

The Rise of Corporate Religious Liberty

Zoë Robinson, Chad Flanders, and Micah Schwartzman, eds., The Rise of Corporate Religious Liberty (Oxford University Press, 2015, Forthcoming)

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Abstract

In the last decade, the rights of religious institutions have become the focus of significant political and legal controversy. In the United States, churches have asserted strong claims of institutional autonomy against government regulation, especially with respect to anti-discrimination laws that might interfere with their internal governance. Faith-based non-profits — charities, universities, hospitals, etc. — have likewise asserted statutory and constitutional rights of religious liberty to gain exemptions from laws that burden their religious beliefs and practices. In a recent, striking development, numerous for-profit corporations have made similar claims. Two decades ago, such claims would have been unthinkable. Today they are meeting with a surprising amount of success, most notably in the recent Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*

These political and legal developments have coincided with renewed scholarly interest in the rights of religious institutions. For the better part of the last century, most philosophical, political, and legal scholarship on the relationship between church and state has focused on the religious rights of individuals, rather than on those of institutions. But recently, a number of legal and political theorists have argued that this neglect of religious institutions is mistaken. Drawing on a broad range of historical, religious, political, philosophical, and legal arguments, these scholars claim that religious institutions are entitled to special — and indeed quite powerful — legal protections against government interference. Although their accounts differ, these scholars claim that churches and other religious organizations are entitled to significant institutional liberty. Some have called this “church autonomy,” while others have invoked the ancient idea of *libertas ecclesiae* — or “freedom of the church” — in defending the view that religious institutions are sovereign powers, whose authority sometimes rivals that of the state.

This emerging and increasingly influential school of thought — what we might call the “new religious institutionalism” — is controversial and has begun to attract significant opposition. Some scholars have argued that theories of institutional sovereignty are historically anachronistic, normatively unattractive, and legally unsound. Similarly, legal scholars have sharply criticized judicial decisions that rely on institutional theories to expand protections for religious non-profit and for-profit organizations. These debates have taken on greater resonance in the face of two critical Supreme Court decisions, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, and *Burwell v. Hobby Lobby Stores, Inc.*

Part I of this volume addresses the foundations of religious institutionalism, including contributions on the nature of institutional rights and the justifications for and against them. Part II focuses on the idea of “freedom of the church,” especially in light of the Supreme Court’s decision in *Hosanna-Tabor*. Part III marks a transition from claims of church autonomy to the rights of for-profit corporations, with a range of perspectives on the *Hobby Lobby* case. Part IV looks beyond *Hobby Lobby*, exploring its implications for health care, same-sex marriage, corporate law, and, more generally, the Supreme Court’s approach to issues of religious freedom.

Keywords: Hobby Lobby, religious institutionalism, corporate religious liberty, law and religion, constitutional law, constitutional theory, First Amendment, church and state

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