland, *Moral Personality and Legal Personality*, in F.W. Maitland, *State, Trust and Corporation* 62, 66 (David Runciman & Magnus Ryan eds., 2003).

<sup>3</sup> See, e.g., Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 18–19 (1983); Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. Cal. L. Rev. 1001, 1001–02 (1983); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 Wis. L. Rev. 99, 100–01, 105; Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 Harv. L. Rev. 91, 92–93 (1953); Franklin G. Snyder, *Sharing Sovereignty: Non-State Associations and the Limits of State Power*, 54 Am. U. L. Rev. 365, 366–68 (2004); Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 Wash. & Lee L. Rev. 381, 383 (1991); see also Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 Utah L. Rev. 47, 47–49 (noting the recurring interest in "[t]he

One recurring question in this debate is whether groups, including churches, have a real personality of their own, or whether any rights they possess are merely derivative of the rights of individual members.<sup>4</sup> Schwartzman and Schragger's answer to this question is clear: "[W]hat might be called institutional or church autonomy is ultimately derived from individual rights of conscience. . . . [A]ny notion of institutional autonomy—to the extent it exists—can come from nowhere else."<sup>5</sup> They insist, quite rightly, that institutionalists clarify the basis for the institutional turn they advocate.

But Schragger and Schwartzman have more varied goals than this—so varied that it is difficult to discern a unified argument, or any clear legal implications, in their article. Another central argument they make is that, with respect to arguments for group autonomy, churches are in a position no different from any other voluntary association. A third is that, insofar as churches and other voluntary associations are simply vehicles for the "conscience and associational rights of their members," "general principles of freedom of association, privacy, and conscience are sufficient to protect all conscience-based associations, including churches."<sup>6</sup> Lurking behind all this theorizing is what appears to be a general skepticism about group rights as such.<sup>7</sup> Despite its invocation of freedom of association as a backstop for church or associational autonomy, the article, from the title on down, comes off as a broad attack on institutionalism altogether.

In this reply, I suggest that *Against Religious Institutionalism* raises several important questions: whether group rights stand on their own or

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question of groups for liberal theory and constitutional doctrine" and adding that this question "has always been posed with special intensity for religious groups" (emphasis omitted)).

<sup>4</sup> See, e.g., Jacob T. Levy, From Liberal Constitutionalism to Pluralism, in *Modern Pluralism: Anglo-American Debates Since 1880*, at 21, 26–27 (Mark Bevir ed., 2012); David Runciman & Magnus Ryan, Editors' Introduction, in *State, Trust and Corporation*, supra note 2, at xi.

<sup>5</sup> Schragger & Schwartzman, supra note 1, at 920.

<sup>6</sup> Id. at 921–22.

<sup>7</sup> This is most evident in Part II of their article, which launches "four broad-based criticisms" at "the new institutionalism." Id. at 922. Space limitations prevent me from addressing those arguments directly here, although some of what I have to say below applies to some of them. It is worth adding briefly that I doubt all of those arguments apply equally to all forms of (religious) institutionalism, and that one of them—the argument that "the scope of religious autonomy claims [is] potentially unlimited," id. at 933—raises questions that apply equally well both to the scope of the conscience-based rights that Schragger and Schwartzman champion as a substitute for institutionalism and, ultimately, to the scope of state power itself.

are derived from individual rights; whether religious group rights should be described as a form of sovereignty; and whether *religious* institutionalism is unique, or just one piece of what I call “First Amendment institutionalism.”<sup>8</sup> It is not clear, however, what payoff these questions have for legal doctrine. Because the authors remain vague in their account of associational freedom, it is difficult to assess what they are *for*, not just what they are against. Finally, the article fails to give an adequate sense of *why* religious institutionalists, and group-oriented pluralists in general, find the institutionalist turn attractive in the first place. *Against Religious Institutionalism* offers a valuable, but not complete or wholly successful, challenge to the institutionalists.

### I. NARROWING THE FOCUS

Schragger and Schwartzman begin by identifying two “strands” of institutionalism: a “corporatist” strand, which emphasizes the value of particular institutions as important features of our social landscape, and a “neo-medievalist” strand, which draws on the historical concept of *libertas ecclesiae* to argue for a principle of “freedom of the church” that is distinct from individual claims of conscience.<sup>9</sup> Both strands, they assert, differ from earlier arguments for church autonomy.<sup>10</sup> Schragger and Schwartzman identify me with the “corporatist” strand of institutionalism. I therefore focus my attention there rather than on what they call, with a taste for aggressive labeling, the “neo-medievalist” strand.<sup>11</sup>

My approach to religious and other institutions under the First Amendment is neither mystical nor antiliberal,<sup>12</sup> but social and infra-

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<sup>8</sup> Paul Horwitz, *First Amendment Institutions* 12 (2013).

<sup>9</sup> Schragger & Schwartzman, *supra* note 1, at 923, 927.

<sup>10</sup> See *id.* at 919, 922–23.

<sup>11</sup> I have offered elsewhere a somewhat critical view of recent discussions of “freedom of the church.” See Paul Horwitz, *Freedom of the Church Without Romance*, 21 *J. Contemp. Legal Issues* (forthcoming 2013). There, I agree with Schragger and Schwartzman that those accounts are problematic, but argue that a modern version of freedom of the church is a viable concept in contemporary American law and society precisely because it has become so chastened. I also maintain that its viability is closely related to the separationist tradition. I thus differ from those who argue that freedom of the church might, and perhaps ought to, result in a loosening of separationist doctrine. See, e.g., Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, in *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* 249, 279–82 (Austin Sarat ed., 2012).

<sup>12</sup> I suspect I am more tolerant of illiberal groups than Schragger or Schwartzman. But it is certainly possible to be liberal *and* fairly tolerant of illiberal groups. See, e.g., Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* 152–65 (2003);

structural. It questions whether all of First Amendment law can be modeled on the romantic vision of a single, self-sufficient speaker arrayed against a monolithic state, like a soapbox speaker facing a line of riot police. In public discourse, speech acts are motivated, refined, transmitted, and debated by a host of institutions. Typically, they are the same recurring institutions: the schools and libraries that educate the speaker, the churches and associations that help inspire her message or supply her with allies, and the news media that convey the message to others and host debates over it.

Those institutions play a key role in what we might call the infrastructure of public discourse. Their role is established by tradition but capable of institutional evolution and pluralism. And it is safeguarded not just by top-down state regulation, but also, and crucially, by institutional self-regulatory norms and practices.

For understandable reasons, First Amendment doctrine often neglects these social facts in favor of “acontextual” rules that either ignore these institutions or treat them all alike. It does the same thing for the “state,” treating all government actors as identical—describing, say, a public broadcaster’s news department as a fungible unit of state employees, not as professionals exercising “journalistic judgment.”<sup>13</sup> If legal doctrine neglects these basic facts, it may cause unwise outcomes or doctrinal confusion.

For both reasons, the courts do sometimes acknowledge relevant institutional facts, offering a contextual view of both the First Amendment institution and the state itself.<sup>14</sup> Again, however, if our doctrine is not clearer about what it is doing, the doctrine is unlikely to offer much value or consistency. First Amendment institutionalism thus argues that legal doctrine should “recognize[] that speech” and worship “occur[] in particular settings and under particular institutional conditions.”<sup>15</sup> Through robust but not unlimited deference, courts might respect the

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Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* 279–80 (1998).

<sup>13</sup> *Forbes v. Ark. Educ. Television Comm’n*, 93 F.3d 497, 505 (8th Cir. 1996), rev’d, 523 U.S. 666 (1998).

<sup>14</sup> See *Forbes*, 523 U.S. at 672–73 (rejecting the extension of the public forum doctrine “in a mechanical way to the very different context of public television broadcasting,” with the attendant “discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose”). I offer other examples in Horwitz, *supra* note 8, at 58–62.

<sup>15</sup> Schragger & Schwartzman, *supra* note 1, at 923.

role, value, and self-regulatory capacity of some of those central infra-structural institutions.

This argument is meant to spark what I hope will be a productive conversation, and is not meant to be the last word on the subject.<sup>16</sup> But I can say this, at least: While my approach is “*akin*” to corporatism, it does not insist that First Amendment institutions are part of a genuinely “*organic* social order” in which society is naturally “divided into separate and distinct spheres, each governed by its own institutions.”<sup>17</sup> It argues that these institutions are a constitutionally significant element of our infrastructure of public discourse—a point Schragger and Schwartzman do not contest. But it views them not as God-given or “natural,” but simply as important and well established.

And so they are. These institutions developed alongside, and in some cases preexisted, the liberal state itself, and have long been coordinate parts of our broader social structure. The state—and its limits—formed with these institutions in mind. No mysticism is required to suggest that this might be constitutionally relevant.

Nor do I argue that “churches should receive *more* deference than other kinds of mediating institutions.”<sup>18</sup> They perform a *distinctive* function,<sup>19</sup> and the deference they receive should reflect that function. But this is just to restate the point I made earlier: Courts should attend to the relevant settings and conditions of particular forms of First Amendment institutions. Newspapers hire journalists with regard to professional qualifications and their own sense of institutional mission, and courts generally defer to those choices; they do not generally hire on the basis of religious beliefs, and courts will not defer if they try. Churches *do* hire employees with respect to religion, and both statutory and constitutional law require respect for those choices.<sup>20</sup> The nature and extent of judicial deference should follow the nature of the institution. But reli-

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<sup>16</sup> See Horwitz, *supra* note 8, at 290–91.

<sup>17</sup> Schragger & Schwartzman, *supra* note 1, at 923 (emphasis added).

<sup>18</sup> *Id.* at 925 (emphasis added).

<sup>19</sup> See, e.g., Victor Muñiz-Fraticelli, *The Distinctiveness of Religious Liberty* 3, 15–16, 29–30 (n.d.) (unpublished manuscript) (on file with author) (arguing that the tradition of religious liberty is distinctive, that it includes church autonomy, and that it should not be absorbed wholesale into multiculturalism or other forms of accommodation). An earlier version of this paper is available at <http://ssrn.com/abstract=1921646>.

<sup>20</sup> See 42 U.S.C. § 2000e-1(a) (2006); *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) (affirming the constitutionality of this provision).

gious institutions, under my approach, need not be utterly unique and are not uniquely privileged.<sup>21</sup>

The institutionalist perspective I offer on the First Amendment thus avoids many of the questions Schragger and Schwartzman raise against institutionalism in general, and religious institutionalism in particular. On the latter point, since I am not a *religious* institutionalist in particular, questions about privileging churches over other institutions are inapplicable. On the former, my approach does not depend on the view that institutional claims are irreducible to the claims of individual members. My approach is structurally and institutionally oriented, to be sure. But other variants of institutionalism, such as federalism, operate in a structural manner, even for those who believe the point of this structure is to serve individual liberty.<sup>22</sup> The First Amendment institutionalism I advocate certainly faces potential questions and criticisms.<sup>23</sup> But it is less clear that it is subject to Schragger and Schwartzman's central critiques. Indeed, it is unclear just who or what *is* the target of their questions.

Two of Schragger and Schwartzman's criticisms *are* pertinent. One has to do with the use of the word "sovereign" in referring to non-state institutions. The other concerns the source of institutional rights.

Schragger and Schwartzman warn against "loose talk of sovereignty" with respect to religious and other non-state institutions,<sup>24</sup> although they note that this language is generally metaphorical.<sup>25</sup> I have used such language myself,<sup>26</sup> although more suggestively than literally.<sup>27</sup> On reflec-

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<sup>21</sup> Similarly, I do not argue that churches or other First Amendment institutions enjoy "more . . . freedom than individuals." Schragger & Schwartzman, *supra* note 1, at 921. I acknowledge the importance of individual rights, while arguing that there are occasions on which one should recognize the role played by First Amendment institutions. See Horwitz, *supra* note 8, at 21–22.

<sup>22</sup> See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *id.* at 575–76 (Kennedy, J., concurring).

<sup>23</sup> See Horwitz, *supra* note 8, at 261–62. One question Schragger and Schwartzman raise is why some institutions should be treated as First Amendment institutions and not others. See, e.g., Schragger & Schwartzman, *supra* note 1, at 948 n.122. I address that question at length, focusing on the important infrastructural role that particular institutions play within public discourse while acknowledging the challenges that remain. See Horwitz, *supra* note 8, at 68–74, 81–82, 239–42, 261–62, 275–79.

<sup>24</sup> Schragger & Schwartzman, *supra* note 1, at 971.

<sup>25</sup> See *id.* at 970.

<sup>26</sup> See Paul Horwitz, *Act III of the Ministerial Exception*, 106 Nw. U. L. Rev. 973, 980 (2012); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harv. C.R.-C.L. L. Rev. 79, 79 (2009).

<sup>27</sup> See, e.g., Horwitz, *supra* note 8, at 175–77.

tion, I agree with them that this language deserves “more careful analytical treatment.”<sup>28</sup>

That does not mean sovereignty talk should be “abandoned,”<sup>29</sup> however, or that it is as “unthinkable” as they suggest.<sup>30</sup> As they concede, the kinds of assumptions used to cast doubt on the “sovereignty” of non-state institutions are “contingent and contestable.”<sup>31</sup> It is unclear why they are entitled to the high burden of persuasion they attempt to impose on anyone who engages in sovereignty talk in this context.

Moreover, readers of their article would be wrong to conclude that no resources exist for thinking about *some* form of sovereignty for non-state institutions within the modern order. There has been much valuable recent discussion about why a degree of multiple authority is both inevitable and necessary in a successful liberal order.<sup>32</sup> “Our constitutional order” itself, Professor Abner Greene has written, contemplates “multiple repositories of power.”<sup>33</sup> Although the state often denies it, the “sources of normative authority to which people turn are plural.”<sup>34</sup> Denying the importance of those competing sources and their attendant obligations may ultimately do more harm than good to the liberal project.<sup>35</sup> Finding a vocabulary that recognizes the importance of multiple obligations, and allows a “measure” of autonomy for the institutions that play a key part in these competing communities,<sup>36</sup> may, in the long run, better reflect the multiple institutions that make up our social infrastructure, keep disparate groups within the liberal fold rather than alienate them, and demarcate the limits of state power.

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<sup>28</sup> Schragger & Schwartzman, *supra* note 1, at 974.

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

<sup>30</sup> *Id.* at 921.

<sup>31</sup> *Id.* at 945. Not incidentally, the kinds of assumptions that are typically marshaled in support of the sovereignty of the *state* are also contingent and contestable.

<sup>32</sup> See, e.g., Abner S. Greene, *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy* 21–23 (2012).

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 20.

<sup>35</sup> See generally Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* 2, 91 (2006) (arguing that the liberal state has failed to arrive at a sound method of addressing and coexisting with illiberal or “theocratic” communities within society, to its detriment).

<sup>36</sup> *Id.* at 91.

This may be a different form of liberalism than the one the authors offer (if vaguely). But it still falls within the scope of liberalism.<sup>37</sup> Its vision of “sovereignty,” or, more accurately, “permeable sovereignty”<sup>38</sup> or “quasi-sovereignty,”<sup>39</sup> is not absolute; but neither is modern state sovereignty itself.<sup>40</sup> Schragger and Schwartzman are right that we should use this language cautiously. But that does not mean we must forswear it entirely.

Schragger and Schwartzman are also right to press on the question of where institutional rights come from, and whether they are ultimately derivative of the rights of the institution’s members. It is fair to ask those who emphasize institutional rights to explain the source of those rights—just as it is fair to question the liberal “prioritization of the autonomous individual,”<sup>41</sup> the source of liberal individual rights, the exclusivity of state authority, and so on. I do not take a strong position on this question here. Moreover, for reasons discussed below, I am not sure we are yet in a position to judge the *legal* implications of Schragger and Schwartzman’s view that institutional rights are wholly derivative of the rights of their members.

In the end, though, I am not sure how much it matters. “[D]erived from”<sup>42</sup> is not synonymous with “identical to.” Even if church autonomy is ultimately genealogically derived from individual worshippers’ rights, it can still entail *different*—not “more”—religious freedom rights.<sup>43</sup>

One can see this by examining an argument for church autonomy that Schragger and Schwartzman treat as acceptable, because it is derived from individual rights.<sup>44</sup> This is the argument advanced in a seminal article by Professor Douglas Laycock, one that he recently revisited.<sup>45</sup> In his

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<sup>37</sup> See Levy, *supra* note 4, at 39 (arguing that pluralist arguments for group personality offer important resources for modern liberals).

<sup>38</sup> See Greene, *supra* note 32, at 2–3.

<sup>39</sup> See, e.g., Horwitz, *supra* note 8, at 175; Swaine, *supra* note 35, at 91.

<sup>40</sup> See, e.g., Paul Schiff Berman, *From International Law to Law and Globalization*, 43 *Colum. J. Transnat’l L.* 485, 491 (2005); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *Stan. J. Int’l L.* 283, 285 (2004).

<sup>41</sup> Schragger & Schwartzman, *supra* note 1, at 920.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 921.

<sup>44</sup> See *id.* at 919 & n.7, 963–64 & n.183.

<sup>45</sup> See Douglas Laycock, *Church Autonomy Revisited*, 7 *Geo. J.L. & Pub. Pol’y* 253, 253 (2009) [hereinafter Laycock, *Church Autonomy Revisited*]; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right*



earlier article, Laycock indeed grounds church autonomy in the Free Exercise Clause, thus suggesting that it derives from individual conscience.<sup>46</sup> But Schragger and Schwartzman go further. A “general theory of conscientious objection,” they write, is sufficient to address all “the problems that the doctrinal concept of church autonomy seeks to address.”<sup>47</sup> Laycock, by contrast, argues that this approach fails to fully recognize or protect the church as “a complex and dynamic organization.”<sup>48</sup> A “strong rule of church autonomy” that is distinct from individual rights of conscientious objection is necessary to avoid “disrupt[ing] ‘the free development of religious doctrine’” by and within the church as a body.<sup>49</sup> Indeed, throughout his article, Laycock is clear in describing church autonomy, however derived, as a strong *institutional* right against interference in internal affairs.<sup>50</sup>

Three decades later, Laycock’s position is even clearer.<sup>51</sup> “[W]hen a church does something by way of managing its own internal affairs,” he writes, “it does not have to point to a doctrine or a prohibition or a claim of conscience in every case. It can make out a good church autonomy claim simply by saying that this is internal to the church. This is our business; it is none of your business.”<sup>52</sup> He is now more sympathetic to the *structural* argument against government interference in church affairs that has been advanced by scholars relying on the Establishment Clause<sup>53</sup>—an argument that is at least a cousin to “corporatist” and even

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to Church Autonomy, 81 Colum. L. Rev. 1373, 1388–92 (1981) [hereinafter Laycock, Church Autonomy].

<sup>46</sup> See Laycock, Church Autonomy, *supra* note 45, at 1389–94.

<sup>47</sup> Schragger & Schwartzman, *supra* note 1, at 959.

<sup>48</sup> Laycock, Church Autonomy, *supra* note 45, at 1389–92.

<sup>49</sup> *Id.* at 1392 (quoting *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969)).

<sup>50</sup> See, e.g., *id.* at 1373 (“Quite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, *churches* have a constitutionally protected interest in managing their own institutions free of government interference.” (emphasis added)); *id.* at 1389 (setting out a distinct right of “churches to conduct [internal] activities autonomously”).

<sup>51</sup> See Laycock, Church Autonomy Revisited, *supra* note 45, at 254 (“The most important thing my earlier article did was to distinguish between conscientious objection claims and church autonomy claims.”).

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., Carl H. Esbeck, The Establishment Clause as a Structural Constraint on Governmental Power, 84 Iowa L. Rev. 1, 42–58 (1998); Ira C. Lupu & Robert Tuttle, Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders, 7 Geo. J.L. & Pub. Pol’y 119, 134–54 (2009).

“neo-medievalist” arguments for church autonomy.<sup>54</sup> And, in a discussion of the church property dispute cases, he warns against a “neutral principles” approach that would “congregationaliz[e] a hierarchical or presbyterial church” by relying too heavily on the majority vote of individual congregations to secede from the main church while retaining the local church property.<sup>55</sup>

That does not mean Laycock rejects the view that the institutional rights of churches are derived from individual constitutional rights, although I am not sure he would now view that description as wholly sufficient. But it strongly suggests that the “good” argument for church autonomy is not as distinct from recent institutionalist arguments as Schragger and Schwartzman argue. It does not treat church autonomy as *reducible* to individual rights. Church autonomy inheres *in the church* as a body and involves more than rights of individual conscience. And it sees church autonomy as involving a *structural* as well as an individual component, one that recognizes the limits of the state and the separate existence of the church.<sup>56</sup> That is not surprising. A constitutional order that involves “multiple repositories” of state and non-state power can adopt structural and institutional, as well as individual rights-oriented, means of maintaining that order, even if the underlying goal is to “preserv[e] citizen sovereignty.”<sup>57</sup>

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<sup>54</sup> See Laycock, Church Autonomy Revisited, *supra* note 45, at 261 (noting that the ministerial exception “is indeed a limit on the appropriate range of government authority”); *id.* at 264 (disagreeing that the Establishment Clause is wholly jurisdictional in nature, but stating that “I think there is force to [the] argument . . . that some of these religious decisions are simply beyond the jurisdiction of government,” both to “protect religious believers *and to protect churches* from government interference” (emphasis added)).

<sup>55</sup> *Id.* at 257–58 (discussing *Jones v. Wolf*, 443 U.S. 595 (1979)). Although the comparison is imperfect, Laycock’s concerns may be contrasted with Schragger and Schwartzman’s more conscience-driven approach in the area of employment disputes, which would evaluate whether an employer is “engaged in a religious enterprise” by “measuring the intensity of the *employees’* religious responsibilities,” rather than the religiosity of the business owner or the entity. Schragger & Schwartzman, *supra* note 1, at 983 (emphasis added).

<sup>56</sup> Again, I believe this structural understanding of our church-state settlement requires strong non-establishment limits as well as strong rights of church autonomy, and thus disagree with those who believe “freedom of the church” implies a loosening of the strictures of the Establishment Clause. See Horwitz, *supra* note 26, at 127–29; Horwitz, *supra* note 11, at 43.

<sup>57</sup> Greene, *supra* note 32, at 3–4.

## II. WHAT “SUFFICIENT” RIGHTS?

Schragger and Schwartzman argue that religious institutionalism is unnecessary, because “a general theory of conscientious objection [is] sufficient to protect churches.”<sup>58</sup> “[G]eneral principles of freedom of association, privacy, and conscience,” they write, “are sufficient to protect all conscience-based associations, including churches.”<sup>59</sup>

Others have questioned this conclusion. Laycock argues that core church autonomy claims are not sufficiently protected by freedom of conscience.<sup>60</sup> In an earlier work, Professor Fred Gedicks asserted that freedom of association doctrine focuses instrumentally on “expressive” association and is thus ill-suited for the protection of the “self-definitional interest[s] of religious groups.”<sup>61</sup> Professor Laurence Tribe, writing to defend *Boy Scouts of America v. Dale*,<sup>62</sup> questions whether the result in that case could be reached through expressive association, while insisting that the Boy Scouts’ self-definitional rights should still be protected, “if not through the First Amendment as such, then as a basic if unenumerated right.”<sup>63</sup> More pragmatically, courts have declined to reach for freedom of association when the Religion Clauses are so close at hand.<sup>64</sup>

Although I do not argue that religious institutions have a *singular* status as associations, I am not persuaded that in considering the legal question of church autonomy, we must set aside the distinctive history of religious freedom, including those aspects of the history that involve

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<sup>58</sup> Schragger & Schwartzman, *supra* note 1, at 977.

<sup>59</sup> *Id.* at 922.

<sup>60</sup> See Laycock, *Church Autonomy*, *supra* note 45, at 1390–92.

<sup>61</sup> Gedicks, *supra* note 3, at 122–25. Schragger and Schwartzman describe Gedicks as having “disavow[ed]” his earlier defense of religious group rights. See Schragger & Schwartzman, *supra* note 1, at 971 n.213 (referring to Gedicks, *supra* note 3, at 48–49 & n.5). But Gedicks’s later article still describes freedom of association as protecting religious groups “only to the extent that such [associational] rights advance speech and expression.” Gedicks, *supra* note 3, at 57. His attitude toward church autonomy may have changed, but not his analysis.

<sup>62</sup> 530 U.S. 640 (2000). *Dale* is a freedom of association case, not a church autonomy case, but it is widely understood to be valuable for church autonomy arguments, especially if the Religion Clauses are unavailable—as they may be under Schragger and Schwartzman’s approach.

<sup>63</sup> Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 *Pepp. L. Rev.* 641, 650 (2001).

<sup>64</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (“We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.”).

churches as autonomous institutions.<sup>65</sup> Like other pluralists before me, however,<sup>66</sup> I am less taken by this question as a philosophical matter than with assuring the underlying “space to self-govern” that churches and other First Amendment institutions require.<sup>67</sup> If Schragger and Schwartzman’s approach would truly supply us with “a more robust version of what already exists,”<sup>68</sup> I am willing to count that as good enough for (limited) government work.

But would it? It is difficult to say. Schragger and Schwartzman hedge their bets. Of *Hosanna-Tabor*, the ministerial exception decision, which Laycock sees as “a clear case for the Church,”<sup>69</sup> they caution that they do not “necessarily agree with the outcome.”<sup>70</sup> They are equally circumspect about *Dale*, whose broad reading of freedom of association would offer vital protection for church autonomy if the Religion Clauses themselves were unavailable.<sup>71</sup> They write supportively of the church property dispute cases.<sup>72</sup> But an earlier reference to the “intensity of the *employees’* religious responsibilities”<sup>73</sup> in employment law cases raises the concern that their approach to both categories of cases might ultimately result in the nose-counting, “congregationalizing” effect that Laycock decries.<sup>74</sup>

No reader can say with confidence where the boundaries of Schragger and Schwartzman’s conscience- and association-driven approach lie. We should therefore not be too quick to agree that it would be sufficient to safeguard the kinds of decisions that ought to belong to First Amendment institutions—religious and otherwise—themselves. Absent a clearer statement of Schragger and Schwartzman’s position, we cannot conclude that (religious) institutionalism is unnecessary.

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<sup>65</sup> For an argument emphasizing the continuing importance for church-state law and theory of the ancient historical tradition of respecting the autonomy of religious institutions, see Muñoz-Fraticelli, *supra* note 19, at 1–2. But see Micah Schwartzman, What if Religion Is Not Special?, 79 U. Chi. L. Rev. 1351, 1352–53 (2012) (examining the question of religion’s distinctiveness from the standpoint of political theory and morality).

<sup>66</sup> See, e.g., Maitland, *supra* note 2, at 71.

<sup>67</sup> Schragger & Schwartzman, *supra* note 1, at 970.

<sup>68</sup> *Id.* at 975.

<sup>69</sup> Douglas Laycock, *Hosanna-Tabor* and the Ministerial Exception, 35 Harv. J.L. & Pub. Pol’y 839, 840 (2012).

<sup>70</sup> Schragger & Schwartzman, *supra* note 1, at 978.

<sup>71</sup> See *id.* at 981.

<sup>72</sup> See *id.* at 985–87.

<sup>73</sup> *Id.* at 983 (emphasis added).

<sup>74</sup> Laycock, Church Autonomy Revisited, *supra* note 45, at 257–58.

## III. WHY INSTITUTIONALISM MATTERS

To sum up, Schragger and Schwartzman raise important questions about the use of “sovereignty talk” and the source of institutional rights. But their answers to those questions are neither wholly satisfying nor necessarily legally dispositive. Furthermore, although much of their article argues against a uniquely *religious* form of institutionalism, my approach to First Amendment institutionalism does not give churches a singular status. It relies only on the sensible point that some institutions play a key role within the First Amendment and public discourse, and that the scope of deference toward those institutions should vary depending on the nature of the First Amendment institution in question. That approach certainly raises questions, but for the most part they are not the questions raised here. Finally, without a clearer statement about what rights of “association, privacy, and conscience”<sup>75</sup> would actually protect, it is premature to conclude that they would adequately safeguard the core interests and key infrastructural role of First Amendment institutions.

It remains to be asked *why* people keep turning to pluralism or institutionalism. Why do they keep insisting that different institutions and sources of authority, including churches, matter? Schragger and Schwartzman offer a credible, if hedged, argument for the sufficiency of a conventional liberal approach. They acknowledge the value of institutions as “places where ideas are formed, shared, developed, and come to influence character,”<sup>76</sup> and that religious institutions form an important part of civil society.<sup>77</sup> Why, then, did anyone ever think that an alternative account was necessary—and why might they still think so? Let me offer two reasons.

The first I have mentioned above and discuss more fully elsewhere.<sup>78</sup> An institutionalist approach carries some risks, but so does a reductionist approach like Schragger and Schwartzman’s. They may be personally capable of stretching individual rights to respect the importance of “institutional setting” and to avoid the “destructive” effect of the state on “local associational life.”<sup>79</sup> But judges may not. Under the “lure of acon-

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<sup>75</sup> Schragger & Schwartzman, *supra* note 1, at 922.

<sup>76</sup> *Id.* at 969 n.207 (quoting Seana Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 *Nw. U. L. Rev.* 839, 865 (2005)).

<sup>77</sup> *Id.* at 988.

<sup>78</sup> See Horwitz, *supra* note 8, at 42–67.

<sup>79</sup> Schragger & Schwartzman, *supra* note 1, at 924–25.

textuality,”<sup>80</sup> they may “systematically ignore[] a range of socially important institutional distinctions,”<sup>81</sup> and under-protect the distinctive social contributions of institutions—contributions whose value Schragger and Schwartzman admit.<sup>82</sup> Or they may acknowledge the importance of institutions to public discourse in a piecemeal and ad hoc fashion, and thus deprive First Amendment doctrine of much of its coherence.<sup>83</sup> A more forthright institutionalism is one way of avoiding that eventuality.

My second point is broader, and concerns what a reductionist approach risks forgetting. The problems raised by the British pluralists and their successors are perennial ones.<sup>84</sup> Their answers (and mine too) may be imperfect, but the concerns that inspired them remain relevant today. They involve the intertwined questions of “the limits of the state model of absolute sovereignty, and the relations among individuals, intermediate groups”—including religious groups—“and the state.”<sup>85</sup> The basic point about the fundamental social reality of groups, and their relationship to the state, was eloquently put by Frederic Maitland:

If the law allows men to form permanently organised groups, those groups will be for common opinion right-and-duty-bearing units; and if the law-giver will not openly treat them as such, he will misrepresent, or, as the French say, he will ‘denature’ the facts; in other words, he will make a mess and call it law. . . . Group-personality is no purely legal phenomenon. The law-giver may say that it does not exist, where, as a matter of moral sentiment, it does exist. When that happens, he incurs the penalty for those who ignorantly or wilfully say the thing that is not. If he wishes to smash a group, let him smash it, send the policemen, raid the rooms, impound the minute-book, fine, and imprison; but if he is going to tolerate the group, he must recognise its

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<sup>80</sup> See, e.g., Horwitz, *supra* note 8, at 5–7, 42–67.

<sup>81</sup> Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 *UCLA L. Rev.* 1747, 1750 (2007).

<sup>82</sup> Schragger & Schwartzman, *supra* note 1, at 988.

<sup>83</sup> See, e.g., Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 *Harv. L. Rev.* 84, 86–87 (1998) (noting “an intractable tension between free speech theory and judicial methodology. If freedom of speech . . . is largely centered on the policy question of institutional autonomy, but the Court’s own understanding of its role requires it to stay on the principle side of the policy/principle divide, then the increasingly obvious phenomenon of institutional differentiation will prove progressively more injurious to the Court’s efforts to confront the full range of free speech issues.”).

<sup>84</sup> See, e.g., David Nicholls, *The Pluralist State: The Political Ideas of J.N. Figgis and His Contemporaries*, at ix–xx (2d ed. 1994).

<sup>85</sup> Levy, *supra* note 4, at 22.

personality, for otherwise he will be dealing wild blows which may fall on those who stand outside the group as well as those who stand within it.<sup>86</sup>

The pluralists thus insisted that groups, including churches, have a meaning and importance of their own. That is not mysticism; it is simply the recognition of a social fact that liberalism and legal doctrine ignore to their detriment.<sup>87</sup> That there are limits to these groups' authority, and proper occasions for state intervention, is something no one denies. But it matters, for our understanding of both groups and the state itself and for our appreciation of their respective structural roles within the social order, that we remember that "groups have [a] real existence that the state recognizes *but does not create*."<sup>88</sup>

In sum, "the facts of the world with its innumerable bonds of association and the naturalness of social authority should be generally recognised and become the basis of our laws, as it is of our life."<sup>89</sup> That conclusion is not inconsistent with First Amendment doctrine, or with liberalism more broadly. Indeed, it may be "necessary for it."<sup>90</sup> One need look no further than today's headlines to appreciate the continuing contestation between the state, with its broad claims of authority, and churches and other groups that play a crucial role in the infrastructure of public discourse.

"To dissolve philosophical perplexities is not the same as solving the problems that produced them."<sup>91</sup> Schragger and Schwartzman deserve praise for spotlighting the philosophical perplexities that attend the institutional approach, both for churches and other institutions. But the underlying social reality and importance of First Amendment institutions remain, and so do the legal tensions between those groups and the state. I worry that too much philosophical dissolution may lead us to lose sight of this fundamental truth.

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<sup>86</sup> Maitland, *supra* note 2, at 68; see also Harold J. Laski, *The Personality of Associations*, 29 *Harv. L. Rev.* 404, 424 (1916) (arguing that, unless we acknowledge the reality of groups, "what we call justice will, in truth, be no more than a chaotic and illogical muddle").

<sup>87</sup> See, e.g., Levy, *supra* note 4, at 36, 39.

<sup>88</sup> *Id.* at 33 (emphasis added).

<sup>89</sup> J.N. Figgis, *Studies of Political Thought from Gerson to Grotius: 1414–1625*, at 206 (1907).

<sup>90</sup> Levy, *supra* note 4, at 27; see also *id.* at 39 ("The pluralists offer alternative resources to the contemporary liberal: sociologically more realistic about group life, and conceptually clearer in their understanding that such norms, rules, and structures arise out of individual freedom itself.")

<sup>91</sup> Runciman & Ryan, *supra* note 4, at xxix n.62.