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# The New Religious Freedom: Secular Fictions and Church Autonomy

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**Abstract:** This article argues that a new form of religious freedom is emerging within the contentious field of United States politics today. Despite the commitment to separating church and state that is characteristic of American secularism, implementation of the new religious freedom appears likely to contribute to processes that are actively reshaping religious and political landscapes. Recent US Supreme Court cases such as *Hosanna-Tabor v. EEOC* and *Burwell v. Hobby Lobby, Inc*. present clear examples and this article uses the former case to bring the dynamics of the new religious freedom to light. The push for religious freedom in contemporary United States law and politics should be assessed in terms of its transformative consequences in both "religious" and "political" spheres. These consequences include refashioning religious communities as increasingly hierarchical and isolated enclaves, undermining the rights and freedoms of citizens, and further fracturing the public sphere.

## INTRODUCTION

This essay argues that a new form of religious freedom is emerging within the contentious field of United States politics today.[1] Despite the commitment to separating church and state that is characteristic of American secularism, implementation of the new religious freedom appears likely to contribute to processes that are actively reshaping religious and political landscapes. Recent United States Supreme Court cases such as *Hosanna-Tabor v. Equal Employment Opportunity Commission* (EEOC) and *Burwell v. Hobby Lobby, Inc*. present clear examples and this article uses the former case to bring the dynamics of the new religious freedom to light. The push for religious freedom in contemporary United States law

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and politics, I argue, should be assessed in terms of its transformative consequences in both "religious" and "political" spheres. These consequences include refashioning religious communities as increasingly hierarchical and isolated enclaves, undermining the rights and freedoms of already vulnerable and disadvantaged populations of citizens, and further fracturing the public sphere.

Mirroring a broader shift of scholarly interest toward religion — a shift that has been polemically cited as "the turn to religion" (Kahn 2013) — the discipline of political theory has engaged the problem of religious freedom and the more general problematic of secularism with increasingly sharp focus and sustained interest in recent years. To cite only a handful of interventions, important articles have sought to restore the centrality of religion (and religious freedom) to the modern liberal tradition (Garsten 2010), reconsidered the viability of "post-secular" paradigms for understanding the contemporary condition (Mufti 2013), and questioned the continued salience of particular religious traditions to contemporary conceptualizations of politics (Walzer 2010; 2012; see also more generally Rawls 1993; Connolly 2000; Taylor 2007; Habermas 2008). This article seeks to bring some of the highly abstract theories — about "modernity," "secularism," and "religion" — at stake in such debates down to the ground by focusing on the concrete parameters of the new forms of religious freedom emerging today. It then feeds back in to these larger debates by using the politics of religious freedom to expose the central importance of a questionable assumption shared by courts and many scholars alike, namely the assumption that "politics" and "religion" can and should be conceived as separate and relatively stable forms of life or fields of practice. Following the historian Edmund Morgan's usage, I argue that a "political fiction" of separation connects religious freedom with American secularism (Morgan 1989; see more below). I show how this fiction enables current debates and practices, and I also argue that is conceals some of the ways in which the deeply interdependent fields of religion and politics are being reshaped today. Before developing that argument further in the body of this essay, I will turn next to clarifying what I mean by secularism and religious freedom.

Secularism is a polyvalent and deeply contested term, and in broader contexts of scholarly inquiry, it is a global problematic closely associated with both the idea of modernity and with processes of modernization.[2] In the narrower context of United States politics, secularism is most often either loosely illustrated with reference Thomas Jefferson's metaphorical "wall of separation between church and state," or more carefully

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delineated as a commitment to religious freedom encoded within the First Amendment to the Constitution (Jefferson 1802; Hamburger 2002). In this article, I use the term secularism in two ways. Usually, by secularism, I mean a political fiction that describes religion and politics as distinct domains that can be effectively separated from one another. Secularism in this sense typically supports policies that confine religion to private, individual conscience, that incorporate religious communities as voluntary associations with limited aims and pluralistic tempers, and that render religious authorities subordinate to political institutions at their points of intersection. I will also use secularism to mean a process that transforms the necessarily interrelated fields of religion and politics. My argument is that the first usage helps to underwrite the new politics of religious freedom, but that it is rather misleading in many important respects; I introduce the second usage to more accurately convey the likely consequences of the new politics of religious freedom.

When it takes the form of the freedom of conscience, religious freedom dovetails neatly with the negative, rights-based conception of freedom promulgated by liberal institutions in an ever-growing range of contexts around the world (Tully 2009; Hirschl 2010). Religious freedom is now supported by advocates for a wide range of religious traditions and advocates for secularism alike, for it both stakes and defends the rights of religious institutions within modern regimes of governance and also typically subordinates religion to the state (McAlister 2012; Mahmood 2012; Evangelicals Catholics Together 2012). In the American political tradition religious freedom is avidly, proudly, and not inaccurately professed as a core element. Claims for religious freedom are typically grounded in the Jeffersonian metaphor of a "wall of separation" and the text of the First Amendment. In recent years, and largely as a reaction to the Court's decision in *Employment Division v. Smith* (1990), which was broadly viewed as a threat to religious freedom, this ideal has been re-established through Congress's enactment of the Religious Freedom Restoration Act (1993). It has been expressly written into foreign policy objectives in the International Religious Freedom Act (1998). As is the case with secularism, only a narrow slice of the problematic of religious freedom lies within the scope of this paper, and my primary interest here is to highlight the new forms being taken by religious freedom in American politics and to tease out some of their likely consequences.

A new form of religious freedom, then, is emerging from the larger processes of transformation that are at work reshaping the interrelated fields of politics and religion (cf., Scherer 2013). *Hosanna-Tabor*, and more

recently *Hobby Lobby*, show how a new ideal of religious freedom is remaking religion as a private enclave where participants are neither governed nor protected by law; they also show how the production of such enclaves undermines the political equality of citizens in their relations to both private and public institutions. As a modulation of the larger framework of American secularism, the new religious freedom is introducing and/or facilitating adjustments to the character of public life, including the relative equality of citizens, the extent and power of legal protections, the reach of hierarchical institutions, and the sway of wealthy individuals and corporations. In the main body of this article I use the Court's decision in *Hosanna-Tabor* to make this argument in more detail and I turn to *Hobby Lobby* in conclusion to indicate how the particular dynamics of religious freedom visible in *Hosanna-Tabor* are likely to spread much more broadly in the future.

## RELIGIOUS FREEDOM AS CHURCH AUTONOMY IN HOSANNA-TABOR

The Court's decision in Hosanna-Tabor was widely hailed as a victory for religious freedom, as a momentous decision, and as a landmark case in articles and op-eds in such publications as Christianity Today (Olsen 2012) and First Things (Frank 2012), as well as USA Today (Garnett 2012), The Wall Street Journal (Skeel 2012), and The New York Times (Liptak 2012). "Black on white in the text of the Constitution is special protections for religion," Justice Scalia had declared in oral arguments, and the Court's unanimous decision in Hosanna-Tabor vigorously re-asserted that categorical assessment. I read the Court's decision here as an example of the new politics of religious freedom that actively remakes "religion" in ways that are likely to have both immediate and long-lasting transformative effects on religious communities and on the larger political collectivities that enfold them. I proceed in three parts: (1) review the basic facts and arguments at play in Hosanna-Tabor; (2) examine how this decision actively re-defines religion; and (3) trace how this re-definition will exert pressures to remake the religious traditions it is intended to protect.

### Hosanna-Tabor Lutheran Evangelical Church v. EEOC

From the perspective of the respondents in Hosanna-Tabor, Cheryl Perich and the EEOC, the facts and history of litigation outline a straightforward

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case of workplace discrimination, retaliation, and wrongful termination. Perich, a teacher at a K-through-8 school (Hosanna-Tabor) in Redford, Michigan, had taken a leave of absence from work to cope with a medical disability. After undergoing treatment and being cleared to return to work by her physician, Perich attempted to resume her teaching position. When she announced her intention to return, she was asked by representatives of the school to resign her position. After the principal indicated that Perich would likely be fired if she did not resign, Perich indicated to the principal that she would seek legal recourse if she were not allowed to resume her teaching position. Perich was fired and the EEOC brought suit on her behalf against Hosanna-Tabor for violation of the Americans with Disabilities Act (ADA). Perich and Hosanna-Tabor both moved for a summary judgment, which the District Court granted in the church's favor. The District Court's decision was reversed by the Court of Appeals, which decision was in turn reviewed by the Supreme Court.

From the perspective of the petitioner, Hosanna-Tabor, a series of qualifications, details, and nuances should be added to these bare facts to get to the central issue in this case. Hosanna-Tabor was not simply a school, but rather a religious school operated by the Hosanna-Tabor Lutheran Evangelical Church, a congregation of the larger Lutheran Church Missouri Synod (LCMS). Cheryl Perich was not simply a teacher, for although she began working at Hosanna-Tabor under a one year contract as a "lay" teacher, by the time of this dispute, she had become a "called" teacher with the official title of "commissioned minister" of the church. Lay and called teaches performed the same job functions at Hosanna-Tabor; called teachers, however, had completed a course of study and been hired on an open-ended basis by a vote of their congregation. (In contrast with "ordained" ministers, exclusively men, "who serve in the office of public ministry [also known as the pastoral office] and have the power to preach the Word and administer the Sacraments," commissioned ministers, including both men and women, "act as auxiliaries to the pastoral office, performing certain important functions of that office," such as teaching.) Perich did not bring suit on the ground of discrimination simpliciter, but rather on the ground that Hosanna-Tabor retaliated against her for threatening to take legal action against the school.[3] Such an appeal to secular courts, Hosanna-Tabor maintained, violates the tenets of the Lutheran faith and of LCMS practice, according to which disputes should be subject to internal arbitration and conflict resolution.[4] More fundamentally, it claimed that there are a series of exceptions to the law

— bundled as a "ministerial exception" — which bar the courts from applying the ordinary strictures of labor law to the special relation between churches and their ministers because the selection of ministers is so vitally important to the church (see, Lund 2011).

The Court took up the last of these issues in *Hosanna-Tabor* asking if the Constitution mandates a "ministerial exception," and if so, if Perich qualifies as a minister for the purposes of that exception. Unsurprisingly, the petitioner and respondents made sharply opposed arguments. Hosanna-Tabor's brief maintained the constitutionality of a "ministerial exception" that bars courts from intervening in disputes over the hiring or firing of ministers. It argued that this exception is grounded in three clauses of the First Amendment. The Free Exercise Clause guaranties churches the right to select the people who perform important religious functions on its behalf; the Establishment Clause bars government from appointing people to those same positions and/or deciding the important theological questions involved in making such appointments; the Freedom of Association Clause guarantees churches the right to control the content of their message and thus to decide who are appropriate members and leaders. Hosanna-Tabor also maintained that Perich was, indeed, a minister for the purposes of this doctrine because her role as a teacher was essential to the church's religious purpose of passing its faith to a new generation and because the church genuinely believed her to be a minister and held her out to the world as such. Hosanna-Tabor's argument was remarkably clear cut: religious freedom forbids the government from interfering with a church's appointment or removal of its ministers, and from questioning a church's definition of its ministry. Drawing extensively on precedents set by lower courts, it argued that the "ministerial exception extends to all those the church selects 'to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large'" as "These are objectively important functions in any religion" (Brief for the Petitioner, 22). Government may not intervene in questions about the employment of ministers because, the argument goes, the question of who is or is not fit to be a minister is essentially a "controversy over religious authority or dogma" that can only be decided by the church in question (Brief for the Petitioner, 23).

The EEOC's opposing brief was similarly clear cut. It argued that Congress had deliberately prohibited religious organizations from retaliating against employees for contesting workplace discrimination when it enacted the ADA. It argued furthermore that this portion of the ADA is not unconstitutional. Relying on the logic of *Smith*, the EEOC argued that the ADA is a "neutral and generally applicable law," and that there can be no exemption

from it on the grounds that it burdens the free exercise of religion. It argued that requiring Hosanna-Tabor to retain Perich as a teacher would not have impinged on Hosanna-Tabor's rights of expressive association, and that her retaliation claim could be adjudicated without entangling the courts in theological questions, and thus without implicating the Court in the establishment of religion.[5] Disputes involving ministers should be handled on a case-by-case basis rather than by granting a blanket exemption which would strip a large number of employees of civil rights protections, according to the EEOC's argument, and it suggested that if a "ministerial exception" were to retained, it should be retained only for the much more limited number of clear cut cases — such as those involving ordained ministers, priests, rabbis, etc. — rather than be extended to the much broader class of borderline cases that includes parochial school teachers.

The Court's decision was unanimous and its opinion unambiguously affirmed the constitutional standing of the ministerial exception. Its opinion mandates a startling deference to churches on the two key questions at stake: which employees count as ministers, and which laws govern employment relations between churches and their ministers. More importantly, and more broadly, the Court's opinion is grounded on a novel principle of church autonomy.[6] Its reasoning here is remarkably clear and its decision categorical: the First Amendment's guarantee of religious freedom requires that churches exercise unqualified autonomy in their internal governance. In the words of the Court:

> "Requiring a church to accept or retain an unwanted minister … interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions" (*Hosanna-Tabor*, 13).

Justice Thomas's concurring opinion crystallizes this argument more succinctly still:

> "As the Court explains, the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith" (Thomas, J., concurring, *Hosanna-Tabor*, 1).

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Rather than affirming the authority of general and neutral laws as suggested by the jurisprudence of *Reynolds v. U.S.* (1878) and *Employment Division v. Smith*, or testing and balancing the interests and concerns of governments against those of religious communities as suggested by the jurisprudence of *Wisconsin v. Yoder* (1972), the Court's ruling in Hosanna-Tabor imposes a categorical distinction that grants forms of autonomy ordinarily reserved for sovereign states to corporate bodies enmeshed within the state. For the purposes of defining its ministers and deciding the terms of their employment, in the words of *Reynolds* repeated in *Smith*, Hosanna-Tabor makes "the professed doctrines of religious belief superior to the law of the land," effectively allowing each church "to become a law unto [itself]." *Hosanna-Tabor* is particularly important insofar as it clearly renders this surprising logic of church autonomy; it suggests as well how the categorical distinction between church and state that underwrites church autonomy is in turn grounded in the political fiction of modern secularism. The following sections consider this decision from two related perspectives: (1) that of defining religion for the purposes of protecting religious freedom and (2) that of deciding the protections appropriate for religion so defined.

## Defining Religion in Hosanna-Tabor

Hosanna-Tabor highlights a difficulty within modern secular legal regimes: where laws protect the freedom of religion, courts must of necessity decide what is (and what is not) religion for the purpose of applying such laws. The Court is in a bind insofar as recognizing some traditions as worthy of protection and others as not runs the danger of establishing those religions in violation of the First Amendment. As Winnifred Fallers Sullivan (2005) has argued, however, courts simply cannot avoid this difficulty, for it is not just practically difficult but rather logically impossible to avoid defining "religion" for the purpose of protecting it. Sullivan shows the contingency and instability of the very category of "religion," and demonstrates how modern law itself is deeply implicated in constructing, disseminating, and governing particular forms of religion. The instability of this key category renders the ideal of religious freedom, along with the category of religion, inescapably political — by which I mean here essentially contested, partisan, and saturated by power (Asad 1993; Smith 1982). Sullivan elucidates the tendency of courts to recognize and protect quite particular forms of religion under the auspices of

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religious freedom while excluding other forms. More directly, Sullivan argues, judges in the United States expect religion to resemble mainline protestant Christianity, which is to say that they expect religion to revolve around propositional beliefs, based in sacred texts that are authoritatively interpreted by a clergy within the context of a congregational organization. As a result, courts tend to protect religion in these forms, and tend not to protect forms of religion that diverge from that model (cf. Gunn 2003 for an international perspective).

*Hosanna-Tabor* extends Sullivan's argument by showing how the manner of recognition accorded by the Court — religion as what takes place within an autonomous church — conditions and shapes the traditions that are recognized as such. *Hosanna-Tabor* does not acknowledge the structural impossibility of distinguishing the activity of government from a pre-existing and autonomous sphere of religion, and thus the impossibility of neutrality. "When a minister who has been fired sues her church alleging that her termination was discriminatory," the Court concludes, "the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way" (*Hosanna-Tabor*, 21–22). In *Hosanna-Tabor*'s rhetorical construction, it is the constitution and not the court that decides that "the church must be free," and that this freedom entails autonomy. However, politics in general, and courts in particular, are called upon to determine which actions will be recognized as religious, to determine over and again what is religious and what is political on a terrain in which religion and politics are both deeply enmeshed and also constantly mutating and evolving.

It is an often remarked fact that secularism draws lines that create expansive public spaces from which religion is excluded (Rawls 1993; Connolly 2000). It is less often remarked that these same lines may also create deep private enclaves in which religious institutions are sheltered from social and political pressures. Such lines are drawn in contested and uneven fashion, case by case. Sullivan, for example, emphasizes the inherent injustice of protecting some religious communities while excluding others. *Hosanna-Tabor* focuses attention on another problem that may prove just as serious: even the individuals, communities, and traditions that are "protected" are subject to pressures that reshape them as they are incorporated as "religious" under the law. Having acknowledged that the Court must of logical necessity define religion for the purposes of protecting religious freedom, and that this necessity involves it in non-trivial problems, we can now ask more about the likely consequences of the definition of religion offered in *Hosanna-Tabor*.

## Protecting Religion in Hosanna-Tabor

Citing with wry humor a "writ sent by Henry II to the electors of a bishopric in Winchester, stating: 'I order you to hold a free election, but forbid you to elect anyone but Richard my clerk,'" the Court acknowledges that its new ideal of religious freedom as church autonomy tallies poorly with the actual historical circumstances of church-state relations (*Hosanna-Tabor*, 7). Combining a striking suggestion with extreme understatement, the Court allows that the freedom of religion from political interference "in many cases may have been more theoretical than real" (*Hosanna-Tabor*, 7). However, the Court's decisions smooths over the implications of this distance between the "theoretical" and the "real." In this section, I first parse the Court's treatment of that distinction more carefully, and then suggest that in *Hosanna-Tabor* the Court applies a certain theoretical understanding of religion in ways that are likely to remake reality when they are implemented to protect religion so imagined.

The Court's peculiar locution, "more theoretical than real," recalls the historian Edmund Morgan's concept of a "political fiction," as a particular kind of "make-believe" required by political actors. Such fictions are neither precisely true nor false, yet they constrain behavior and they are essential to the creation of political worlds. Morgan's chief examples of political fictions include the "divine right of kings" to rule, and the "sovereignty of the people" that largely replaced it in the modern world (Morgan 1989). When the Court concludes that "the First Amendment has struck the balance for us," and that the "church must be free to choose those who will guide it on its way" despite the "interest of society in the enforcement of employment discrimination statutes," (*Hosanna-Tabor*, 21, 22) it rehearses the fiction that judicial decisions are strictly governed by the text of the Constitution (which is, again, neither simply true nor false, but a fiction that constrains the behavior of judges and adjudged parties alike). More importantly, here, it also recapitulates the fiction of a secular polity in which religion has been set apart and is effectively separate from governance. This, of course, is the key fiction of modern secularism that "religion" is something "special," something that is and should be set apart, something that is separate from other aspects of life.

The Court observes that "Controversy between church and state over religious offices is hardly new," before stepping above that fray to sketch 600 years of comparative Anglo-American history from the signing of Magna Carta to the presidency of James Madison (*Hosanna-Tabor*, 6).

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There are a number of remarkable dimensions to the Court's history, but one deserves special attention. In producing such an extensive pedigree for religious freedom — enshrining it within the foundations of English and later US American liberty — the Court reifies the problem of religious freedom, suggesting that it is addressing one and the same problem throughout this history, namely the interference of government within what is now recognized as the proper sphere of religious and church autonomy. The Court's narrative frames the emergence of religious freedom in the American colonies as a response to the failure of this freedom in England: "Seeking to escape the control of the national church," the Court argues, "the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship" (*Hosanna-Tabor*, 7). And, "It was against this background that the First Amendment was adopted," according to the Court, for "familiar with life under the established Church of England the founding generation sought to foreclose the possibility of a national church" (*Hosanna-Tabor*, 8). That the Court's sweeping history is not likely to pass muster with contemporary historians, and that it treats a particular historical construct — i.e., the problematic of religious freedom in 2012 — as essentially unchanged since 1815, indeed since 1215, are beside the point. What is more important to note here is how the Court projects an absolute, age-old distinction between the spheres of religion and of politics — a distinction that it only notes in passing is "more theoretical than real" — to implement a new doctrine of church autonomy that is likely to produce dramatically new blends of religion and politics in public life.

Operating within the fiction that it reaches impartial decisions, guided by the strongest arguments, within the tight constraints of Constitution, the Court's silence on the more controversial political context of its decisions is not surprising, and this can partially explain its preference for the long historical view of religious freedom. Scholars and advocates too typically engage in debate at this longer scale. Douglass Laycock, a Professor of law and advocate in *Hosanna-Tabor* as well as *Boerne v. Flores* (1997), *Town of Greece v. Galloway* (2014), and *Holt v. Hobbs* (2015), for example, has argued that the principle of autonomy is grounded in the proper understanding of the First Amendment (Laycock 1981). Marci Hamilton, a Professor of law and advocate for the opposing side in *Boerne*, on the other hand, has argued that the concept of church autonomy "simply does not make sense in the context of the larger republican theory of the Constitution," for "Republican liberty signifies government in pursuit of the common good, when no citizen is subject to the

unfettered will of another," and yet "church autonomy would permit religious entities to avoid being legally accountable for the harm they have caused" (Hamilton 2004, 1110). My point is not to intervene directly in such debates, but rather to note the rigidity of their key terms — religion, religious freedom, autonomy, republican liberty — and to suggest that the contests they engage might be seen and decided differently from a perspective that is focused upon the continual transformation of these categories in their profound interrelation.

An example can help to draw this point out here. *Hosanna-Tabor* turns to Madison's actions as president to support the notion of a ministerial exception, but in making a strong case for autonomy, it might have drawn on the argument of his *Memorial and Remonstrance against Religious Assessments* that religion "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society," and therefore "wholly exempt from the cognizance of civil society." Madison's argument, like the Court's, is a-historical on its face, but on close examination it would provide a dubious foundation for the Court's conception of church autonomy. Both the Court and Madison agree upon the value of religious freedom, but where the Court identifies religion with the institutions and communities whose autonomy it seeks to establish and protect, Madison had identified religion with individual conscience with the consequence of undermining such institutions. Although Madison makes strong claims on behalf of "religion," the clear and intended effect of his *Memorial and Remonstrance* was to undermine the established privilege, power, and authority of "churches" — in this case Virginia's Episcopal establishment (cf. the history cited by the court, McConnell 1990). The point here is not that the Court's understanding of religion is somehow wrong; the point is rather that the basic contours of religion, religious freedom, and republican liberty have shifted considerably over time, and that interventions such as the Court's decision in *Hosanna-Tabor* contribute to those shifts.

Changes in the operative conceptions of religion and the parameters of the protections afforded to religion are legible across texts such as the *Memorial and Remonstrance*, *Smith*, *Hosanna-Tabor*, and *Hobby Lobby*. This observation that the definition of religion and that the specification of the protections appropriate to it is contingent and shifting is not particularly novel but it is not trivial either. This general observation can be sharpened by noting how a certain fiction of secularism — a perspective that is, in the Court's words, "more theoretical than real" — conditions the current forms in which religion is recognized and protected,

and how the implementation of these theoretical forms contributes to changes in social reality. Where Madison had defined religion as a matter of individual conscience, this had the effect of undermining an existing religious establishment; where the Court in *Hosanna-Tabor* defines religion as a matter of church autonomy, this has the effect of undermining the universality of citizenship and the reach of anti-discrimination law. As the amicus curiae briefs filed on behalf of Perich and the EEOC point out, *Hosanna-Tabor*'s broadening of the ministerial exception has direct implications for tens of thousands of employees.[7] Justice Ginsberg's dissenting opinion in Hobby Lobby, as we will consider further below, points out that extending religious freedom beyond churches to include businesses corporations holds the potential to disseminate these implications throughout society.

Part of the interest of *Hosanna-Tabor* is the apparent ease and confidence with which the Court decided this case. Putting one of the central questions in quite pointed fashion in oral arguments, the EEOC's advocate suggested that even if the Constitution mandates the protection of religion, it is by no means obvious that Congress has violated the Constitution "by making it illegal … to fire a fourth grade teacher in retaliation for asserting her statutory rights" (*Hosanna-Tabor*, transcript of oral arguments). The opinion of the Court, however, labeled the EEOC's argument that courts should adjudicate discrimination claims against religious associations as they would claims made against any other expressive association a "remarkable view." In oral arguments, Justice Kagan called it "amazing," and Justice Scalia called it "extraordinary" three times. Insofar as the EEOC was arguing the importance of ensuring that a law against discrimination protects all citizens, as per the intention of Congress, the Court's marked skepticism — "remarkable," "amazing," "extraordinary … extraordinary … extraordinary" — and easy dismissal of this line of argument itself seems to be worth explanation. How, to put it another way, can one explain the Court's easy unanimity in deciding to effectively grant a wide range of employers the right to discriminate against their employees (in this case on account of a medical disability) against basic standards of fairness as well as the express intent of Congress?

In more general terms, the EEOC argued that religious freedom should be set in balance with an equally fundamental component of political freedom, namely the equality of citizens before the law. The ministerial exception, in this view, denies citizens access to the courts, which is essential for securing the protections of the law. There is nothing abstract or

conjectural about this concern, for Perich's suit was dismissed summarily, and never proceeded to trial; the Court's ruling in favor of Hosanna-Tabor makes dismissal of employment claims automatic once the employee in question is determined to be a minister and it broadens the definition of ministry immensely. The EEOC suggested in essence that the state's interest in preserving the freedom of religious institutions be set against the state's interests in combatting discrimination and ensuring its citizens access to the protections of law, and that these competing interests be weighed and balanced as in, for example, *Yoder*. The EEOC argued that churches could enjoy the same freedoms of association that protect other institutions; a solution that seeks to protect the integrity, rather than the autonomy, of religious institutions, while also protecting citizens' fundamental rights to equal treatment before the law.

The Court's decision on those difficult questions is eased by the "special" status accorded to religion within a distinctly modern secular fiction that separates religion from other aspects of social organization and, in the American context, asserts its priority over these. Among the sources of the Court's preference for a narrow and principled view — crystallized as a doctrine of ministerial exception grounded in the value of church autonomy as a central aspect of religious freedom — I want to suggest is a larger secular fiction that fixes the terms and priorities in question in an intelligible order and underwrites the certainty of the Court's judgment. For that preference to make sense at all, let alone for it to seem self-evident, natural to the point that dissent from it can be seen as extraordinary, amazing, or remarkable is the deep-seated conceptualization of "religion" as something that is "special" and apart from everything else. Ironically, perhaps, it is a distinctly secular fiction that here authorizes the autonomy of religion.

It would be difficult to overemphasize the historically grounded injunction to develop languages, institutions, and procedures for politics that are separate from — that float above and avoid entanglement with — the contentious and divisive issues opened by religious difference at the core of modern secularism (cf. Rawls 1993). Modern secularism obviously rests on the distinction between "church" and "state," and this distinction rests in turn on a deeper distinction between "religion" and "politics." A long historical imaginary underpins a great deal of contemporary thinking about religious freedom creating a dense, rich, and durable secular fiction in which "religion" and "politics," "church" and "state," are naturally and clearly demarcated from one another. It is this fiction that enables the Court's easy and certain distinction between a minister of the church

and a school-teacher. The Court's offhand remark that religious freedom is "more theoretical than real" indexes an important process: the Court is not so much securing the autonomy of the church (which has never quite been "real") as it is creating it by trying to press the world into conformity with a secular fiction. What the new ideal of religious freedom as autonomy obscures are actual conditions in which that freedom is always conditioned and compromised, and more importantly under which important dimensions of religion and politics are being reshaped (cf., Roy 2010; Bowen 2010; Asad 2003).

The secular fiction that underwrites the Court's assumptions about religion is both insufficient to capture the transformational tendencies at work in American religion and politics, and essential to the promotion of the very tendencies it misrepresents. In other words, by rendering religion autonomous, decisions such as Hosanna-Tabor contribute to remaking the religious field in the image of secularism. This is not to say that they secularize religion in the sense of consigning it to a private sphere. One might instead read such decisions as part of a transformation of public life that crosses religious and political fields. Hosanna-Tabor reflects the remaking of patterns of authority, disciplinary power, accountability, and legal immunity in ways that undermine both the individual rights and the capacity for collective decision-making particular to liberal democracy, while enhancing the power of non-governmental public/private corporations, in this instance a church, in *Hobby Lobby* a for-profit business corporation. As I argue in this paper's conclusion, those tendencies are exacerbated by *Hobby Lobby*, and together these decisions index a new religious freedom with consequences for religious and political life.

## CONCLUSION

Following *Hosanna-Tabor* the Court made yet another landmark statement on religious freedom in *Hobby Lobby*, ruling that a law regulating the conduct of a business corporation had placed an unacceptable burden on the religious freedom of the business's owner. *Hobby Lobby* differed from *Hosanna-Tabor* in many significant respects, but it converges with *Hosanna-Tabor* in involving the court in defining and reshaping religion by granting it new protections that are likely to have significant political consequences. Unlike *Hosanna-Tabor*, *Hobby Lobby* was a split decision (5-4) with a strongly argued dissent that cautioned against the potential consequences of the decision and a sharply worded majority opinion

that downplayed the novelty of the decision. Yet importantly both decisions redrew certain contested contours of religion and of politics in ways that intensified hierarchical and disciplinary dimensions of religious organizations. Both decisions implement religious freedom in ways that undermine the political rights of large populations of workers. Together they index larger processes of social, political, and religious transformation crystallized by a new religious freedom aligned with the consolidation of power and authority in non-governmental institutions, the curtailment of individuals' political rights, the erosion of a shared public sphere, and the reduced capacity for collective decision-making.

If the concept of religion is part of a political fiction necessary for sustaining, describing, and governing an unruly variety of human practices that fit unevenly within this fiction, scholars have long recognized the importance of the particular concepts of religion employed by courts (cf. Sullivan 2005). There are further questions to ask, as well, about the ways in which decisions like *Hosanna-Tabor* and *Hobby Lobby* contribute to remaking of religion. The autonomy of religion and corporate personhood are crafted, imposed, and sustained by a larger social and political framework, and their further institutionalization will impact political and religious realities in important ways. Granting the artifice involved, the key questions become: what happens to the character of religious and political institutions, the tenor of collective life, and the particular conditions for those people involved when churches are rendered autonomous? How does such a religious freedom impact upon political freedoms?

The Court acknowledges that religious freedom as autonomy is "more theoretical than real" in *Hosanna-Tabor* and it makes quite clear that it relies on the "familiar legal fiction" of corporate personhood in *Hobby Lobby* (18). Yet a secular fiction in which religion and politics can be separated smooths over many of the difficult issues these cases might otherwise raise. Looking more closely at the church that was a party to *Hosanna-Tabor*, for example, one finds that the LCMS encompasses 2.3 million baptized members in the United States in some 6,200 congregations. LCMS operates missions in 90 countries; maintains a global media presence through print and radio; runs the largest protestant parochial school system in the United States; and claims to provide social services to 1 in 50 Americans.[8] The Court frames Hosanna-Tabor as an autonomous spiritual community that must be strictly separated from government interference, but suspending the secular fiction of separability for a moment, Hosanna-Tabor clearly appears as part of a worldwide advocacy network, a major employer, and the provider of basic social services. The *Hobby Lobby*

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corporation is even more obviously enmeshed within the broader networks and fabrics of public life (that difference may do much to account for a split decision in *Hobby Lobby* and a unanimous one in *Hosanna-Tabor*). In both cases the Court's implementation of religious freedom creates enormous enclaves in which laws that would otherwise protect individuals' rights and interests no longer apply and in which organizations are granted power and authority ordinarily reserved for the state.

While it is true that the Court's decisions on religious freedom in *Hosanna-Tabor* and *Hobby Lobby* were likely to have transformative effects whichever way they broke, those consequences come into the sharpest focus as adjustments to the deeply entwined parameters of religious and political life, rather than as victories or defeats for religion as such. The movement toward constituting churches as autonomous bodies has consequences not only for employees of those bodies, but also for the members of those bodies and for society more generally. *Hobby Lobby*'s extension of religious freedom's protections to include business corporations creates the potential for the expansion of those consequences. Religious freedom could potentially empower individuals vis a vis the organizations and hierarchies with which they engage in their day to day lives (including churches, schools, workplaces, etc.; consider for example *EEOC v. Abercrombie & Fitch Stores, Inc.*). But as *Hosanna-Tabor* and *Hobby Lobby* show, religious freedom can also grant those institutions more leverage to enforce beliefs, to induce conformity, to discipline, to discriminate, and to circumscribe civil liberties. Recall for example that Hosanna-Tabor required Perich to undertake advanced religious instruction to qualify as a teacher, but that completing that course of instruction rendered her employment status more precarious, for it is the essence of the Court's decision that "called" teachers can be dismissed at will (unlike "lay" teachers who hold contracts). The shift in power in *Hobby Lobby* is even clearer and more direct, for in that case business owners' beliefs about contraception are allowed to narrow the range of health care options that would otherwise be available to employees.

*Hosanna-Tabor* and *Hobby Lobby* share a central innovation: they redefine religion as a corporate practice and they create new powers and exemptions for religious corporations including both churches and businesses. Rather than counting these decisions as working for or against religion, one gains more insight by tracing the transformations of religious and political fields that are likely to follow from granting powers to corporations and stripping protections from vulnerable individuals and from political institutions.[9] If one takes the fiction of modern secularism at

face value, taking secularism to mean the separation of church and state, the priority of the state in political and public affairs, and the priority of the church in private affairs, religious freedom might appear in these cases to simply enlarge the private sphere reserved for religion. A different picture emerges, however, if the implementation of religious freedom is viewed as a product of processes reshaping the terrain, tenor, and character of public life. From that latter perspective, the new religious freedom exemplified by *Hosanna-Tabor* and *Hobby Lobby* authorizes hierarchical corporations to exercise new powers over their employees by stripping those employees of political protections and it further strips political institutions of their powers to enact a collective will. It is not so much that religion is relegated to the private sphere as it is that the nature of public space, the parameters of religious community, and the quality of citizenship itself are changed. Looking past the secular fiction of separation, then, today's new religious freedom might appear in a different light as a novel site at which religion and politics are being deeply transformed in their profound interrelation.

## NOTES

1. I want to thank the audiences and discussants in Religious Studies at the University of California Santa Barbara and at the 2015 annual conference of the Association for the Study of Law, Culture, and the Humanities for their engagement with these arguments. I also want to thank the editors, Paul A. Djupe and Angelia R. Wilson, and the anonymous reviewers at *Politics and Religion*; their generous comments and guidance have greatly improved this essay. Not least I want to thank Hussein Agrama, Winni Sullivan, Melani McAlister, and Elisabeth Anker; their work and our conversations about this essay as well as broader themes have enriched my thinking and writing immensely.

2. Treatments of this problematic are legion, but one of the most sophisticated and satisfying explorations occurred in twentieth-century debates among Hans Blumenberg (1983), Carl Schmitt (1985), Karl Löwith (2011), and Reinhart Koselleck (1988), (and, to a lesser extent, Hannah Arendt [2006]). While it is becoming more difficult for scholars to view secularism simply as the opposite of religion, or the absence of religion, it remains difficult to adequately state what secularism is. On the one hand, it is now commonly argued that secularism is equivalent to the culture of protestant Christianity, and to the individualistic culture of modern, pluralistic democracy (Berger 2007), and along the same lines, but turned somewhat more critically and provocatively, it has been suggested secularism is simply equivalent to western Christianity, which is simply equivalent to western Imperialism (Anidjar 2006). On the other hand, it has been argued that secularism as such does not exist, that there is no general, global phenomenon that corresponds to "the secular," and that scholars can only meaningfully investigate the interrelation of distinct religious traditions, with particular regimes of governance, on individual occasions or around certain issues (Bowen 2010). José Casanova 1994; Talal Asad 1993 and 2003; John Milbank 1991; William Connolly 2000 are also noteworthy among the most probing attempts to re-imagine the terms of debate about secularism.

3. The ADA "prohibits an employer with 15 or more employees from discriminating against a qualified individual with a disability in all terms and conditions of employment" (42 U.S.C. 12111(5), 12112(a)). A separate section also protects employees' rights to raise charges of workplace discrimination by prohibiting retaliation "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted,

or participated in any manner in any investigation, proceeding, or hearing under [the ADA]" (42 U.S. C. 12203(a)). (Cited in the Brief for the Federal Respondent in *Hosanna-Tabor*, p. 2).

4. "Like many Christian denominations, the Synod has long taught that Christians should resolve religious disputes within the church rather than sue each other in the civil courts. This teaching is based on 1 Corinthians 6:1-11, and is further developed in Lutheran interpretations of that Scripture" (Brief for the Petitioner, *Hosanna-Tabor*, pp. 7–8). See also LCMS's own Commission on Theology and Church Relations, 1 Corinthians 6:1-11: An Exegetical Study (1991), available at http://www.lcms.org/Document.fdoc?src=lcm&id=415, which paints a more complex and ambiguous picture of the proper Christian use of secular courts, noting that even a "cursory review of Scripture makes it clear that not all use by Christians of legally established procedures is wrong. Laws established by governments are to be obeyed if they do not clearly prohibit Christians from carrying out their calling as Christians. The government is God's instrument for good, for maintaining peace and order and for establishing justice in the land," and further that life "for the Christian is always lived in two realms, that in which Christ rules by His grace and love and that in which He rules with His power, maintaining order in the world" (p. 4).

5. "When an employer admits discrimination or retaliation but asserts a religious reason for its actions, a court can accept the employer's articulation of its religious doctrine while rejecting its defense (under Smith) without any entanglement. And cases in which an employer denies retaliation and asserts an alternative religious justification for its actions can proceed, 'if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.'" (Brief for the Federal Respondent, *Hosanna-Tabor*, 13–4).

6. The Court seeks to ground its principle of autonomy in a long line of property dispute cases, but that analogy is questionable insofar as the courts involved in these cases were asked to intervene in disputes over which element of a fragmented church was the true church, disputes wherein it is reasonable to imagine that the church in question should resolve this issue without the interference of the courts, and insofar as courts often do intervene in these disputes when they can be settled with reference to secular law (such as questions of contract).

7. See the "Brief for Law and Religion Professors," and "Brief for the National Employment Lawyers Association" (available at <http://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc/>).

8. These figures are as reported by LCMS itself. See http://www.lcms.org

9. In *Hosanna-Tabor* this shift has a strongly gendered dimension insofar as a male dominated church leadership is given more power over mostly female teachers. In *Hobby Lobby*, this shift has a strong class dimension insofar as the owners of businesses are allowed to project their beliefs in ways that impact on the lives of their employees.

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