



Rights, Institutions, and Religious Freedom: Toward Clarity in the Midst of Controversy

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One reason that institutional religious freedom has become so controversial in the United States in recent years relates to the American people's historical understanding of rights as applying only to individuals. Contentious U.S. Supreme Court decisions such as [Citizens United](#) and [Hobby Lobby](#) have also contributed to widespread suspicion about the general idea of institutional rights, especially in the form of recognizing the legal personhood of corporations.

To begin to grasp the meaning and scope of institutional religious freedom requires outlining its main aspects and considering how they fit together. Growing uncertainty over the very nature of rights presents a key challenge in this regard so we will address that first.

Varieties of Rights

Despite stiff competition, the notion of *rights* is perhaps the most confused concept in our political vocabulary. Human rights are the most common way of addressing normative issues in politics worldwide and are central to many modern theories of politics and to many laws.^[1] However, the varied notions of rights—human rights, civil rights, moral rights, and legal rights—are often conflated when, in fact, each can refer to quite distinct entities. The concept of *rights* often loses specific content and becomes merely a general term implying approval or disapproval, commendation or criticism. For instance, I could say, “You have no right to speak to me like that,” meaning that you are wrong to do so, without implying that you have no legal right to insult me. Or, I could claim a legal right to a book I have authored without implying that this is in any way a human right.

As a result, despite our society's emphasis on rights, there is little clarity about what we mean or should mean when we discuss issues related to rights.

Historical Institutional Rights

I will focus here on legal rights and argue that they may be held by institutions. In the West, such rights have been held by institutions for millennia. Some of these institutions have been subordinate

political entities, such as cities, towns, villages, and colonies that were granted charters to exercise rights and powers often founded on a covenant and oath.^[2]

Such rights, however, have been and are held by more than political entities. One prime example is, of course, the Church, which has had the right to own land, carry out ecclesiastical trials, choose or appoint leaders, determine doctrine, grant academic credentials, and perform multifarious functions related to the lives of its members or constituents. As Harold Berman wrote: “The competition between the ecclesiastical and the secular court had a lasting effect on the Western legal tradition. Plural jurisdiction and plural legal systems became a hallmark of Western legality ... Underlying the competition ... was the limitation of the jurisdiction of each.”^[3]

Other organizations such as guilds and professional societies also had rights to determine their training and qualifications for membership and to perform particular lines of work. They were understood as more than mere means of work and income. The term “profession” itself derives from the profession of faith and commitment that a candidate made on entry into the guild’s order, analogous to entering a monastic order.^[4] Indeed, Berman describes guilds as originally “sworn brotherhoods whose members were bound by oaths to protect and serve one another” so they might provide “for the spiritual, and not only the material, aspects of their members’ lives.” He notes that guilds could also be lawmaking bodies with their own authority.^[5]

Accordingly, there was no sharp distinction between a religious body and an economic one. Hence, these aspects could be understood as intertwined—described by terms such as *profession*, *calling*, or *vocation*. While this sense of meaning has been weakened in the modern era, it is still present. There is still often a formal commitment required upon entry into professions such as medicine and law, which maintain their own governing bodies, rules, and ethical standards.

More strictly, commercial corporations have also been granted extensive rights, frequently too much so. Some, such as the British East India company or the Vereenigde Oost-Indische Compagnie, exercised governmental powers and often did so brutally. Thankfully, the rights of commercial bodies have now been trimmed to better fit their purpose and organization, but they still maintain a range of rights.

So, rights have been long held by institutions and organizations.

What Types of Collective Bodies Can Have Rights?

Not all collective bodies can bear institutional rights. People with different characteristics may properly have some different rights. Hence native American tribes may have different hunting and fishing rights from those who do not come from a tribal background on the grounds that this reflects longstanding traditional rules and customs, analogous to common law. Such rights, moreover, may be central to their lives and livelihood in ways that do not apply to other groups. There may also be differing language rights, as in Canada, where [traditional indigenous languages](#) are granted legal status in certain regions of the country.^[6]

But while these rights pertain to a particular set of people (or members of a people group), rather than to all people residing in a particular territory, they still remain individual rights. These rights are differentiated only according to specific, shared characteristics. They are not rights held by collective entities as such.

Institutional rights must be held by bodies capable of exercising rights (and duties). For instance, Francophone people, or red-headed persons, or left-handed individuals do not have institutional rights. Such classes of people have no collective legal personality.^[7] However, an organized body such as a mosque, a university, or a flower shop can have rights. These organized bodies can, for example, receive a bill or write a check; they can bring a lawsuit or be sued; they can buy and sell property. In short, these organizations have legal personality.

My late professor, Bernard Zylstra, provided a pithy guide to determining whether a collective body has legal personality, observing that it depends on whether you can write a letter to it, or it to you. If not, it is not an institution and cannot have legal personhood.^[8]

What Is Religion?

Of course, clarifying the nature of rights and institutions only addresses part of our puzzle—we must now turn to the contested concept of religion. While most agree that there is a set of phenomena that we can properly call religious, there is no universally accepted definition or specification of what religion is. Indeed, Miroslav Volf has written, “I’m somewhat hesitant to designate any of the world’s faiths as ‘religions’ because the very notion of ‘religion’ is a product of modernity; it represents the reduction of a living and encompassing faith to a sphere—a religious one—within the larger secular society.”^[9]

There is general agreement that, for example, Islam and Christianity are religions, but other situations are less clear. Since Buddhism does not entail belief in a God or gods and is still usually accepted as a religion, then neither theism nor deism is presumably a necessary aspect of religion. But, if this is so, is Confucianism then also a religion? Or Taoism? If we include these, we would be close to treating religion as any ultimate or basic belief or commitment, whether or not others regard it as “secular.”

Political movements such as Communism or Fascism have been described as “political religions.”^[10] Several Western European countries treat “secular humanism” as a religion or, at least, something to be recorded in listings of “religions and beliefs.” Belgium, for example, recognizes and funds secular humanism (*la laïcité*) on the same basis as it does religions. Hence, there is a plausible claim that all people and institutions are in some ways religious in that they embody some ultimate commitment that shapes them. This reflects some established theological positions and also recent trends in religious freedom.

In many places in the world, atheists may be persecuted for holding atheistic beliefs. It seems correct to describe this as religious persecution. Is, then, being an atheist or an agnostic a religious stance? One could say no and instead argue that the only real religious elements are to be found among those who persecute atheists.

But in the case of, say, conscientious objection, courts and international bodies have often concluded that it would be unjust to give conscientious objector status to those with religious objections to serving in combat while denying it to those with deeply held “secular” reasons. In these cases, courts and legislatures have extended this right to religion-like beliefs. In considering conscientious objection, the U.S. Supreme Court held that the legal protections around it could apply to a “sincere and meaningful belief which occupies in the life of its possessor a place parallel

to that filled by God.”^[11] In a similar vein, the most common expression in international religious freedom matters is “freedom of religion or belief” (FoRB).

Hence, there are good grounds for holding a very extensive view of what counts as religion and, therefore, a religious institution. However, a drawback to this approach is that the definition could become so broad that little would be left out. If everything is religious, then functionally, nothing is. Also, the use of the word “religion” would be far removed from that most commonly used in law and public discourse.

An alternative would be something akin to Kathleen Brady’s reworking of Daniel Philpott’s definition of religion, which is: “Religion is an interconnected set of beliefs and practices through which people answer the grand questions of life by seeking to live in relationship to the ultimate power or powers that grounds reality and is present to them in the real circumstances of their lives. They do this most characteristically through worship and similar practices seeking a connection with the divine. Religion typically involves related rituals, a community, a clerical professional, and a moral code grounded in the sacred realm.”^[12] This definition is not tight—no good definition of religion is—but it does capture what most scholars and most ordinary people think of as religion, while also including a range of fundamental beliefs that function “like religion.”

With this understanding of religion, which I will adopt, a religious institution is one that is shaped by a particular set of beliefs and practices oriented to the ultimate questions of reality.

What Sorts of Institutions Can Be Religious Institutions?

There is general agreement that churches, mosques, synagogues, temples, and the like are religious institutions—both as particular congregations and also as larger organized entities, such as the Catholic Church or the Islamic Society of North America. This recognition is usually also extended to “para-church” organizations with quasi-church functions such as the Billy Graham Evangelistic Association and to institutions that train clergy.

Disagreements usually arise regarding religious organizations that serve in the wider community—often called faith-based organizations. Some of these, such as religious magazines, newspapers, radio and television stations, and so forth, have so far not been legally contentious. The disputes arise primarily about organizations that serve people who are not part of the sponsoring religious group.^[13] For example, universities that have a religious mission may, and usually do, educate students who do not share their religious identity. The same is typically true for schools, hospitals, welfare agencies, homeless shelters, adoption agencies and the like.

The question then arises as to whether these institutions may insist that their staff, or certain members of it, must uphold the mission of the organization. Relatedly, can they insist on the adherence of their staff, faculty, and students to codes of conduct that proceed from their religious mission?^[14] American courts have usually held that they can. The U.S. Supreme Court’s *Hosanna-Tabor v. EEOC* holding that a Lutheran church school could fire one of its teachers for violating the school’s code was unanimous.^[15] Similar contentious issues have emerged with respect to religiously oriented welfare organizations, such as hospitals, social service organizations, and adoption agencies, where the [effect on third parties](#) comes to the fore.

Perhaps the most contentious matters concern commercial organizations, such as Hobby Lobby or Chick-fil-A. Can they be religious institutions even though they are for-profit entities competing in the commercial market? In *Burwell v. Hobby Lobby Stores*, which I mentioned at the beginning, the Supreme Court stated that “closely held” for-profit corporations could be considered as “persons” under the Religious Freedom Restoration Act. They left open the matter of less closely held corporations.

This decision has received much criticism and many of the more general objections appear to stem from a secular belief that religion is, or should be, in most cases irrelevant to how corporations function. Critics argue that religion is, or should be, a private matter that has, or should have, no effect on how a person or an institution teaches, serves, or works. In these contexts, religious criteria are often criticized as discriminatory, analogous to racial discrimination. But race is usually irrelevant to carrying out particular tasks, whereas religiously informed standards, whether moral, anthropological, or otherwise, can be central to such activities for individuals and institutions striving to follow their religious convictions.

Criteria for a Religious Institution

One key question in discerning whether an institution, even a for-profit corporation, is religious is to ask whether it does particular things that are shaped by a religious commitment.

As noted earlier, guilds in ages past could recognize and nurture the spiritual aspects of their members’ lives. There was no sharp distinction between a religious body and an economic one: these aspects were intertwined and were described by terms such as profession, calling, or vocation.

We can ask similar questions of a university, a hospital, a welfare organization, a law firm, and a for-profit corporation. Does the entity’s religion and religious claim affect the way it operates? For example, Chick-fil-A closes on Sunday, one of the more profitable days of the week for restaurants. This would indicate that its owners see the company not only as a market-oriented entity but as a calling, a means of service, a corporate way of obeying God. The corporation accepts a religious duty.

In 2000, Chick-fil-A’s founder Truett Cathy and his brother [presented a covenant](#) to their sons about how the family business should operate. The covenant included promises never to open on Sunday, that it would stay private, and that the family would continue philanthropic work. It continued, “We will be faithful to Christ’s lordship in our lives. As committed Christians we will live a life of selfless devotion to His calling in our lives We will prayerfully seek His leadership in all major decisions that impact our family and others. Our family roles as spouses to our lifelong mates, parents to our children, and loving aunts and uncles will be our priority.”[\[16\]](#)

This example and others illustrate that even for-profit corporate bodies can have religious duties and embody religious convictions. When such duties and convictions are evident, for-profit entities should be eligible for religious freedom protections alongside their non-profit counterparts.

Endnotes

[\[1\]](#). See Paul Marshall, “Two Types of Rights,” *Canadian Journal of Political Science* XXV: 4, (December, 1992): 661-676.

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- [2] Harold Berman, *Law and Revolution: the Formation of the Western Legal Tradition*, (Cambridge: Harvard University Press, 1983): 393.
- [3] *Ibid*: 268-269. For expositions of this idea, see also Steven D. Smith, “The Jurisdictional Conception of Church Autonomy,” pp. 19-37 and Richard W. Garnett, “The Freedom of the Church: (Toward) an Exposition, Translation, and Defense,” in Chad Flanders, Micah Schwartzman, and Ze Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016): 39-62.
- [4] From the Old French *profession* (12c.), from the Latin *professionem* (nominative *professio*) meaning a “public declaration.”
- [5] Harold Berman, *Law and Revolution: the Formation of the Western Legal Tradition*, (Cambridge: Harvard University Press, 1983): 390-391.
- [6] See, for example, the guidelines for the Canadian North West Territories’ “Indigenous Languages and Education Secretariat,” <https://www.ece.gov.nt.ca/en/services/le-secretariat-de-leducation-et-des-langues-autochtones/languages-overview>.
- [7] Such a grouping could be organized to be involved in a class action.
- [8] The case of North American and other native tribes can have additional complexities. A tribe that is also an organized political entity can certainly bear rights distinct from the particular rights that its members hold as a class, such as having a tribal police force. In some cases the boundary may become blurred. Similarly, the Convention on the Prevention and Punishment of the Crime of Genocide also forbids not only actions against individuals within a threatened group but also *against the group itself*. So, for example, the Convention forbids transferring children out of a group, by adoption for instance.
- [9] Miroslav Volf, “A Voice of One’s Own: Public Faith in a Pluralistic World,” Discussion draft for conference on “The New Religious Pluralism and Democracy,” (Washington, DC: Georgetown University, April 21-22, 2005) http://www.yale.edu/faith/downloads/x_volf_voice.pdf, referenced in Janet Epp Buckingham, *Fighting Over God: A Legal and Political History of Religious Freedom in Canada* (Kingston: McGill-Queen’s University Press, 2014): 207.
- [10] See, for example, Eric Voegelin, *Political Religions* (Lewiston: Edwin Mellen Press, 1986).
- [11] *United States v. Seeger*, 380 U.S. 163 (1965) at 176. In several places I cite U.S. court decisions, but these citations are meant to illustrate an argument, not to argue that the Court or U.S. law embodies the position for which I am arguing.
- [12] Philpott’s original formulation is “an interconnected set of beliefs and practices through which people answer the grand questions of life by seeking to live in harmony with a superhuman power that intervenes in real circumstances in their life. They do this most characteristically through worship.” Daniel Philpott, *Religious Freedom in Islam* (New York: Oxford University Press, 2019):22.
- [13] Of course, religious radio programs and magazines may serve an audience who are not members of the sponsoring religious group, but here the relation seems to be a minimal one.
- [14] This issue has also arisen regarding staff such as receptionists in churches, which some secular people have held as not requiring a religious commitment.
- [15] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S. Ct. 694 (2012), <https://www.supremecourt.gov/opinions/11pdf/10-553.pdf>.
- [16] Kate Taylor, “Chick-fil-A’s CEO signed a covenant with his father — the founder — pledging to remain a committed Christian, keep the company private, and never open on Sunday,” *Business Insider* (August 12, 2019), <https://www.insider.com/chick-fil-a-ceo-promised-closed-sunday-keep-company-private-2019-8>.
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