A New Name for an Old and Discredited Metaphor

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A Critique of Paul Horwitz’s *Churches as First Amendment Institutions: Of Sovereignty and Spheres*

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INTRODUCTION

“Is there any thing whereof it may be said, See, this is new? it hath been already of old time, which was before us. / There is no remembrance of former things.”

Interpretation of the First Amendment as a whole is a remarkably heterogeneous activity, perhaps befitting an amendment which seems, on first reading, to be a catchall list of prohibitions on Congress loosely related to expressive activity. This difficulty is exacerbated by what seem to be two very different kinds of expression underlying the First Amendment: religious rationales (the Establishment Clause and the Free Exercise Clause), and political expression (the freedoms of speech, press, assembly, and petition). The Amendment itself does not differentiate between the protections provided to any of these rights, and certainly does not indicate how these rights are to conflict, or overlap, or which of these rights, if any, is to be predominant. So it is perhaps not surprising that First Amendment jurisprudence has produced a “notoriously scattered and confused” jurisprudence characterized by “a jumble of incompatible and

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1 *Ecclesiastes* 10-11(King James).
indeterminate tests.” More distressingly, for those seeking to impose intellectual order and coherence on the First Amendment, a new element has emerged in constitutional law whose interaction with the First Amendment (when the First Amendment’s clearest application is usually to individuals or religious groups) is not always clear: namely, freedom of association.

Partly in response to the state of First Amendment jurisprudence and theory, and partly for its own sake, an increasingly influential group of scholars has proposed that we reject the “lure of acontextuality” – that we reject attempts to “bring a theoretically pure and coherent shape to the whole of First Amendment law, with little apparent regard for who is speaking or what is being said” and their accompanying buzzwords such

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3 Compare Michael Stokes Paulsen, Scouts, Families, and Schools, 85 Minn. L. Rev. 1917, 1919, 1922 (2001) ("The First Amendment freedom of expressive association--the key principle at issue in the Boy Scouts case--is one of those rare “penumbras” that is not all shadow and no substance. Quite the contrary, the freedom is firmly rooted in the Constitution’s text and internal logic...If it is legitimate to accord “the freedom of speech” to collective expression (and I think that it plainly is...), the freedom...logically entails a freedom of autonomous message formation and delivery by the group, including the right of the group to define itself...All this can be part of a group’s group exercise of the First Amendment freedom of speech, protected from the government’s interference abridging the freedom.") with Daniel A. Farber, Speaking in the First Person Plural: Expressive Associations and the First Amendment, 85 Minn. L. Rev. 1483, 1513 (2001) ("The structural similarities among different types of expressive associations, which are highlighted in recent decisions such as Dale, are important. But the constitutional and functional differences among associations are also significant. If we ever do have a general theory of expressive association, it will have to do justice to both the similarities and the differences. In the meantime, we have to remember that associations are in the end merely groups of people, and that it is their rights (and ours) -- not those of abstract entities called expressive associations-- which the Constitution ultimately seeks to protect.")
as “‘equality’, ‘neutrality’, ‘content neutrality’, and many more.”

Instead, they suggest that the problem is that First Amendment jurisprudence pays too little “regard for the identity of the speaker or the institutional environment” in which the Amendment applies, and that seeking a “seemingly elegant and uniform approach” causes “more problems by ‘miss[ing], or mis-describ[ing], the role of institutions and institutional context’…as it is experienced on a real-world basis.”

Thus, proposes Prof. Horwitz, it is time for a new metaphor. As he stirringly reminds us:

Movements need metaphors. Every age, in seeking not merely the solutions to problems, but also the kinds of problems which are to be conceptualized as requiring solution, requires its own imagery and its own way of understanding and resolving the issues that beset it. Metaphors shape as well as create political discourse…Metaphors are especially thick in the realm of

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6 Id. at 82 (quoting Richard W. Garnett, Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses, 53 Vill. L. Rev. 273, 284 (2008)).
law and religion. A literal re-vision—a new way of seeing a vital but confused area of law—is what I offer here.\footnote{Id. at 80-81.}

The metaphor Horwitz wants to adopt is, he tells us, neither from American nor English constitutional thought. It is instead based in the theology and politics of nineteenth-century Holland…The metaphor derives from [Abraham] Kuyper’s signature intellectual contribution to the study of religion and politics—his doctrine of ‘Souvereiniteit in Eigen Kring,’ or ‘sphere sovereignty’. Sphere sovereignty is 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.\footnote{Id. at 82-83 (citations omitted).}

Without wanting to disparage Prof. Horwitz’s possibly merited enthusiasm for Kuyper’s theology, this Article protests that there is nothing novel about the metaphor he proposes, except a slight tweaking in name (and perhaps in source\footnote{Horwitz notes that “Kuyper has not been ignored by the American legal academy”, but has made “scattered appearances” and that “a number of factors combine to minimize Kuyper’s potential influence in American religious and political thought.” Id. at 91-92 (citations omitted). To that extent, there is a real possibility that Kuyper has been overlooked because the ideas being proposed were largely conventional ones.}). ‘Sphere sovereignty’ so far as Horwitz
elaborates it, is difficult to distinguish from the familiar ‘separate spheres ideology’ which we rightfully associate with both sexism and racism, and, insofar as Horwitz gives applications of his metaphor to legal struggles in the church-state arena, it is more than suggestive to see that these examples tend towards protecting the church from legal intervention with rationales that sound suspiciously like those once proffered by the state itself, once the main enforcer of ‘separate spheres’ in discriminating against and disempowering women and blacks.

This Article proceeds in two parts. In Part I, I present and criticize Horwitz’s account of the idea of ‘sphere sovereignty’. For the most part, I bypass the historical exegesis of Kuyper, since by Horwitz’s own account, his proffer is not primarily an exercise in intellectual history, but rather the presentation of a metaphor and theory he actually proposes to apply in American law.

Part II recalls the operation of ‘separate spheres ideology’, discussing both the general ideology, and its not-unusual application in two seminal (and long-overruled) Supreme Court cases: Bradwell v. Illinois, and Plessy v. Ferguson. Part II then compares Horwitz’s ‘sphere sovereignty’ to the ‘separate spheres ideology’ and, not finding much to distinguish them, concludes that for the most part, the classic criticisms directed at the ‘separate spheres ideology’ are all equally applicable to the ‘sphere sovereignty’ theory of First Amendment institutionalism, at least as applied to church-state relations.
PART I: SPHERE SOVEREIGNTY

This part, which discusses the metaphor of sphere sovereignty, is divided into two sections, roughly following Horwitz’s own discussion. The first discusses the distinctive parts of the ‘sphere sovereignty’ metaphor, and the second delves into what Hortwiz says “the picture we have drawn of sphere sovereignty has to offer First Amendment institutionalism…a vision of a vital, diverse, organic, and ordered legal pluralism.”

THE STRUCTURE OF SPHERE SOVEREIGNTY

1) A FUNDAMENTAL OPPOSITION TO UNIPOLAR SOVEREIGNTY

We begin with what appears to be the motivating factor behind the Kuyperian theory, a kind of resistance to two of the two prevailing strong theories of sovereignty: popular sovereignty, which in the Kuyperian account would lead to a “shackling of liberty in the irons of State-omnipotence”, and state sovereignty, “which he believed would led to ‘the danger of state absolutism.’” Horwitz does not further amplify these fears, except to note that for Kuyper, “neither course was acceptable.” Incidentally, it’s not hard to trace these two conceptions of sovereignty to Rousseau in On The Social Contract and Hobbes in Leviathan respectively. The criticisms are, to a certain extent, features of the

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10 Id. at 109.
11 Id. at 94.
12 Id.
theories, but, to give Kuyper credit where credit is due, they certainly are not very attractive ones. Consider first Rousseau in Book 1, Chapter 7 (“On The Sovereign”):

For since the sovereign is formed entirely from the private individuals who make it up, it neither nor could have an interest contrary to theirs…Thus, in order for the social compact to avoid being an empty formula, it tacitly entails the commitment- which alone can give force to the others- that whoever refused to obey the general will will be forced to do so by the entire body. This means merely that he will be forced to be free.13

Being ‘forced to be free’ certainly smacks of an authoritarianism such that, no matter the logic behind saying that in the theoretical construction of the sovereign from the general will there could be no particularistic desires, on inspection with actual sovereigns imposing actual rules, being ‘forced to be free’ has significantly sinister results.

Kuyper’s objection to the ‘danger of state absolutism’ seems like an on-point criticism on the starting point for another major family of sovereignty theories: the Hobbesian monarch. Recall that in Hobbes’ theory after vesting the sovereign with the power to “submit their wills,

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every one to his will, and their judgments, to his judgment”¹⁴ that same
sovereign may then have “the use of so much power and strength
conferred on him, that by terror thereof, he is enabled to form the wills of
them all.”¹⁵ The conventional and obvious criticism of this schema is, of
course, that such a sovereign has little if any practical limits on its power,
regardless of the subject areas in which it is only supposed to be enforced.
If Kuyper’s theory of sovereignty truly avoided both the problems of
Rousseauian sovereignty and Hobbesian sovereignty, that alone would
speak in its favor – given that the heart of both problems are the
majoritarian problem and the minoritarian problems (The tyranny of
Rousseau’s general will being the a transposition of the tyranny of the
majority, and Hobbes’s will of the sovereign being an exaggerated
problem of the tyranny of the minority). Nevertheless, given the vibrant
philosophical life of the problems caused by these particular poles of
political theory, a claim to neatly circumvent them should be viewed with
considerable skepticism.

2) THE TRIPARTITE/MULTIPARTITE SPHERES

Kuyper’s theory of different spheres has a bimodal aspect in which
there are three main spheres: “the state, society, and the church”¹⁶ as well
as a variety of smaller spheres built into the other spheres, particularly the

¹⁴ THOMAS HOBBES, LEVIATHAN, reprinted in CLASSICS OF MORAL AND POLITICAL
THEORY, 491, 547 (3d. ed., Michael Morgan ed.).
¹⁵ Id. at 548.
¹⁶ Horwitz, supra note 5, at 95.
social sphere. These are each “separate spheres each with its own sovereignty,” which is perhaps the key claim to the Kuyperian theory.

On one hand, this is merely a version of the old Christian division, e.g., between the kingdom of God and the kingdom of men, or church and state. To the extent one takes the separation of church and state as being compelled from the religious viewpoint, and as denoting truly separable activities, Kuyper’s theory only differs by including ‘society’ as a third category distinct from the state and church. On the other hand, there are attractive aspects of Kuyper’s rendering. First, in Horwitz’s view, Kuyper’s methodology brings out the “striking energy, diversity, and pluralism…of human existence”, most strikingly in passages where such as the one in which Kuyper explains that “the family, the business, science, art, and so forth are all social spheres, which do not owe their existence to the state, and which do not derive the law of their life from the superiority of the state, but obey a high authority within their own bosom.” Horwitz does not specify whether Kuyper’s claim is a descriptive one (in which case it is probably operationally false with several of those categories, at the very least ‘business’) or a normative

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17 Id. at 95-96, 100-101.
18 Id. at 95.
19 This too, is a reflection of well-known tropes in political philosophy. In this case, Kuyper is adopting a distinction of state/civil society developed first and most influentially in the political philosophy of Hegel. See G.W.F. Hegel, Elements of the Philosophy of Right, 220-274 (Allen Wood, ed. 1991)(Section 2 of “Ethical Life”: “Civil Society”).
20 Id. at 95.
21 See, e.g., Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Political Science Quarterly 470 (1923) (demonstrating that property norms
one. As a normative claim, it is an attractive idea with very minimally libertarian overtones. Certainly, there’s a certain private sphere of autonomy that we all crave, at least when compared to Kuyper’s demand that 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.” But with a minimalist vision, it certainly is incompatible with both standard conservative and liberal visions of the state.

3) **The Role of the State**

If each sphere is to retain autonomous, then a certain coordination function must be fulfilled, so that “all the spheres operate harmoniously and according to their divine purpose.” Thus, while the state is in one sense merely a separate sphere like the others, it is in another sense “the sphere of spheres, which encircles the whole extent of human life” – an encircling which perhaps motivates Kuyper’s octopus image. As the ‘sphere of spheres’, the state has

ultimately are expressed in physical coercion, e.g., calling the police if someone takes something, and that as a result transactions involving property (business) are mediated by the power of the State and the methods for invoking its power (laws of property, contract, etc.).

22 Horwitz, *supra* note 5 at 96 (quoting Kuyper).

23 *Id.* at 96. It should be noted that Horwitz believes, quite plausibly, that little of what he takes from Kuyper’s theory actually requires that “its readers share Kuyper’s religious views.” *Id.* at 94. The criticisms I will be making are largely functional and normative ones, which do not, however, overtly focus on the religious derivation of the ideas.

24 *Id.* at 96 (quoting Kuyper).
Three primary obligations...[a] threefold right and duty. 1. Whenever different spheres clash, to compel mutual regard for the boundary-lines of each; 2. To defend individuals and the weak ones, in those spheres, against the abuse and power of the rest; and 3. To coerce all together to bear personal and financial burdens for the maintenance of the natural unity of the State. \(^{25}\)

This is quite a minimalist state,\(^{26}\) though perhaps not unworkably so, since the second and third roles would generate much of the police-power, regulatory power, and infrastructure-provision of the modern state.\(^{27}\)

Sphere sovereignty is a vision of “guided and divided pluralism.”\(^{28}\) The guidance comes from the fact that each sphere is demarcated by its “own unique set of functions and norms.”\(^{29}\) The functions and norms of each sphere are essentially organic, arising from “social and communal activities, from the smallest unit, the family, up to churches universities, guilds, and associations.”\(^{30}\) Again, there is serious question as to whether this claim is meant descriptively or normatively, and again, it looks like an extremely implausible view descriptively. (One need only look to the

\(^{25}\) Id.

\(^{26}\) It bears a not-inconsiderable resemblance to the Nozickian ‘night-watchman’ state. See generally Robert Nozick, Anarchy, State, and Utopia (1974).

\(^{27}\) Horwitz, supra note 5, at 97.

\(^{28}\) Id. at 98.

\(^{29}\) Id.

\(^{30}\) Id. at 95.
suppression of, e.g., polygamous marriages, to note that the family’s “organic structure”, is heavily mediated through interaction with the state.)

Normatively, however, the case is muddier than with the multipartite spheres. Definitional problems arise (as they often do with questions of so-called ‘organic’ fact), and in this case are particularly sharp. The problems may be phrased by reference to two unattractive possibilities. The first possibility is that the state should always be the arbiter of what is an ‘organic’ social structure, and whether a given social structure is contrived or artificial. Under Kuyper’s theory, this determination would be of an overriding, ultimate importance since it would literally determine whether or not the state should treat the group as potentially sovereign over a set of issues, with all the prerogatives implied by the term, or as subject to regulation.

This problem is an expanded version of the problem that American jurisprudence has had when facing the question of whether a belief in conflict with a state regulations is a ‘religious’ belief for the purposes of the First Amendment. The First Amendment’s Free Exercise and Establishment Clauses treat ‘religion’ as an organic category or at the very least as an undefined concept in a context in which it is reasonable to suspect that the Founders thought they were employing an organic

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31 See, e.g., Malnak v. Yogi, 592 F.2d 197,207-210 (3d Cir. 1979)(proposing three ‘indicia’ for whether an asserted belief or belief system is religious – “ultimate nature of the ideas presented” being the most important and convincing evidence, comprehensiveness of belief structure, and formal, external signs properly analogized to more-acknowledged religious practices).
The State in a sense cannot remain neutral between religions and non-religions because the First Amendment commands differential treatment, but also runs the danger of subtly aiding and establishing certain kinds of religious practices by refusing to protect practices it deems not religious. The very act of making the judgments would be intensely contested, and a great deal of theorizing and litigation would immediately descend on the boundaries. Needless to say, even when done conscientiously, it’s an uncomfortable and difficult task to perform even in the limited context of religion. The Kuyperian theory would require performing this analysis not only with regard to religion (with even higher stakes since protections granted by the theory are much stronger than anything proposed by even the most radical adherents of the Free Exercise or Establishment Clauses), but with regard to every possible form of association. A Kuyperian State would have to judge whether a bank was an ‘organic, natural’ bank, whether a neighborhood association was ‘organic’, etc. Clearly, this would be an untenable state of affairs in anything but the least interesting, least plural, least diverse society imaginable, and certainly not in the diversity and pluralism that Kuyper’s theory seems designed in other aspects to address.

The self-definitional solution would be equally impossible, and here the Free Exercise comparison is helpful. Why is it that judges have to

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32 Cf. Malnak, 592 F.2d 197 (considering the question of whether the “Science of Creative Intelligence/Transcendental Meditation was a “religion” for Establishment Clause purposes).
decide whether avowed beliefs are actually religious? Why are litigants permitted to contest the religious nature of an avowal? (Why is one litigant’s word that a given belief is religious not enough?) The simplest answer is that there are transparent legal incentives to claim something is a religious belief whether or not it actually is or not, because of the differential benefits granted to religious belief. That is, if one wanted to engage in a certain kind of activity that the State forbade, a clear stratagem would be to deceive the State into believing the belief was religious, and trying to get Free Exercise protection for the belief. But since the only grounds for State interference post-sovereignty-recognition in the Kuyperian theory are abuse and violations of membership rights (expulsion and exit both) allowing groups to self-define with self-defined parameters would essentially allow groups of people to ‘opt out’ of the State except with regard to its own ‘organic’ powers. This is, of course, Lochnerism given broader scope – except that in *Lochner* only business was essentially exempt from regulation (*Lochner*, of course, excepted, in a clear parallel to Kuyper’s theory, the undefined ‘police power’ of the State), and the theoretical criticisms of *Lochner* are familiar enough that I will forgo them here.

The sovereignty-assignment function then seems very difficult if not predicated on a lack of disagreement which itself poses the question of what sphere sovereignty is meant to accomplish. Most tellingly of all, the

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33 198 U.S. 45 (1905).
middle ground is precisely the normal everyday operation of constitutional law: constitutional law constantly operates to answer questions as to what may or may not be regulated, and to what extent persons and groups are or are not effectively autonomous under law. So while either state-defined or self-declared organic social structure sovereignty would be a radical departure from existing practice at either of its least-possible-to-administer poles, it would be difficult to distinguish from constitutional law per se in the middle.

PART II: SEPARATE SPHERES IDEOLOGY

The separate spheres ideology is a fairly old trope in American and European law and morality, dating back from at least Victorian times, and, depending on how one wants to interpret the relevant attitudes, farther. The most fundamental part of separate spheres ideology, and the part which has been subject to the most consistent, sustained attack, was the gendered aspect of the appropriate ‘husband’s’ sphere and ‘wife’s sphere’.

34 Compare, e.g., Boos v. Barry, 485 U.S. 312 (1988)(holding that petitioner could “display a sign reading ‘STOP THE KILLING’ within 500 feet of the Nicaraguan Embassy” in contravention of D.C. law) with United States v. O’Brien, 391 U.S. 367 (1968)(holding that respondent could be convicted by a law making an offense “forg[ing], alter[ing], knowingly destroy[ing], knowingly mutilat[ing], or in any manner chang[ing]” a Selective Service registration certificate, even as political protest.)

This separation was role-based and grossly sexist. As the more intelligent, and more mature person, the man was automatically the ‘head of the household’ and had legal rights commensurate with such a role. Thus, e.g., only men could vote, due to women’s natural incapacity to exercise such responsibility. Only men could or should deal with money, property, and business affairs, have a career, or make any important decisions with regard to the family’s affairs. The man’s role was thus to operate in the ‘public’ sphere, the sphere in which he was the representative of the household – essentially, the political, legal, and business spheres.

The woman, on the other hand was delegated to the ‘private’ sphere as the housekeeper. Nominally, the affairs of the home were delegated to the wife, but in practice were consistently overridden by the expressed desires of the husband. The ‘sphere’ for women was thus essentially the prison of the home. Women would cook, clean, entertain guests, etc., but had no legal status as persons themselves.

In law, one of the clearest and most blatant expressions of the separate spheres ideology as applied to women was the case *Bradwell v. People of*  

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36 See Richard Chused, *Cases, Materials, and Problems in Property* 144-5 (2d. ed) (“Married women were unable to own or control many forms of property, or to act as a party in litigation. Common law rules provided that upon marriage, almost all personal property owned by a woman became the property of her husband if he, in eighteenth century parlance, ‘reduced it to his possession’. Her real property became subject to the husband’s ‘marital right’, or *jure uxoris*, the right to manage, control, encumber, and take the profits from her real estate.”)

37 See id. at 144 n. 36 (“Women could not vote, serve on juries, or hold elective office among other things.”)
Myra Bradwell, an enterprising businesswoman and publisher and key figure in the women’s suffrage movement, had obtained not only a private bill removing her civil disabilities, but had shepherded two Married Women’s Acts in 1861 and 1869 to generally extend the rights of married women. When the Illinois Supreme Court subsequently rejected her application for the state bar, Bradwell sued. The Court, among other things in its opinion, noted that

That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth. It may have been a radical error, and we are by no means certain it was not, but that this was the universal belief certainly admits of no denial. A direct participation in the affairs of government, in even the most elementary form, namely, the right of suffrage, was not then claimed, and has not yet been conceded, unless recently in one of the newly-settled territories of the west.

Unwilling to accept this result, Bradwell then pursued her case to the U.S. Supreme Court. The question presented to the Supreme Court was “can a female citizen, duly qualified in respect of age, character and

\[38\] 83 U.S. (16 Wall.) 130 (1872).
\[39\] See CHUSED, supra note 36 at 160.
\[40\] Id. at 161 (quoting Illinois Supreme Court).
learning, claim under the Fourteenth Amendment, the privilege of earning a livelihood” by practicing law in Illinois? The result was a narrowly-worded defeat in the majority opinion, which relied heavily on the now-much-vilified *Slaughter House Cases*, decided and announced the day before, to argue that since under the *Slaughter House* rationale, the Privileges and Immunities Clause only protected rights already granted by the Constitution, and did not encompass a right to employment, Bradwell could not claim a similar right. The great and horrible irony of the *Bradwell* decision was the concurring opinion by Justice Bradley, who in *Slaughter House* (the day before!) had argued in dissent that the right to pursue employment was protected by the Fourteenth Amendment.\(^{41}\)

[The Privileges and Immunities claim] assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life. It certainly cannot be affirmed, as a historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and

\(^{41}\) *Id.* at 163.
proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.\textsuperscript{42}

It takes little imagination to figure out why women rebelled against this state of affairs, and attacked the ideology; it took benefits that were equally appealing to anyone (and that everyone should have been entitled to from the first place), and distributed them solely to men, and then attempted to valorize the inferior status of women by a dignified name and by constant attempts to depict them as truly being free within their realms, regardless of the practical realities of how the separate lives compared.

While suffering significant and, for the most part, un-reversed setbacks in light of the women’s suffrage and equality movement, another aspect of the separate-spheres ideology, which grew as a reactionary response to Reconstruction Acts and Reconstruction Amendments, proved much more

tenacious and difficult to extirpate. This was the idea that government was an inherently limited enforcer of equality, and that in particular, issues of social equality were not within the legitimate ‘sphere’ of government. This was, of course the animating idea of *Plessy v. Ferguson*:

> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either…Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.\(^{43}\)

Though Justice Brown for the majority in *Plessy* does not explicitly refer to the social and political/legal as different ‘spheres’, the method of the

\(^{43}\) 163 U.S. 537, 551-552 (1896)(Brown, J. for the majority)).
argument is strikingly similar to that in Bradwell – both even use the same “nature of things” phrase in similar arguments that the Supreme Court is or should be powerless in the face of the way things simply are.

Some structural features of the separate spheres ideology should be quite clear then. In each case a historically propagated inequality or injustice was justified by both appeals to the fact that it was the way things were done (as an appeal to their being natural and thereby normatively desirable, and appeals to separateness – the idea that the powerful interests should be free to privately order their interests in the particular ‘sphere’ to limit government. Consider again in this light the Kuyperian theory of ‘sphere sovereignty’. In the time and place in which the Kuyperian theory was being propounded (19th century Holland)44 would it have meant much more or different than the separate sphere ideology?

One way to try to differentiate the theories would be to point to the fact that Kuyper’s theory was more general, not meaning to support specific entrenched interests, but rather whatever social structures happened to be extant, and if applied now, would only support the structures that are already present. This answer is, however, quite problematic. First, Bradwell and Plessy teach us that often organizational forms exist to entrench interests. Second, consider the combination of Lochner and Muller v. Oregon.45 As is well-known, in one case (Lochner) the Supreme

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44 Horwitz, supra note 5, at 83.
45 208 U.S. 412 (1908).
Court overturned maximum-hours legislation applied to men as derogating their right to contract for more, but the same Court had little difficulty sustaining similar legislation as applied to women because of their differences from men. The combination suggests that at least so far as legal reasoning can be concerned, it is remarkably easy to divide and sub-partition ‘organic’ social structures from each other to effectively partition the rights as desired. *Lochner* and *Muller* look equally plausible under a Kuyperian schema, which is to say that the Kuyperian protections can, with construction by the State, be turned into swords against minoritarian interests with ease. Moreover, the Bradwell-Plessy-Lochner-Muller areas of legislation were all ones easily considered ‘sovereign’ under the Kuyperian schema (businesses for the most part).

The theoretical critique only gains strength from Horwitz’s own application of the Kuyper schema to churches as First Amendment institutions. Consider some examples: intra-church property disputes, discriminatory hiring by churches, and sexual abuse and clergy malpractice issues.

Kuyper’s theory would seem to suggest that intra-church property disputes would be prototypical examples of where the church’s sovereignty should be respected and not subject to the State’s interference. Horwitz agrees that this is the proper application of the Kuyperian scheme to churches, and concludes that “courts should allow religious entities to resolve their own disputes, according to the norms that they select to
govern themselves." But of course this is not really a plausible conclusion standing on its own. First, of course, there is a classification problem. Who is what church, and what counts as inside/outside the church? If a splinter group tries to assert claims of property, is it a case of members vs. church, or church v. church?

Horwitz points to the case of Jones v. Wolf. Jones suggests that as a matter of First Amendment law, states are free to adopt either of two approaches for settling church-property disputes: the older approach of deference to hierarchically-organized churches embodied by Watson v. Jones or an approach it called the “neutral principles of law” analysis which would involve examining “the deeds to the properties, the state statutes dealing with implied trusts” and the church’s organizational documents to see if there was “any basis for a trust in favor of the general church.”

Assuming reasonably prudent behavior on the part of churches and an awareness that some states would adopt the “neutral principles” model, the obvious upshot of Jones is that by permitting states to use such principles consistent with the First Amendment, the Supreme Court is effectively pushing churches to “structure their own governing documents with secular language state courts can read and enforce,” which Horwitz assures us is not a constriction on church sovereignty since this simply

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46 Id. at 117.
48 80 U.S. 679 (1872).
49 443 U.S. at 660.
provides a way for churches to order their own affairs, and is an attempt to “accommodate church autonomy, not to eliminate it.”\textsuperscript{50} There is, I think, significant slippage here. Under a Kuyperian theory, the question is whether the church is \textit{sovereign}, not autonomous. That is to say, as remarked above, various forms of law already demarcate greater and lesser zones of autonomy, and church-state law is no different. The Kuyperian theory rejects this model in favor of primarily horizontal sovereignty relations with some vague, saving-clause constructions of the special role of the State.

The \textit{Jones v. Wolf} analysis is absolutely clear on two things: that the “State has an obvious and legitimate interest in the peaceful resolution of property disputes” and that the State has an interest in “providing a civil forum where the ownership of church property can be determined conclusively.”\textsuperscript{51} These state interests permit state to select the default rules for proceeding in church property disputes, and the vesting of substantive power is in the State as a matter of First Amendment law.

It may be objected that these are very fine distinctions, and in either case, a hierarchical church – for ease of example, let us select the Catholic Church could easily still exert a great deal of influence in an actual church property dispute. I think this is both true, and besides the point in equal amounts. It is true because of the nature of property and contract. As has

\textsuperscript{50} Horwitz, \textit{supra} note 5, at 117-118.
\textsuperscript{51} 443 U.S. at 602.
been recognized for some time, what property does is in large part establish a zone of sovereignty on the part of the individual, mediated by the structure of property law itself;\textsuperscript{52} contract law performs similar functions in allowing smaller subsets of society to regulate themselves consensually with the conditional backing of the State. Property law has long acknowledged society’s interests in allowing collectivities to possess the same way real persons do, and indeed a corporation may possess property quite as easily as a church may. Through contract law and property law, a hierarchical church can quite easily exert a great deal of control over its own property as noted.

But for two reasons the observations are beside the point. The first reason is that the imposition of these controls would happen before a dispute (though one could imagine cases in which the imposition of controls would precipitate nascent disputes, these cases would be exceptions and not the rule), and the process under which it would happen would either be consensual in the strict sense or consensual in the sense in which following the participants were at least at the moment (before the dispute) consenting to the hierarchical structure of the church; neither case would be particularly troublesome. The second, and conclusive reason why this would be beyond the point is that in neither the \textit{Watson} nor the “neutral principles” approach is the church ceded any strong sense of

sovereignty – it simply is being granted a very quotidian kind of associational sovereignty, albeit one whose interests the state may not consider on the merits but solely through the application of default rules. To the extent that this permits the church to discriminatorily dispose of its property, we may note that generally the disposition of property is a private matter anyhow so long as original possession and ownership are not in dispute, and the State’s power to impose default rules above all is intended to reduce the extent to which original possession and ownership are so disputed.

Next, consider the issue of church discriminatory hiring. Here two Kuyperian norms – that of the church’s sovereignty and the state’s desire to defend individuals and the weak from abuse by the powerful – conflict. Horwitz comes out on a strongly church-absolutist side. As he puts it:

Deference to self-regulation, though disturbing in individual cases, is justified in light of the institutional or Kuyperian value of church autonomy…Religious entities are protected as part of the social landscape not simply because they are instrumentally valuable, but because they are intrinsically valuable…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.\textsuperscript{53}

Horwitz is right to note that deference to self-regulation is disturbing in individual cases; it in fact, potentially has all the weight of our considered reactions to \textit{Plessy} and \textit{Bradwell} and its ilk behind it. But even so, the rest of Horwitz’s position is still weaker than he presents it. Consider the definitional problem again. The church cannot be allowed to dictate the scope of its activity, since the proper scope of its activity is ‘organic’. The state cannot also be allowed to dictate the church’s scope. Thus either there is a ‘natural’, organic answer to the question of whether a church’s employment practices are ‘essentially’ part of its own affairs are not, or instead, there are a series of stronger and weaker answers as applied. Of course, this merely restates the problems as seen from outside of the Kuyperian perspective. The state sees the employment issues as, except for the ‘ministerial exception’, not ‘naturally’ within the church’s own affairs; the church sees it as all ‘naturally’ within the church’s own affairs, and First Amendment law picks up the slacks and makes the working compromises. Moreover, the state’s ‘jurisdiction’ is not so easy to defeat as Horwitz would have it, at least not if we give any effective scope to the State’s duty to defend the weak and powerless. The stronger the church is as employer, naturally, the weaker in bargaining position its employee

\textsuperscript{53} \textit{Id.} at 120-121.
would be, and the stronger the case for the State’s intervention. And any employee would almost certainly call for the State’s aid in part by denying the definitional question; e.g., by denying that the church’s organic scope was pertinent to the discrimination against them. Categorically saying they are incorrect, and that the church’s sovereignty would always trump is a pat answer that simply adopts the superstructure of Kuyper to bring others aboard, but only really concerns itself with maximizing the power of the church. In Kuyper’s theory itself, things are not and should not be so simple.

Last, consider the case of sexual abuse and clergy malpractice. Unlike the case of employment discrimination, Horwitz recognizes that here the State’s sovereignty is called forth by the protective principle:

one of the occasions on which it is most appropriate for the state to exercise its own sovereignty and intervene in the sphere of religious sovereignty is when an institution has behaved abusively toward one of its own members. In those circumstances, the state is obliged to act to ensure the protection of the individual from the tyranny of his own circle.\footnote{Id. at 122 (citations & quotation omitted).}

So state intervention is justified in sexual abuse cases. Horwitz, however, thinks that Kuyper’s theory “suggest[s] something about how we
might go about intervening in these cases. We should adopt a measure of caution, preventing courts or juries from deciding numerous issues that ranger further afield from the abuse itself.”\textsuperscript{55} Horwitz accepts the argument, for instance, that “religious officials should not be liable for abuse committed by an individual clergy member” unless a higher standard of actual knowledge was met, so that religious organizations would have space to “organize their own polities, select their own leaders, and preach their own creeds.”\textsuperscript{56} This is again, in Horwitz’s view, a jurisdictional issue – the approach treats “First Amendment institutions, or sovereign spheres...as lying largely beyond the jurisdiction of the state” and though it does not leave them totally free, such institutions, Horwitz notes, are still subject to “internal critique and reform, non-legal public pressure, and reputational forces.”\textsuperscript{57}

I do not believe these positions are actually justifiable from the Kuyperian theory. First, a maximally-protective attitude towards the churches is only justified when they act as churches organically in the Kuyperian theory. This behaves as if the definitional problem was solved, but it in fact is the object of greatest contestation here, particularly if phrased as a jurisdictional barrier. Horwitz assumes implicitly that it is a simple matter to separate the ‘abuse’ from the numerous issues that range farther afield; it definitively is not the case, given that what is most vexing

\textsuperscript{55} Id. at 123.
\textsuperscript{56} Id. (citations omitted).
\textsuperscript{57} Id. at 124.
about the sexual abuse cases was the extent to which church organizational policies and practices abetted the abuses and abusers while systemically preventing ‘internal critique’ from occurring! Of course other kinds of church-abuse cases raise even more troubling and religiously-challenging questions about what a church may ‘organically’ claim is behavior it may mandate or forbid; encourage, or deter. The self-regulation defense is a thin reed to hold against the rights of the individuals violated, and particularly so when the State itself in Kuyperian theory is tasked with the duty of protecting those individuals.

In the end, Kuyperian theory is not particularly useful as a descriptive matter, and certainly not particularly instrumentally valuable for American jurisprudence. It is, however, potentially useful as a guileful way to push towards a certain set of substantive results – *Lochner*-type restraints on government in the name of autonomy that all that promises to be abused. This is most evident when we see that the theory does not yield very determinate answers to the hardest questions, but contains much pleasing rhetorical punch for arguing the most permissive and most radical positions in favor of church autonomy. It is perhaps ironic then that Horwitz’s proposal appears in the Harvard Civil Rights-Civil Liberties Law Review, since his proposal seems to be aimed at little more than sacrificing the power of the state to intervene in church matters for civil rights and civil liberties in favor of the ‘civil rights and civil liberties’ of churches themselves as institutions.