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## *Hosanna-Tabor* in the Religious Freedom Panopticon

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# The Immanent Frame

Secularism, religion, and the public sphere

The politics of religious freedom:

## *Hosanna-Tabor* in the religious freedom Panopticon

posted by Peter Danchin

*Religious freedom is much in the air these days. In the coming weeks, The Immanent Frame will publish a series of reflections on religious freedom, beginning with four initial posts by a group of scholars involved in a joint research project that steps back from the political fray to consider the multiple histories and genealogies of religious freedom—and the multiple contexts in which those histories and genealogies are salient today. It is only the beginning of what will be, necessarily, an unfinished and complex effort. Talk of religious freedom, or a lack thereof, is always only part of a much larger story. We look forward to learning from the posts that follow.*

—Elizabeth Shakman Hurd and Winnifred Fallers Sullivan, TIF guest editors

Michel Foucault famously describes Jeremy Bentham's Panopticon as a "cruel, ingenious cage" to be understood not as a "dream building ... [but as] the diagram of a mechanism of power reduced to its ideal form ... a figure of political technology." For Foucault, panopticism is "the general principle of a new 'political anatomy' whose object and end are not relations of sovereignty but the relations of discipline: [t]he celebrated, transparent circular cage, with its high towers powerful and knowing." In reading the Supreme Court's decision in *Hosanna-Tabor v. EEOC* recognizing a "ministerial exception" to antidiscrimination law—a case hailed almost immediately as a victory for religious freedom—it is for me the specter of the Panopticon that haunts every page.



I offer these reflections on the case and what it may teach us about contemporary law, politics, and theorizing on religious freedom from the perspective of international legal theory. Viewed from outside the strictures of First Amendment scholasticism, the judgments are at once striking and familiar as compared to cases arising in other parts of the world. Striking because the justices do not justify, or even acknowledge, the antinomies and contradictions in their reasoning regarding the two cardinal principles of religious freedom orthodoxy: (1) that the State must be "secular" and thus "neutral between religion and religion, and between religion and nonreligion"; and (2) that the right to religious freedom protects what Martha Nussbaum has recently called the "essential idea" of "liberty of conscience."

I read the case instead as an attempt to rebel *against* these two ideas and, at a deeper level, to resist what Foucault termed Kant's "contract of rational despotism with free reason: the public and free use of autonomous reason will be the best guarantee of obedience, on condition, however, that the political principle that must be obeyed itself be in conformity with universal reason." To me the judges seem trapped simultaneously in the tower and circle of the modern Panopticon of Enlightenment rationality. On the one hand, they speak with authority in an objective register of right and reason as they gaze upon the category of "religion," while on the other they speak defensively in a subjective register of history and culture as they seek in vain to resist the disciplinary implications of the category of "freedom." This leaves their reasoning exquisitely caught in a fraught but familiar dialectic of power and illusion.

*Hosanna-Tabor* presented the Court with the two standard dilemmas in religious freedom cases. First, if a "ministerial

exception” was to be recognized under the First Amendment (a) who is a “minister” and how (and by whom) can this be determined in a way that is neutral between different religious traditions; and (b) if so recognized, how can the exception be justified to secular groups performing the same activities to whom neutral laws of general application apply and to “ministers” themselves whose rights under laws such as the Americans with Disabilities Act are now to be denied? How can this be neutral between religion and nonreligion? Some argument is needed to explain why religion is accorded special treatment either because it is distinctly burdened or under a special legal disability, an argument which itself cannot be “religious.”

Second, how can religious liberty be justified as a collective right, here attaching to religious groups and institutions as opposed to individual persons? Religious institutions don’t have consciences *per se*, only their individual members do, although religious entities do have texts, traditions, rituals and practices. If such groups or institutions are indeed bearers of rights, what is the scope of that right, what forms of conduct and activity does it include, and with what legal consequences? Does the right generate, for example, a duty on the State not to interfere in some “autonomous” sphere (as yet undetermined) or officially to recognize certain group manifestations of religious practice? If so, why does this not pose the same threat to the modern administrative state articulated by Justice Antonin Scalia in *Employment Division v. Smith*, where he stated that “permitting [a person] by virtue of his beliefs ‘to become a law unto himself,’ contradicts both constitutional tradition and common sense”?

For Chief Justice John Roberts, writing for a rare unanimous Court, the answers to these two sets of questions were to be found simply in “the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.” Added to this textualism were two forms of historical argument: one looking at the original understanding of the Religion Clauses on the basis of which the Court (re)tells a founding story of the principled rejection after 1776 of the established Church of England and entrenchment of “disestablishment” and “free exercise;” and the other interpreting the Court’s own labyrinthine Religion Clause jurisprudence from which distinctly Protestant terms such as “Church,” “minister,” “ecclesiastical,” “belief,” “faith,” and “mission” are neatly distilled and woven together in the Court’s final *ratio* that “the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”

I will make three general arguments concerning the reasoning in *Hosanna-Tabor*.

First, the paucity of reasoning in *Hosanna-Tabor* regarding the two sets of dilemmas above is best explained in terms of a political theology based on popular sovereignty and a prophetic hermeneutics of textualism and originalism. This form of political theology is unstable, however, for two reasons: one concerning the relationship between liberty and religion and the other the relationship between popular sovereignty and universal freedom.

Second, the privatization of churches and religion more broadly and their Erastian control by the State are the premises of freedom in the private sphere—a sphere *unilaterally* defined, protected, delimited, and increasingly regulated by the State itself. Regardless of how the sphere of conscience is delimited by the State, the background assumption underpinning the assertion of line-drawing power itself is the *denial* of the coercive authority of religious institutions in enforcing the demands of conscience. This is the critical point.

Any interest of the State in appointing officials to the Church would arise only if either the Church had a corresponding official role in the public realm of the State (as in England where, for example, of the Church of England’s 44 bishops and archbishops, 26 are permitted to sit in the House of Lords) or an agreement was negotiated between sovereigns (as is possible in Italy in its relations with the Holy See and Vatican City). It is difficult to see why the State would wish to appoint officials to a “free church” assigned the legal status of a voluntary association in the private sphere of civil society. If this is what is claimed to be a victory for religious freedom, it is a Pyrrhic victory. The churches have long ago ceded or been denied their former ecclesiastical jurisdiction and are now unilaterally “free” to select their ministers in private under

the disciplinary gaze of the Panopticon.

This legal understanding is expressly confirmed in the Court's opinion, which states that the ministerial exception is not a "jurisdictional bar" but a "defense" on the merits because "the courts have power to consider ADA claims in cases of this sort and to decide whether the claim can proceed or is instead barred by the ministerial exception." This, in Foucault's terms, is not a relation of sovereignty, but of discipline. The Church has already been absorbed into the State, the former ecclesiastical jurisdiction has been collapsed into the secular and, [in the words](#) of Bradin Cormack, the temporal law has become "the rule against which the claim of conscience [is] to be measured."

Finally, the other great transformation that defines the modern politics of religious freedom is the definition of religion itself as conscience or belief in an age of what we might term "secular equality" and the ensuing unstable convergence between conscience and autonomy on the one hand and gradual reversal in the secular imaginary whereby freedom of conscience is today viewed as autonomy on the other.

What is most interesting in *Hosanna-Tabor* is how the Court first expands the notion of individual autonomy to include "the Church" as a legal subject with a right to a certain autonomous sphere. But unlike in *Smith*, as soon as the category of "religion" is broadened to include not only the *forum internum* of conscience but also the *forum externum* of manifestations of religion or conscience, then potential conflicts arise with State jurisdiction (which potentially extends to any action implicating State interests).

In order to deal with the legal consequences of this move, the Court almost seamlessly shifts to the language of conscience and in effect analogizes the "inner conscience of the Church" to individual conscience seen as extra-legal and pre-political. In other words, the Court seeks to identify a realm not merely of autonomy but *sovereignty*—a jurisdiction in some sense separate from the State. As a sovereign realm, this must include not only decisions made for a religious reason but more broadly must ensure "that the *authority* to select and control who will minister to the faithful—a matter strictly 'ecclesiastical'—is the church's alone."

This turns the autonomy argument on its head. Indeed, this is the kind of classical religious freedom argument which communitarian theorists have long adduced against Rawlsian liberals claiming the self to be prior to its ends and the right prior to the good. The communitarian argument hinges on the moral importance of religion and rests on the idea that religious liberty should also protect those "who regard themselves as claimed by religious commitments they have not chosen" and thus encompasses the right to "pursue a substantive good characteristic of a group moral identity."

The idea appears to be, [as Winni Sullivan has observed](#), that the "'Church' is prior to the sacraments" for it is in Churches that the individual conscience is *formed*. This, of course, is a deeply theological argument which unselfconsciously claims to identify the proper attributes of religion and religious subjectivity. But it does so unilaterally—by an act of imagination rather than mutual recognition of sovereign relations—and it does so in an almost nostalgic gesture towards a now extinct legal relation that has vanished from the modern secular democratic state.

But how exactly does the Court know which matters are "strictly ecclesiastical" or which affect "the faith and mission of the church"? From a religious point of view, the scope of the "inner conscience of the Church" is likely to be viewed more broadly than that permitted under the ministerial exception as delimited in *Hosanna-Tabor*. Conversely, from a secular point of view there are likely to be a host of activities and actions pertaining to the "inner conscience of the Church" which raise the question of proper exercise of legal jurisdiction.

Given the depth and scope of these complexities, the puzzle remains why the Court in *Hosanna-Tabor* so effortlessly assumes the compatibility between autonomy and conscience in the formulation of the ministerial exception. What is central is that the Church "freely decide" ecclesiastical matters as a matter of right and further that it have autonomy to control matters even on non-religious grounds provided these pertain to the "inner conscience of the Church." The first

position defines conscience in terms of autonomy and the second defines autonomy in terms of conscience. In this set of historically- and culturally-contingent dialectic moves, a Protestant understanding of “the Church” and an Enlightenment conception of freedom are simultaneously asserted and naturalized.

This necessarily creates what Winni Sullivan [has termed](#) a “protestant *de facto* establishment,” privileging one religious subjectivity over another. This is easily visible when the ministerial exception is considered in relation to different religious traditions, especially those that historically or currently are seen as threatening either the security of the state (public order) or the freedom of others (freedom of conscience). Consider, for example, the vast governmental surveillance and monitoring of mosques in America since September 11, 2001. This has gone far beyond the extension of criminal law to suspected acts or support of terrorism. The government has directly targeted theological issues and established intrusive mechanisms to monitor the content of religious speech thought to foster “fundamentalism” or “radicalism.” U.S. policy in both domestic and international *fora* has thus comprehensively set out to “reform Islam from within.”

[As Saba Mahmood has observed](#), the “effectiveness of such a totalizing project necessarily depends upon transforming the religious domain through a variety of reforms and state injunctions .... [and t]his has often meant that nation-states have had to act as *de facto* theologians, rendering certain practices and beliefs indifferent to religious doctrine precisely so that these practices can be brought under the domain of civil law.” Muslim adherence to the phenomenal forms of religion such as Islamic laws, scriptures, rituals, liturgies, and observances potentially disturb such naturalized understandings of religion as conscience and conscience as autonomy (see [my previous posts](#) on this topic).

To an international lawyer then, the most glaring antinomy in *Hosanna-Tabor* is between the exceptionalist and universalist strands of U.S. religious freedom discourse. This is especially so viewed from the perspective of international law and foreign policy where the U.S. continues to wage a global war against “religious fundamentalists” said to pose an existential threat to modern liberal democracy and where the monitoring, promotion, and protection of the right to religious liberty (in countries apart from the U.S.) is both strongly encoded in national law, e.g. in the International Religious Freedom Act of 1998, and implemented through extensive governmental machinery, e.g. the U.S. Commission on International Religious Freedom.

A better understanding of the contemporary politics of religious freedom may help us diminish the disciplinary power of the Panopticon and see more clearly what is at stake for Christian and non-Christian traditions and conditions both within and beyond North-Atlantic modernity.

Tags: [Christianity](#), [church and state](#), [Hosanna-Tabor](#), [Jeremy Bentham](#), [law and religion](#), [political theology](#), [religious freedom](#), [sovereignty](#), [Supreme Court of the United States](#)



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