Lost in Translation: A Dilemma for Freedom of the Church

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I. INTRODUCTION

Contemporary proponents of freedom of the church defend three main claims: first, that the church is a sovereign institution; second, that the church's sovereignty warrants special legal protections beyond those available to non-religious voluntary associations (e.g., the university, the press, the Boy Scouts); and third, that the church's sovereign status is singular, meaning that it is not derived from the rights and interests of

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those who comprise it.\textsuperscript{1} We take these three theses—involving the 
sovereignty, specialness, and singularity of religious institutions—to 
define the core elements of freedom of the church.

We have argued elsewhere and at length against this understanding of 
freedom of the church as a form of religious institutionalism.\textsuperscript{2} Rather 
than rehearsing all of our earlier objections, in this brief symposium 
contribution, we focus on a dilemma for proponents of freedom of the 
church. The problem is that the historical justifications for the church’s 
sovereignty are explicitly theological. Those justifications might provide 
internally coherent arguments for the three theses described above, but 
they do so in highly sectarian terms. Those who reject the religious 
foundations of the freedom of the church will have no reason to accord 
special and singular sovereign status to religious institutions.

Some proponents of freedom of the church appear to recognize this 
problem. Instead of defending their views on sectarian grounds, they rely 
on a more familiar constitutional argument for church sovereignty.\textsuperscript{3} This 
argument, which sounds in classical republican theory, focuses on 
the importance of intermediary groups in maintaining social and political 
pluralism, which helps to guard against threats to liberty from the modern 
secular state. But while this argument is not sectarian, it fails to support 
the specialness and singularity of religious institutions.

Freedom of the church thus faces what we might call a \textit{translation} 
dilemma. The idea has its roots in eleventh-century Catholic thought. 
The popes who developed the slogan \textit{libertas ecclesiae} were locked in a 
struggle with secular emperors over the scope of their respective powers: 
armies were mobilized, territory was defended or conquered, and sovereign 
powers were threatened and overthrown.\textsuperscript{4} But the social and political 
conditions that gave rise to the medieval conception of freedom of the 
church no longer hold. Even if there is only one political sovereign in a 
jurisdiction, there are now many churches, none of which has the 

\textsuperscript{1} See Steven D. Smith, \textit{Freedom of Religion or Freedom of the Church}, available 
Freedom of the Church}, 4 J. CATH. SOC. THOUGHT 59 (2007); Paul Horwitz, \textit{Church as 
First Amendment Institutions: Of Sovereignty and Spheres}, 44 HARV. C.R.-C.L. L. REV. 79 
(2009); Patrick McKinley Brennan, \textit{The Liberty of the Church: Scope, Source, and Scandal}, 
21 J. CONTEMP. LEGAL ISSUES 165 (2013).

\textsuperscript{2} See Richard Schragger & Micah Schwartzman, \textit{Against Religious Institutionalism}, 

\textsuperscript{3} See Richard W. Garnett, "The Freedom of the Church": (Towards) An Exposition, 

\textsuperscript{4} See generally R. W. SOUTHERN, \textit{WESTERN SOCIETY AND THE CHURCH IN THE 
MIDDLE AGES} 16–23 (1970); BRIAN TIERNEY, \textit{THE CRISIS OF CHURCH AND STATE} 1050-
1300 (1988); WALTER ULLMANN, \textit{A SHORT HISTORY OF THE PAPACY IN THE MIDDLE AGES} 
attributes of anything like the sovereign power of the ancient Church. As even its proponents recognize, freedom of the church must be reformulated—or translated—to account for the pluralism and fragmentation of religion in modern democratic states. The traditional Catholic foundations of the doctrine must give way to a set of justifications that are more ecumenical and indeed more secular—justifications that can be adapted for use in constitutional democracies characterized by deep, pervasive, and persistent pluralism about not only religion, but also about non-religious comprehensive conceptions of the good.

But much is lost in this translation. The modern republican and constitutional arguments used to justify freedom of the church render the idea incoherent. They do not support any of the central features of the traditional doctrine—sovereignty, specialness, or singularity. As one intermediary association among others, the church—like the university, the press, or the civic association—is subject to the rule of law under a secular democratic authority. Religious institutions are entitled to legal protections, but they are not distinctive in this regard. Nor must they be conceived of as sovereign powers whose status lacks any connection to the rights and interests of their members. Neither sovereignty nor singularity is necessary to make sense of the importance of intermediary groups in fostering pluralism and diversity within our constitutional system.

The dilemma, then, amounts to a choice between two bad options: (1) to be internally coherent, freedom of the church must be justified on traditional theological grounds, which makes the doctrine sectarian and unfit for use in constitutional argument; or (2) its justification can be translated into secular terms, which renders the idea incoherent. Proponents of freedom of the church are divided over which horn they choose to tackle. But despite their efforts, the dilemma is intractable. At least when its content is defined by a commitment to the singular and special sovereignty of religious institutions, freedom of the church is an idea whose time passed long ago. There is no way to recover a coherent conception of it, nor is there, as we argue below, any reason to think that such a recovery is necessary to maintain a serious commitment to religious liberty.

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II. THE FIRST HORN: THE THEOLOGICAL ARGUMENT

How does one justify freedom of the church? Why should religious institutions have special legal protections beyond those that apply to non-religious associations? And why should those protections inhere in the sovereignty of religious institutions, rather than derive from the rights and interests of their members?

A theological answer to these questions has been forcefully presented in the pages of this symposium. The Church is sovereign because it is the embodiment of God’s presence on earth. Moreover, the Church does not derive its authority from the rights or interests of its members, let alone from the state, but rather directly from God. As Patrick McKinley Brennan explains, “[T]he Church must insist upon the truth about herself not because to do so is, say, an expression of the collective will of the faithful or of the hierarchy, but because ‘[t]he Church is founded by Christ; therefore it is juridically a ‘foundation,’ not a corporation, and its constitution, its fundamental law, is given directly by God and not ordained by the people’.” On this view, the Church is radically unlike any other religious or secular group in civil society. The source of its sovereignty is transcendent, which makes it *special* as compared to other corporate entities, as well as *singular*, in the sense of not deriving from the rights and interests of its members. As it understands itself, the Church is wholly (or, rather, holy) distinctive in the truth of its claim to divine authority, which entails its ultimate supremacy over any earthly power.

Although remarkable for its honesty and candor, this theological argument is a non-starter as a justification for affording legal protections to religious institutions in a religiously pluralistic democratic society. First, the argument only supports a claim asserted by the Catholic Church—not churches generally. Unless there is some form of natural theology underlying all religious belief systems—i.e., that all churches are really aspects of one church—then only the True Church warrants legal protection. False churches should not enjoy special claims to sovereign power. To the extent freedom of the church is justified according to


7. *Id.* at 168 (quoting, in part, HEINRICH ALBERT ROMMEN, *CHURCH AND STATE* 322 (1950)).

8. *See id.* at 188 (“The Church is possessed of legitimate ruling power, a real and final God-given jurisdiction… On the Church’s self-understanding… she speaks not in her own name, at least not ultimately, but in the name of Christ.”); Patrick McKinley Brennan, *Differentiating the Church and State (Without Losing the Church)*, 7 GEO. J. L. & PUB. POL’Y 29, 45 (2009) (asserting “nothing short of the superiority of the Church—that is, of the spiritual—over the body politics of the State”).
God's will, it cannot support protections for a diversity of religious institutions.

Second, and more importantly, the theological argument for freedom of the church provides no justification to those who do not share the religious views underlying it. It is simply not persuasive to argue that the Catholic Church or churches generally should be free of civil rule because the Church is the Body of Christ or because churches generally are following God's will. "Because Jesus said so" is not an argument or a justification; it is an assertion of power. Moreover, it communicates an implicit threat to those who do not agree—for how can one tolerate those who do not believe in God's truth? A more general—non-theological—account of institutional freedom is needed, one that can gain traction outside of religion or a specific religious tradition. Catholic doctrine—religious doctrine—has to be translated for the rest of us.

Before turning to non-religious arguments, however, we should pause here to observe a tension that emerges when one seeks to translate theological justifications into secular ones. The hardy among the advocates of freedom of the church should be willing to stand behind its theological content—and, as we have seen, some are willing to do that—even if it means ultimately advocating a religious state with the Catholic Church (or some other religious institution) at its core. For some believers, translation is akin to selling out, especially if the translator is someone who also professes belief in the doctrines of the Catholic Church.

Translation


10. Brennan defends a form of religious toleration, but claims that "common goods, natural and supernatural .... properly set the limits of tolerance." Brennan, Liberty of the Church, supra note 1, at 191. But given that the common good is interpreted according to Catholic doctrine, this conception of toleration is hardly reassuring. Indeed, Brennan suggests that, properly interpreted, Catholic doctrine rejects the right of non-Catholics to express their religious beliefs in public. On this view, religious toleration entails a right against coerced baptism and a right to practice one's religion in private, but no protection for the public expression of false belief. We think this conclusion is more than sufficient to motivate the concern about implicit threats mentioned in the text above.

11. See id. at 193.

12. Id. at 188 ("To the extent that these ["liberal pluralist"] arguments succeed in preserving some of the liberty of the Church, it may prove to be counterproductive to object to them or to oppose them. Or it may not be. The trouble is that they succeed, if
implies that the Church’s embodiment of the Truth is not sufficient to justify its sovereignty. To claim that the Church deserves legal protection because it functions as an intermediary group—one among many others—that protects against encroachments on liberty by the secular state is to reduce the Church to a mere instrumentality of republican checks and balances. The translation process loses what is essential about freedom of the church, namely, its justification in the Church’s relationship to Christ. On this view, secular arguments for the Church’s authority are, at best, a necessary inconvenience to guard against intrusions by the state; at worst, they are a cheap and degrading distraction from the Church’s “freedom to vindicate the divine will.”  

The intra-sectarian conflict between believers who are skeptical about translation and those who favor it is revealing, for it underlines the fraught nature of theological encounters with secular constitutional discourse. That Catholics—let alone other Christians—disagree so deeply about the content of freedom of the church should give the rest of us (non-Catholics or non-believers) reason for concern.

III. THE SECOND HORN: THE SECULAR ARGUMENT

For those scholars who accept that theological justifications will not persuade or are inappropriate in a religiously pluralist society, a different justificatory problem emerges. Once one begins to translate theological doctrine into secular terms, the supposed religious origins of church-state separation and thus the historical justification for the invocation of freedom of the church falls away. If the separation of church and state is based on a theological premise, i.e., freedom of the church, why not own that premise altogether? Certainly those who believe that churches play a special role in preserving constitutional government should do so.

But they do not. In order to draw the sting of religious hubris, more moderate advocates of freedom of the church ground their argument in social pluralism and the importance of mediating institutions. They make a structural or constitutional argument that encompasses all religious traditions, arguing that religious institutions are uniquely important for

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they do at all, at the high price of distorting or eclipsing the Church’s claims about something antecedent to herself: Christ.”.

13. Id. at 190.
the proper functioning of a constitutional democracy.\textsuperscript{15} Being at the origin of constitutionally limited government, churches continue to play a central role in that form of government. Freedom of the church is thus akin to federalism. Indeed, at times, advocates argue that church sovereignty is a necessary condition for modern constitutionalism; without jurisdictional limits imposed on the state by the presence of another sovereign power (i.e., the church), constitutional government as we know it would collapse.\textsuperscript{16}

This argument is the core of the translation project, and its appeal lies precisely in its accessibility (and perhaps acceptability) to a diverse audience of believers and non-believers alike. But it is deeply flawed in a number of ways. First, it rests on a genetic fallacy. It is possible that the church-state separation of the Middle Ages represented the beginnings of the concept of limited government.\textsuperscript{17} But there is no reason to believe that freedom of the church is essential for limited government today. The rise of democratic, constitutional regimes, the liberal conception of individual rights, and the development of decentralized, market economies do most of the work that institutional separation may have done in a feudal society dominated by the twin hierarchies of church and crown.

Second, and relatedly, the ambitious claim that constitutional government in a post-feudal society depends on church sovereignty is not at all obvious. One can easily imagine a constitutional democracy in which religious institutions have lost their verve and withered away or in which the populace has become estranged from religion and churches play a quite minor role in society generally.\textsuperscript{18} Third, and most importantly, why privilege only churches? Why are other institutions, like the press, the family, the corporation, or the political party, not just as essential to the constitutional order? Some advocates of an institutional account of religious liberty do indeed embrace all such “First Amendment” institutions.\textsuperscript{19} But

\textsuperscript{17} See generally Tierney, Crisis of Church and State, supra note 4, at 165–66; Berman, Law and Revolution, supra note 16, at passim.
\textsuperscript{19} See Paul Horwitz, First Amendment Institutions (2012); Paul Horwitz, Defending (Religious) Institutionalism, 99 Va. L. Rev. 1049, 1053 (2013).
once one admits that religion and religious institutions are not unique, the force of the argument for freedom of the church melts away. There is no reason to give churches legal protections that other institutions do not have.

Embedded in the argument for freedom of the church is the controversial claim that organized religion is necessary for constitutional government. This claim should be surprising, as many in the Founding generation believed that organized religion was antithetical to constitutional government, as Alan Brownstein’s contribution to this symposium shows. Indeed, the argument for church centrality implies a much more robust role for church institutions than our constitutional tradition imagines. If churches were so important, why were they not built into the structure of the federal Constitution, whose body makes no mention of churches or freedom of the church? The First Amendment is an important limitation on government—no doubt—but the argument that churches are at the center of our political structure is not at all apparent from any account of the organization of our political state.

It is notable that the argument for church sovereignty turns out to be a republican one—steeped in a theory of participatory mediating institutions, the need for a rich non-state social world that can protect individual liberty, advance non-state values, and guard against state uniformity and overreaching. But republican theory is misplaced here. First, republican theorists at the Founding and beyond have always been deeply skeptical of hierarchical, corporate institutions, whether state or church. As Sarah Barringer Gordon’s recent work has shown, republican political principles were deployed in the antebellum period to regulate, limit, and constrain institutionalized religion. State legislators adopted severe limits on church property holdings, restrictions on clergy power, and regulations that mandated lay control of religious organizations. Advocates of freedom of the church emphasize its anti-statist valence, but anti-statism in republican America was not restricted to governments. It was extended to all institutions that attempted to insulate themselves from popular control. Church hierarchies were by definition anti-republican.

23. See Gordon, State v. Church, supra note 22.
Second, even if religious institutions embrace republican principles, it is not self-evident that providing state-granted immunities from government regulation will produce churches that are more inclined to resist state co-optation. Immunities may instead produce churches that are beholden to the state or—more likely—churches that are unconcerned about resisting state requirements—since they do not need to comply. The values of resistance could be better served by making churches equally subject to state law. State-granted autonomy can be an instrument that induces quiescence, not resistance.\textsuperscript{24}

Republican political theory does not get advocates of church sovereignty very far. But even if it did, the translators have a bigger problem: if they succeed in their project then we do not need freedom of the church. The supposed theological foundations of religious liberty are not—it turns out—theological at all. Non-religious doctrines—federalism, the rights of conscience and association, the value of mediating institutions, corporations, and unions—do all the necessary work. Furthermore, churches are just one of many valuable institutions and associations, all of which contribute to a flourishing civil society.\textsuperscript{25} In this way, churches are assimilated, domesticated, brought into the great open maw of liberalism, which is more than capacious enough to embrace them. Translation will succeed but only at the cost of religion’s and religious institutions’ special status.

IV. DEFENDING THE DILEMMA

Stuck on the horns of the translation dilemma, strong proponents of freedom of the church may be inclined to attack the choice of options as we have presented them. More specifically, they may argue that the distinction between religious and secular justifications for religious liberty, including freedom of the church, is falsely posed. That is because, on their view, the divide between the religious and the secular is itself a


\textsuperscript{25} We argue this point at greater length in Schragger & Schwartzman, \textit{Against Religious Institutionalism}, supra note 2, at 953–56.
product of a contested and non-neutral ideology. 26 The liberal insistence on a separation of church and state, and on protection for the freedom of conscience, is itself a religious imposition, indeed one with a distinctly Protestant cast to it. 27 On this account, religious freedom is a “myth” because there is no non-religious perspective from which the state can govern. 28 

The implications of this argument are dramatic. Because the divide between secular and religious is contested and contestable—indeed, because those terms are themselves incoherent—it is impossible to talk about “freedom of religion” or the “free exercise” of religion, since there is (and can be) no such thing. 29 There is no individual, autonomous, private realm; the state is always and already defining the contours of right thinking. Thus, all that is left are rival institutions asserting competing powers, understood in terms of their respective jurisdictions. 30 Religious freedom, on this view, involves mediating church-state disputes by demarcating institutional and perhaps territorial boundaries. But ultimately there is only a balance of power—the relative powers of church and state. 31 On this account, the individual right of conscience is historically and conceptually derived from the institutional freedom of the church, not the other way around. Moreover, since that institutional freedom was and continues to be theologically justified, the right of conscience that follows from it is similarly restricted in its scope and content. 32 

More moderate proponents of freedom of the church are right to be wary about the radical implications of this account. They do not want to endorse a theory that subverts the conceptual foundations of freedom of conscience and the free exercise of religion. But nothing less radical than denial of the distinction between the secular and the religious can save proponents of freedom of the church from the dilemma they face. Proponents can, as we have already observed, take the theological horn of the dilemma and concede that freedom of the church cannot be publicly justified in a pluralistic democratic society, or they can accept


28. See id.; see also Stanley Fish, The Trouble with Principle (2001).


the secular horn, which leads to assimilation of religious institutions into the broader category of voluntary associations. A third option is to reject the terms of the dilemma altogether by undermining the distinction between the secular and religious, yielding the extreme conclusion that there can be no such thing as freedom of religion but only freedom of the church.33

If proponents of freedom of the church are going to accept any of these options, we suggest they choose the second. Better to defend religious institutions on constitutional and republican grounds, while conceding that their status is not special among expressive voluntary associations, than accept either a sectarian justification for freedom of the church or a view of religious liberty that jettisons the theoretical foundations of individual conscience and religious free exercise. Rather than defend freedom of the church, a more defensible (if not, we think, the most defensible) position would be to argue for some measure of deference to the collective rights of expressive associations.

On this view, freedom of the church would give way to a broader conception of freedom of association. Churches would not be conceived of as sovereign, but rather as the voluntary associations that they are. They would not be special, but rather protected like other important civic associations. And at least for constitutional purposes, they would not be singular, but rather collective agents that reflect the rights and interests of those who sustain them over time. Although much work remains to be done in describing this more plausible and attractive account of associational freedom,34 it at least has the advantage of avoiding the translation dilemma faced by proponents of freedom of the church.

V. Why Institutional Sovereignty?

Advocates of religious institutional sovereignty are responding to a deeply felt truth: religious activities and exercises do take place in groups, within institutions—not always, but frequently. Advocates argue that freedom of the church captures this collective component better than does an individual right of conscience. Moreover, they argue that the recognition of a collective dimension to religious liberty makes better

sense of existing legal doctrines, such as the rules against government interference with religious questions, the limits on government intervention in church schisms, and—most recently—the restrictions on government regulation related to the employment of ministers.35

Certainly there is a collective dimension to the exercise of individual rights. But the idea that individual conscience cannot accommodate or understand such group exercise is incorrect. In fact, group autonomy must be premised on individual affiliation—reflected in a person’s right to enter or exit a voluntary association.36 No institutionalist has yet rejected religious voluntarism and for good reason: the coerced dissenter is the paradigm offence to any liberal conception of religious liberty. At a minimum, we respect the individual’s moral and political right to decide her own religious affiliation.37

It is thus a caricature of rights-based liberalism to assert that it is not concerned with groups. It is the way groups form and to what extent they are able to exercise power that concerns liberalism—and here, it is true that the individual is the starting point, at least for political and legal purposes. But the rights of conscience, speech, and association are all more than capacious enough to capture the ways in which these rights are exercised in and through groups.38 Conscience is developed through relationships in and among expressive associations of all kinds.39 Nothing in liberal theory needs to deny the existence and importance of groups, associations, and mediating institutions.40

Indeed, the burden is on institutionalists to point to rights claims that can only be explained with reference to an irreducible group. It is quite difficult to locate such claims, for it is hard to imagine an institutional


36. The classic statement of this view is Locke’s. See JOHN LOCKE, A LETTER CONCERNING TOLERATION 28 (James H. Tully ed., 1983) [1689]; see also Laycock, Church Autonomy, supra note 35, at 1405 (“[V]oluntary affiliation with the group is the premise on which group autonomy depends.”).

37. For further discussion, see Schragger & Schwartzman, supra note 2, at 957–62.


40. See JOHN RAWLS, A THEORY OF JUSTICE 467–71 (1971) (discussing the importance of associations in the development of moral psychology and the capacity for a sense of justice); see also AMY GUTMANN, IDENTITY IN DEMOCRACY 86–116 (2004) (discussing the value of voluntary associations within liberal theory).
claim of religious freedom that does not reflect some underlying individual claim (or set of individual claims). The church's doctrinal and theological integrity, its freedom to run its affairs, its power to admit or excommunicate members, its ability to choose its leaders—these are all easily understood as extensions of individuals' rights of conscience and association that inhere in members of the church. The institutional rights articulated by proponents of freedom of the church are either based on a strong metaphysical or theological claim about the Church's personhood, or on an instrumental claim about the good of mediating institutions to promote human flourishing. The former claim is not translatable, as we have argued, so it can be put aside. The latter claim, however, presumably advocates the protection of churches not for the churches' sakes, but for the sake of those who engage in individual and collective free exercise within them. One does not need a separate theory of institutional sovereignty to protect groups, associations, corporations, or churches.

Perhaps what motivates the search for a theory of church sovereignty is the sense in some quarters that individual religious liberty is under assault. We should note parenthetically (again relying on Sarah Barringer Gordon's work) that when compared to their treatment in the 19th century, religious institutions are doing quite well. Anti-clericalism has receded dramatically. Religious institutions hold significant assets and receive significant amounts of direct state funding. Churches enjoy tax exemptions and a charitable deduction regime that heavily subsidizes

41. See Brennan, Differentiating the Church, supra note 8, at 45; John Courtney Murray, S.J., Are There Two or One? The Question of the Future of Freedom, in We Hold These Truths: Catholic Reflections on the American Proposition 184–86 (1960).
43. See Smith, Discourse in the Dusk, supra note 26, at 1903–06; Garnett, Freedom of the Church, supra note 1, at 86.
44. See Gordon, State v. Church, supra note 22; Gordon, Landscape of Faith, supra note 22.
45. In the last two decades, however, sex abuse scandals have given rise to new forms of skepticism about the ability of religious (and other) institutions to self-regulate and to be trusted to police their own without external oversight. See, e.g., Marci Hamilton, God v. The Gavel: Religion and the Rule of Law (2007).
their operations. Moreover, despite claims that American society is hostile to religious believers, religious institutions and their members have and continue to exercise substantial political power.

The "war on religion" narrative continues apace nevertheless, fueled in large part by changing sexual mores—the women's and sexual liberation movements, abortion and birth control, and now the battle over LGBT equality. Another important contributing factor, which may partly explain the relatively recent turn toward religious institutionalism, is the Supreme Court’s decision in Employment Division v. Smith, which rejected a free exercise claim for exemptions from generally applicable laws for religiously-motivated conduct. For over twenty-five years, religious accommodationists have bemoaned Smith and sought to work around it. Freedom of the church is only the most recent conceptual effort to avoid Smith and regenerate some measure of constitutional immunity for religious conduct.

To this end, religious institutionalists have expressed the hope that Hosanna-Tabor v. EEOC, in which the Supreme Court unanimously affirmed a constitutional exemption from federal employment laws for ministerial employees, will mark the beginning of a larger shift in the constitutional law of religious freedom. As many commentators have observed, Hosanna-Tabor is difficult, if not impossible, to square with


52. *Id.* at 879.


Smith. Smith held that there is no free exercise right to an exemption from neutral and generally applicable laws. Hosanna-Tabor holds that, at least with respect to ministers, there is a free exercise (and Establishment Clause) right to an exemption from neutral and generally applicable employment laws.

No one knows what the Court will do going forward with this emerging inconsistency. Hosanna-Tabor might represent only a small carve-out from the general rule of Smith, or it might auger a more significant break with that decision. Either way, many institutionalists view Hosanna-Tabor as the constitutional birth of freedom of the church—a new theory of institutional religious liberty that may, in time, lead to the demise of the rule in Smith.

We are skeptical that Hosanna-Tabor represents anything of the sort. That decision can be explained by appealing to more conventional rights of conscience and association. And any additional retreat from Smith need not refer to institutions at all, but only to rights of conscience and religious free exercise, which have been the grounds for criticizing Smith for more than a quarter-century. Standard liberal arguments based on individual rights of conscience, along with the freedom of association with which they are intimately connected, can do all the work needed to undermine Smith—if that is one’s goal. Indeed, we suspect that antipathy for Smith is what is really driving the development of an institutional theory, as opposed to some deep realization that liberal theory has gone awry.

It is of course appropriate to argue over whether Smith and Hosanna-Tabor are rightly decided. We think that both cases (and indeed, all cases involving religious claims of exemption from generally applicable laws) involve balancing rights of conscience against important public interests, which may include protection of competing rights of conscience. That balancing is difficult, and appeals to church sovereignty cannot circumvent it.

57. See Schragger & Schwartzman, supra note 2, at 974–79.
VI. CONCLUSION

Freedom of the church has been resurrected out of an ancient history. But to make sense of it today requires justifying a theory of sovereignty for institutions that look much different now than they did when the idea was first developed. Our democratic society is marked by a religious—and sometimes irreligious—pluralism that did not play a role in the early development of church sovereignty. Freedom of the church must be translated or adapted to modern conditions. It is not obvious, however, how this can be done, at least not while preserving the essential features of the doctrine. Indeed, there are reasons to be skeptical about the possibility of rescuing the idea of *libertas ecclesiae* from the limits of its original historical and theological contexts. Moreover, as we have argued, it is not clear why such an idea is needed given the liberal rights of conscience and association that have become familiar parts of our constitutional law over the last half century. Those rights must be reinvigorated now and again, but at least they speak in terms that are readily understandable to a wide diversity of religious and non-religious citizens.

It is not necessarily in “bad taste” to argue that one’s political or legal views are justified on theological grounds. For example, if some Catholics want to argue that “an adequate conception of *libertas ecclesiae* is predicated upon an acceptance of the concrete implications of the social kingship of Christ,” they are, of course, free to do that. In a liberal society, there will be no hand-wringing about their right to publicly express their religious beliefs, including beliefs about the proper shape of constitutional law. But that law should not be shaped by sectarian theological views. If freedom of the church is to play any role in our constitutional thinking, it must be articulated in a way that can, in principle, be made acceptable to those who reject, quite reasonably, the religious foundations of the medieval conception of it. We are skeptical that such an account can be developed, not without abandoning the commitments to the specialness and singularity of the church that make

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60. See Brennan, *Liberty of the Church*, supra note 1, at 166 (asking whether it will “be considered socially unacceptable—‘intolerant,’ even—to expound the concept of the liberty of the Church in its own right, that is, as understood by the Catholic Church with respect to herself, which, after all, is where the concept originated?”).

61. *Id.*

62. Can the same be said for the rights of religious minorities to express their religious beliefs publicly under traditional Catholic doctrine? See Brennan, *Liberty of the Church*, supra note 1, at 184–87 (arguing that the “[Catholic] tradition plainly, authoritatively, and repeatedly” teaches that non-Catholics “[d]o not possess a natural right not to be prevented from the public expression of error”).
the doctrine so appealing to its proponents. But that is no reason for despair. Not everything that is lost can or must be found.
"The Freedom of the Church":
(Towards) An Exposition, Translation,
and Defense

RICHARD W. GARNETT*

In his *Law and Revolution*, Harold Berman identified and discussed, among (many) other things, the implications and effects of a “revolutionary change within the church and in the relation of the church to the secular authorities” that took place in western Europe during the late-eleventh and early-twelfth centuries.¹ This “revolution,” he argued, involved more than intra-church arrangements, or relations among popes, bishops, kings, and emperors, and “include[d] within its scope all the interrelated changes that took place at that time,” including “the revolution in agriculture and commerce, the rise of cities and of kingdoms as autonomous territorial polities, the rise of the universities and of scholastic thought, and other major transformations”—including the “invention of the concept of the State” and “the creation of modern legal systems”—“which accompanied the birth of the West.”² And, a powerful “slogan” of the revolutionaries

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1. HAROLD BERMAN, LAW AND REVOLUTION 87 (1983).
2. *Id.* at 23, 87.