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10-19-2011

### October 19, 2011: The Religious Exemption

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#### Repository Citation

Ledewitz, B. (2011). October 19, 2011: The Religious Exemption. Retrieved from <https://dsc.duq.edu/ledewitz-hallowedsecularism/587>

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Title: The Religious Exemption

Date: 2011-10-19T20:34:00.003-04:00

10/19/2011—Stanley Fish wrote an op-ed column for the New York Times on Monday, entitled “Is Religion About the Law?” I’m not sure what point he really meant to make. Certainly the field is beset by difficulty, as he noted, but matters are not as problematic as he suggests. In the first place, the headline is a classic case of putting the rabbit in the hat before taking it out. If there is a religious exemption to the reach of otherwise applicable law, such as the anti-discrimination law at issue in *Hosanna-Tabor v EEOC*, then the exemption is the law. Therefore, an exempted religion would not be above the law, but squarely within it. Thus, it is misleading to say the courts lack authority to look at church decisions. They may or may not but it is because the law so provides. The second point is related. There may once have been an issue about separate sovereigns here, but no longer. If law recognizes a religious exemption, then it is only because the courts and the people have so decided. The jurisdiction of the modern state is not at issue. If you doubt it, try claiming refuge from the criminal law in a church, as once you could have done. What Fish leaves out is the possibility of pretext. In HT, the teacher was allegedly fired for bringing suit against the school. Now if anyone else has brought suit without being fired, a jury would be justified in finding that the religious justification was not offered in good faith. Has anyone sued anyone other than the church without being terminated? Such evidence might not always be available, but it often will be and when it is, the tension of secular jurisdiction over a church is lessened. The Catholic Church is clearly sincere when it refuses all women the right to be priests. No one doubts it. But what if, tomorrow, one Bishop refused one particular male who was disabled the right to be a priest? The Bishop says it is not because the man is disabled but because Catholic doctrine does not allow left-handed men to become priests. Yet there are left-handed priests now. Some people would say that the courts cannot examine pretext even here, but I think the ministerial exemption requires sincerity and that there is limited authority in the courts to ensure it.