Article

Towards Religious Institutionalism? The Future of the Regulation of Religious Institutions in Taiwan

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ABSTRACT

This article analyzes a newly emerging approach to the autonomy of religious institutions in Taiwan's constitutional jurisprudence developed by Justice Chen Shin-Min of the Constitutional Court of Taiwan. In his concurring opinion in Judicial Yuan Interpretation No. 728, Justice Chen suggests that religious associations occupy a distinctive place in the ROC Constitution and thereby deserve a higher level of constitutional protection which is not enjoyed by other voluntary associations. This view is in contrast to an underlying assumption in the Court's previous jurisprudence on freedom of religion, namely, that the norms and activities of religious groups are presumptively subject to the authority of state law.

The divergent understandings of the authority of state law in relation to religious institutions in Taiwan's current constitutional jurisprudence parallel the ongoing debate in the American legal scholarship over the idea of "religious institutionalism." I discuss different perspectives proposed in this debate and argue that, in light of Taiwan's specific circumstances, the approach developed by Ira Lupu and Robert Tuttle--which claims that religious institutions are entitled to special treatment in law for their activities that are intimately connected with their

DOI：10.3966/181263242017031201003

* Doctor of Civil Law candidate, McGill University Faculty of Law. I would like to thank the anonymous reviewers for their valuable comments that help improve the quality of the paper. I benefited greatly from a discussion with Victor Muñiz-Fraticelli and Daniel Weinstock on the issues addressed here. I thank them for having inspired me to write this paper in that discussion. I am also indebted to Vrinda Narain for her encouragement during my writing process and for her comments on an earlier draft of this paper. All remaining errors, of course, are mine.

distinctively religious quality--deserves more of our attention. I conclude by commenting on the ways in which both Justice Chen's approach and the traditional assumption of the authority of state law over religion can be modified on the basis of Lupu and Tuttle's theoretical arguments.

Keywords: *Religious Institutions, Constitutional Court of Taiwan, J. Y. Interpretation No. 728, Religious Institutionalism, Distinctive Treatment for Religion*

CONTENTS

I. INTRODUCTION

This article analyzes the emerging disagreement in Taiwan's constitutional jurisprudence over the ways in which religious organizations should be regulated. The Constitutional Court of Taiwan (also known as the Council of Grand Justices) is one of the oldest constitutional courts in East Asia.[1] However, since the Court's establishment in 1948, there have been few discussion on the issue of freedom of religion in its Judicial Yuan Interpretations (decisions of the Court)--only 3 out of the 736 Interpretations so far (March 2016) directly address the constitutional protection of freedom of religion.[2] The issue of the autonomy of religious organizations had not received the Court's formal attention until 2004 in Judicial Yuan Interpretation No. 573.

This situation could change and a more vibrant discussion could be anticipated with Justice Chen Shin-Min of the Court recently expressing a view on the regulation of religious organizations that pushes the boundaries of Taiwan's jurisprudence on this issue. In J.Y. Interpretation No. 728, Justice Chen recognizes that religious associations have a distinctive place in Taiwan's Constitution (formally known as the Constitution of Republic of China, the ROC Constitution) and thereby deserve the strongest degree of constitutional protection. This view challenges an underlying assumption in the Court's previous jurisprudence, namely, that state law is sovereign over the norms and activities of religious groups.

In addition to pointing out the tension between this assumption and Justice Chen's concurring opinion in J.Y. Interpretation No. 728, this paper considers the way forward by looking at a similar and ongoing debate primarily in American legal scholarship on the idea of "religious institutionalism." Religious institutionalism is an institutionalist approach to religious freedom which claims that religious entities enjoy a form of legal sovereignty and are largely beyond the jurisdiction of the state.[3] This debate

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1. *See* Wen-Chen Chang & Jiunn-Rong Yeh, *Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 373, 373-74 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

2. The three Interpretations are: Sifa Yuan Dafaguan Jieshi No. 460 (司法院大法官解釋第460號解釋) [Judicial Yuan Interpretation No. 460] (July 10, 1998) (Taiwan), Sifa Yuan Dafaguan Jieshi No. 490 (司法院大法官解釋第490號解釋) [Judicial Yuan Interpretation No. 490] (Oct. 1, 1999) (Taiwan), and Sifa Yuan Dafaguan Jieshi No. 573 (司法院大法官解釋第573號解釋) [Judicial Yuan Interpretation No. 573] (Feb. 27, 2004) (Taiwan). The Court also addressed the issues related to the regulation of religion in two earlier Interpretations: Sifa Yuan Dafaguan Jieshi No. 65 (司法院大法官解釋第65號解釋) [Judicial Yuan Interpretation No. 65] (Oct. 1, 1956) (Taiwan) and Sifa Yuan Dafaguan Jieshi No. 200 (司法院大法官解釋第200號解釋) [Judicial Yuan Interpretation No. 200] (Nov. 1, 1985) (Taiwan). But the Court's opinions in these two Interpretations were very short and did not explore the idea of freedom of religion in a meaningful way.

3. *See* Paul Horwitz, *Church as First Amendment Institutions: Of Sovereignty and Spheres*, 44

provides a rich source of inspiration for the future development of Taiwan's own constitutional approach to the autonomy of religious institutions. I will discuss some of the major positions in this debate and consider the ways in which they may inform the understanding of the relationship between the state and religious groups in the Taiwanese context.

The plan of the article is as follows. Section II first presents the main ideas in Justice Chen's recent concurring opinions. It then describes the ways in which Justice Chen's view is different from the assumption that the norms and activities of religious groups are presumptively subject to the authority of state law, which I argue is an underlying yet important theme in both J.Y. Interpretation No. 490 and J.Y. Interpretation No. 573. Section III focuses on the debate on the idea of religious institutionalism. I first discuss the positions of two main proponents of the institutionalist approach to religious freedom, Paul Horwitz and Richard Garnett, followed by a discussion of two alternative views on this issue, that of Richard Schragger and Micah Schwartzman, on one hand, and that of Ira Lupu and Robert Tuttle, on the other. Section IV considers which of the positions proposed in this debate is more useful in the Taiwanese context where religion has historically been regarded as a sector that requires special regulation. I argue that the approach developed by Lupu and Tuttle is worthy of greater attention and proceed to consider the ways in which both the above-mentioned assumption and Justice Chen's position could be modified in light of their approach.

II. DIVERGENT UNDERSTANDINGS OF THE AUTHORITY OF STATE LAW IN RELATION TO RELIGIOUS GROUPS IN TAIWAN'S CONSTITUTIONAL JURISPRUDENCE

A. *Justice Chen's Concurring Opinion in J.Y. Interpretation No. 728*

Justice Chen Shin-Min began to develop his views on constitutional protection for the autonomy of religious organizations in Judicial Yuan Interpretation No. 728,[4] which was rendered in March 2015. This Interpretation considers the issue of whether the constitutional protection of gender equality is applicable in a private association formed for the purpose of ancestor worship. While strictly speaking the association in question is not a religious organization, Justice Chen, in explaining why the internal governance of the association should be given a high degree of protection,

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HARV. C.R.-C.L. L. REV. 79, 124, 130 (2009).

4. Sifa Yuan Dafaguan Jieshi No. 728 (司法院大法官解釋第728號解釋) [Judicial Yuan Interpretation No. 728] (Mar. 20, 2015) (Taiwan). An English translation of the interpretation, Interpretation No. 728, JUSTICES CONST. CT., JUD. YUAN, R.O.C., http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=728 (last visited Dec. 22, 2016).

nonetheless made a reference to religious organizations and the constitutional protection they enjoy in his concurring opinion.

First of all, Justice Chen asserts that the autonomy of religious organizations is a sub-category of the constitutional protection for freedom of association. He insists, however, that the freedom of association of religious groups is unique among other types of freedom of association. He writes:

> With regard to freedom of association, the right to freedom of association of ordinary nature can be limited by general legislation; courts may adopt a lower level of scrutiny in the adjudication of cases involving this type of freedom of association. The constitutional protection for political parties, however, is stronger than the protection for the freedom of association of ordinary nature, since political associations are closely related to the practice of democracy and serve to sustain a nation's rule of law. . . . Religious groups enjoy an even greater protection for their autonomy than political parties in the constitutional system of freedom of association.[5]

This is a clear acknowledgement that religious organizations occupy a distinctive place in the ROC Constitution. What is suggested here is that, as a matter of law, religious organizations can be distinguished from other kinds of associations and that they deserve a higher degree of constitutional protection. Since religious associations enjoy a higher degree of constitutional protection, they might be able to claim an immunity from certain regulations with which the other voluntary associations are required to comply.

Secondly, Justice Chen clearly affirms that it is illegitimate to intervene in the operation of religious organizations even for the purpose of enforcing the right to gender equality. He writes,

> Under state law religious organizations should be guaranteed to enjoy the greatest extent of autonomy with regard to matters including the ways in which they organize, their membership requirements and duties, the interpretation of doctrine and the conducting of rituals. The autonomy of religious organizations is so crucial that it should be accorded the strongest constitutional protection. . . . Accordingly, constitutional clauses on human rights protection are not necessarily applicable within the confines of a

5. J.Y. Interpretation No. 728 (Chen Shin-Min, J. (陳新民大法官), concurring).

> religious organization. For example, the principle of gender equality cannot be invoked as a basis upon which to limit the operation of religious groups.[6]

In the previous quote, we see that religious organizations are not necessarily subject to a general governmental regulation. Here Justice Chen goes on to suggest that, even if a regulation is based on highly recognized public values such as the right to gender equality, yet this right must be judged as subordinate to the autonomy of religious organizations when the two come into conflict.

Justice Chen further developed his view of the autonomy of religious organizations in J.Y. Interpretation No. 733,[7] which was decided in October 2015. Again, the issue considered by that Interpretation does not involve a religious organization; rather, it concerns whether a teachers' association may select its leader in the way that the majority of its members choose without state intervention.[8] However, in his concurring opinion, Justice Chen takes the opportunity to emphasize that the state has no right to require a religious organization's selection process for its clergy or leader be carried out democratically. Neither the right to gender equality nor the principle of democracy can place a constraint on the internal governance of religious organizations.

B. *The Assumption of the Authority of State Law over Religion*

1. *J.Y. Interpretation No. 490*[9]

Justice Chen's strong position on the autonomy of religious organization, as developed in J.Y. Interpretations No. 728 and No. 733, stands in contrast to an underlying assumption in the Court's previous jurisprudence on freedom of religion--that state law is sovereign over the

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6. *Id.*

7. Sifa Yuan Dafaguan Jieshi No. 733 (司法院大法官解釋第733號解釋) [Judicial Yuan Interpretation No. 733] (Oct. 30, 2015) (Taiwan).

8. Renmin Tuanti Fa (人民團體法) [Civil Associations Act] § 17, para. 2 (promulgated and effective Feb. 10, 1942, as amended June 15, 2011) (Taiwan) stipulates: "[A] chairperson of the board of directors shall be elected by the directors from the standing directors, or elected by and from the directors if there is no standing director." A teachers' association in Kaohsiung (which, as an occupational organization, is subject to the requirements in Civil Association Act) claims that the provision violates its freedom of association, as the majority of its members prefers its chairperson to be directly elected by all the members of the association, rather than by a relatively small number of directors.

9. J.Y. Interpretation No. 490. An English translation of the interpretation, Interpretation No. 490, JUSTICES CONST. CT., JUD. YUAN, R.O.C., http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=490 (last visited Dec. 22, 2016).

norms, practices, and activities of religious communities. For example, in J.Y. Interpretation No. 490, one of the most controversial decisions in the Court's history, it refused to accommodate Jehovah's Witnesses' conscientious objection to the military service. The Court was emphatic in asserting that: "No one shall renounce the state and its laws simply because of his/her religious belief. Thus, because believers of all religions are still citizens of the state, their basic responsibilities and duties to the state will not be relieved because of their respective religious beliefs."[10] This is a categorical denial of the possibility of religious exemptions from state law. As long as a person is a citizen of the state, he or she is obliged to comply with the law and has no claim to be accommodated on the basis of religious beliefs.

Traditionally, this decision has been seen more as addressing a conflict between individual religious conscience and the state, instead of a conflict between religious groups and the state. For the following reasons, however, I take it as a decision that implicates the rights and freedoms of religious groups as well.

Firstly, it is well known that Jehovah's Witnesses as a group have a collectively held belief against participating in the military service. Therefore, it is not just a few members of Jehovah's Witnesses whose religious conscience is at stake here; rather, the compulsory military service mandated by the law threatens the conscientious rights of *every adult male member* of the religious community.

More broadly, since in most circumstances, as in this case, individual believers derive their religious obligations from the norms and beliefs of the religious community to which they belong, to punish individual religious practice is to strike a blow at the normative values of the religious group as a whole.

Lastly, there is no reason to think that the "no exemption" rule established in this decision applies only to individual believers but not to religious groups. The Court justifies the denial of the claim of exemption on the ground that "believers of all religions are still citizens of the state," and therefore religious believers have to fulfill their responsibilities and duties to the state. This means the religious identity of religious believers has no bearing at all on whether they should comply with the obligations of state law. Nothing in the Court's opinion prevents the extension of this logic to cover the cases where the decisions made by a religious group with regard to an internal affair came into conflict with the requirements of state law. The state can certainly argue that the religious identity of the religious group has no bearing on whether their decisions should be subject to the requirements

10. *Id.* (in "Reasoning").

of state law.

Based on the discussion above, I suggest that what this Interpretation affirms is not only that the state law is sovereign over individual religious conscience, but also that it is sovereign over the norms and practices of religious communities. The norms and practices of religious communities--which form the basis of individual religious conscience and give rise to religious obligations of individual believers--have no ground to challenge the authority of state law.

2. *J.Y. Interpretation No. 573*[11]

J.Y. Interpretation No. 573 was the first case in which the Court directly addressed the issue of the autonomy of religious organizations. In this Interpretation, the Court explicitly recognized that freedom of religion guaranteed in Article 13 of the ROC Constitution includes the protection of the autonomy of religious organizations. The Court struck down several clauses in the Act of Supervision of Temples and Shrines (*Jiandu Simiao Tiaoli*, ASTS) that require the disposition of temples' real estates be approved by the government. The requirement violates freedom of religion because, the Court points out, it "fails to give considerations to the autonomy of a religious organization." The constitutional status of the autonomy of religious organizations is recognized and its rationale and scope are defined in this paragraph:

> Article 13 of the Constitution provides for the people's freedom of religious belief. . . . The scope of such protection extends to the freedom of inner belief, freedom of religious activity, and freedom of religious association. It is impossible to completely separate the religious activities engaged in and religious association attended by the people from the heartfelt, devout religious convictions held by the same. In respect of a religious association established and attended by the people for the purpose of observing their religious beliefs, autonomy should be given to it as far as its internal organization and structure, personnel and financial administration are concerned. Any religious regulations, if not made to maintain the freedom of religion or any significant public interests, or if not made to the minimum extent necessary, should be deemed to be in conflict with the constitutional intent to protect the people's

11. J.Y. Interpretation No. 573. An English translation of the interpretation, Interpretation No. 573, JUSTICES CONST. CT., JUD. YUAN, R.O.C., http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=573 (last visited Dec. 22, 2016).

freedom of belief.[12]

While it is undeniable that J.Y. Interpretation No. 573 advances the interests of religious organizations, a closer look at the Court's opinion reveals some negative implications it has for the autonomy of religious groups. Firstly, it should be pointed out that what was under review by the Court in this Interpretation was not a neutral law of general applicability; rather, the Court was asked to consider the legitimacy of a number of clauses in a regulation that specifically targets religious institutions--the Act of Supervision of Temples and Shrines. In other words, J.Y. Interpretation No. 573 did not touch upon the "no exemption" rule established in J.Y. Interpretation No.490. Accordingly, it can be argued that the rule remains the guiding principle in the situation where a religious institution claims that its religious freedom is violated by a neutral law of general applicability.

Secondly, while the Court struck down a few clauses of ASTS, it did not question the legitimacy of the law as a whole, which was specifically designed to bring temples and shrines under the supervision of the state. By not questioning the legitimacy of the law, the Court in effect authorized the government to make comprehensive and restrictive legislation on religion (despite the existence of a few conditions that the government needs to meet), thereby endorsing the idea that the state has jurisdiction over the internal affairs of religious institutions.[13]

As we can see from the quote above, the Court asserts that a "religious regulation"--a law targeting religion, as opposed to a neutral law of general applicability--can survive judicial review only when it is made "to maintain the freedom of religion or any significant public interests" and "limits rights to the minimum extent necessary." The meaning of "to maintain the freedom of religion" is somewhat ambiguous. It can be understood as implying that the autonomy of a religious organization may be limited if it operates in ways that violate the *individual religious conscience* of its members. Alternatively, it can be understood as forwarding a paternalistic view, which claims that sometimes state supervision and intervention are necessary in order to ensure a healthy development of religious organizations. This latter reading may seem radical, but it is not an idea entirely foreign to contemporary Taiwan's legal culture. As I will argue in greater detail below, state paternalism forms the basis of certain important clauses in the latest

12. *Id.* (in "Reasoning").

13. This criticism was raised by Justice Chen Shin-Min before he was appointed to the Court. *See* Chen Shin-Min (陳新民), *Xianfa Zongjiao Ziyou de Lifa Jiexian-Ping "Zongjiao Tuantifa" Caoan De Lifa Fangshi* (*憲法宗教自由的立法界限—評「宗教團體法」草案的立法方式*) [*Constitutional Protection for Religious Freedom and the Limitations on Legislative Power: A Comment on the Draft Law on Religious Corporations*], 52 JUNFA ZHUANKAN (軍法專刊) [MIL. L.J.] 1, 10 (2006).

draft of Taiwan's Law on Religious Corporations (*Zongjiao Tuantifa Caoan*). Understood either in individualistic terms or as an expression of state paternalism, there is no doubt that by contending that the autonomy of religious groups may be limited for the purpose of "maintain[ing] the freedom of religion", the Court creates an important opening for the state to intervene in the internal affairs of religious groups.

The difference between Justice Chen's view and J.Y. Interpretation No. 573 is clear. The Court in J.Y. Interpretation No. 573 takes a milder position on a law that placed religious groups under strict supervision of the state by not questioning the legitimacy of the law as a whole. It also leaves room for the state to intervene in the internal affairs of religious organizations on the basis of--according to one reading of the Interpretation--paternalistic concerns. A law that limits the freedom and autonomy of religious institutions has a better chance, I suggest, to be recognized as legitimate under J.Y. Interpretation No. 573, than under the framework developed by Justice Chen.

I have argued that an underlying assumption in J.Y. Interpretation No. 490 is that state law is sovereign over the norms and practices of religious groups. While J.Y. Interpretation No. 573 is certainly more progressive vis-à-vis J.Y. Interpretation No. 490--because it recognized for the first time the right to autonomy of religious institutions--it seems to me that the assumption remained largely intact in this Interpretation. The activities and practices of religious groups are still presumed to be subject to the regulatory authority of the state. The state retains the right to make comprehensive legislation on religion; it may also act as a guardian of religious institutions, regulating them according to its view of their best interest.

However, it is this assumption that is strongly challenged in Justice Chen's recent concurring opinions. Towards the end of his discussion in J.Y. Interpretation No. 728, Justice Chen claims that the autonomy of religious organizations "should be given the greatest respect *without any state interference*."[14] In his view, religious organizations should be deemed under the law to be presumptively autonomous.[15]

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14. J.Y. Interpretation No. 728 (Chen Shin-Min, J. (陳新民大法官), concurring). It is not clear whether the rhetoric of "without any state interference" points to a broad right of autonomy for religious organizations that covers all aspects of their internal operation, which is a strong position that has been advocated by Kathleen Brady. *See* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections about What Is at Stake*, 22 J.L. & RELIG. 153, 157 (2006-2007). It remains to be seen whether Justice Chen would want to add any qualifications to this statement.

15. Some of the claims of an earlier draft of this paper gave the impression that there is a dichotomy between, on the one hand, J.Y. Interpretation No. 490 and J.Y. Interpretation No. 573, and on the other, Justice Chen's recent opinions. It was not my intention to generate this somewhat misleading impression. Viewing from the perspective of protecting religious freedom, the two earlier decisions by the Court together with Justice Chen's recent opinions should be seen as falling on a continuum: J.Y. Interpretation No. 573 is more progressive than J.Y. Interpretation No. 490, but Justice

The divergent understandings of the authority of state law in relation to religious groups generate a degree of uncertainty with regard to the regulation of religious groups in Taiwan. Consequently, there is a need to develop a coherent framework to regulate the relationship between the state and religious groups. To that end, I turn in the next section to the ongoing scholarly debate in the United States over the idea of "religious institutionalism." As will be clear, the new approach proposed by Justice Chen bears significant resemblance to the position of those scholars in the US who support the idea of religious institutionalism. Analyzing the debate on religious institutionalism may thus help us better understand the strengths and weaknesses of Justice Chen's approach.

III. THE DEBATE OVER RELIGIOUS INSTITUTIONALISM

In recent years, the issue of the place of religious institutions in the constitutional order has received increasing attention in the scholarship around law and religion, especially in the United States. Proponents of the idea of religious institutionalism claim that, in addition to the common individualistic understanding of religious freedom, institutional freedom should also be a defining concept of religious liberty. They advocate for a "zone of freedom" to be carved out for religious institutions to manage their affairs without state intervention.[16] And since other forms of voluntary associations are ordinarily not entitled to this zone of freedom under the law, critics argue, what the proponents of religious institutionalism demand amounts to a distinctive legal treatment or even privilege for religious associations.

Furthermore, according to religious institutionalists, this zone of freedom should be understood in a jurisdictional sense. In other words, the relationship between church and state can and should be understood as the relationship between separate legal jurisdictions. In the writings of religious institutionalists, they sometimes analogize churches to foreign states.[17] As a

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Chen's opinions provide an even more robust protection to religious organizations than J.Y. Interpretation No. 573.

However, I do argue that Justice Chen's view stands in direct opposition to the assumption that state law is sovereign over the norms and practices of religious groups. In my opinion, such an assumption is an underlying theme in both J.Y. Interpretation No. 490 and J.Y. Interpretation No. 573. But I fully agree that there are positive aspects of J.Y. Interpretation No. 573 that advance the interests of religious organizations, and they should not be ignored. I would like to thank an anonymous reviewer for pushing me to clarify this point.

16. *See* Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 373, 373 (Micah Schwartzman et al. eds., 2016).

17. *See, e.g.*, Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 980 (2012) ("The two kingdoms of temporal and spiritual authority, of church and state, constitute two separate sovereigns. The state can no more intervene in the sovereign affairs of the church than it can

country is prohibited from intervening in the sovereign affairs of another country, so the state is prohibited from intervening in the internal affairs of the church. One of the doctrinal implications of this foreign state analogy is that the interest-balancing approach that was traditionally used by courts to address the conflicts between public interests and the rights of religious institutions should be rejected.[18] As long as a matter can be classified as part of the internal affairs of the church, religious institutionalists argue, the state has no authority to interfere with the church's decision on that matter.

Reviewing the work of two leading scholars in this field, Paul Horwitz and Richard Garnett, I aim to better understand their justification for the assertion that religious institutions deserve a distinctively robust legal protection. I will then discuss the works of those scholars who hold the contrasting view on church autonomy and who are the opponents of religious institutionalism.

A. *Paul Horwitz*

Professor Paul Horwitz sets out an approach to religious entities that would "treat[] these entities as lying largely beyond the jurisdiction of the state, and seek[] to craft the law affecting them in ways that give them the utmost freedom to shape and regulate themselves."[19] Religious entities enjoy "a form of legal sovereignty and immunity as a fundamental part of the legal structure rather than as a matter of state generosity."[20] He came to this conclusion by combining two institution-oriented theories: First Amendment Institutionalism and Abraham Kuyper's sphere sovereignty theory.

First Amendment Institutionalism begins with the observation that particular speech institutions--such as universities, religious associations, and the press--play a central role in shaping public discourse. These institutions are the "infrastructure of public discourse", meaning that they are the sites where the ideas and messages in our public discussions are formed, transmitted and debated.[21] Without these institutions, the freedom of speech guaranteed in the First Amendment of the U.S. Constitution would become shallow or even meaningless. In other words, we need to acknowledge that "freedom of expression is not only enjoyed by and through, but also depends

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in the sovereign affairs of Mexico or Canada.").

18. *See, e.g.*, Brady, *supra* note 14, at 173 ("[R]estrictions on religious group autonomy should not be the result of a balancing approach even one that would only limit group autonomy in cases of significant social harm. . . . [S]uch an approach risks restricting group freedom for reasons that are not, in fact, compelling or even persuasive in the long run."). *See also* Horwitz, *supra* note 3, at 120-21.

19. Horwitz, *supra* note 3, at 124.

20. *Id*. at 130.

21. Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1052 (2013).

on the existence and flourishing of," these institutions.[22]

Accordingly, in order to encourage and enhance public discourse, the autonomy of these "First Amendment Institutions"[23] needs to be protected. Disrupting or suppressing the autonomous operation of these institutions--who serve "the speech-enhancing and freedom-protective role"[24]--would do a disservice to freedom of expression. According to Horwitz, there are at least three forms of protection that courts may employ to protect the autonomy of First Amendment Institutions. At the weakest level, courts would defer to "the factual claims of those institutions in considering how present doctrine should apply to them."[25] A stronger form of protection would treat these institutions as "substantially autonomous within the law."[26] Although Horwitz did not clearly articulate this point, it appears that under this approach courts would be asked to adopt a compelling state interest analysis to address any conflict between state law and the norms or practices of religious institutions.

Finally, the strongest form of protection would treat First Amendment Institutions as legal sovereignties, or "sites of law in almost, or entirely, a formal sense."[27] Under this approach, the decisions of First Amendment Institutions "would take on a jurisdictional character, such that any decision taken by a First Amendment institution within the proper scope of its operation . . . would be subject to a form of 'de facto non-justiciability'."[28]

The concept of sphere sovereignty is a theory developed by the Dutch theologian Abraham Kuyper. It asserts the view that "human life is 'differentiated into distinct spheres', each featuring 'institutions with authority structures specific to those spheres.' Under this theory, these institutions are literally sovereign within their own spheres."[29] Kuyper identifies three distinct spheres, with each one of them possessing its own sovereignty delegated by God: state, society, and church. The sovereign nature of these spheres prevents them from intruding upon each other's internal affairs. The state, in particular, must respect the "sacred autonomy" of other spheres: "The State may never become an octopus, which stifles the whole of life. It must occupy its own place, on its own root, among all the other trees of the forest, and thus it has to honor and maintain every form of life which grows independently in its own sacred autonomy."[30] As (simply)

22. Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008).
23. Horwitz, *supra* note 3, at 82.
24. *Id*. at 88.
25. *Id*.
26. *Id*.
27. *Id*. at 89.
28. *Id*. (footnote omitted).
29. *Id*. at 83.
30. *Id*. at 96.

one of the sovereign spheres, the state has no right to interfere with the operation of its coequals.

Horwitz combines the two theories presented above--First Amendment institutionalism and Kuyper's sphere sovereignty theory--and suggests that we think about First Amendment institutions, including religious entities, as sovereign spheres.[31] An inevitable conclusion that results from the combination of the two theories is that, of the three possible forms of protection of the autonomy of First Amendment institutions, it is the most stringent one that must be preferred.[32] This is because if we perceive First Amendment institutions as sovereign spheres, we then must treat their decisions as having "a jurisdictional character" and "subject to a form of 'de facto non-justiciability.'" A mere deference to the factual claims of the institutions by the courts or even treating them as "substantially autonomous within the law" would not do justice to the idea that First Amendment institutions are sovereign spheres. The jurisdictional integrity of these institutions is what is at stake here.

This is most evident in Horwitz's discussion of "ministerial exception." Not surprisingly, Horwitz supports the doctrine of ministerial exception, which immunizes religious institutions from state inquiry into the employment decisions they make with regard to their ministers.[33] However, in addition to that, he also supports extending the doctrine to cover every job position within a religious institution. He writes: "A more robust version of First Amendment institutionalism, however, would treat the question more categorically: churches *qua* churches are entitled to a substantial degree of decision-making autonomy with respect to membership and employment matters, regardless of the nature of the employee or the grounds of discrimination."[34] Under his approach, the relations between the church and any of its employees--whether they perform spiritual function or not--would be beyond the reach of courts' examination and inquiry.

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31. *See id*. at 79.

32. Horwitz himself did not explicitly argue this point. However, I suggest it is a reasonable reading of his accounts of both First Amendment institutionalism and the sphere sovereignty theory. For example, he suggests what the strongest form of protection entails is that courts would "employ an approach to First Amendment institutions that treats them as genuinely 'jurisgenerative' institutions." (*Id*. at 89) Later, in describing the characteristics of Kuyper's sphere sovereignty theory, he claims that the theory "recognizes the 'jurisgenerative' power of thee spheres as sovereigns." (*Id*. at 110) The similarity of the wording in the two quotes here suggests that there is a clear fit between the strongest form of protection for First Amendment institutions and the sphere sovereignty theory.

33. The ministerial exception has been formally recognized by the U.S. Supreme Court in its landmark decision in Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171 (2012). Writing for a unanimous court, Chief Justice John Roberts points out that "there is a ministerial exception grounded in the Religion Clauses of the First Amendment," which "precludes application of [anti-discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." (*Id*. at 191, 187).

34. Horwitz, *supra* note 3, at 120.

Horwitz justifies the categorical denial of state intervention in churches' employment decisions based on the fact that "religious entities are intrinsically valuable." In discussing his strong position on this issue, Horwitz points out: "Religious entities are protected as a part of the social landscape not simply because they are instrumentally valuable, but because they are *intrinsically valuable*, and a fundamental part of a legally pluralistic society. The state is precluded from interfering in church employment decisions not simply because it would be problematic, but because the church's affairs are not the state's affairs; it simply has no jurisdiction to entertain these concerns."[35] Because religious entities are intrinsically valuable and, as Horwitz suggests elsewhere, an "intrinsically worthy part of both social discourse and individual human flourishing",[36] it would be better to allow them to live by their own law without any interferences.

The view that religious entities deserve special protection because they are intrinsically valuable can be a target of criticisms. The most obvious one, which is raised most forcibly by Marci Hamilton, is this: how do we address the "inescapable empirical reality" that religious entities are capable of doing great harm?[37] Hamilton suggests that "the problem posed by religious entities . . . is that they are run by humans, with the full spectrum of human fallibility. . . . If religious actors are not deterred and punished for bad acts, they wreak great wrongs."[38]

While Horwitz did not respond directly to this criticism, he seems to acknowledge the reality that religious entities can do harm and therefore their right to self-govern has to be limited. For example, he suggests that "sphere sovereignty, even in its strongest form, is not the equivalent of a general immunity from liability for the sexual victimization of minors and adults."[39] Even if religious entities are an intrinsically worthy part of human flourishing, they do need to be "deterred and punished" when they act contrary to who they truly are and engage in harmful behaviors. Therefore, the approach proposed by Horwitz should not be understood as endorsing "an absolute license"[40] for religious entities; rather, it is "a limited form of immunity."[41]

Another possible criticism of his viewpoint is related to the internal consistency of his theory. One difficulty with basing a strong protection for religious entities on their intrinsic worthiness is that religious entities are

35. *Id*. at 121 (emphasis added).
36. *Id*. at 111.
37. Marci A. Hamilton, *Church Autonomy Is Not a Better Path to "Truth"*, 22 J.L. & RELIG. 215, 216 (2006-2007).
38. *Id*. at 215-16.
39. Horwitz, *supra* note 3, at 122.
40. *Id*. at 122.
41. *Id*. at 124.

certainly *not* the only mediating associations that are intrinsically valuable. First Amendment institutions other than religious entities--universities, press, and libraries--would necessarily be regarded by Horwitz as an intrinsically worthy part of human existence as well.[42] The logical conclusion of this argument is that these institutions should enjoy a similar degree of protection as religious entities.[43] Yet, if that is the case, the question becomes whether we are ready to declare that a newspaper or a university is entitled to an expanded form of ministerial exception that would grant them "a substantial degree of decision-making autonomy with respect to membership and employment matters, *regardless of the nature of the employee or the grounds of discrimination*"? If the answer is yes, then a significant number of institutions would be freed from the control of anti-discrimination law. This is indeed a radical position and is not likely something that Horwitz would advocate for. Conversely, if we think that other First Amendment institutions are not entitled to an expanded form of ministerial exception, this would generate an internal inconsistency in Horwitz's theory. That is, if we are willing to grant a broad right of autonomy to religious entities, how can we not grant the same level of protection to institutions that are similarly situated? I suggest that this is an issue that Horwitz has not clearly addressed.

B. *Richard Garnett*

Another version of religious institutionalism that has emerged recently is that expounded by Richard Garnett. At the heart of Garnett's approach is the ancient idea of *libertas ecclesiae*--the freedom of the church.

The idea of *libertas ecclesiae* emerged during the so called "Investiture Crisis" in the 11th century and served as a "powerful slogan" that Pope Gregory VII relied on in his struggle with Henry IV the Holy Roman Emperor, for papal control over the church.[44] As a product of that specific context of the power struggle between the King and the Church, the freedom of the church can be defined as "the freedom of clergy, under the pope, from emperor, kings, and feudal lords. It was the assertion of papal primacy over the entire Western church and of the independence of the Church from

42. Consider, for example, this passage: "The justification for giving special recognition to particular First Amendment institutions is ultimately both instrumental and intrinsic. . . . Intrinsically, it argues that these institutions are natural features of the social landscape and that the courts would do well to recognize this fundamental fact." (*Id*. at 87).

43. This is a position that Horwitz does not refute. *See* Horwitz, *supra* note 21, at 1053-54 ("Nor do I argue that 'churches should receive *more* deference than other kinds of mediating institutions.' . . . [R]eligious institutions, under my approach, need not be utterly unique and are not uniquely privileged.") (emphasis original).

44. Richard W. Garnett, *The Freedom of the Church: (Toward) an Exposition, Translation, and Defense*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 16, at 39, 39-40.

secular control."[45] Garnett believes that engaging with the idea of the freedom of the church may "contribute to a better, richer understanding of constitutionalism generally and, more specifically, of religious freedom under law."[46] He claims that, despite being an ancient concept, "the idea of the freedom of the church--or something like it--remains a crucial component of any plausible and attractive account of religious freedom under and through constitutionally limited government."[47]

In Garnett's view, the attempt to import the idea of freedom of the church into the contemporary account of religious freedom is justified by the idea's relations with the Western constitutionalism. Some scholars have credited this idea with contributing significantly to the Western ideal of "the limited state in a free society." For example, Garnett quotes George Weigel: "Thanks to the resolution of the investiture controversy in favor of the Church, the state . . . would not be all in all. The state would not occupy every inch of social space. . . . The Western ideal--a limited state in a free society--was made possible in no small part by the investiture controversy."[48] This high regard for the idea of the freedom of the church can also be found in the writings of the Catholic theologian John Courtney Murray. In discussing Murray's view, Garnett suggests that "[t]he challenge, in his view, has always been to find the limiting principle that would 'check the encroachments of civil power and preserve immunities'; and, he thought, '[w]estern civilization first found this norm in the pregnant principle, the freedom of the Church.'"[49]

If these scholars' understanding that Western civilizations have relied on the freedom of the church to pursue the project of limiting political power is correct, then there is nothing extraordinary to think about contemporary constitutions, and religious freedom they guaranteed, in light of this idea. The idea of the freedom of the church continues to be relevant today because, as Garnett notes, "there are reasons to think that the *libertas ecclesiae* has mattered and does matter for the development and sustaining of constitutionally limited government."[50] In another place, Garnett claims that "the revolutionary significance in the history of western

45. Richard W. Garnett, *The Freedom of the Church* 1 (Notre Dame L. Sch. Legal Stud. Res. Paper, Paper No. 06-12, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=9163364 (quoting HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 50, 94 (1983)).

46. Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST JOHNS J LEGAL COMMENT 515, 525 (2007).

47. Garnett, *supra* note 44, at 40.

48. GEORGE WEIGEL, THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD 101 (2005).

49. Garnett, *supra* note 45, at 3-4.

50. *Id*. at 20.

constitutionalism of *libertas ecclesiae*"[51] provides reason to be skeptical about the proposal that religious institutions should be subject to state regulation as other expressive associations are subject to it.

At the first glance, the freedom of the church does not seem to be a controversial idea. There does not seem to be a significant difference between this idea and the traditional "church autonomy doctrine."[52] A closer look, however, reveals that this idea has some unique characteristics that distinguish it from the approach to church autonomy more widely accepted in scholarly discussion or in jurisprudence.[53] Among these characteristics, perhaps the most striking is the way in which it understands the relationship between individual religious conscience and the autonomy of religious institutions.

Consider this passage where Garnett describes how the current church autonomy doctrine falls short of the vision presented by Murray:

> In our religious-freedom doctrines and conversations, it is more likely that the independence and autonomy of churches, or of religious institutions and associations generally, are framed as deriving from, or existing in the service of, the free-exercise or conscience rights of individual persons than as providing the basis or foundation for those rights.[54]

The suggestion here is that it is wrong to think about the autonomy of religious institutions as "deriving from, or existing in the service of" individual religious freedom. Instead, it is the freedom of the church that grounds, or gives effects to, individuals' religious liberty.

This point was reiterated by Garnett in later discussions. For example, in

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51. Garnett, *supra* note 46, at 529.

52. For a classic account of the constitutional doctrine of church autonomy, *see* 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).

53. I assume that the more widely accepted approach to church autonomy includes the view that the legitimacy of church autonomy is ultimately derived from the protection of individual religious freedom. *See* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 920 (2013). This view is affirmed by the Constitutional Court of Taiwan in J.Y. Interpretation No. 573, where it claims that there is an inseparable tie between individuals' religious convictions and practices and a faith community. In order to offer a full protection for individuals' religious convictions, the autonomy of religious communities must be recognized. Similarly, in a recent decision by the Supreme Court of Canada, Loyola High Sch. v. Quebec (Att'y Gen.), [2015] 1 S.C.R. 613 (Can.), Chief Justice McLachlin and Justice Moldaver justify freedom of religion for religious organizations by relating it to the protection of the religious freedom of individuals. They point out in their concurring opinion that "[t]he individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for organizations through which those individuals express their religious practices and through which they transmit their faith." (at para. 94).

54. Garnett, *supra* note 45, at 5.

discussing *Dignitatis humanae*, the Second Vatican Council's Declaration on Religious Freedom, he suggests what the Declaration calls for is the "recognition by the state of the freedom of the Church--for itself, and not simply as a proxy for the religious-liberty rights of individuals."[55] Also, "the freedom to be enjoyed by religious communities is not defended merely as a vehicle for or incident of individuals' private religious expression."[56] One can sense in these accounts a resistance to see institutional freedom as owing its existence and legitimacy to individual religious freedom. As Richard Schragger and Micah Schwartzman point out, Garnett's account of the freedom of the church "inverts the usual formulation whereby institutional autonomy is derived from individual rights of conscience" by "putting church first."[57]

The consequence of this inversion of the relationship is that institutional autonomy is no longer conditional upon the protection it offers for individual religious conscience. The instrumental value it has, to whatever extent, for individuals is not what defines and justifies the freedom of the church. Consequently, the state would not be able to intervene in the internal affairs of a religious institution by pointing to the violation of the individual religious conscience within the institution. This would certainly pave the way for a claim of the jurisdictional sovereignty of religious entities, which is something that Murray endorsed.[58]

The insistence on the jurisdictional sovereignty of religious groups on the part of Garnett, however, appears to be somewhat implicit. Indeed, a difficulty with Garnett's freedom of the church approach is that it is not very clear what this approach would actually entail in application, despite its strong rhetoric. For example, he once expressed his disproval of applying the compelling state interest analysis to address conflicts between religious groups and state regulation. He writes:

> [T]he claims at the heart of the *libertas ecclesiae* principle are, for lack of a better word, "bigger" than those animating the free-speech cases. After all, Hildebrand's contention was not that a state-imposed burden on the Church's ability and right as a voluntary, expressive association to determine for itself the content of its message must be justified by balancing the freedom of speech against compelling state interests. A freedom or independence

55. *Id*. at 11.

56. *Id*. (footnote omitted).

57. Schragger & Schwartzman, *supra* note 53, at 929.

58. *See* Garnett, *supra* note 45, at 4 ("[Murray] assured his readers that our Constitution guarantees religious freedom not only to the individual believer, 'but to the Church as organized society with its own law and jurisdiction. . . . Within society, as distinct from the state, there is room for the independent exercise of an authority which is not that of the state.'").

> whose content and boundaries are, conceptually as well as practically, determined by the state and with reference to the state's needs and interests, is not likely to ignite a revolution, or sustain the project of constitutionally limited government.[59]

The rejection of a balancing approach based on compelling state interests is, without question, a jurisdictional claim against the state. However, in his most recent article on the freedom of the church, Garnett did not further remark on this point, despite the fact that he did devote some space to discuss the doctrinal implications of the freedom of the church.[60] Certainly, the lack of a further elaboration does not necessarily mean a change of position, but it does give rise to a sense of uncertainty about whether the freedom of the church requires the denial of the compelling state interest approach.

In that article, there is a section entitled "jurisdiction and abstention", which Garnett suggests is one of the themes that define his approach of the freedom of the church.[61] The discussion in that section focuses on the constitutional prohibition under American law on the judicial interpretation of religious doctrine or the resolution of religious disputes. Garnett points out that "a commitment to the 'freedom of the church' should be seen as requiring not only that secular authorities 'abstain' from interfering in religious matters but also that they acknowledge the limits on their jurisdiction over such matters."[62] This quote clearly suggests that the freedom of the church means *religious matters* of a religious group are beyond the jurisdiction of civil courts. But the question remains: what about the more mundane matters the religious intensity of which is not that high? Are they beyond the reach of the secular authorities as well? Some proponents of religious institutionalism have suggested they are. Kathleen Brady, for example, has indicated that her approach favors "a broad right of autonomy that covers all aspects of the organization's internal affairs, those which are clearly religious in nature as well as those which seem less so."[63] This is of course a more radical position than one that prohibits only the judicial intervention in "religious matters." It is not clear, however, that Garnett shares a commitment to the position that would immunize every aspect, religious in nature or not, of the internal operation of religious institutions from state intervention. This again raises the question of how strong a position Garnett's freedom of the church approach really is.

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59. *Id*. at 23-24.
60. *See* Garnett, *supra* note 44.
61. *Id*. at 43, 48-49.
62. *Id*. at 49.
63. Brady, *supra* note 14.

Towards the end of his most recent article, Garnett envisions the ways in which "[a] doctrinal regime informed or animated by the 'freedom of the church' idea would be different" from the current regime.[64] According to Garnett, the changes that will be brought forth by the adoption of the freedom of the church approach mainly concern the Establishment Clause doctrines in the U.S. Constitution; there was no mentioning of any aspect of the Free Exercise Clause that might be affected by a recognition of the freedom of the church in the Constitution.[65] In other words, Garnett did not make it clear what additional protections religious institutions would be entitled to under the Free Exercise Clause if his approach were formally adopted.

The above analysis of Garnett's approach points to a basic question: what does the freedom of the church actually require? Does it require a rejection of the compelling state interest analysis? Does it warrant an immunity of all aspects (distinctively religious or not) of the operation of religious institutions from state intervention? Does it offer any additional protection for religious groups which they don't enjoy under the current Free Exercise doctrines? I believe that until these questions are clarified, there cannot be strong confidence in the "freedom of the church" approach.

C. *Schragger and Schwartzman*

On the other end of the spectrum, Richard Schragger and Micah Schwartzman reject the claim that religious institutions deserve distinctive treatment under the law, let alone the idea that they enjoy a form of legal sovereignty. Schragger and Schwartzman take a strictly neutralist position to reconsider the rights and privileges granted to religious institutions under American law. They follow the conventional liberal view that characterizes churches as voluntary associations in developing their approach.[66] Based on this view, they claim that the so-called church autonomy doctrine is merely a species of associational freedom more generally.[67] Churches, they insist, are simply a sub-category of the many conscience-based associations that exist in the society and, as a result, do not deserve a larger space to govern themselves than do their similarly situated secular counterparts.[68] According to them, a general theory of conscientious objection, applicable to all conscience-based associations, is sufficient to protect churches from

64. Garnett, *supra* note 44, at 61.
65. *See id*. at 61-62.
66. *See* Schragger & Schwartzman, *supra* note 53, at 956-68.
67. *See id*. at 969.
68. *See id*. at 932 ("[R]eligious institutions cannot be distinguished from other voluntary associations in a manner that warrants special forms of deference from the state.").

illegitimate state intervention. Thus, it is unnecessary to rely on a religion-specific theory such as freedom of the church to address the challenges facing religious groups.[69]

There are two characteristics of this approach that worth emphasizing. Firstly, under this approach, freedom of association is understood more as "an aggregate rights of the membership"[70] of the association rather than as a right enjoyed by the association itself. In other words, Schragger and Schwartzman are reluctant to recognize the church as an independent rights-bearer. In particular, they resist "the anthropomorphizing instinct in the church context" which is intended to attach "dignitary or conscience-based rights" to religious institutions.[71] The concern is that assigning conscience-based rights or "human rights" to churches may weaken the protection of the rights of the individual: "[A]ttributing human rights to institutions poses a potential danger to individual human rights. As an expressive matter, it may dilute the unique legal status of human beings as it is reflected in that concept. And as a legal matter, it implies that groups can assert competing claims of conscience against other individuals and against their members, thus undermining the protection for individuals."[72]

Secondly, as aforementioned, Schragger and Schwartzman insist that religious institutions are *not* distinctive vis-à-vis other forms of association. They argue that "the only thing that seems to distinguish churches from other voluntary associations is their subject matter."[73] Treating religious institutions distinctively based on the difference in subject matter, however, is hardly justifiable in modern liberal society with its growing emphasis on freedom of conscience (as opposed to a narrow focus on religion) and equality. They write: "Once religious toleration is expanded to the more universal freedom of conscience, it is difficult to justify the special treatment of religious dissenters over other kinds of dissenters or the special treatment of associations that deal in religious beliefs and activities from those associations that deal in non-religious beliefs and activities. In modern times, state coercion of all belief, thought or speech, is suspect."[74]

Despite their forcefulness, these two propositions are not, in my opinion, without problems and difficulties. First of all, I do not agree that recognizing the church as an independent rights-bearer would necessarily undermine the protection of individual rights. Even if we recognize that

69. *See id*. at 969 ("[W]e will examine the core instances of church autonomy doctrine and ask whether an approach based on separate spheres or freedom of the church is necessary. We argue that it is not, that rights of conscience are doing all the relevant work. . . .").

70. *Id*. at 963.

71. *Id*. at 965.

72. *Id*. (footnote omitted).

73. *Id*. at 967.

74. *Id*. at 967-68.

churches *qua* churches enjoy constitutional protection of freedom of religion, the rights they enjoy still need to be balanced with other rights and interests protected by the constitution, including individual religious conscience. As long as a balancing process is still in place--as opposed to a claim of jurisdictional sovereignty of religious institutions--the risk of individual rights being trumped by institutional rights will be significantly reduced. Furthermore, while it might be the case that on many occasions institutional rights would need to give way to individual rights, it is also true that in some instances individual rights can *legitimately* be outweighed by the interests of institutions in the balancing process.[75] Individual religious conscience, as valuable as it is, does not always deserve protection under the constitution.

The difficulty with the other proposition, that religious institutions are not distinctive vis-à-vis other forms of association and therefore do not deserve special treatment, is that it tends to overlook the fact that in certain areas of the law, courts do treat religious institutions differently. For example, in cases involving church property controversies, the core essence of the doctrine adopted by American courts is that "courts should avoid making theological determinations in resolving disputes over church assets."[76] While Schragger and Schwartzman do not disagree with this doctrine, they do try to interpret it in a way that makes it less a religion-specific principle than a formulation of a more general principle that governs all voluntary associations. They do so by characterizing the doctrine as seeking to avoid defining group identity: "What is unique about property cases is that group identity is itself at issue. Both parties are asking the court to resolve the same question: Who belongs to the (rightful) church? That question is what the doctrine seeks to avoid, for the group identity should be determined exclusively by individuals within the association, coming together as consenting members--not by the state."[77]

Characterizing church property cases in this way would lead to an inevitable conclusion: an abstention approach similar to the one developed in church property cases should also be adopted in cases involving internal controversies of *non-religious* associations, if what is at issue in those controversies is the definition of group identity. As in church property cases,

75. A case in point is the Canadian case of Schroen v. Steinbach Bible Coll. (1999), 35 C.H.R.R. D/1 (Can. Man. Bd. Adj.), where the Manitoba Board of Adjudication affirms the legitimacy of Steinbach Bible College's requirement that a person be of the Mennonite faith to be eligible to work at the College as an accounting clerk. The Board holds that the requirement is a bona fide qualification for that occupation, because "everyone employed at SBC was expected to share in a faithful way with students espousing the Christian faith, and that was what SBC was all about." The complainant's freedom from discrimination on the basis of religion was overridden in this case by the institutional interest of the College in creating a uniquely Christian educational environment.

76. Schragger & Schwartzman, *supra* note 53, at 981.

77. *Id*. at 982.

courts should generally avoid picking sides in a dispute over the assets of a non-religious association, if doing so would potentially interfere with the process by which the association defines itself. However, this approach, if adopted, would deviate from the position normally taken by the American courts. For example, in discussing the landmark case of *Employment Division v. Smith*[78] and the U.S. Supreme Court's affirmation of the constitutional prohibition on judicial involvement in religious disputes in that case, Lupu and Tuttle point out that while American courts tend to be cautious not to make theological determinations in church property cases, they generally do not have the same hesitation in dealing with cases involving secular dogma or ideology:

> In reaffirming the constitutional prohibition on judicial involvement in controversies over religious authority and dogma, the Court exempted from the neutrality principle a class of cases in which religious entities are particularly interested and involved. If courts may "lend [their] power to one or the other side in controversies" over other forms of dogma--economic, political or what-have-you--there is something decidedly nonneutral in the judicial refusal to take sides on religious matters in dispute. For example, courts may enforce contracts and trusts that require judgment of disputed questions of secular ideology--for example, whether a university has acted consistently with a gift donated for the support of a scholar who is committed to the rule of law.[79]

It seems obvious that the judicial determination of "disputed questions of secular ideology" would result in, to a certain extent, a redefinition of group identity. Still, the courts have been less reluctant in addressing those questions. This seems to provide the proof that, ultimately, the concern for group identity is not what grounds the constitutional prohibition on taking sides on religious questions in church property cases. Contrary to what Schragger and Schwartzman claim, the rights of association and conscience are *not* "do[ing] all of the work here".[80] To better explain the doctrine developed in the context of church property controversies, something additional is required.

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78. Emp't Div. v. Smith, 494 U.S. 872 (1990).

79. Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 81 (2002).

80. Schragger & Schwartzman, *supra* note 53, at 983.

D. *Lupu and Tuttle*

A more moderate approach, compared to that of religious institutionalists and the strictly neutralist approach, is proposed by Professor Ira Lupu and Professor Robert Tuttle. On one hand, they agree with the neutralist position that distinctive treatment in law for religious institutions is generally not justifiable.[81] On the other hand, they are still open to the possibility of religion-specific treatment in limited cases where state intervention would potentially touch upon the "spirit" of religious institutions. They write:

> Totalitarian regimes typically try to control intimate aspects of their subjects' lives. Control of the intellectual, political, sexual, and economic details of the lives of political subjects creates enormous leverage for the state in the struggle for control of their spirits…If the right of privacy, at least in part, insulates the realm of the spirit from state control, the constitutional distinctiveness of religious institutions--those that nurture the spirit directly--rests on comparable foundations.[82]

The "spirit" here can be understood as referring to the "sacredness", or the distinctively religious quality, of religious institutions.[83] Religious institutions are normally engaged in a variety of activities, among them are those that nurture their "sacredness" directly, and those that deal primarily with the practical and material aspect of the group life. The former type of activities include (but not limited to): "gathering for worship, religious instruction, and spiritual or sacramental celebration of life's major events."[84] An example of the latter type of activities is the building and using of parking facilities by religious institutions.[85]

Lupu and Tuttle argue that the "spirit-nurturing" or "sacredness-nurturing" activities of religious institutions deserve distinctive treatment in the form of exemption from the law, while other activities of the

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81. *See* Lupu & Tuttle, *supra* note 79, at 78 ("First, the only sensible starting point involves a presumption of neutrality. In most ways with which the law is concerned, religious institutions are entirely indistinguishable from their counterparts.").

82. *Id*. at 84.

83. In the paragraph immediately before the above quote, Lupu and Tuttle point out: "Separationism, then, depends on articulation of this political concept of sacredness and on some attempt to identify what particular aspects of the behavior of religious institutions are bound up with the sacred." Right after this, they claim that religious institutions deserve distinctive treatment for those aspects of the operation that "nurture the spirit directly." If we compare these two statements, it seems fair to say that the "spirit" and the "sacredness" are two interchangeable terms. *See id*.

84. Lupu & Tuttle, *supra* note 16, at 375.

85. *See id*.

institutions should remain subject to state regulation. The rationale for this argument has to do with the distinction between ultimate and temporal concerns and the jurisdictional limit on the state power this distinction entails. The proper jurisdiction of the secular state is the temporal welfare of its citizens, while on the other hand it disclaims the task of pursuing and addressing the ultimate concerns. Lupu and Tuttle point out: "The role of the contemporary state is broad indeed, but it remains circumscribed by its penultimacy. Life's ultimate questions are to be left in private hands, and when those hands are institutional, the state must respect the internal life and self-governance of such institutions."[86]

Typically, the "sacredness-nurturing" activities of religious institutions are closely connected with the ultimate concerns or have these concerns as their main content. The secular state should therefore refrain from interfering with such activities, lest it trespass on a territory over which it has no jurisdiction--the territory of ultimate concerns.

In their most recent article on the place of religious institutions in the constitutional order, Lupu and Tuttle refer to the spirit-nurturing activities of religious institutions as "distinctively religious activities."[87] The term is a bit different, but the idea remains unchanged: religious institutions are entitled to exceptional treatment only with respect to those activities that are directly related to their transcendent nature, their distinctively religious quality.

Although Lupu and Tuttle sometimes present themselves as leaning more closely towards the neutralist position[88] and as opposing the project proposed by religious institutionalists,[89] their framework does provide significant latitude for religious institutions to operate their affairs without state intervention. This is evident in their position on the state regulation of employment relationships within religious nonprofit organizations. First of all, they acknowledge the legitimacy of Section 702 of the 1964 Civil Rights Act,[90] which grants exemption to all religious organizations--including "houses of worship" and the broader category of religious nonprofit organizations--from the prohibition against discrimination in employment on the basis of religion. Lupu and Tuttle believe that this statutory exemption "protects legitimate and distinctive concerns of faith institutions."[91] They point out that instead of seeing the exemption as a privilege for religious

86. Lupu & Tuttle, *supra* note 79, at 92.

87. Lupu & Tuttle, *supra* note 16, at 375-76, 392, 394.

88. *See* Lupu & Tuttle, *supra* note 79, at 92 ("Our answer is only a bit . . . broader than that of the Neutralist, who will systematically deny the possibility of distinctive treatment in the law for religious institutions, and considerably narrower than that of the Separationist, who will affirm such distinctive treatment whenever plausible.").

89. *See* Lupu & Tuttle, *supra* note 16, at 373-74.

90. 42 U.S.C. § 2000e-1(a) (2012).

91. Lupu & Tuttle, *supra* note 16, at 386.

organizations, it should rather be seen as a protection of their equal liberty: "[T]he exemption is designed to avoid discrimination against religious organizations . . . The exemption places religious nonprofits on equal footing with other cause-oriented organizations. The Democratic Party may insist that all its employees be enrolled as voting Democrats; likewise, environmental groups may require all employees to embrace green commitments."[92]

Section 702 of the 1964 Civil Rights Act covers only the discrimination in employment by religious organizations on the basis of religion. How about the discriminatory employment practices by them that are based on other factors, such as sexual orientation? Can a religious nonprofit organization refuse to hire a person because he or she engages in a same-sex relationship?

Lupu and Tuttle suggest that we apply the principle of "ministerial exception" to address this type of issue. They start from the job positions within religious nonprofits that "replicate core aspects of the minister's role in a house of worship"[93]: a chaplain in a religious hospital, and a professor of theology at a seminary. The duties of these job positions necessarily involve the articulation and transmission of faith, and therefore they can certainly be covered by the ministerial exception. Beyond these paradigmatic examples, it is still possible for a religious nonprofit organization to claim the protection of the ministerial exception, if the position in question functions in important ways to help communicate the religious messages of the organization. Importantly, Lupu and Tuttle suggest that "[i]n close cases, courts should *give greater deference* to institutions that are directly involved in the articulation of religious ideas or delivery of religious experience, such as schools, counseling services, publishers dedicated to production of religious works, or summer camps."[94] The claims of such institutions that a particular position advances their religious messages--though not necessarily in a direct or explicit way--must be respected by the courts. By contrast, "courts should give less deference to institutions that are predominantly oriented to the delivery of discrete services with obvious secular counterparts. . . . In such service organizations, courts should require strong proof that the role in question involves the explicit transmission of faith . . . ."[95]

As indicated above, the general thesis of Lupu and Tuttle's approach is that distinctively religious activities of religious institutions are entitled to be treated differently by the law, while other activities with a more temporal

92. *Id*.
93. *Id*. at 385.
94. *Id*. (emphasis added).
95. *Id*.

character are not. Here we can see a further development of this thesis: if a religious institution is constantly engaged in distinctively religious activities in their day to day operation, it should be given greater deference in the judicial process that determines whether a particular job position in that organization is covered by the ministerial exception. For those institutions with strong religious orientation, such an idea can be very helpful in their effort to argue against state interference with the employment decisions they make. To illustrate, let us consider a recent decision by the Massachusetts Superior Court in *Barrett v. Fontbonne Academy*,[96] where a Catholic school's refusal to hire a person who has a same-sex spouse was deemed by the court to be an illegal discrimination.

Mr. Matthew Barrett was originally hired by Fontbonne Academy, a private Catholic school for girls, for the position of the school's Food Service Director. After he filled out an employee new hire form in which he listed his same-sex spouse as "emergency contact", his offer of employment was rescinded. Mr. Barrett was told by the school officials that they cannot hire him because he was involved in a same-sex marriage, which was against the teachings of the Catholic Church. In the decision, the court considers, among others, whether the school has a constitutional right to be exempt from Massachusetts' anti-discrimination law, which includes a prohibition of employment discrimination on the basis of sexual orientation. In particular, the court considers whether requiring the school to comply with the anti-discrimination law would violate its right to expressive association. The court concluded that it would not, because the role of Food Service Director does not include "formally presenting the gospel values or the teachings of the Catholic Church."[97] Moreover, there is a distinction between "compliance with a non-discrimination mandate imposed by our civil laws even upon unwilling employers" and "actual acceptance of same-sex marriage as a matter of religious doctrine or public policy."[98] Even if there may be a risk of confusion, the school "has every right . . . to articulate that distinction to students, parents, and the public."[99]

Now, Fontbonne Academy clearly qualifies as an institution that is "directly involved in the articulation of religious ideas or delivery of religious experience." Therefore, under Lupu and Tuttle's framework, the court should give greater deference to the school in determining whether the job position in question contributes to advancing the religious messages of the school, and is thereby covered by the ministerial exception. A particular

96. Barrett v. Fontbonne Acad., No. NOCV2014-751, 2015 WL 9682042 (Mass. Super. Dec. 16, 2015).

97. *Id.*

98. *Id.*

99. *Id.*

job position within a religious school needs not to be excluded from the protection of ministerial exception if it does not involve "the explicit transmission of faith."[100] If Fontbonne Academy can give more evidence on how the director of food service may serve as a role model for students, or help communicate its religious messages in the daily interaction with students, there is a possibility that the school's decision not to hire Mr. Barrett could be accepted under Lupu and Tuttle's framework. To put it another way, if the school believes that the religious messages it attempts to convey could be inadvertently transformed by the presence of a director of food service who engages in same-sex relationship and can provide reasonable explanations for this concern, Lupu and Tuttle's approach would probably require the court to defer to the school's judgment. A court decision based on Lupu and Tuttle's approach, in other words, would have given the Catholic school a greater degree of protection.

IV. RECONSIDERING TAIWAN'S APPROACH TO THE AUTONOMY OF RELIGIOUS INSTITUTIONS

In the previous section, I have discussed the merits and weaknesses of some of the major positions in the debate over the idea of "religious institutionalism." How does this debate help inform our understanding of the relationship between the state and religious groups in Taiwan? In the face of the emerging disagreement within the Constitutional Court of Taiwan with respect to the ways in which religious institutions should be regulated, what are some of the insights we may draw from this debate for our road ahead? To answer these questions, let us first briefly consider the place of religious institutions in Taiwan's legal culture.

A. *The Place of Religious Institutions in the Taiwanese Context*

Historically, religious institutions in Taiwan have often been regarded as a social sector that needs to be placed under special control. Take the Act of Supervision of Temples and Shrines (*Jiandu Simiao Tiaoli*, ASTS), which was the focus of J.Y. Interpretation No. 573, for example. In addition to the requirement that temples' disposition of their real estates be approved by the state, ASTS also bans non-citizens from holding management positions in temples and shrines.[101] ASTS was promulgated in 1929 and was a product of the extremely hostile social atmosphere toward religion that emerged

100. Lupu & Tuttle, *supra* note 16, at 385.

101. *See* André Laliberté, *The Regulation of Religious Affairs in Taiwan: From State Control to Laisser-faire?*, 38 J. CURRENT CHINESE AFF. 53, 68 (2009).

during the 1920s in mainland China.[102] In the 1920s in China, "Chinese intellectuals were attracted to anti-imperialism, anti-Christianity, nationalism, rationalism, science, and Marxism, and tended to blame the weakness of China on traditional ideologies and institutions, including 'superstitious' religions."[103] It was in this kind of social atmosphere that ASTS was promulgated and it became one of the earlier regulations of religion that "ostensibly aimed at reinforcing national unity and combating foreign imperialism [and] were designed to control religious institutions."[104] Another regulation that reflects the spirit of the 1920s was the Private School Regulations (*Sili Xuexiao Guicheng*, PSR), which was promulgated in the same year as ASTS. PSR was part of a larger campaign in the 1920s that aimed at "the secularization of both structure and content of mission education"[105] and the restoration of full Chinese control over mission schools. It is therefore not surprising that one of the provisions of PSR banned the holding of religious rituals in all elementary schools, including religious schools.[106]

After World War II, Taiwan was freed from the colonial rule of the Empire of Japan and became part of the Republic of China. As a result, since 1945, the ASTS and the PSR, as part of the legal regime of the Republic of China, became the official law in Taiwan. In other words, the anti-religion spirit of the 1920s was able to further exert its influence in Taiwan with the ASTS and PSR becoming the official laws of the society.

After the Kuomintang regime (hereinafter referred to as "KMT regime") retreated to Taiwan in 1949 after being defeated by the Communist Party in mainland China, the KMT regime had attempted to replace the ASTS with a new law that regulates religion. For example, the Ministry of Interior proposed three draft laws on religion respectively in 1979 (the Law for Temples and Churches, *Simiao Jiaotang Tiaoli*), 1983 (the Law for the Protection of Religion, *Zongjiao Baohufa*), and 1993 (the Law on Religious Corporations, *Zongjiao Tuantifa*), but all three attempts failed due to the opposition of religious groups.[107] During the fall of 1996, however, several high-profile religious controversies and scandals broke out and sent shock waves throughout the country. One of them was "Chung Tai Chan Monastery

102. For a detailed account of the hostility toward religion generally, and more specifically toward Christianity, in the Chinese society during the 1920s, *see* KA-CHE YIP, RELIGION, NATIONALISM, AND CHINESE STUDENTS: THE ANTI-CHRISTIAN MOVEMENT OF 1922-1927 (1980).

103. Cheng-Tian Kuo, *State-Religion Relations in Taiwan: From Statism and Separatism to Checks and Balances*, 49 ISSUES & STUD. 1, 13 (2013).

104. Laliberté, *supra* note 101, at 68.

105. YIP, *supra* note 102, at 34.

106. Sili Xuexiao Guicheng (私立學校規程) [Regulations Governing the Private School] § 5 (promulgated and effective Aug. 29, 1929) (R.O.C.).

107. *See* Laliberté, *supra* note 101, at 69-70.

controversy", where about 40 colleges students who served as volunteers at a summer camp held by the famous Buddhist monastery decided collectively to give up their study and become monks and nuns after the camp. The parents of these students protested fiercely and sought to take them back from the monastery, as they did not expect their sons and daughters would make such a decision without consulting them.[108] Another incident concerned a controversial religious leader, Song Qi-Li, who had a large crowd of followers, among them were a few influential politicians. In October 1996, he was accused of faking his photos in order to prove that he possessed supernatural powers and asking his followers to purchase those photos at high prices.[109]

These controversies generated public outcry and demands to impose more stringent regulations on religious organizations and their leaders. Public sentiment during that period of time was that the "chaotic situation" within the religious sector could not be solved without placing more legal restraints on religious organizations. Unsurprisingly, government's attempt to enact new comprehensive laws on religion gained momentum as a result of these controversial events.[110]

The idea that religion needs to be placed under special control by the state can also be seen in the latest draft of the Law on Religious Corporations (*Zongjiao Tuantifa Caoan*).[111] I have briefly mentioned in section II that a number of the provisions of the draft can be regarded as reflecting a paternalistic view, which claims that sometimes state intervention is necessary in order to ensure the healthy development of religious organizations. A clear example of this is the proposed law's regulation concerning the eligibility of the chairmen of religious corporations. Article 15 of the proposed law, for example, stipulates:

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108. *See* Huang Yin (黃寅) & Chen Dong-Xu (陳東旭), *Xiaoxingchen Xialingying Jieshu Yi Liangxingqi, Xueforen Wei Gui* (*小星辰夏令營結束已兩星期 學佛人未歸*) [*Two Weeks after the Little Stars Summer Camp, Volunteers are Still not Coming Home*], LIAN-HE BAO (聯合報) [THE UNITED DAILY NEWS], Sept. 4, 1996, at A5.

109. *See* Luo Xiao-He (羅曉荷) & Chen Jin-Zhang (陳金章), *"Song Qi-Li" Bei Zhi Zaoshen Liancai Jian Ta Xu Gong Yiqianwan* (*「宋七力」被指造神斂財 見他需供一千萬*) [*"Song Qi-Li" Accused of Cheating His Followers of Their Money: It Takes 10 Million to Personally Meet with Song*], LIAN-HE BAO (聯合報) [THE UNITED DAILY NEWS], Oct. 10, 1996, at A3.

110. *See* Lin Ben-Xuan (林本炫), *Woguo Dangqian Zongjiao Lifa de Fenxi* (*我國當前宗教立法的分析*) [*An Analysis of Current State of Legislation on Religion in Taiwan*], *in* ZONGJIAO LUNSHU ZHUANJI DI SAN JI: ZONGJIAO FAZHI YU XINGZHENG GUANGLI PIAN (宗教論述專輯第三輯：宗教法制與行政管理篇) [VOLUME THREE OF RELIGIOUS DISCOURSES: LAWS ON RELIGION AND ADMINISTRATIVE MANAGEMENT] 213, 215 (Liu Wen-Shi (劉文仕) ed. 2003).

111. Zhonghua Minguo Neizhengbu (中華民國內政部) [Ministry of the Interior, R.O.C.], Zongjiao Tuantifa Caoan (宗教團體法草案) [The Law on Religious Corporations (draft)] (May 8, 2015) (Taiwan).

> A person who is under any of the following circumstances shall not be appointed to be the chairman of a religious corporation (and shall be removed from the position if the religious corporation has made the appointment):
> 1. Having committed criminal offences under "Organized Crime Prevention Act", sexual offences, or crimes related to sexual moralities, and has been convicted by the courts.
> 2. Having committed crimes other than those identified in the previous section, and has accordingly been sentenced to more than 1 year, but has not finished the jail term or has finished it for less than 3 years.
> 3. Having been dishonored for unlawful use of credit instruments, and the term of such sanction has not expired yet.
> 4. Having been declared bankruptcy and not been resumed the rights.
> 5. Having become subject to the order of the commencement of guardianship or assistantship and the order has not been rescinded.[112]

The government's intention here is to ensure that the leaders of religious organizations are morally qualified for the leadership positions so as not to do damage to the interests of the organizations and to the interests of the larger society. Apparently, Article 15 is an expression of state paternalism and seriously interferes with the freedom of religious groups to choose their own leaders. After all, why should the state be concerned that members of a religious organization may not be capable of selecting a leader in the best interest of the group? And what if a religious group does not want a seemingly "moral" person to lead them but a person who best embodies their spiritual message (one who may be a "sinner" in the eyes of the state)?

B. *The Assumption of the Authority of State Law over Religion and Justice Chen's Approach Reconsidered*

How does this discussion of the place of religion in Taiwan help us reconsider the approach to the autonomy of religious institutions that needs to be taken? One possible suggestion is that, in the face of state paternalism and the tradition of placing religious institutions under special state control, perhaps a stronger protection for the autonomy of religious institutions is required. In other words, a position that would recognize the legal sovereignty of religious institutions in managing their internal affairs should

112. *Id.* § 15 (author's translation from Chinese).

be adopted in order to protect them from the state's intrusive policies. I have some reservations, however, about this suggestion. For one thing, as we have seen, the sphere sovereignty approach and the freedom of the church approach are not without their own difficulties. For another, as some scholars have pointed out, in Taiwan and other East Asian countries, the institutional power of religious groups in relation to the state has been relatively weak.[113] Therefore, it may not be easy for lawyers and ordinary people in Taiwan to re-imagine the state and religious institutions as separate spheres of sovereignty.

On the other hand, the approach developed by Lupu and Tuttle seems to be more balanced while also able to provide religious institutions with significant protection against state intrusion. Under their approach, for example, Article 15 of the draft Law on Religious Corporations would certainly be deemed as an illegitimate interference with the religious freedom of religious institutions. Few activities of a religious institution are more intimately connected with the "spirit" of the institution than the selection of their spiritual leader. Such an activity is so crucial to the development of the distinctively religious aspect of the institution that it should be completely off limits to the state. Despite being a moderate approach compared to the sphere sovereignty approach and the freedom of the church approach, I believe Lupu and Tuttle's approach, if adopted, could effect significant change in Taiwan's current thinking on the autonomy of religious institutions.

Let us now return to the divergent understandings of the authority of state law in relation to religious groups in Taiwan's constitutional jurisprudence. I suggest that both the assumption of the authority of state law over religion and the position of Justice Chen Shin-Min require certain adjustments in the light of Lupu and Tuttle's theoretical arguments. To begin, the idea that the activities and practices of religious institutions are presumptively subject to the regulation of the state is, in principle, reasonable. Religious institutions normally do not deserve distinctive treatment in the form of exemption from state law. However, caution is called for when the application of a regulation would have an impact on the activities that are intimately related to the distinctively religious quality of religious institutions. The state should refrain from interfering with distinctively religious activities of religious institutions, because the secular character of civil government means that it has no jurisdiction over the

113. *See* André Laliberté, *Something Got Lost in Translation: From "Secularism" to "Separation between Politics and Religion" in Taiwan*, *in* SECULAR STATES AND RELIGIOUS DIVERSITY 207, 215 (Bruce J. Berman et al. eds., 2013) ("Religions in East Asian societies . . . have seldom constituted powerful institutions similar to the Catholic Church, the Anglican Church, or the established Lutheran churches of continental Europe.").

matters that engage ultimate concerns.

On the other hand, Justice Chen is right in insisting that the right to autonomy of religious institutions prohibits the state from imposing the norm of gender equality and the principle of democracy on their management of internal affairs, especially on the clergy selection process. The doctrine of ministerial exception, which has been formally recognized by the U.S. Supreme Court in the decision of *Hosanna-Tabor*,[114] reflects exactly that understanding. However, Justice Chen would need to clarify whether, under his approach, a broad right of autonomy for religious groups that covers all aspects of internal group operations is warranted, as some of his statements can be read in this way. I suggest that further qualifications need to be added to his approach to clearly define situations in which religious institutions deserve distinctive treatment. The religious *identity* of these institutions is not what justifies the distinctive legal treatment for them. Rather, it is the *activities* that are intimately related to their distinctively religious quality that deserve special protection.

V. CONCLUSION

In this article, I have described a newly emerging approach to the autonomy of religious institutions developed by Justice Chen Shin-Min, and the tension between his approach and the Court's previous decisions on the issue of religious freedom. I have also offered a critical analysis of the major positions in the debate over the idea of religious institutionalism in American legal scholarship. After some consideration of state-religion relations in the Taiwanese context, I conclude that Lupu and Tuttle's approach is more worthy of our attention, since it provides a much-needed protection from state intervention for religious institutions in Taiwan while benefiting from not having the theoretical weaknesses we have seen in both the sphere sovereignty and the freedom of the church approaches. In light of Lupu and Tuttle's theoretical intervention, I suggest that both the assumption of the authority of state law over religion and the new approach by Justice Chen need certain adjustments. Although further research is required to explore the potential difficulties of applying Lupu and Tuttle's approach to the Taiwanese context, I believe their approach should be an integral part of Taiwan's future framework for the regulation of religious institutions.

114. *See supra* note 33.

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邁向宗教團體主義？
臺灣對於宗教團體之規範的未來

林 榮 光

摘 要

本文分析臺灣大法官解釋中針對宗教團體自治權的一個新出現的觀點。此一新的觀點乃是由陳新民大法官所提出。陳新民大法官於釋字第728號解釋之協同意見書中指出，宗教團體之結社權在憲法秩序中具獨特地位，宗教性質之結社權與一般性質之結社權不同，應受最嚴格之憲法保障。此一觀點相當不同於過去涉及宗教自由的相關大法官解釋中的一個潛在假設，亦即：宗教團體的規範及活動應受制於國家法律的權威之下。

這種對於國家法律權威與宗教團體之間的關係的不同理解，類似於美國法學界近年來就「宗教團體主義」（religious institutionalism）之正當性所展開之辯論。本文分析此一辯論中之各方重要立場，並主張：有鑑於臺灣的社會文化背景，由Ira Lupu和Robert Tuttle所共同提出之觀點較值得我國參考。他們的觀點是：宗教團體的活動若與其獨特之宗教性有密切關聯時，得享有法律之特別對待。本文於文末根據此一理論見解，來評論陳新民大法官所提出之觀點，以及過去大法官解釋中就國家法律對於宗教團體之權威的潛在假設。

關鍵詞：宗教團體、大法官釋字第728號解釋、宗教團體主義、法律對宗教之特別對待