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**Richard Garnett**

John Cardinal O'Hara, C.S.C. Associate Professor of Law

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## **Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?**

Richard W. Garnett<sup>1</sup>

What role do religious communities, groups, and associations play – and, what role *should* they play – in our thinking and conversations about religious freedom and church-state relations? These and related questions – that is, questions about the rights and responsibilities of religious institutions – are timely, difficult, and important. And yet, they are often neglected.

Consider, just briefly, the hot-button “church-state” disputes that are the stuff of front-page stories and high-profile court decisions: May governments allow privately owned menorahs and nativity scenes in public parks, or display the Ten Commandments on the grounds or in the halls of public buildings, or include the words “under God” in the Pledge of Allegiance? May the state ban ritual animal sacrifice, or the religiously motivated use of hallucinogenic tea, or peyote? May a child in public school read a Bible story from his favorite book, or hand out pencils with a religious message, or start a Christian after-school club? And so on.

Cases presenting questions like these are touted as “church-state” controversies. Certainly, they involve important questions about the freedom of conscience and the powers and prerogatives of governments. The image of the lone religious dissenter, heroically confronting overbearing officials or extravagant assertions of state power, armed only with claims of conscience, is evocative and timeless. No account of religious freedom would be complete if it neglected such clashes or failed to celebrate such courage. And yet, while the “state” is (usually) easy to spot in these cases, where is the “church”?

It is not new to observe that American judicial decisions and public conversations about religious freedom tend to focus on matters of

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<sup>1</sup> John Cardinal O’Hara, C.S.C. Associate Professor of Law, University of Notre Dame. This paper is based on remarks given at a conference, “Religion and Morality in the Public Square: A Symposium on Philosophy, History, and Law,” hosted by the *St. John’s Journal of Legal Commentary* at the St. John’s University School of Law in Queens, New York. I am grateful to the Lecia Griep and Dean Michael Simons for organizing and including me in such an engaging event, and to John McGreevy, Philip Hamburger, and Bernadette Meyler for joining me in conversation. Thanks to Nicole Stelle Garnett, John Garvey, Steven Smith, Andrew Koppelman, Mark Tushnet, Paul Horwitz, John Witte, Michael Perry, for their comments on earlier drafts and sections of this paper.

individuals' rights, beliefs, consciences, and practices.<sup>2</sup> The special place, role, and freedoms of groups, associations, and institutions are often overlooked.<sup>3</sup> However, if we want to understand well, and to appreciate, the content and implications of our constitutional commitment to religious liberty, we need to broaden our focus, and to ask, as Professors Lupu and Tuttle have put it, about the "distinctive place of religious entities in our constitutional order."<sup>4</sup> Are religious institutions special? May and should they be treated specially? If so, how? Why?

## I.

In 2000, the Supreme Court held that the First Amendment conferred and protected a right of the Boy Scouts of America – an "expressive association" – to engage in what would otherwise have been illegal discrimination in selecting its leaders.<sup>5</sup> This right, the Court suggested, "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas[.]" and is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the government."<sup>6</sup>

Whatever the merits of the *Boy Scouts* decision,<sup>7</sup> religious institutions enjoy and exercise a similar, though probably less controversial, license to discriminate. The Civil Rights Act of 1964 allows religious organizations to engage in otherwise unlawful religious discrimination<sup>8</sup> and a judge-made, though apparently constitutionally grounded, rule prevents courts from applying anti-discrimination laws to such organizations' hiring and firing decisions regarding ministers.<sup>9</sup> These exemptions are, again,

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<sup>2</sup> See generally, e.g., Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. REV. 1633 (2004).

<sup>3</sup> See, e.g., Gerard V. Bradley, *Forum Juridicum: Church Autonomy in the Constitutional Order*, 49 LA. L. REV. 1057, 1064 (1987) (noting that the idea of "church autonomy" sits uneasily in our law and discourse about religious freedom, because of our "longstanding blind spot . . . concerning groups of all kinds").

<sup>4</sup> Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in our Constitutional Order*, 46 VILLANOVA L. REV. 37 (2002).

<sup>5</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

<sup>6</sup> *Dale*, 530 U.S. at 647-48 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). See generally, e.g., Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001).

<sup>7</sup> For just one critique of *Dale*, see, e.g., Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

<sup>8</sup> See, e.g., *Corp. Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

<sup>9</sup> See, e.g., *Hollins v. Methodist Healthcare*, 474 F.3d 223, 225 (6<sup>th</sup> Cir. 2007) ("The ministerial exception, a doctrine rooted in the First Amendment's guarantees of religious

widely accepted (even if there are disagreements about their shape and application).<sup>10</sup> But again, we should ask, why? Is there something – something special, or distinctive – about religious organizations, religious discrimination, and ministerial positions that justifies or requires limiting the reach of anti-discrimination laws in this way? Or, is the theory simply that religious associations – or, for present, short-hand purposes, “churches” – are, so far as the constitution is concerned, like the Boy Scouts?

## II.

In 1988, while out on the campaign trail, then-Vice President George H.W. Bush recalled being shot down over the South Pacific, as a young pilot during World War II.<sup>11</sup> He said:

Was I scared floating in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them, and God and faith—and the separation of church and state.<sup>12</sup>

Now, this train-of-thought seems absurd. At the same time, though, it is entirely American. That the would-be President apparently thought he could not identify “God” and “faith” as “fundamental values” without awkwardly appending “the separation of church and state” reveals much about how we Americans think about the content and implications of religious freedom.

Of course, an earlier President, Thomas Jefferson, in his 1801 Letter

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freedom, precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees.”).

<sup>10</sup> See, e.g., CHRISTPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 62 (2006) (“[M]ost people – including many who lament these discriminatory practices – believe that church policies about clergy should be constitutionally exempt from anti-discrimination statutes.”). But cf., MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005); Diana B. Henriques, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 9, 2006, at \_\_\_\_.

<sup>11</sup> I have recounted this story in other work, including Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, \_\_\_\_ J. L. & REL. \_\_\_\_ (forthcoming 2007), from which some of the discussion that follows is adopted.

<sup>12</sup> Cullen Murphy, *War Is Heck*, WASH. POST, April 8, 1988, A21.

to the Danbury Baptists, similarly – if more eloquently – professed his “sovereign reverence” for the decision of the American people to constitutionalize church-state “separation.”<sup>13</sup> In so doing, he supplied what is for many the “authoritative interpretation” of the First Amendment’s Religion Clauses.<sup>14</sup> Indeed, Professor Dreisbach observed not long ago that “[n]o metaphor in American letters has had a greater influence on law and policy than Thomas Jefferson’s ‘wall of separation between church and state.’”<sup>15</sup> “Jefferson’s words,” in Professor Hamburger’s words, “seem to have shaped the nation”<sup>16</sup> and are, for many of us, “more familiar than the words of the First Amendment itself.”<sup>17</sup>

However, that we are familiar, even intimate, with Jefferson’s words hardly means we agree about their meaning. Notwithstanding our third President’s “reverence” for church-state separation and the comfort it supplied to our 41<sup>st</sup> President, the idea remains both controversial and contestable. What does it mean, really, for “church” and “state” to be “separate”? Is church-state “separation” an imaginable reality, let alone a constitutional requirement? Not long ago, then-Rep. Katherine Harris complained that the separation of church and state is a “lie we have been told” to keep religious believers out of politics and public life.<sup>18</sup> Her charge drew widespread, forceful criticism, and certainly seems well off the mark. Still, Professors Eisgruber and Sager have reminded us that “it is easy to overlook how just how odd and puzzling the idea of separation is”; indeed, “[t]he notion of literally separating the modern state and the modern church is implausible in the extreme. . . . Church and state are not separate in the United States, and could not possibly be separate. The question is not *whether* the state should be permitted to affect religion, or religion permitted to affect the state; the question is *how* they should be permitted to affect each other.”<sup>19</sup>

This is not to deny that the institutions of religion (the “church”) are and should be distinguished, and different, from the institutions of government (the “state”).<sup>20</sup> It is, instead, only to echo Justice Douglas, who

<sup>13</sup> Letter from the Danbury Baptist Association to Thomas Jefferson (Oct 7, 1801).

<sup>14</sup> Philip Hamburger, *Separation and Interpretation*, 18 J. L. & POL. 7, 7 (2002).

<sup>15</sup> Daniel L. Dreisbach, *Origins and Dangers of the “Wall and Separation” Between Church and State*, IMPRIMIS, Vol. 35, No. 10 (October 2006).

<sup>16</sup> PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 1 (2002).

<sup>17</sup> Hamburger, *Separation and Interpretation*, at 7.

<sup>18</sup> Jim Stratton, *Rep. Harris Condemns Separation of Church, State*, ORLANDO SENTINEL, Aug. 26, 2006, at A9.

<sup>19</sup> EISGRUBER & SAGER, *supra*, at 6, 7.

<sup>20</sup> Cf. ID. at 23 (“[Separation] crisply expresses two different ideals associated with

noted more than fifty years ago that the “separation” does not and, given our traditions, could not mean that “the state and religion [must] be aliens to each other.”<sup>21</sup> After all, given the size, reach, powers, and aims of contemporary governments, the segregation of “church” from “state” – let alone of religion from society, or faith from politics – seems neither possible nor desirable.

And so, although James Madison insisted, in his *Memorial and Remonstrance*, that “[r]eligion is wholly exempt from [the] cognizance” of government (or, the “institution of Civil Society”),<sup>22</sup> an appropriate respect for his arguments should not prevent us from seeing that American governments do, in fact, take “cognizance” of religion all the time. To paraphrase the above-quoted assertion by Professors Eisgruber and Sager, the question is not whether our laws and governments do or will take notice of religion; it is how, when, and for what purpose they take religion into account. More specifically, and in Professor McConnell’s words, the question is not so much “whether religion should be ‘singled out,’ but how, when, and why it should be singled out.”<sup>23</sup>

But maybe this is too quick. That we do “single out” religion – sometimes for special accommodation, sometimes for special exclusion; sometimes for acknowledgment, sometimes for silence – might not necessarily justify our doing so. Professors Leiter and Smith, for example, have – from very different perspectives – expressed and developed their doubts about the existence of a principled, secular reason for specially accommodating religion.<sup>24</sup> The central thesis and animating theme in the new book by Professors Eisgruber and Sager, *Religious Freedom and the Constitution*, is that “aside from [a] deep concern with equality, we have no reason to confer special constitutional privileges or to impose special

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religious freedom—first, that individuals and churches should be free to pursue their theological convictions and practices without undue interference from the state; and second, that citizens and public officials should be able to conduct politics without inappropriate interventions by religious institutions and groups.”).

<sup>21</sup> *Zorach v. Clauson*, 343 U.S. 306, 313, 312 (1952).

<sup>22</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* No. 1 (1785). See also *id.* at No. 8 (“If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government?”).

<sup>23</sup> Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000).

<sup>24</sup> See, e.g., Brian Leiter, *Why Tolerate Religion?* (2006); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PENN. L. REV. 149 (1991).

constitutional disabilities on religion.”<sup>25</sup> That is, “special and distinctive treatment” of religion is justifiable, when it is justifiable, not so much because of anything about religion, but because such treatment is sometimes required to secure and protect the “Equal Liberty” to which we all are entitled under the Constitution.<sup>26</sup> In Professor Koppelman’s view, though, even an appropriately agnostic liberal state may and should accommodate and “recogniz[e] the value of religion[.]”<sup>27</sup> And, for years and years, scholars have wrestled with the problem of identifying those accommodations of religion that the First Amendment’s Free Exercise Clause might be thought to require without privileging, advancing, or endorsing religion in ways that the Establishment Clause might be thought to prohibit.<sup>28</sup>

It would not be possible, even if it could be useful, to review and resolve the accommodation-of-religion debate. Still, we might return to the questions raised at the outset of this paper: What is the place, function, and nature of religious institutions in our constitutional order? Why are these institutions different – if they are – from others? More particularly, why are churches allowed to engage in what would otherwise be illegal discrimination in their dealings with ministers?<sup>29</sup> That is, what is the justification for the so-called “ministerial exception,” mentioned earlier?<sup>30</sup> If, for example, it would be illegal for Wal-Mart to fire a store-manager because of her gender, then why should a religiously affiliated university be

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<sup>25</sup> EISGRUBER & SAGER, *supra*, at 6.

<sup>26</sup> *Id.* at 7, 4.

<sup>27</sup> See, e.g., Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions* 67 (2007); Andrew Koppelman, *Is It Fair To Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571.

<sup>28</sup> Cf. Koppelman, *Is It Fair To Give Religion Special Treatment*, *supra*, at 571 (“It is widely believed that the First Amendment puts courts and legislatures of the United States in a double bind when it comes to religion: requiring them to remain neutral with respect to religious concerns, while simultaneously protecting these same concerns.”). See generally, e.g., Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L. J. 555 (1998), Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

<sup>29</sup> The terms “church” and “minister” are simple to use, but are imprecise and under-inclusive. The legal rule at issue applies to religious institutions other than “churches,” and to people other than “ministers.”

<sup>30</sup> See, e.g., Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1181 (2007) (reviewing MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005)) (“[B]y judicial interpretation, religious organizations may hire and fire their clergy and similar religious leaders on any criteria they choose; courts will not entertain lawsuits alleging discrimination of any kind.”); see generally *Petruska v. Gannon University*, 462 F.3d 294, 303-305 (3d Cir. 2006) (discussing the “ministerial exception”).

permitted to fire a chaplain because of hers?<sup>31</sup> Or, to borrow the example discussed by Professors Eisgruber and Sager, why should anti-discrimination law not reach the refusal – or, more precisely, the asserted inability<sup>32</sup> – of the Roman Catholic Church to ordain women as priests?

Eisgruber and Sager consider carefully whether the law's treatment of this refusal undercuts their argument that "equal liberty," and not distinctive treatment of religion, is what the Religion Clauses require.<sup>33</sup> In their view, churches' liberty to discriminate when selecting ministers does not reflect religion's or churches' special status, and is not a result of a constitutionally mandated "separation" of church and state; instead, it is better regarded as rooted in "constitutional values of autonomy and freedom of association that run to the benefit of all members of our constitutional community."<sup>34</sup> Although indicating dissatisfaction with the Court's reason in the *Boy Scouts* case, they nevertheless invoke that decision as providing a basis for churches' right to discriminate, and right that they regard as flowing from the general (*i.e.*, not religion-specific) constitutional principle that "there are a variety of personal relationships in which members of our political community are free to choose their partners, associates or colleagues without interference from the state": "[C]ontemporary constitutional law endorses associational freedom[ and] the constitutional immunity of the Catholic church from equal employment opportunity mandates in the choice of priests can readily be explained as an instance of that freedom."<sup>35</sup>

Are they right? Is it enough – that is, does it capture all that we want to say about the freedom of religious institutions to make decisions about training and ordaining ministers and about the power of governments to oversee and regulate these decisions – to treat the Roman Catholic Church like the Boy Scouts?<sup>36</sup> Several earlier reviewers – while expressing great admiration their project – have expressed doubts about this aspect of

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<sup>31</sup> See *Petruska*, *supra*.

<sup>32</sup> See generally, *e.g.*, Pope John Paul II, *Ordinatio sacerdotalis* (1994).

<sup>33</sup> See EISGRUBER & SAGER, *supra*, at 62-66.

<sup>34</sup> EISGRUBER & SAGER, *supra*, at 63.

<sup>35</sup> *Id.* at 65.

<sup>36</sup> Cf. Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in our Constitutional Order*, 46 VILLANOVA L. REV. 37, 51 (2002) (noting that "[t]he task of any overarching theory of the constitutional status of religious entities is to identify and elaborate the reasons, if any, that justify treatment of religious enterprises different from secular organizations and from religious believers").



the Eisgruber & Sager approach.<sup>37</sup> I share these doubts.<sup>38</sup> I have suggested, in other work, that although religious institutions, like mediating institutions generally, “contribute to the busy and crowded public square” on which a “free and liberal society . . . depends,”<sup>39</sup> and serve sometimes as “wrenches in the works of whatever hegemonizing ambitions government might be tempted to indulge,”<sup>40</sup> they remain more than “voluntary association[s] with a cause.”<sup>41</sup> Is this suggestion plausible, or attractive?

### III.

As was noted above, the idea of church-state “separation” has, for better or worse, long been at the heart of our doctrines and debates about religious liberty under law. As Professor Witte has noted, though, the so-called “wall” of separation has, in public law and in public discourse, proved far more “serpentine” – both in the sense of winding and twisting, and in the Edenic sense of “seductively simple” – than many who invoke it appreciate.<sup>42</sup>

I have suggested elsewhere that, whatever we might think of Jefferson’s “misleading metaphor”<sup>43</sup>, or about the constitutionalization of that metaphor in the Court’s 1947 decision, *Everson v. Board of Education*<sup>44</sup>, it remains important that we get church-state separation right.

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<sup>37</sup> See, e.g., Thomas Berg, *Can Religious Liberty Be Protected As Equality?*, 85 TEX. L. REV. \_\_\_\_ (2007); Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. \_\_\_\_ (2007).

<sup>38</sup> Richard W. Garnett, *Equality Is Not Enough*, FIRST THINGS (May 2007) (forthcoming).

<sup>39</sup> Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 800 (2001).

<sup>40</sup> Garnett, *The Story of Henry Adams’s Soul*, *supra*, at 1853.

<sup>41</sup> George Weigel, *Papacy and Power*, FIRST THINGS, Feb. 2001 at 18, 25. See also Russell Hittinger, *Dignitatis humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 GEO. WASH. L. REV. 1035, 1153 (2000) (“What was most important [for the Church in the modern world] was that the Church could be differentiated without reducing itself to the status of other private associations.”).

<sup>42</sup> JOHN WITTE JR., *GOD’S JUSTICE, GOD’S JOUST: LAW AND RELIGION IN THE WESTERN TRADITION* 209 (2006).

<sup>43</sup> *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting) (“It is impossible to build sound constitutional doctrine upon a mistaken understanding of Constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”).

<sup>44</sup> 330 U.S. 1 (1947). See, e.g., John Courtney Murray, *Law or Prepossessions?*, 14 J. L. CONTEMP. PROBS. 23, 40 (1949) (“The absolutism of [*Everson*] . . . is unsupported, and unsupportable, by valid evidence and reasoning—historical, political, or legal—or on any sound theory of values, religious or social.”).

It would be a mistake either to embrace, or to war against, a misguided version of the idea.<sup>45</sup>

Well understood, “separation of church and state” would seem to denote a structural arrangement involving institutions, a constitutional order in which the institutions of religion – not “faith,” “religion,” or “spirituality,” but the “church” – are distinct from, other than, and meaningfully independent of, the institutions of government.<sup>46</sup> What is “at stake”, then, with separation is not so much – or, not only – the perceptions, feelings, immunities, and even the consciences of individuals but a distinctions between spheres, the independence of institutions, and the “freedom of the church.”<sup>47</sup>

The first constraint to which King John agreed (but did not always respect),<sup>48</sup> in 1215, in the meadows of Runnymede, was “that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.” And, more than a century earlier, during what is usually called the Investiture Crisis, the idea of *libertas ecclesiae* – i.e., the freedom of the church – served, in Professor Berman’s judgment, as the catalyst for “the first major turning point in European history”<sup>49</sup> and as the foundation for nearly a millennium of political theory. Armed with this idea, an eleventh century monk named Hildebrand – who eventually reigned as Pope Gregory VII -- not only orchestrated a campaign in support of his struggle with secular powers for papal control over the church;<sup>50</sup> he led a “revolution” that, Professor Berman reports, worked nothing less than a “total transformation” of law, state, and society.<sup>51</sup> For Hildebrand and his

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<sup>45</sup> See Garnett, *Pluralism, Dialogue, and Freedom*, *supra*.

<sup>46</sup> See generally, e.g., Steven D. Smith, *Separation and the “Secular”*: *Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989).

<sup>47</sup> See generally, e.g., Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007). Some of the text that follows is adopted from *The Freedom of the Church*, *supra*.

<sup>48</sup> See F. POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW*, Vol. 1, at 172 (2d ed. ) (Lawyers’ Literary Club edition, 1959) (“The vague large promise that the church of England shall be free is destined to arouse hopes that have been dormant and can not be fulfilled.”).

<sup>49</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 87 (1983)

<sup>50</sup> BERMAN, *supra*, at 94 (quoting *Introduction* to G. TELLENBACH, *CHURCH, STATE, AND CHRISTIAN SOCIETY AT THE TIME OF THE INVESTITURE CONTEST* xiv-xv (R.F. Bennett trans., 1940)).

<sup>51</sup> BERMAN, *supra*, at 23. See also WITTE, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT*, *supra*, at 1-14 (discussing the “papal revolution”). See generally, e.g., BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE: 1050-1300* (1988).

allies, the “freedom of the church” was the “assertion of papal primacy over the entire Western church and” – more important, for present purposes – “of the independence of the Church from secular control.”<sup>52</sup> What was at stake in Pope Gregory’s famous confrontation with Emperor Henry IV at Canossa – as at the Cathedral in Canterbury a century later, when the “meddlesome priest” St. Thomas Becket was murdered by another ambitious King Henry<sup>53</sup> – was the “principle that royal jurisdiction was not unlimited . . . and that it was not for the secular authority alone to decide where its boundaries should be fixed.”<sup>54</sup>

Now, no Justice of the United States Supreme Court has ever mentioned – at least, not according to Westlaw – Hildebrand or Canossa in any published opinion. Nevertheless, it seems worth considering whether engagement with the Investiture Crisis, Hildebrand’s “revolution,” and the idea of the “freedom of the church” could contribute to a better, richer understanding of constitutionalism generally and, more specifically, of religious freedom under law. After all, as John Courtney Murray once noted, persons are not really free if their “basic human things are not sacredly immune from profanation by the power of the state[.]”<sup>55</sup> The challenge has long been to find the limiting principle that would “check the encroachments of civil power and preserve these immunities” and, it can be argued, “[w]estern civilization first found this norm in the pregnant principle, the freedom of the Church.”<sup>56</sup>

It is tempting to assume that such a “revolutionary” principle of limited government is be deeply rooted in our Constitution’s text, history, structure, and doctrine, and readily available to supply a well credentialed answer to questions about the differences between churches and the Boy Scouts. There are, as students of the First Amendment learn, a number of constitutional doctrines and lines of cases that guard the religious

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<sup>52</sup> BERMAN, *supra*, at 50. *See also* WITTE, *supra*, at 11-12 (noting Pope Gregory VII’s claim that “[o]nly the pope . . . had authority to ordain, discipline, depose, and reinstate bishops, to convoke and control church councils, and to establish and administer abbeys and bishoprics.”).

<sup>53</sup> In the Academy Award-winning 1964 film, *BECKET*, England’s King Henry II – played by Peter O’Toole – says of Thomas Becket, the Archbishop of Canterbury – played by Richard Burton – “will no one rid me of this meddlesome priest?”

<sup>54</sup> BERMAN, *supra*, at 269.

<sup>55</sup> JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 204 (1988).

<sup>56</sup> *IBID.* *See also* *ID.* at 205 (arguing that it was the freedom of the Church that furnished a “social armature to the sacred order,” within which the human person would be “secure in all the freedoms that his sacredness demands”).

institutions' ability and right to control their internal structure and operations, to select their own ministers, to propose their own messages, to administer their own sacraments, to conduct their own liturgies, and so on.<sup>57</sup> There is, for example, the above-mentioned doctrine of "church autonomy" which, in Professor Bradley's words, is "the issue that arises when legal principles displace religious communities' internal rules of interpersonal relations (as opposed to prescriptions for personal spirituality)."<sup>58</sup> So understood, Bradley insists, "church autonomy" is the "flagship issue of church and state," the "litmus test of a regime's commitment to genius spiritual freedom."<sup>59</sup>

However, even one disposed to agree with Professor Bradley about the principle's importance should concede that, in fact, the "church autonomy" doctrine is more of a grab-bag of precedents than a clear rule or prohibition. The Court told us, in its battered-but-still-standing *Lemon* decision, that the First Amendment does not permit state action that creates or requires "excessive entanglement" between the government and religious institutions, practices, teachings, and decisions.<sup>60</sup> It commands that the "secular and religious authorities . . . not interfere with each other's respective spheres of choice and influence."<sup>61</sup> In a line of cases,<sup>62</sup> the Justices have refused to "undertake to resolve [religious] controversies" because "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."<sup>63</sup> The Court has affirmed, time and again, the "fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,'"<sup>64</sup> and deferred to church authorities and processes "on matters

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<sup>57</sup> See generally Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1652-59 (2004).

<sup>58</sup> Bradley, *Forum Juridicum*, *supra*. See generally, e.g., Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

<sup>59</sup> Bradley, *Forum Juridicum*, *supra*, at 1061.

<sup>60</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971).

<sup>61</sup> LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 1226 (2d ed. 1988); see also EUGENE VOLOKH, THE FIRST AMENDMENT: PROBLEMS, CASES, AND POLICY ARGUMENTS 916-21 (2001) (discussing rule that "[t]he government may not delegate certain kinds of government power to religious institutions").

<sup>62</sup> See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976).

<sup>63</sup> *Hull Church*, 393 U.S. at 449.

<sup>64</sup> *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting *Kedroff*, 344 U.S. at 116).

purely ecclesiastical.”<sup>65</sup> And, as was mentioned earlier, courts recognize a “ministerial exception” in discrimination cases (although the Justices have not spoken directly to the matter<sup>66</sup>).

All that said, it does not seem unfair to suggest that the doctrine has something of an imprecise emanations-and-penumbras air about it.<sup>67</sup> Many scholars and courts locate the church-autonomy rule in the Free Exercise Clause.<sup>68</sup> Others have looked instead to the Establishment Clause’s proscription on “excessive entanglement.”<sup>69</sup> Some experts appear to regard the rule as an implication from general, foundational religious-freedom principles, underlying the Religion Clauses, such as the “separation of church and state”<sup>70</sup> or the “voluntary principle.”<sup>71</sup> Professor Esbeck has explained that the autonomy of churches follows from the fact that the Establishment Clause is a “structural restraint” on government (while the Free Exercise Clause protects individuals’ rights of belief and practice).<sup>72</sup> And, as was discussed earlier, Professors Eisgruber and Sager find protection for church-autonomy-as-autonomy within the privacy protected by the Fourteenth Amendment, and adjacent to the freedom of expressive association.

What’s more, it is not only the lack of a clear doctrinal and textual home that might raise doubts about the church-autonomy doctrine. It is worth noting that one of the justifications sometimes invoked in church-autonomy cases is the asserted incompetence of secular courts to resolve

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<sup>65</sup> *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

<sup>66</sup> *See* *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Ohio Civil Rights Comm’n v. Dayton Christian Schools*, 477 U.S. 619 (1986).

<sup>67</sup> *See* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

<sup>68</sup> *See* Laycock, *supra*; JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 139 (1996).

<sup>69</sup> *See, e.g.,* *Bollard v. Cal. Province of the Soc’y of Jesus*, 211 F.3d 1331, 1332 (9th Cir. 2000) (order denying rehearing *en banc*) (Wardlaw, J., dissenting) (“Though the concept originated through application of the Free Exercise Clause, the Supreme Court has held that the Establishment Clause also protects church autonomy in internal religious matters.”); Lupu & Tuttle, *supra* note, at 62 (“If anything in the positive law of the Constitution confirms the distinctive character of religious institutions, the doctrine of non-entanglement is it.”).

<sup>70</sup> *See, e.g.,* Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 131 (2003).

<sup>71</sup> Thomas C. Berg, *The Voluntary Principle and Church Autonomy: Then and Now*, 2004 BYU L. Rev. 1593, 1606.

<sup>72</sup> *See, e.g.,* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385.

internal church disputes or to interpret and apply religious rules.<sup>73</sup> Indeed, the immunity of churches' internal decisions is framed as a function of their irrationality, as a result of the asserted fact that "religious truth by its nature [is] not subject to a test of validity determined by rational thought and empiric knowledge."<sup>74</sup> However, the fact that religious teaching and practices often involve recourse to, and reliance on, revelation – or on materials with which secular judges are unfamiliar – does not seem a particularly strong reason for a rule protecting churches' autonomy in matters of governance and structure. Judges confront new substantive areas all the time, and the issue in church-autonomy cases rarely has to do with the truth or content of revelation.<sup>75</sup> Indeed, a church-autonomy doctrine grounded ultimately, or even largely, on abstention-like notions misses the point.

The laws and canons of a particular church or religious community need not be more inscrutable or inaccessible to a judge than those of any other entity or voluntary association. Again, then, the question: So far as the Constitution is concerned, is a religious institution just an expressive association? Are churches (just) like the Boy Scouts?

#### IV.

To review: We started with the fact that churches, like "expressive associations," appear to enjoy an exemption from otherwise applicable antidiscrimination requirements, and with the suggestion that this is both a curious and an interesting feature of our laws and conversations relating to religious freedom. According to a recent and important book by two leading scholars in the field, churches' right-to-discriminate does not – and, indeed, may not – depend on their special constitutional status or on an thoroughgoing commitment to church-state "separation." It reflects, instead, nothing more than the equal rights of religious believers – *i.e.*, their autonomy and privacy rights – to form associations, seek guidance and role-

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<sup>73</sup> See, e.g., *Thomas*, 450 U.S. at 715 ("Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences."); *Milivojeovich*, 426 U.S. at 714 n. 8 ("Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes."); *Watson v. Jones*, 80 U.S. 679, 729 (1872) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of [church] bodies as the ablest men in each are in reference to their own.").

<sup>74</sup> *TRIBE*, *supra*, at § 14-11, at 1232 n. 46. See also *Garnett*, *supra*, at 1658-59.

<sup>75</sup> Cf., e.g., *Lupu & Tuttle*, *supra*, at 58-59 (noting that a "weaker" argument for limiting courts' review of religious matters is their "lack of judicial expertise on matters of religion").

models, provide consolation and mentoring, *etc.*

Given the power in our thinking, and in our traditions, of the idea of “separation,” it made sense to hesitate before joining Professors Eisgruber and Sager in rejecting the idea, both as a general rule and as the basis for churches’ right to select ministers without regulatory oversight. And, this hesitation seemed even more warranted after we pushed deeper, past President Jefferson and the Danbury Baptists, to the “revolutionary” significance in the history of western constitutionalism of *libertas ecclesiae*. The historical, structural significance of that freedom, of church autonomy, provides, at the very least, reasons to be skeptical about the reductionist, churches-as-expressive-associations account. And yet, even a far-too-quick overview of the church-autonomy doctrine and its place in constitutional law has left us wondering whether, in the end, it is all just “equal liberty” after all.

If Professors Eisgruber and Sager are right, and the “separation of church and state” – even if understood in Gelasian and Gregorian, and not merely Jeffersonian, terms – cannot supply a defensible, principled distinction between the privacy and autonomy that is promoted through the freedom of association and whatever goods or values are served by churches’ exemptions from antidiscrimination laws, then what? The thoughts that follow are tentative and incomplete. Still, maybe they point in a productive, or at least provocative, direction.<sup>76</sup>

Professor Schauer observed, about a decade ago, that First Amendment doctrine tends to ignore institutions.<sup>77</sup> Free-speech law in particular, he contended, “has been persistently reluctant to develop its principles in an institution-specific manner, and thus to take account of the cultural, political, and economic differences among the differentiated institutions that together comprise a society.”<sup>78</sup> Instead, the doctrine tends to employ speech categories that reflect differences in “content” (“obscenity” and “incitement”, for example) or in public-property location (“traditional public forums”, “designated public forums”, *etc.*). This “institutional agnosticism” with respect to the “increasingly obvious phenomenon of institutional differentiation,” Schauer warned, undermines

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<sup>76</sup> The thoughts that follow are developed in more detail in Richard W. Garnett, *Toward an Institutional Understanding of the Religion Clauses*, \_\_\_\_ VILL. L. REV. \_\_\_\_ (forthcoming 2008).

<sup>77</sup> Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

<sup>78</sup> *Id.* at 84.

the Amendment's implementation and the commitments it reflects.<sup>79</sup> In the real world – *i.e.*, the world to which legal categories are applied and the salient features of which those categories should capture and reflect – institutions differ, and matter.

In recent years, a number of other scholars have been inspired, or provoked, to take up Schauer's invitation to re-think the "institutional agnosticism" of First Amendment theory and doctrine. Professor Paul Horwitz, for example, has suggested that universities are "First Amendment institutions" whose special status and function should be reflected in constitutional doctrine.<sup>80</sup> Professor Roderick Hills has presented an "institutional theory of rights" that emphasizes the structural, power-dividing function of private associations.<sup>81</sup> David Fagundes has taken an "institutional rights approach" to the problem of speech by government entities and actors.<sup>82</sup> At a February 2007 conference convened to explore the "role of institutional context in constitutional law,"<sup>83</sup> Schauer reaffirmed his view that "there are important institutional distinctions that constitutional law systematically ignores," suggested that recognizing and giving doctrinal effect to these distinctions "might well serve deeper First Amendment purposes," and again invited efforts to develop and defend institutional approaches and institution-specific categories.<sup>84</sup> And, Professor Scott Moss – while acknowledging the critique that First Amendment doctrine is "institutionally oblivious" – has highlighted and warned of the dangers that can accompany "excessive institutional tailoring" in free-speech cases arising in prisons, workplaces, and public schools.<sup>85</sup>

So far, the conversation about the alleged failure of First

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<sup>79</sup> *Id.* at 120, 87.

<sup>80</sup> See Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461 (2005); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, \_\_\_ U.C.L.A. L. REV. \_\_\_ (forthcoming 2007). [Anuj Desai on Post Office].

<sup>81</sup> Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003).

<sup>82</sup> David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006).

<sup>83</sup> UCLA Law Review Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law* (Feb. 2, 2007).

<sup>84</sup> Schauer, *Institutions*, *supra*. See also Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); see Schauer, *Principles*, at 118 ("If First Amendment doctrine were subdivided along institutional lines, it is possible that the doctrine would be better poised not only to capture important institutional differences, but also to recognize the potentially distinct First Amendment status that the arts, universities, libraries, and journalism, and possibly other institutions such as elections, possess.").

<sup>85</sup> Scott A. Moss, *Prisoners and Students and Workers – Oh My! A Cautionary Note about Excessive Institutional Tailoring of First Amendment doctrine* (on file with author)..



Amendment doctrine to capture, translate, and protect the importance of distinct social, political, and other institutions has focused almost entirely on the Amendment's Speech and Press Clauses and on the importance of certain institutions – newspapers, universities, libraries, political parties, *etc.* – to those Clauses purposes and underlying values. It seems both worthwhile and important, though, to consider the force and implications of Schauer's diagnosis in the context of the freedom of religion, and to explore the possibility of an institution-sensitive approach to the First Amendment's Religion Clauses. Are there institutions that, in Professor Horwitz's words, "play a fundamental role in our system of [religious freedom]"?<sup>86</sup> Others have noted this possibility, and the promise of such an approach, but have not yet pursued it.<sup>87</sup> Have courts and commentators, in fact, been "institutionally agnostic" when it comes to Religion Clauses doctrine? Have the categories and doctrinal tools we use to frame Religion Clauses disputes and decide Religion Clauses cases missed, or mis-described, the role of institutions and institutional context? If so, what are the implications of this mistake, and how might it be corrected? To what extent could or should religious institutions be regarded in law as "Religion Clauses Institutions" that contribute in a distinctive and important way – in a way that distinguishes them from the Boy Scouts – to the protection and exercise of religious freedom? Questions like these tend, of course, pull our thinking about "the separation of church and state" away from questions relating to the role of religion in civil society, or the place of religiously grounded arguments in public life, and toward those involving the actual relations between "church" and "state." And so, they might help us identify what it is that the Religion Clauses govern as the relationship, interactions, entanglements, and nexus between certain religious institutions (the "church") and certain political institutions (the "state").

An "institutional" approach to the Religion Clause might proceed from a claim that the values that the First Amendment is today understood to embody and protect – and, we might usefully refer to this cluster of goods and values as "religious freedom" – are well served by a civil-society landscape that is thick with churches (and mediating institutions and associations of all kinds) and by legal rules that acknowledge and capture their importance. And, it might push us to think a bit more than we have about religious institutions' status, rights, immunities, and obligations. If "churches" have "rights", how is this true? If they have "autonomy" or independence, what does this really mean?

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<sup>86</sup> Horwitz, Grutter's *First Amendment*, *supra*, at 589.

<sup>87</sup> See, e.g., Schauer, *Institutions*, *supra*, at \_\_\_\_; Horwitz, *Universities*, *supra*, at 12, 30-31; Hills, *Private Governments*, *supra*, at 149, 161-63, 183-84, 189-90, .

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To ask these questions is not even to come close to answering them. Nevertheless: Following Professor Schauer and others, I have suggested in this concluding part that institutions matter, in the real world and to the values that, we think, the First Amendment's Speech, Press, and Religion Clauses embody and protect. That the much-maligned and often-misused idea of church-state "separation" remains at the heart of our thinking not only about the Constitution's religion-related provisions, but also and more generally about religious freedom under limited government suggests an opening for an approach to the First Amendment that treats "churches" – like newspapers, political parties, universities, libraries, expressive associations, *etc.* – as "First Amendment institutions." That is, if newspapers and universities matter, in a special way, for the meaning and values of the free speech clause, and if we suspect – even if we are not yet convinced – that it might make sense for free-speech doctrine and categories to not be blind to the contours of these institutions – then perhaps the same thing is true with respect to the Religion Clauses?

Of course, the relevant history of the First Amendment's Free Exercise and Establishment Clauses is famously, even frustratingly, contested. Their aims are multiple.<sup>88</sup> Some seem clear, others seem obscure. It is far from obvious what this provision was understood to do, in terms of constraining the national government, let alone the states; and it is no less clear what it should mean for us today. Even those of us who are sympathetic to the view that, all things considered, constitutional provisions should be understood and applied, to the extent possible, in accord with their original public meaning, so as to leave more space for evolution through the democratic process and to constrain judges – even we have to admit that the First Amendment's religion clauses serve primarily as vehicles for the construction and implementation of one or another political theories about the nature and value of religious freedom, the merits and demerits of majoritarianism, the place of religious expression in the public square, and the appropriate relations between religious and political authority and institutions.

So, we can be resigned to the fact that the Religion Clauses' meaning, purposes, and values are contested and contestable. It is still true, we all agree, that the implementation, application, interpretation, and

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<sup>88</sup> See generally, *e.g.*, WITTE, *supra*.

enforcement of these Clauses is going to involve the development and deployment of categories, doctrines, and abstractions. Maybe we can also agree that the claims developed by others in the context of the Free Speech Clause, with respect to the need for institution-sensitive doctrine, have some force in the Religion Clauses context as well. Finally, we might agree to consider the possibility that an institutional approach could, and should, make room for, and build upon, the commitments embodied in the ancient idea of the “freedom of the Church,” an idea that, with all due respect to the Boy Scouts, is bigger than “be prepared.”