

# THE RISE OF CORPORATE RELIGIOUS LIBERTY

Edited by **Micah Schwartzman,**  
**Chad Flanders,** and **Zoë Robinson**



OXFORD

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## Introduction

Chad Flanders, Micah Schwartzman, and Zoë Robinson

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MOST OF THE chapters in this book began as presentations at a conference on religious institutions held a few years before this book's publication. In terms of the relationship between law and religion, that was ages ago. Some of our contributors, to be sure, speculated about what the case of *Hobby Lobby v. Sebelius*, as it was styled on its way up to the Supreme Court, might hold, and scholars were already grappling with some of the themes that the case would bring front and center.<sup>1</sup> But like other landmark Supreme Court cases, *Hobby Lobby* has now become a symbol for something larger—about the role of corporations in constitutional law, about the role of religion in the United States, and about the confluence of the two.

This book is about the rise of *corporate* religious liberty in American law. *Hobby Lobby* is the start of something, but it was also the culmination of a growing movement of legal scholars, who advocated for what might be called a “corporate turn” in law and religion. Of course, the term “corporate” has many meanings. Here we use it both generally to describe any organized body of people—groups, associations, and organizations—and, more specifically, to refer to those entities that have incorporated under the law.<sup>2</sup> Another way to describe this turn is to emphasize the rights of religious *institutions*. Some of our contributors refer to this movement as the “new religious institutionalism.” Whether we talk about corporate religious liberty or

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<sup>1</sup> 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>2</sup> The Oxford English Dictionary defines “corporate” variously as “united in one body,” “[f]orming one body constituted of many individuals,” and “[o]f or belonging to a body politic, or corporation, or to a body of person,” but also its noun form as a “large company, a corporation.”

religious institutionalism, however, the central focus of this book is the development of the law, and the scholarship surrounding it, as courts moved initially to protect churches and affiliated organizations and, from there, to recognizing the rights of for-profit corporations.

While the *Hobby Lobby* litigation was proceeding, our original conference on religious institutions focused on another case recently decided by the Supreme Court. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>3</sup> a Lutheran church had fired one of its schoolteachers, Cheryl Perich, after she threatened to file suit for discrimination under the Americans with Disabilities Act. The Court faced the question whether churches and affiliated organizations, such as religious schools, could assert a “ministerial exception,” preventing application of antidiscrimination laws to their decisions about who can serve as a religious leader in their communities. In a unanimous decision, the Court affirmed the existence of a constitutionally grounded ministerial exception. The Justices agreed that “the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.”<sup>4</sup> Moreover, the Court held that when those rights involve an “internal church decision,” such as the hiring and firing of ministers, the government may not interfere with them, even to apply otherwise neutral and generally applicable civil rights laws.

*Hosanna-Tabor* was a significant victory for religious institutions, and was immediately recognized as such. But it was not clear how far the constitutional protections recognized by the Court would extend. The case left open important questions about which organizations are protected by the ministerial exception. The Justices also expressed a range of views about who counts as a “minister.” But the larger question emerging from *Hosanna-Tabor* was whether the Court would find that the First Amendment protects only churches and affiliated organizations, or whether it would be possible for other types of entities, including nonprofit and for-profit corporations, to assert rights of religious freedom.

It did not take long for the Supreme Court to answer this question and to move from protecting churches to protecting corporations more generally. Two years after deciding *Hosanna-Tabor*, in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>5</sup> the Court declared that a for-profit corporation could assert a right to religious free exercise under the Religious Freedom Restoration Act (RFRA).<sup>6</sup>

The facts of *Hobby Lobby* are by now familiar. A large business that purported to operate according to religious principles, or at least to reflect the religious faith of its owners and directors, challenged the “contraception mandate” of the Patient Protection and Affordable Care Act,<sup>7</sup> which requires employers to provide free access to contraception as part of their health insurance coverage. As a threshold matter,

<sup>3</sup> 132 S. Ct. 694 (2012).

<sup>4</sup> *Id.* at 706.

<sup>5</sup> 134 S. Ct. 2751 (2014).

<sup>6</sup> 42 U.S.C. §§ 2000bb-1(a), (b).

<sup>7</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010).

the Court determined that closely held, for-profit corporations count as “persons” under RFRA, which means that they can assert its protections just as any natural person would. The Court also held that the contraception mandate imposed a “substantial burden” on the corporation’s exercise of religion. RFRA requires the government to show that any law imposing such a burden must be the “least restrictive means” of achieving a “compelling interest.” Applying this test, the Court held that while the government may have a compelling interest in promoting women’s health, the contraception mandate was not the “least restrictive means” of achieving it. *Hobby Lobby* was thus entitled to a religious exemption from regulations requiring it to pay for contraception to which it objected on religious grounds.

*Hobby Lobby* reflected—and expanded—the Court’s jurisprudence with respect to religious activities within groups, associations, and organizations. But it also reflected an interest in the constitutional rights of business corporations. In this sense, *Hobby Lobby* may be seen as the religious counterpart to the Court’s controversial decision in *Citizens United v. Federal Election Commission*,<sup>8</sup> which held that corporations are protected by the freedom of speech in challenging campaign finance regulations. In recognizing the free exercise rights of corporations, *Hobby Lobby* may have broader implications for corporate law and, more generally, for how we think about the moral and legal status of corporations, including whether they count as “persons” for purposes of asserting various rights. Thus, although much of this book is focused on matters of religious liberty, it is also important to address the business side of *Hobby Lobby*. In explaining the rise of *corporate* religious liberty, we need an account of how religious liberty extends not only to groups, organizations, and associations, but also to commercial enterprises, including large for-profit corporations like *Hobby Lobby*.

## 1. FROM INDIVIDUAL LIBERTY TO FREEDOM OF THE CHURCH

To see how corporate claims of religious freedom have risen in prominence, we can start with the Supreme Court’s decision in *Employment Division v. Smith*,<sup>9</sup> which has been severely criticized for undermining the constitutional free exercise rights of individuals. In the decades preceding *Smith*, the Court had applied a stringent form of judicial review to laws that burdened religious free exercise, whether directly or indirectly. But in *Smith*, the Court rejected that standard of review. It held that individuals are not entitled to exemptions from neutral and generally applicable laws that only incidentally burden religious beliefs and practices. Writing for the Court, Justice Scalia held that to allow each person to follow his religious beliefs in violation of a general law would be “to permit every citizen to become a law unto himself.”<sup>10</sup> In

<sup>8</sup> 558 U.S. 310 (2010).

<sup>9</sup> 494 U.S. 872 (1990).

<sup>10</sup> *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)).



announcing this rule, however, Justice Scalia noted an exception for a line of cases involving religious authorities deciding matters of theological controversy, especially in church property disputes. The state, he said, could not take sides in disagreements over religious doctrine, for example, by choosing one interpretation of a religion's sacred texts over another.<sup>11</sup>

Across the political and ideological spectrum, the *Smith* decision was widely viewed as a catastrophe for religious freedom. But some saw hope in the form of claims on behalf of religious institutions. If churches and other religious organizations were to be free from judicial scrutiny in controversies over religious doctrine, then perhaps new and possibly more expansive claims for religious freedom could be built on that foundation. In particular, the ruling in *Smith* did not seem to foreclose what had been recognized previously in lower courts: a so-called “ministerial exception” that gave houses of worship wide latitude in hiring and firing their religious leaders.

In the aftermath of *Smith*, scholars of law and religion focused increasingly on the rights of religious institutions and not merely on those of religious individuals. In developing theories of institutional liberty, they drew on a diversity of sources. Perhaps most importantly, Catholic theology has long held that the “church” has a special status in society. Appealing to the doctrine of *libertas ecclesiae*, or “freedom of the church,” some argued that in matters of internal governance, the state should be strongly deferential toward the church. Related to this Catholic emphasis on the freedom of the church is the Calvinist doctrine of “sphere sovereignty,” according to which governmental and religious institutions have independent domains within which to exercise their respective authority. Building on this idea, some scholars outside the Catholic tradition argued that while the demands of church and state might occasionally intersect, making for hard choices, each institution ought to be treated as sovereign within its own sphere.

At the limit, the argument that churches are “autonomous,” or that religious institutions are “sovereign,” is one about legal *jurisdiction*. Under this view, the church is analogous to a separate nation, so that dealing with a church is not a matter of applying domestic law, but rather of negotiating with an independent sovereign entity. The church deals with its citizens on its own terms and with its own laws, and if, for example, the United States wants to apply its law to the church, it must approach the church as if it were petitioning, say, France or Mexico, for extradition of a fugitive. This is the extreme instance of deferring to churches in their self-governance. Within their sphere or jurisdiction, churches and their laws are sovereign or supreme.

Proponents of freedom of the church found their views vindicated to a surprising extent by the Supreme Court's unanimous decision in *Hosanna-Tabor*. As noted above, Chief Justice Roberts emphasized that the First Amendment gives “special solicitude to the rights of religious organizations.”<sup>12</sup> This use of the phrase “religious organizations” was more than a little surprising. The text of the First Amendment, after all,

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<sup>11</sup> *Id.* at 877.

<sup>12</sup> 132 S. Ct. at 706.

refers to “religion,” not to individuals or organizations. It does not specify whether it is concerned with the solitary believer, the church, or the corporation. For the Court to single out religious organizations appeared to validate the idea that *Smith* left open the possibility of recognizing institutional or corporate liberties, even as it largely foreclosed the free exercise rights of individuals. Those scholars who advocated for the ideas of *libertas ecclesiae*, church autonomy, and sphere sovereignty had good reason to give *Hosanna-Tabor* a warm reception. More than any prior decision, it provided a legal foundation for their views.

## 2. FROM FREEDOM OF THE CHURCH TO CORPORATE LIBERTY

As the changes in law and religion described above were unfolding, on a seemingly separate track, another area of First Amendment law took its own corporate turn. In *Citizens United*, the Supreme Court upheld a challenge to campaign finance regulations that turned in part on whether corporations have the power to “speak,” such that their voices, like those of natural persons, are entitled to protection under the Free Speech Clause.<sup>13</sup> Relying on an earlier precedent, the Court ruled that corporations can indeed speak and that audiences have an interest in hearing their contributions to political discourse. The Court’s decision freed corporations to make campaign expenditures with the same constitutional protections afforded to natural persons.

*Citizens United* set off a fierce debate about the metaphysical, moral, and legal status of corporations. Are corporations “persons” who can exercise moral and legal rights? Or are they merely aggregations of individuals, or otherwise useful legal fictions? These questions, which so dominated Anglo-American jurisprudence a century ago, re-emerged as matters of central concern in debates about the First Amendment.

Thus, when numerous for-profit corporations asserted that they are “persons” within the meaning of the RFRA and therefore entitled to its protections, it was no surprise that their claims generated intense controversy. The businesses challenging the contraception mandate, including Hobby Lobby, responded to skepticism about their claims by noting that the Obama Administration had already approved religious accommodations for nonprofit corporations. The focus of litigation shifted from whether a corporation could “exercise” religion in any meaningful sense—hardly anyone doubted that a church could do so—to the more specific question whether *for-profit* corporations could assert claims of religious liberty.

Ruling in favor of Hobby Lobby, the Court held that corporations are indeed “persons” within the statutory meaning of RFRA. In explaining the majority’s reasoning, Justice Alito described the idea of corporate personhood as a legal fiction, whose purpose is “to provide protection for human beings.”<sup>14</sup> Corporations are not persons

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<sup>13</sup> 588 U.S. 310 (2010).

<sup>14</sup> *Hobby Lobby* 134 S. Ct. at 2768.

in the sense of having their own rights and interests, but are rather legal forms and structures used to secure the rights and interests of natural persons assigned various legal roles associated with the corporation. Thus, in his brief, one-paragraph analysis of corporate personhood, Justice Alito took sides in a debate about the metaphysical status of corporations, including those that are religiously affiliated. They are not “real” or independent entities, he seemed to suggest, but instead are reducible ultimately to the beliefs, values, and interests of the people who compose them.

But can something similar be said about churches? Are they, too, merely legal forms? Are they aggregations of their members, or are they greater than the sum of their parts? Must religious organizations represent the rights and interests of their members, or can they assert claims on their own behalf? Such questions will undoubtedly linger for some time, not only because there are competing conceptions of corporate personhood but also because, for better or worse, those conceptions are widely thought to have significant normative and legal implications.

*Hobby Lobby* was a statutory case, it is important to note, whereas *Hosanna-Tabor* was decided on constitutional grounds. But some important concepts and ideas run through both cases. Religious liberty is not only a matter of what individuals believe but also of what they believe in groups—whether in churches, nonprofits, or businesses. As a matter of federal law, and in many states, religious liberty extends to the actions of those groups as well, even when those actions conflict with neutral and generally applicable laws. More than two decades after the Supreme Court’s decision in *Employment Division v. Smith*, the law of religious free exercise has turned in a corporate direction. The rights of religious groups are expanding statutorily under RFRA and constitutionally under the First Amendment. These corporate entities may not win every challenge they raise, but they have succeeded in establishing standing to assert religious claims and have demonstrated the power of framing religious liberty in corporate terms.

### 3. QUESTIONS ABOUT CORPORATE RELIGIOUS LIBERTY

The corporate turn in law and religion—from individual liberty to freedom of the church, and from freedom of the church to corporate liberty—raises numerous theoretical and practical questions. While not meant to be exhaustive, what follows are some of the main questions addressed in this book.

#### (i) *What Justifies Corporate Religious Liberty?*

An account of corporate religious liberty must explain why corporations—including groups, associations, organizations, businesses, and so forth—and not only individuals, ought to have the power to assert rights of religious free exercise. What is it about corporations that warrants ascribing rights to them—if indeed they can have rights at all? Are corporations moral actors with principles, values, and interests distinct from those of who compose them? Or should we think of corporations as having

rights that derive from, and perhaps represent, those of individuals? Moreover, even if the ascription of rights to corporations can be justified, why should *religious* groups deserve “special solicitude” (to borrow the Supreme Court’s phrase)? Why should they receive rights and privileges not afforded to many other nonreligious expressive associations, including political parties, universities, social clubs, and other groups within civil society? Theories of church autonomy, and more broadly, corporate religious liberty, are designed to answer such questions by providing moral, political, legal, historical, and theological arguments for ascribing special rights to religious organizations. These arguments are, of course, contested and controversial, but any assessment of the rights of religious organizations requires some understanding of them.

(ii) *To Whom (Or to What) Does Corporate Religious Liberty Apply?*

A doctrine of corporate religious liberty must include an account of the subjects to which it applies. Some cases will be easy. *Hosanna-Tabor* dealt with what many consider the “core” example of a religious organization: a church. But *Hobby Lobby* involved an organization that was closer to the periphery: a closely held, for-profit corporation—an entity that many assumed was not entitled to assert free exercise rights. What, then, defines a religious organization? Perhaps it is possible to specify criteria for identifying the corporate entities that are entitled to assert religious claims. If not, another approach might be to protect those activities that express or promote religion, regardless of the type of entity that undertakes or facilitates them. The decision whether to adopt various criteria for determining which organizations are religious, or instead to focus on religious functions rather than religious entities, may have significant implications for the shape of legal doctrine.

(iii) *What Is the Scope of Corporate Religious Liberty?*

Another way of putting this question is to ask: What falls within the “internal affairs” of a religious organization? In *Hosanna-Tabor*, the Court indicated that while the state could regulate “outward physical acts,” it could not interfere with “internal church decision[s].”<sup>15</sup> But what does this contrast mean, or more pointedly, what is “inside” a church or other religious organization such that the state cannot regulate it, and what is “outside”? The idea of “internal church decisions” could be limited to the facts of *Hosanna-Tabor*, which involved the hiring and firing of religious leaders or “ministers.” But of course, the category of internal affairs might extend well beyond such matters. Perhaps a church cannot be liable for any decision that involves how it applies religious doctrine to its members, so that a person could not sue a church for being injured during a worship service, for instance. The

<sup>15</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.

distinction between internal and external affairs may be unstable at the limits, but again, institutional accounts of religious freedom are premised on the possibility of drawing some lines to define what is within the authority or jurisdiction of religious institutions.

*(iv) What Are the Limits of Corporate Religious Liberty?*

In enacting RFRA, Congress sought to restore the constitutional standard that the Supreme Court had applied to claims for religious exemptions prior to its decision in *Smith*. Under that general standard, when a law substantially burdens free exercise, the government can limit religious freedom only if it can show that the law is justified by a compelling state interest and is the “least restrictive means” of achieving that interest. But what interests count as compelling, and under what circumstances are policies to be considered “least restrictive”? In *Hobby Lobby*, the Court assumed that the state’s interest in promoting women’s health was compelling, though it found that the contraception mandate was not the least restrictive means of achieving it. In dicta, the Court also noted that preventing racial discrimination is a compelling state interest. But what about discrimination on other grounds, including on the basis of sex or sexual orientation, which are currently the subject of political and legal disputes in numerous states? What, in general, will be the interests that courts find sufficiently powerful to limit the freedom of religious organizations in the future? And when the government has identified a compelling interest, what factors will courts take into consideration in determining whether its policies are least restrictive?

*(v) What Are the Main Objections to Corporate Religious Liberty?*

Those opposed to corporate religious liberty have raised numerous objections to it. Some critics are skeptical that corporations can exercise religion in any meaningful sense. It seems strange to speak of a business practicing religion as if it were a natural person, although it may be less strange to speak this way about other organizations, such as churches and religious schools. A further objection is that many corporations, especially large for-profit companies, may serve and employ people of many religions or of no religion at all. Compare this to churches, and other houses of worship, which may employ only people of the same faith—and where people of the same faith gather together voluntarily to worship. When the scope of corporate religious liberty expands beyond the church, new problems of heterogeneity seem to arise, one after another. This concern about how religious organizations treat those who do not share their religious commitments points to a larger objection, namely, that religious exemptions sometimes impose significant harms on third parties. Determining when such harms exist, and striking the proper balance between them and claims of religious liberty, is now a central issue in debates about religious liberty more generally, but especially in the for-profit corporate context.

(vi) *What Explains the Timing of the Corporate Turn, and What Implications Will It Have?*

As noted above, the Supreme Court's recent decisions in *Hosanna-Tabor* and *Hobby Lobby* reflect the development of several approaches to religious liberty, converging on its application to churches, affiliated religious institutions, and now to business corporations. These decisions, especially *Hobby Lobby*, have also occasioned significant opposition in the scholarly literature, as well as backlash in the political domain. All of which may lead us to ask: Why has the corporate turn happened now? And, perhaps more importantly, what are its prospects for the future? We have already suggested one answer to the timing question, involving reactions to what many perceived to be the Supreme Court's undermining of constitutional free exercise rights in *Smith*. But this account is only part of the story, and some of the contributions to this book attempt to provide more complete explanations for these developments. As for the future, it is already possible to identify continuing sources of controversy, especially in the contexts of health care and antidiscrimination law. Examples from these areas feature prominently in many of the discussions that follow.

## 4. STRUCTURE OF THE BOOK

The structure of this book mirrors the account of the turn toward corporate religious liberty given above, marking a shift from individual liberty to freedom of the church and then a further expansion to include for-profit corporations.

Part I examines the first of these moves, from individual liberty to freedom of the church, beginning with Kent Greenawalt, who lays out a basic framework for analyzing the freedom of conscience as applied mainly to individuals. Greenawalt identifies numerous issues, including what counts as a claim of conscience, whether religious claims should receive special treatment, whether assertions of conscience must be sincere and how to determine sincerity, how close or attenuated a person's involvement must be to assert conscientious objections, what considerations might override such objections, and whether standards for granting exemptions ought to be specific or general. These considerations apply to individuals, but as we shall see, similar questions arise, *mutatis mutandis*, in evaluating organizational claims as well.

The two subsequent chapters by Steven Smith and Richard Garnett make the case for protecting the freedom of religious organizations and especially churches. Smith argues for what he calls a "jurisdictional conception" of church autonomy, contending that churches and other religious organizations have their own spheres of authority in which they should be more or less sovereign. Garnett expounds the idea of "freedom of the church," arguing that it is deeply embedded in the Western tradition and that, far from being anachronistic, it remains a vital principle of limited, constitutional government. Responding to various criticisms of church autonomy and freedom of the church, respectively, Smith and Garnett provide a robust defense and translation of these ancient ideas under modern conditions of democratic government and religious pluralism.

The next three chapters express more skepticism about corporate religious liberty. Sarah Barringer Gordon challenges accounts of church autonomy in the American legal tradition by showing that the history of religious disestablishment in the states is one of pervasive regulation of churches, far from the highly deferential approach favored by current proponents of freedom of the church. In an extended and insightful discussion of *Hosanna-Tabor*, Lawrence Sager defends the right of churches to discriminate in selecting their ministers, but finds the best justification for this freedom in a right of “close association,” which extends beyond intimate relationships and friendships to include faith communities and, as his title suggests, perhaps social clubs as well. Chad Flanders finds many similarities between religious organizations and political parties, but contends that we should examine the rights of both groups in pragmatic and functional terms, rather than grounding them in accounts of freedom of association or institutional autonomy that draw firm distinctions between the private and public affairs of various types of organizations.

Part II marks the movement from freedom of the church to corporate religious liberty by offering various perspectives on the *Hobby Lobby* decision. Kent Greenawalt begins with an overview of the majority opinion, followed by a critical discussion of its approach to interpreting the legal sources and standards relevant to determining the free exercise rights of corporations. Although he describes the result in *Hobby Lobby* as a “close question,” Greenawalt criticizes the majority for excessive formalism and for separating doctrinal issues that he argues are deeply connected within a comprehensive, multifaceted, and context-specific legal analysis.

A threshold issue in *Hobby Lobby* was whether a for-profit corporation can assert a right to religious free exercise. The Supreme Court addressed that issue by relying in part on state corporate law. Elizabeth Pollman examines the significance of that decision for long-standing debates about corporate personality, corporate purpose, and the role of state law in resolving disputes within corporations. She argues that *Hobby Lobby* provided insufficient guidance on many issues of corporate law, ultimately raising more questions than it answered.

Zoë Robinson examines the expansion of the category of “religious organizations” from houses of worship to for-profit corporations. To the extent the Supreme Court grants religious organizations constitutional exemptions from certain generally applicable laws—as it did in *Hosanna-Tabor*—the decision in *Hobby Lobby* raises difficult questions about which organizations should qualify for such exemptions. Robinson offers a framework for identifying religious organizations and for determining the proper boundaries of the constitutional rights ascribed to them.

In his contribution, however, Frederick Schauer argues that many of the troublesome theoretical questions about corporate religious identity might be avoided by learning from free speech jurisprudence. Instead of inquiring about the identity of particular speakers, free speech doctrine asks whether the government has permissible grounds for restricting speech. Similarly, Schauer suggests, if religious freedom means preventing the state from discriminating on religious grounds, then perhaps



we should focus on government motives for regulation rather than on the identities of those who are regulated.

Stepping back from the doctrinal issues addressed in *Hobby Lobby*, Paul Horwitz and Nelson Tebbe raise the question: Why has there been a turn toward corporate rights of religious liberty in recent years? They see a puzzle in the timing of this development, which expands the rights of religious organizations at a moment in history when Americans are increasingly disaffiliating from them. Horwitz and Tebbe offer some explanations for this renewed interest in corporate rights of religion, observing complex interactions between religious demographics, political polarization, and culture war dynamics.

Part III considers the implications of *Hobby Lobby*. Douglas Laycock gives a spirited defense of the Supreme Court's decision while acknowledging the strong opposition it has provoked, which he sees as symptomatic of a larger "campaign against religious liberty." Laycock argues that in disagreements over sexual morality—including contraception, abortion, and same-sex marriage—many progressives have become hostile toward religious liberty, to the point of rejecting it as a secular liberal value. Making a case for broad religious exemptions under federal and state RFRAs, as well as for more specific exemptions, he calls for a commitment to religious liberty as a basis for sensible moral and political solutions in the culture wars.

Both Robin Wilson and Christopher Lund emphasize the continuing significance and value of religious exemptions after *Hobby Lobby*. Wilson identifies new opportunities for compromise between conservatives and progressives in the form of targeted exemptions to broad antidiscrimination laws. If those on the left can secure antidiscrimination protections for lesbian, gay, bisexual, and transgender people, then they may be willing to grant exemptions for religious organizations, which may help alleviate concerns about religious liberty on the right. Wilson is hopeful that such bargains can be struck, despite the deep disagreements each side may have with the other. Lund argues that fearful reactions to *Hobby Lobby* are overblown, given how rarely for-profit corporations have asserted religious liberty claims in the past. There is, however, the risk that political backlash to the decision will undermine support for federal and state RFRAs, which are important sources of legal protection for religious minorities. Lund concludes that the best course forward, all things considered, may be to limit free exercise rights to individuals and religious nonprofits.

Whereas Laycock, Wilson, and Lund generally support exemptions for religious organizations and are concerned about increasing criticisms of such claims, Elizabeth Sepper, Frederick Gedicks, and Rebecca Van Tassell raise doubts about institutional accommodations after *Hobby Lobby*. Drawing on her extensive analysis of conscience legislation in the healthcare context, Sepper cautions that extending free exercise rights to for-profit corporations creates a host of doctrinal and practical problems involving confusion about which entities are religious, conflicts among various corporate stakeholders, and harms imposed on third parties, especially as a result of restricted access to healthcare services. Focusing specifically on third-party harms, Gedicks and Van Tassell expand on their important argument, presented in



an amicus brief filed during the *Hobby Lobby* litigation, that the government may not permit religious exemptions that impose significant burdens on others. They draw attention to some brief but potentially significant remarks by Justice Alito in footnote 37 of the majority opinion, which they criticize for adopting a libertarian baseline to measure effects on third parties. The proper baseline, they argue, is set by the system of legal regulations in place when exemptions are requested.

Part IV presents challenges to the idea of corporate religious liberty. Richard Schragger and Micah Schwartzman reject a standard justification for corporate rights, including those of religious organizations, according to which corporations are moral agents—or persons—and therefore capable of exercising moral and legal rights. They argue that the metaphysical or ontological status of corporations—whether they are independent agents, or aggregations of individuals, or legal fictions created by the state—is irrelevant to determinations about corporate rights, which should turn on how such rights affect social relations between natural persons.

Focusing more specifically on religious organizations, especially in the context of granting religious exemptions, Ira Lupu and Robert Tuttle also criticize theories that emphasize the relevance of corporate identity. What matters, on their view, is not whether an entity is religious, but rather whether it engages in particular religious activities that are protected from state interference by principles of religious disestablishment.

Both Robin West and Jessie Hill raise important and troubling questions about the broadening scope of corporate religious liberty. West argues that the idea of freedom of the church is a form of “exit right” that allows religious believers to exempt themselves from civil rights laws, which are a crucial part of our society’s social contract. On her view, rather than expand participation in civil society, corporate religious liberty encourages a disturbing departure from it. Hill focuses on whether those who enter religious organizations have voluntarily consented to membership, whether they are free to participate fully in those organizations, including through internal dissent, and whether they have the opportunity to exit. She argues that consent-based arguments for religious autonomy rest on inaccurate descriptions of membership in religious organizations, and that courts should therefore play a larger role in adjudicating claims of church autonomy.

Finally, Gregory Magarian and Mark Tushnet end our book with a look at the future of religious liberty in the Supreme Court. Magarian urges a renewed consideration of issues of religious establishment in an era of increased protection for religious liberty and the rights of religious organizations. Instead of abandoning the historical tension between religious free exercise and disestablishment, he calls on courts to reengage this conflict by distinguishing between different models of institutional religious accommodation. In the closing chapter, Tushnet finds in the recent Roberts Court a continuing trend of treating Christianity as the “unmarked religion”—what the Court considers to be religious when no other religion is clearly specified. Favoring Christianity in this way sends an ambivalent message, argues Tushnet, both to Christians and to non-Christians, about who is a full member of

society—a message perhaps amplified by recent decisions, including *Hosanna-Tabor* and *Hobby Lobby*.

## 5. CONCLUSION

It is a common feature of modern life that much of it is corporate, in both of the senses we have discussed. We may worship in a small church or a large one. We may work for a closely held, family business or a publicly traded, multinational one. What the Supreme Court's decisions in *Hosanna-Tabor* and *Hobby Lobby* have done is to put before us hard questions about the rights of those corporations, whether they are essentially religious like a church or purport to follow religious principles like some businesses. Those cases were litigated and decided against the background of a vibrant intellectual debate about the freedom of religious institutions, and the opinions in each case are not the final word on the matter—although they will certainly frame the debate going forward. As the chapters in this book demonstrate, there is still much work to be done, philosophically, legally, and practically, on the rights of religious organizations. Ours is not the last word, either.



## PART ONE

# From Religious Liberty to Freedom of the Church

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# 1

## Religious Toleration and Claims of Conscience

*Kent Greenawalt\**

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### 1. INTRODUCTION

One aspect of the issue of toleration of religion is how far the government and others should recognize religious claims of conscience. Such claims will be present in any liberal democracy. The particular controversies in focus shift, but certain underlying themes remain.

In this chapter, I first outline major issues about government recognition of religious claims of conscience, and then address the special problems created when those claims compete with basic premises about fairness and justice. Such competition is involved when the question is a possible exemption from compliance with laws that recognize same-sex marriage and laws that require insurance coverage of contraceptive drugs, two prominent issues in our present political setting. I should note here the aspirations of this chapter, an important consideration on which it does not focus, and crucial evaluations it does attempt to resolve. The aim of this piece is to provide a structure for thinking about and determining which claims of conscience-based exemptions from legal duties should be granted. A number of chapters in this volume deal in much more detail with how various specific issues over exemptions should

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be treated. I mention some of those questions, but the ambition here is to provide a structure for analysis, rather than decisive resolutions.

The consideration that is largely omitted is a bit more complex. I concentrate on claims of conscience, grounded in religion or elsewhere, not to perform legal duties. That does not itself exclude possible rights for organizations not to perform, but the relevant grounding would then be the convictions of those who operate the organizations, as was true in the *Hobby Lobby* case.<sup>1</sup> What this omits is the possible grounding of a right not to perform in the essential autonomy of the organization. In respect to that, one might believe that the free exercise of religion and nonestablishment simply preclude government interference with how a religious body operates. I shall note here a few general thoughts about this topic, which is not really tackled in the body of the chapter.

On the division between those who believe our country should no longer assign any special status to religious organizations<sup>2</sup> and those, represented in this volume by Steven D. Smith and Richard W. Garnett,<sup>3</sup> who explain and defend support of a fairly robust independence, but without disregarding competing social interests, I come out in the middle. I do think independence of religious bodies from aspects of government regulation continues to be a constitutional value, but one that does not bar various kinds of restrictive laws. Since religious bodies are not inclined to claim exemptions from legal duties that are consistent with their convictions, the idea of independent organizations typically will supplement, not supplant, the kind of claims of conscience addressed here.<sup>4</sup>

A related aspect of organizational independence and claims of conscience involves nonreligious bodies. Freedom of speech and association provide some protections for organizations seeking to represent points of view and convey messages, a conclusion the Supreme Court reached in respect to a decision of the Boy Scouts to relieve a homosexual of a position leading young men.<sup>5</sup> Once we recognize this broader right of constitutional independence, we can see both that it can supplement certain claims for exemptions and raise the question whether religious groups should be special in this respect. My own sense is that religious groups do warrant a somewhat broader protection of independence, but I do not tackle that complex question here.

In summary, my concentration on individual convictions omits one factor that can be relevant for some exemptions, but it does focus on what is usually of major importance.

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<sup>1</sup> *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014). For a general analysis of the role of religious convictions, see Ira C. Lupu & Robert W. Tuttle, Chapter 18, *Religious Exemptions and the Limited Relevance of Corporate Identity*, in this volume.

<sup>2</sup> See, e.g., Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 947 (2013).

<sup>3</sup> See Steven D. Smith, Chapter 2, *The Jurisdictional Conception of Church Autonomy*, in this volume; Richard W. Garnett, Chapter 3, *Freedom of the Church: (Toward) An Exposition, Translation, and Defense*, in this volume.

<sup>4</sup> Richard Garnett emphasizes the connection of autonomy to the consciences of members. See Garnett, *supra* note 3.

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

## 2. BASIC ISSUES ABOUT GOVERNMENT RECOGNITION OF RIGHTS OF RELIGIOUS CONSCIENCE

For the standard issue of conscience, the question is whether individuals or organizations should be allowed on that basis to engage in, or avoid, actions that are generally forbidden or required. The most notable example throughout our history is whether pacifists should be drafted into the military or jailed if they refused to comply. Here, the precise issue involves compliance of an individual person with a requirement of the government. In the United States the primary locus for resolving that question has been Congress, the national legislature. However, the Supreme Court has also played a prominent role, essentially reading a requirement of “religious training and belief” so broadly it covered convictions that were definitely not religious in any ordinary sense.<sup>6</sup> Its implausible construction of the statutory language was probably motivated in large part by a concern about the possible unconstitutionality of distinguishing some genuine pacifists from others.

It is worth emphasizing at the outset the range of variations about the relation between governments and their recognition of claims of conscience. Some of these claims of conscience are constitutionally protected, or are basic human rights recognized by international law, while others may be asserted as rights that deserve respect from legislatures or executive officials, but are not themselves guaranteed by constitutional or international law. Still other claims may properly be conceived not as “rights” but as providing the bases for the exercises of discretion by those in authority. This chapter concentrates on what are wise choices about our government recognizing claims of conscience.

As already mentioned, a government’s concessions may be to organizations as well as to individuals. One may fairly question whether organizations can have a “conscience” or “convictions.” In some circumstances this may well be a proper extension of the basic concept, but for practical purposes the crucial issue is not whether we call these “exemptions based on conscience,” but whether particular kinds of organizations should receive exemptions from ordinary requirements on bases like those available to individuals. Most obvious, an exemption for an organization may effectively fulfill the sense of conscience of individual members or leaders.

Once we bring organizations into the picture, we quickly realize that the government’s relation to claims of conscience can vary from that present in the draft example. First, claims of conscience need not be directed at the government. Private businesses and universities may be asked to recognize claims of employees or students. For example, a student might seek to have his Saturday exam delayed because

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<sup>6</sup> *Welsh v. United States*, 398 U.S. 333 (1970) (extending protection to claimant whose objection was not “religious” in any ordinary sense); *United States v. Seeger*, 380 U.S. 163 (1965) (essentially eliminating the requirement of belief in a Supreme Being). My understanding of those cases appears in 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 49–67 (2008) [hereinafter *FREE EXERCISE*], and in Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31 (1971).



it would conflict with his sense of what God wills that we do on that day. Second, the government may be involved, but in a way different from granting an exemption from a legal requirement, instead insisting that organizations grant exemptions to individuals from requirements that the organization (or the government) sets. Thus, hospitals may be forbidden to dismiss or penalize nurses for refusing to participate in abortions.

With respect to the precise content of any exemption based on conscience, a number of crucial questions arise. Among these are: (1) what counts as a relevant claim of conscience?; (2) should an exemption be limited to religious conscience or extended to all claims of conscience?; (3) must such claims be sincere, and how may sincerity be determined?; (4) must the claimant's relation to the action to which she objects be close or is peripheral involvement sufficient?; (5) what, if any, considerations should outweigh claims of conscience that ordinarily would warrant acceptance?; (6) should standards of exemption be cast in general or specific terms? I address each of these questions in turn, highlighting the central issues and indicating my sense of sound responses, but without exploring the issues in depth.

For each question, an important dichotomy can exist between what would make sense in some ideal setting and what is a desirable resolution in our actual social context. By "ideal" here, I do not mean people with perfect motivations and perfect insights into what is right and wrong. Rather, I am assuming that officials and others are capable of ascertaining all relevant facts, that they will understand and apply accurately whatever standards are set, and that in doing so they will not give way to irrational resentments and prejudices. This construction allows us to see what deviations from otherwise desirable standards are needed to respond to human difficulties of fact-finding and norm application or to regrettable but common misunderstandings and hostilities.

When I turn to "actual social context," I do not focus on the political balance of the moment and what compromises will work in a particular jurisdiction.<sup>7</sup> Instead, that reference is to more general aspects of American culture.

#### *A. What Counts as a Claim of Conscience?*

As with most fundamental concepts, the coverage of "conscience" is by no means precise.<sup>8</sup> For our purposes, the serious question is not the outer boundaries of the proper use of the term, but what needs to be seriously considered if one is thinking about exemptions based on conscience. Three central concerns are: whether conscience involves a substantial intensity of conviction; what is its relation to moral judgments

<sup>7</sup> For an insightful examination that is much more specific, see Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012).

<sup>8</sup> I explore aspects of this issue in Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901 (2010).

and self-identification; and whether for practical purposes we should conceive of organizations as having claims of conscience.

When we think about conscience as connected to moral judgments, we usually assume that it involves a certain intensity of conviction, a sense that a wrong that one might commit is of a substantial magnitude. Such intensity and magnitude is not implied in all ordinary uses of the word. I might say to a friend, "You've made a perfectly reasonable suggestion of what I should do, but somehow my conscience tells me that would be wrong." Here "conscience" expresses a sort of feeling about right and wrong that I may not be able to defend on a reasoned basis. In another situation, I might say, "My conscience tells me I should take the children out to play," without implying that a failure to do so would be a serious moral wrong. But in most contexts, asserting that something is a matter of "conscience" implies a strong moral conviction, a belief that I should be willing to suffer serious adverse consequences rather than perform the act. We do not suppose someone is a genuine conscientious objector to military service if he thinks he *should* serve rather than spend two years in jail. He would not fail to be such an objector if he does not have the moral courage to act on that conviction; but if he were actually willing to suffer no adverse personal consequence, we certainly would doubt the intensity of his moral sense. So objections of "conscience" typically do imply both a strong intensity of conviction and a sense of serious moral wrong. Just what the required intensity and magnitude would need to be to cross the line might vary with the seriousness of the act in question. Given the sacrifice that those who submit to a draft are making, one's objection would need to be very powerful if military service is the question; a lesser intensity and sense of magnitude might suffice if the question were whether a person should tell a "white lie" to assuage a friend's feelings, and she objected in conscience to doing so.

A central question is what the law should implicitly incorporate as part of a standard for a legal exemption. Perhaps for some matters, all moral objections should be accommodated. And a serious practical problem is that those deciding whether individuals qualify for an exemption may be hard put to judge their intensity of feeling and sense of wrongness. Nonetheless, such language in the law may send the message that only those with genuinely powerful feelings should be exempted and help discourage those with lesser moral objections from seeking that privilege.

The very connection of "conscience" to moral judgment is more elusive than the need for intensity of conviction. Apart from certain religious claims, for virtually all of the practical issues involving exemptions based on conscience, that is conceived as related to morality. The objector believes that performing the otherwise required act would be deeply immoral, wronging other beings on earth. I use "other beings" rather than "persons" because I think ideas about decent treatment of animals are moral ideas, as are notions about the stage at which embryos and fetuses deserve protection (even if they are not yet considered persons).

It has sometimes been suggested that claims of conscience are tied to personal identification or connected to the search for the ultimate meaning of life. The ultimate meaning approach is not persuasive, because many people feel claims of

conscience that are not related in any conscious way to their sense of life's fundamental meaning or to a search for that meaning.

The connection to personal identification is less simple. When we have deep moral convictions, they form a part of our sense of ourselves. But what if we have an aspect of our personal identity that is unrelated to our moral judgment? Consider this response by a scholar to a complaint that he is paying insufficient attention to family members: "You are probably right about my moral responsibilities, but my conscience tells me I am first and foremost an intellectual, that, even if I am not particularly able or influential, the search for truth is what I must devote my attention to." Whether we should regard this as a genuine claim of conscience is doubtful, but the law definitely should not create exemptions from ordinary standards based on notions of self-identification that do not comport with strong moral convictions about our responsibilities to others.<sup>9</sup>

The connection to moral perspectives is more complicated when we turn to religious convictions. Many religious believers perceive a responsibility to God to act in certain ways, either because God directly seeks such behavior or because God has placed authority in human individuals and institutions that require it. A typical Roman Catholic priest believes, as a matter of conscience, that he should not reveal what he is told in confession, regardless of how damaging his silence may be to innocent individuals.<sup>10</sup> This restraint can be conceived as a moral responsibility to the person who confessed or as a needed safeguard to keep the practice of confession effective; but priests who do not find either of these bases independently persuasive will still think their religious position requires that they remain silent. Simpler claims of religious conscience that are not "moral" in any ordinary sense are to cover one's head, or not to work on the Sabbath, or not to eat certain foods. Some nonmoral claims of religious exercise should be accommodated, whether or not they are seen as amounting to claims of conscience. However, if someone stands to be seriously harmed by that exercise, as when a priest's silence allows an innocent person to be convicted, it makes sense to require that the claimant has the intensity of feeling and sense of magnitude associated with "conscience."

Can an organization have a "conscience"? One way of speaking undoubtedly is that consciences are individual and that it is a misnomer to attribute "conscience" to organizations. In respect to ordinary usage, however, we might say this: "If there is a small group of individuals who work together in some way, and all share a particular view about what conscience demands, we can say that the organized group has a claim of conscience to that effect." For example, "The McNair family has a conscientious objection to abortion." The terminology becomes much more disputable if we are talking about an organization in which the authoritative doctrine and the actual

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<sup>9</sup> Such convictions *can* be present for those who feel a "calling" to help others in particular ways, such as working as a nurse or a cleric.

<sup>10</sup> The absolute duty is compared with the approaches of other clerics in a discussion of particulars for confidential communication to clergy in *FREE EXERCISE*, *supra* note 6, at 246–60.

view of most “individuals at the top” asserts that people (or believers) should definitely not engage in certain behavior, but the organization includes many individuals who happen not to share that perspective. The crucial practical question is not whether it conforms with ordinary usage to say, “Roman Catholic hospitals believe as a matter of conscience abortions are wrong”; it is rather whether exemptions should be granted to organizations, such as the closely held, for-profit corporations I address in my other chapter in this volume,<sup>11</sup> on the ground of the conscientious views of crucial members of the organization. As I have noted, this reason for an exemption can be related, but not necessarily identical, to a claim about the desirability of organizational autonomy.

### *B. Should Religious Claims of Conscience Be Treated Specially?*

Two basic reasons support not forcing people to act against what their conscience tells them. The first is that in a society that values individual liberty and autonomy, we should hesitate to require people to do what their conscience tells them is deeply wrong. This reason applies in personal relationships and within private organizations, as well as in relations between the government and its citizens. Ordinarily, one would not seek to push a family member or friend to do what she says would violate her conscience, and a business or university may seek to formulate duties consistent with the consciences of those subject to their requirements. Similarly, if the government can avoid trespassing on the consciences of its citizens, that is healthy, barring strong countervailing reasons.

The second ground for accommodation relates to practical implications that flow from the intrinsic nature of conscience. If people really do feel that an act would violate their conscience, they will be hesitant to perform it under pressure. This can set up unproductive conflict and waste. In the family context, if a parent insists that an adult child perform an act she says would violate her conscience, he threatens family harmony. If, despite his insistence, the daughter refuses to perform the act, the father has failed to achieve his aim and now faces the unpleasant dilemma of how to respond. If a conscientious objector to military service is put in jail, the government has failed to add to military personnel, has consigned the objector to an unproductive period of life, and has expended public resources. Of course, imposing such sentences may weed out those who are not sincere objectors, and may provide a sense of fairness for those who do submit to the draft, but these are high prices to pay. The benefits of refusing exemptions altogether can be substantially achieved by instead requiring alternative nonmilitary service of successful objectors.

A more positive practical reason for recognizing claims of conscience is that allowing people to act on their developed moral sense can be healthy for society. We all

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<sup>11</sup> See Kent Greenawalt, Chapter 7, *Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application*, in this volume.

benefit from the exercise by others of moral convictions, and in a free society we need to recognize that variations in particular convictions can themselves be desirable.

Thus, we can start from the premise that if many citizens are conscientiously opposed to performing certain acts, that is a good reason to think seriously about a possible exemption from what is generally required. Are there reasons to exempt only religious claims of conscience? This turns out to be anything other than a simple question, and much may depend on exactly what exemption is being considered. The issue can be sidestepped, but not really avoided, by treating all claims of conscience as religious. The Supreme Court took a substantial step in this direction in *Welsh v. United States*<sup>12</sup> when, contrary to the clear import of the statutory language, the plurality concluded that those “whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace” if they became an instrument of war, qualified under the Selective Service Act’s requirement of religious belief.<sup>13</sup> This stretching of the language may well have been designed to avoid the constitutional objection that, at least in this context, religious objectors could not be treated more favorably than nonreligious ones.<sup>14</sup>

In one sense, it is a kind of insult to nonbelievers to say that all claims of conscience are religious. Some people live their lives actually rejecting positive claims of religion or without relying either on those claims or their rejections. They evaluate moral issues according to other criteria. And in a society like our own, many religious believers have moral convictions—for example, about family or professional responsibilities—that are not derived from their religious understandings. On a thorough examination, those people might well be able to connect these convictions to their religious understanding and affiliation, but religion is not their primary source. If people undoubtedly can have nonreligious moral convictions, some of these can possess the intensity of claims of conscience. Against a possible argument that religious people will feel more powerful claims of conscience because of their belief in a Higher Authority, the answer is that not all religions posit such an Authority, and that if a Christian believes that God is ready to forgive all confessed sins, he may feel no worse about doing what he takes as a moral wrong than those who do not believe in God.

We can quickly identify reasons *not* to single out religious conscience. The most obvious reason is that drawing such a distinction among people with equally strong moral convictions seems intrinsically unfair, if not actually unconstitutional. A second reason is the difficulty of drawing the line about what counts as religious. This problem involves both the difficulty of saying what exactly makes something religious, and the reality that many people have moral convictions that do not seem

<sup>12</sup> 398 U.S. 333 (1970).

<sup>13</sup> *Id.* at 344.

<sup>14</sup> Justice Harlan, concurring (and a necessary vote to constitute a majority), did take the position that the statutory language itself favored religious claims, but that nonreligious objectors should be included in the exemption because it would be unconstitutional to do otherwise. *Id.* at 344–62.

directly grounded in their religion but may bear some relation (perhaps remote) to that religion.

What arguments might be made for limiting exemptions to religious claims? One might, of course, say that they have a special constitutional status; but even if the Free Exercise Clause is a reason to accommodate religious claims of conscience, it is not, in and of itself, a solid basis to deny statutory extension, or even constitutional extension, to nonreligious claims of conscience.

The most obvious reason to limit claims to religious ones is the absence or implausibility of parallel nonreligious ones. More subtle rationales involve society's role in influencing the morality of its citizens and the message an exemption may send. A related concern is the basis for some nonreligious moral judgments. Tied to these reasons is the idea that religious institutions should be largely free of government control.

When we think of conscientious objection to military service, we have no difficulty imagining nonreligious claims. A vegetarian's objection to eating meat could also have a nonreligious grounding. But we find it harder to think of a nonreligious claim of conscience never to eat pork or lobster in particular, or to wear a certain kind of clothing, or not to work on a particular day of the week.<sup>15</sup> As the claims move away from moral appraisals, the likelihood increases that ones connected to religion will not be matched by nonreligious claims. Even as to moral claims, some may seem effectively limited to religion. Although natural law theorists present nonreligious reasons why it is wrong to use any contraceptive devices, I would be surprised if their claims, resting on a sense of the intrinsic nature of proper sexual behavior, seem persuasive to more than a minute percentage of nonbelievers.<sup>16</sup> For the various kinds of claims connected to religious convictions and practices for which nonreligious analogies are hard to imagine, limiting an exemption to religious grounds makes sense.

More perplexing issues involve what the formal organ of the general society should regard itself as confident to assert and what message a government exemption will send. Liberal democratic governments, by their very nature, are not experts about religion; they lay no claim to determining what God expects of us. By contrast, officials may regard themselves as able to make judgments of nonreligious morality. If a person claims on nonreligious grounds that all war is immoral, we might point to Nazi rule in Germany and say that an unwillingness to fight back against Hitler's armies would predictably have been ruinous to much of the world. This premise

<sup>15</sup> Perhaps a parent's moral sense that he or she should spend time with his or her children could rise to a moral claim of conscience not to work regularly on all days when the children are out of school. See also Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1156–57 (2011) (suggesting various claims for privileges that could be directly connected to religious skepticism).

<sup>16</sup> A brief explanation of why this view will be unpersuasive to most of those who are not relying on religious reasons is offered in Kent Greenawalt, *How Persuasive Is Natural Law Theory?*, 75 NOTRE DAME L. REV. 1647 (2000) (considering natural law accounts based either on teleology or self-evidence) and in 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 500–504, 511–20 (2008) [hereinafter *ESTABLISHMENT*] (exploring the relation of such accounts to public reason).

that governments are better equipped to make judgments of nonreligious morality than religious morality includes not only judgments about actual facts but rationally based value judgments, especially when these are supported by a widely shared social morality.

Connected to the capacity of assessment is the message an exemption may send. When directed at religiously based conscience, an exemption can be cast as one aspect of accommodation, or toleration, of religious practice. An exemption that extends to all claims of conscience may seem to acknowledge that the claimants' basic position is not wholly unreasonable. Thus, allowing a religion to limit clergy to males does not seem nearly as much a concession to the acceptability of gender discrimination as would a concession that nonreligious organizations with similar beliefs about their higher positions could do so.

The distinction between religious and nonreligious claims has special force when one turns to possible exemptions for organizations. For most of our country's history, religious institutions have been regarded as desirably independent of the government. Whether or not one thinks, as I do, that religious groups appropriately play a part in our political life,<sup>17</sup> it is desirable that they not be under government control. This is both because such independence is healthy and because governments in liberal democracies should not be regarded as competent to assess religious truth.<sup>18</sup> One can, of course, see similar advantages in having certain other nongovernmental organizations that are largely independent, operating as a kind of check and limit on government power.<sup>19</sup> But there is much less sense that these organizations should generally be able to operate on premises at odds with particular fundamental values held within a modern liberal democracy. As a consequence, the reasons for limiting exemption claims to religious institutions are generally stronger than the reasons for limiting individual claims to those religiously based. This conclusion about organizations is partly based on the necessity of drawing lines; even if nonreligious organizations may have reasons for exemptions as strong as those of some religious ones, the religion-nonreligion distinction can serve the purposes of clarity and administrability.

A particular concern exists about some moral outlooks, especially nonreligious ones. These might arise with respect to vaccinations, as the anxiety over the present outbreak of measles has revealed. Many parents feel their primary moral obligation is to their own children. This could rise to a conviction of conscience that they should not sacrifice their children's specific interests even if that were somehow overall desirable. Here is a troubling illustration. If no one is yet vaccinated against a serious disease,

<sup>17</sup> For a summary of my outlook, see *ESTABLISHMENT*, *supra* note 16, at 497–537.

<sup>18</sup> This premise is a central feature of the Supreme Court's approach to disputes over what group should control church property. See *FREE EXERCISE*, *supra* note 6, at 261–89.

<sup>19</sup> This observation seems more apt for organizations that have a wide range of objectives and outlooks, such as nonreligious universities, than organizations created for limited, nonideological, nonpolitical purposes, such as hospitals.



such as polio, the slight risk created by a vaccination is far outweighed by the benefit of being protected. So rational parents would want their children vaccinated. But if almost everyone else has been vaccinated, parents might believe, rightly or wrongly, that the risk now to their individual child of being vaccinated is greater than the increased risk of getting the disease if not vaccinated. Were the government to allow all parents to decide for their children on the basis of such calculations, of course one problem would be serious misassessments. But even parents who managed a precise assessment of comparative risks might opt against vaccination in a way that would slightly reduce the risks to their particular children but increase overall risk in a socially undesirable way. To illustrate, let us assume unrealistically a single magnitude of harm. When the vast majority of others are vaccinated, a child not vaccinated suffers one chance in 10,000 of suffering the harm by getting the disease, and, if vaccinated, one chance in 5,000 of harm from the vaccination process. If the unvaccinated child gets the disease, the odds are he will spread it to three other children. The harm from being vaccinated is not transmitted to others. Thus, the overall risk of refusing the child's vaccination would be four chances out of 10,000 of harm, as compared with one chance in 5,000. This *could* be a reason to deny all but medical exemptions or to limit any others to persons whose religion teaches that vaccinations are deeply wrong.

Another reason to limit exemptions to religious conscience is that identifying honest assertions may be easier to do than with nonreligious claims. Even if what properly counts for religious claims of individuals is what they actually believe, not the dominant view of their religious institutions, and even if some claims, including a number of those raised by prisoners, may lack an institutional connection,<sup>20</sup> nevertheless, many religious claims may be simpler to assess because they connect to standards of organized religions.

My own view is that whether a limit to religious claims is warranted depends on exactly what exemption is to be given. For individuals, but not organizations, most exemptions granted to moral conscience should be extended to nonreligious claimants. But whatever one concludes about that, recognizing two basic features is crucial. There *are* special reasons for governments to recognize religious claims of conscience, and these can bear on the decision whether to provide any exemption at all. These reasons do not themselves settle whether, either as a matter of justice or wisdom, an exemption should also reach similar nonreligious claims.

### *C. Sincerity and Its Assessment*

To be valid, must a claim of conscience be sincere? In one sense, the obvious answer is "Yes." People who clearly lie about their conscience should not be granted an exemption. The main problem about sincerity is the practical problem facing those who

<sup>20</sup> See, e.g., *Nilsson v. Mass. Department of Correction*, 2011 WL 1235474 (D. Mass. 2011). It may also be important that an increasing number of Americans consider themselves religious but unaffiliated.



determine applications for an exemption. With the pacifist exemption from military service, draft boards and reviewing agencies made that determination after a fairly extensive examination, although as the Vietnam War continued, federal courts required objective evidence of insincerity, not so easy to come by.<sup>21</sup> When exemptions are granted for less important matters, one cannot expect a searching examination of sincerity. This is a problem, although its dimensions vary considerably.

If an exemption, say from participating in the sale of morning-after pills, confers no ordinary advantage on the person who claims that participation would violate his conscience, and if his seeking an exemption is likely to irritate superiors or colleagues and could down the road hurt his chances for a promotion, he has no incentive to make an insincere claim. On the other hand, if the claim for an exemption is not to work on Saturday, or to refrain from having a child vaccinated, we can imagine that someone who wishes to spend the day with his family, or to avoid vaccination risks for his child, might announce an insincere objection in conscience. For those who run businesses, a possible reason to assert an insincere claim is that performing the required act would disturb one's clients or workers. One way to minimize the success of insincere claims is to limit an exemption to religious claims, which many people may be more hesitant to make up, given the typical tie of religious convictions to institutional affiliations.

A nuance about a sincerity claim of conscience concerns a person's actual feeling of intensity and sense of magnitude. Not every moral objection to performing an act rises to the level of conscience, but outsiders are hard put to judge exactly what is the force of another's moral convictions and to evaluate the degree necessary to constitute a claim of conscience. What the claimant believes she should suffer if not accommodated is one test; and someone who loses her job or is demoted because she actually refuses to perform an act has helped to demonstrate her strength of conviction. But those whose claims for exemptions are granted are not usually put to such a clear test. In any event, a connection to religious conviction, say that God or church teaching absolutely forbids particular behavior, can constitute one criterion to assess whether a person's sense that an act is morally wrong rises to the necessary degree of intensity and magnitude.

Of course, another way of dealing with this particular problem is not to require a claim of conscience, rather granting the exemption to anyone who believes that the required act is immoral. Some exemptions have been cast in this form. The concern about this strategy is opening an exemption too far to those with lukewarm reservations. Yet another approach, one I believe should be considered much more than it has been, is to allow anyone to receive an exemption if that person undertakes to do what most people would regard as at least as onerous as the required act. Thus, if

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<sup>21</sup> See, e.g., *United States v. Owen*, 415 F.2d 383, 389 (8th Cir. 1969); Donald L. Doernberg, *Pass in Review: Due Process and Judicial Scrutiny of Classification Decisions of the Selective Service System*, 33 *HASTINGS L.J.* 871 (1982). I happened to review such cases from 1971 to 1972 as a deputy Solicitor General.

a university student objects to certain uses of a yearly \$400 fee to support student organizations, let the student contribute slightly more to a scholarship fund instead. A similar approach could be used by governments for people who object to uses of their ordinary taxes. This strategy avoids the need for an observer to judge a claimant's sincerity and intensity of conviction.

#### *D. Degree of Involvement*

Does it matter how close a claimant's involvement is to what she regards as an objectionable act? One might think this is intrinsically relevant, or indirectly is one measure of sincerity. It may also affect how others respond to an exemption, or the ability of the claimant to perform a sufficient component of her duties. If we think about hospitals that perform abortions, we have doctors asked to perform them, nurses asked to assist, technicians who set up the operating room for their performance, nurses who care for patients in their rooms, personnel who make beds and clean rooms, admissions officers who interact briefly with patients entering the hospital, and persons who keep hospital records, including what procedures are performed on which patients. Within drugstores, managers run the store, druggists fill prescriptions, clerks hand drugs to customers, cashiers accept payments, and other personnel place products on shelves and keep the stores clean. The intuitive appeal of granting an exemption seems to increase the more closely an individual is actually involved in the procedure to which she objects.

The basic point about a claimant's ability to function in a job is straightforward. Given that hospitals perform abortions, and women have a constitutional right to receive them, a hospital employee whose religious conversion has led him to believe that all abortions are a form of murder cannot assert both that virtually any job at such a hospital would violate his conscience, and that, nonetheless, he cannot be dismissed for his refusal to perform a job that is remote from the actual procedure.

Whether the degree of involvement has intrinsic relevance is more debatable. According to most people's ordinary sense, if a person's job calls upon her to receive answered questionnaires of admitted patients and to exchange a few words with them, an objection to this interacting with patients who are receiving abortions would be unreasonable. The counterargument is that only sincerity of conscience matters. As Steven Shiffrin puts it, "the question should not be what society regards as too remote, too principled, too fastidious, too crazy, or too offensive."<sup>22</sup> If the person really feels she cannot in good conscience have *any* such dealings with those who will receive abortions, *and* the hospital will suffer no great inconvenience by allowing her to disengage from those contacts, why not allow her to do so?

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<sup>22</sup> Steven Shiffrin, *Gay Weddings: A Note on Town Clerks, Florists, and Photographers in Response to Dorf*, MIRROR OF JUSTICE BLOG (Oct. 14, 2011), <http://mirrorofjustice.blogs.com/mirrorofjustice/2011/10/gay-wedding.html>.

I have no decisive answer to this counter, but I do not find it fully persuasive. I believe society is warranted in saying simply that some connections are so remote they should not give rise to exemptions from duties. Still further, if exemptions reach too broadly, they will seem unacceptable to much of the public. Requiring some closeness of connection to the act to which one objects can also be an indirect way of assuring an employee's basic sincerity and the intensity of his moral objection.

At least for some people, sincerity may raise a special problem when involvement in the act objected to would be peripheral and no personal adverse consequences would flow from obtaining the exemption. A person with strong moral objections to particular behavior may wish to register that publicly in order to impress and influence others, even if she would not genuinely feel she was doing a serious moral wrong by submitting to a highly peripheral involvement, such as admitting an abortion patient into the hospital. This highly subtle form of insincerity<sup>23</sup> seems much more likely when involvement is remote than when it is direct.

I conclude that exemptions for claims of conscience may properly require that a claimant's responsibilities would otherwise connect in a substantial way to the act to which he objects. That would certainly include direct participation in the act itself and *might* also include extended personal contact with the person who will undergo the procedure the claimant believes is deeply wrong.

#### *E. What Can Outweigh Claims of Conscience?*

No one thinks claims of conscience to perform otherwise required acts should always be absolute. The process of comparative evaluation involves three different dimensions. One is denial or inconvenience, or a kind of insulting embarrassment, for those who have a right to have the required act performed. If women are given a right to receive morning-after pills, granting an exemption that would prevent them from doing so would be unacceptable. The harder questions on this score are just when practical inconvenience or embarrassment is sufficient to override a claim for an exemption. A second form of inconvenience involves those responsible for seeing that various acts are performed. A business cannot be expected to suffer an extreme expense to pay for an objecting worker's conscientious refusal to perform a certain act. Both these kinds of hardships are straightforward, though saying when they are great enough to override a claim for exemption can be very difficult and highly controversial.

A third, and different, kind of countervailing reason against claims of conscience asserts that the very message sent by acknowledging the claims is unacceptable, that people broadly need to understand that certain actions (or refusals to act) simply should not to be tolerated, or, in the case of officials, that those who are given

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<sup>23</sup> The label "insincerity" here could itself involve a serious oversimplification. If a person realized an exemption was available, she might rationalize her own perspective to honestly conclude that she had an objection in conscience.

particular positions must accept a fundamental responsibility to perform the duties of those positions. These kinds of reasons are now often offered by advocates of same-sex marriage, who oppose any broad exemptions from the responsibility to recognize those marriages and not to discriminate against the couples who undertake them. Instead of depending on someone's immediate practical hardship or inconvenience, such arguments assert that creating an exemption is itself wrong from a moral point of view, and that doing so can retard broader understanding that the underlying fundamental discrimination is intrinsically unacceptable.

To bolster the argument that it is basically wrong to permit same-sex marriage exemptions, advocates often draw a comparison with racial discrimination roughly along these lines: "We would not accept many exemptions from rules forbidding racial discrimination, whether in marriage or in other aspects of life. Discrimination against gay people is no more acceptable than racial discrimination, and exemptions are no more warranted." This argument has considerable force for those who acknowledge that those who engage in homosexual relations should be free from discrimination. I believe that, given strong historical traditions of marriage between men and women, and the fact that because someone three-quarters white and one-quarter black counted as "negro" under southern statutes, those laws were designed to protect the purity of one race, the analogy, though it carries some force, is not immune to differentiation.<sup>24</sup>

#### *F. The Generality of Formulations*

If exemptions are to be granted for claims of conscience, should they be in general terms such as the Religious Freedom Restoration Act, or should they specifically indicate which claims of conscience will be recognized? If legislators are persuaded that particular exemptions are warranted, as with abortions, it is generally desirable to specify that. A problem with language that is too open is that it can make initial decisions by private employers and executive government officials difficult. It can also render judicial determinations highly debatable, although a higher court can attack this problem by affording more specific standards of coverage for various circumstances. Given the wide range of claims of conscience people may have, general statutory language can sometimes be needed. An intermediate approach is for a statute to employ general language but set up an agency to provide more specific guidelines, something courts may also do to deal with later cases.

This outline of basic premises and questions hardly resolves various controversial issues about what the government should now do. However, it does support many of the considerations that should matter, and it also, implicitly at least, indicates how often there are legitimate arguments for and against particular exemptions. My hope is that this will promote the understanding that things are often less simple and one-sided than advocates for and against may assert.

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<sup>24</sup> See Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91, 112–14 (2013).



## 2

### The Jurisdictional Conception of Church Autonomy

Steven D. Smith\*

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THE VENERABLE IDEA of “freedom of the church”—or church autonomy, or institutional religious freedom—has received renewed support in recent legal scholarship, as well as in the Supreme Court’s *Hosanna-Tabor* decision.<sup>1</sup> Not surprisingly, this development has provoked vigorous and wide-ranging criticism as well.<sup>2</sup> One of the most frequent and fervent objections is to the idea of the church<sup>3</sup> as a “jurisdiction” that is in some sense independent of the state’s jurisdiction. Although this way of thinking about the relations between church and state may have made sense in the Middle Ages, the idea is unassimilable and wholly unacceptable in modern political thought and constitutional discourse. Or so say the critics.

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<sup>1</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

<sup>2</sup> Articles expressing a variety of perspectives are collected in Symposium, *The Freedom of the Church in the Modern Era*, 21 J. CONTEMP. LEGAL ISSUES 1 (2013).

<sup>3</sup> In this chapter I will refer to “the church” in the singular. One important objection asserts that although it made sense to speak of “the church” in the Middle Ages, today there is no “the church”; there is only a vast multiplicity of churches. See Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 936 (2013). Although I have addressed this objection briefly elsewhere, see STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 164–66 (2014), a more complete response would surely be helpful; but that is not the purpose of this chapter.

Thus, in this volume Gregory Magarian summarily dismisses what he describes as the “sovereignty” version of institutional religious freedom.<sup>4</sup> Elsewhere, Richard Schragger and Micah Schwartzman reject the jurisdictional conception with the dismissive label of “neo-medieval”;<sup>5</sup> indeed, “the type of sovereignty that seems to be contemplated by freedom of the church,” they say, “is *unthinkable* in a post-Enlightenment world of rights-bearing individuals.”<sup>6</sup> Andrew Koppelman, while acknowledging religion and hence religious freedom as a “value” in the American constitutional tradition, forcefully rejects any suggestion that the church might be viewed as an independent jurisdiction:

The American state recognizes religion as so important that it sometimes suspends its laws in order to accommodate it. Some things, it concedes, are more important than the law. But the law decides which things are more important than the law. . . . Religious freedom is a right among other rights. There is no separate and independent jurisdiction. The contemporary United States is not medieval Europe.<sup>7</sup>

So, is the jurisdictional conception of church autonomy a relic of medieval thought that cannot be revived or accepted in modern constitutional discourse? I will argue in this chapter that it is not.

Given the breadth of the criticisms and the limited space available here, my responses will be of necessity quite summary. With this caveat, I will try to clarify what the jurisdictional conception means and what is at stake in the debate. I then identify and respond to objections that persuade critics that the jurisdictional conception is demonstrably untenable or even “unthinkable” today. Finally, I briefly sketch what I take to be a central justification for treating church autonomy as a jurisdictional constraint on governmental authority.

## 1. A “JURISDICTIONAL” CONCEPTION OF CHURCH AUTONOMY: WHAT IS AT STAKE?

What are proponents of church autonomy suggesting—and what are critics so adamantly rejecting—in the claim that the church is in some sense a “jurisdiction” independent of the state’s jurisdiction? Schragger and Schwartzman begin their wide-ranging critique by asserting that proponents of freedom of the church favor

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<sup>4</sup> Gregory P. Magarian, Chapter 21, *The New Religious Institutionalism Meets the Old Establishment Clause*, in this volume.

<sup>5</sup> Schragger & Schwartzman, *supra* note 3, at 926.

<sup>6</sup> *Id.* at 921 (emphasis added).

<sup>7</sup> Andrew Koppelman, “Freedom of the Church” and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 164 (2013).

“absolute constraints on the state’s power to enforce its laws [against churches].”<sup>8</sup> And they worry that because religions sometimes claim to encompass the whole of life, jurisdictional autonomy would give churches power of “unlimited scope.”<sup>9</sup> Later, though, parsing more closely the claims of proponents, Schragger and Schwartzman seem to assert just the opposite criticism—namely, that proponents of church autonomy are not offering anything distinctive. No one today advocates that churches should have coercive power or should be given medieval privileges such as “benefit of clergy.” Thus, the language of “jurisdiction” or “sovereignty” seems to be merely “metaphorical,” and “freedom of the church seems to be merely a more robust version of what already exists.”<sup>10</sup>

In this critique, it seems, jurisdictional church autonomy is unattractive because it is shockingly radical and also disappointingly tame. If Schragger and Schwartzman seem confused, though, their confusion is understandable. Proponents of church autonomy (including myself) have often been less than clear about what exactly they are advocating. There is no easy fix for this problem, unfortunately, because the ideas and terms at issue are (and always have been, for centuries) elusive. But we can perhaps make progress by considering some suggestive, albeit imperfect, analogies to situations where contemporary lawyers intuitively understand the idea of “jurisdiction” and its limitations.

So, suppose a Mexican drug lord who makes millions of dollars illegally smuggling cocaine into the United States wanders into California—to watch a Chargers game, maybe, or admire the venomous snakes in the San Diego Zoo. U.S. authorities would consider themselves authorized to arrest, prosecute, and convict him, subject to whatever due process protections apply. Now, suppose in the alternative that before his presence is detected, this same drug lord returns to Tijuana. In that case, American officials would probably deem themselves powerless to apprehend him.

Why the difference? The obvious answer is that American officials have “jurisdiction” in San Diego, but they have “no jurisdiction” in Mexico. But what does this assertion mean? What is this thing—“jurisdiction”—that American officials possess in one place and then suddenly lose a few feet to the south?

Consider a common explanation that seems, upon examination, insufficient. It is often said that an institution or official without jurisdiction has “no power” to act.<sup>11</sup> But a moment’s reflection discerns that this statement is not *literally* true in this case. American officials *could* slip across the border, apprehend the drug lord,

<sup>8</sup> Schragger & Schwartzman, *supra* note 3, at 919 (emphasis added).

<sup>9</sup> *Id.* at 945–49.

<sup>10</sup> *Id.* at 970–72.

<sup>11</sup> See, e.g., *The Mayor v. Cooper*, 73 U.S. 247, 250 (1868) (holding that “(i)f there were no jurisdiction, there was no power to do anything but strike the case from the docket”); Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1342 (2003) (describing contention that “the [Marbury] Court, having no jurisdiction, had no power to reach the questions it did reach,” and that “[o]nce the Court saw that it had no jurisdiction, the Court was stripped instantly of all power to do anything other than to hold it had no jurisdiction, give its reasons, and dismiss”); see also Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1310 (2014) (“The word ‘jurisdiction’ is basically a legal term for power, literally the power to ‘speak[] the law.’”) (citation omitted).



and bring him back for prosecution (or otherwise execute summary justice on him).<sup>12</sup> Maybe they could do this without Mexican officials ever being told; or they might do it openly, if necessary with military backing (much in the way they eliminated Osama bin Laden in Pakistan).

So the “power/no power” account of jurisdiction is not literally accurate.<sup>13</sup> At this point, an overeager deconstructionist might conclude that the distinction between “jurisdiction” and “no jurisdiction” is a false dichotomy that ought to be abandoned for the deceit it is. Whether the drug lord is in San Diego or Tijuana, the United States in fact has power and also a legitimate interest supporting his apprehension. In each situation, the decision to apprehend him must accordingly turn on weighing the benefits of doing so against the costs. To be sure, these costs may be quite different depending on the drug lord’s whereabouts. Apprehending him in Tijuana may be more difficult, may provoke more opposition and resentment, may sacrifice the “value” of getting along amiably with a neighbor. So it might turn out that officials will prudently decide not to proceed in Mexico, even though they *would* act in San Diego. But that is just because the cost-benefit calculation comes out differently in the different situations—not because officials “lack jurisdiction” and hence have “no power” in one case.

There is a kind of bracing “no illusions” realism in this description. And yet the rejection of a distinction that has been so central to legal thinking seems precipitous. So we might ask whether the distinction can be explicated in more defensible terms.

Such an explication might go something like this: Nations have come to understand that it is desirable to construct and respect presumptively autonomous spheres within which they may act largely unimpeded, and to refrain from intruding or interfering within another government’s sphere. These spheres of noninterference are marked off with the vocabulary and imagery of “jurisdiction.” If a boundary or limit is designated “jurisdictional,” this designation signals that even if a nation has the power in a literal sense to invade another’s jurisdictional sphere, and even if the nation might have a strong interest in doing so, then normally that option should be regarded as preempted and not subject to the usual, conscious, explicit cost-benefit calculations.<sup>14</sup>

<sup>12</sup> Or they could work with nonofficials to accomplish the same end. See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>13</sup> In a similar way, it may be said that what happens within Mexico is “none of our business.” But again, this familiar formulation is dubious, at least as a literal matter. The drug lord is as much a threat to American interests when he is in Tijuana as he was when he happened to be in San Diego. More generally, what happens in Mexico may powerfully affect the concerns and interests of the United States.

<sup>14</sup> In this respect, the function I am assigning to “jurisdiction” *could* conceivably be performed by the vocabulary of “rights.” In Ronald Dworkin’s well-known conception, for example, “rights” serve as “trumps” that protect particular interests against restrictions based on ordinary cost-benefit calculations. See Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153–67 (Jeremy Waldron ed., 1984). And Rick Hills has argued for an “institutional theory of rights” that could protect the ability of institutions, including churches, to perform their functions as “private governments.” See Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 175–96 (2003). In a similar locution, rather than using the vocabulary of “jurisdiction,” we *could* say that

This preemption is only presumptive, however. If a nation's interests beyond its borders are sufficiently strong that they force themselves into consideration—if, for example, its own citizens are being abused or killed—the presumption may be overcome. Nor, of course, do jurisdictional boundaries prevent nations from interacting in a whole variety of ways, and even from exerting influence or force against each other—through agreements, for example, or sanctions, or incentives.

So then what should we make of the conventional account which teaches that “no jurisdiction” means an actor has “no power” to act? Is that familiar formulation an out-and-out falsehood?

Before attempting an answer, we would do well to reflect briefly on the nature—or the ontological status—of jurisdictional limits. The explanation just given suggests that jurisdictional limits are constructed or conventional rather than natural or empirical facts. If you drive out to the California-Mexico border, you may see a fence with various features—height, color, and so forth—but “jurisdictional” will not be one of those observable features. Transfer the exact same fence ten miles northward and it will no longer have any jurisdictional quality or function. And yet although jurisdiction is a construction, not a natural fact, it serves the preemptive function for which it is constructed by coming to seem almost *as if it were* a kind of natural fact.<sup>15</sup> Thus, *communities* are said to be “imagined,”<sup>16</sup> not natural realities, though they come to seem like natural realities. So also the *boundaries of communities* and of their governments exist in part in human imagination—in the limits or constraints that nations and people habitually take to be given, to be just somehow “there,” and

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U.S. officials should not pursue criminals living in Mexico because Mexico has a “right” to be free of American interference in its territory. Insofar as “rights” are understood in this jurisdictional sense, I would have no objection to using the language of rights, and then I might say, along with Koppelman, that church autonomy is a “right among other rights.” Koppelman, *supra* note 7, at 164. But in fact my sense is that, especially in more professional legal contexts, the vocabulary of “jurisdiction” carries a strong preemptive sense that the vocabulary of “rights” typically does not. Rather, to say that something is a “right” is to say that it is an interest that ought to be given weight in a cost-benefit assessment. See Steven D. Smith, *The Deflation of Rights*, LIBRARY OF LAW AND LIBERTY (July 24, 2014), <http://www.libertylawsite.org/2014/07/24/the-deflation-of-rights/>. A clear and perhaps extreme statement of this contemporary understanding (taken, to be sure, from a more international context) comes from Mattias Kumm:

[A] rights-holder does not have very much in virtue of having a right. More specifically, the fact that a rights holder has a *prima facie* right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified.

Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS OF HUM. RTS. 140, 150 (2010).

<sup>15</sup> Reflecting on the nature of jurisdiction, Perry Dane explains: “Most legal systems . . . embrace a set of images, metaphors, fictions, and even puns. Yet legal culture has the boldness to treat these linguistic creations as a species of reality, with real import and effect. That claim of reality is ontological, and normative.” Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 3 (1994).

<sup>16</sup> BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983).

so not to be transgressed. And it is arguably this perceived naturalness that gives communities and their boundaries much of their human significance.

Indeed, it is because a government *does* have de facto power to act in some domain that we find it useful to think of restrictions in a “no power” jurisdictional vocabulary to prevent ourselves from easily treating matters in standard cost-benefit terms. Conversely, where the government literally has no power, we find no occasion to resort to the language of jurisdiction. Thus, it would seem odd to say that the U.S. government has no jurisdiction on Saturn, or Alpha Centauri. We can deal with that question when and if we ever get there. Conversely, and perhaps paradoxically, we insist that the U.S. government has no jurisdiction, or “no power,” to act in Mexico precisely because the government *does* literally have power to act in Mexico—but (normally) shouldn’t even consider exercising that power.

In sum, the “no power” description of jurisdictional boundaries is not literally or empirically true. If you like, you could call it (to borrow from Schragger and Schwartzman) “metaphorical.”<sup>17</sup> And yet for those who have assimilated the metaphor, the description comes to seem intuitively true. It serves to support and convey the sort of useful imagining that elevates a valuable convention of noninterference almost to the level of a natural barrier, like a virtually impassable river or mountain range.

This “different nations” analogy may seem inapplicable to the relations between church and state; after all, a church is within the geographical territory of the United States, while Tijuana and its residents are not.<sup>18</sup> But this objection seems misplaced. Although some jurisdictional boundaries follow geographical lines, jurisdiction is not a concept that needs to be geographical in nature. A second analogy—the perfectly familiar example of judicial subject matter jurisdiction—should make the point clear.

The legal system of the United States includes both federal courts and state courts, and it is a commonplace that the federal courts have only such jurisdiction as Article III of the Constitution permits and as Congress confers on them. So a federal court’s jurisdiction may be limited by various nongeographical factors—the subject matter of a controversy, the amount in controversy, the kind of injury alleged by a plaintiff, or the susceptibility of a controversy to present resolution. Cases brought before a federal court may accordingly be dismissed “for lack of jurisdiction,” and lawyers understand the difference between this sort of dismissal and a dismissal “on the merits.” A judge who dismisses a case “on the merits” has in effect considered the plaintiff’s case and determined that the plaintiff should lose. But a judge who dismisses the case “for lack of jurisdiction” might well believe that on the merits the plaintiff deserves to win, and perhaps ultimately *will* win. The obstacle is that this particular federal court is not authorized to assess those merits and resolve the case.

<sup>17</sup> Schragger & Schwartzman, *supra* note 3, at 970.

<sup>18</sup> See *id.* at 971.

Once again, judges or lawyers may say that a court without jurisdiction has “no power” to decide the case. And once again, this common description is not literally true. As a purely empirical or physical matter, so to speak, the court *could* decide the case. And if the decision is not appealed, or if the court happens to be the Supreme Court, then this decision would have practical force. So “no jurisdiction” does not literally mean “no power.” This fact is perhaps most apparent when a dissenting judge argues that a case should have been dismissed for lack of jurisdiction:<sup>19</sup> The dissenter cannot mean that the court literally has no power to decide the case, because in fact the court has already done just that.

So the “no power” description must again be taken as a sort of vivid, reifying abbreviation for the claim that under established rules or conventions allocating responsibility among judicial institutions, this court should have declined to resolve the case on the merits. Also once again, a conclusion of lack of jurisdiction does not mean that a court must have nothing at all to do with a case. At the very least, the court may have “jurisdiction to determine jurisdiction.” While that determination is occurring, the court might issue restraining orders, say, to preserve the status quo,<sup>20</sup> and might hold parties in contempt for violating such orders.<sup>21</sup> In addition, a court may sometimes have jurisdiction over some claims or parties within a case but not over other claims or parties.

More generally if more subtly, in deciding debatable jurisdictional questions, courts may sometimes take a peek at the merits of the case; they may strain to find jurisdiction in a case they want to decide, and to find “no jurisdiction” when they do *not* want to pronounce on the merits of a case.<sup>22</sup> Even so, it would misrepresent legal thinking to say that jurisdiction is merely a “value” or “factor” that courts throw into the mix along with other factors—“the merits”—in deciding a case. That description would understate the distinctive function and preemptive force of “no jurisdiction.”

Although inexact, these analogies to national and judicial jurisdiction may help clarify the basic disagreement in the debate over whether church autonomy is “jurisdictional.” The debate is typically triggered when there is a dispute over something that a church has done, or something that has happened within a church. A minister—or a teacher, or a custodian—has been fired. A parishioner has been injured during a church service. A faction within the church believes that the church should ordain women to its priesthood. Such disputes may be brought before a court, or they may draw the attention of a legislature or regulatory agency. In such

<sup>19</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2698–700 (2013) (Scalia, J., dissenting).

<sup>20</sup> See, e.g., *Dennis Garberg & Assoc., Inc. v. Pack-Tech Int’l Corp.*, 115 F.3d 767, 773 (10th Cir. 1997).

<sup>21</sup> *U.S. v. Mine Workers of America*, 330 U.S. 258, 695–96 (1947).

<sup>22</sup> At least according to dissenters and critics, both tendencies were starkly apparent in notable recent companion cases. Compare *United States v. Windsor*, 133 S. Ct. 2675, 2698–700 (2013) (Scalia, J., dissenting) (arguing that in its eagerness to strike down a law prohibiting same-sex marriage, the Court exceeded its jurisdiction) with *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2688 (2013) (Kennedy, J., dissenting) (arguing that the Court had jurisdiction and should have reached the merits of a case challenging a marriage law).

situations, what difference does it make, if any, that the issue arises within and affects a church?

One side in the debate suggests that the government, including its judiciary, should address and resolve such issues “on the merits,” just as it would do if a similar issue arose within a business partnership or voluntary association.<sup>23</sup> To be sure, in addressing the merits, government may take account of the “value” of religious freedom for whatever that value may be worth. Nevertheless, with that qualification, it is still government that must ultimately consider the competing pros and cons and then decide whether the church should take back the minister, pay for the injury, or change its policy or doctrine regarding eligibility for the priesthood. The other side maintains that there is a space within a church that government should presumptively treat as *the church’s* business, *not the government’s*. When disagreements over matters within that space arise, the proper response by the government would thus be: “Whatever doubts we ourselves might have about how the church has acted, and however we might resolve this matter if it were within our jurisdiction, we are not authorized to reach the merits of this issue. This matter is for the church to resolve, not for us. End of discussion.”

Contrary to the suggestion of Schragger and Schwartzman, such jurisdictional boundaries would surely not be “absolute” or of “unlimited scope” any more than they were in the Middle Ages, or any more than other familiar jurisdictional boundaries today are absolute or unlimited. Exactly how the jurisdictional lines should be drawn would itself be subject to ongoing debate and negotiation, as has been true for as long as there have been churches and governments. Jurisdictional lines between church and state were different in the twelfth century from what they had been in the tenth; jurisdictional lines in America today are likely different than they were in the nineteenth century, or than they will be a century from now.

The content and configuration of such jurisdictional lines cannot be—and never have been—simply deduced from some Platonic idea of “jurisdiction,” of “the state,” or of “the church.” Rather, the jurisdictional boundaries are shaped and negotiated using whatever rhetorical and political resources happen to be available. Thus, the challenge of drawing contemporary jurisdictional lines is one that courts and scholars already confront, with some success. Douglas Laycock has elaborated principles that courts more cognizant of church autonomy might use in addressing the problem of child sexual abuse.<sup>24</sup> In a learned and perceptive study, Christopher Lund shows that in American law it is by now understood that secular authorities should decline efforts by church members or insiders to use the law to reshape a church’s doctrine, worship practices, or leadership.<sup>25</sup> The Supreme Court’s unanimous decision in

<sup>23</sup> This was the position taken by the government and rejected by the Supreme Court in *Hosanna-Tabor*, 132 S. Ct. at 706.

<sup>24</sup> Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J. L. & PUB. POL’Y 253, 275–78 (2009).

<sup>25</sup> Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183 (2014).