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The Freedom of the Church (New Revised Standard Version)

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The Freedom of the Church (New Revised Standard Version)

JOHN D. INAZU*

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That political concepts have their origin in theological concepts is, to most contemporary theorists, about as interesting and important as learning that English words have their origin in old Norse. Consequently, a contemporary political theology must be more than a genealogical inquiry if it is to be more than a passing curiosity. It becomes interesting just to the degree that these concepts continue to support an actual theological dimension in our political practices.¹

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1. PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 3 (2011).

I. INTRODUCTION

Significant discussion about the “freedom of church” has emerged at the intersection of law and religion scholarship and political theology.² That discussion gained traction with the Supreme Court’s ruling in *Hosanna-Tabor v. EEOC*, an opaquely grounded decision that drew upon both Free Exercise and Establishment principles to recognize the “special solicitude” granted to “religious organizations” by the text of the First Amendment.³ The freedom of the church has intuitive appeal for scholars and judges who recognize the importance of religious liberty and have lamented its decline since the Court’s 1990 decision in *Employment Division v. Smith*.⁴ It offers, in other words, a plausible (though partial) alternative to the First Amendment’s free exercise protections that have been hobbled since *Smith*.⁵

But the freedom of the church is at its core a *theological* concept. That does not preclude its integration into our constitutional discourse, but it does require a process of translation. And translation is not a scripted process—the efficacy of any background political concept as

2. See generally Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts*, 22 ST. JOHN’S J. L. COMMENT. 515 (2007); Steven D. Smith, *Freedom of Religion or Freedom of the Church*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 249 (Austin Sarat ed., 2012) [hereinafter *Religion or Church*]; Paul Horwitz, *Church as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013); Richard W. Garnett, “*The Freedom of the Church*”: (*Towards*) *An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013) [hereinafter *Towards an Exposition*]; Patrick McKinley Brennan, *The Liberty of the Church: Scope, Source, and Scandal*, 21 J. CONTEMP. LEGAL ISSUES 165 (2013); Richard C. Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. CONTEMP. LEGAL ISSUES 15 (2013). My use of the term “political theology” differs from efforts in the second half of the twentieth century that “argued for the correlation of theological and political concepts, but made the former depend on the latter.” OLIVER O’DONOVAN, *THE WAYS OF JUDGMENT: THE BAMPTON LECTURES*, 2003 x (2005). Rather, I adopt O’Donovan’s view that “[t]he work of political theology is to shed light from the Christian faith upon the intricate challenge of thinking about living in late-modern Western society.” *Id.*

3. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 712 (2012).

4. 494 U.S. 872 (1990).

5. See Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 833–37 (2012) (positing that *Hosanna-Tabor* may signal a shift in the trajectory of the Court’s religious liberty jurisprudence); MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 174–86 (2013) (highlighting the significance of *Hosanna-Tabor*).

legal doctrine will ultimately stand or fall on something akin to what Frederick Schauer has called “constitutional salience.”⁶

The existing debate over the freedom of the church obscures these insights in two ways. First, its back-and-forth nature suggests that translation succeeds or fails on the level of individual arguments. Second, its current focus on a mostly Catholic argument neglects other theological voices. The kind of cultural views that affect constitutional doctrine are less linear and more textured than the current dialogue suggests.

While I have doubts that the freedom of the church can translate into contemporary constitutional discourse, I see no reason to deny the possibility.⁷ The eventual salience or lack of salience of the idea will depend upon complex interactions that have yet to unfold, including the way in which *Hosanna-Tabor* comes to be understood.⁸ Because we don’t yet know those contours, I am presently more interested in the second limitation that I described above: the heavily Catholic focus of the debate thus far.

My goal here is a fairly modest intervention to offer a Protestant account of the freedom of the church: the New Revised Standard Version.⁹

6. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785 (2004) (defining constitutional salience as “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not.”).

7. See Chad Flanders, *The Mutability of Public Reason*, 25 RATIO JURIS 180, 200–02 (2012) (suggesting why cultural and social forces can generate new forms of reasoning); Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1459, 1481 (1996) (describing how “novel political arguments” could over time “become part of the public political culture”).

8. I am sympathetic to a number of Schragger and Schwartzman’s critiques, but they seem oddly dismissive of the role of case law. If the freedom of the church fails as a constitutional idea, it will not be because “[t]here is no reason to give churches legal protections that other institutions do not have.” Schragger & Schwartzman, *Lost in Translation*, *supra* note 2, at 22. The unanimous decision in *Hosanna-Tabor* reaches exactly the opposite conclusion, and that decision has *some* role to play in the ongoing political and legal debates, even if Schragger and Schwartzman find its reasoning unpersuasive. Elsewhere in their commentary, Schragger and Schwartzman implicitly acknowledge the role of case law. See *id.* at 29 (using the Court’s holding in *Employment Division v. Smith* to question *Hosanna-Tabor*); *id.* at 25 (relying on the judicially created right of “expressive association” to suggest a “more plausible and attractive” alternative to the freedom of the church).

9. My description plays upon the name of one of the Protestant translations of the Bible. Because I join an ongoing debate, I draw upon the Protestant voices most

Part II briefly sketches the process of translation that any theological concept encounters in the path to constitutional doctrine. Part III summarizes the current debate in legal scholarship about the freedom of the church. Part IV introduces the New Revised Standard Version through three prominent twentieth-century theologians: Karl Barth, Dietrich Bonhoeffer, and Stanley Hauerwas. Part V assesses the possibility of translation, and Part VI warns of the theological limits to translating certain theological concepts.

The New Revised Standard Version reinforces some of the normative claims underlying the Catholic story, but it does so through a Protestant lens that is more familiar to American political thought. It also differs from the Catholic account in two important ways: (1) by characterizing the church as a witnessing body rather than as a separate sovereign; and (2) by highlighting the church's freedom in a political context that no longer privileges Christianity. Importantly, I do not offer this alternative account because I think it "works" better than the Catholic story. In fact, I think that most of the contemporary constitutional protections sought by advocates of the freedom of the church are better anchored in the First Amendment's right of assembly.¹⁰ But the theoretical discussion hovering around the freedom of the church remains important because constitutional law does not operate in a vacuum and, as demonstrated most recently in *Hosanna-Tabor*, ideas related to the freedom of the church contribute to contemporary insights about our constitutional framework.

II. THE PROCESS OF TRANSLATION

I have suggested above that the process of translation the freedom of the church might travel cannot be mapped with specificity. We can,

relevant to *that* debate. Accordingly, I do not set forth a Protestant view of religious liberty generally or a Protestant theory of the Religion Clauses.

10. I have argued elsewhere for renewed attention to the political right of assembly in the American constitutional tradition. See JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012); John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013); John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. (forthcoming 2014). Others have also noted the close links between assembly and religious freedom in our constitutional tradition. See Michael McConnell, *Freedom by Association*, FIRST THINGS 39 (August/September 2012); Robert K. Vischer, *Commentary—How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403 (2012); Richard A. Epstein, *Forgotten No More: A Review of John D. Inazu's Liberty Refuge: The Forgotten Freedom of Assembly* (reviewing John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012)), 13 ENGAGE 153, 157 (2012) (noting "the connection between assembly and the protected freedoms of religion and speech, with which it has historically been linked"); Ashutosh A. Bhagwat, *Assembly Resurrected*, 91 TEXAS L. REV. 351 (2012).

however, describe in general terms a three-step process through which some theological concepts are translated. In the first step, a theological doctrine is cultivated within a particular tradition.¹¹ In the second step, some but not all aspects of that doctrine migrate into cultural views in a way that resonates not only with its theological adherents but also with parts of the broader society. Finally, in the third step, some but not all cultural views work their way into legal doctrine.

This trajectory helps explain why some strands of political theology do not effectively translate outside of a particular theological tradition: the *possibility* of translation says nothing about its *likelihood*. Theocracy may be a coherent political theology for some religious traditions, but it has no chance of gaining broad adherence in the United States today. On the other hand, some aspects of political theology do successfully migrate into cultural views and legal doctrine. That is the case, for example, with the influence of ideas like conscience and forgiveness in contemporary legal doctrine.¹²

Having described the process of translation, we can identify at least three potential hurdles to the likelihood of translation for the freedom of the church: (1) it is difficult to understand how an idea not found in the text of the Constitution (the “freedom of the church”) would offer *more* protection than an idea found in the text (the “free exercise” of “religion”); (2) the specific applications of “church” will encounter line-drawing challenges similar to those that have historically confounded the specific applications of “religion”; and (3) the substantive account of the freedom of the church that has framed the scholarly discussion thus far is somewhat

11. For this reason, it should be unsurprising that many if not most theological concepts with eventual purchase on the broader society emerge from within established religious traditions. Cf. STANLEY HAUERWAS, *THE STATE OF THE UNIVERSITY: ACADEMIC KNOWLEDGES AND THE KNOWLEDGE OF GOD* 90–91 (2007) (“at the very least Christianity names an ongoing argument across centuries of a tradition which has established why some texts must be read and read in relation to other texts.”).

12. See, e.g., ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010); MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008); JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* (2003). See also John D. Inazu, *No Future Without (Personal) Forgiveness: Reexamining the Role of Forgiveness in Transitional Justice*, 10 HUM. RTS. REV. 309 (2009) (exploring the role and limits of forgiveness in the South African Truth and Reconciliation Commission).

detached from contemporary American understandings of the relationship between church and state.¹³

Although each of these challenges complicates the process of translation, each challenge highlights a slightly different concern. The first addresses a matter of constitutional interpretation: can (or should) a framework epiphenomenal to a textual provision supersede the original provision? I am skeptical of this interpretive approach, and I have highlighted in other work some of the dangers in supplanting the First Amendment's right of assembly with the judicially recognized right of expressive association.¹⁴ The text of the Constitution has to mean *something*.¹⁵

The second concern is a matter of constitutional pragmatism: can any contemporary constitutional doctrine that affords special treatment for "religion" draw meaningful boundaries around that category? The increasingly diverse forms of religious belief in the United States have led some scholars to question whether the constitutional category of religion has a coherently definable "essence."¹⁶ Left without any essence, it becomes difficult to distinguish religious belief from any other deeply held belief, or even from strongly held preferences or personal taste.¹⁷ These conceptual challenges do not disappear simply by shifting the

13. See Shragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 2, at 935 (pointing out that Smith and Garnett draw upon an era when the church "wielded tremendous civil authority").

14. See INAZU, *supra* note 10. Indeed, I find one of the most problematic aspects of Schragger and Schwartzman's argument to be their assumption that much of the constitutional protection sought by proponents of the freedom of the church will be provided by the right of association. See Schragger & Schwartzman, *Lost in Translation*, *supra* note 2, at 15. The Court concluded in *Hosanna-Tabor* that the freedom of association would be insufficient to protect the autonomy of churches. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) ("We find this position untenable."). One of the reasons that this right is insufficient for churches is that it is insufficient (and undertheorized) for associations more generally. See INAZU, *supra* note 10, at 135–41.

15. I do not mean to advance an originalist argument here, but simply to suggest that in most cases, the most plausible constitutional interpretation will account for the history, structure, and framing of constitutional text.

16. See George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEORGETOWN L.J. 1519, 1564 (1983) ("[c]ourts simply cannot use 'religion' as a term of art without converting the right to the free exercise of religion into a seemingly illimitable right of personal autonomy."); Kent Greenawalt, *Religion as a Concept in Constitutional Law* 72 CAL. L. REV. 753 (1984); Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1884 (2009) (entertaining the possibility that while "[r]eligious speech, practice, and association might still enjoy substantial protection under other constitutional provisions and principles—free speech, perhaps, or equal protection," there may be "no good justification for treating religion as a special legal category").

17. See, e.g., BRIAN BARRY, *CULTURE AND EQUALITY* (2001) (arguing that religious preferences cannot be distinguished from expensive tastes).

locus of the inquiry from “religion” to “church.” We still confront the question of whether, as a matter of constitutional law, churches are any different than the Boy Scouts.¹⁸

It may well be that these first two concerns will prevent the integration of the freedom of the church into contemporary constitutional doctrine. But I want to focus here on the third concern: whether the particular conception of the freedom of the church formulated at step one of the process of translation is the proper candidate to begin that process. This concern is in some ways antecedent to the other two because the eventual salience of constitutional doctrine (step three) will depend in no small part on the extent to which aspects of a theological concept migrate into cultural views (step two), which in turn depends in some ways on the initial framing and content of the theological concept (step one).¹⁹ My intuition is that the process of translation for the freedom of the church will be aided by greater connections to Protestant theology that establish a broader and more ecumenical lens than the (mostly) Catholic story advanced thus far in legal scholarship.

III. THE CATHOLIC STORY

Micah Schwartzman and Richard Schragger have characterized proponents of the freedom of the church in recent legal scholarship as offering “a set of arguments that coalesce around the conclusion that churches qua churches are constitutionally unique and that they should have significant autonomy to regulate their own affairs.”²⁰ Schwartzman and Schragger pay particular attention to contributions from Richard Garnett, Steven Smith, and Paul Horwitz. Because Garnett and Smith write more squarely in the realm of political theology, I will focus on their arguments.²¹

18. Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts*, 22 ST. JOHN’S J. L. COMMENT. 515 (2007).

19. See Schauer, *supra* note 6.

20. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 2, at 922.

21. I should make clear that I am offering only snippets of complex arguments by Smith and Garnett. For their extended arguments, see the articles cited *supra* note 2. I do not mean to dodge Horwitz, who is one of the few voices in the conversation thus far to have engaged with Protestant sources. See Horwitz, *supra* note 2. But even though Horwitz draws heavily from the Dutch-Calvinist tradition of sphere sovereignty, he self-consciously engages on the level of political theory without an argument about political

Garnett calls attention to the principle of *libertas ecclesiae* that emerged out of the Investiture Controversy at Canossa at the end of the Eleventh Century.²² His strongest formulation suggests that Canossa and related events “could be helpful, if not essential, to an understanding of constitutionalism generally and, more specifically, of the religious freedom protected by the First Amendment to our Constitution.”²³ Garnett is not the first to focus on the events surrounding the Investiture Crisis—he notes, for example, their central role in important works by Harold Berman and Brian Tierney.²⁴

Garnett also calls attention to *Dignitatis Humanae*, the Second Vatican Council’s 1965 “Declaration on Religious Liberty.”²⁵ In his words, “[t]hat document and the work that shaped it are rightly regarded as an indispensable part of contemporary thinking about the nature, foundations, and implications of religious freedom, properly understood.”²⁶ He suggests that *Dignitatis Humanae* “[a]t its heart is a claim about the state, and about what [John Courtney] Murray called the ‘ontological structure of

theology. For this reason, I think his contributions are best read as deploying the sphere sovereignty concept entirely on the level of theory, metaphor, or analogy. That gives him a useful and interesting perspective on First Amendment law. See generally PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2012). But Protestant theology for Horwitz is really just circumstantial, and the theory—at least in the way that he deploys it—does not rely in any meaningful way on either the theology or the contemporary salience of the Dutch-Calvinist tradition. Cf. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 2, at 946 n.122 (observing that absent theological foundations “it is unclear what, if anything, justifies a particular distribution of spheres (or the form of sovereignty granted to them”). Another scholar to mention is Alan Brownstein, whose contribution to the freedom of the church debate calls attention to colonial and early American Protestant sources. See Alan Brownstein, *Protecting the Religion Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201, 208–09 (2013). I omit consideration of Brownstein’s arguments here because he stops short of explaining how the political theology translates into broader cultural views, or why these arguments have ongoing political salience.

22. Garnett, *Freedom of the Church*, *supra* note 2, at 59–61; Garnett, *Towards an Exposition*, *supra* note 2, at 48.

23. Garnett, *Freedom of the Church*, *supra* note 2, at 59.

24. Garnett, *Towards and Exposition*, *supra* note 2, at 33–34 (discussing HAROLD J. BERMAN, *LAW & REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983) and BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150–1650* (2008)).

25. Garnett, *Towards and Exposition*, *supra* note 2. Accord Brennan, *supra* note 2 (“Any discussion to the contemporary Catholic understanding of the *libertas Ecclesiae* must take as its point of departure the text of *Dignitatis Humanae*, the Second Vatican Council’s ‘Declaration on Religious Liberty’ promulgated in 1965 at the conclusion of the Council.”).

26. Garnett, *Freedom of the Church*, *supra* note 2, at 68–69.

society”²⁷ and “calls for recognition by the state of the freedom of the Church—for itself, and not simply as a proxy for the religious-liberty rights of individuals.”²⁸

Smith, like Garnett, draws upon the events at Canossa, which he argues “initiated a distinctively Western tradition of discourse about church-state relations and, more broadly, religious freedom that has persisted for a millennium.”²⁹ He contends that “[t]he commitment to freedom of the church can be seen as a predecessor to the American ‘separation of church and state,’ and conflicts over investiture resemble in important respects modern controversies over, for example, whether the state’s laws prohibiting employment discrimination can be enforced within and against churches.”³⁰

To the extent that the preceding compilation frames the normative conversations about the freedom of the church in contemporary American law, it is substantially incomplete.³¹ And because the current debates move beyond originalist arguments, the story will need to account for contemporary normative influences. The discourse, in other words, is on the level of political theory and cultural influence, with an eye toward legal doctrine. And it is on this level that twentieth century Protestant theology—the kind that fills many American seminaries, pulpits, and pews—becomes increasingly significant. Inattention to ongoing Protestant influences in these conversations risks eliding the extent to which Protestant theology has framed and continues to frame an American understanding of the freedom of the church.

27. *Id.* at 70 (quoting JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 199 (1988)).

28. Garnett, *Freedom of the Church*, *supra* note 2, at 71.

29. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 *HARV. L. REV.* 1869, 1870 (2009).

30. Smith, *Religion or Church*, *supra* note 2, at 266. Smith also recognizes “noteworthy differences” between the medieval political theory and contemporary American constitutionalism. *Id.* at 266–67.

31. Although I leave mostly to the side the merits of Smith’s and Garnett’s arguments and the critiques leveled against them, I think it is important to address Schragger and Schwartzman’s claim that Garnett’s recognition of conscience undermines his argument. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 2, at 936 (suggesting that Garnett’s attempt “to absorb post-Reformation religious pluralism by coupling freedom of the church with a more modern freedom of conscience . . . seems ad hoc.”). I see no reason why the freedom of the church translated through cultural views into constitutional doctrine could not coexist with an amalgam of other separately grounded freedoms within the liberal political order.

One of the most important and least recognized Protestant contributions to the current debates about the freedom of the church is rooted in *ecclesiology*. Garnett pays little attention to Protestant ecclesiology, and engages only once with Protestant theology at all.³² Smith acknowledges that “a good deal happened in between Canossa and America,” but he focuses largely on the role of “individual conscience” in Protestant thought.³³

The history of Protestant theology from the Reformation to the Declaration makes clear that the Reformers objected to the particular institution of the Catholic Church, not to ecclesiology as such. The two most prominent Reformation theologians, Martin Luther and John Calvin, both recognized a central role for the church in their political theology.³⁴ Later Protestant theologians and political theorists repeatedly underscored the importance of the institution of the church.³⁵ That presumption shaped political and legal discourse around mostly Protestant institutions in the colonies and the early Republic.³⁶ It has also framed a great deal of religious liberty jurisprudence—concepts like “church autonomy” and

32. Garnett, *Freedom of the Church*, *supra* note 2, at 22 (quoting Stanley Hauerwas).

33. Smith, *Religion or Church*, *supra* note 2, at 270. Elsewhere, Smith acknowledges: “For Protestants the church remained important as a community of believers and as a vehicle through which the word of God was preached” and warns that the contrast between Catholic ecclesiology and Protestant conscience “can be overstated.” Smith, *Discourse in the Dusk*, *supra* note 29, at 1878. But even in the context of those assertions, Smith emphasizes that with respect to the church, “Protestants sought to cut out (or at least downsize) the middle man, so to speak, and to encourage a more direct relation between the individual and God.” *Id.* at 1877.

34. See, e.g., PAUL D. L. AVIS, *THE CHURCH IN THE THEOLOGY OF THE REFORMERS* 1–35 (1981) (discussing Luther’s and Calvin’s understanding of church). Luther’s famous assertion of the “priesthood of all believers” left intact the offices of priests and bishops (and presumably an ecclesial structure that made them possible). MARTIN LUTHER, *ON SECULAR AUTHORITY* (1523), *reprinted in* LUTHER AND CALVIN ON SECULAR AUTHORITY 3, 33 (Harro Hopfl ed. & trans., 1991). Calvin devoted Book IV of his *Institutes of the Christian Religion* to the “Society of Christ”—the church. JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 669 (Henry Bevrige trans., Hendrickson Publishers 2008).

35. See, e.g., JOHN JEWEL, *AN APOLOGY OF THE CHURCH OF ENGLAND* (J.E. Booty ed., 1963); RICHARD HOOKER, *THE LAWES OF ECCLESIASTICALL POLITIE* (1594). John Locke framed his famous *Letter Concerning Toleration* around the institution of the church, not individual religious belief. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (1689).

36. See JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785); THOMAS JEFFERSON, *THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM* (1786). See generally DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* (1988); JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* (3d ed. 2011). Protestants like Roger Williams and William Penn also spoke in terms of church instead of religious belief. See John D. Inazu, *Between Liberalism and Theocracy*, 33 *CAMP. L. REV.* 591, 593–99 (2011).

“hierarchical vs. congregational” presupposed an institutional church that was largely Protestant in nature.³⁷

This is not to say that ecclesiology has always remained at the forefront of Protestant theology. To take an obvious example, the shift in popular discourse away from “church” and toward the category of “religion” had a corrosive effect on Enlightenment Protestant theology.³⁸ The turn to “religion” both facilitated and diluted the integration of Protestant political theology into American political thought. More recently, the lack of an ecclesial focus in the influential theology of Reinhold Niebuhr left a profound effect on twentieth century American Protestantism.³⁹ Yet there is also a significant strand of Protestant theology that maintains an ecclesial focus and advances an argument for the freedom of the church. It is to this account that I turn in the next section.

IV. THE NEW REVISED STANDARD VERSION

The Protestant account of the freedom of the church that I offer here focuses on the work of Karl Barth, Dietrich Bonhoeffer, and Stanley Hauerwas, each of whom has advanced an understanding of the church’s freedom that is constitutive of Christian practice and witness.⁴⁰ These

37. See, e.g., *Watson v. Jones*, 80 U.S. 679, 681–82, 723 (1872) (describing in detail the organizational structure of the Presbyterian Church and focusing on “hierarchical” and “congregational” models of church governance); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 441 (1969) (“This is a church property dispute which arose when two local churches withdrew from a hierarchical general church organization.”); *Jones v. Wolf*, 443 U.S. 595, 597 (1979) (“This case involves a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization.”); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (“The relationship between an organized church and its ministers is its lifeblood.”).

38. See TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* (1993).

39. See, e.g., STANLEY HAUERWAS, *WITH THE GRAIN OF THE UNIVERSE* 137 (2001) (“In neither his ethics nor his theology did Niebuhr provide an account of the church.”). Niebuhr was certainly interested in political theology of a kind, but he paid little attention to “the church,” and almost no attention to the “freedom of the church.” His well-known *Moral Man and Immoral Society* focused on “the conflict between ethics and politics” that presupposes a duality between “the inner life of the individual” and “the necessities of man’s social life” (life in “society”) that offers no account of the church. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 257 (1931).

40. The emphasis on the church is evident even in the titles of some of their major works: *Church Dogmatics* (Barth), *Sanctorum Communio* (Bonhoeffer), *Life Together* (Bonhoeffer), *Community and Character* (Hauerwas), *In Good Company: The Church as Polis* (Hauerwas). The Mennonite theologian John Howard Yoder deserves consideration

three theologians embody a strand of contemporary Protestant theology that insists upon the centrality of ecclesiology. They emphasize that the church's freedom serves as a reminder to the state of the state's limits and that the church's freedom includes the freedom to speak truthfully.⁴¹

A. Karl Barth

Karl Barth is a towering figure in twentieth-century Protestant theology, once described by Pope Pius XII as “the most important theologian since Thomas Aquinas.”⁴² Barth's thirteen-volume *Church Dogmatics* is one of the most significant works of modern theology.⁴³ In 1962, Barth's first visit to the United States landed him on the cover of *Time*.⁴⁴ The news coverage captured both Barth's theological prominence and his controversial role within American Protestant theology. As to the former, *Time*'s cover story noted that “Among Protestant theologians, Barth's arrival has caused as much stir as would a visit by the Pope to a Jesuit convention.”⁴⁵ But the story also flagged the hostility to Barth from both left and right Protestantism:

Reinhold Niebuhr regards Barth as a “man of infinite imagination and irresponsibility” writing “irrelevant theology to America. I don't read Barth any more,” he says. And Dr. Cornelius Van Til of Westminster Theological Seminary speaks for a host of U.S. fundamentalists in charging that “Barthianism is even more hostile to the theology of Luther and Calvin than Romanism.”⁴⁶

alongside Barth, Bonhoeffer, and Hauerwas. I omit a consideration of Yoder only because his contemporary influence outside of some Mennonite and Catholic circles is largely represented in Hauerwas's work.

41. It should be obvious that I am highlighting a particular strand of Protestant political theology, and I do not claim that it is *the* Protestant account. I mean only to suggest that there are substantial elements of Protestant political theology that focus on ecclesiology rather than simply individual conscience. The vast and contested literature on the broader contours of Protestant political theology and its potential implications for religious liberty far exceeds the scope of my present inquiry. See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003); DAVID VANDRUNEN, *NATURAL LAW AND THE TWO KINGDOMS: A STUDY IN THE DEVELOPMENT OF REFORMED SOCIAL THOUGHT* (2010); BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 129–79 (2012).

42. Upon hearing of the compliment, Barth purportedly responded “This proves the infallibility of the Pope.” *Witness to an Ancient Truth*, *TIME*, Apr. 20, 1962, at 61.

43. KARL BARTH, *CHURCH DOGMATICS* (G.T. Thomson trans., T. & T. Clark 1977) (1932-1967).

44. *Witness to an Ancient Truth*, *TIME*, Apr. 20, 1962, at 61.

45. *Id.* The article mentioned lectures that Barth would be delivering at the University of Chicago (where he received an honorary degree) and Princeton Theological Seminary. *Id.*

46. *Id.*

Niebuhr and Van Til shared more than a dislike of Barth.⁴⁷ They both wrote from within a longstanding Protestant conception of the dualistic relationship between “church” and “world.” Because Barth (and later Bonhoeffer and Hauerwas) react *against* this political theology, it is useful to trace it briefly here.⁴⁸

The relationship between church and world has perplexed and confounded political theology since the admonition of Jesus to the Pharisees to “render unto Caesar that which is Caesar’s, and unto God, that which is God’s.”⁴⁹ As New Testament scholar Richard Hays observes, “Christendom’s traditional interpretation takes Jesus’ response as one of acquiescence to the taxing authority of the ruler, thus establishing a ‘two kingdoms’ theory of separation between the secular and the religious realms.”⁵⁰ This interpretation is likely the result of an emphasis in Christian theology on the apostle Paul’s instructions in the thirteenth chapter of Romans.⁵¹ Through the lens of Romans 13, Jesus’s response to the Pharisees could be understood to endorse a jurisdictional separation that leads eventually to distinct realms of “church” and “state.”⁵²

The latent dualism of church and state gained traction with Augustinian political theology (and to an even greater extent with later interpretations

47. Van Til was one of the most persistent Reformed critics of Barth. For a useful introduction to the theological acrimony between the two, *see generally* KARL BARTH AND AMERICAN EVANGELICALISM (Bruce L. McCormack & Clifford B. Anderson eds., 2011) (the essays by George Harinck and D.G. Hart are particularly salient).

48. The pre-Reformation history also contains the roots of the Catholic story advanced by Garnett and Smith.

49. *Matthew* 22:11; *Mark* 12:17; *Luke* 20:25.

50. RICHARD HAYS, *THE MORAL VISION OF THE NEW TESTAMENT: COMMUNITY, CROSS, NEW CREATION, A CONTEMPORARY INTRODUCTION TO NEW TESTAMENT ETHICS* 126–27 (1996).

51. *Romans* 13:1–7 (“Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgment. . . . For the same reason you also pay taxes, for the authorities are God’s servants, busy with this very thing. Pay to all what is due them—taxes to whom taxes are due, revenue to whom revenue is due, respect to whom respect is due, honor to whom honor is due.”).

52. These precise terms are anachronistic at various stages of Christian political theology, but they capture a persistent dualism. The significance of this interpretation plays a crucial role in subsequent political theology. *See* JOHN HOWARD YODER, *THE POLITICS OF JESUS* 193 (1972) (“Until the crisis of Nazism struck into the heartland of Protestant theological scholarship, there was little question about the centrality and adequacy of Romans 13:1–7 as the foundation of a Christian doctrine of the state.”).

of Augustine). In Book XV of the *City of God*, Augustine famously distinguished between the “heavenly city” and the “earthly city.”⁵³ Because the heavenly city worshiped one God and the earthly city recognized many gods, Augustine argued, “it has come to pass that the two cities could not have common laws of religion.”⁵⁴ For this reason, “the heavenly city has been compelled in this matter to dissent.”⁵⁵ While Augustine did not draw a binary distinction between “church” and “state,” the two cities metaphor lent itself to such an oversimplified interpretation of his work.⁵⁶

Centuries later, Martin Luther drew an even sharper divide. Luther envisioned state and church as “two realms” and reinforced these divisions with a related distinction between “Law” and “Gospel.”⁵⁷ He recognized that he was departing from most earlier formulations but claimed an Augustinian heritage: “Of this difference between Law and Gospel . . . there is nothing to be found in the books of the ancient fathers. Augustine did somewhat understand this difference and showed it. Jerome and others knew it not.”⁵⁸

Lutheran political theology as it was interpreted in early twentieth century Protestantism had a profound and tragic effect on the German

53. AUGUSTINE, *CITY OF GOD*, Book XIV, c.28. The difference between the cities was rooted in the objects of their love: the heavenly city pursues the love of God; the earthly city pursues the love of self. This explains the need for Augustine’s massive historiography in the preceding books. By constructing a history of the *saeculum*, he shows that the earthly city is fundamentally rooted in violence and self-love. Cf. JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* 390 (1990) (“Augustine’s contrast between ontological antagonism and ontological peace is grounded in the contrasting historical narratives of the two cities.”).

54. *CITY OF GOD*, Book XIX, c.17.

55. *Id.* (emphasis added).

56. Augustine recognized that Christian citizens shared a “mortal life” that was “common to both cities.” *CITY OF GOD*, Book XIX, c.17. Cf. *id.*, Book XV, c.21 (both cities “starting from a common gate opened in Adam into this mortal state”); *id.*, Book XVIII c.54 (describing “the mortal course of the two cities, the heavenly and the earthly, which are mingled together from the beginning down to the end.”); *id.*, Book XIX c.26 (“the two cities are commingled”). As John Milbank notes, “[t]he *civitas terrena* is not regarded by [Augustine] as a ‘state’ in the modern sense of a sphere of sovereignty, preoccupied with the business of government.” MILBANK, *supra* note 53, at 406. Cf. SHELDON WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 113 (2004) (“In Augustine’s system the *civitas terrena* was not intended to represent in an exact way the political community any more than the *civitas dei* was synonymous with the Church”).

57. Martin Luther, *On Secular Authority*, in LUTHER AND CALVIN ON SECULAR AUTHORITY 6 (Harro Höpfl ed., 1991).

58. Quoted in BERMAN, *LAW AND REVOLUTION II*, *supra* note 41, at 40. Berman notes that “Luther considered this doctrine to be revolutionary.” *Id.* Luther’s scriptural exegesis reinforced his dualism: he grounded *On Secular Authority* on Romans 13. Martin Luther, *On Secular Authority*, in LUTHER AND CALVIN ON SECULAR AUTHORITY 6 (Harro Höpfl ed., 1991).

Christian Church and its failure to articulate a coherent theological response to the Nazi regime.⁵⁹ Barth and Bonhoeffer did not completely free themselves from their Lutheran trappings, but their theology marked a distinctive break from their predecessors.⁶⁰ Barth signaled this break in his 1935 essay “Gospel and Law,” published within months of his dismissal from a professorship at Bonn after refusing to take the oath of allegiance to Hitler.⁶¹ Barth began the essay by calling attention to its title:

If I chose the title, “*Law and Gospel*,” I would have to speak in terms of the formula which has come to be taken almost for granted among us. But I should like immediately to call attention to the fact that I shall not speak about “Law and Gospel” but about “*Gospel and Law*.” . . . Anyone who wishes correctly to approach our subject must first speak of the *Gospel*.⁶²

Barth underscored these claims later in the essay: “We are always concerned with faith in Jesus Christ, who is crucified and risen. Thus there can never be claims and demands which would have legal validity from another source or in themselves . . .”⁶³ Will Herberg observes that Barth’s essay contained “very little direct political comment” but offered “one glancing reference not without significance: among the ‘falsifications’ of the law, Barth lists an example that has arisen ‘in these troubled times: the ‘*Volksnomoi*’ [‘people’s laws’] so happily invented.”⁶⁴

59. For a description of Barth’s critiques of Lutheran political theology and its relationship to the German political situation of the 1930s, see Jesse Couenhoven, *Law and Gospel, or the Law of the Gospel? Karl Barth’s Political Theology Compared with Luther and Calvin*, 30 J. REL. ETHICS. 181, 191–92 (2002).

60. Will Herberg argues that “what Barth actually depends upon in much of his political thinking is the familiar Augustinian-Reformation doctrine of the state as an order of preservation.” Will Herberg, *Introduction* to KARL BARTH, COMMUNITY, STATE, AND CHURCH: THREE ESSAYS 11, 36 (Will Herberg ed., 1960). Cf. HAUERWAS, WITH THE GRAIN, *supra* note 39, at 203 n.67 (“[I]n what might be called his theological politics, [Barth] gave the state far too much independence.”); STANLEY HAUERWAS, PERFORMING THE FAITH: BONHOEFFER AND THE PRACTICE OF NONVIOLENCE 51 (2004) (“Bonhoeffer’s attempt to rethink the Lutheran two-kingdom theology in light of his christological recovery of the significance of the visible church, I think, failed to escape from the limits of the habits that have long shaped Lutheran thinking on these matters.”).

61. See Herberg, *supra* note 60, at 41.

62. Karl Barth, *Gospel and Law*, in COMMUNITY, STATE, AND CHURCH: THREE ESSAYS 71, 71 (Will Herberg ed., 1960).

63. *Id.* at 83.

64. Herberg, *supra* note 60 at 43.

Three years later, Barth published his essay, “Church and State.”⁶⁵ Haddon Willmer describes how Barth’s political theology reoriented previous understandings:

The difference between church and state is not that the church belongs to God and the state to itself, or to the devil, but that the church knows God as Lord through his revelation, and so consciously obeys and witnesses, while the state does not know—indeed, as the necessarily pluralist, tolerant, inclusive community, it cannot know God in his Word. The state nevertheless belongs to God, who in his providence brings good even out of evil.⁶⁶

Barth insisted that the state’s authority was “included in the authority of Jesus Christ.”⁶⁷ There were not “two realms” but two orders, both centered around the reality of Jesus Christ. Barth’s political theology flowed out of his ecclesiology—he could not conceive of the Christian witness apart from the church: “If [the Christian] were not in the church, he would not be in Christ. He is elected and called, not to the being and action of a private person with a Christian interest, but to be a living member of the living community of the living Lord Jesus.”⁶⁸

Barth recognized that that state maintained authority and order in ways helpful to the church, but he insisted:

It is quite another question whether the State has any right to try to strengthen its authority by making a kind of *inward* claim upon its subjects and its citizens; that is, whether it has any right to demand from them a particular philosophy of life, or at least sentiments and reactions dominated by a particular view imposed by the State from without. According to the New Testament, the only answer to this question is an unhesitating “No!”⁶⁹

For Barth, this freedom lay at the core of the church’s claim on the state:

[T]he guarantee of the State by the Church is finally accomplished when the Church claims for itself the guarantee of the State, i.e., the guarantee of freedom to proclaim her message. This may sound strange, but this is the case: all that can be said from the standpoint of divine justification on the question (and the questions) of human law is summed up in this one statement: the Church *must have the freedom to proclaim divine justification*.⁷⁰

65. *Id.* at 43.

66. Haddon Willmer, *Karl Barth*, in *THE BLACKWELL COMPANION TO POLITICAL THEOLOGY* 131 (Peter Scott & William T. Cavanaugh eds., 2007).

67. Karl Barth, *The Christian Community and the Civil Community*, in *COMMUNITY, STATE, AND CHURCH: THREE ESSAYS* 149 (Will Herberg ed., 1960).

68. KARL BARTH, *THE CHRISTIAN LIFE* 188, *quoted in* HAUERWAS, *WITH THE GRAIN*, *supra* note 39, at 198–99.

69. Karl Barth, *Church and State*, in *COMMUNITY, STATE, AND CHURCH: THREE ESSAYS* 101, 143 (Will Herberg ed., 1960).

70. *Id.* at 147. Augustine makes a similar claim: “This heavenly city, then, while it sojourns on earth, calls citizens out of all nations, and gathers together a society of

The Church “has this freedom as its right” and “it desires from the State nothing but freedom.”⁷¹

Barth’s most mature political theology came in a 1946 essay titled “The Christian Community and the Civil Community.”⁷² He defined the Christian community as “the commonality of the people in one place, region, or country who are called apart and gathered together as ‘Christians’ by reason of their knowledge of and belief in Jesus Christ.”⁷³ Barth emphasized that “[t]he meaning and purpose of this ‘assembly’ (*ekklesia*) is the common life of these people . . .”⁷⁴ The civil community, in contrast “embraces everyone living within its area. Its members share no common awareness of their relationship to God, and such an awareness cannot be an element in the legal system established by the civil community.”⁷⁵

Barth noted “the positive relationship between the two communities,” observing that “[t]he very term *ekklesia* is borrowed from the political sphere.”⁷⁶ But the core of both communities remained rooted in the church: “the State forms the outer circle, within which the Church, with the mystery of its faith and gospel, is the inner circle” and the State “shares a common centre with the Church.”⁷⁷ Thus, as Jesse Couenhoven has noted,

pilgrims of all languages, not scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognising that, however various these are, they all tend to one and the same end of earthly peace. It therefore is so far from rescinding and abolishing these diversities, that it even preserves and adapts them, *so long only as no hindrance to the worship of the one supreme and true God is thus introduced.*” CITY OF GOD, Book XIX, c.17 (emphasis added).

71. Barth, *Church and State*, *supra* note 69, at 147, 148.

72. Herberg, *supra* note 60, at 30–31.

73. Barth, *Church and State*, *supra* note 69, at 150.

74. *Id.*

75. *Id.* at 151.

76. *Id.* at 153. There is a rich political-theological meaning to the use of *ekklesia* by the New Testament writers. See BERND WANNENWETSCH, POLITICAL WORSHIP: ETHICS FOR CHRISTIAN CITIZENS 138 (Margaret Kohl trans., 2004) (the Christian use of *ekklesia* “had a distinctly political colouring”); WAYNE A. MEEKS, THE FIRST URBAN CHRISTIANS: THE SOCIAL WORLD OF THE APOSTLE PAUL 108 (1983) (the first Christians “seem[ed] early on to have been using [*ekklesia*] in a peculiar way that must have been puzzling to any ordinary Greek” because the term “name[d] not just the occasional gathering, but the group itself”); SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 96 (2004) (the *ekklesia* viewed itself “as a polity, over other political entities”).

77. Barth, *Christian Community*, *supra* note 67, at 169. The “common centre” means that “although [the state’s] presuppositions and its tasks are its own and different, it is nevertheless capable of reflecting indirectly the truth and reality which constitute the Christian community.” *Id.*

“against Luther, and more strongly than Calvin, Barth insists that the church and state both exist in the same sphere, under the grace of God.”⁷⁸

The significance of Barth’s insistence on the supremacy of Christ is evident in the 1934 Barmen Declaration, which denounced the German Church for its support of Nazi nationalism.⁷⁹ Barth served as its primary author. The second article insisted: “We reject the false doctrine that there could be areas of our life in which we would not belong to Jesus Christ but to other lords.”⁸⁰ The fifth article emphasized: “We reject the false doctrine that beyond its special commission the State should and could become the sole and total order of human life and so fulfill the vocation of the Church as well.”⁸¹ Barmen’s theological claims also served political ends: they pronounced a limit on the state’s authority and rejected its claim to “the sole and total order of human life.” But Barmen’s central claim was the church’s freedom to proclaim its message: “The Christian Church is the community of brethren in which, in Word and Sacrament, through the Holy Spirit, Jesus Christ acts in the present as Lord. With both its faith and its obedience, with both its message and its order, it has to testify in the midst of the sinful world, as the Church of pardoned sinners, that it belongs to him alone and lives and may live by his comfort and under his direction alone, in expectation of his appearing.”⁸²

B. Dietrich Bonhoeffer

Dietrich Bonhoeffer was among those most influenced by Barth’s theology.⁸³ Like Barth, Bonhoeffer’s theology depended on ecclesiology. He wrote in *Discipleship* of the “first step of obedience” required of the believer:

Come to the church! You can do that on the strength of your human freedom. You can leave your house on Sunday and go to hear the preaching. If you do not do it, then you willfully exclude yourself from the place where faith is possible.⁸⁴

This first step is a “public act” and the subsequent life of the Christian is “externally visible through active participation in the life and worship of

78. Couenhoven, *supra* note 59, at 190–91.

79. Confessing Church, THEOLOGICAL DECLARATION OF BARMEN (1934).

80. *Id.*

81. *Id.*

82. *Id.*

83. In addition to his theological writings, Bonhoeffer is known for his involvement in the *Abwehr* plot to assassinate Hitler and his subsequent execution by the Nazis.

84. 4 DIETRICH BONHOEFFER, DISCIPLESHIP, *in* DIETRICH BONHOEFFER WORKS 64–65 (Clifford J. Green ed., 2005).

the church community.”⁸⁵ Bonhoeffer’s German editors misleadingly intimate that this way of life “*became* a political act” when the National Socialist regime discouraged church attendance.⁸⁶ For Bonhoeffer, the church was always a political act:

The “political ethics” of the church-community is grounded solely in its sanctification, the goal of which is that the world be world and community be community, and that, nevertheless, God’s word goes out from the church-community to all the world, as the proclamation that the earth and all it contains is the Lord’s. That is the “political” character of the church community.⁸⁷

Bonhoeffer continued this theme in his unfinished *Ethics*:

The message of God’s love for the world places the church community into a relationship of *responsibility* for the world. In both word and deed, the church-community has to witness to the world concerning its faith in Christ, to work on removing any offense, and to make room for the gospel in the world.⁸⁸

Bonhoeffer, like Barth, did not believe that the church’s proclamation to the world meant that the church desired a Christian state.⁸⁹ But the church “can and must oppose any concrete order that represents an offense to faith in Jesus Christ, and thus it can and must at least negatively define the boundaries of an order within which it is possible to believe in and to render obedience to Jesus Christ.”⁹⁰ In its opposition, the church’s focus is ensuring the opportunity to proclaim its message. Indeed, in contrast to the jurisdictional focus of some Catholic arguments, Bonhoeffer argued that: “The church can only defend its own space by fighting, not for space, but for the salvation of the world. Otherwise the church becomes a ‘religious society’ that fights in its own interest.”⁹¹

Shortly before his execution at the Flossenbürg concentration camp, Bonhoeffer wrote to a friend of the need to “try to find a [country] in which justice, lawfulness, freedom of the churches is being restored.”⁹²

85. *Id.* at 210.

86. *Id.* at editor’s note 19 (emphasis added).

87. *Id.* at 262. The church engages in a struggle “that seeks to prevent the world from wanting to be church, and the church from wanting to be world.” *Id.*

88. 6 DIETRICH BONHOEFFER, *ETHICS*, in DIETRICH BONHOEFFER WORKS 357 (Clifford J. Green ed., 2005).

89. *Id.* at 360 (“the church is not able to proclaim a concrete earthly order that would necessarily follow from faith in Jesus Christ.”).

90. *Id.* at 360. These boundaries “must be determined ever anew.” *Id.*

91. *Id.* at 64.

92. Bonhoeffer emphasized the primacy of the freedom of the church in a 1941 letter to Paul Lehmann: “As far as I know Germany, it will just be impossible, for instance, to

Bonhoeffer thus recognized in the state resources to help the church protect its boundaries and facilitate the proclamation of its message. But he invoked the freedom of the church as a theological imperative.

Bonhoeffer's attempts to reframe Lutheran political theology followed Barth. In his *Ethics*, he insisted: "There are not two realms, but only *the one realm of the Christ-reality*, in which the reality of God and the reality of the world are united."⁹³ Bonhoeffer's 1933 Christology lectures pronounced "Christ the center," which his editors describe as "very similar to Barth's model of two concentric circles, with Christ the center of both the inner circle—the church—and the outer circle—the state."⁹⁴

The key building blocks for Bonhoeffer's political theology are found in his 1930 dissertation, *Sanctorum Communio*,⁹⁵ and it is here that he makes a significant connection between the freedom of the church and a related political concept, the freedom of assembly. In this early work, Bonhoeffer insisted that assembly was indispensable to the Christian: "A Christian who stays away from assembly is a contradiction in terms."⁹⁶ The concepts of preaching and assembly "imply one another," and assembly rightly understood is inherently communal: "[o]nly when an individualistic outlook began to transform this *obvious necessity* [of assembly] into a *psychological* one did it ask about the meaning of the assembly in terms of its usefulness and necessity for the individual."⁹⁷

Bonhoeffer's choice of words makes explicit the connections between church and assembly. Referring to the *ekklesia* that is the "empirical form of the church," Bonhoeffer opted for the German word *versammlung* rather than *gemeinde*.⁹⁸ His use of *versammlung* is striking. Luther had written in the Larger Catechism that "the Greek word [*Ekklesia*] signifies strictly an assembly [*Versammlung*]."⁹⁹ But when Luther translated *ekklesia*

restore complete freedom of speech, of press, of association. That sort of thing would throw Germany right into the same abyss. I think we must try to find a Germany in which justice, lawfulness, freedom of the churches is being restored." Letter to Paul Lehmann (Sept. 20, 1941) (quoted in Clifford J. Green, *Editor's Introduction to the English Edition*, in *ETHICS* 17 (Clifford J. Green ed., 2005)).

93. BONHOEFFER, *ETHICS*, *supra* note 88, at 58. Bonhoeffer also argued that the two realms doctrine "deeply contradicts both biblical and Reformation thought." *Id.*

94. Green, *Editor's Introduction to Ethics*, *supra* note 92, at 5. Cf. BONHOEFFER, *ETHICS*, *supra* note 88, at 68 ("The world stands in relationship to Christ whether the world knows it or not.").

95. DIETRICH BONHOEFFER, *SANCTORUM COMMUNIO: A THEOLOGICAL STUDY OF THE SOCIOLOGY OF THE CHURCH*, vol. 1, in *DIETRICH BONHOEFFER WORKS* (2009).

96. *Id.* at 227.

97. *Id.* at 227. Christians "seek the assembly not merely out of gratitude for the gift they have already received, but are driven by the desire to receive it ever anew, to be born anew again and again." *Id.* at 228.

98. *Id.* at 208.

99. MARTIN LUTHER, *SMALLER AND LARGER CATECHISMS* 122 (1855).

from the Vulgate, he opted for *gemeinde* over *versammlung*, and the former became the authoritative German word.¹⁰⁰ Bonhoeffer follows Luther's *gemeinde* throughout most of *Sanctorum Communio*, but he introduces *versammlung* to describe the visible *ekklesia* that interacts with the world. The political connotations are apparent in contemporary discourse: four years after Bonhoeffer's death, the German *Grundgesetz* recognized the right to *versammlungsfreiheit* (freedom of assembly).¹⁰¹

C. Stanley Hauerwas

The political theology of Barth and Bonhoeffer also resonates in the work of Stanley Hauerwas, and it is here that it becomes most directly relevant to contemporary American debates about the freedom of the church. Barth is influential today in some of the leading American seminaries¹⁰² and Bonhoeffer has enjoyed a recent resurgence among American Christians.¹⁰³ But Hauerwas has arguably "articulated the most

100. H. C. Erik Midelfort, *Social History and Biblical Exegesis: Community, Family, and Witchcraft in Sixteenth-Century*, in *THE BIBLE IN THE SIXTEENTH CENTURY* 9 (David Curtis Steinmetz ed., 1990). Midelfort writes that "[b]y avoiding Kirche as often as possible, Luther found a way of interpreting *ekklesia* with a word that emphasized the fact that the Greek word had originally meant both sacred and profane assemblies and that it was not primarily a building or a clerical organization but a community." *Id.* at 10.

101. The *Grundgesetz* established the Basic Rights of the German People. The *versammlungsfreiheit* provides that "[a]ll Germans have the right to assembl[e] peacefully and unarmed without prior notification or permission" and that "[i]n the case of outdoor assemblies this right may be restricted by or pursuant to a law." ALBERT P. BLAUSTEIN & GIBBERT H. FLANZ, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD; A SERIES OF UPDATED TEXTS, CONSTITUTIONAL CHRONOLOGIES AND ANNOTATED BIBLIOGRAPHIES* 4 (1971).

102. Barth is particularly important at Duke Divinity School (largely through Hauerwas's influence), Princeton Theological Seminary (which houses the Center for Barth Studies), and Fuller Theological Seminary. Both Fuller and the conservative Westminster Theological Seminary (where Van Til was a major influence) emerged in the mid-twentieth century in reaction to disputes at Princeton, some of which revolved around Barth's theology. See generally D. G. Hart, *Beyond the Battle for the Bible: What Evangelicals Missed in Van Til's Critique of Barth*, in *KARL BARTH AND AMERICAN EVANGELICALISM* 42 (Bruce L. McCormack & Clifford B. Anderson eds., 2011).

103. Bonhoeffer's prominence has recently increased from a bestselling (though controversial) biography. See ERIC METAXAS, *BONHOEFFER: PASTOR, MARTYR, PROPHET, SPY* (2011). See also JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 151 (2000) (discussing Bonhoeffer's ecclesiology and its implications for "group action" and "interpersonal community."); CHARLES MARSH, *RECLAIMING DIETRICH BONHOEFFER: THE PRESENCE OF HIS THEOLOGY* (1996); JENNIFER M. MCBRIDE, *THE CHURCH FOR THE WORLD: A THEOLOGY OF PUBLIC WITNESS* (2012).

coherent and influential political theology in and for the North American context.”¹⁰⁴ He has been “at the forefront of major transformations in theology” including virtue ethics, the role of narrative and community, and understandings of medicine and illness.¹⁰⁵ His arguments have shaped theological education and reached a broader public through books and sermons—both his own and those of the pastors and educators whom he has influenced.¹⁰⁶

The freedom of the church is crucial to Hauerwas’s political theology. He credits Barth for crystalizing its significance: “[i]t has always been my conviction, a conviction I believe I learned from Barth, that the character of a society and state is to be judged by the willingness to have the gospel preached truthfully and freely.”¹⁰⁷ Hauerwas expresses a similar debt to Bonhoeffer: “From the beginning to the end of his work Bonhoeffer relentlessly explores and searches for what it means for the church to faithfully manifest God’s visibility.”¹⁰⁸

Hauerwas is critical of American Christians whose habits “have so led them to confuse America with God’s salvation.”¹⁰⁹ His response echoes Barth and Bonhoeffer: “all theology must begin and end with ecclesiology.”¹¹⁰ In a book subtitled *The Church as Polis*, Hauerwas found “little use for the current fascination with individual salvation in either its conservative or liberal guises” that neglects the role of the church.¹¹¹ As Hauerwas explains there and elsewhere, participation in the church and its practices is itself central to what “salvation” for Christians must be.¹¹²

104. R.R. Reno, *Stanley Hauerwas*, in *THE BLACKWELL COMPANION TO POLITICAL THEOLOGY* 302 (Peter Scott & William Cavanaugh eds., 2004). For an overview of Hauerwas’s work and influence, see John D. Inazu, *Stanley Hauerwas and the Law: Is There Anything to Say?*, 75 *LAW & CONTEMP. PROBS.*, no. 4, i (2012).

105. *Engaging Stanley Hauerwas*, in *GOD, TRUTH, AND WITNESS: ENGAGING STANLEY HAUERWAS* 8 (L. Gregory Jones, Reinhard Hutter & C. Rosalee Velloso Ewell eds., 2005).

106. Hauerwas’ book *Resident Aliens* (coauthored with William Willimon) has sold over 75,000 copies. See *STANLEY HAUERWAS & WILLIAM H. WILLIMON, RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY* (1989).

107. HAUERWAS, *PERFORMING THE FAITH*, *supra* note 60, at 56.

108. *Id.* at 35. Hauerwas writes: “I am, of course, aware that my account of Bonhoeffer and, in particular, my emphasis on his ecclesiology for rightly interpreting his life and work, will lead some to suspect that my account of Bonhoeffer sounds far too much like positions that have become associated with my own work. I have no reason to deny that to be the case, but if it is true, it is only because I first learned what I think from reading Bonhoeffer (and Barth).” *Id.* Hauerwas argues for the “continuing relevance” of Barth and Bonhoeffer, rejecting the assumption “that Bonhoeffer’s (and Barth’s) work was peculiarly suited to a totalitarian context that makes his reflections less useful for us who live in democracies.” *Id.* at 19.

109. *STANLEY HAUERWAS, IN GOOD COMPANY: THE CHURCH AS POLIS* 55–56 (1997).

110. *Id.* at 58.

111. *Id.* at 8.

112. *Id.*

Hauerwas diagnoses an especially pernicious threat to the church in the Jeffersonian distinction between religious “conduct” and “mere belief”:

The problem with this notion is that “belief” gets confined to an asocial sphere of interiority (e.g., Jefferson’s “operations of the mind”) in such a way that “freedom” pertains solely to that entity of liberal subjectivity called “the individual” and never to the only body, for Christians, wherein true belief resides, the body of believers called “the church.”¹¹³

Hauerwas then leverages this claim against the way that “church and state” have emerged within the “political arrangement we call the United States of America”:

[I]nsofar as that political arrangement underwrites a “non-confessional God” and a non-ecclesial version of Christianity, it runs into profound conflict with Christianity. When “Christianity” becomes separable from the social form in which it is to be embodied, two things happen: one, Christian belief gets located in an interior, asocial sphere, “the heart” or “conscience” or some other private (i.e., non-public) space, and this degenerates into “mere belief”; and two, in consequence of the first, a “public” space is cleared away for a counterfeit form of “religion” to emerge that is said to be “common” and thus become “the religion of the nation.” What gets obscured in this arrangement is the possibility of a Christianity the material form of which is located neither in a private space nor in a general public space, but the body of believers, in the church.¹¹⁴

These kinds of arguments are not an attempt to carve out a limited “jurisdiction” or “sphere” for the church.¹¹⁵ Like Barth’s two circles metaphor and Bonhoeffer’s insistence on “the one realm of the Christ-reality,” Hauerwas rejects a jurisdictional divide between church and state. What distinguishes church and state is their *knowledge* of the Kingship of Christ, not their ultimate ordering under Christ.¹¹⁶ Hauerwas invokes Pope Pius XI’s claim that “It would be a grave error . . . to say that Christ has no authority whatever in civil affairs, since by virtue of the absolute empire over all creatures committed to Him by the Father, all things are in His power.”¹¹⁷ He decries both liberal and neo-conservative

113. *Id.* at 201–02.

114. *Id.* at 210.

115. In this sense, the account situated in Barth, Bonhoeffer, and Hauerwas departs significantly from the Dutch-Reformed arguments about sphere sovereignty.

116. Couenhoven describes Barth’s view similarly: “The distinction between the church and state is not, as it were, metaphysical or ontological, but functional and epistemological.” Couenhoven, *supra* note 59, at 192.

117. HAUERWAS, IN GOOD COMPANY, *supra* note 109, at 212.

successors of John Courtney Murray for championing an account of the church's freedom that is devoid of the ontological claims of Christ.¹¹⁸ In this regard, Hauerwas insists that the category of jurisdiction is irrelevant on the level of political theology because there is no divided jurisdiction under God.

While Hauerwas's claims are deeply aligned with Barth's and Bonhoeffer's conceptions of the freedom of the church, there are, of course, important differences. Barth and Bonhoeffer react against an early twentieth-century Protestant liberalism in the midst of the political realities of the rise of Nazi power. Hauerwas writes against a different kind of Protestant liberalism, and in the political reality of late twentieth-century America.¹¹⁹ Yet despite their differences, Barth, Bonhoeffer, and Hauerwas all write about the freedom of the church in a political context in which the church lacks significant political control. That is one of the reasons that the New Revised Standard Version is distinguishable from the historical sources relied upon by Smith and Garnett.¹²⁰ As Schragger and Schwartzman have argued:

To the extent they have invoked it, legal scholars have understood the freedom of the church in defensive terms—as the church's protection of its authority in the face of an overbearing state, as the spiritual beating back of the depredations of the temporal. But that is anachronistic obviously. The medieval Church was not—in the eleventh century or for generations thereafter—disentangled from something we would identify as “the state” or from the civil authorities, no more than the Church was disentangled from something we would identify as “society” or “economy.”¹²¹

Not so with the Confessing Church in 1930s Germany. And increasingly, not so with the Christian church in the context in which Hauerwas writes.¹²² It is precisely in this kind of context where the freedom of the church might have increased relevance.¹²³

118. *Id.* at 215–16 (“the christologies of Murray’s successors, both liberal and neo-conservative, [are] inadequate . . . ; indeed they are nonexistent.”).

119. See Inazu, *Hauerwas and the Law*, *supra* note 104 (describing the philosophical context of Hauerwas’s arguments).

120. Of course, Protestantism has not always lacked significant political control. The Reformation led to a number of Protestant state establishments, some of which included direct supervision over religious institutions, communities, and doctrines (including the Church of England from which the Puritans fled). The Protestant ethos that dominated early American relationships between “church” and “state” was also rooted in extensive power and control.

121. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 2, at 928.

122. In October 2012, the annual survey of the Pew Forum on Religion & Public Life reported that forty-eight percent of adults in the United States identified as Protestants. See “Nones” on the Rise, PEW FORUM ON RELIGION & PUBLIC LIFE (Oct. 9, 2012), available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>. It was the first time in history that American Protestants did not find themselves in a majority of its

Part of the church's freedom is its proclamation to the state. Barth illustrates this proclamation in his insistence that National-Socialism was not just a political regime but an "anti-Christian counter-church."¹²⁴ Will Herberg has noted that this kind of indictment "condemns [the state] not merely because it does many wrong and evil things" but also for "its self-divinizing pretensions, demanding total allegiance to itself as the embodiment of a 'particular philosophy of life.'"¹²⁵ As Paul Kahn suggests, the contemporary American political arrangement also demands a kind of sacred allegiance: "the state is not the secular arrangement that it purports to be" and "the state maintains its own sacred space and history."¹²⁶ The church performs its proclamation in service to the state by naming the state's limits and ambitions.

citizens. And it came in a year that saw no Protestants on the Supreme Court and a Mormon and a Catholic on the Republican presidential ticket. The changing Protestant demographic is only part of the story. The same Pew survey reported a record twenty percent of Americans who identified no religious affiliation. The so-called "nones" include a growing number of atheists and agnostics, including a not insignificant segment of America that is hostile to religious belief.

123. See Stanley Hauerwas, *Church Matters*, in *APPROACHING THE END: ESCHATOLOGICAL REFLECTIONS ON CHURCH, POLITICS, AND LIFE* (2013) (the end of "Christendom" means that "the church is finally free to be a politic"). Hauerwas suggests that "Bonhoeffer's work from beginning to end was the attempt to reclaim the visibility of the church as the necessary condition for the proclamation of the gospel in a world that no longer privileged Christianity." HAUERWAS, *PERFORMING THE FAITH*, *supra* note 60, at 34. For a similar characterization of Barth's political theology, see EBERHARD BUSCH, *THE GREAT PASSION: AN INTRODUCTION TO KARL BARTH'S THEOLOGY* 170–71 (2004).

124. Herberg, *supra* note 60, at 46 (quoting Barth).

125. *Id.* at 45. Cf. BARMEN DECLARATION, *supra* note 79, art. 5 ("We reject the false doctrine that beyond its special commission the State should and could become the sole and total order of human life and so fulfill the vocation of the Church as well.").

126. KAHN, *supra* note 1, at 18, 19. Kahn elaborates: "When modern revolutionaries took up the task of translating the felt meaning of political revolution into a constitutional order of law, they thought of themselves as men of the Enlightenment using the language of reason to push religion out of the public sphere. This hardly means that they neither experienced nor relied upon the sacred . . . The state's territory becomes consecrated ground, its history a sacred duty to maintain, its flag something to die for. None of this has much to do with the secular; these are matters of faith, not reason." *Id.* at 23. For a striking example of the state's embodiment of the sacred, see *Trunk v. City of San Diego*, 568 F.Supp. 2d 1199, 1218 (S.D. Cal. 2008), *rev'd*, 629 F.3d 1099 (9th Cir. 2011) ("[T]he cross has a broadly-understood ancillary meaning as a symbol of military service, sacrifice, and death.").

V. THE POSSIBILITY OF TRANSLATION

I suggested earlier that some but not all aspects of political theology travel a path from theological doctrine through cultural views and into legal doctrine. I turn now to a preliminary consideration of whether the idea of the freedom of the church can move beyond a particular theology to be embraced by a broader polity.

We can offer a partial answer to that question by observing that our background institutions and laws already embed aspects of Protestant ecclesiology in concepts like “church autonomy” and “hierarchical” vs. “congregational” models of church governance.¹²⁷ This observation suggests that the process of translation that I have described is oversimplified to the extent that I have suggested it is unilateral. The arc of translation is neither static nor unidirectional. Legal doctrine does not appear out of nowhere—its specific contours are shaped in important ways by background cultural views and political theory. But those contours themselves fold back into theory and culture. The freedom of the church as a plausible cultural notion is buttressed not only by political theology but also by statutory exemptions from otherwise generally applicable laws.¹²⁸ By the same token, it is weakened by the judicial diminishment of the free exercise clause¹²⁹ and growing restrictions against illiberal religious practices.¹³⁰

The strengthening of the freedom of the church is evident in *Hosanna-Tabor*.¹³¹ One of the most important lines from the opinion is the Court’s assertion that “the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.”¹³² Every justice on the Court embraced the idea that the church is different than the individual religious believer and different than a non-religious association.¹³³ Something underlies that intuition.

127. See *supra* note 37 (citing cases). Of course, I do not mean to suggest that these doctrines originate in the particular account that I’ve offered here. But the common Protestant discourse underlying the doctrines and the subsequent theological account may facilitate the narrative, critique, and imagination that aid the process of translation.

128. See, e.g., *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

129. See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990).

130. See, e.g., *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010); *Mozert v. Hawkins County Board of Education*, 827 F. 2d 1058 (6th Cir. 1987).

131. 132 S. Ct. 694 (2012). The unanimous decision recognized the “ministerial exception” and upheld the decision of a Lutheran church to fire an employee who had claimed disability discrimination. *Id.* It is significant that the Court grounded its reasoning in both the free exercise clause and the establishment clause.

132. *Hosanna-Tabor*, 132 S. Ct. at 706.

133. As I have argued elsewhere, I find some of the Court’s distinctions difficult to reconcile with its prior decisions. See *Inazu, Four Freedoms, supra* note 10. It may be that the Court had backed itself into a corner with weakened interpretations of free

I do not mean to suggest that *Hosanna-Tabor* draws explicitly from a theological understanding of the freedom of the church. That is not how constitutional law works. But background ideas form languages, practices, and assumptions—concepts emerge from specific contexts. And in the case of our current understanding of religious liberty, Protestantism generally and the Protestant account of the freedom of the church in particular are not without significance. Indeed, the idea of the freedom of the church gains traction from the very language that the Court is forced to confront. The Court’s opinion struggles to vary its terminology between “religious groups” and “religious organizations,” but its very reasoning presupposes churches and ministers:

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action 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 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.¹³⁴

There is a church and a history of the church that makes possible a decision like *Hosanna-Tabor*.¹³⁵

exercise and associational principles articulated in earlier decisions like *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (recognizing but denying protections under a right of “expressive association”), *Employment Division v. Smith*, 494 U.S. 872 (1990) (finding the First Amendment’s right of the free exercise of religion largely irrelevant to neutral laws of general applicability), and *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010) (finding no applicability of either the free exercise or association rights to a Christian student group that met for Bible study and prayer). Confronted with a claim brought under a generally applicable antidiscrimination law, and unable to rely on either free exercise or association without substantially revising or overruling its earlier decisions, the Court attempted to distinguish churches from religious individuals (left largely unprotected after *Smith*) and non-religious groups (left largely unprotected after *Roberts*).

134. *Hosanna-Tabor*, 132 S. Ct. at 706.

135. Frederick Gedicks’ characterization of the Court’s vocabulary as a “stylistic convention” neglects the historical context in which the ministerial exception has emerged. Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MER. L. REV. 405, 405 n.2 (2013) (“In keeping with the stylistic convention in this area, I use ‘churches’ to refer to all religious groups rather than just Christian congregations, and ‘ministers’ to refer to all religious leaders rather than just Protestant leaders.”).

The Protestant conception of the church offered here also sheds light on an important dimension of Justice Alito's concurrence in *Hosanna-Tabor*.¹³⁶ Barth, Bonhoeffer, and Hauerwas focus on the church's witness and proclamation to a greater degree than the Catholic accounts of the freedom of the church.¹³⁷ On this view, the church's ability to retain and protect the integrity of its message is central to its freedom. Justice Alito's concurrence underscored this observation: "A religious body's control over [its] 'employees' is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world."¹³⁸

On the other hand, *Hosanna-Tabor* leaves open many important questions.¹³⁹ One of the most pressing set of questions pertains to the meaning of "church" and "minister."¹⁴⁰ We know that these concepts will not be limited to Lutheranism (the denomination of the successful petitioners in *Hosanna-Tabor*) or Christianity. And we know that constitutional and common law reasoning is quite adept at extending

136. *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., concurring).

137. Consider, for example, the way in which the Protestant account offered here might modify Steven Smith's analogy of the church to an embassy. See Smith, *Religion or Church*, *supra* note 2, at 271 ("There is a jurisdiction—not 'religion,' but rather the church, and now also the individual conscience—that is in essence a sort of foreign embassy or extension of the kingdom of the divine sovereign within the bounds of this world."). A focus on witness and proclamation would make the church more like an ambassador than an embassy. I thank Michael Martinich-Sauter for insightful thoughts along these lines.

138. *Id.* at 713 (Alito, J., concurring). Justice Alito's commentary coheres with observations about more broadly applicable First Amendment freedoms like assembly and association. See *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."); McConnell, *Freedom By Association*, *supra* note 10 ("If freedom of association is merely 'implicit' in freedom of speech, groups lose control over their identity—their membership and leadership—if they cannot prove to a court's satisfaction that their public message would be changed by the admission of outsiders. This removes all constitutional protection for the nonexpressive aspects of a group's activities and invites courts to second-guess the meaning of their beliefs.").

139. Professor McConnell raises a number of these questions. See McConnell, *Reflections*, *supra* note 5.

140. Professor Gedicks suggests that "[s]ince the responsibilities of many church employees, if not most, can be linked to church doctrine or practice, one may expect that churches will seek to apply the categorical immunity from government regulation created by *Hosanna-Tabor* to most church employment decisions." Gedicks, *supra* note 134, at 429.

protections through analogical reasoning.¹⁴¹ It is not hard to think of “easy” cases that will likely be covered by extension—a mosque, a synagogue, a temple.

The analogical extensions will reach not only across different faiths but also to different institutions that fall under the auspices of “church.” The Lutheran school in *Hosanna-Tabor* gives us a clear example of such an extension. We can envision other institutional forms like soup kitchens and outreach ministries that might be similarly covered. We will see more contested arguments about larger and more powerful institutions that are formally tied to churches, most notably universities and hospitals.

There is a related challenge with respect to religious organizations unaffiliated with churches, most notably the “parachurch” phenomenon that has emerged within American evangelicalism. As Mark Noll observes, many Protestant evangelicals identify with “parachurch groups only loosely connected to an ecclesiastical structure.”¹⁴² Is it possible to extend the constitutional protections of the freedom of the church to religious institutions that expressly disavow the label of “church”? The answer seems less obvious to me as a matter of constitutional analogizing than the preceding two examples of extension to other faiths and sub-institutions.¹⁴³ But *Hosanna-Tabor* at least suggests the possibility, often invoking terms like “religious groups” and “religious institutions.”¹⁴⁴

141. See, e.g., Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD UNIV. COMM L.J. 155 (2002); Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237 (1986).

142. MARK A. NOLL & CAROLYN NYSTROM, IS THE REFORMATION OVER? AN EVANGELICAL ASSESSMENT OF CONTEMPORARY ROMAN CATHOLICISM 85–86 (2005).

143. On the other hand, disparate treatment of church-affiliated and non-church-affiliated religious institutions may raise Establishment Clause concerns. Consider, for example, if courts were to conclude that the University of Notre Dame were protected under the freedom of the church because of its formal affiliation with the Catholic Church but Bob Jones University, a non-denominational fundamentalist school unaffiliated with any church, were not.

144. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 669, 705 (2012). One reason that the constitutional category of freedom of the church might be stretched to include non-ecclesial religious groups is that this kind of rhetorical framing already exists in contemporary political theory. Nancy Rosenblum, whose work figures prominently in this area, argues that religious groups have “an exceptional constitutional status” and that “the internal life of religious associations, particularly its congruence with public norms or resistance to them, is the heart of the moral uses of pluralism.” NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 73, 79 (1998). See also OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST

The possible extensions of the freedom of the church—to other faiths, to sub-institutions, and to non-ecclesial religious groups—remain to be seen. But *Hosanna-Tabor* suggests that a remnant of the freedom of the church has moved from political theology through broader cultural views and into legal doctrine.¹⁴⁵ As the Court’s unanimous opinion concludes: “The church must be free to choose those who will guide it on its way.”¹⁴⁶

At least some of these cultural views can be strengthened by a deeper recognition of Protestant understandings of the freedom of the church. Protestants may no longer represent a majority of Americans, but they remain a significant demographic in our polity.¹⁴⁷ Arguments rooted in Vatican II or a medieval feud involving a pope will have little normative or theological purchase for many Protestants, particularly those who view Catholics at best as “cobelligerents” against a growing secularism.¹⁴⁸ But greater attention to the significance of ecclesiology *within* Protestant theology may have greater appeal to a Protestant audience. Protestantism also embraces an ecumenical breadth beyond that envisioned by Catholic accounts: the focus is more on the *church* than *the* church.

DEMOCRACIES (Nancy Rosenblum, ed., 2000); Kent Greenawalt, *Freedom of Association and Religious Association* in FREEDOM OF ASSOCIATION 136 (Amy Gutmann, ed. 1998) (“claims deriving from religious association will often have more force than those deriving from other associations”); Michael Sandel, *Freedom of Conscience or Freedom of Choice*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY (James Davison Hunter & Os Guinness eds., 1990); JEFF SPINNER-HALEV, SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP (2000); WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002); LUCAS SWAINE, THE LIBERAL CONSCIENCE: POLITICS AND PRINCIPLE IN A WORLD OF RELIGIOUS PLURALISM (2006). Commentators writing contemporaneously with the Supreme Court’s initial recognition of a right of association also focused extensively on the special case of religious groups. See, e.g., CHARLES E. RICE, FREEDOM OF ASSOCIATION (1962); ROBERT A. HORN, GROUPS AND THE CONSTITUTION 44–66 (1956); GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 175–80 (1961).

145. Cf. McConnell, *Reflections*, *supra* note 5, at 836 (with *Hosanna-Tabor*, the freedom of the church “has again taken center stage”); Garnett, *Towards an Exposition*, *supra* note 2 (“[T]he Supreme Court has resoundingly affirmed, in *Hosanna-Tabor*, what I have suggested is the core of the ‘freedom of the church’ claim.”). The salience of the remnant and the extent to which it may be strengthened by Protestant conceptions of the freedom of the church are both contingent—they might not have the same political purchase in fifty or even five years.

146. *Hosanna-Tabor*, 132 S. Ct. at 712.

147. See Pew Forum Report, *supra* note 122 (reporting that 48% of Americans identified as Protestant).

148. On the other hand, there has been increased cooperation between some Catholics and Evangelicals over the past few decades. See, e.g., NOLL & NYSTRUM, *supra* note 141; CHARLES COLSON & RICHARD JOHN NEUHAUS, EVANGELICALS & CATHOLICS TOGETHER: TOWARD A COMMON MISSION (1995); GEOFFREY WAINWRIGHT, IS THE REFORMATION OVER? (2000).

VI. THE LIMITS OF TRANSLATION

Even if *Hosanna-Tabor* contains a remnant of the freedom of the church, and even if a Protestant account could strengthen cultural views, the remnant may ultimately prove unrecognizable. In other words, the *political* possibility of translation risks obscuring the *theological* limits to translation. The Catholic account offered by Smith and Garnett and the Protestant account offered here are both theological accounts in the first instance. Some theological accounts are translatable. For example, a certain kind of theological argument for conscience and dissent can resonate with broader cultural understandings when the theological argument itself rejects compelled orthodoxy irrespective of the views held by dissenters.¹⁴⁹ But other theological concepts are less susceptible to translation from the theological perspectives out of which they emerge.

The strong claims that undergird the freedom of the church depend upon a thick account of church that may not be generalizable to “religious institution” or “religious organization.” Consider, for example, Garnett’s claim that “[t]he ‘freedom of the church’ idea presumes and proposes that religion *is* special—or more precisely, that religious institutions, communities, and authorities are and should be differentiated both from political authorities and from non-state institutions and voluntary associations generally.”¹⁵⁰ The problem with Garnett’s reasoning is that the freedom of the church has nothing to say about “religious institutions, communities, and authorities.” Its theological anchor is an ontological claim about the reality of Jesus Christ embodied in the church on earth, which presumes nothing about the special nature of “religion.”¹⁵¹

For these reasons, the theological concept of the freedom of the church may not coherently expand to cover worshipping bodies outside of the Christian tradition, or non-worshipping bodies (like hospitals and universities) within the Christian tradition. While it may be that these broader protections can be derived from constitutional provisions like

149. See, e.g., H. Jefferson Powell, *The Earthly Peace of the Liberal Republic*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 91 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella eds., 2001).

150. Garnett, *Towards an Exposition*, *supra* note 2, at 49.

151. Indeed, the Catholic claim about the particularity of the institutional church may pose a challenge to ecumenical alliance around a freedom of the church that extends beyond the Catholic Church. See Brennan, *supra* note 2.

the free exercise of religion or the right of assembly, they might not be derivable from the freedom of the church.

Barth's understanding of the Barmen Declaration is illustrative on this point. Barmen gained instant fame throughout Britain and the United States.¹⁵² But its widespread endorsements "tended to focus on the threat to 'freedom of conscience' posed by the state and the brutal methods of the nazified church leadership, rather than the positive witness of confessing the faith."¹⁵³ Barth rejected these abstractions, arguing that Barmen was "not about the freedom, but about the substance, of the Church."¹⁵⁴ To Christians in Britain, Barth wrote that "the only real help, apart from your prayers, which you can render the German Church, would consist in this: in your declaration, with as much publicity and solemnity as was done in Barmen itself that in your conviction . . . [the Declaration is] also your confession of faith."¹⁵⁵ For Barth, the Declaration did not need to be translated into the secular language of freedom of "conscience" or "religion": confessing the lordship of Christ was a radical political act in itself.

In other words, Barmen may resist translation out of fidelity to its proclamation. And, so too might the freedom of the church. Hauerwas warns of the danger of ignoring this kind of theological resistance to translation: "In the attempt to make Christianity intelligible within the epistemological conceits of modernity theologians have been intent on showing that what we believe as Christians is not that different than what those who are not Christians believe."¹⁵⁶ The cost of this generalizing might be a "domestication" in which "the church is understood to be no more than a 'voluntary association' of like-minded individuals."¹⁵⁷

152. Keith Clements, *Barmen and the Ecumenical Movement*, 61 *ECUMENICAL REVIEW* 6 (2009).

153. *Id.* at 8. See also *id.* at 9 ("[T]he German Church Struggle was persistently seen as one about 'religious liberty' or 'freedom of conscience.'"); Arthur C. Cochrane, *The Act of Confession-Confessing*, 8 *SIXTEENTH CENTURY J.* 61, 69 (1977) ("The British, Canadians, and Americans could understand a pronouncement on religious liberty, but an act of a confessing church was beyond their comprehension.").

154. *Karl Barth Answers a Question: How Can Churches Abroad Help the German Evangelical Church*, *THE BRITISH WEEKLY*, Apr. 22, 1937, quoted in Clements, *supra* note 151, at 9.

155. *Id.*

156. Hauerwas, *Church Matters*, *supra* note 123.

157. *Id.* at 2–3. In my view, the more generalizable right of assembly (whose political and theological history encompasses both churches and non-church groups) can offer constitutional protections to churches alongside other groups without "domesticating" the theological meaning of church in the way that broadening the "freedom of the church" to include non-churches would necessarily do.

VII. CONCLUSION

The freedom of the church is an important concept in contemporary scholarship at the intersection of political theology and constitutional law, and the Supreme Court's *Hosanna-Tabor* decision all but ensures its continued significance to the debates surrounding our understanding of religious liberty. The political theology that gives rise to the freedom of the church will play a role in these ongoing discussions, sometimes explicitly, more often implicitly. The New Revised Standard Version should be part of the debate. Whether the political theology of the freedom of the church will successfully translate into constitutional doctrine is another matter—and one of the contributions of the New Revised Standard Version is to suggest that the limits of translation may ultimately be theological as much as they are political.