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### Freedom of the Church Without Romance

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## FREEDOM OF THE CHURCH WITHOUT ROMANCE

PAUL HORWITZ\*

### INTRODUCTION

“Freedom of the church” is in vogue these days.

A number of law and religion scholars have invoked the phrase recently. It serves as a placeholder for the idea that freedom of religion is not just an individual right, but also includes a group- or institutional-rights element—that the Religion Clauses guarantee not just “freedom of religion” but also “freedom of the church.”<sup>1</sup>

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\* Gordon Rosen Professor, University of Alabama School of Law. I am grateful to the participants in the Symposium on Freedom of the Church in the Modern Age for comments, and to Aisha Mahmoud for research assistance.

<sup>1</sup> See, e.g., Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, in *Matters of Faith: Religious Experience and Legal Response* (Austin Sarat, ed., 2012) [hereinafter Smith, *Freedom of the Church*]; Paul Horwitz, *First Amendment Institutions*, ch. 7 (2012) [hereinafter Horwitz, *First Amendment Institutions*]; Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol’y 821 (2012); Thomas C. Berg *et al.*, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U.L. Rev. Colloquy 175 (2011); Steven D. Smith, *Lawyering Religious Liberty*, 89 Tex. L. Rev. 917 (2011) (book review); Patrick McKinley Brennan, *Are Catholics Unreliable From a Democratic Point of View?: Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanshard’s American Freedom and Catholic Power*, 56 Vill. L. Rev. 199 (2011); Michael J. White, *The First Amendment’s Religion Clauses: “Freedom of Conscience” Versus Institutional Accommodation*, 47 San Diego L. Rev. 1075 (2010); E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 Penn. St. L. Rev. 485 (2009); Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 Harv. L. Rev. 1869 (2009) (book review) [hereinafter Smith, *Discourse*]; Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harv. C.R.-C.L. L. Rev. 79 (2009) [hereinafter Horwitz, *Sovereignty and Spheres*]; Patrick McKinley Brennan, *Equality, Conscience, and the Liberty of the Church: Justifying the Controversiale per*

Some of this scholarship has drawn on the Catholic concept of “*libertas ecclesiae*,” or “freedom of the church,” found in Vatican II’s pronouncement *Dignitatis Humanae*.<sup>2</sup> Other scholarship has looked further back, to the medieval era. A few have also drawn on similar ideas in various strains of Protestantism.<sup>3</sup> The concept arguably played an implicit but important role in the Supreme Court’s recent decision upholding the ministerial exception, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.<sup>4</sup> Its status as a going concern in law and religion scholarship has recently been affirmed in the best possible way: with strong, sustained criticism of the very concept.<sup>5</sup> Every

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*Controversialius*, 54 Vill. L. Rev. 625 (2009); Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 Wm. & Mary Bill Rts. J. 43 (2008); Richard W. Garnett, *Do Churches Matter?: Towards an Institutional Understanding of the Religion Clauses*, 53 Vill. L. Rev. 273 (2008); Gerard Bradley, *Pope John Paul II and Religious Liberty*, 6 Ave Maria L. Rev. 33 (2007); Richard W. Garnett, *The Freedom of the Church*, 4 J. Cath. Soc. Thought 59 (2006).

<sup>2</sup> Second Vatican Ecumenical Council, *Dignitatis Humanae* [Declaration on Religious Freedom] (1965) [hereinafter *DH*], available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

<sup>3</sup> See, e.g., John D. Inazu, *The Freedom of the Church (New Revised Standard Edition)*, \_\_ J. Contemp. Leg. Issues \_\_ (2013); Horwitz, *Sovereignty and Spheres*, *supra* note 1; Robert Joseph Renaud & Lael Daniel Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. Ky. L. Rev. 67 (2008).

<sup>4</sup> 132 S. Ct. 694 (2012). See, e.g., McConnell, *supra* note 1, at 836 (“The ‘freedom of the church’ was the first kind of religious freedom to appear in the western world, but got short shrift from the Court for decades. Thanks to *Hosanna-Tabor*, it has once again taken center stage.”).

<sup>5</sup> See Micah Schwartzman & Richard Schragger, *Against Religious Institutionalism*, 99 Va. L. Rev. (forthcoming 2013). For earlier criticisms, aimed more broadly at religious group or institutional rights rather than “freedom of the church” as such, see, e.g., Leslie C. Griffin, *The Sins of Hosanna-Tabor*, Ind. L.J. (forthcoming 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2026046](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026046) [hereinafter Griffin, *Sins of Hosanna-Tabor*]; Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 Nw. U.L. Rev. Colloquy 96 (2011); Leslie C. Griffin, *Smith and Women’s Equality*, 32 Cardozo L. Rev. 1831 (2011); Marie Ashe, *Women’s Wrongs, Religions’*

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movement needs an adversary.

As with any emerging movement—if anything based on “freedom of the church” can be called an “emerging” movement after more than a millennium of existence—the terms and the stakes are not always clear. To have a useful conversation about freedom of the church and its place in contemporary American church-state law, we must answer two basic questions: “what is it?” and “so what?” In this Article, I offer some foundations for such an inquiry. I draw on two broad sources: history and economics.

Not surprisingly, given its roots in the lengthy and often contentious relationship between what we now call “church” and “state,” freedom of the church has already been examined in historical terms in the recent scholarship. Those discussions often focus on a single moment: the so-called “Investiture Controversy” of the eleventh century, and particularly the evocative image of “Emperor Henry IV, barefoot in the snow at Canossa, begging Pope Gregory VII to grant him absolution.”<sup>6</sup> The romantic nature of this scene lends a certain power to freedom of the church. Like the Spanish Inquisition, the episode at Canossa would “make[ ] a

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*Rights: Women, Free Exercise, and Establishment in American Law*, 21 Temp. Pol. & Civ. Rts. L. Rev. 163 (2011); Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 Me. L. Rev. 23 (2010); Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 Utah L. Rev. 47; Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 Cardozo L. Rev. 225 (2007); Caroline Mala Corbin, *Above the Law?: The Constitutionality of the Ministerial Exemption From Antidiscrimination Law*, 75 Fordham L. Rev. 1965 (2007); Marci A. Hamilton, *Church Autonomy is Not a Better Path to “Truth,”* 22 J.L. & Religion 215 (2006-2007); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women’s Equality*, 10 Wm. & Mary J. Women & L. 459 (2004); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. Rev. 1099; Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 Cornell L. Rev. 1049 (1996).

<sup>6</sup> Schwartzman & Schragger, *supra* note 5, at 12; *see also* Smith, *Discourse*, *supra* note 1, at 1869-70; Berg *et al.*, *supra* note 1, at 179 (describing Henry “plead[ing] with the Pope for forgiveness in a blizzard at the Alpine fortress of Canossa”).

smashing film.”<sup>7</sup> The “Canossa moment” reminds us of church-state relations’ long history, and cuts through the dry technicalities of modern Religion Clause doctrine and the pristine abstractions of modern liberal political theory.<sup>8</sup> But it also gives rise to accusations of reactionaryism and anachronism.<sup>9</sup>

A richer account of the history of freedom of church is necessary: one that takes into account the centuries of interest-group politics and power struggles that gave rise to freedom of the church and influenced the course of its development. In Part I, I offer such an account.

Economics, on the other hand, has been entirely absent from recent discussions of freedom of the church by legal scholars. This is distressing but not surprising. Despite a burgeoning literature outside the law,<sup>10</sup> the economics of religion has played an unfortunately small role in law and religion scholarship.<sup>11</sup>

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<sup>7</sup> *Monty Python’s Flying Circus*, episode 15 (BBC Sep. 22, 1970), transcript available at <http://www.ibras.dk/montypython/episode15.htm> (“In the early years of the sixteenth century, to combat the rising tide of religious unorthodoxy, the Pope gave Cardinal Ximenez of Spain leave to move without let or hindrance throughout the land, in a reign of violence, terror and torture that makes a smashing film. This was the Spanish Inquisition. . .”).

<sup>8</sup> See Schwartzman & Schragger, *supra* note 5, at 16 (in “neo-medievalist” accounts of freedom of the church, “it is easy to sense a form of religious nostalgia, a certain melancholy for the passage of an age in which everyone—or at least all Christians—shared a thick set of religious beliefs and perhaps also a way of life based on common rituals and practices. . . . Maybe one day, in the distant future, we will be able to use those relics to reestablish an order long gone.”).

<sup>9</sup> See *id.* at 17.

<sup>10</sup> For a useful recent collection, see *The Oxford Handbook of the Economics of Religion* (Rachel M. McCleary, ed., 2011) [hereinafter *Oxford Handbook*]. For a good popularized introduction to the economics of religion, see Larry Witham, *Marketplace of the Gods: How Economics Explains Religion* (2010). For an excellent account of religious liberty that draws heavily on the economics of religion, see Anthony Gill, *The Political Origins of Religious Liberty* (2007) [hereinafter *Religious Liberty*].

<sup>11</sup> There are exceptions. See, e.g., Keith N. Hylton, *Church and State: An Economic Analysis*, 13 *Am. L. & Econ. Rev.* 402 (2011); Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 *Wm. & Mary Bill Rts. J.* 133 (2011); Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 *Ariz. St. L. Rev.* 585

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Economics has a good deal to teach us about church-state relations, and law and religion more generally. It certainly has much to offer us in any consideration of freedom of the church. I take up that task in Part II.

I offer three prefatory points. First, my approach in this Article is clinical.<sup>12</sup> I seek “neither to be cynical about religion nor to be pious about it.”<sup>13</sup> I take as a given that there is value in an approach, whether historical or economic, that “look[s] at ways in which the religion market . . . influences individual choices as well as institutional development,”<sup>14</sup> one that involves a study of both religious institutions themselves and the political economy of religious freedom.<sup>15</sup> I neither affirm nor deny any particular religious truth claim.<sup>16</sup> Nor do I assume that religious individuals

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(2008); Jonathan Klick, *Salvation as an Economic Incentive*, 26 Int'l Rev. L. & Econ. 15 (2006); Shima Baradaran-Robison, Brett G. Scharffs, & Elizabeth A. Sewell, *Religious Monopolies and the Commodification of Religion*, 32 Pepp. L. Rev. 885 (2005); Dennis W. Carlton & Avi Weiss, *The Economics of Religion, Jewish Survival, and Jewish Attitudes Toward Competition in Torah Education*, 30 J. Legal Stud. 253 (2001); Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 Stan. L. Rev. 1295 (1998); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133 (1996); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1 (1989). Some of these examples run rather far afield, however, and few of the authors write regularly on church-state issues. On the whole, church-state legal scholars have engaged all too little with the economics of religion.

<sup>12</sup> Hence the title of this Article, which pays tribute to the “decidedly ‘unromantic’” public choice analysis of free speech in Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 579 (1991).

<sup>13</sup> Witham, *supra* note 10, at vii.

<sup>14</sup> Rachel M. McCleary, *The Economics of Religion as a Field of Inquiry*, in *Oxford Handbook*, *supra* note 10, at 3, 8.

<sup>15</sup> For the latter, see, e.g., Gill, *Religious Liberty*, *supra* note 10; Anthony Gill, *Religion and Civil Liberties in the United States*, in *Oxford Handbook*, *supra* note 10, at 275, 277 (discussing “religious liberty as a regulatory issue”) [hereinafter Gill, *Religion and Civil Liberties*]; Anthony Gill, *Rendering Unto Caesar: The Catholic Church and the State in Latin America* (1998).

<sup>16</sup> This is consistent with my approach in Paul Horwitz, *The Agnostic Age: Law*,

or institutions act only for worldly reasons. I *do* assume that “[b]ecause religion is a set of organized beliefs, and a church is an organized body of worshippers, it is natural to use economics—a science that explains the behavior of individuals in organizations—to understand the development of organized religion.”<sup>17</sup> Similarly, in examining religious freedom in general and “freedom of the church” in particular, I assume that it is useful to examine “the political and economic interests of politicians (rulers) and the institutional interests of religious leaders in the policy-making arena.”<sup>18</sup>

Second, my goals in this piece are mostly descriptive, not normative. I have championed freedom of the church and/or an institutional approach to religious freedom in the past.<sup>19</sup> I am not currently tempted to retreat significantly from those views.<sup>20</sup> But neither am I wholly satisfied with the current accounts and defenses of freedom of the church or church autonomy. There is surely a place for a certain degree of romance, or a somewhat nostalgic retrieval of ancient ideas and historical moments, as an inspiration for those who seek an alternative to the current understanding of church-state law and relations.<sup>21</sup> But there is also a place for more dry-eyed realism about freedom of the church, and for a more careful evaluation of the concept and its history. This kind of analysis of freedom of the church should come from its *advocates*, not just its critics.

Finally, this Article focuses substantially on Roman Catholic history and thought. There are obvious reasons for this choice. The

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*Religion, and the Constitution* (2011).

<sup>17</sup> Robert B. Ekelund Jr., Robert F. Hébert, & Robert D. Tollison, *The Marketplace of Christianity* vii (2006) [hereinafter Ekelund, Hebert, & Tollison, *Marketplace*].

<sup>18</sup> Gill, *supra* note 10, at 7-8.

<sup>19</sup> See my book and article cited at note 1; see also Paul Horwitz, *Defending (Religious) Institutionalism*, 99 Va. L. Rev. (forthcoming 2013) [hereinafter Horwitz, *Defending (Religious) Institutionalism*]; Paul Horwitz, *Act III of the Ministerial Exception*, 106 Nw. U. L. Rev. 973 (2012) [hereinafter Horwitz, *Act III*].

<sup>20</sup> But see Horwitz, *Defending (Religious) Institutionalism*, *supra* note 19, at \_\_\_ (agreeing that religious institutionalists, and First Amendment institutionalists more generally, should be cautious about using sovereignty as a guiding concept or metaphor in their work).

<sup>21</sup> See, e.g., Frederick Mark Gedicks, *True Lies: Canossa as Myth*, \_\_\_ J. Contemp. Legal Issues \_\_\_ (2013).

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concept of freedom of the church comes from Catholic history, and the Catholic Church's long institutional history makes it an exemplary subject of economic analysis.<sup>22</sup> That focus involves two risks. First, given the unromantic bent of this Article, it may seem to reserve all its barbs for Catholicism; of course, there is no hostile intent in my focus on a single church.<sup>23</sup> Second, it mostly leaves out significant developments in Protestant history and thought, which also involve versions of freedom of the church.<sup>24</sup> I address some of those matters in Part II, but I acknowledge the gap that remains.

In Part III I draw some tentative conclusions about freedom of the church in light of the historical and economic analysis that I provide here. If there is a broad theme here, it is one of declension or chastening.<sup>25</sup> My point is more descriptive than normative, although it may carry some normative implications. I mean nothing more—or less—than that the idea of freedom of the church has undergone a “scaling-back,” a “chastening of [ ] aspiration.”<sup>26</sup> Despite some of the grand talk that has accompanied the revival of interest in freedom of the church, the modern version of “freedom of the church” is a shadow of its former self. It is a concept with dramatically diminished aspirations. What began as a struggle for the soul of the Church and the ordering of Western society has mostly ended as a fight for exemptions from

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<sup>22</sup> See Eamon Duffy, *Saints & Sinners: A History of the Popes* xi (3d ed. 2006).

<sup>23</sup> Witham, *supra* note 10, and *Oxford Handbook*, *supra* note 10, both offer many examples of other faiths that can be seen as acting in terms of institutional interests, rent-seeking, and so on.

<sup>24</sup> See generally Inazu, *supra* note 3. Indeed, most of the Supreme Court cases dealing with church autonomy involve non-Catholic churches. For an overview, see, e.g., Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1 (2011).

<sup>25</sup> Not for the first time, apparently. See Robert Post, *Understanding the First Amendment*, 87 Wash. L. Rev. 549, 554 (2012) (describing my article in the same issue, Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 Wash. L. Rev. 445 (2012), as “advanc[ing] a melancholy narrative of declension”). As the saying goes, write what you know.

<sup>26</sup> Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 Harv. L. Rev. 29, 107, 108 (1999); see also *id.* at 109 (“A nation-state whose sovereignty has diminished must have chastened constitutional aspirations, and properly so”—a statement that, we will see, can be applied to the Church as well).



employment discrimination laws and mandatory insurance coverage provisions.

The “what is it?” and “so what?” questions with which we began the discussion thus turn out to be closely related. What freedom of the church “is” today, or is likely to be, turns out to be not such a big deal, for better or worse. It still has practical value, in my view.<sup>27</sup> It still speaks, in broader terms, to important conclusions about the nature and limits of the state and the importance of mediating institutions.<sup>28</sup> But, under present conditions of American religious pluralism, it is not what it was. In that environment, it is both less dangerous and less substantial.

Both the defenders and the critics of freedom of the church’s revival seem to take as their text Santayana’s observation that those who do not remember the past will be condemned to repeat its mistakes.<sup>29</sup> In this case, however, Marx was closer to the mark: “[A]ll facts . . . of great importance in world history occur, as it were, twice[:] . . . the first time as history, the second as farce.”<sup>30</sup> If that is a little too harsh, it is still an apt description of the fact that freedom of the church is now on the upswing precisely because it has already fallen so far and been so thoroughly domesticated.

## I. FREEDOM OF THE CHURCH IN HISTORY

Our first question is what, precisely, is meant by the phrase “freedom of the church.” A recurring trope in discussions of freedom of the church is that it is, at least in some measure, a historically transcendent concept. The principles it contains are said to be “absolute and immutable and supra-temporal.”<sup>31</sup> “The same idea” is seen as a singular motivating force in events separated by some 14 centuries.<sup>32</sup>

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<sup>27</sup> See Part III, *infra* (arguing that religion’s “credence good” nature supplies arguments for a ministerial exception).

<sup>28</sup> See, e.g., Horwitz, *Defending (Religious) Institutionalism*, *supra* note 19; Horwitz, *First Amendment Institutions*, *supra* note \_\_, ch. 7; Horwitz, *Act III*, *supra* note 19; Horwitz, *Sovereignty and Spheres*, *supra* note 1.

<sup>29</sup> See George Santayana, *The Life of Reason* 284 (1936) (“Those who cannot remember the past are condemned to repeat it.”)

<sup>30</sup> Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* 15 (Int’l Publishers 1991).

<sup>31</sup> Jacques Maritain, *Man and the State* 157 (1951).

<sup>32</sup> See, e.g., John Courtney Murray, S.J., *We Hold These Truths: Catholic*

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I reserve judgment on whether that is true as a metaphysical matter. As a historical matter, however, it is false. “Freedom of the church” has had a wide range of meanings and implications. As such, it is no more helpful in understanding religious freedom and church-state relations than other abstractions, such as “liberty” or “equality.” Whether the label captures any “general immutable principles” or not, what matters for most purposes is the way “freedom of the church” has been applied within “the specific patterns of civilization, the intelligible features . . . peculiar to every given historical age.”<sup>33</sup>

A. Freedom of the Church Circa 494 A.D.

It is appropriate to begin well before Canossa, with the enunciation of a position on church-state relations that would recur frequently throughout the medieval debates on freedom of the church.<sup>34</sup> It arose from the simple fact of Christianity having become an imperial religion, under the protection of the emperors but also, in large measure, under their command.<sup>35</sup> In 494, Pope Gelasius I wrote to the emperor, Anastasius, arguing:

Two there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power. Of these the responsibility of the priests is more weighty in so far as they will answer for the kings of men themselves at the divine judgement. . . . [I]n the order of religion, in matters concerning the reception and right administration of the heavenly sacraments, you ought to submit yourself rather than rule, and [ ] in these matters you should depend on [the priesthood’s] judgement rather than seek to bend them to your will. For

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*Reflections on the American Proposition* 201-02 (1960).

<sup>33</sup> Maritain, *supra* note 31, at 157; *see also id.* at 179-80 (“[W]hat matters essentially to me is the fact that the supreme general principles are immutable; and that the ways of applying or realizing them are analogical, and change according to the variety of historical climates. So the principles which were applied in a given way by the sacral civilization of the Middle Ages always hold true, but they are to be applied in another way in modern secular civilization.”).

<sup>34</sup> *See* Brian Tierney, *The Crisis of Church and State 1050-1300* 10 (reprint 1988) (1964).

<sup>35</sup> *See id.* at 8-9.

if the bishops themselves, recognizing that the imperial office was conferred on you by divine disposition, obey your laws so far as the sphere of public order is concerned lest they seem to obstruct your decrees in mundane matters, with what zeal, I ask you, ought you to obey those who have been charged with administering the sacred mysteries?<sup>36</sup>

Many conventional accounts of freedom of the church, especially in the recent legal literature, draw a straight line from Gelasius to the Investiture Controversy and beyond. Thus, Michael McConnell writes, “After the collapse of Imperial Rome, from at least the time of Pope Gelasius, standard legal thinking in Western Europe was based on the theory of the Two Kingdoms—the idea that God created two different forms of authority, two swords that were clearly distinguished: spiritual and temporal, sacred and secular, church and state.”<sup>37</sup> Similarly, citing Gelasius, Richard Garnett writes that “the observation at the heart of the *libertas ecclesiae* principle—*i.e.*, that there are two, not one—preceded [Gregory VII] by many centuries.”<sup>38</sup>

Gelasius’ letter was cited frequently in the propaganda war that accompanied the Investiture Controversy.<sup>39</sup> But its relationship to the later debate is controversial at best. On one reading, Gelasius’ careful use of different terms to describe papal and imperial power—*auctoritas* for the papacy, and *potestas* for the emperor—signaled that the secular power was to be subordinate to that of the Church.<sup>40</sup> But that reading is open to debate. Other scholars have argued that this interpretation “places more weight on Gelasius’ words than they can bear,” and that Gelasius’ aim was simply “to protect the doctrinal independence of the church and the judicial

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<sup>36</sup> *Id.* at 13-14.

<sup>37</sup> Michael W. McConnell, *Non-State Governance*, 2010 Utah L. Rev. 7, 8.

<sup>38</sup> Garnett, *supra* note 1, at \_\_ [CST].

<sup>39</sup> See, e.g., Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 94 (1983); Gerd Tellenbach, *Church, State and Christian Society at the Time of the Investiture Contest* 115 (R.F. Bennett trans., 1940); see generally Maureen C. Miller, *Power and the Holy in the Age of the Investiture Conflict: A Brief History With Documents* (2005).

<sup>40</sup> See, e.g., Walter Ullman, *A Short History of the Papacy in the Middle Ages* 32-35 (2<sup>nd</sup> ed. 2003).

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freedom of the clergy.”<sup>41</sup> Elsewhere, Gelasius made clear that neither the secular nor the spiritual power ought to be subordinate to the other: that the “‘soldier of God’ would not be involved in secular affairs, while on the other hand he who was involved in secular affairs would not seem to preside over divine matters.”<sup>42</sup>

Gelasius, in short, appeared to argue for a dualist approach to church-state relations. On that view, “temporal and spiritual power existed in parallel within their own spheres,” and the Pope could no more interfere with secular matters than the emperor with spiritual ones.<sup>43</sup> Moreover, this view made clear that the power of kingship was as divinely ordained as the power of religious leadership. Gelasius’ version of “freedom of the church” represented a sensible position for the Church, one that was assertive but basically defensive. Like all influential textual authorities, however, its meaning and implications would be vigorously contested over time.

## B. Freedom of the Church Circa 1075

It is impossible to do justice to the many changes that occurred in the period leading up to the Investiture Controversy, but some of them merit discussion here. First, for most of this period the divine nature of kingship, for the emperor if not all rulers, was widely accepted.<sup>44</sup> Kings were not simply a part of what would eventually become the laity; they were “sacral figures,” whose power derived from both spiritual and temporal sources.<sup>45</sup> The papal coronation of Charlemagne as emperor in 800, which was both a politically necessary alliance and perhaps an attempt to assert the Pope’s right to “delegate imperial authority in the West to whom he would,”<sup>46</sup> left the emperors in a strong position to wield power over not only church appointments, but even matters of religious doctrine.<sup>47</sup>

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<sup>41</sup> Joseph Canning, *A History of Medieval Political Thought 300-1450* 36, 37 (2005 ed.) (1996).

<sup>42</sup> Tierney, *supra* note 34, at 14-15 (quoting Gelasius).

<sup>43</sup> Canning, *supra* note 41, at 92, 94.

<sup>44</sup> See Tellenbach, *supra* note 39, at 90.

<sup>45</sup> Berman, *supra* note 39, at 88; see also R.W. Southern, *Western Society and the Church in the Middle Ages* 32 (1970).

<sup>46</sup> Southern, *id.* at 99.

<sup>47</sup> See, e.g., F. Donald Logan, *A History of the Church in the Middle Ages* 69-72

Second, the clergy served as part of those kings' governing apparatus. That meant not only that they could significantly influence secular matters, but also that the Church itself accrued expertise and experience in the art of government.<sup>48</sup> This development would contribute significantly to its emergence as a central institution in western European history.

Third, the Church depended on secular rulers for land and income. It thus accepted, whether grudgingly or willingly, a subordinate relationship to secular power as a result. Under the prevailing proprietary church system, "the owner of the land had a right to erect a church on his land which[,] because it remained his property[,] was provided by him with a cleric whom he simply appointed to it. The clerics thus appointed came under the jurisdiction of the lay lord."<sup>49</sup> The same was true at higher levels of the church hierarchy as well. "In effect," Walter Ullmann writes, "every important see, church or abbey, had by the tenth century become dependent upon the monarchy."<sup>50</sup> The outward sign of this relationship, and the immediate symbol of the contest between church and state in the eleventh century, was the participation by the lay ruler in the ceremony investing the new ecclesiastical official, generally selected by that ruler, with the ring and staff of office. In short, the clergy enjoyed both land and office as much through secular as ecclesiastical means, "and the ruler understandably felt that he had rights."<sup>51</sup>

The conventional story of freedom of the church told by most legal scholars tends to offer too light a gloss on this fact. The causes and consequences of the proprietary church system are essential to the struggle that followed. To say that the proprietary system was an artifact of feudalism is true but too limited. The feudal system itself was an artifact—in this case, of insecurity. This was a period in which Western Europe was under attack by the expanding Muslim empire, the Vikings, and the Magyars. The job of protection fell to local lords, and with that protection came feudal bonds of duty, or vassalage. The Church, like other communities and institutions, thus fell substantially under the

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(2d ed. 2013).

<sup>48</sup> See, e.g., Tellenbach, *supra* note 39, at 69; Ullmann, *supra* note 40, at 116.

<sup>49</sup> Ullmann, *id.* at 99.

<sup>50</sup> *Id.* at 116.

<sup>51</sup> Logan, *supra* note 47, at 105. For a discussion of the investiture ceremony, see Miller, *supra* note 39, at 2-4.

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control of “lay lords.”<sup>52</sup>

Given this state of affairs, church lands and offices became commodities to be bought and sold. In those circumstances, there was no guarantee that the prize would go to the most pious. So the church became rife with questionable local practices, including the abandonment of “the old ascetic discipline of the Western church,” such as clerical celibacy.<sup>53</sup>

The Church’s initial response was not to seek absolute independence, but to turn to the kings themselves for support,<sup>54</sup> blessing this arrangement by arguing that “[k]ingship was itself a sacred office.”<sup>55</sup> This certainly benefited the king, who could maintain greater control over the church territories in his command and the people appointed to run them than he could over lands held by lesser nobles, which were subject to hereditary succession.

Although the proprietary church system placed a good deal of authority over the Church in the hands of secular powers, in the long run it also benefited the Church. By the eleventh century, many of these lands were owned by church bodies.<sup>56</sup> Moreover, in some cases, most famously the establishment of the monastery at Cluny and its daughter houses, the proprietary system, when generously exercised by patrons, helped create and sustain a monastic movement that would ultimately launch the eleventh century push for church reform.<sup>57</sup>

The church reform movement and its leaders bring us to the Investiture Controversy and the scene at Canossa. The conventional story is typically given in broad, bold strokes. Although sometimes acknowledging that the controversy was

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<sup>52</sup> Tierney, *supra* note 34, at 24.

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* at 25 (“In such circumstances pious churchmen throughout Europe turned to their kings for leadership and protection. It seemed to them that the only hope for the maintenance of any orderly Christian life lay in the emergence of strong monarchs who would maintain an elementary degree of peace and justice in their lands.”).

<sup>55</sup> *Id.*

<sup>56</sup> *See* Tellenbach, *supra* note 39, at 117.

<sup>57</sup> *See* Tierney, *supra* note 34, at 26, 28-29; *see generally* Kathleen G. Cushing, *Reform and the Papacy in the Eleventh Century: Spirituality and Social Change* (2005).

complex and resulted in no clear winner or loser,<sup>58</sup> the narrative still ends up portraying a struggle between two clear contending sides—church and state—over the simple, attractive idea that “royal jurisdiction was not unlimited.”<sup>59</sup> The “whole point of the great conflict,” it is said, concerned state assertions of authority over “religious entities’ training, selection, and dismissal of clergy.”<sup>60</sup> More than this needs to be said to understand the controversy properly, however.

To be sure, the Investiture Controversy, and the other reforms that made up the Gregorian movement, had their roots at least as much in spiritual matters as in temporal ones. The movement began flowering under Pope Leo IX—himself, ironically, the chosen appointee of King Henry III of Germany. Leo gathered together a number of talented figures, mostly from the monastic communities, to press for reform on the issues “considered to be the most besetting sins of the church: simony and clerical marriage or concubinage.”<sup>61</sup> Whether lay investiture was always and everywhere wrong as a form of simony, what this meant for the validity of priestly functions performed by those who had obtained their offices through simony, and whether kings retained some legitimate role in appointing or approving clergy—all these were contested issues, debated by the central intellectual figures of the reform movement, Cardinal Peter Damiani and Cardinal Humbert of Silva Candida.<sup>62</sup>

Thus, the Investiture Controversy was not simply a power play by the Church. Nor was it simply a power play by the state. The royalists’ justifications for lay investiture were equally theological in nature, and drew on equally ancient sources and customs.<sup>63</sup>

But it was, inevitably, *also* a power play, involving changing material conditions, competing ambitions, multiple contending

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<sup>58</sup> See, e.g., Berg *et al.*, *supra* note 1, at 180; Smith, *Discourse*, *supra* note 1, at 1870.

<sup>59</sup> Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 St. John’s J. Legal Comment. 515, 524 (2007) (quoting Berman, *supra* note 39, at 269).

<sup>60</sup> Richard W. Garnett, *Church, State, and the Practice of Love*, 52 Vill. L. Rev. 281, 300 (2007).

<sup>61</sup> Tierney, *supra* note 34, at 27. Clerical marriage was also known as “nicolaitism.”

<sup>62</sup> See *id.* at 33-44; Norman F. Cantor, *The Civilization of the Middle Ages* 250-56 (1993).

<sup>63</sup> See, e.g., Tierney, *supra* note 34, at 74-84.

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forces, and strategic as well as intellectual considerations. Among the relevant factors here were the relative freedom of Western Europe from outside attack, which gave the contending forces within Western Europe breathing space for their mutual struggle; increasing economic development in the region; the youth of King Henry IV, whose minority status gave the Church room to press its causes without immediate political pushback; and the presence of multiple contending interest groups, each with its own resources and weapons. This included the troubled but useful alliance forged between the papacy and the Normans. The Normans had only recently broken the papacy of Leo IX and held him captive. But they soon negotiated with Pope Nicholas II to provide the Church with military support in exchange for the legitimization of Norman holdings in southern Italy.<sup>64</sup>

The intellectual and spiritual aspect of this power struggle was equally important, and not just because it was here that “freedom of the church” became the “battle cry”<sup>65</sup> of the Gregorian reformers—especially the leading figure, Pope Gregory VII, formerly the monk Hildebrand. The positions that Gregory pushed so fiercely have several noteworthy aspects. The Pope “was deeply preoccupied with moral reform” of the Church, “and sometimes seems to have set this objective above all others.”<sup>66</sup> He sought to arrest the moral corruption of the Church, and specifically—and this represents a change in medieval thinking—that of the clergy, the preservation of whose distinct status from the laity became increasingly important to the reformers.<sup>67</sup> To the extent that lay investiture, combined with the proprietary church system, led to the choice of inadequate clergy, and their neglect of spiritual matters in favor of temporal ones and personal ambitions, Gregory’s opposition to it can be seen as part and parcel of the project of *internal* Church reform, not just as a church-state power struggle.

But things are not quite so simple as that. Whatever texts the ostensibly doctrinally conservative Gregory VII may have cited in

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<sup>64</sup> See *id.* at 28, 36, 44.

<sup>65</sup> Brian Tierney, *Religious Rights: An Historical Perspective*, in *Religious Human Rights in Global Perspective: Religious Perspectives* 17, 23 (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

<sup>66</sup> Tierney, *supra* note 34, at 47.

<sup>67</sup> See Cantor, *supra* note 62, at 246-47.



favor of his reform program,<sup>68</sup> what was at stake in the dispute was not simply an argument for a return to the kind of Gelasian church-state dualism that is the focus of modern champions of freedom of the church. To the contrary, both with respect to “internal” church reform and to “external” church-state relations, Gregory’s program was a hierocratic one. It described a “model of papal monarchy” based on a single community of *Christianitas*, in which the Pope is the head of the church, “the clergy are superior to the laity[,] and spiritual jurisdiction is superior to temporal.”<sup>69</sup> In particular, the latter two claims applied as clearly to kings and emperors as to lesser lords or laity, placing all of the *regium* under the control of the *sacerdotium*—and all of the *sacerdotium* under the control of the Pope. Only the most vague or delicate description could ignore the fact that the Gregorian reform and the Investiture Controversy were not about “two swords” wielded by two distinct powers, each with distinct jurisdictions, but about two swords ultimately wielded by *one* man.

All this is apparent in the *Dictatus Papae*, the list of propositions propounded by Gregory VII in 1075.<sup>70</sup> Demonstrating the point that the Gregorian revolution was as much about Church reform and the consolidation of papal control as it was about church-state relations, most of the propositions put forward by Gregory dealt only with ecclesiastical matters.<sup>71</sup> For example, the *Dictatus Papae* asserted, often in the teeth of the custom and practice of the time, that the Pope alone could “depose or reinstate bishops,” that papal legates “take[ ] precedence [ ] in a council of all bishops and may render a sentence of deposition against them,” that he could “be judged by no one,”<sup>72</sup> and that “the Roman Pontiff . . . is undoubtedly sanctified by the merits of St. Peter.” Equally important was its assertion that “no one shall dare to condemn a person who appeals to the Apostolic see.”<sup>73</sup> This assertion helped maintain direct appeals to the papacy over other dispute resolution mechanisms, reinforcing the system of papal adjudication that would play a major role in making the Church a quasi-state over

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<sup>68</sup> Joseph Canning aptly calls Gregory VII an “archetypal conservative revolutionary.” Canning, *supra* note 41, at 97.

<sup>69</sup> *Id.* at 94.

<sup>70</sup> See Tierney, *supra* note 34, at 49; see also *id.* at 46.

<sup>71</sup> See Canning, *supra* note 41, at 88.

<sup>72</sup> Tierney, *supra* note 34, at 49-50.

<sup>73</sup> *Id.* at 50.

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the following centuries.

But the *Dictatus Papae* reached beyond internal Church reform itself. It sought to redefine the relationship between the Church and the secular powers. It made clear that the Pope could *depose* emperors, not just excommunicate them, as earlier popes had done; that he alone could use the imperial insignia, thus emphasizing an “imperial papacy” with “the attributes and trappings of secular power”;<sup>74</sup> and that he could release kingly subjects from their oaths of fidelity to their rulers.<sup>75</sup>

These theological positions inevitably intersected with conditions on the ground. They implicated not just the relationship between “Church” and “State,” but the relationship between the Pope and bishops, between emperors or kings and their lay lords, between rulers and their own military resources, between the Church as a political institution and its political allies, and so on. At the risk of anachronism or faulty labeling, just as the dispute was not only a “secular” power struggle,<sup>76</sup> neither was it just about “pure” theology as we would understand it today. It was theology *as* power play; it involved the theology *of* power; and it was a power play with theology as the strategic battleground.

All this helps us understand a little better what Gregory VII meant when he made “*libertas ecclesiae*,” or “freedom of the church,” his rallying cry. The phrase signified neither a withdrawal of the Church from the secular world, with a concomitant protection from the depredations of that world, nor a Gelasian vision of a limited but protected church in a dualist order. It signified, rather, the freedom of the church *to do what it must*. Because Gregory and other reformers took a broad view of the spiritual obligations and authority of the Church *in the world*,<sup>77</sup> that meant in effect “[bringing] the world unreservedly into the

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<sup>74</sup> Canning, *supra* note 41, at 89.

<sup>75</sup> See *id.* at 88-89; Tierney, *supra* note 34, at 49-50; see also Logan, *supra* note 47, at 99 (“Gregory VII used the reforming movement as a means of enhancing papal power, or, to put it another way, he considered reform to include the enhancement of papal power.”).

<sup>76</sup> But see Norman Davies, *Europe: A History* 339 (1993) (“[D]espite the high-flown legal and theological language in which it was conducted, the investiture contest was a straightforward struggle for power. Was the emperor to control the pope, or the pope to control the emperor?”)

<sup>77</sup> See, e.g., Cantor, *supra* note 62, at 249.

sphere of the Church.”<sup>78</sup>

With respect to papal authority both within the Church and beyond it, in short, this was a hierocratic vision of power through and through. It was a bid for dominance, not separation. And it was as worldly as it was spiritual or conceptual. For Gregory, Gerd Tellenbach writes, “the metaphysical precedence which, in the eyes of the spiritual leaders of the Church, the priestly authority had always possessed over the royal, had logically to be converted into a complete supremacy.”<sup>79</sup> If the Church was to advance its mission in the world, it must perforce expand its power to the utmost extent.<sup>80</sup> *Libertas ecclesiae* entailed far more, in terms of both church power and church supremacy, in this period than it would—or could—later.<sup>81</sup>

The dramatic climax of the Investiture Controversy has been presented often enough in recent American church-state literature to be generally familiar.<sup>82</sup> In a contest over the appointment of the bishop of Milan, Gregory and King Henry IV of Germany reached an impasse. Following Henry’s denunciation of Gregory, the pope not only excommunicated him, in February 1076, but stripped him of royal authority as well, “releas[ing] all Christian men from the allegiance which they have sworn or may swear to him” and “forbid[ding] anyone to serve him as king.”<sup>83</sup> Henry, “excommunicated and hence politically crippled,” begged the pope’s forgiveness in the snow at Canossa.<sup>84</sup> Once absolved,

<sup>78</sup> Tellenbach, *supra* note 39, at 154; *see id.* at 158 (“In reality [Gregory] excluded nothing from the purview of the Church. The old theory of the two powers which should bear rule in the world consequently lost its meaning for him and his supporters. . . . [T]he point to which importance was now attached was the superiority of the one [power] over the other.”).

<sup>79</sup> *Id.* at 158.

<sup>80</sup> *See id.* at 156.

<sup>81</sup> Compare John Witte, Jr., *Introduction*, in *Christianity and Human Rights: An Introduction* 8, 20-21 (John Witte, Jr. & Frank S. Alexander eds., 2010) (offering a description of the breadth of the Gregorian version of *libertas ecclesiae*), with Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, in *id.* at 267, 269, 272, 274 (offering a description of the post-Vatican II version of *libertas ecclesiae*).

<sup>82</sup> *See, e.g.*, Garnett, *supra* note 1, at \_\_ [CST]; Smith, *Freedom of the Church*, *supra* note 1, at \_\_. For a brief narrative and documentary record, see Tierney, *supra* note 34, at 53-73.

<sup>83</sup> *Id.* at 61 (quoting the pope’s deposition of the king).

<sup>84</sup> Smith, *Freedom of the Church*, *supra* note 1, at \_\_.

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although not restored to his kingship, Henry was able to collect his forces. Though he was excommunicated a second time, he and his forces “marched on Rome to expel Gregory and install his own pope there.”<sup>85</sup> Gregory ended up driven away from Rome, expiring with the words, “I have loved justice and hated iniquity—and so I die in exile.”<sup>86</sup> The investiture struggle raged on, but the spark of *libertas ecclesiae* had been lit.

Nothing in that narrative is untrue, and those who recount it note responsibly that there is “a great deal more to the story.”<sup>87</sup> But this version still seems to place too much weight on the notion that the contest involved political weapons wielded against spiritual ones, excommunication versus military power. In fact, both sides wielded both sorts of weapons. The king and his allies made their own theological arguments.<sup>88</sup> Excommunication itself was as much a political as a religious weapon. And on both sides there was a tangle of political alliances and power relations.

It is true that excommunication was a powerful tool. But it is not the whole truth. Many German ecclesiastics feared allying themselves too much with Henry in case he should lose. Given the interconnectedness of land—including church lands—and power at the time, their hesitation effectively deprived the king of a good deal of his military power.<sup>89</sup> The German nobility, which had its own sources of power and revenue and chafed at the king’s command, “exulted in this unexpected [positive] reversal of their fortunes” and took full advantage of it.<sup>90</sup> In the short term, at least, “the centrifugal forces of the feudal order worked to the Pope’s advantage.”<sup>91</sup>

In the medium term, however, political forces shifted. Gregory’s insistence on traveling to Germany to arbitrate between Henry and his princes, and the attendant travel delays, gave his wavering supporters reason to believe that he had become “irresolute[e]” in

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<sup>85</sup> Tierney, *supra* note 34, at 55.

<sup>86</sup> *Id.*

<sup>87</sup> Garnett, *supra* note 1, at \_\_\_ [CST]. Garnett is referring here not only to the controversy and its immediate aftermath, but to the wider sweep of historical struggle over the freedom of the church.

<sup>88</sup> See, e.g., Tierney, *supra* note 34, at 74-84; Canning, *supra* note 41, at 99.

<sup>89</sup> See Cantor, *supra* note 62, at 269.

<sup>90</sup> *Id.*

<sup>91</sup> Davies, *supra* note 76, at 342.

his position.<sup>92</sup> Moreover, Gregory's stand against Henry raised the ire of the Roman nobility, who resented the dangers to which he had exposed the city and who themselves ultimately invited Henry and his newly appointed anti-pope, Clement III, into Rome.<sup>93</sup> Thirteen of Gregory's own cardinals defected. And Gregory's last resort, his own military alliances, proved his undoing. Although his Norman allies came to his defense, they also sacked the city, ultimately leading the Romans to cast out pope and Normans alike.<sup>94</sup>

The point of this extended description of events is not to undercut the importance of the controversy or its broader implications by reducing it to a more vulgar version of reality, although a little more vulgarity may be appropriate. Rather, it suggests that the more details are added to the story, the more complex, multivariant, and contingent the whole affair becomes. One of the standard morals of the contemporary Canossa story is that we moderns must appreciate that church and state were not truly separate in that era—that the whole of medieval life was suffused with religion.<sup>95</sup> But the converse point is equally true. It is just as accurate to say that the medieval Church, as one of the principal institutions of the era, was inseparable from worldly politics. As R.W. Southern writes: "When historians write of the church as if it could be separated from secular history, they are simply repeating the mistake made by medieval ecclesiastical reformers, who were never more clearly the captives of their environment than when they spoke of their freedom from it."<sup>96</sup>

In sum, whatever we conclude about the underlying correctness of either Gregory or Henry's positions on investiture and church-state relations, we must at least agree that those positions worked themselves out as much politically as spiritually or intellectually.

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<sup>92</sup> Ullmann, *supra* note 40, at 159.

<sup>93</sup> *See id.* at 160-61.

<sup>94</sup> *See id.* at 161.

<sup>95</sup> *See, e.g.,* Smith, *Freedom of the Church*, *supra* note 1, at \_\_. *But see,* R. Martin Goodridge, *The Ages of Faith: Romance or Reality?*, 23 *Sociological Rev.* 394 (1975); Witham, *supra* note 10, at 152-53; Rodney Stark & Roger Finke, *Acts of Faith: Explaining the Human Side of Religion* 63-68 (2000) ("[L]ike so many once-upon-a-time tales, this conception of a pious past is mere nostalgia; most prominent historians of medieval religion now agree that there never was an 'Age of Faith'") [hereinafter Stark & Finke, *Acts of Faith*].

<sup>96</sup> Southern, *supra* note 45, at 15-16.

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They were deeply entangled in the resources and institutions of the time, from feudalism to the weak state to the political and geographical divisions within the Church itself. They were thus deeply contingent, changing according to context just as they ultimately worked a great change *in* the Western context.

The immediate outcome of the Investiture Controversy, after some thirty years of conflict, was the Concordat of Worms in 1122. As others have noted, an interesting preface to that development was the proposal by Pope Paschal II to disclaim the Church's worldly positions, lands, and revenues and live by voluntary donations, in exchange for the royal surrender of any role in investiture.<sup>97</sup> On Paschal's view, the Church was superior to lay authorities, but its authority "had to be based on a real repudiation of the worldly power and wealth that secular princes had sought for themselves."<sup>98</sup> The proposal was shouted down.<sup>99</sup>

Surely one reason that Paschal's radical proposal failed was a worldly concern on the part of the bishops, who "wanted the pope to help them defend their ancient rights [and holdings], not to act as a broker in relinquishing them."<sup>100</sup> In that telling, the rejection of Paschal's proposal represents an intriguing missed opportunity, in which Paschal fell victim to tenacious "vested interests" within the Church.<sup>101</sup> But if there were political motives in the priestly opposition to the proposal, there were equally political motives on the part of the secular princes, who also rejected it, fearing that the transfer of church power would dramatically enhance the power of the king.<sup>102</sup> Again, the proposal and its failure were both spiritual and political, and must be viewed through both lenses.

Paschal's abortive proposal also illustrates how variable the concept of *libertas ecclesiae* and its implications could be, even

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<sup>97</sup> See, e.g., Ullmann, *supra* note 40, at 168-69. Canning, *supra* note 41, at 107, offers a different interpretation of events: "This initiative was not, as was once thought, the product of a desire to achieve apostolic poverty, but an attempt to remove the root reason for royal investiture in order to free the church from lay control: Paschal intended that the church should retain all its possessions (*ecclesiastica*) which were not *regalia*, together with the patrimony of St. Peter."

<sup>98</sup> Tierney, *supra* note 34, at 87.

<sup>99</sup> See Ullmann, *supra* note 40, at 169.

<sup>100</sup> Southern, *supra* note 45, at 189.

<sup>101</sup> Logan, *supra* note 47, at 107.

<sup>102</sup> See Ullmann, *supra* note 40, at 169.

within a relatively narrow, albeit unsettled, period of time.<sup>103</sup> Paschal was a Gregorian reformer and a believer in the superiority of the Church. But his understanding of freedom of the church and what it entailed “was one which Gregory VII had never dreamed of and which he certainly would have viewed with dismay.”<sup>104</sup> For Paschal, freedom of the church meant renunciation as well as autonomy; for Gregory, “the greater the material wealth and power of the church, the better; and if the argument was pressed to the point where temporal kings became mere agents of the pope, there were some who would find the conclusion palatable enough.”<sup>105</sup>

Ultimately, the Concordat of Worms involved a different compromise, and “[t]here was no winner . . . just as there was no right party and no wrong party.”<sup>106</sup> The German contest was resolved by allowing bishops to be elected by the church and ending the imperial practice of investing new bishops with ring and staff. On the other hand, the king “was permitted to be present at the election and to receive homage from newly elected prelates for the feudal lands of their churches.”<sup>107</sup> The king could refuse to accept that homage, and thus retained an effective veto over the appointment. “[I]n practice[,] secular rulers continued to have a very large say in the appointment of their bishops all through the Middle Ages.”<sup>108</sup> This was a local compromise, not a universal one, and it would remain to negotiate compromises with individual powers for a long time to come.<sup>109</sup>

The result was victory for both sides—and neither side. That fact is important to our understanding of freedom of the church, both in principle and in practice. The Church surrendered a great deal: “No other course had been left to it than to give up the theory—maintained with so much force—of the spiritual character of clerical property and its inseparability from the spiritual

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<sup>103</sup> Cf. Berman, *supra* note 39, at 105 (noting that the changing meaning of freedom of the church between 1075 and 1122 “was one of the marks of the revolutionary character of the times”).

<sup>104</sup> Tierney, *supra* note 34, at 87.

<sup>105</sup> *Id.*

<sup>106</sup> Logan, *supra* note 47, at 107.

<sup>107</sup> Tierney, *supra* note 34, at 86.

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., Logan, *supra* note 47, at 107; cf. Tellenbach, *supra* note 39, at 123 (noting that royal investiture was tolerated by the papacy in particular cases both before and after Gregory’s prohibition of the practice). For evidence that local compromises continue to this day, see Part II.D, *infra*.

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office.”<sup>110</sup> At the same time, the compromise had important long-term effects. It preserved and enhanced some measure of church autonomy and clerical authority, by driving “[t]he lay princes . . . out of the ecclesiastical sphere.”<sup>111</sup> By reposing that authority within the Church, and at the same time reinforcing the Church’s hierarchical structure with the papacy at the top, it helped establish the Church as an institutional power in the West, one with its own substantial bureaucracy, quasi-judicial structure, and legal system. The compromise in effect helped create the Church as a quasi-modern state.<sup>112</sup>

No less important was the effect of the compromise on the state. It became substantially desacralized, forced to rely on its own secular resources.<sup>113</sup> And it became ever more comfortable doing just that. From the time of the Investiture Controversy through the rest of the Middle Ages and beyond, the secular powers were determined to resist extreme versions of the Gregorian assertion of church authority over them.<sup>114</sup> Toward the end of the 19<sup>th</sup> century, Pope Leo would observe wistfully, “There was once a time when States were governed by the philosophy of the Gospel.”<sup>115</sup>

Although many intervening causes contributed to that sense of “a world gone-by,”<sup>116</sup> it may fairly be said that the militant Gregorian version of *libertas ecclesiae* helped light the fuse, creating the assertive secular state as a strong competitor to the Church and reinforcing the Church’s own sense of itself as a

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<sup>110</sup> Tellenbach, *id.* at 124-25.

<sup>111</sup> *Id.* at 125.

<sup>112</sup> See generally Berman, *supra* note 39; Southern, *supra* note 45.

<sup>113</sup> See, e.g., Canning, *supra* note 41, at 104.

<sup>114</sup> See, e.g., Tierney, *supra* note 65, at 23. A classic example is the renewed assertion of papal superiority by Pope Boniface VIII and his subsequent defeat by King Philip of France, an episode that culminated in Boniface’s concession that “whenever the king so willed reason of state took precedence over clerical privilege.” Tierney, *supra* note 34, at 185. His defeat marked the nadir of the medieval papacy. Tierney adds: “Certainly the combination of an exalted theory of papal overlordship with a persistent practice of using the spiritual authority of the popes to serve local ends sapped the prestige of the Roman see to a degree that made possible the victory of Philip the Fair.” *Id.*

<sup>115</sup> Patrick McKinley Brennan, *Differentiating Church and State (Without Losing the Church)*, 7 *Geo. J.L. & Pub. Pol’y* 29, 38 (2009).

<sup>116</sup> *Id.*



competing institution and interest group.<sup>117</sup> The kind of dualistic version of the church-state relationship that characterizes the modern version of “freedom of the church” was not, all things considered, anything like what the Gregorian movement had in mind, its invocations of Gelasius notwithstanding. But the movement’s failure, or at least its incomplete victory, may itself be said to have been an important source of the modern conception of church-state dualism.<sup>118</sup>

### C. Freedom of the Church Up to and Circa 1965

Our story now jumps forward somewhat rashly across a span of centuries, bypassing for the moment the rise of the Church as a form of transnational government in the West, its political intrigues and negotiations with other Western powers, its own internal failings and triumphs, and the landmarks of Reformation and Counter-Reformation.<sup>119</sup> We pick up the thread in the eighteenth and nineteenth centuries. In this period, the Church was once again forced to confront the scope and extent of its powers, the nature of its relationship to the state, and the meaning of freedom of the church. By the time it reached a modern resolution of this question at the Second Vatican Council in the mid-1960s, the meaning of “freedom of the church” underwent revolutionary changes, moving from a neo-Gregorian resistance to the state to a neo-Gelasian support for the distinct but valuable roles of both church and state. The modern version of *libertas ecclesiae* would be quite different from the medieval version.

For both defenders and critics of freedom of the church in the contemporary legal literature, history sometimes seems to begin and end with the Investiture Controversy.<sup>120</sup> *Something* happens in the interval between the eleventh century and today, but mostly that something lies in the realm of political and religious *theory*, not history. This shift from vulgar to intellectual history serves useful purposes for both sides. For defenders of freedom of the

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<sup>117</sup> See generally Joseph R. Strayer, *On the Medieval Origins of the Modern State* (Princeton Classic Edition 2005) (1970).

<sup>118</sup> See Tierney, *supra* note 65, at 24.

<sup>119</sup> Some of these developments are discussed in Part II, *infra*.

<sup>120</sup> One exception is Brennan, *supra* note 115, who begins his defense of freedom of the church with the expulsion of monasteries in early twentieth century France.

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church, this leaves the Canossa narrative in place as the source of the modern concept of freedom of the church, in more or less unbroken continuity with the present day. Whatever changes in context may have occurred since then, freedom of the church remains a single concept flowing from a singular historical fount.

For its critics, this approach means that the depiction of medieval 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”—is rendered all the more nostalgic and anachronistic.<sup>121</sup> This positions freedom of the church for two criticisms. The first—which we have seen is quite true—is that this narrative is itself historically imperfect. Second, whatever justifications the medieval version of freedom of church might have had, it is out of place in the context of a modern liberal state, whose “commitment to association and participation” is sufficiently protective of “religion (and churches)” to obviate any need for a revival of freedom of the church.<sup>122</sup>

Both the defenders’ and the critics’ moves are unsatisfactory. The former ignores dramatic and sometimes disturbing changes during that period in the meaning of freedom of the church. The latter pays short shrift to genuine threats posed to the Church in the course of the development of modern liberalism—threats that make the idea of freedom of the church seem much less anachronistic than a simple focus on the Investiture Controversy alone does.<sup>123</sup>

Those threats are best represented by the French Revolution. From its roots in resentment at clerical power and wealth, and “the secularisation of the French national psyche,”<sup>124</sup> it reached a height of shocking violence, with “more than 30,000 priests and untold tens of thousands of Catholic laity killed or exiled from France, massive numbers of church properties defaced, destroyed, or confiscated, and much priceless religious art, literature, and

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<sup>121</sup> Schwartzman & Schragger, *supra* note 5, at 8.

<sup>122</sup> *Id.* at 20.

<sup>123</sup> Schwartzman and Schragger do note that “[a]nti-clericalism is an important and powerful strain in Enlightenment thought,” and observe that the French Revolution “was in large part directed at the entrenched power of the Catholic Church.” *Id.* at 26. This is a rather light gloss on events.

<sup>124</sup> Duffy, *supra* note 22, at 254.

statuary stolen or destroyed.”<sup>125</sup> Equally important was the revolutionary state’s takeover of the church. From a system in which the Church formed one of the key estates of the social order, society was redivided into “two parts: the state, which rules; and civil society, which is ruled.”<sup>126</sup>

An emblematic moment was the enactment in 1790 of the Civil Constitution of the Clergy, which reorganized the parishes and eliminated many of them, turned clergy into salaried state officials, and declared that henceforth all clergy and bishops would be elected by the people.<sup>127</sup> This system extended the right to select the officials of the Church to non-Catholic French voters, while stripping any power of appointment from the Church hierarchy outside France, including the pope.<sup>128</sup> The defenders of the Civil Constitution made clear just how broad the state’s claim of authority was, declaring that “[a] state can decide whether or not to permit a religion” and that “[w]e certainly have the power to change religion.”<sup>129</sup> Robespierre, responding to protests over these revolutionary innovations, announced:

The nomination of bishops is an exercise of political power. So to privilege the clergy over other citizens in this process is to ride roughshod over the principle of political equality, which is the foundation of the Constitution. It amounts to granting the clergy special political influence and reconstituting them as a separate body.<sup>130</sup>

This was far beyond anything Henry IV would have dreamed of. It certainly suggests that post-medieval assertions of the freedom of the church are no mere anachronism, and that suspicion of the depth of the liberal state’s commitment to the protection of

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<sup>125</sup> Witte, *supra* note 81, at 24.

<sup>126</sup> Emile Perreau-Saussine, *Catholicism and Democracy: An Essay in the History of Political Thought* 8 (Richard Rex trans., 2012).

<sup>127</sup> See Duffy, *supra* note 22, at 254-55; Perreau-Saussine, *supra* note 126, at 7-8.

<sup>128</sup> See Perreau-Saussine, *supra* note 126, at 12.

<sup>129</sup> *Id.* at 14.

<sup>130</sup> *Id.* at 9-10. For a recent argument against church autonomy that sounds in Robespierrean tones, see Rutherford, *supra* note 5.

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“religion (and churches)” is not unfounded.<sup>131</sup>

It is important not to gloss over the scope and violence of the revolutionary liberal state’s assertion of authority over the church in this period. But neither should we ignore the Church’s dramatic response: the vehement rejection of liberalism. As John Witte writes, the eighteenth and nineteenth century Church “pronounced anathema on [the] radical Enlightenment and its new ideas of liberty, democracy, and separation of church and state[,] and called the faithful back to the ideals of a unified Christendom under the moral *and legal* authority of the papacy.”<sup>132</sup> As the liberal state had called into question the existence of the church as anything other than an ordinary association, so the papacy in turn called “the autonomy of the temporal sphere . . . into doubt.”<sup>133</sup>

This move found its high-water mark in the *Syllabus of Errors*, issued by Pope Pius IX in 1864. Its list of 80 propositions that violate Catholic teaching includes many uncontroversial points.<sup>134</sup> But others strike directly at the liberal state and its freedoms. They include a rejection of church-state separation and of the view that “the Catholic religion should [not] be held as the only religion of the State, to the exclusion of all other forms of worship,” and the refusal of the pope to reconcile himself to “progress, liberalism, and modern civilization.”<sup>135</sup>

Modern-day apologists have argued that the *Syllabus* must be read in light of the texts to which it refers,<sup>136</sup> and must be understood in the context of the era’s anticlericalism and state coercion.<sup>137</sup> That is true but insufficient. There can be little doubt

<sup>131</sup> Schwartzman & Schragger, *supra* note 5, at 20.

<sup>132</sup> Witte, *supra* note 81, at 24 (emphasis added).

<sup>133</sup> Perreau-Saussine, *supra* note 126, at 63; *see also* J. Bryan Hehir, *The Modern Catholic Church and Human Rights*, in Witte, *supra* note 81, at 113, 114.

<sup>134</sup> *See* Duffy, *supra* note 22, at 295.

<sup>135</sup> Zachary R. Calo, Note, “The Indispensable Basis of Democracy”: American Catholicism, the Church-State Debate, and the Soul of American Liberalism, 1920-1929, 91 Va. L. Rev. 1037, 1046 (2005) (quoting Pope Pius IX, *Syllabus of Errors* (1864)).

<sup>136</sup> *See, e.g.*, Christopher T. Carlson, *Church and State: Consistency of the Catholic Church’s Social Teaching*, 35 Cath. Law. 339, 356-57 (1994).

<sup>137</sup> *See, e.g.*, Richard S. Myers, *A Critique of John Noonan’s Approach to Development of Doctrine*, 1 U. St. Thomas L.J. 285, 292 (2003) (“The basic point is that the nineteenth-century popes were criticizing a far more extreme

that this statement represents a revival of the strong Gregorian position, and is hardly the same as what we will shortly see is the modern Catholic concept of freedom of the church.<sup>138</sup> It is striking that the *Syllabus* itself, and an earlier papal condemnation of liberal arguments for church-state separation, both came in response to speeches and newspapers using the phrase “a Free Church in a Free State,” a phrase that would not be out of place among modern defenders of freedom of the church.<sup>139</sup>

Reaction begets reaction. The French Revolution was far from the last European war on the Church. In mid-to-late nineteenth century Prussia, Bismarck’s hostility to the Church led to the *Kulturkampf*, in which the state dominated, harassed, and expelled the Catholic Church and its religious orders. Bismarck asserted that the Vatican’s assertion of papal infallibility in the First Vatican Council “had revived the most extravagant claims of Gregory VII and Boniface VIII: this time, however, he promised, ‘We will not go to Canossa.’”<sup>140</sup>

Similarly, militant French secularism and anticlericalism, and the assertion that religious associations were wholly subordinate to state authority and could be licensed or expelled at will, extended well past the Revolution into the twentieth century. The French prime minister Emile Combes stated at the time, “There can be no rights except the right of the State, and there [is], and there can be

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idea of civil liberty.”); Maritain, *supra* note 31, at 159 n.13 (observing that the proposition in the *Syllabus* rejecting a non-exclusive Catholic state was issued in the context of the violent overturning of prior concordats between church and state, and adding, somewhat disturbingly, “At such moments no one is prepared to discard weapons that are at his command in actual fact.”); Murray, *supra* note 32, at 67-68 (arguing that the *Syllabus* rejected “freedom of religion and separation of church and state” because they were predicated at the time on the “thesis of the juridical omnipotence and omnicompetence of the state,” which implied not separation but “perhaps the most drastic unification of church and state which history had known”).

<sup>138</sup> See, e.g., John T. Noonan, Jr., *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching* 155 (2005).

<sup>139</sup> See Duffy, *supra* note 22, at 281-84 (describing the Church’s rejection of the arguments of Felicité de Lamennais, whose newspaper used that phrase), 295 (noting that the *Syllabus* was issued in response to a speech by Count Charles Montalembert titled “A Free Church in a Free State,” arguing for “a reconciliation between the Church and democracy”).

<sup>140</sup> *Id.* at 303.

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no other authority than the authority of the Republic.”<sup>141</sup> Similarly militant statements and actions could be found elsewhere in Europe and abroad, as in post-revolutionary Mexico. In short, neither the more extreme assertions of freedom of the church, nor the more intolerable incursions of the state, had spent themselves by the time the West reached modernity. However common the language of dualism had become, each side continued to assert its dominance over the other. By this time, however, a sense of exhaustion and chastening had begun to emerge on both sides.<sup>142</sup>

The Second Vatican Council’s Declaration on Religious Freedom, *Dignitatis Humanae*, must be viewed in light of these events and the accompanying sense of both exhaustion and genuine reconciliation. The Declaration continues to insist on the truth and exclusivity of the Church’s claims on religious matters. But it takes a very different view than its predecessors of the place of “the free exercise of religion in society.”<sup>143</sup> While asserting the existence of the one “true religion and . . . the one Church of Christ,”<sup>144</sup> it also affirms that human beings are endowed with dignity and a “moral obligation to seek the truth, especially religious truth,” and that it would violate human dignity to subject this search to “external coercion,” whether the seeker’s quest leads to Catholicism or some other faith.<sup>145</sup>

At the same time, it champions not just individual rights, but also freedom of the church. “The freedom or immunity from coercion in matters religious which is the endowment of persons as individuals,” it says, “is also to be recognized as their right when they act in community.”<sup>146</sup> Churches and other religious communities “have the right not to be hindered [by government] . . . in the selection, training, appointment, and transferral of their own ministers, in communicating with religious authorities and communities abroad,” and in acquiring and building on church

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<sup>141</sup> John Neville Figgis, *The Great Leviathan*, in *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* 112 (Paul Q. Hirst ed., 1989).

<sup>142</sup> See, e.g., Brennan, *supra* note 115, at 38 (noting Pius IX’s acknowledgment shortly before his death that his model of Church-state relations “had failed and that it was time for a new approach”).

<sup>143</sup> *DH*, *supra* note 2, § 1.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*, § 2.

<sup>146</sup> *Id.*, § 4.

property.<sup>147</sup> They have the right to engage in witness and proselytization, although they should not abuse this right by engaging in coercion or abusive or deceptive tactics.<sup>148</sup> They must be entitled “freely to hold meetings and to establish educational, cultural, charitable and social organizations, under the impulse of their own religious sense.”<sup>149</sup> The Declaration recognizes the legitimate role of the state—“the power of government and its rights”—but cautions that “the higher rights of God are to be inviolate.”<sup>150</sup>

“The freedom of the Church,” in sum, “is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order.”<sup>151</sup> The Church “claims freedom for herself in her character as a spiritual authority,” and “in her character as a society of men who have the right to live in society in accordance with the precepts of the Christian faith.”<sup>152</sup> It claims “the independence which is necessary for the fulfillment of her divine mission.”<sup>153</sup> The freedom and autonomy of the church, on this view, is “a structural feature of social and political life” as well as “a moral right to be enjoyed by religious communities. It is not simply an effect or implication of private, individual claims to freedom of conscience and immunity from government coercion in matters of religious belief.”<sup>154</sup>

If the Declaration is forthright in its assertion of the natural and legal status of both individual religious freedom and church autonomy, it is vague on questions of establishment.<sup>155</sup> Government, it says, should “help create conditions favorable to

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<sup>147</sup> *Id.*

<sup>148</sup> *See id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*, § 11.

<sup>151</sup> *Id.*, § 13.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience*, 54 *Vill. L. Rev.* 655, 675 (2009).

<sup>155</sup> *See, e.g.*, Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 *Geo. Wash. L. Rev.* 1035, 1039 (2000) (the Declaration “is not a complete exercise in either the theory or the practice of Church-state relations”); *see also id.* at 1043 (the Declaration “puts to one side theoretical treatment of the issues which directly touch, in American terms, upon establishment of religion”).

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the fostering of religious life,” both to enable individuals to fulfill their religious duties “and also in order that society itself may profit by the moral qualities of justice and peace which have their origin in men’s faithfulness to God and to His holy will.”<sup>156</sup> It adds two important caveats, however, which suggest something about both the permissibility of religious establishment and its limits:

If, in view of peculiar circumstances obtaining among peoples, special civil recognition is given to one religious community in the constitutional order of society, it is at the same time imperative that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice.

Finally, government is to see to it that equality of citizens before the law, which is itself an element of the common good, is never violated, whether openly or covertly, for religious reasons. Nor is there to be discrimination among citizens.<sup>157</sup>

This statement leaves a great many questions unanswered. But it surely provides some guidance, particularly if read in contrast to the earlier positions staked out by the medieval or even the nineteenth century papacy. It does not forbid, but positively encourages, cooperation between church and state. It does not appear to prohibit, and on some readings positively desires, the public acknowledgment of God, although its equality provision suggests some role for the public acknowledgment of other faiths.<sup>158</sup> But it still sees some important limits here.

According to Jacques Maritain, one of the key influences on the Declaration, government’s role was to assist “the spiritual mission of the Church . . . , not the political power or the temporal advantages to which certain of her members might lay claim in her name.”<sup>159</sup> It would recognize “the juridical personality of the Church” and its status as “a perfect and perfectly independent

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<sup>156</sup> *DH*, *supra* note 2, § 6.

<sup>157</sup> *Id.*

<sup>158</sup> *See, e.g.*, Maritain, *supra* note 32, at 172-73.

<sup>159</sup> *Id.* at 173.



society”; but even a Christian society “would have to hold that, in its own temporal sphere, Christian citizens [and associations] . . . are no more legally privileged than any other citizens.”<sup>160</sup> The state would be “fully differentiated in its secular type.”<sup>161</sup> Continuing the trend that began with the Investiture Controversy, the state would be fully desecralized. At the same time, the church would also be differentiated from the state, left to “reach people through its direct effect on individuals and society (rather than, as before, through the arm of the state).”<sup>162</sup> Its influence on and in the world would come through service and persuasion, not coercion. Whatever is left within the realm of permissible realm of establishment, it is a far cry from the kinds of actions, by church or state, that were viewed by Gregory VII as necessary implications of *libertas ecclesiae*.

#### E. Freedom of the Church Circa 2012

This historical tour, if more lengthy than the somewhat canned narratives that accompany recent discussions of freedom of the church, still falls short of doing justice to a complex story. Even so, in filling out the story a little, it offers some lessons for the modern debate over freedom of the church.

First, it cautions against undue romanticization of the story of the Investiture Controversy. To be sure, none of the recent versions of the story have concluded that it was an unmixed triumph for Pope Gregory VII, or that Canossa represented a final capitulation of temporal power to the authority of the Church. Still, the shorter the version of the story presented, the more likely it is to leave the impression that Christian society in that era was naively pious and spiritual, or that the struggle was one of temporal power on one side against spiritual power on the other.

In fact, *both* sides invoked religious arguments. Both sides wielded political and military power and confronted its limits. Both sides were embedded in a web of feudal relations and shifting alliances. The struggle was intellectual and spiritual. But it was also a conflict of multiple interest groups, all of them alien to contemporary circumstances and thus neither wholly sympathetic nor wholly unsympathetic. We are far better off viewing the

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<sup>160</sup> *Id.* at 175.

<sup>161</sup> *Id.* at 176.

<sup>162</sup> Brennan, *supra* note 115, at 39 (describing the views of Pope Leo XIII).

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contending parties as historical actors, responding to and sparking long-reaching historical phenomena, than we are selecting champions from among them, whether the intrepid reforming Church or the nascent liberal state.

Second, it suggests that the historical developments that followed the Investiture Controversy matter too. Again, that is not to say that modern discussions of freedom of the church leave out the period between the eleventh century and today altogether. But they tend to shift from a full historical analysis, when discussing the medieval era, to a mere genealogy of ideas, such as sovereignty or conscience, in the post-medieval period. For defenders of freedom of the church, this suggests that all that remains is to figure out how “freedom of the church” translates into our modern vocabulary. For the critics, it means that “freedom of the church” has been yanked inappropriately from the mists of history into the modern era of the liberal state. A fuller understanding of the historical interval between Canossa and today suggests that the Church’s own understanding of its power and limits, and its relationship to the society that surrounded it, continued to change in response to circumstances on the ground. It also shows that those circumstances included serious threats to the Church’s very existence—threats that persisted long after the rise of the liberal state.

Finally, it suggests the dangers of treating freedom of the church as a transcendent, transhistorical concept with a fixed definition. What “freedom of the church” entailed and implied, whether in terms of the internal affairs of the Church or its external relations with other powers, was always deeply contingent on the status of church *and* state, the role of other interest groups, and the changing social imaginaries that surrounded individuals and communities within the broader society.<sup>163</sup> Freedom of the church could not, and did not, mean the same thing in the fifth, eleventh, nineteenth, twentieth, or twenty-first centuries, nor could its implications and emanations.<sup>164</sup>

Whatever debates we hold today about freedom of the church, and however they much they appear to draw on the past or on fixed and eternal principles, they will ultimately not have all that

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<sup>163</sup> See generally Charles Taylor, *Modern Social Imaginaries* (2004).

<sup>164</sup> See, e.g., note 81, *supra* (comparing Witte and Garnett’s descriptions of the medieval and modern scope of *libertas ecclesiae* respectively).

much to do with the simple revival of an ancient idea. Nor can they simply be reduced by its critics to the task of laying to rest an ancient anachronism. They will, first and foremost, be about defining something called “freedom of the church,” and discerning its scope and limits, *today*.

## II. FREEDOM OF THE CHURCH AND THE ECONOMICS OF RELIGION

History is one tool by which we can examine the concept of freedom of the church, and it has been by far the most commonly used. But there are other disciplinary tools in our toolkit. In this Part, I turn to economic analysis, and the literature on the economics of religion, to examine freedom of the church from another perspective.

After a general introduction to the field and its assumptions and methods, I suggest that churches—including the Catholic Church, whose history gave rise to both the ancient and modern concepts of “freedom of the church”—can be viewed productively through a number of economic lenses: as sellers of a particular kind of good, as organizations, as occasional monopolists and frequent competitors, and as interest groups that interact with regulators. This Part is mostly descriptive. I take up the lessons we can draw from both economic and historical analysis of freedom of the church in Part III.

### A. Introduction to the Economics of Religion

The study of religion from an economic perspective is, quite literally, at least as old as modern economics, and as old as the United States itself. Its progenitor is the father of modern economics, Adam Smith. In his classic book *The Wealth of Nations*, first published in 1776, Smith argued that the economy can best be understood as a product of the interactions of self-interested individuals.<sup>165</sup> Smith applied that insight to a wide range of human conduct, including religion.<sup>166</sup>

As with other workers, Smith argued, the “industry and zeal” of

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<sup>165</sup> See, e.g., Adam Smith, *The Wealth of Nations* 16-18 (Edwin Cannan ed., Modern Library 1994) (1791) (1776).

<sup>166</sup> For a modern treatment of Smith and religion, see Laurence R. Iannaccone, *The Consequences of Religious Market Structure: Adam Smith and the Economics of Religion*, 3 *Rationality & Soc’y* 156 (1991).

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the clergy are “kept alive” in substantial part “by the powerful motive of self-interest.”<sup>167</sup> Smith’s friend David Hume had argued that states would benefit from established religion, because they could “bribe” the clergy into “indolence” to the ultimate advantage of “the political interests of society.”<sup>168</sup> By contrast, Smith argued, in a fashion that is familiar to students of the Madisonian view of faction,<sup>169</sup> that the optimal approach to church-state relations was to avoid establishment and encourage a profusion of competitive faiths, with a concomitant moderating effect:

But if politics had never called in the aid of religion, had the conquering party never adopted the tenets of one sect more than those of another, when it had gained the victory, it would probably have dealt equally and impartially with all the different sects, and have allowed every man to chuse his own priest and his own religion as he thought proper. There would in this case, no doubt, have been a great multitude of religious sects. . . . Each teacher would no doubt have felt himself under the necessity of making the utmost exertion, and of using every art both to preserve and to increase the number of his disciples. But as every other teacher would have felt himself under the same necessity, the success of no one teacher, or sect of teachers, could have been very great. The interested and active zeal of religious teachers can be dangerous and troublesome only where there is, either but one sect tolerated in the society, or where the whole of a large society is divided into two or three great sects[.] . . . . But that zeal must be altogether innocent where the society is divided into two or three hundred, or perhaps into as many thousand small sects, of which no one could be considerable to disturb the public tranquillity. The teachers of each sect, seeing themselves surrounded on all sides with more adversaries than friends, would be obliged to learn that candour and moderation which is so seldom to be found among the teachers of those great

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<sup>167</sup> Smith, *supra* note 165, at 848.

<sup>168</sup> *Id.* at 850 (quoting David Hume, *The History of England* (1773 ed.)).

<sup>169</sup> See, e.g., James Madison, *Federalist No. 51*, in *The Federalist Papers* \_\_\_ (Clinton Rossiter ed., 1961).

sects[.]<sup>170</sup>

Beyond this broad exercise in political economy, Smith also delved into the economic aspects of the religious behavior of both groups and individuals at a more intimate level—tracing, for instance, what religious economists today would call the movement from sect to church,<sup>171</sup> the growth of legal privileges such as benefit of clergy,<sup>172</sup> and the causes and consequences of the Protestant Reformation.<sup>173</sup>

Although Smith's discussion of the economics of religion lay largely dormant for some two centuries, in the last forty years there has been an explosion of work in this area by economists and other social scientists employing economic tools. As Rachel McCleary observes, the economic study of religion, following Smith's general approach, "is defined by two theoretical schemes: rational choice and market theory."<sup>174</sup>

The rational choice assumption holds that, "when faced with choices, humans try to select the most rational or reasonable option."<sup>175</sup> This assumption applies to decisions about religion just as it does to other human activities.<sup>176</sup> Given both the potential short-term benefits of religion, such as the acquisition of social capital, and the ultimate, high-stakes, long-term benefits of religion—enlightenment now and immortality afterwards—people may choose rationally to adopt religious beliefs. Given different individual preferences, and the wide mix of costs involved in particular choices about religious belief and observance, including financial and other costs, time commitments, and search costs, the decision to favor particular religions or sects is also subject to rational considerations. In short, in light of their individual preferences, "people will try to achieve their goals (i.e., their preferential needs and desires) in the least costly manner possible given the various environmental and strategic constraints that they face."<sup>177</sup> Although preferences, costs, and benefits may be harder

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<sup>170</sup> Smith, *supra* note 165, at 851-52.

<sup>171</sup> *See id.* at 853-61; Stark & Finke, *Acts of Faith*, *supra* note 95, at 203-08.

<sup>172</sup> *See* Smith, *supra* note 165, at 861-62.

<sup>173</sup> *See id.* at 862-68.

<sup>174</sup> McCleary, *supra* note 14, at 7.

<sup>175</sup> Stark & Finke, *Acts of Faith*, *supra* note 95, at 36.

<sup>176</sup> *See, e.g.*, Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 3.

<sup>177</sup> Gill, *Religious Liberty*, *supra* note 10, at 28.

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to model in the religious arena than in other areas, it is still a universal truth that people make choices under conditions of constraint and will seek the most benefits at the lowest cost.

The market theory aspect of the economics of religion begins with the basic assumption that churches exist in a “religious marketplace”—a “social arena wherein religious firms compete for members and resources.”<sup>178</sup> Many faiths want their beliefs to be universal, and seek to attract new members; even faiths that are often characterized as non-proselytizing, such as Judaism, want to avoid losing existing members. To that end, religious doctrines or organizations, over time, may adjust or diversify the package of costs and benefits they offer in order to maintain or increase their market share. Moreover, the religious marketplace is a regulated marketplace. Churches face governmental constraints on their ability to attract members or retain revenue, and will seek to minimize those constraints—and, often, to convince the regulator to transfer wealth to them, or to constrain their competitors.<sup>179</sup> In short, churches, like other actors in a marketplace, will engage in rent-seeking behavior.<sup>180</sup>

Another important aspect of the economics of religion literature is its attempt to define and describe the nature of supply and demand in the religious marketplace. The general assumption is that the real activity is on the supply side.<sup>181</sup> This is in contrast to a good deal of conventional historical work, which has emphasized supposed changes in the demand for religion. Thus, the standard account of American religious history often stresses the importance of the so-called “Great Awakenings,” moments in which “the nation has been subject to periodic paroxysms of public piety.”<sup>182</sup> The economic model instead treats the demand for religion, and the kinds of material and spiritual goods it offers, as fairly stable. Under that model, “religious change is largely the

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<sup>178</sup> *Id.* at 42; see also Stark & Finke, *Acts of Faith*, *supra* note 95, at 193 (defining a “religious economy” as “a ‘market’ of current and potential adherents, a set of one or more organizations seeking to attract or maintain adherents, and the religious culture offered by the organization(s)”).

<sup>179</sup> See generally Gill, *Religious Liberty*, *supra* note 10.

<sup>180</sup> See, e.g., Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 32-34.

<sup>181</sup> See, e.g., McCleary, *supra* note 14, at 22.

<sup>182</sup> Roger Finke & Rodney Stark, *The Churching of America, 1776-2005: Winners and Losers in Our Religious Economy* 87 (2005) [hereinafter Finke & Starke, *Churching of America*].

product of supply-side transformations.”<sup>183</sup> In asking why particular faiths flourish or die, how and why religious doctrines change, and why religious participation in general increases or declines, it is more instructive to examine developments in religious competition and the regulatory environment than to speculate about changing views or needs on the part of consumers. Human beings are always looking for answers to the fundamental questions; the real dynamics lie in the kinds of “products” on offer to the seekers.

The economic approach to religion represents a departure from much if not most legal scholarship on church-state relations. It emphasizes a view of the world in which “interests predominate over ideas.”<sup>184</sup> By contrast, most legal scholarship on law and religion, including much of the best of it, privileges ideas over interests. It invokes on history, but it tends to emphasize intellectual history rather than a more jaundiced and institutionally focused historical analysis.<sup>185</sup> It is also top-heavy with theory. In our field, a page of Rawls often outweighs a volume of financial or demographic data.<sup>186</sup> Apparently, as far as many church-state scholars are concerned, the life of the law has been logic, not experience.<sup>187</sup> Although there are exceptions,<sup>188</sup> few law and religion scholars—too few—analyze church-state law and relations through the same lens of rational-choice and market-oriented analysis that has yielded so many positive, if contested,

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<sup>183</sup> Stark & Finke, *Acts of Faith*, *supra* note 95, at 193. For arguments to this effect, showing that the “Great Awakenings” were far less important than the conventional account holds, see Finke & Starke, *Churching of America* *supra* note 182, at 87-92. As they note, the conventional account of the Great Awakenings has also come under question by historians. *See id.* at 88 (citing, *inter alia*, Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* (1990), and Frank Lambert, *Inventing the “Great Awakening”* (1999)).

<sup>184</sup> Gill, *Religious Liberty*, *supra* note 10, at 27; *see also id.* at 57.

<sup>185</sup> *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346 (2002).

<sup>186</sup> A search of the JLR database on Westlaw for articles with some variant on the word “religion” *in the title* and mentions of John Rawls in the text yields 343 documents. A search of the JLR database for *any* mention of Laurence Iannaccone, one of the leading economists of religion for almost four decades, shows 33 results.

<sup>187</sup> *Cf.* Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881) (“The life of the law has not been logic; it has been experience.”).

<sup>188</sup> *See* note 11, *supra*.

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results elsewhere in the legal academy.

It is also true that other religion scholars, some religious and some not, have objected to the bloodless and clinical nature of the economics of religion, or raised questions about its assumptions and methodology. Thus, the theologian and historian Martin Marty argues that this approach “contains no God or religion or spirituality, no issue of truth or beauty or goodness, no faith or hope or love, no justice or mercy; only winning or losing in the churching game matters.”<sup>189</sup> Robert Wuthnow, a leading sociologist of religion, complains that the economic approach “fails to illuminate about 90 percent of what I find interesting about religion.”<sup>190</sup> Others have challenged some of the findings or methodology of the economic approach more directly.<sup>191</sup>

Of course, scholars of the economics of religion do not disdain or ignore the ideational or spiritual element of religion.<sup>192</sup> They openly acknowledge the limitations of an economic approach.<sup>193</sup> But it remains useful—certainly far more useful than its scarce use in law and religion scholarship suggests. However other-motivated religious individuals may be, they still make choices in a constrained environment: whether to incur time and travel costs going to a nearby church or a more distant one, whether to seek out religious sects that are widely available in town or travel to a different continent in search of locally inaccessible religious ideas and communities, whether to donate time or money, whether to take up a costly and inconvenient set of religious practices or adopt less demanding practices.<sup>194</sup> And whatever the sources of their beliefs and authority, churches are also *organizations*, subject to resource constraints and the imperfect human motivations and behavior of their leaders and members. Churches also interact with

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<sup>189</sup> Finke & Starke, *Churching of America*, *supra* note 182, at xiii-xiv (quoting Martin E. Marty).

<sup>190</sup> Robert Wuthnow, *After the Baby Boomers* 256 (2008) (quoted in Witham, *supra* note 10, at 8).

<sup>191</sup> See, e.g., Steve Bruce, *Secularization and Economic Models of Religious Behavior*, in *Oxford Handbook*, *supra* note 10, at 289.

<sup>192</sup> See, e.g., Finke & Starke, *Churching of America*, *supra* note 182, at xiv.

<sup>193</sup> See, e.g., Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 4-9.

<sup>194</sup> See, e.g., Laurence R. Iannaccone, *Sacrifice and Stigma: Reducing Free-Riding in Cults, Communes, and Other Collectives*, 100 *J. Pol. Econ.* 271 (1992); Laurence R. Iannaccone, *Why Strict Churches Are Growing*, 99 *Am. J. Sociology* 99 (1994).



governments and other regulators, whose all-too-human motivations no one questions.

The economic approach to religion may, in short, be unsentimental, incomplete, and imperfect. But it remains a valuable tool nonetheless. On the margins, law and religion scholarship today is likely to benefit more from a serious look at economics than from yet another discussion of Rawls.

That is especially true for our subject: the freedom of the church and the institutional freedom of religious organizations. An economic analysis of this topic is valuable for several reasons. First, “[O]rganized bodies imply organization and administration. Therefore, in order to understand the workings of administrative bodies, it makes sense to turn to a science like economics that seeks to explain the behavior of organizations.”<sup>195</sup> The central concern of freedom of the church is the institutional autonomy of religious organizations. It makes obvious sense to examine how those organizations function and the potential influences on their behavior.

Second, equally central to the role of freedom of the church in the modern American context are the questions of how that concept interacts with the political and cultural environment, and what relationship it bears to basic legal concepts like nonestablishment.<sup>196</sup> Rational-choice approaches to the interaction between organizations and government are obviously relevant to those questions.<sup>197</sup>

Third, freedom of the church is often treated by its supports as a single, universal principle. To the extent that it is, in fact, applied inconsistently or opportunistically by religious organizations, that may say something about the viability or applicability of the concept. Here, too, economics may supply some explanatory and predictive power.

Fourth, as we saw in Part I, the story of freedom of the church involved not just church *autonomy*, but ecclesiastical *reform*. The Catholic Church’s assertion of its right to be “left alone,” and particularly to form its own doctrines and make its own appointments free of interference from temporal powers, formed a complex pattern of cause and effect with respect to the real or

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<sup>195</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 1.

<sup>196</sup> *See, e.g., Hosanna-Tabor*, 132 S. Ct. at 706 (rooting the ministerial exception in both the Free Exercise and Establishment Clauses).

<sup>197</sup> *See generally* Gill, *Religious Liberty*, *supra* note 10.

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perceived need for internal reform. The scope and implications of “freedom of the church” necessarily changed as the nature and scope of Church doctrine changed, both for reasons internal to the Church as a religious organization and in response to external forces. The economics of religion may help us to understand the internal and the external influences on church reform and freedom of the church—and thus to understand the causes, effects, and limits of freedom of the church.

Finally, at the level of legal doctrine, specific applications of freedom of the church, such as the ministerial exception doctrine, may be subject in particular cases to categorical limitations in scope or an outright balancing of interests.<sup>198</sup> Those questions, too, are subject to examination by a variety of analytical tools, including economics.

In what follows, I argue that the economics of religion can help organize and explain many historical phenomena that are relevant to the evolution of churches, church doctrine, and the principle of freedom of the church. It also says something about the conditions and limits under which it operates today.

## B. Churches as Sellers (of Credence Goods)

Churches offer a “complex product” to consumers of religion, consisting of a mixture of private and public goods and costs.<sup>199</sup> The products they offer include various religious goods, including doctrine, moral guidance, the remission of sins, and assurance of both present and future spiritual benefits. They also include a variety of more or less tangible present goods, including the provision of social services,<sup>200</sup> network benefits, and various forms of social and religious capital.<sup>201</sup>

Many of the goods that churches offer are difficult to value

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<sup>198</sup> See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 710 (describing some limitations on the scope of the ministerial exception).

<sup>199</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 163.

<sup>200</sup> See, e.g., Witham, *supra* note 10, at 189-90; Finke & Starke, *Churching of America*, *supra* note 182, at 138-39, 155; Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 30.

<sup>201</sup> See, e.g., McCleary, *supra* note 14, at 13-16; Witham, *supra* note 10, at 172-74; Stark & Finke, *Acts of Faith*, *supra* note 95, at 118-19; Laurence R. Iannaccone, *Religious Practice: A Human Capital Approach*, 29 *J. Scientific Study of Religion* 297 (1990).

properly. Some, like the promise of salvation after death, are impossible to value with assurance, whether before or after the religious consumer selects a faith.<sup>202</sup> They are classic credence goods: “goods [that] require that certain types of assurances be given in order to satisfy purchasers because the quality of the good in question cannot be determined either before or after the sale.”<sup>203</sup>

To assure potential purchasers of the superior quality of the religious product they offer, and to assuage fears of fraud, churches may employ a variety of signaling devices. Because the nature of the product offered is complex and ambiguous, and its value difficult or impossible to certify, those signaling devices mostly involve the *agents* of the religious organization.<sup>204</sup> The level of education and commitment that is required for many priests and other religious authorities, for instance, and the many costs they are willing to bear—not least, in the case of the Catholic Church, priestly celibacy and poverty—suggest to potential followers that they are confident of the value of their faith.<sup>205</sup> The costs that priests and other religious leaders incur for their faith “can assure consumers that priests *sincerely believe* in life after death and believe that certain steps must be taken to achieve it.”<sup>206</sup>

Other forms of signaling are available, of course. Advertising the existence of saints, martyrs, and other heroic figures who paid

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<sup>202</sup> Barring a revelatory experience, of course. But I am unaware of any faiths, and certainly no large mainstream faiths, that guarantee such an experience to their consumers on a wholesale basis.

<sup>203</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 28. *See generally id.* at 27-29; Robert B. Ekelund et al., *Sacred Trust: The Medieval Church as an Economic Firm* 26-27 (1996) [hereinafter Ekelund et al., *Sacred Trust*]; Gill, *Religion and Civil Liberties*, *supra* note 15, at 281.

<sup>204</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 52.

<sup>205</sup> *See id.*; Stark & Finke, *Acts of Faith*, *supra* note 95, at 112. Stark and Finke argue further that in regions where the clergy are well-compensated financially, “there tends also to be a relatively low level of mass commitment and a quite high level of antagonism toward ecclesiastics.” *Id.* As with other consumer goods, however, one can also imagine instances in which it is precisely the wealth of the clergy that acts as a signal of the credence of the religious good on offer. One example in the United States is the rise of “prosperity gospel” sects of Christianity. *See generally* Kate Bowler, *Blessed: A History of the American Prosperity Gospel* (2013).

<sup>206</sup> Brooks B. Hull & Frederick Bold, *Towards an Economic Theory of the Church*, 16 *Int’l J. Soc. Econ.* 11, \_\_ (1989) (quoted in Witham, *supra* note 10, at 62).

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epic costs for the faith may be one.<sup>207</sup> Large churches, cathedrals, and other major building projects, which signal both the quality of the church and its willingness to make “a substantial long-term commitment to maintaining customers’ satisfaction,” are another.<sup>208</sup> But certainly the willingness of religious leaders in any number of religions to endure privation and strict rules is a prominent signal of quality and sincerity.

This phenomenon of signaling the value of a particular religious credence good is more than just an intriguing explanation of a particular set of religious behaviors. It is directly relevant to the subject of freedom of the church and its legal offspring, such as the ministerial exception doctrine. Recall, again, one of the lessons of Part I of this Article: the argument for church *autonomy* was inextricably intertwined with the argument for church *reform*, specifically including the stricter enforcement of rules against simony and nicolaitism—or, to put it in the converse, rules requiring clerical poverty and celibacy. Corrupt, licentious, and self-serving behavior among the clergy not only interfered with the Church’s efforts to maintain control of its own property and ensure that its lands and wealth did not pass to individual inheritors, although it did that as well.<sup>209</sup> It also signaled that the Church hierarchy was unable to maintain control of its own officials, and weakened the “warranty” of quality that celibacy and poverty made to “demanders and potential demanders that the product was genuine.”<sup>210</sup>

We might view demands for the freedom of the church to regulate its own affairs, and for the ability of churches to maintain control over the conduct of their own officials regardless of generally applicable employment laws, in this light. Most goods can be warranted effectively in a variety of ways. Mercedes Benz can point purchasers to the latest issue of *Consumer Reports*; a computer manufacturer can compare the speed and quality of its product to those offered by others. A church cannot point to figures comparing the number of its adherents currently residing in

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<sup>207</sup> See, e.g., Witham, *supra* note 10, at 62; Robert J. Barro, Rachel M. McCleary, & Alexander McQuoid, *The Economics of Sainthood (A Preliminary Investigation)*, in *Oxford Handbook*, *supra* note 10, at 191.

<sup>208</sup> Witham, *supra* note 10, at 63 (quoting Hull & Bold, *supra* note 206).

<sup>209</sup> See, e.g., Ekelund et al., *Sacred Trust*, *supra* note 203, at 32-33; Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 148-49.

<sup>210</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 10, at 149.

Heaven to those of other faiths. Its primary means of ensuring the quality of the signals it sends about the faith will be through its representatives. Churches will understandably be jealous of governmental efforts to interfere with their ability to select, monitor, and maintain the quality of those representatives. Critics of the ministerial exception who champion the application of employment discrimination laws to the clergy and other ministerial employees, and think of doing so as only a marginal incursion on religion, may not fully appreciate the stakes involved on the religious side of the ledger, for religious “buyers” and “sellers” alike.

Of course, all these religious goods are purchased at a cost. The full price of religion includes donations to the church or others, the time committed to assisting or working in the church, and the foregoing of other opportunities, both religious and secular.<sup>211</sup> Cost considerations are largely beyond the scope of this Article. But a few words are necessary, because the costs of religious products, and the response of religious organizations to those costs, are relevant to certain aspects of religious competition, and to the nature and consistency of some claims about freedom of the church, especially in the modern era.

For those religious entities that are capable of diversification, the products offered may vary substantially in price.<sup>212</sup> Particularly in monopoly situations, the diversity of services and fees available, and the agency problems that arise the larger a church gets, can lead to rent-seeking by the church or segments within it. That rent-seeking may lead to increased consumer demand for alternatives and, depending on how effective the church monopoly is, increased competition, which in turn may lead to changes in that church’s behavior.<sup>213</sup>

Churches face competition and threats from a variety of sources. Those threats may be internal, stemming from the agency problems inherent in large enterprises.<sup>214</sup> They may involve free-

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<sup>211</sup> See, e.g., *id.* at 55-56; see also, e.g., Corry Azzi & Ronald G. Ehrenberg, *Household Allocation of Time and Church Attendance*, 83 J. Pol. Econ. 27 (1975).

<sup>212</sup> See generally Ekelund et al., *Sacred Trust*, *supra* note 203; Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17.

<sup>213</sup> See, e.g., Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at \_\_\_; Stark & Finke, *Acts of Faith*, *supra* note 203, at \_\_\_.

<sup>214</sup> See, e.g., Ekelund et al., *Sacred Trust*, *supra* note 203, at 17-59. As we saw

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riding church members, who consume goods without paying full price.<sup>215</sup> They may be external threats of competition from rival faiths.<sup>216</sup> They may involve secular goods that compete with the church for consumers; for example, the repeal of the Sunday blue laws appears to have led to a decline in church attendance as other activities became available.<sup>217</sup> They may also involve some of the key social services that churches provide or used to provide, as the government provides social services that threaten to “crowd out” the social services offered by the church.<sup>218</sup> Finally, the church may face regulatory pressures from government that drive up its costs or seek to suppress it altogether.<sup>219</sup>

Churches may respond to these pressures in several ways. One potential response is closely associated with changes in Christianity in the past two centuries or so, and with the so-called “secularization thesis,” which posits that the gradual secularization of society will ultimately kill off religion.<sup>220</sup> That is to lower the full price of religion for consumers or would-be consumers, by lowering the cost of particular religious products or mandatory donations. Reducing the tithe owed a church from ten percent to five percent would be an example. Indirect methods of lowering price are even more important. Churches can lessen the demands placed on members by religious doctrine by changing that doctrine, thus decreasing the tension between members’ religious

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in Part I, much of the Church reform movement that was such an essential part of the Investiture Controversy, and thus of the demand for *libertas ecclesiae*, was driven by desires to centralize the Catholic Church under the direction and control of the papacy.

<sup>215</sup> See, e.g., Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 26-27.

<sup>216</sup> See generally Finke & Starke, *Churching of America*, *supra* note 182; see also Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 105-60 (discussing the competitive aspects of the Protestant Reformation and the Catholic Counter-Reformation).

<sup>217</sup> See, e.g., Jonathan Gruber & Daniel Hungerman, *The Church versus the Mall: What Happens When Religion Faces Increased Secular Competition?*, 123 Q.J. Econ. 831 (2008).

<sup>218</sup> See, e.g., Daniel M. Hungerman, *Rethinking the Study of Religious Markets*, in *Oxford Handbook*, *supra* note 10, at 257, 266.

<sup>219</sup> See generally Gill, *Religious Liberty*, *supra* note 10.

<sup>220</sup> See, e.g., Stark & Finke, *Acts of Faith*, *supra* note 95, at 29; Witham, *supra* note 10, at 139-59.

obligations and their secular or worldly obligations and desires.<sup>221</sup>

Alternatively, and somewhat counter-intuitively, churches can respond to competition by *increasing* the price of the religious product they offer. This approach has been the focus of much of the work of the leading economist of religion Laurence Iannaccone.<sup>222</sup>

Here, the “cost” that is increased is not so much the direct financial contribution required to the church<sup>223</sup> as it is the strictness and distinctiveness of the demands made on believers by the church. In addition to demanding greater time commitments, a church may introduce new religious doctrines, or vigorously enforce old ones, that make it difficult to be both religious *and* secular, to assimilate to the larger society or move in and out of a faith community at will.<sup>224</sup>

We might call this the “*Ninotchka* strategy,” after a line from the classic comedy in which Greta Garbo, playing a Soviet official, announces that after the latest purges, “There are going to be fewer but better Russians.”<sup>225</sup> This approach may reduce the number of members of a church. But it also makes the church more distinctive in the product it offers, enhances its apparent value as a credence good by suggesting that any church that raises the cost of commitment must be offering something real and beneficial. It also discourages free riders, both by increasing the costs of membership and by making it easier to monitor back-sliders and opportunists within a smaller and more distinctive church community. In the long run, maintaining a distinctive and expensive product may do more to ensure the church’s survival

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<sup>221</sup> See, e.g., Starke & Finke, *Acts of Faith*, *supra* note 95, at 142-43, 151-54; Finke & Starke, *Churching of America*, *supra* note 182, at 235-83.

<sup>222</sup> See, e.g., *supra* note \_\_ (citing articles by Iannaccone).

<sup>223</sup> Although that approach arguably features in the “prosperity gospel” movement, see Bowler, *supra* note 205.

<sup>224</sup> This is one effect of the strict behavior, distinctive dress, and removal of children from public schooling at an early age that characterizes sects like the Old Order Amish or the Satmar Hasidim. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

<sup>225</sup> *Ninotchka* (Metro-Goldwyn-Mayer Studios, 1939). This was the approach advocated by the previous Pope, Benedict XVI. For discussion and debate on that point, see Joseph A. Komonchak, “*A smaller but purer Church?*,” dotCommonweal, Oct. 21, 2010, <http://www.commonwealmagazine.org/blog/?p=10517>.

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than going mainstream.<sup>226</sup>

These different approaches have been widely discussed in the economics of religion literature. They can be variously described as encompassing the difference between churches as “clubs” and churches as “firms,”<sup>227</sup> between “sects” and “churches,”<sup>228</sup> or between “high-tension” and “low-tension” religions.<sup>229</sup>

These phenomena, too, are more than a mere curiosity. They illuminate certain aspects of the general discussion of freedom of the church and attendant legal doctrines. In their important book, *The Churching of America, 1776-2005: Winners and Losers in Our Religious Economy*, Roger Finke and Rodney Starke argue that “to the degree that denominations [in the United States] rejected traditional doctrines and ceased to make serious demands on their followers, they ceased to prosper. The churching of America was accomplished by aggressive churches committed to vivid otherworldliness.”<sup>230</sup> By and large, the enforcement of generally applicable legal rules such as antidiscrimination laws to religious organizations, or the application of mainstreaming rules to individual religious practices, such as restrictions in other countries on wearing the *hijab* in public, make it difficult for churches to adopt the *Ninotchka* strategy. The enforcement of such laws lowers the costs of religious observance for observers. In doing so, however, it also reduces a religion’s ability to combat free-riding and to maintain its distinctiveness against both religious and secular competitors.

Whatever one ultimately concludes about the descriptive or normative value of the secularization thesis, it is clear that laws that affect a church’s decision to raise or lower the costs of religious observance interfere significantly with its doctrines and their development. More seriously still, to the extent that such laws generally favor reducing rather than raising the costs of

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<sup>226</sup> See generally Finke & Starke, *Churching of America*, *supra* note 182.

<sup>227</sup> See, e.g., McCleary, *supra* note 14, at 11-12; Laurence R. Iannaccone & Feler Bose, *Funding the Faiths: Toward a Theory of Religious Finance*, in *Oxford Handbook*, *supra* note 10, at 323.

<sup>228</sup> See, e.g., Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 278 n.45 (discussing the work of the sociologist of religion Ernst Troeltsch, who first described the “church”-“sect” distinction); Starke & Finke, *Acts of Faith*, *supra* note 95, at 142-46, 203-08, 259-76.

<sup>229</sup> See, e.g., Starke & Finke, *Acts of Faith*, *supra* note 95, at 142-43.

<sup>230</sup> Finke & Starke, *Churching of America*, *supra* note 182, at 1.



religion, and thus “mainstreaming” those churches, they may ultimately harm those churches’ prospects of long-term survival by reducing their distinctiveness and brand value. This makes it more apparent why churches are concerned about such laws, why they would insist so vehemently on maintaining doctrinal autonomy as against the force of generally applicable laws, and why those arguments are about more than just some arrogant desire to remain “above the law”<sup>231</sup>—are, indeed, potentially about the very survival of those churches in a competitive religious and secular marketplace.

By way of segue into the next section, it is worth noting that a particular church need not go all in, adopting either a cost-raising or a cost-lowering approach to religious doctrine in the face of competition. Instead, it can take *both* approaches at the same time, offering a diversified range of religious product lines that can satisfy varied consumer preferences for high- or low-tension religious doctrines and practices. An example from within the Catholic Church is the proliferation of different religious orders, in addition to the local clergy, that could cater to the “spiritual needs of the more intellectually inclined and to higher-income individuals,” as well as to the poor.<sup>232</sup> Multinational churches can diversify not only according to product lines, but also according to differing preferences in different local or regional markets.<sup>233</sup> So cost-based responses to competition for religious consumers are not limited to a decision either to raise or lower costs altogether. Like other large producers of goods, large religions can and do choose from among an array of options and offer a range of products. “In my Father’s house are many mansions.”<sup>234</sup>

Similarly, churches can adopt a range of doctrinal responses to regulatory regimes in different markets, adopting one or the other strategy as necessary, just as a multinational corporation may choose to respond to different labor laws in different countries by raising wages in one nation, offering low wages in another, and lobbying for special exemptions or subsidies in a third. On the one hand, as I argue below, this may help explain the resurgence of arguments for “freedom of the church” or institutional autonomy in the United States in recent years. On the other hand, the

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<sup>231</sup> See, e.g., Corbin, *supra* note 5; Griffin, *supra* note 5.

<sup>232</sup> Ekelund et al., *Sacred Trust*, *supra* note 203, at 21.

<sup>233</sup> See *id.* at 21-22.

<sup>234</sup> John 14:2 (KJV).

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willingness of churches to diversify in this way may raise questions about the sincerity of, or necessity for, arguments for freedom of the church or institutional autonomy. The willingness of a church to capitulate to regulatory demands in one place while insisting on autonomy in another, depending on the political calculus in each place, will provoke a cynical reaction and raise questions about the need for and value of such autonomy. Furthermore, to the extent that a church claims that freedom of the church is a universal, transcendent, or trans-historical principle of vital importance, its actions may belie that claim and seriously undercut its arguments for institutional autonomy.

### C. Churches as (Monopolistic or Competitive) Firms

The discussion so far in this Part has focused in substantial part on churches as vendors of religious “products” to individual “consumers” of religion. In reducing religious doctrines to products or product lines, and describing individuals as making religious commitments based on some form of rational cost-benefit analysis, it is perhaps most susceptible to Martin Marty’s charge that such an approach boils away religion’s essence, depriving it of “God or religion or spirituality,” “truth or beauty or goodness,” “faith or hope or love,” and so on.<sup>235</sup>

In this section, I focus on churches as *entities*. That is fitting for a Symposium whose subject is “freedom of *the church*”—whose very point is a move away from religious liberty as an individual matter to a consideration of the religious liberty of institutions. Taking religious institutions seriously *as institutions*, subject to the general constraints and incentives that drive all institutions, may teach us something about the causes, consequences, and limits of freedom of the church.

The explicitly institutional focus also blunts the force of the criticism that the economics of religion is too worldly an approach to an essentially otherworldly phenomenon. Few would argue that even if divine providence exists, human organizations are still frequently subject to human limitations. The miracle of the loaves and fishes is not an everyday event. Most of the time, religious organizations struggle to survive and thrive in a world of limited

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<sup>235</sup> Finke & Starke, *Churching of America*, *supra* note 182, at vii (quoting Martin E. Marty).

resources. Nor, even assuming the existence of revelations from beyond, do people march in lockstep, seized by the same revelation and the same understanding of how to implement it in the world. Most of the time, they must do their imperfect best to organize and coordinate their actions. We may therefore learn something about freedom of the church by considering how these organizations function as a general matter.

Here, there is an especially strong overlap with the kinds of issues that we discussed in our look at the history of freedom of the church in Part I. The source and subject of the most influential debates about freedom of the church, the Catholic Church, is a prototypical organization. The development of freedom of the church and the kinds of issues that surrounded it can be better understood when viewed through an organizationally focused economic lens.

The most useful work on this subject has been done by the economist Robert Ekelund and his colleagues.<sup>236</sup> Begin with the truism that “[a]s groups grow, it becomes increasingly difficult to coordinate activities—to make and pursue decisions.”<sup>237</sup> Most of the time, they respond to this dilemma by devoting more resources to the administration of the enterprise, with the usual result that “authority will become more centralized and policies will be standardized.”<sup>238</sup>

The medieval Church, around and following the time of the great Gregorian reforms and the Investiture Controversy, can be understood in light of this fact. The medieval Church closely resembles a modern form of organization: “the multidivisional or ‘M-form’ firm.”<sup>239</sup> Such firms are “characterized by a central

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<sup>236</sup> See Ekelund et al., *Sacred Trust*, *supra* note 203; Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17. Witham, *supra* note 10, at 82-85, provides a brief popularized overview. A similar but more sociologically oriented discussion is provided in Starke & Finke, *Acts of Faith*, *supra* note 95, ch. 6.

<sup>237</sup> Starke & Finke, *Acts of Faith*, *supra* note 95, at 162.

<sup>238</sup> *Id.* As we will see below, it is not fully accurate to say that policies will *inevitably* be standardized. A centralized organization may decide to take different approaches to policies in different regions and circumstances. Moreover, even centralized groups that pursue standardized policies will be subject to agency problems that result in diverse policies on the ground. Centralization and standardization are *responses* to agency problems, but they are hardly completely successful responses.

<sup>239</sup> Ekelund et al., *Sacred Trust*, *supra* note 203, at 20; *see generally id.*, ch. 2.

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office that controls overall financial allocations and conducts strategic, long-term planning, but allows divisions (usually regional) a high degree of autonomy in day-to-day operations.<sup>240</sup> Thinking of a church as a firm—of the problems to which this institutional formation is a response, of the ongoing problems to which it must respond, and of the incentives and institutional tendencies the firm structure encourages—helps us to understand some of the historical developments in the Catholic Church and their relationship to the concept of freedom of the church, and to understand its subsequent actions.

The development of a firm, and particularly an M-form firm, model of the Church was a natural response to the burdens of success. As the resources, geographic scope, and numbers of the Church grew,<sup>241</sup> it naturally became concerned about “managerial problems of inefficiency.”<sup>242</sup> The early Church had been much more decentralized, and the papacy lacked effective “central authority” over the Church’s far-flung units.<sup>243</sup> This weakness also rendered the Church vulnerable to interference by local secular authorities.<sup>244</sup>

Some decentralization was a good thing, allowing Church authorities to respond to local circumstances, particularly in an era in which communication between different Church outposts was difficult.<sup>245</sup> Too much decentralization, however, posed a threat to the Church as a going concern. “Given the make-up of the medieval Church,” Ekelund and his colleagues write, “there were ample opportunities for managerial rent seeking and X-inefficiency.”<sup>246</sup> Local priests or units of the Church could divert revenue from the Church itself to those local units or, in cases of

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<sup>240</sup> *Id.* (citing Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1975)).

<sup>241</sup> *See, e.g., id.* at 8, 19.

<sup>242</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 94.

<sup>243</sup> Ekelund et al., *Sacred Trust*, *supra* note 203, at 17.

<sup>244</sup> *See id.* at 17.

<sup>245</sup> *See id.* at 20.

<sup>246</sup> *Id.* at 30. “X-inefficiency” is the “[f]ailure of a firm or other organization to get the maximum possible output from the input it uses, or to produce its output with the minimum use of inputs. X-inefficiency implies that there is slack in the organization.” John Black, Nigar Hashimzade, & Gareth Myles, *Oxford Dictionary of Economics* 444 (4<sup>th</sup> ed. 2012).

simony for instance, directly to themselves.<sup>247</sup> They could also shirk their responsibilities to the Church.<sup>248</sup> Finally, local priests or Church bodies might ignore or revise religious doctrine, to ease their own jobs, to realize personal profit, or to respond to local competition, secular regulation, and other circumstances.

All of these actions risked “damaging the reputation of the institutional Church,”<sup>249</sup> and harming its financial health. Particularly given that the Church’s product was a credence good, local rent-seeking or general organizational slack presented a serious problem. Organizing along the lines of an M-form firm was a response to those concerns.<sup>250</sup> By emphasizing Church reform, reinforcing the central hierarchy of the papacy and stocking that “office” with a host of similarly reform-minded, expert administrators, and asserting the freedom of the Church as a bulwark against control by local governments, Gregory VII and his successors created a “general office” that was “principally concerned with strategic decisions involving planning, appraisal, and control [of the Church], including the allocation of resources among the (competing) operating divisions,” and which was overseen by “[a]n elite staff,” “attached to the general office,” which helped “secur[e] greater control over operating division behavior.”<sup>251</sup> In short, the governance model adopted by the medieval Church, its struggle for independence from local secular control, and its attempts to avoid rent-seeking or agency slack by lower local Church officials, all made sense. The rise of that governance model explains how and why internal Church reform and the movement for freedom of the church were so closely related.

As a firm, the Church faced two substantial incentives. On the one hand, it sought to establish and maintain an effective monopoly within the religious marketplace.<sup>252</sup> In stable monopoly

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<sup>247</sup> See, e.g., Ekelund et al., *Sacred Trust*, *supra* note 203, at 32-33 (discussing “proprietary simony”).

<sup>248</sup> See *id.* at 30 (characterizing this as an example of X-inefficiency in the Church).

<sup>249</sup> *Id.*

<sup>250</sup> See, e.g., Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 33.

<sup>251</sup> Ekelund et al., *Sacred Trust*, *supra* note 203, at 20; see also Stark & Finke, *Acts of Faith*, *supra* note 95, at 162; McCleary, *supra* note 14, at 24-25.

<sup>252</sup> Cf. Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 67 (discussing scholarship arguing that “there might be a tendency toward natural

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circumstances, one might expect that the Church would engage in rent-seeking, using its position to attempt to increase its revenue.<sup>253</sup> On the other, it would also wish to stave off competition, either by aggressively attempting to maintain its monopoly position against would-be market entrants<sup>254</sup> or, in situations of more genuine competition, attempting to provide a more attractive product than the one offered by its competitors.

This description of churches as entities or firms, whether monopolistic or competitive, provides useful explanatory and predictive power. It ties together a host of doctrinal and other behaviors by the Church from the medieval era forward, showing how its actions and doctrines across a range of issues and over a span of centuries proceeded from a common set of organizational incentives. It suggests something about why the Church would want to assert *libertas ecclesiae* as a governing principle, how it would use its status as an autonomous institution, and why those actions would necessarily run into limits. Here are some examples.

*Usury.* “The most overt economic doctrine of the medieval Church was its doctrine concerning usury—charging interest on a loan.”<sup>255</sup> Usury had long been condemned in Jewish and Christian thought, on the grounds that taking a profit on a loan to others is a sin. In 1139, the Second Lateran Council “denounced usury as a form of theft and required restitution from those who practiced the sinful act.”<sup>256</sup> But the Church was also a major lender and borrower. Ekelund and his colleagues argue that “Church officials frequently manipulated the usury doctrine to create or bolster the

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monopoly in religion”); McCleary, *supra* note 14, at 19 (predicting that “if no Smithian state exists to minimally regulate the religion market, then religions will tend toward a monopolistic market, not a pluralistic one”).

<sup>253</sup> See, e.g., Witham, *supra* note 10, at 84.

<sup>254</sup> In doing so, as we will see, the Church (or any similarly situated religious monopoly) would likely employ a variety of tools, including the use of doctrine, the use of force, and attempts to convince the secular regulatory authorities to support its monopoly status. The latter point, we shall see, is especially relevant to modern discussions of freedom of the church, and it is well covered in Gill, *Religious Liberty*, *supra* note 10.

<sup>255</sup> Robert B. Ekelund, Jr., Robert F. Hebert, & Robert D. Tollison, *The Political Economy of the Medieval Church*, in *Oxford Handbook*, *supra* note 10, at 305, 311.

<sup>256</sup> Ekelund, Hebert, & Tollison, *Sacred Trust*, *supra* note 203, at 115.

monopoly power of the Church.”<sup>257</sup> It “acted as a monopolist when it lent funds but as a monopsonist or single buyer when it was a borrower of funds.”<sup>258</sup> When it acted as a lender, it priced “loans *inside* the Church at market rates (or above), thus extracting rents.”<sup>259</sup> But when borrowing money, it rigorously enforced the usury doctrine, “thereby extracting rents by reducing its cost of credit on certain loans.”<sup>260</sup> This action obviously served pecuniary goals. But it served non-pecuniary goals as well, indirectly exploiting ambiguities in the doctrine “to augment the power of the papal monopoly, including its far-flung bureaucracy.”<sup>261</sup> It also aided the Church in its efforts to “secure more fighting personnel” in the Crusades, which themselves served monopolistic and anti-competitive purposes, by “dispens[ing] restitution for usurers who volunteered to fight the infidels.”<sup>262</sup>

*Simony.* The the sale of Church offices was a central concern of the Gregorian reforms and a major part of the bundle of issues that gave rise to Gregory VII’s aggressive arguments for freedom of the church. Here we must distinguish between “*professional* simony” and “*proprietary* simony.”<sup>263</sup> Professional simony consisted of payment for professional services by priests. This was a longstanding practice and made eminent economic sense, as it provided a revenue stream for local branches of the Church, some of which would go to the central Church, and because it “gave customers the wherewithal to reward efficient, and discourage inferior, clerical services.”<sup>264</sup> At the same time, professional simony gave rise to concerns about local rent-seeking and inefficiency that might harm the credence value of the religious product sold by the Church. The Church responded by permitting professional simony but regulating it. It took a “common carrier”-

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<sup>257</sup> *Id.* at 116. They add: “We do not assert that the medieval Church invented the doctrine of usury . . . for its own economic gain. Rather, we contend that in spite of its original (and perhaps lasting) concern for justice, the Church recognized, and acted on, the rent-seeking opportunities of the doctrine at a certain juncture in its history.” *Id.* at 117.

<sup>258</sup> *Id.* at 114-15.

<sup>259</sup> *Id.* at 117.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 121.

<sup>263</sup> *Id.* at 32 (citing Robert E. Rodes, Jr., *Ecclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation* 46 (1977)).

<sup>264</sup> *Id.*

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type approach that allowed the charging of fees for services, but limited the amount that could be charged and forbade priests from withholding their services to exact payment from customers.<sup>265</sup>

Proprietary simony consisted of “the purchase and sale of all manner of Church assets, including land, offices, relics, and consecrated vessels.”<sup>266</sup> As Ekelund et al. note, “[u]nlike professional simony, proprietary simony did not reward efficient behavior. Rather, it was a pure drain on Church resources, in short, theft of Church property.”<sup>267</sup> The permanent loss of Church property, and the diversion of its value into private clerical pockets, deprived the Church of revenue and undermined its ability to function as a seller of a credence good. Moreover, given the Church’s decentralized nature, this behavior was difficult to effectively monitor. Accordingly, proprietary simony was dealt with more harshly, and was a major target of the Gregorian reforms.<sup>268</sup>

*Nicolaitism.* Another major thrust of the Gregorian reforms was the movement to enforce priestly celibacy. As we saw earlier in this Part, celibacy was an important means of maintaining the value of the Church’s religious product as a credence good. The high costs involved in forswearing a life of earthly comforts, including connubial ones, signaled the value of the product. It is thus understandable nicolaitism was targeted for reform. The connection between celibacy and religious products as credence goods also emphasizes, supportively this time, the importance to a religion of maintaining control over the selection of its clergy and the behavioral rules that apply to it, despite the existence of antidiscrimination laws and other secular legal employment regimes. It thus reinforces the arguments for freedom of the church and for particular legal doctrines such as the ministerial exception.

Priestly celibacy served an additional function for the Church as a whole. The passage of Church property from individual clergy into the hands of their inheritors risked depriving the Church of its own property and revenues.<sup>269</sup> Legal conditions in medieval

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<sup>265</sup> *See id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *See id.* at 32-33.

<sup>269</sup> *See id.* at 33 (noting that “[d]uring the early Middle Ages, benefices were often hereditary and came to be ‘owned’ by families for long periods of time.”).



Europe made it difficult and costly to address this. Thus, “the Church found it expedient to legislate mandatory celibacy.”<sup>270</sup>

*Lay Investiture.* Similar imperatives and incentives were arguably at work in the central concern of the Investiture Controversy: the control over the selection of Church officials by the centralized papacy rather than by local secular officials. Its goal, again, was to “limit[ ] opportunistic behavior [by] downstream suppliers of its chief product—assurance of eternal salvation.”<sup>271</sup>

We saw in Part I that from a historical perspective, the Investiture Controversy, and the accompanying arguments for (and against) freedom of the Church, involved a broad struggle for power, loyalty, and resources among a variety of leaders and constituencies. But resistance to lay investiture, like resistance to secular control over the circumstances of ministerial employment today, also protected the Church as seller of a credence good. It guarded against having officials thrust on it who would weaken the value and credibility of the Church’s religious product. From this perspective, the Church was right to resist—although, as we will see, it hardly did so with total consistency.

*Auricular Confession.* Whether it is seeking continued loyalty or enhanced revenues, a religious entity will have strong incentives to respond to varied consumer resources and preferences. Individual oral confession between priest and penitent, or auricular confession, can be viewed from an economic perspective as serving this purpose.<sup>272</sup> Although private confession has always been a part of Church practice, it was not always the sole or even the dominant mode of airing and forgiving sin. For a substantial period of time, general public confession was common,<sup>273</sup> with

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 113.

<sup>272</sup> See, e.g., *id.* at 161; Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 33-34; Benito Arruñada, *Catholic Confession of Sins as Third-Party Moral Enforcement*, working paper, Universitat Pompeu Fabra, Barcelona, Spain (2004), <http://www.econ.upf.es/~arrunada>. For a historical overview, see, e.g., P. Biller, *Confession in the Middle Ages: Introduction*, in *Handling Sin: Confession in the Middle Ages 3* (P. Biller & A.J. Minnis eds., 1998); H.C. Lea, *A History of Auricular Confession and Indulgences in the Latin Church* (1968 reprint) (1896); T.N. Tentler, *Sin and Confession on the Eve of the Reformation* (1977).

<sup>273</sup> See Arruñada, *supra* note 272, at 13; Ekelund et al., *Sacred Trust*, *supra* note 203, at 157.

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private auricular confession only becoming truly dominant in the high Middle Ages<sup>274</sup> and firmly established with the Council of Trent in the mid-fourteenth century. Because such confessions were heard by local priests with an intimate knowledge of their parishioners, the priest would be well aware of “the income profile of each penitent and other pertinent characteristics regarding wealth and tastes.”<sup>275</sup> Penance could be closely tailored to the individual resources and demands of the penitent. The local nature of the parish structure made forum-shopping difficult and thus prevented “arbitrage and retrading,”<sup>276</sup> at least for the less wealthy. Finally, “the secrecy of the confessional precluded tariff schedules from being published.”<sup>277</sup> In short, auricular confession made it possible for the Church to respond to elastic consumer preferences—and made it easier to raise revenue and engage in price discrimination.<sup>278</sup>

*Purgatory and Indulgences.* The discussion of auricular confession dovetails with another set of innovations: the rise of the Catholic doctrine of purgatory and the growth of the market in indulgences.<sup>279</sup> Purgatory was a medieval innovation. From a theological perspective, purgatory gave “sinners a ‘second chance’ to prepare themselves for heaven.”<sup>280</sup> From an economic perspective, purgatory “essentially introduced a means of ‘deferred payment,’ which not only allowed atonement to be postponed beyond this life, but also allowed third parties to make payments on behalf of the deceased.”<sup>281</sup>

Purgatory formed part of a “system,” along with auricular confession and another innovation, the granting of indulgences.<sup>282</sup>

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<sup>274</sup> See Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 34.

<sup>275</sup> Ekelund et al., *Sacred Trust*, *supra* note 203, at 161.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> Cf. Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 34 (describing the finding of Arruñada, *supra* note 272, that “increases in the frequency of confession are positively correlated with increases in cash giving and in-kind service”).

<sup>279</sup> See generally Ekelund et al., *Sacred Trust*, *supra* note 203, at 152-61; Ekelund, Hebert, & Tollison, *supra* note 255, at 316-17; Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 116-18.

<sup>280</sup> Ekelund et al., *Sacred Trust*, *supra* note 203, at 154.

<sup>281</sup> *Id.* at 155.

<sup>282</sup> *Id.* at 153, 157.

Indulgences, whether general (as in the issuance of general indulgences to induce participation in the Crusades) or as payment for the remission of sin and the commutation of time in purgatory, served a number of purposes. Obviously, their use was a means of raising revenue directly. Other forms of indulgence did so indirectly, while priming the pump of local economies: for example, some indulgences were issued at no direct cost for pilgrims who visited Rome a certain number of times during a jubilee year.<sup>283</sup> Because indulgences were issued by the pope, they were also a means of *centralizing* revenue collection, in an age in which the expanding numbers of the clergy made it “increasingly difficult to monitor shirking and malfeasance at the local level.”<sup>284</sup> Finally, indulgences enabled price discrimination, with the Church issuing a variety of differential pricing systems depending on the wealth of the person seeking the indulgence.<sup>285</sup>

*Marriage.* Marriage was another product innovation that created opportunities for rent-seeking behavior.<sup>286</sup> Ekelund and his colleagues write that “over time the Church successfully captured the marriage market by implementing a twofold strategy. First, it linked regulatory compliance with eternal salvation; second, it varied its interpretations of what constituted a ‘valid’ marriage in accord with certain objectives.”<sup>287</sup> On the first point, by tying marriage to salvation the Church was gradually able to take over most of the marriage market, which previously had allowed a substantial number of secular marriages,<sup>288</sup> and thus to expand the sphere of its influence and authority.<sup>289</sup>

Second, by entering and ultimately capturing the market, the Church found a new revenue source in marriage fees, a kind of excise tax that was more manageable at the time given the difficulties involved in collecting head taxes.<sup>290</sup> And that income source was highly amenable to manipulation and rent-seeking. Incest laws, for instance, “varied widely over the early medieval

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<sup>283</sup> *Id.* at 158.

<sup>284</sup> *Id.* at 70.

<sup>285</sup> *Id.* at 161-62; *see also* Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 115-17.

<sup>286</sup> *See id.* at 118; *see also* Ekelund et al., *Sacred Trust*, *supra* note 203, ch. 5.

<sup>287</sup> *Id.* at 85.

<sup>288</sup> *See id.* at 87-88.

<sup>289</sup> *See id.* at 85.

<sup>290</sup> *See id.* at 89-90.

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period,”<sup>291</sup> expanding from a prohibition on marriage between first cousins to a prohibition extending to sixth cousins. “This served not only to increase Church control over the matrimonial process, but it also provided ample opportunity for rent extraction through dispensations and exemptions.”<sup>292</sup>

The possibility of expanding, contracting, or granting exemptions from strict entry barriers for marriage within the Church had several benefits for the Church. First, it allowed for the collection of fees for exemptions from the marriage laws,<sup>293</sup> including negotiations for large gifts from the wealthy.<sup>294</sup> Second, because litigation over marriage issues was streamed into the Church’s Consistory courts, it enhanced revenue through litigation fees going to the Church.<sup>295</sup> Third, in addition to price discrimination in the enforcement of (or exemption from) marriage laws based on the wealth of the individual, it also allowed for price discrimination between countries.<sup>296</sup> Finally, by exerting some measure of control over what constituted a valid marriage and who could or couldn’t inherit as the issue of a valid marriage, the Church was able to “effectively limit[ ] dynastic development that could have rivaled the power of the Church.”<sup>297</sup>

*Reformation and Counter-Reformation.* Most of the issues discussed above involved actions that enhanced the Church’s control and authority and made possible a good deal of revenue enhancement and rent-seeking. These all took place within a monopoly environment. The more powerful the monopoly and the more revenue the Church collected, however, the more likely it was that competition would emerge, and at some point might overcome the Church’s efforts to suppress it through excommunication and other means of control. As Ekelund, Hebert, and Tollison argue, “[I]f [a] religious monopoly overcharges, it

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<sup>291</sup> *Id.* at 91.

<sup>292</sup> *Id.*

<sup>293</sup> *See id.* at 95-96, including a table showing fees for church exemptions for consanguineous marriages.

<sup>294</sup> *See, e.g., id.* at 98 (discussing the marriage of William, Duke of Normandy to a distant cousin and his negotiations with the Church for permission to do so, which ultimately resulted in the construction by William and his cousin of major churches).

<sup>295</sup> *See id.* at 89-90, 99-100.

<sup>296</sup> *See id.* at 104-05.

<sup>297</sup> *Id.* at 97.

risks two forms of entry: (1) the common citizenry may choose other dispensers of religious services; and (2) the civil authorities may seek a different provider of local services.”<sup>298</sup>

Economic analysis thus helps explain the rise of the Protestant Reformation and the subsequent Catholic response, the Counter-Reformation.<sup>299</sup> This is wholly consistent with the conventional wisdom that the rise of Protestantism came in substantial part as a “protest” against a variety of expensive and allegedly corrupt Church practices, including the market in indulgences.<sup>300</sup> The result of that rent-seeking behavior, unsurprisingly, was the rise of competition through the offer of lower-cost options by other faiths.<sup>301</sup> “Suddenly, vast numbers of Catholics, including many of its priests and political patrons, were offered a variety of alternative ways to obtain the precious product of salvation.”<sup>302</sup> Given the desire of local rulers to capture the loyalty of their subjects and enhance their own power and control as against that of the Church, there were increasing incentives for secular rulers to support such movements.<sup>303</sup>

The Church attempted to respond to this competition through what became known as the Counter-Reformation, or what Ekelund, Hebert, and Tollison describe romantically as an “incumbent-firm reaction to market entry [by competitors].”<sup>304</sup> The Church took a number of economically predictable actions in response to the Protestant Reformation.<sup>305</sup> On the retail price side, many of the reforms launched by the Council of Trent “can readily be interpreted as attempts to lower the price, or increase the quality, of church services.”<sup>306</sup> Because of the possibility of “Tiebout-like competition,” where “people ‘vote with their feet’ in

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<sup>298</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 106-07.

<sup>299</sup> *See generally id.*, chs. 5, 6.

<sup>300</sup> The “corruption” of the services involved was as important as the expense, insofar as perceptions of priestly luxury and self-dealing would reduce the credence value of the Church’s products and lower the cost of competition by other churches and church leaders, many of whom were ascetics.

<sup>301</sup> *See, e.g.*, Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 119.

<sup>302</sup> Witham, *supra* note 10, at 85.

<sup>303</sup> *See, e.g.*, Gill, *Religious Liberty*, *supra* note 10, at 77.

<sup>304</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 135.

<sup>305</sup> *See id.* (“We find that the Roman Catholic Church responded to rival entry in a way predicted by economic theory.”).

<sup>306</sup> *Id.* at 140.

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response to local economic policies,”<sup>307</sup> Catholic competition with Protestantism was fiercest “in contiguous areas where a Catholic region abutted a Protestant one.”<sup>308</sup> The Church also responded to Protestant competition by taking measures to suppress its rivals or raise their costs, through military actions such as the Thirty Years’ War and suppressive actions such as the Inquisition.<sup>309</sup> The Church took measures to advertise its products and enhance their quality and credence—for example, by renewing efforts to enforce the rule of priestly celibacy—in order to spur consumer demand.<sup>310</sup> It also made some efforts at Church reform of the “wholesale” side of its operation.<sup>311</sup> For various reasons of institutional structure, however, including the closely held, “Roman-centered, Italian-dominated, papal monopoly” of the era, the members of which “were naturally eager to protect their [own] economic interests,”<sup>312</sup> efforts at wholesale reform were largely ineffective.<sup>313</sup>

Some of the examples I have canvassed in the past few pages run somewhat far afield from the issue of freedom of the church, at least at a superficial level, while others are closely related to the kinds of doctrinal issues and reforms that formed the core of the struggle over freedom of the church, and that can be seen in chastened form in contemporary debates over things like the ministerial exception. The economics of the Reformation and Counter-Reformation, in particular, may seem to be interesting as a historical matter but something of a departure from our core concerns. As the next section shows, however, even that broader discussion is highly relevant to freedom of the church and its modern doctrinal implications, for two reasons.

First, the existence of religious competition ultimately says a good deal about whether and when “freedom of the church” will be the least dangerous, the least susceptible to rent-seeking, and

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<sup>307</sup> *Id.* at 139; see also Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416 (1956).

<sup>308</sup> Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 143.

<sup>309</sup> See *id.* at 143-48.

<sup>310</sup> See *id.* at 148-49.

<sup>311</sup> See *id.* at 143-60. “Wholesale,” here, “refer[s] to the structure of internal transactions of the institutional church, such as dealings between bishops and lower clergy.” *Id.* at 135-36.

<sup>312</sup> *Id.* at 155.

<sup>313</sup> See *id.* at 158, 160.

the most acceptable. Second, as we have seen, one factor in inter-religious competition that may influence the conditions for and consequences of church autonomy is the involvement of secular regulatory authorities, such as the actions of secular powers throughout the religious wars and into the Peace of Westphalia.<sup>314</sup> It is to the regulatory question that I now turn.

D. Church Interaction with Secular Regulatory Authorities:  
Competition, Regulation, and the Shape of (Institutional)  
Religious Freedom

Much of our discussion so far has focused on economic analysis of religion and of churches—appropriately enough, for a Symposium on freedom of the church. But the word “freedom” is important as well, and it necessarily involves the regulatory environment in which freedom does or does not exist. Accordingly, in this final descriptive section, we turn from the church by itself to the relationship between church and *state*.

Like churches and their leaders, states and their leaders are also interest groups, capable of acting rationally in the service of self-interested goals.<sup>315</sup> We routinely ask of any regulatory regime why, and under what pressures, regulators and/or politicians would agree on some set of rules or legislation. If we use economic tools in doing so, we call that public choice theory: the economic study of political behavior.<sup>316</sup> We can and should ask the same thing about the regulatory regime of religious liberty, including its application to freedom of the church and its legal doctrinal offshoots.<sup>317</sup> In exploring that subject in this section, I draw

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<sup>314</sup> See, e.g., *id.* at 144.

<sup>315</sup> Like churches, of course, politicians may have a host of principled or public-regarding reasons for acting. As with my analysis of the economics of religion, the analysis of church-state relations that follows continues to emphasize “interests” over “ideas.” Gill, *Religious Liberty*, *supra* note 10, at 27; see also *id.* at 57.

<sup>316</sup> See, e.g., James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and its Normative Implications*, in 2 *The Theory of Public Choice* 11, 13 (James M. Buchanan & Robert D. Tollison eds., 1984).

<sup>317</sup> For examples in legal scholarship—again, relatively few of them, not all of which are entirely on point—see, e.g., Hylton, *supra* note 11; Robinson, *supra* note 11; Jill I. Goldenziel, *Sanctioning Faith: Religion, State, and U.S.-Cuban Relations*, 25 *J.L. & Pol.* 179 (2009); Bruce Yandle *et al.*, *Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation*, 2008 *U. Ill. L. Rev.* 1225;

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heavily on the work of the political scientist Anthony Gill, whose recent book, *The Political Origins of Religious Liberty*, is a useful and provocative guide to the subject.<sup>318</sup>

Gill's basic object is to "frame[ ] religious freedom as a regulatory issue" and "propose[ ] an economically rooted explanation for why politicians would [regulate or] deregulate the religious marketplace."<sup>319</sup> His starting assumption is that "interests" play a critical role in "securing legislation aimed at unburdening religious groups from onerous state regulations," or in securing legislation that imposes rather than relieves burdens on religious practice.<sup>320</sup> Proceeding from a set of fairly non-controversial axioms, Gill derives a set of propositions about the interests and motivations of both political and religious actors.<sup>321</sup> The interaction between them results in a set of predictions about the likely state of religious regulation or deregulation in particular political environments.

On one side of the ledger, political leaders considering whether to regulate or deregulate religious groups and practices<sup>322</sup> will take

Christopher L. Eisgruber, *Secularization, Religiosity, and the United States Constitution*, 13 *Ind. J. Global Legal Stud.* 445 (2006); Baradaran-Robison, *supra* note 11.

<sup>318</sup> See generally Gill, *Religious Liberty*, *supra* note 10; see also note 15, *supra* (citing other works by Gill). Portions of Stark & Finke, *Acts of Faith*, *supra* note 95, and Finke & Stark, *Churching of America*, *supra* note 182, are also highly useful to this discussion—especially the latter, which offers data and analysis on how religious competition played out in the relatively unregulated American religious marketplace.

<sup>319</sup> Gill, *Religion and Civil Liberties*, *supra* note 10, at 276.

<sup>320</sup> Gill, *Religious Liberty*, *supra* note 10, at 7.

<sup>321</sup> See *id.* at 231-33.

<sup>322</sup> Regulation may be direct or indirect; that is, it may involve generally applicable regulations that incidentally burden religious conduct, or it may involve regulations that are aimed at religious conduct. See *id.* at 9-18. Thus, the analysis here mostly elides the standard doctrinal difference between the two, see, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). To be sure, each form of law raises not only doctrinal questions of its own, but also questions of political economy. See Paul Horwitz, *Rethinking the Law, Not Abandoning it: A Comment on "Overlapping Jurisdictions,"* \_\_ *Faulkner L. Rev.* \_\_, \_\_ (forthcoming 2013) (discussing the ways in which the requirement that a law affecting religion be non-discriminatory increases the political costs of such



three primary factors into account: “their own political survival (i.e., ability to get reelected or stave off a coup), the need to raise government revenue, and the ability to grow the economy.”<sup>323</sup>

They also prefer to minimize both civil unrest and the costs of ruling.<sup>324</sup> The latter two goals can be achieved in several ways, but the optimal method is to seek the “ideological compliance of the population.”<sup>325</sup> At least where the dominant faith or faiths are likely to support the government’s goals and to counsel obedience to the state and civil peace, the politician will have an incentive to cooperate with the church.<sup>326</sup>

Of course, “churches are not only a source of ideological legitimation [for the rulers] but also can represent a source of rival authority.”<sup>327</sup> Leaders facing churches as potential policy opponents and competitors for popular affection will have some incentive to reduce those churches’ religious liberty. Or, as Hume recognized,<sup>328</sup> they might choose instead to “co-opt[ ] the support of a religious group with preferential legislation that directly benefits the church in question or restricts the activities of competitive denominations.”<sup>329</sup> The relative bargaining power of political leaders with religious groups will vary depending on several factors, including the existence and strength of political rivals, the level of religious homogeneity or pluralism, and the degree to which any one faith “commands hegemonic loyalty among the population.”<sup>330</sup>

On the other side, a religious group’s incentives depend on a similar set of circumstances.<sup>331</sup> Many churches “are market-share maximizers; they seek to spread their brand of spiritual message to as many followers as possible.”<sup>332</sup> Any or all of them may maintain a rhetorical commitment to freedom of conscience

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legislation, by creating larger affected constituencies and incentivizing them to cooperate to defeat the law).

<sup>323</sup> Gill, *Religious Liberty*, *supra* note 10, at 9; *see also id.* at 47-48.

<sup>324</sup> *See id.* at 47.

<sup>325</sup> *Id.* at 49.

<sup>326</sup> *See id.* at 49-50.

<sup>327</sup> *Id.* at 51.

<sup>328</sup> *See Hume*, *supra* note 168.

<sup>329</sup> Gill, *Religious Liberty*, *supra* note 10, at 51.

<sup>330</sup> *Id.* at 53.

<sup>331</sup> *See id.* at 8, 44-47.

<sup>332</sup> *Id.* at 44.

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regardless of one's faith;<sup>333</sup> indeed, those faiths and faith leaders may sincerely believe in freedom of conscience. In practice, however, their approach to laws affecting religion may differ depending on their position within the religious marketplace. Gill's propositions on this point are simple, clear, and plausible:

Hegemonic religions will prefer high levels of government regulation (i.e., restrictions on religious liberty) over religious minorities. Religious minorities will prefer laws favoring greater religious liberty. . . . In an environment where no single religion commands a majority market share, the preferences of each denomination will tend toward religious liberty.<sup>334</sup>

These propositions require little explanation. But two points deserve some further gloss. First, the goal of a relatively hegemonic religion is not necessarily to suppress other sects for its own sake, or because it believes those faiths to be not only false but perniciously false. Rather, its goal will be to reduce religious *competition*.

Second, the kind of regulation of minority faiths favored by the majority faith may not be the simple suppression of the minority's practices or organization. Quite commonly, it will consist of efforts to raise the costs of practice for that faith—for example, by supporting the passage of generally applicable laws that raise costs for minority faiths but, because its practices are consistent with the law, are costless the majority faith<sup>335</sup>—or to raise entry barriers for faiths that are new to that political jurisdiction. For example, the majority faith may “seek laws that require minority religions to gain the government's official permission to proselytize, restrict visas on foreign missionaries, impose zoning and . . . media

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<sup>333</sup> *See id.*

<sup>334</sup> *Id.* at 45, 46.

<sup>335</sup> An example might be a majority faith in a jurisdiction that practices abstention from alcohol and does not use alcohol in its religious practices, and thus happily supports that jurisdiction's prohibition on the sale of liquor. Or a majority religion that believes in the use of conventional medical care might support laws that ban “alternative” medical treatments or limit the ability to refuse conventional medical care, whether the unconventional treatments or refusals to accept conventional medical treatment are religiously motivated or not.

restrictions on alternative faiths, and so on.”<sup>336</sup> Or it might support laws that strongly protect the freedom of religious groups, but favor the imposition of strict standards before a group qualifies for legal recognition as a church—standards that the majority faith will naturally meet.<sup>337</sup>

Gill acknowledges the breadth of some of his propositions, and that this breadth is a potential weakness.<sup>338</sup> Given enough propositions and enough possible tradeoffs, his theory can conveniently explain everything, and thus nothing.<sup>339</sup> This is, of course, a familiar criticism of economic explanations of human conduct,<sup>340</sup> one that economists themselves recognize.<sup>341</sup> But he argues that the breadth of his approach is a strength as well as a weakness, allowing it to shed light on the conditions of religious liberty in “a wide array of political settings, both longitudinal and latitudinal.”<sup>342</sup>

Based on his evidence, as well as the examples discussed throughout this Part and elsewhere in the economics of religion literature,<sup>343</sup> I agree. Among other things, such an approach may offer a useful corrective to approaches that take seriously—perhaps too seriously—a set of purely intellectual positions taken

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<sup>336</sup> Gill, *Religious Liberty*, *supra* note 10, at 44.

<sup>337</sup> *See id.* at 14 (citing the Czech Republic’s law defining the standards for the legal recognition of churches).

<sup>338</sup> *See id.* at 53. Although his acknowledgment focuses on only one of the propositions about the political economy of religious liberty that he offers, I doubt he would quarrel that this criticism is likely to be made of any of his propositions.

<sup>339</sup> Cf. Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 Va. L. Rev. 1491, 1527 (2001) (“Typically an argument or approach is less, not more, valuable if more aspects of different problems can be defended or explained with it. At the limit, an argument that explains everything explains nothing. This is the root of the common complaint that law and economics work tends toward being ad hoc[.]”).

<sup>340</sup> *See generally* Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 Cardozo L. Rev. 351 (2001).

<sup>341</sup> *See, e.g.*, Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 Geo. L.J. 67, 69 n.3 (2002) (collecting examples).

<sup>342</sup> Gill, *Religious Liberty*, *supra* note 10, at 53; *see also id.* (“The specific nature of the policies and policy trade-offs will largely be determined by the historical context.”).

<sup>343</sup> *See, especially*, Finke & Stark, *Churching of America*, *supra* note 182.

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by politicians, religious groups and their leaders, and intellectuals themselves about religious liberty. This approach reminds us that interests matter as well as ideals, and that “when competing ideas [about religious liberty] exist in society, it is often political interests that tip the balance of the debate in one direction or another.”<sup>344</sup> An interest-based approach also arms us to evaluate the policy tradeoffs involved in different religious liberty regimes in different regions, depending on the degree of religious homogeneity or heterogeneity that exists in that area<sup>345</sup> and the extent of competition that the dominant church or churches face from new religious entrants.<sup>346</sup>

Gill marshals a great deal of historical and contemporary evidence suggesting that his model of the political conditions that enhance or impede religious liberty has genuine explanatory power across a range of geographical regions and political conditions. Both the evidence and its consistency with his model are relevant to the question of freedom of the church in several respects. They neither support nor refute the broader arguments for freedom of the church,<sup>347</sup> although they may undermine arguments

<sup>344</sup> Gill, *Religious Liberty*, *supra* note 10, at 8 (emphasis omitted).

<sup>345</sup> See, e.g., Paul Horwitz, *Of Football, “Footnote One,” and the Counter-Jurisdictional Establishment Clause: The Story of Santa Fe Independent School District v. Doe*, in *First Amendment Stories* 481, 500-10 (Richard W. Garnett & Andrew Koppelman eds., 2011) (discussing the problems of religious establishment and coercion in overwhelmingly religious homogeneous locales); Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in Adler v. Duval County*, 63 U. Miami L. Rev. 835, 881-92 (2009) (same).

<sup>346</sup> See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>347</sup> To be clear, I believe the economic account offered in this Part does offer some arguments for freedom of the church or religious institutional autonomy, or some set of legal doctrines consistent with it, such as the ministerial exception. In particular, if religion is a credence good whose viability depends on a church’s ability to certify the quality of its representatives and signal the degree of their commitment to its doctrines, then churches have excellent reasons to resist the imposition of generally applicable employment laws. To the extent that the broader society believes that religion is a positive good, see, e.g., Andrew Koppelman, *Defending American Religious Neutrality 2* (2012), that religious organizations enhance social welfare (by, for example, caring for the poor and sick), and that the law should not push churches down a

for (or against) freedom of the church that depend too much on theoretical exercises or romanticized versions of past or current events. But they do raise questions, and offer valuable suggestions, about the conditions in which freedom of the church is likely to be more or less viable—and more or less dangerous.

In broad terms, one may draw the following lessons from Gill's account. (1) Regardless of its broader principles, whether and how a religious entity asserts "freedom of the church" is likely to depend on whether it constitutes a religious majority or a religious minority in a particular region. (2) Again regardless of its broader principles, whether a church views institutional autonomy and religious freedom as goods that ought to apply to all faiths, or seeks to insulate itself from regulation while disadvantaging other faiths, is also likely to depend on its majority or minority status, as well as the nature of the competition it faces from other faiths. (3) Accordingly, religious institutional autonomy, and religious freedom in general, are more likely to flourish, and less likely to be accompanied by disturbing side-effects, under conditions of genuine religious pluralism and some form of non-establishment. Let me illustrate these conclusions using Gill's evidence, again taking the Catholic Church as the primary example.

As we saw in Part I, in *Dignitatis Humanae* the Church took a broad view of the importance of religious freedom for all persons and faiths, and made clear that religious freedom involves freedom of the church as well as individual freedom.<sup>348</sup> It did not make strong statements about religious establishment, and suggested on the whole that some form of establishment would be permissible. But it added that even under conditions in which "special civil recognition is given to one religious community in the constitutional order of society," "the right of all citizens and religious communities to religious freedom should be recognized

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mainstreaming path that may lead to their decline, *see generally* Finke & Stark, *Churching of America*, *supra* note 182, then society will have reasons to favor such doctrines as well. Arguments that the ministerial exception "mistakenly protect[s] religious institutions' religious freedom at the expense of their religious employees" may lack a full appreciation of the effects on churches of laws that undermine their credence value. Griffin, *Sins of Hosanna-Tabor*, *supra* note 5, at 4. They fail to weigh properly the costs of imposing employment discrimination laws on churches, which might serve religious employees in the short run but kill their employers in the long run.

<sup>348</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

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and made effective in practice,” and made clear that all citizens should be entitled to “equality . . . before the law.”<sup>349</sup>

This language, assertive of universal principles, suggests that the Church’s position on religious freedom would apply equally everywhere. Conversely, a more interest-based approach to questions of religious freedom “would lead us to expect variations in Catholic policy positions as determined by the Church’s market position” in particular countries.<sup>350</sup>

The evidence Gill amasses points more strongly to the latter position.<sup>351</sup> It suggests that, both before and after *Dignitatis Humanae*, the Church has sought to “cut[ ] the best deal it [can], country by country.”<sup>352</sup> In each case, the contours of its position are substantially determined by its majority or minority status, and by the nature of the competition it faces in the local religious marketplace.

Two regions recently emerging from relative political and religious stasis provide strong evidence on this point: Latin America and the former Soviet states. Catholicism long enjoyed a dominant position in Latin America. That position involved a mix of costs and benefits. It enjoyed privileged status and financial aid

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<sup>349</sup> *DH*, *supra* note 2, § 6.

<sup>350</sup> Gill, *Religious Liberty*, *supra* note 10, at 45.

<sup>351</sup> Russell Hittinger makes a similar point about pre-Vatican II Church relations with various states, arguing that between 1789 and the promulgation of *Dignitatis Humanae* “the Church was equipped on the one hand with philosophical and theological doctrines on the relationship between Church and the states (in the abstract), and on the other with an ad hoc diplomatic policy realized via concordats,” but “lacked a middle-level policy bringing together the speculative and diplomatic poles.” Hittinger, *supra* note 155, at 1037; *see also id.* at 1056 (“[A]fter 1789, the Church attempted to protect its liberties by cutting the best deal it could, country by country.”). Hittinger argues that *Dignitatis Humanae* “attempts to supply what had been missing for two centuries, namely a ‘middle level’ position that unifies principle and policy,” while cautioning that the document “is not a complete exercise in either the theory or the practice of Church-state relations.” *Id.* at 1039. Gill’s work confirms Hittinger’s broad point about pre-Vatican II practice, and places it in a useful framework of political interests. But his research also suggests that a good deal of inconsistency remains between principle and practice, and that it can be explained from the interest-based, rational choice perspective that he offers.

<sup>352</sup> *Id.* at 1056.

on the one hand. On the other, it accepted strict state-imposed limits on its behavior, centuries after the Investiture Controversy, such as monarchical rights of approval of clerics in the colonies, control over excommunication, and royal “veto power over papal bulls.”<sup>353</sup> During this period, the Church “struggled to gain more independence from state control, seeking its own preferred regulatory regime that enhanced its institutional autonomy—freedom of religion for Catholicism—while protecting its social position by limiting the freedom of non-Catholics.”<sup>354</sup>

With the rise of independent Latin American states, the Church was left to negotiate arrangements piecemeal, depending on the political circumstances that applied in each country. For the most part, it was able to retain its privileged status, both because of its monopoly position and because secular leaders saw political advantages in religious uniformity.<sup>355</sup> It also used the changes in political power to seek to renegotiate its deals, attempting to “retain exclusive dominion over the region while simultaneously securing institutional autonomy,” without losing access to continued state financial support.<sup>356</sup> At the same time, these states gradually muscled in on the Church’s resources and revenue streams, expropriating Church lands and assets and taking over profitable social functions such as marriage and funeral services and birth and death registries.<sup>357</sup>

Nevertheless, the Church maintained a strong position in many states well into the twentieth century,<sup>358</sup> with obvious glaring

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<sup>353</sup> Gill, *Religious Liberty*, *supra* note 10, at 119; *see generally id.* at 114-21.

<sup>354</sup> *Id.* at 115.

<sup>355</sup> *See id.* at 123-24. Gill quotes Juan Egaña, a nineteenth century Chilean politician, as saying that “[r]eligious uniformity is the most effective means of consolidating the tranquility of the great mass of the nation.” *Id.* at 124 (citation omitted) (emphasis omitted).

<sup>356</sup> *Id.* at 125. *See also id.* at 125-26, discussing the work of Rafael Lasso de la Vega, the Bishop of Mérida in nineteenth century Venezuela (“The primary concern of the Bishop . . . was to secure the recognition by the state that the exercise of the patronage should belong to the church. By opposing a “religion of state,” he hoped to bring about the abolition of state control over the Catholic church, not to establish liberty of worship. He expected the state to uphold the exclusiveness of the Catholic church without exercising any tuition over it.”) (quoting Mary Watters, *A History of the Church in Venezuela, 1810-1930* 83-84 (1933)).

<sup>357</sup> *See id.* at 128-32.

<sup>358</sup> *See id.* at 133.

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exceptions such as Mexico.<sup>359</sup> Where it could, the Church cooperated with despotic regimes to maintain its privileges and state subsidies while seeking to deny similar privileges to competing Protestant faiths, as it did in Peronist Argentina.<sup>360</sup> As Protestant competition grew, its efforts to restrain that competition grew apace, including efforts to restrict entry by foreign missionaries, deny broadcast licenses to Protestant churches and limit public assembly, and restrict property ownership by those churches.<sup>361</sup> As Gill argues elsewhere, political conditions and the degree of Protestant competition also dictated local Church policies on fundamental issues of human rights. Where competition was light, the Church was more likely to support despotic regimes; where it was heavy, the Church in that country was more likely to “take up a preferential option for the poor and, as a means of winning back credibility among the poor, to oppose military dictatorships.”<sup>362</sup>

The balance of political and religious power has changed in much of Latin America in the modern era. Both political liberalization and the rise of the Protestant population worked together to create more open and egalitarian religious liberty regimes.<sup>363</sup> The liberalization and universalization of religious liberty in Latin America coincided with the advent of post-Vatican

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<sup>359</sup> For a discussion of conditions in Mexico, see *id.* at 146-65.

<sup>360</sup> See *id.* at 134. As Gill notes, the Church ultimately opposed Perón and supported the military coup that toppled him. (Perhaps coincidentally, in the final years of his regime had been more inclined to take action against the Church.) The military junta that replaced him returned the favor by rigorously restricting the actions of competing Protestant groups. Ultimately, the close association between local Church officers and the anti-Peronist forces would damage the Church’s standing in Argentina. See *id.* at 134, 139.

<sup>361</sup> See *id.* at 139. In Colombia, “For the Catholic bishops’ part in helping to bring about a political truce between the Liberal and Conservative parties, the military government that took power in 1953 negotiated a concordat with the Vatican that effectively made Protestantism illegal in 75 percent of the nation’s territory.” *Id.* at 140.

<sup>362</sup> *Id.* at 141 n.41 (summarizing Gill, *supra* note 15). As Gill notes, the fall of liberation theology, although it surely had an ideational component, was also consistent with a broader trend that should be familiar to readers of this Article: the Vatican’s move to centralize its doctrines and operations and “bring[ ] the international Church under greater hierarchical control.” *Id.* at 161.

<sup>363</sup> See *id.* at 140-45.



II Catholic policies on religious liberty, although the discussion below of events in the former Soviet states suggests that this point should not be overstated. At the same time, and despite the universal statement that *Dignitatis Humanae* represents, local branches of the Church have not always behaved accordingly.<sup>364</sup>

In Argentina, the Church “encouraged politicians to enact tough restrictions on non-Catholic religions including onerous registration requirements that would make it nearly impossible for new and smaller evangelical groups to gain official status.”<sup>365</sup>

Protestants are still harassed in parts of Argentina, Chile, and Colombia, and “the willingness of public officials to respond is largely determined by the strength of the Catholic clergy.”<sup>366</sup>

Gill concludes that “[t]he trajectory is in the right direction.”<sup>367</sup> But it seems unlikely that changes in the Church’s own views on religious liberty are entitled to all the credit. Rather, it has more to do with changes in the Church’s competitive position and the rise in political liberalization in those countries, which gives the growing Protestant population more bargaining power and encourages all sides to share in the resulting growth in religious freedom. As Gill writes, “[R]eligious pluralism begets religious freedom, which in turn enhances the prospects for greater pluralism.”<sup>368</sup>

Recent events in the Russian and Baltic states follow something of the same trajectory, but with far less liberalization and a far more toxic combination of demographics and political interests. One difference, of course, is that the Catholic Church has been a minority faith in most of the region, and has acted accordingly.

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<sup>364</sup> See also Stark & Finke, *Acts of Faith*, *supra* note 95, at 179 (noting strong resistance to Vatican II by the local Catholic hierarchy in Spain and Portugal, and observing that “[t]he insulation of the national church in both nations was greatly facilitated by authoritarian governments with profound commitments to traditional Catholic piety and power to veto all appointments to bishop”).

<sup>365</sup> Gill, *Religious Liberty*, *supra* note 10, at 142 (citing Matthew Marostica, *Religion and Global Affairs: Religious Activism and Democracy in Latin America*, 18 SAIS Rev. 44, 48 (1998)).

<sup>366</sup> *Id.* at 145 n. 49.

<sup>367</sup> *Id.* at 145.

<sup>368</sup> *Id.* at 47; see also Mark Chaves & David E. Cann, *Regulation, Pluralism, and Religious Market Structure*, 4 *Rationality & Soc’y* 272, 288 (1990) (agreeing that the evidence suggests that “state subsidies and state regulation of religion clearly dampen the level of religious participation in a society,” but adding that additional sociological factors must also be considered).

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The majority church, the Russian Orthodox Church, has acted in ways that confirm, as if there were any doubt, that entrenchment of majority status and efforts to suppress religious competition are hardly uniquely Catholic behaviors.<sup>369</sup> But where the Catholic Church does enjoy majority status in parts of this region, it has mirrored that behavior, several decades after Vatican II.

Thus, in those regions where the Russian Orthodox Church formed the dominant faith, it sought to entrench itself, both by seeking exclusive financial support from the state and by attempting to suppress competition from other faiths, including evangelical Protestants and Muslims, largely by banning the operations of purportedly “foreign” religious organizations.<sup>370</sup> As a minority faith in Russia, the Catholic Church lobbied for greater religious liberty, but also pursued a second-best strategy of seeking recognition under existing law as a privileged “historic faith,” which would have protected the Church while still imposing restrictions on Protestant minorities.<sup>371</sup> In a somewhat more pluralistic state, Latvia, the situation is different. There, six faiths, including Catholicism, are given some benefits and are not required to register with the state, while smaller faiths are subject to greater restrictions.<sup>372</sup>

In Lithuania, where Catholicism is a majority faith, its strategy has been different. While the nation was an early leader in seeking new legal guarantees of religious liberty, and a Catholic official was involved in those efforts,<sup>373</sup> other “influential Catholics” in the country argued that the law ought to restrict the religious liberties of “unknown religious movements” as opposed to older and more established faiths.<sup>374</sup> By the time the religious freedom law passed in 1995, it “had been modified so many times as to

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<sup>369</sup> The Russian Orthodox Church’s behavior, during and after the Soviet years and well into the present, also confirms another proposition that has been plain since well before Adam Smith: majority churches that seek to survive by collaborating with and accommodating themselves to the ruling regime risk corruption in the process.

<sup>370</sup> See, e.g., Gill, *Religious Liberty*, *supra* note 10, at 208-09.

<sup>371</sup> See *id.* at 210 & n.42.

<sup>372</sup> See *id.* at 217-18. Interestingly for entrenchment and anti-competitive purposes, “[t]he law also stipulates that no splinter group (a second group within the same confession) may register.” *Id.* at 217.

<sup>373</sup> See *id.* at 219.

<sup>374</sup> *Id.* at 220.

render it unrecognizable.”<sup>375</sup> It establishes several “historical churches” with special privileges, among which “the Roman Catholic Church stands out as being the one confession that is more equal among equals.”<sup>376</sup> Its special status is confirmed and reinforced by a concordat signed between the Lithuanian parliament and the Vatican in 2000 that effectively grants the Church a local franchise in rendering a number of social services.<sup>377</sup> The treatment of non-established churches in Lithuania has mostly been good, without the suppression of competition that has been observed elsewhere, although a law passed in 2006 made real estate assets held by those churches taxable, as compared to the tax-exempt properties held by traditional churches.<sup>378</sup>

### E. Conclusion

The discussion in this part has ranged widely, and sometimes seemingly far afield of the core subject of freedom of the church, narrowly understood. As Part I of this Article shows, however, “freedom of the church” has never been confined to a simple rule of institutional autonomy or non-interference with central church functions. From Gelasius to Gregory VII to the present day, it has always been part of a suite of complex and interrelated issues, including doctrinal reform, the entrenchment of centralized power within the church itself, questions about the nature and scope of both institutional and individual religious liberty, and the balance of power, competition, and cooperation between church and state. Whether one supports or opposes the general concept of freedom of the church, one can hardly do it justice without a comprehensive and fairly unromantic look at all of these issues.<sup>379</sup>

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<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *See id.*

<sup>378</sup> *See id.* at 221-22.

<sup>379</sup> As Frederick Gedicks rightly remarks in his contribution to this Symposium, we might still understand freedom of the church, and the events that led to it, as a powerful and useful “myth.” *See generally* Gedicks, *supra* note 21. I have taken a similar position about the role of history in American constitutional law. *See* Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 62 *Alb. L. Rev.* 459 (1997). But myths have their limits. Even if they need not be strictly true, their power depends in part on achieving a sufficient degree of accuracy. The more inaccurate a myth proves to be, the more likely it is that it will leave embittered and cynical critics and

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To do that, we need a decent set of tools and enough clinical distance to use them properly. History provides such a tool. As this Part has shown, so does economics.

What this Part and its focus on the economics of religion suggests is that a purely principled, intellectual, or even intellectual-historical approach to freedom of the church, and religious freedom more generally, is insufficient. Interests and incentives matter too, whether for individuals or institutions and regardless of whether those institutions are religious or not. Individuals make choices about religious commitment for a variety of reasons, not least the obvious spiritual ones. But they are not immune from considerations of cost and benefit. Churches want to survive and thrive in a world of scarce resources, and act accordingly. Churches, as institutional actors, are aware of and interact with external forces, including both religious competitors and regulatory regimes—often according to principle, but sometimes inconsistently and rarely without any consideration of interests. As I conclude in the final Part, a full consideration of those motives, incentives, and interests, and a decent appreciation for how they have played out in the past and present, can tell us something about the value and dangers of freedom of the church, and about the circumstances in which it is likely to do the most good and the least harm.

### III. SOME TENTATIVE CONCLUSIONS ABOUT FREEDOM OF THE CHURCH, ESPECIALLY IN THE CONTEMPORARY UNITED STATES

The historical and economic accounts that I have offered in this Article lead to similar conclusions about freedom of the church. They do not tell us in strong terms whether we should favor “freedom of the church” or oppose it. But they do tell us some important things. They suggest something about the chastened nature of freedom of the church in the modern era. They tell us something about the legal, political, and demographic conditions under which we might be more or less concerned about

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apostates in its wake. Moreover, myths operate at a general level, and rarely answer specific questions; for that, one needs more. Finally, as this Part’s discussion of the inconsistency between *Dignitatis Humanae* and the Church’s actions on the ground suggests, those who invoke a powerful but simple myth will ultimately suffer a loss of support when the slippage between myth and reality becomes obvious. *See id.* at 508-09.

invocations of “freedom of the church.” Finally, albeit more tentatively still, they may tell us something about why claims for church autonomy have recently been advanced so urgently in the United States.

First, whatever “freedom of the church” means today, it is certainly a greatly reduced and chastened phenomenon. Neither churches, nor the concept of freedom of the church itself, are immune from the disenchantment, rationalization, and bureaucratization of law and society.<sup>380</sup> The kinds of things that a legal claim of “freedom of the church” or church autonomy cover in our present environment are a far cry from the kinds of claims that would once have been viewed as central to freedom of the church. That might be less true in a more homogenous religious and political environment; but it is *very* true in an environment of religious and political pluralism like ours.<sup>381</sup>

Claims of freedom of the church and its concomitant legal consequences in the modern United States thus hardly resemble the Gregorian goal of “[bringing] the world unreservedly into the sphere of the Church.”<sup>382</sup> Freedom of the church, in America at least, is now much closer to a simple claim to be left alone. Even that is overstated. Churches invoking institutional autonomy in the United States in fact seek only a limited degree of immunity from law’s operation, while accepting and even welcoming it in many

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<sup>380</sup> See generally Max Weber, *Science as a Vocation*, in *Sociological Writings* 276 (Wolf Heyerbrand ed., Hans A. Gerth & C. Wright Mills trans., 1994) (1919). For a useful recent discussion, see Yishai Blank, *The Reenchantment of Law*, 96 Cornell L. Rev. 633, 635-38 (2011). Religious institutions, too, can be modern bureaucracies, as Weber noted. See, e.g., 2 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 220-21 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Bedminster Press 1968) (1956). See also George H. Taylor, *Race, Religion, and Law: The Tension Between Spirit and its Institutionalization*, 6 U. Md. L.J. Race, Religion, Gender & Class 51, 59-62 (2006).

<sup>381</sup> I thus agree with Richard Schragger and Micah Schwartzman, who argue in their contribution to this Symposium that “freedom of the church must be reformulated—or translated—to account for the pluralism and fragmentation of religion in modern democratic states.” *Lost in Translation: A Dilemma for Freedom of the Church*, \_\_ J. Contemp. Legal Issues \_\_, \_\_ (2013). As they note, this point is widely acknowledged by champions of freedom of the church. I do not, however, share their conclusion that “freedom of the church is an idea whose time passed long ago.” *Id.* at \_\_.

<sup>382</sup> Tellenbach, *supra* note 39, at 154.

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areas.<sup>383</sup> They do not demand the reinstatement of benefit of the clergy, or treatment as full and equal sovereigns; rather, they ask—in court<sup>384</sup> and in regulatory filings with government agencies<sup>385</sup>—for exemptions from employment or insurance laws.

In short, whatever it may one have represented, freedom of church is now both dualist in nature and diminished in scope. Sweeping assertions by opponents of one of the doctrinal offshoots of freedom of the church, the ministerial exception, that churches here are demanding the right “to become a law unto themselves” are vastly overstated by any reasonable standard.<sup>386</sup> So too, however, are any attempts by the most ardent defenders of freedom of the church to draw too direct a line between Canossa and today. Today’s version of “freedom of the church” may be a descendant of yesterday’s version, but in roughly the same way that a chickadee is descended from a dinosaur. “Freedom of the church” in the modern United States is, in the end, simply not that big a deal, despite some of the claims of defenders and critics of the concept alike.

The second point follows from the first. Somewhat counter-intuitively, freedom of the church today is on a stronger footing precisely *because* it has become so chastened and reduced. It is more justifiable because it is so boxed in. In the United States, at least, assertions of freedom of the church do not represent an existential threat to the modern legal and political order or to the fundamentals of church-state relations.<sup>387</sup> In practice, they are

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<sup>383</sup> See, e.g., Reply Brief for Petitioner, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, No. 10-553, 2011 WL 3919718, at \*19-\*22 (Sept. 1, 2011) (discussing the “narrow category of cases” to which the ministerial exception applies and readily acknowledging many areas of law that should and will continue to apply to religious entities) [hereinafter *Reply Brief*].

<sup>384</sup> See, e.g., *id.*

<sup>385</sup> See, e.g., U.S. Conference of Catholic Bishops, General Counsel, *Rulemaking*, <http://www.usccb.org/about/general-counsel/rulemaking/> (collecting comments filed with government on proposed regulations regarding the contraceptive mandate and other issues).

<sup>386</sup> Griffin, *supra* note 5, at 1842.

<sup>387</sup> Conversely, it is a stretch to say that opposition to particular legal doctrines instantiating some chastened version of freedom of the church threatens “a revolution in relations between church and state,” *Reply Brief, supra* note 383, at \*1, or that negotiations over the precise contours of the contraceptive mandate represent a fundamental threat to American religious liberty. See, e.g.,

closer to a debate over the interpretation of the precise terms of the relational contract between church and state.<sup>388</sup> To be sure, that debate speaks to broader questions about our church-state settlement, and about the nature of both the state and mediating institutions such as the church.<sup>389</sup> It is an important debate. But it takes place on very different terms and with much lower stakes in modern America than it did in medieval Europe.

Even in this environment, there are still good reasons to champion some version of freedom of the church. The history canvassed in Part I suggests that it is premature—indeed, that it may *always* be premature<sup>390</sup>—to conclude that arguments for freedom of the church are just “religious nostalgia,” and that it has “almost nothing to do with our modern, post-Enlightenment, democratic society.”<sup>391</sup> We are a long way from the Middle Ages; but we are not that far from Bismarck’s *Kulturkampf*, or the expulsion of the Carthusian monks from their motherhouse in democratic, post-Enlightenment, early twentieth century France.<sup>392</sup> In the modern era, in which the government can argue that the Religion Clauses of the First Amendment supply “no basis” for a church’s right to control its relations with ministers, while conceding that freedom of association *might* shelter it from the operation of the employment laws,<sup>393</sup> freedom of the church is surely still relevant, even if it is less essential.

Our study of the economics of religion in Part II also suggests

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U.S. Conference of Catholic Bishops, Ad Hoc Committee for Religious Liberty *Our First, Most Cherished Liberty: A Statement on Religious Liberty* (April 6, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf>.

<sup>388</sup> Cf. Horwitz, *supra* note 322, at \_\_\_ (arguing that it is a mistake to treat advocates of the use of *shari’a* in the interpretation of Islamic marriage agreements in American courts as seeking to abandon the law altogether).

<sup>389</sup> See, e.g., Horwitz, *Defending (Religious) Institutionalism*, *supra* note 19, at

<sup>390</sup> In this, I agree with Zhou Enlai, who reportedly said in 1973, when asked about the effects of the French Revolution, that it was “too early to say.” See, e.g., David L. Faigman, *The Daubert Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science*, 46 U.C. Davis L. Rev. 893, 895 & n.4 (2013) (quoting Enlai and noting questions about the accuracy of the statement).

<sup>391</sup> Schragger & Schwartzman, *supra* note 5, at \_\_\_, \_\_.

<sup>392</sup> See, e.g., Brennan, *supra* note 115, at 30-31.

<sup>393</sup> See *Hosanna-Tabor*, 132 S. Ct. at 706 (emphasis added).

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that some version of freedom of the church, or religious institutional autonomy, still carries weight. If it suggests that churches are an interest group, it also reminds us that they face competition from other interest groups, who may engage in regulatory capture to the disadvantage of religious groups.<sup>394</sup> More broadly, it reminds us that one of the central facts of the religious marketplace is the idea that religion is a credence good. A primary field of competition between churches is the assurances they provide of the quality of religious goods and the trustworthiness of the seller. The legal regulation of fundamental questions involving such matters as church hiring and firing is thus no minor matter. It goes directly to the heart of a church's well-being—and possibly its survival.<sup>395</sup>

The economics of religion literature also tells us something about the optimal conditions for religious institutional autonomy: the conditions under which it is least likely to result in the kinds of overweening claims or social dangers that concern its opponents. Recall the core conclusion of Anthony Gill's economic analysis of religious liberty: "[R]eligious pluralism begets religious freedom, which in turn enhances the prospects for greater pluralism."<sup>396</sup> Remember Adam Smith's argument that "[t]he interested and active zeal of religious teachers can be dangerous and troublesome only where there is, either but one sect tolerated in the society, or where the whole of a large society is divided into two or three great sects."<sup>397</sup> And consider Roger Finke and Rodney Starke's conclusion, after an extensive examination of American religious history, that the rise of disestablishment and free exercise of religion, by encouraging a competitive religious marketplace, contributed to "the churching of America."<sup>398</sup> Indeed, Catholicism

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<sup>394</sup> See, e.g., Jo Becker, *The Other Power in the West Wing*, N.Y. Times, Sept. 1, 2012, at A1 (discussing the efforts of Valerie Jarrett, a powerful advisor to President Obama, to resist church demands for broader exemptions from the contraceptive mandate, in part because doing so "would pit the president against a crucial constituency, women's groups, who saw the coverage as basic preventive care").

<sup>395</sup> See generally Finke & Stark, *Churching of America*, *supra* note 182.

<sup>396</sup> Gill, *Religious Liberty*, *supra* note 10, at 47.

<sup>397</sup> Smith, *supra* note 165, at \_\_\_.

<sup>398</sup> Finke & Stark, *Churching of America*, *supra* note 182, at 1, 3. *But see* Daniel V.A. Olson, *Religious Pluralism and US Church Membership: A Reassessment*, 60 *Sociology of Religion* 149 (1999) (critiquing Finke and Stark's argument).



itself flourished in the United States precisely because it did not and could not achieve what Gregory VII wanted for Europe. It was forced to become “an extremely effective and competitive religious firm when forced to confront a free market religious economy.”<sup>399</sup>

This suggests that arguments for freedom of the church or its correlates are ultimately strengthened by a strong regime of non-establishment. Non-establishment rules guard against a variety of potential risks to both church and state that are posed by the possibility of regulatory capture of government by a church (and vice versa)—risks that are evident in the events of the Investiture Controversy itself. They provide important safeguards against the kinds of efforts to suppress competition and engage in rent-seeking that generally accompany religious homogeneity. They strengthen individual churches by encouraging and facilitating competition, which in turn prevents political and regulatory overreach by any one church. And, both through the competitive mechanisms of the religious marketplace and by imposing limits on government sponsorship of religion, they ward off the stultification and co-optation that may result from religious monopoly or government sponsorship. Some modern champions of freedom of the church have argued that in theory, greater government endorsement of religion is consistent with freedom of the church.<sup>400</sup> From a practical perspective, however, they would be wiser to think of strong non-establishment rules as a positive good for freedom of the church.

Finally, and more speculatively, this Article offers some insight on why freedom of the church has become an increasingly prominent part of recent debates about religious freedom. With changes in Establishment Clause doctrine allowing greater access to public funding for religious institutions that provide social services,<sup>401</sup> and the corresponding rise in government support of faith-based services,<sup>402</sup> religious organizations have become

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<sup>399</sup> *Id.* at 117. See also Rodney Stark, *Do Catholic Societies Really Exist?*, 4 *Rationality & Soc’y* 261 (1992) (arguing that the intensity of religious commitment among Catholics is inversely correlated to their percentage of the population).

<sup>400</sup> See, e.g., Smith, *Freedom of the Church*, *supra* note 1;

<sup>401</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>402</sup> See, e.g., Stanley W. Carlson-Thies, *Faith-Based Initiative 2.0: The Bush*

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increasingly important competitors for public funding in the social services arena. Social services have long been a primary avenue by which churches provide goods to current or potential members.<sup>403</sup> At the same time, churches are always at risk of being crowded out of this part of the religious marketplace by the state itself, which now provides many of the social services that used to be supplied by churches.<sup>404</sup> Moreover, churches' acceptance of government support for the provision of social services often comes with substantial regulatory strings attached,<sup>405</sup> creating a tradeoff between the benefits they enjoy from funding and the effects that conditional funding may have on their distinctive religious product.<sup>406</sup>

Viewed in this light, it is worth considering whether the recent revival of arguments for freedom of the church might represent a form of rent-seeking by churches in response to contemporary financial and regulatory conditions in the United States. When equal access by churches to government funding of social services is combined with arguments for institutional autonomy and/or regulatory exemptions or immunity, the result is decidedly advantageous for churches. It allows churches to enhance both their status and their revenue base by providing social services while being paid by the state to do so. At the same time, it allows them to assert immunity from any regulatory conditions connected

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*Faith-Based and Community Initiative*, 32 Harv. L.J. & Pub. Pol'y 931, 931-33, 936-37 (2009) (discussing the growth of such initiatives, dating back to the Clinton administration and continuing through the present).

<sup>403</sup> See, e.g., Witham, *supra* note 10, at 189-90; Finke & Starke, *Churching of America*, *supra* note 182, at 138-39, 155; Ekelund, Hebert, & Tollison, *Marketplace*, *supra* note 17, at 30.

<sup>404</sup> See, e.g., Hungerman, *supra* note 218, at 266 ("In some cases government provision of goods and services (such as services for the poor) may substitute or 'crowd out' the role of religious groups in local communities").

<sup>405</sup> See, e.g., Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1 (2005); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151 (2003); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229 (2003).

<sup>406</sup> Even with respect to *privately* funded social services provided by churches, both their coffers and their consciences are likely to be burdened by the imposition of new regulatory requirements, as the continuing debate over the contraceptive mandate suggests.

to those public funds. Similarly, in the case of privately funded social services provided by churches, it gives them a competitive advantage over other social services providers, by allowing them to avoid the costs involved in providing full health insurance coverage or complying with employment discrimination laws.

I doubt that this is the only reason, or even the primary reason, why freedom of the church has become a hot topic of late. But the possibility that it is *a* motivating factor ought to spur some reflection on the part of its champions. They should at least think hard about just how far freedom of the church should extend where funding with strings is involved.

That is a somewhat grim note on which to end the discussion. I emphasize that I continue to believe that freedom of the church is an important topic, and one that has much to recommend it. I believe its critics treat it too harshly. But it certainly deserves a tougher look from its friends.<sup>407</sup>

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<sup>407</sup> Cf. *Miller's Crossing* (20<sup>th</sup> Century Fox 1990) ("My chin's hanging out right next to yours. I'd worry a lot less if I thought you were worrying enough.").