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Church, State, and the Practice of Love

Richard W. Garnett¹

“God is love.”² In his first encyclical letter, *Deus caritas est*, Pope Benedict XVI speaks movingly of “the love which God lavishes upon us and which we in turn must share with others.”³ This love, he proposes, is the key to the “heart of the Christian faith,” namely, “the Christian image of God and the resulting image of mankind and its destiny.”⁴ That is, that “God is love” is not only the truth about God, it also carries and illuminates the truth about us.

This love, Benedict explains, is also the essence of the Church. The Church, the Pope explains, is a “community of love,” a community whose “entire activity . . . is an expression of a love that seeks the integral good of man[; that] seeks his evangelization through Word and Sacrament[; and that] seeks to promote man in the various arenas of life and human activity.”⁵ Accordingly, he explores in his encyclical letter not only the “love which God mysteriously and gratuitously offers to man,”⁶ but also, and relatedly, the “ecclesial exercise”⁷ and “organized practice”⁸ of love, by and through the Church. And, he reflects on the relationship between this

¹ Lilly Endowment Associate Professor of Law, University of Notre Dame. This paper was presented at the First Annual Scarpa Conference, “From John Paul II to Benedict XVI: Continuing the Re-Evangelization of Law, Politics, and Culture,” held on September 15, 2006 at the Villanova University School of Law. I am honored and grateful for the invitation to participate in the Conference, and to Professor Patrick Brennan, the John F. Scarpa Chair in Catholic Legal Studies, for his work, example, and friendship. I appreciate the thoughtful comments and suggestions received from Robert Miller, Fr. Robert Araujo, John Breen, Paolo Carozza, Nicole Garnett, Rob Vischer, Michael Scaperlanda, Patrick Brennan, Mark Sargent, and Amy Uelmen.

² 1 John 4:16.

³ *Deus caritas est* ¶ 1 (2006). The encyclical’s theme came, apparently, as a surprise to some observers. See, e.g., Ian Fisher, “Benedict’s First Encyclical Shuns Strictures of Orthodoxy,” N.Y. TIMES, Jan. 26, 2006, at ____ (noting that *Deus caritas est* presents “Roman Catholicism’s potential for good rather than imposing firm, potentially divisive rules for orthodoxy”). Such obtuse reporting about things Catholic is, unfortunately, not uncommon, even in our best newspapers. See, e.g., Ian Fisher, “A Public End for an Extraordinary Papacy,” N.Y. TIMES, Apr. 4, 2005, at ____ (describing the funeral for Pope John Paul II and noting that “[t]ucked under his left arm was the silver staff, called the crow’s ear, that he had carried in public”).

⁴ *Deus caritas est* ¶ 1.

⁵ *Id.* at ¶ 19.

⁶ *Id.* at ¶ 1.

⁷ *Ibid.*

⁸ *Id.* at ¶ 24.

practice, on the one hand, and the Church's "commitment to the just ordering of the State and society," on the other.⁹ What does it mean, the Pope asks, for church-state relations, for the public lives of Christians, and for religious freedom under law, that charity "must animate the entire lives of the faithful and therefore also their political activity" and that the Church's practice of love and contributions to justice are and must be "distinctive[]"?"¹⁰

This paper considers, among other things, the constraints and responsibilities that a meaningful commitment to religious freedom imposes on governments. It is animated by Pope Benedict's claims, in *Deus caritas est* and elsewhere, about both the Church and the state. In this letter, the Pope shares his thoughts and teaching on Who God is and on what it means for us – and for the Church – that He is Love. This is, again, the truth about God. But it is also the key to understanding the nature and vocation of persons and of the Church. What's more, it has important implications for the inescapably complicated nexus of church-state relations in our constitutional order.

The specific goal for this paper is to draw from *Deus caritas est* some insight into what is a fundamental and – at present – the most pressing challenge in church-state law, namely, the preservation of the Church's moral and legal right to govern herself in accord with her own norms and in response to her own calling.¹¹ In constitutional-law circles, this right is often discussed in terms of churches' or religious groups' "autonomy."¹² While it is settled that churches enjoy constitutionally protected freedoms to govern themselves and arrange their internal affairs in accord with religious teachings and authority, these freedoms' scope and theoretical justification

⁹ *Id.* at ¶¶ 20, 29.

¹⁰ *Id.* at ¶¶ 29, 34.

¹¹ *See id.* ("[R]eligious communities rightfully claim freedom in order that they may govern themselves according to their own norms[.]"); *Gaudium et spes* ¶ 76 ("[I]n their proper spheres, the political community and the Church are mutually independent and self-governing."). Not long ago, as part of a four-part series on the ways in which government accommodates religious entities by exempting them from otherwise applicable laws, the *New York Times* carried a lengthy story focusing on church-autonomy questions. Diana B. Henriquez, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 6, 2006, at

¹² *See, e.g.,* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake* (working paper on file with author); Mark E. Chopko & Michael F. Moses, *Freedom To Be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J. L. & PUB. POL'Y 387 (2005); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

remain unclear and contested. Considering also the increasingly prominent conversation, within faith communities and also in the broader public square, about the task of maintaining, or retrieving, the religious character of religiously affiliated universities, schools, hospitals, and social-service agencies, the Pope's letter on love is as timely as its central theme is timeless.

It is the teaching of the Church that the right to religious freedom is rooted in the dignity of the human person and protects the individual conscience from coercion in matters of religious belief.¹³ This freedom, the Church claims, "has its foundation not in the subjective disposition of the person, but in his very nature."¹⁴ That is, religious freedom is not a function of what we want or prefer, but of who and what we are and what we are for. It is a truth about who we are that we are, by nature, "social."¹⁵ We are relational; we flourish in community. From our social nature, and also from the nature of religion itself, the Church contends it follows that the "freedom or immunity from coercion in matters religious which is the endowment of persons as individuals is also to be recognized as their right when they act in community."¹⁶ And so, "[p]rovided the just demands of public order are observed, religious communities rightfully claim freedom in order that they may govern themselves according to their own norms."¹⁷ Finally, the Church claims for herself "that full measure of freedom which her care for the salvation of men requires."¹⁸ Because of her mission, and because of her "suprapolitical sacredness,"¹⁹ the Church demands recognition by the state, and treatment under law, as more than a group, aggregation, or association of free, individual believers.²⁰

¹³ See *Dignitatis humanae* ¶ 2 ("The right to religious freedom has its foundation in the very dignity of the human person[.]")

¹⁴ *Ibid.*

¹⁵ *Id.* at ¶ 4.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Id.* at ¶ 13. See also *ibid* ("In human society and in the face of government the Church claims freedom for herself in her character as a spiritual authority, established by Christ the Lord, upon which there rests, by divine mandate, the duty of going out into the whole world and preaching the Gospel to every creature.").

¹⁹ JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 203 (1960).

²⁰ See Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 BOSTON COLLEGE L. REV. 771, 801 n. 147 (2001) (noting that it would be a "mistake to reduce the Church to a mediating institution with a message, or a 'voluntary association with a cause'" (quoting George Weigel, *Papacy and Power*, FIRST THINGS, Feb. 2001, at 18). Cf., Ira C. Lupu and Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 51 (2002) (noting that "[t]he task of any overarching theory of the constitutional status of religious entities is to identify and

These are, to be sure, sweeping and controversial claims. Still, many of them are consonant with American constitutional law, history, and tradition. After all, as President Clinton once put it, “religious freedom is literally our first freedom.”²¹ The freedom of religion, it has been argued powerfully, was central to our Founders’ vision for America.²² The Framers did not all agree about what, precisely, the “freedom of religion” meant, but they all knew that it mattered. The same is true today. Although, as Noah Feldman has observed, the vast majority of Americans profess to believe in God and cherish religious liberty, “no question divides Americans more fundamentally than that of the relation between religion and government.”²³ *Deus caritas est* speaks to this question, and maybe in a way that can begin to bridge this divide. And so, what does our new Pope’s work and thinking, about the future and present state of the Church and her organized practice of love, suggest about the appropriate content and vulnerable state of the rights and independence of religious groups – and of the freedom of the Church?²⁴

I.

For the most part, there were few surprises in the press coverage of the reactions to the election of Joseph Cardinal Ratzinger to succeed Pope John Paul II. The usual suspects from the standard camps were reported,

elaborate the reasons, if any, that justify treatment of religious enterprises different from secular organizations and from religious believers”).

²¹ President William Jefferson Clinton, *Religious Liberty in America* (July 12, 1995). See also, e.g., THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 *CARDOZO L. REV.* 1243 (2000).

²² See generally, e.g., JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* (2000); JOHN T. NOONAN, *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* (1998).

²³ NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM – AND WHAT WE SHOULD DO ABOUT IT* 5 (2005).

²⁴ For more on the “freedom of the Church,” see, e.g., Richard W. Garnett, *The Freedom of the Church*, 4 *J. CATH. SOC. THOUGHT* 59 (2006). In brief, and in John Courtney Murray’s words, the “freedom of the Church” refers both to her “freedom as a spiritual authority” to carry out her “divine commission . . . to teach, to rule, and to sanctify” and to the freedom of the Christian people “to live within her fold an integral supernatural life,” a life with an “inherent suprapolitical dignity” that transcends the goals and powers of the state and its temporal ends. JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 201, 203-04 (1988).

predictably, to be delighted, nervous, or “petrified.”²⁵ For example, *Washington Post* columnist E.J. Dionne worried that “Pope Benedict’s vision of the Church is that it should comprise a tough band of orthodox believers who confront modernity and uphold the truths the Church teaches, without any hesitations.”²⁶

Much of the post-election commentary involved sound-bite accounts, in ominous tones, of Ratzinger’s work with the Congregation for the Doctrine of the Faith and superficial speculations about his election’s implications for the various hot-button debates that so many in the media imagine to be at the heart of the Church’s life and teaching. Some of it, however, latched onto several of Benedict’s past statements suggesting that the Church in the future will be “small,” but perhaps more faithful to the Gospel.²⁷ These and similar reflections suggested to some that the new Pope wants “a more fervent, orthodox, evangelical church – even if it drives people away.”²⁸ “If that means a smaller Church,” Dionne reported, “with squishy doubters or dissenters left by the wayside, so be it.”²⁹ Many wondered, would the Church under Benedict be more a “remnant” than a “big tent”?³⁰ Others had no doubt: The Pope’s goal, warned Andrew Sullivan, is “a smaller, leaner, rump church, dominated by ultra-conservative lay groups such as *Opus Dei*.”³¹ A Pope who prefers a “leaner, smaller, purer church,” Professor Scott Appleby noted,³² might well welcome the withering, or “evangelical pruning,”³³ of the many Catholic

²⁵ Andrew Sullivan, Comment, *Benedict could pour petrol on America’s cultural fires*, THE SUNDAY TIMES, at ____ (April 24, 2005).

²⁶ E.J. Dionne, *Benedictus*, THE NEW REPUBLIC, May 2, 2005, at ____.

²⁷ JOSEPH CARDINAL RATZINGER, THE SALT OF THE EARTH: THE CHURCH AT THE END OF THE MILLENNIUM 256 (1997) (“I had foreseen then . . . that the Church would become small, that one day she would become a Church comprising a small minority of society and that she could then no longer continue with the large institutions and organizations that she has but would have to organize herself on a more modest scale.”). See also John Allen, *The Vatican’s Enforcer: A Profile of Cardinal Joseph Ratzinger*, NAT’L CATH. REP., April 16, 1999, at ____ (“Ratzinger has often suggested that Christianity may need to become smaller and less culturally significant in order to remain faithful.”).

²⁸ Peter J. Boyer, *A Hard Faith: How the New Pope and His Predecessor Redefined Vatican II*, THE NEW YORKER ____ (May 16, 2005). See also Ian Fisher, *Benedict XVI and the Church that May Shrink. Or Not*, N.Y. TIMES, May 29, 2005, at ____.

²⁹ Dionne, *Benedictus*, *supra* note ____.

³⁰ “Big Tent v. Remnant,” Open Book blog (April 20, 2005) (available at: http://amywelborn.typepad.com/openbook/2005/04/big_tent_v_remn.html).

³¹ Sullivan, Comment, *supra* note ____.

³² Online Extra, “A Leaner, Smaller, Purer Church?,” BusinessWeek Online (May 2, 2005).

³³ Scott Jaschik, *Evangelical Pruning” Ahead?*, Inside Higher Ed. (Nov. 3, 2005) (quoting remarks by Archbishop Michael Miller, Secretary of the Congregation for

institutions – schools, hospitals, universities, *etc.* – whose distinctively Catholic identity has dissipated.

Much of this commentary now appears to have misunderstood or mischaracterized Cardinal Ratzinger's point, predictions, and hopes. If we want to understand or think usefully about the Pope's work and thought, and about what it means for religious freedom, it makes sense to identify and consider more carefully what he has said about the Church's nature, mission, state, and future.

In a 2003 interview, Cardinal Ratzinger was asked about Pope John Paul II's often-expressed hope for a "new springtime for the Church." As he had before,³⁴ Ratzinger indicated both his admiration for the Pope's hopeful vision and his own hesitation about embracing it. John Paul traveled the world, spoke to and inspired millions, and proclaimed time and again the imminence of sweeping, transforming renewal. Ratzinger, however, voiced his doubts that "we will have in a near time buses of conversions, that all peoples of the world will be converted to Catholicism. This is not the way of God. The essential things in history begin always with the small, more convinced communities. . . . This is springtime – a new life in very convinced persons with joy of the faith."³⁵

These thoughts echo a theme that was explored more deeply in Cardinal Ratzinger's 1996 book, *The Salt of the Earth: The Church at the End of the Millennium*. "[P]erhaps," he wondered, "the time has come to say farewell to the idea of traditional Catholic cultures." "Maybe," he suggested, "we are facing a new and different kind of epoch in the Church's history, where Christianity will again be characterized more by the mustard seed, where it will exist in small, seemingly insignificant groups that

Catholic Education, noting the Pope's past suggestions that "it might be better for the Church not to expend its resources trying to preserve institutions if their Catholic identity has been seriously compromised").

³⁴ See, e.g., RATZINGER, *supra* note ___, at 16 ("[T]here are no mass conversions to Christianity, no reversal of the historical paradigm, no about face."), 121 ("The historical hour is not turning around, nor is this star becoming compact again, as it were, or returning to its accustomed size and luminosity."), 148 (expressing reservations about the significance of the "mass demonstrations of Catholicism" that accompanied John Paul II's visits to the United States), 237 ("[T]he Pope does indeed cherish a great expectation that the millennium of divisions will be followed by a millennium of unifications."), 238 ("The Pope's untiring activity comes precisely from his visionary power. . . . [But,] [w]hether this vision is actually fulfilled is something we naturally have to leave entirely in God's hands. At the moment, I do not yet see it approaching."), 242 ("An absolute unity of Christians within history is something I do not venture to hope for.").

³⁵ "The World Over: Cardinal Ratzinger Interview," EWTN (Sept. 5, 2003).

nonetheless live in an intensive struggle against evil and bring the good into the world – that let God in.”³⁶ Even if the Church should again find herself in “the position of the mustard seed, . . . that is precisely what constantly rejuvenates it. Whether it will again shape history as it did in the whole Middle Ages is something no one can predict. But,” he continued, “I am quite certain that it will continue to be present anew and in new ways – also a vital presence in history – once again forming places of survival for mankind.”³⁷ “The Church,” he explained, “will assume different forms. She will be less identified with the great societies, more a minority Church; she will live in small, vital circles of really convinced believers who live their faith. But precisely in this way she will, biblically speaking, become the salt of the earth again.”³⁸

Pope Benedict returned to these predictions and images – “small, vital circles,” the “mustard seed,” the “salt of the earth” – in his recently published reflection on the religious foundations and secular state of Europe.³⁹ Recalling Arnold Toynbee’s understanding of civilizations and their development,⁴⁰ he proposed that “Christian believers . . . look upon themselves as [one of those] creative minorities” on which the “fate of society always depends.”⁴¹ It is important, he emphasized, to have “convinced minorities in the Church, for the Church, and above all beyond the Church and for society.”⁴² These convinced, creative minorities of believers will, he hoped, re-enact the service of those monastic communities that served Europe before as renewing “yeast,”⁴³ and “help Europe to reclaim what is best in its heritage and to thereby place itself at the service of all humankind.”⁴⁴

What should we make of all this? For starters, it should be clear that only a superficial and prejudiced review could yield the regrettably common charge that Pope Benedict envisions or eagerly plans a purge of the Church, a forced contraction to a smaller, more faithful ecclesial essence. He has no illusions that a smaller and shrinking Church is or will

³⁶ RATZINGER, *supra* note ____, at 16.

³⁷ *Id.* at 123.

³⁸ *Id.* at 222.

³⁹ JOSEPH RATZINGER & MARCELLO PERA, WITHOUT ROOTS: THE REST, RELATIVISM, CHRISTIANITY, ISLAM (2006).

⁴⁰ See ARNOLD JOSEPH TOYNBEE, A STUDY OF HISTORY (1934-61).

⁴¹ RATZINGER & PERA, *supra* note ____, at 80.

⁴² *Id.* at 120.

⁴³ *Id.* at 122.

⁴⁴ *Id.* at 80.

be, for that reason, a purer one.⁴⁵ Indeed, his concern seems less with doctrinal dissent or behavioral missteps among believers than with “weariness,” “resignation,” and “hopelessness” in the world.⁴⁶ It is not so much that he is angry about Christians’ errors as he is saddened by their *ennui*. For all the tired talk about Ratzinger the watchdog, enforcer, Inquisitor, or *panzercardinal*, a better interpretation of his statements about a smaller Church and her “creative minorities” is that he is challenging us to embrace with hope new possibilities for being in, ministering to, and evangelizing cultures that are, or affect to be, post-Christian.

At least three more observations might help to connect what Benedict calls “the ecclesial exercise of the commandment of love of neighbour”⁴⁷ to the contemporary debates about, and challenges to, religious freedom. First, the Pope is convinced that the Church, as “mustard seed” and “salt of the earth,” will not and need not enjoy the exalted, even dominant, public place and cultural role to which she might, in some places and times, have become accustomed.⁴⁸ That is, “the Church will, in the foreseeable future, no longer simply be the form of life of a whole society[.]”⁴⁹ (And, of course, it has been a long time since the Church was “the form of life of a whole society.”). She will instead, present to the world, perhaps in a modest, understated way, a “liveable alternative” and a “Christian model of life.”⁵⁰

Next – and, again, in contrast to all of the breathless, mindless chatter about Benedict’s imagined yearning for theocracy⁵¹ – it is worth

⁴⁵ *Id.* at 179 (“[A] purification does not take place automatically simply because things decline.”). We might recall here the scene in Rob Reiner’s classic mockumentary, *This Is Spinal Tap*, where the manager of a fading heavy-rock band says, when asked if the group’s bookings in small and obscure venues reflects a waning popularity, “no, not at all. . . I just think that . . . their appeal is becoming more selective.” *This Is Spinal Tap* (Spinal Tap Productions 1984).

⁴⁶ RATZINGER & PERA, *supra* note ___, at 234 (discussing the situation in the formerly Communist countries of Europe and observing that “there is no great awakening in the sense that people are now saying: ‘We must get back to Christian values.’ Rather, a new weariness is setting in in souls, a dissipation, a resignation: hopelessness increases.”).

⁴⁷ *Deus caritas est* ¶ 1.

⁴⁸ RATZINGER, *supra* note ___, at 126 (“[T]he relationship between society and the Church will . . . continue to change, and it will presumably continue in the direction of a dechristianized form of society.”). 127 (“[T]he public function of the Church will no longer be the same as it was with the traditional fusion of Church and society.”), *id.* (noting that ours is a “culture in which Christianity is not seen as a force determining the shape of things”).

⁴⁹ *Id.* at 164.

⁵⁰ *Id.* at 126-27.

⁵¹ Were one to judge from the new releases table at the local Border’s or Barnes &

noting his strong and firmly stated commitment to the distinct roles of, and necessary separation between, the institutions of religion and government. This Pope is clear-eyed about the dangers that accompany “institutional integration,” and acknowledges readily that “the Church benefited from being forced to detach herself from the state Church systems.”⁵² He harbors no illusion that Church’s freedom and mission were always respected and advanced by the “Catholic majesties” of centuries past. Indeed, he could not have put the matter more clearly than he did in the recent encyclical: “Fundamental to Christianity is the distinction between what belongs to Caesar and what belongs to God, in other words, the distinction between Church and State, or . . . the autonomy of the temporal sphere.”⁵³

Of course, this is nothing like an endorsement of what is often presented as the heart of church-state separation, namely, a legally mandated and judicially enforced privatization of religion. This is nothing like the frequent, facile assertions that moral claims and proposals relating to the ordering of society through law are illegitimate if they reflect or are rooted in religious conviction, or are advanced by religious believers.⁵⁴ It is, instead, a reminder that it was, in fact, Christianity that “brought the idea of the separation of Church and state into the world”⁵⁵ and “deprived the state of its sacral nature. . . . In this sense,” the Pope has insisted, “separation is ultimately a primordial Christian legacy and also a decisive factor for freedom.”⁵⁶

Third, the Pope is and has been insisting that the Church’s many,

Noble, one might think that “theocracy” is not only a live option, but has arrived, at least in the United States. *See, e.g.,* KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERILS AND POLITICS OF OIL, RADICAL RELIGION, AND BORROWED MONEY IN THE 21ST CENTURY* (2006); DAMON LINKER, *THE THEOCONS: SECULAR AMERICA UNDER SEIGE* (2006); MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM* (2006). Of course, it isn’t, and hasn’t.

⁵² RATZINGER, *supra* note ___, at 155 (“Excessively strong ties were always detrimental to the Church.”).

⁵³ *Deus caritas est* ¶ 28(a).

⁵⁴ *See, e.g., id.* at ¶ 29 (“The Church has an indirect duty [regarding the formation of just structures] . . . in that she is called to contribute to the purification of reason and to the reawakening of those moral forces without which just structures are neither established nor prove effective in the long run.”), *ibid* (“The direct duty to work for a just ordering of society . . . is proper to the lay faithful.”). *See also* Congregation for the Doctrine of the Faith, *A Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life* (2002).

⁵⁵ RATZINGER, *supra* note ___, at 238 (“Until then the political constitution and religion were always united. It was the norm in all cultures for the state to have sacrality in itself and be the supreme protector of sacrality.”).

⁵⁶ *Id.* at 240.

varied institutions must be, or become, “imbue[d] with ecclesial spirit.”⁵⁷ And, she should not retain or create institutions that she is unable to suffuse with that spirit.⁵⁸ Unanimated institutions are just so much “ballast,” he warns, and can “suffocate[,]” rather than strengthen and structure, the Church.⁵⁹ This third concern was also raised and explored in the Pope’s recent encyclical letter on the nature and practice of love. After noting that love and its practice “needs to be organized if it is to be an ordered service to the community,”⁶⁰ he emphasized that this practice must not be, nor be regarded as, merely as a “welfare activity” in which the Church and her organizations happen to engage. Instead, this practice is and must be an “indispensable expression of her very being.”⁶¹ He then proceeded to connect the Church’s social teachings relating to her relationship to the state and her place in the political arena, on the one hand, with an emphasis on the “distinctiveness” of the Church’s practice of charity and charitable institutions, on the other.⁶²

The vision, then, of the Church that figures in the recent writings of our new Pope is of a distinctive, independent, engaged community of love. She is not a prominent and perhaps over-familiar piece of cultural furniture, and does not seek to bend culture and politics to her claims through the sheer bulk and number of her institutions. She cooperates with, but is not an arm of, the political authority. She is smaller than she was, and different

⁵⁷ *Id.* at 173.

⁵⁸ *Cf.* Jaschik, *supra* note ____ (discussing Archbishop Michael Miller’s recent remarks at the University of Notre Dame, where the Archbishop “told a packed audience . . . that the pope might favor ‘evangelical pruning,’ rather than maintaining ties to institutions that have become too secular”).

⁵⁹ RATZINGER, *supra* note ____, at 123 (“Churches of the Christian countries are perhaps suffocating on account of their own over-institutionalization, of their institutional power, of the pressure of their own history. . . . Christianity thus appears as traditional and institutional ballast that can’t be jettisoned only because there is still some recognition of the ancillary function it performs.”).

⁶⁰ *Deus caritas est* ¶ 20. *See also id.* at ¶ 24 (noting “how essential the early Church considered the organized practice of charity”).

⁶¹ *Id.* at ¶ 25(a). *See also id.* at ¶ 29(b) (“The Church’s charitable organizations . . . constitute an *opus proprium*, a task agreeable to her, in which she does not cooperate collaterally, but acts as a subject with direct responsibility, doing what corresponds to her nature.”), ¶ 31 (“[I]t is very important that the Church’s charitable activity maintains all of its splendour and does not become just another form of social assistance.”).

⁶² *Id.* at ¶ 31. *See also id.* at ¶ 31(a) (the Church’s charitable organizations must be “distinguished by the fact that they do not merely meet the needs of the moment, but . . . dedicate themselves to others with heartfelt concern, enabling them to experience the richness of their humanity”), *id.* at ¶ 34 (stating that the Church’s charity workers should “work in harmony with other organizations in serving various forms of need, but in a way that respects what is distinctive about the service which Christ requested of his disciples”).

from the world, she has not abandoned it. Her organizations and their members seek, above all – through “their words, their silence, [and] their example . . . [to] be credible witnesses to Christ.”⁶³ What does this vision mean for our inquiry into the content of, and challenges to, the freedom of the Church? What are its implications for the re-evangelization of law, politics, and culture?

II.

From the outset, Pope John Paul II put the Great Commission to “teach all nations”⁶⁴ at the heart of his teaching and pontificate. He urged Christians to “be not afraid” and to “open the doors to Christ.”⁶⁵ In contrast with Benedict’s reservations,⁶⁶ the late Pope assured us that “God is opening before the Church the horizons of a humanity more fully prepared for the sowing of the Gospel. I sense,” he insisted, “that the moment has come to commit all of the Church’s energies to a new evangelization No believer in Christ, no institution of the Church can avoid this supreme duty: to proclaim Christ to all peoples.”⁶⁷

I have suggested elsewhere that John Paul II’s emphasis on “missionary fervor,”⁶⁸ and his constant proclaiming that the Church and Christians promote authentic human freedom by proposing the truth, connect in interesting ways to First Amendment doctrines, precedents, and values.⁶⁹ Near the heart of that Amendment’s Free Speech Clause is a particular human activity, namely, changing minds, our own and others’. The freedom of speech protected by our Constitution does not simply serve our interest in expression; it is also about advocacy, persuasion, and conversion. In fact, the paradigmatic First Amendment enterprise is not self-projection or pop-psychology-style actualization, but is instead a complex and dynamic transaction in which what is taken to be true is proposed by the one and then accepted or rejected by the other, thereby changing or transforming him in a meaningful way.⁷⁰

⁶³ *Id.* at ¶ 31(b).

⁶⁴ *Matthew* 28:19-20.

⁶⁵ *Redemptoris missio* ¶ 3 (1990).

⁶⁶ *See supra* note ____.

⁶⁷ *Redemptoris missio* ¶ 3.

⁶⁸ Pope John Paul II, *A Milestone in the Journal of the Church* (April 19, 2004).

⁶⁹ *See generally* Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 U. ST. THOMAS L. J. 453 (2005).

⁷⁰ *Id.* at 458-465.

John Paul II's celebration of missionary evangelism, and his insistence that evangelization liberates the hearer, because it gives him the power to say "no," was consonant with this free-speech theme.⁷¹ What's more, the late Pope's understanding of evangelization as a generous, even promiscuous, invitation to "come over"⁷² to Christ was helpful to responding to a particular, urgent challenge to the freedom of speech, namely, the increasing efforts by governments around the world to regulate religious proselytism and conversion.⁷³ These efforts reflect, among other things, a worry – one that certainly is well founded – that speech aiming to change hearers' minds about religious truth is destabilizing and destructive, that it unsettles political tranquility and established orthodoxies, and that it invades privacy and conscience.⁷⁴ However, John Paul II's unswerving belief that religious freedom, properly understood, is not immunity from persuasion, and that, by "[p]roclaiming Christ and bearing witness to him," the Church offers a liberating proposal, not a constraining imposition,⁷⁵ is a better response to these worries than insulating hearers from argument.

Turning back to Pope Benedict, it could be that his emphasis, in *Deus caritas est*, on the Church as a distinctive, committed community of love – one that evangelizes the culture through the organized practice of love and credible witness to Christ⁷⁶ -- speaks in a similarly helpful and timely way to today's most pressing religious-freedom problem, that is, the articulation and defense of a constitutional church-autonomy principle that is plausible and attractive in our historical and cultural context and that respects and protects the freedom of the Church.

Is this challenge really so pressing, though? Certainly, it is widely regarded as "black letter" law that, in the words of one expert, "[c]hurches . . . enjoy broad freedoms to organize themselves according to religious doctrine" and that the Constitution affords "broad protections for [churches'] rights to organize and operate in conformity with their internal law."⁷⁷ However, and although it is true that churches "plainly have the

⁷¹ *Id.* at 471.

⁷² *Id.* at 466 (noting that words like "proselytize" and "proselytism" come from a Greek word, *proselutos*, meaning "one who comes over").

⁷³ See generally, e.g., John Witte, Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 WM. & MARY L. REV. 707 (2001).

⁷⁴ Garnett, *supra* note ___, at 465-72.

⁷⁵ *Redemptoris missio* ¶ 8.

⁷⁶ Cf. *Deus caritas est* ¶ 31(b).

⁷⁷ Mark E. Chopko, *Our Schizophrenic Constitution? Constitutional Reflections on the Parish as an Organization* [on file with author].

right to organize and govern [themselves] according to religious principle, the scope of that right is increasingly contested,”⁷⁸ and its theoretical and constitutional foundations uncertain. In case after case, and in all kinds of ways, the freedom and autonomy of religious communities today is challenged, even under attack.⁷⁹ Whether the dispute involves the supervision of diocesan finances by a bankruptcy court or administrative agency, a requirement that religiously affiliated organizations pay for employees’ contraception or that doctors in religiously affiliated hospitals perform abortions, or a lawsuit challenging churches’ and religious schools’ decisions about the hiring and firing of clergy and teachers, or even the usurpation by China’s government of the Church’s ancient right to select bishops, it seems that the church-autonomy question – and not the words of the Pledge of Allegiance, or public displays of crosses on hilltops and the Ten Commandments in parks – is the front line.

This uncertainty is connected, no doubt, to the limited, and dwindling, appeal in public discourse of “church autonomy.” We are, generally speaking, enthusiastic about autonomy, of course, but many of us are uneasy about connecting “church” with *nomos*. Matters are not helped by the fact that the idea is often understood as entailing the implausible and unattractive assertion that clergy and church employees are entirely “above the law” and unaccountable for wrongs they do or harms they cause.⁸⁰ And, the freedom of religious associations, communities, and institutions is made more vulnerable by the link that many perceive between church-autonomy principles, on the one hand, and – on the other – sexual abuse by clergy, venality and mismanagement by bishops, and dioceses’ declarations of bankruptcy.⁸¹ To the extent the church-autonomy principle is thought to privilege institutions over individuals, or structures over believers, its

⁷⁸ *Id.* at _____. See generally, e.g., Mark E. Chopko & Michael F. Moses, *The Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J. L. & PUB. POL’Y 387 (2005).

⁷⁹ See, e.g., Diana B. Henriquez, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 6, 2006, at ____.

⁸⁰ See, e.g., MARCI A. HAMILTON, GOD V. THE GAVEL: RELIGION AND THE RULE OF LAW 8 (2005) (contending that “[i]n recent decades, religious entities have worked hard to immunize their actions from the law” and “lobbying for the right to hurt others without consequences”). See also, e.g., Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake*, at 6-7 [working paper, on file with author].

⁸¹ See, e.g., Marci A. Hamilton, *The Catholic Church and the Clergy-Abuse Scandal*, Findlaw’s Writ (April 10, 2003) (available at: <http://writ.news.findlaw.com/hamilton/20030410.html>) (arguing that “the so-called church autonomy doctrine is not really a legal doctrine at all, at least as far as the U.S. Constitution and Supreme Court are concerned. Rather, it is an insidious theory that invites religious licentiousness rather than civic responsibility”).

appeal will suffer, given that people today think about faith – and, by extension, about religious freedom – more in terms of personal spirituality than of institutional affiliation, public worship, and tradition.⁸² We are – many of us, anyway – like the woman, Sheila Larson, described by Robert Bellah and his colleagues in *The Habits of the Heart*, who described her faith as “Sheilaism.”⁸³ To the extent we approach religious faith as a form of self-expression, performance art, or therapy, we are likely to regard religious institutions as, at best, potentially useful vehicles or tools or, more likely, stifling constraints or bothersome obstacles to self-discovery.

Nevertheless, churches’ freedom – that is, the independence of religious communities from political control over their internal polity and norms – is a vital dimension of any attractive notion of religious freedom. If churches are not independent of the state, if they are not free to be different from the state, and if the government not limited by churches’ freedom, then believers are not really free, either.

III.

On December 7, 2005, Pope Paul VI promulgated the Second Vatican Council’s Declaration on Religious Liberty, *Dignitatis humanae*.⁸⁴ This Declaration was at the same time one of the Council’s most controversial and most succinct achievements. The Council Fathers opened with the observation that “[a] sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man.”⁸⁵ It is “in accordance with [this dignity] . . . that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, . . . to adhere to the truth once it is known, and to order their whole lives in accord with the demands of truth.”⁸⁶ And, the discharge of these obligations requires both the recognition and the protection of religious freedom.⁸⁷

⁸² See generally, Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1662-65 (2004). See also, e.g., William Dinges, et al., “A Faith Loosely Held: The Institutional Allegiance of Young Catholics,” COMMONWEAL, July 17, 1998, at ____.

⁸³ See ROBERT N. BELLAH, ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 221, 235 (1996).

⁸⁴ Portions of the discussion that follows are taken or adapted from an earlier work. See Garnett, *The Freedom of the Church*, supra note ____, at 68-73.

⁸⁵ *Dignitatis humanae* ¶ 1.

⁸⁶ *Id.* at ¶ 2.

⁸⁷ See *ibid* (“This Vatican Council declares that the human person has a right to

Now, the Declaration provides nothing like a comprehensive theory or account of what constitutional lawyers think of as church-state relations. That said, its animating, foundational claim is the affirmation that “[t]he right to religious freedom has its foundation in the very dignity of the human person[,]” not “in the subjective disposition of the person but in his very nature.”⁸⁸ That is, attached to our “very nature” is the desire – and the responsibility – to seek, find, and adhere to the truth and, at the same time, a moral immunity from external coercion in matters of religious conscience.⁸⁹ This immunity, in turn, ought to be secured through constitutional limits on the powers of government,⁹⁰ but also promoted through policies that help “create conditions favorable to the fostering of religious life.”⁹¹

It is important to emphasize that the Declaration speaks not only to the freedom of individual religious conscience but also – and inextricably – to the freedom of religious communities and associations, and of the Church. It states, for instance, that the “freedom or immunity from coercion which is the endowment of persons as individuals is also . . . their right when they act in community.”⁹² Notice, though, that the claim is not merely that individuals carry with them their own personal immunity from coercion, or liberty of conscience, on those occasions when they choose, as individuals, to engage in joint religious projects or exercises with other,

religious freedom.”).

⁸⁸ *Dignitatis humanae*, at ¶ 2. See also *id.* at ¶ 9 (“The declaration of this Vatican Council on the right of man to religious freedom has its foundation in the dignity of the person, whose exigencies have come to be fully known to human reason through centuries of experience.”).

⁸⁹ *Id.* at ¶ 2. See also *id.* at ¶ 3 (“The exercise of religion, of its very nature, consists before all else in those internal, voluntary, and free acts whereby man sets the course of his life directly toward God.”); *id.* at ¶ 10 (“It one of the major tenets of Catholic doctrine that man’s response to God in faith must be free[.] . . . The act of faith is of its very nature a free act.”).

⁹⁰ *Id.* at ¶ 1 (“The demand is likewise made [*i.e.*, in addition to the demand for dignity-grounded freedom of conscience] that constitutional limits should be set to the powers of government, in order that there may be no encroachment on the rightful freedom of the person and of associations.”).

⁹¹ *Id.* at ¶ 5. The Declaration’s premise that respect for religious freedom and the immunity of religious conscience is consistent with government obligations affirmatively to promote the good of religion fits uneasily, of course, with present-day constitutional doctrine regarding the First Amendment’s prohibition on “establishment[s]” of religion. Cf. *id.* at ¶ 3 (“[G]overnment . . . ought indeed to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare. However, it would clearly transgress the limits set to its power, were it to presume to command or inhibit acts that are religious.”).

⁹² *Id.* at ¶ 4.

similarly immune individuals. The Declaration is not denying, of course, that the rights of religious communities serve the free exercise of religion by individual believers. But it is saying something more, too, and suggesting that the religious freedom of these entities is not entirely reducible to that of the aggregated or collected individuals. “Religious communities,” the Declaration affirms, “are a requirement of the social nature of man and of religion itself.”⁹³ Accordingly, the coming together for worship, prayer, and so on is not simply an individual act that is somehow “covered” by a believer’s immunity from conscience. Religious freedom involves more than non-interference by government in the content of individuals’ beliefs; it is about more than privacy. Rather, the existence and freedom of religious communities is, no less than the liberty of conscience enjoyed by persons, rooted in the “nature of man[.]”⁹⁴

The Declaration fleshes out the meaning, and fills in some of the content, of the freedom “rightfully claim[ed]” by religious communities to “govern themselves according to their own norms[.]”⁹⁵ More specifically still, it proceeds from the rights of “religious communities” generally to the freedom of the Church herself. Interestingly, it is not only for the “good of the Church,” the Declaration asserts, but also for the “welfare of society here on earth,” that “the Church should enjoy that full measure of freedom which her care for the salvation of men requires.”⁹⁶ This is, in fact, “preeminent.”⁹⁷ Indeed, this freedom is “the fundamental principle in what concerns the relations between the Church and governments and the whole civil order.”⁹⁸ At the core of this freedom is “the independence which is necessary for the fulfillment of her divine mission.”⁹⁹ That mission, again, is the “organized practice of love.”¹⁰⁰

Finally, and intriguingly, the Declaration asserts a link between the

⁹³ *Ibid Dignitatis humanae* ¶ 4.

⁹⁴ *Ibid.* See also *id.* at ¶ 5 (“The social nature of man and the very nature of religion afford the foundation of the right of men freely to hold meetings and to establish educational, cultural, charitable, and social organizations, under the impulse of their own religious sense.”).

⁹⁵ *Id.* at ¶ 5 (explaining that religious communities have, among other things, the right not to be hindered or interfered with in the “selection, training, appointment, and transferal of their own ministers, in communicating with religious authorities and communities abroad, in erecting buildings for religious purposes, and in the acquisition and use of suitable funds or properties”).

⁹⁶ *Id.* at ¶ 13.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Deus caritas est* ¶ 24.

Church's own freedom, and her own claim to "independence," with the right of persons generally "not to be hindered in leading their lives in accord with their consciences."¹⁰¹ That is, it proposes a "harmony," and not a tension, between "the freedom of the Church and the religious freedom which is . . . the right of all men and communities and sanctioned by constitutional law."¹⁰² The Declaration invites us to regard the Church's demands for self-government not merely as parochial, self-serving pleas for special privilege, but more broadly, as claims about the constitutional structure of just, limited governments, and about what John Courtney Murray called the "ontological structure of society."¹⁰³ The church-autonomy principle provides a structural safeguard for others' religious – and, indeed, political – freedom.¹⁰⁴ The understanding of constitutional government – of its role, obligations, and limits – to which the Declaration's defense of religious conscience points is one that depends, fundamentally, on the independence, autonomy, and distinctiveness of the Church.

This theme – *i.e.*, the structural importance of self-governing, independent churches to religious and political freedom – runs through Pope Benedict's recent work. Echoing *Dignitatis humanae*, he states in *Deus caritas est* that the state "must guarantee religious freedom" and that this freedom includes the recognition in law that the Church "has a proper independence and is structured on the basis of her faith as a community."¹⁰⁵ As was noted earlier, the Pope sees in church-state separation not an anti-religious ideology but a fundamentally Christian development, one that liberates the Church and limits the state.¹⁰⁶ American society, in particular, is "built on a separation of church and state that is determined and indeed demanded by religion. . . . In America the state is little more than a free space for different religious communities to congregate; it is in its nature to

¹⁰¹ *Dignitatis humanae* ¶ 13.

¹⁰² *Ibid.*

¹⁰³ MURRAY, *supra* note ___, at 199.

¹⁰⁴ See Garnett, *supra* note ___, at 66 ("[I]ndependence for [religious] institutions and communities is both a feature of and a necessary condition for political freedom."). See also *Dignitatis humanae* at ¶ 13 (The freedom of the Church is "the fundamental principle in what concerns the relations between the Church and governments and the whole civil order").

¹⁰⁵ *Deus caritas est* ¶ 28(a).

¹⁰⁶ *Ibid* (affirming that the "distinction between Church and State" – or, the "autonomy of the temporal sphere" – is "[f]undamental to Christianity"). See also RATZINGER & PERA, *supra* note ___, at 113 (noting that the American bishops at the Second Vatican Council contributed to the Declaration by bringing to the question the "experience of the non-state Church . . . as a Christian form that emerged from the very nature of the Church").

recognize and permit these communities to exist in their particularity and their non-membership in the state. This is a separation that is conceived positively, since it is meant to allow religion to be itself, a religion that respects and protects its own living space distinctly from the state and its ordinances.”¹⁰⁷

In a regime of separation, properly understood, the state is not itself a sacred power. It is simply an “order that finds its limits in a faith that worships, not the state, but a God who stands over against it and judges it.”¹⁰⁸ This “duality,” or “separation and distinction of powers [has been] of vital importance to the . . . development of Europe, and . . . laid the foundations for the distinguishing characteristics of the West.”¹⁰⁹ What’s more, a free and separate Church provides a place to stand, a position from which to engage critically the state. In *The Salt of the Earth*, Pope Benedict stated that the world’s recent experiences with repressive regimes confirmed that the Church can serve “as a counterpole; she is present as a worldwide communion, as a force against repression. . . She gives men a place of freedom and sets a sort of ultimate limit to oppression. . . [W]hen I stand up to a dictatorship,” he explained, “I do so, not just in my name as a private individual, but in virtue of an inner strength that transcends my own self and my subjectivity.”¹¹⁰ Through her juridical separation from the political realm – though not, of course, her disengagement from public life or unconcern for the justice of the political order – the Church actually helps and improves that realm. By being different, Benedict believes, the Church is a “source of energy that provides what the state cannot have of itself. . . . Democratic society lives,” in fact, “by energy that it cannot produce itself.”¹¹¹

IV.

To sum up: Pope Benedict sees a future in which the Church is smaller, her secular power erased, and her cultural presence understated. At

¹⁰⁷ RATZINGER & PERA, *supra* note ___, at 110-11.

¹⁰⁸ RATZINGER, *supra* note ___, at 240.

¹⁰⁹ RATZINGER & PERA, *supra* note ___, at 57.

¹¹⁰ *Id.*, at 165. *See also* *Id.* at 115 (“This Church lives in all nations. It creates a community – above and beyond all loyalty to one’s own country – that spreads beyond national borders.”).

¹¹¹ RATZINGER., *supra* note ___, at 271. *See also, e.g.*, Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 456 (2000) (“The great weakness of a liberal state is that it is dependent on cultural and demographic preconditions over which it has no direct control.”).

the same time, she is enriched by and enriching through her convinced, creative minorities and the distinctive, inspired institutions through which she practices charity. In addition, he endorses the teaching of the Second Vatican Council that the independence and autonomy of the Church, and of religious communities generally, are at the heart of religious freedom and play an important, state-limiting role. The scope and content of this freedom, though, are increasingly contested and unstable.

To bring the exploration to a point, consider a specific, recent case, *Petruska v. Gannon University*.¹¹² Lynette Petruska was hired by Gannon University – a Catholic institution in Erie, Pennsylvania – as the university’s Director of Social Concerns in 1997. In 1999, she was made permanent chaplain. Because Ms. Petruska knew that the University had promised her predecessor, Rev. Nicholas Rouch, that he could resume as chaplain when he returned from studying in Rome, she requested and received assurances from the University’s president, Msgr. David Rubino, that “she would not simply be replaced when Rouch returned or another qualified male became available” and that “future decisions regarding her tenure as chaplain would be based solely on her performance, not her gender.”¹¹³ In May of 2000, Msgr. Rubino resigned, after being accused of sexual harassment, and the University’s provost, Dr. Thomas Ostrowski, became Acting President. Ms. Petruska had helped to bring these accusations to the attention of Dr. Ostrowski and the local Bishop, and objected strongly to what she regarded as their efforts to “cover-up” Rubino’s misconduct after he resigned.¹¹⁴

When Rev. Rouch returned from Rome, in July 2000, Bishop Trautman told Dr. Ostrowski that he had created a new University position – the “Vice-President for Mission and Ministry” – and that he had appointed Rouch to fill it. He also directed Ostrowski to remove Petruska as University Chaplain. Ostrowski refused, and refused also to restructure the Chaplain’s Division by placing it under the administration of the new Vice-President for Mission and Ministry. When Ostrowski met with Petruska, to discuss the Bishop’s plans and to assure Petruska of his own support for her, he “conceded that the proposed action was being taken on

¹¹² See *Petruska v. Gannon University, et al.*, No. 05-1222 (3d Cir., May 24, 2006) (“*Petruska I*”). On June 20, 2006 the full Third Circuit vacated the panel’s decision and agreed to re-hear the case. On September 6, a new panel handed down a new decision in the case, and arrived at a different conclusion than had the original three judges.

The *Petruska* case is discussed in some detail in the *New York Times* article referenced above, in note ____.

¹¹³ *Petruska I*, slip op., at 3-4.

¹¹⁴ *Id.* at 7.

the basis of her gender.”¹¹⁵

Over the next year-and-a-half, Petruska, Rouch, Bishop Trautman, and the new University President, Dr. Antoine Garibaldi, were engaged in what, for brevity’s sake, can be characterized as adversarial and sometimes unedifying dealings relating to Petruska’s role at Gannon University and the structure of the Chaplain’s Division. Finally, in October of 2002, Petruska resigned. Eventually, after exhausting her administrative remedies, she filed a lawsuit in federal court, alleging, among other things, that the University had demoted her because she is a woman and because she opposed sexual harassment by University officials. The United States District Court dismissed the case, concluding that the “ministerial exception” deprived it of jurisdiction to adjudicate Petruska’s claims.¹¹⁶

On appeal, in an opinion by Judge Becker (now deceased), the United States Court of Appeals for the Third Circuit acknowledged that the existence of the judicially-created “ministerial exception,” which “exempts religious organizations from employment discrimination lawsuits brought by ministers. Grounded in the Establishment and Free Exercise Clauses of the United States Constitution, the ministerial exception was created to protect church autonomy and avoid entangling government in religious affairs.”¹¹⁷ Judge Becket concluded, though, that this exception is not available in cases involving alleged discrimination unrelated to religious teachings: “Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution permits.”¹¹⁸

Now, most courts to consider the question have concluded that a religious institution’s reasons for firing a minister, or employee charged with religious duties, are not relevant to the question of the ministerial

¹¹⁵ *Petruska I*, slip op., at 8.

¹¹⁶ *Petruska v. Gannon University*, 350 F. Supp. 2d 666 (W.D. Pa. 2004).

¹¹⁷ *Petruska I*, slip op., at 3-4. *See also, e.g.*, *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999) (“Simply stated, the ministerial exception insulates a religious organization’s employment decision regarding its ministers from judicial scrutiny under Title VII.”); *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972) (“The relationship between an organized church and its ministers is its lifeblood. . . . Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection.”).

¹¹⁸ *Petruska*, slip op. at 5. *See also id.* at 32 (“Petruska alleges that she was demoted because of animus against women that had nothing to do with religious beliefs, religious doctrine, or internal regulation.”).

exception's availability.¹¹⁹ The *Petruska* panel, though, departed from this tradition, and was confident that it could, without threatening religious freedom or overstepping the bounds of secular courts' authority, distinguish the religious reasons a Catholic university might have for dismissing a female chaplain from those that are "simply put, sexist."¹²⁰ The ministerial exception, the panel insisted, reflects the Constitution's solicitude for "religious exercise"; "we decline to turn the Free Exercise Clause," the court stated, "into a license for the free exercise of discrimination unmoored from religious principle."¹²¹

The panel decision in *Petruska* sparked a great deal of commentary and debate.¹²² Then, after the death of Judge Becker, the full Court of Appeals withdrew the panel's opinion, and agreed to rehear the case, before a new three-judge panel. That panel affirmed, in relevant part, the district court's decision.¹²³ Judge Smith – who had dissented from the original panel's decision – wrote for the court, and agreed with the other federal appeals courts that the ministerial exception "bars any inquiry into a religious organization's underlying motivation for [a] contested employment decision."¹²⁴ "[L]ike an individual," Judge Smith observed, "a church in its collective capacity must be free to express religious beliefs, profess matters of faith, and communicate its religious message. Unlike an individual who can speak on her own behalf, however, the church as an institution must retain the corollary right to select its voice."¹²⁵ Accordingly, he continued, "any restriction on the church's right to choose who will carry its spiritual message necessarily infringes upon its free exercise right to profess its beliefs."¹²⁶

Judge Smith was right: "The First Amendment protects a church's right to decide matters of faith and to declare its doctrine free from state interference. A church's ability to select who will perform particular

¹¹⁹ *Id.* at 15 n. 7. See generally, e.g., Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. REV. 1633, 1652-53..

¹²⁰ *Id.* at 26.

¹²¹ *Id.* at ____.

¹²² See, e.g., Marci A. Hamilton, *A Federal Trial Court Dismisses a Nun-Priest Sexual Harassment Claim*, FindLaw's Writ (Jan. 27, 2005) (available at: <http://writ.news.findlaw.com/hamilton/20050127.html>) (calling *Petruska* a "dubious case for invocation" of the ministerial exception).

¹²³ *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006) ("*Petruska II*").

¹²⁴ *Petruska II*, 462 F.3d at 304 & n. 7.

¹²⁵ *Id.* at 306.

¹²⁶ *Id.* at 306-07. See *id.* at 307 ("The ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions.").

spiritual functions is a necessary corollary to this right.”¹²⁷ Indeed, it would seem almost the paradigmatic violation of religious freedom, and of church-state separation, for the government or its courts to take up, let alone to resolve, questions relating to religious entities’ training, selection, and dismissal of clergy. To protect the freedom of the Church from such interference was, one might reasonably think, the whole point of the great conflicts at Canossa and Canterbury.

There is, of course, a great deal that could be said about the reach and theoretical foundations of the “ministerial exception,” and about the diffuse body of church-autonomy doctrine more generally.¹²⁸ *Petruska* is only one of many cases that could serve to illustrate the vulnerability of an understanding of church-state separation according to which the power of the government over the internal polity and ministry of the church is limited.¹²⁹ For present purposes, the more specific question is, what might Pope Benedict’s statements, in *Deus caritas est* and elsewhere, about the organized practice of love and the distinctiveness of the Church’s charitable organizations suggest about decisions like *Petruska* and institutions like Gannon University?

For starters, it seems clear that the *Petruska* panel’s impulse to subject a Catholic university’s employment decisions involving one of that university’s most prominent religious ministers cannot be reconciled with the freedom of religion expounded in the Declaration and embraced fully by the Pope. That freedom, after all, includes the right of religious communities and institutions to “govern themselves according to their own

¹²⁷ *Id.* at 311. It is worth noting that, in another case, decided only a few weeks after *Petruska* I, another panel of the Third Circuit issued an opinion in a case that presented issues similar to those raised in *Petruska*, but that resolved them differently. *Curay-Cramer v. Ursuline Academy*, No. 04-4628. Michele Curay-Cramer was fired from her position as a teacher at a Catholic school after she signed her name to a pro-abortion-rights advertisement in a local newspaper. Ms. Curay-Cramer filed a discrimination lawsuit and complained that, among other things, the school had treated her more harshly than it had treated men for “substantially similar conduct.” *Id.*, slip op. at 13. The court was reluctant, though, to “meddl[e] in matters related to a religious organization’s ability to define the parameters of what constitutes orthodoxy.” *Id.* at 20.

¹²⁸ See, e.g., Brady, *supra* note ____; Chopko & Moses, *Freedom To Be a Church*, *supra* note ____; Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789; Lupu & Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, *supra* note ____; Laycock, *Towards a General Theory of the Religion Clauses*, *supra* note ____.

¹²⁹ For more on the claim that, notwithstanding its black-letter status, the church-autonomy principle is vulnerable, see Garnett, *The Freedom of the Church*, *supra* note ____.

norms,”¹³⁰ a right that would seem necessarily to encompass decisions about how to interpret and apply those norms. Indeed, the *Petruska* court’s glib pronouncement that the Constitution’s Free Exercise Clause protects only that free exercise of religion that is left over once “intolerance” and “sexis[m]” are excluded reflects a troublingly aggressive agenda of remaking religion – or, some religions – to conform more closely with the state’s own norms.

As then-Cardinal Ratzinger once insisted, though, “[t]he Church is not an organization among others or a sort of state within a state that would thus have to be formed in exactly the same way as the state according to the same democratic rules of the game.”¹³¹ For the Church to be free is to be free to be distinctive, different, and separate from the state. Ratzinger has warned, though, about the “development of what you might call a modern world view that regards Christianity or the Catholic faith as an intolerant, antiquated affair, unreconcilable with modernity, and begins to apply pressure. I believe that this peril is already rather great, even though it still does not seem immediate. But the social pressure on the Church essentially to conform to today’s accepted standards already exists now.”¹³²

On the other hand, couldn’t it also be said that the Pope’s work and thought suggests, in addition to an argument against the original *Petruska* panel’s premises, a critique of Gannon University and its administrators? To say, as Pope Benedict correctly does, that the Church and her institutions must be free from intrusive, aggressive supervision in matters relating to the selection of ministers and the content of teaching is hardly to say that these institutions and clergy are beyond reproach and reform. The point, after all, of religious freedom and church autonomy is not merely to insulate religious institutions from liability. It is not lawsuit-immunity for its own sake. It is, instead, to protect the Church’s ability to carry out her mission. It is to enable the Church to serve as a faithful witness, as it engages in the organized practice of love. The fact that the law does prevent – and should prevent – prevent the state from imposing heavy-handedly its norms on the

¹³⁰ *Id.* at ¶ 5 (explaining that religious communities have, among other things, the right not to be hindered or interfered with in the “selection, training, appointment, and transferal of their own ministers, in communicating with religious authorities and communities abroad, in erecting buildings for religious purposes, and in the acquisition and use of suitable funds or properties”).

¹³¹ RATZINGER, *supra* note ___, at 271. See also *Deus caritas est* ¶¶ 31, 34.

¹³² RATZINGER, *supra* note ___, at 152. See also *Id.* at 153 (“Any future anti-Christian dictatorship would probably be more subtle than anything we have known until now. It will appear to be friendly to religion, but on the condition that its own models of behavior and thinking not be called into question.”).

institutions of the Church does not relieve these institutions from criticism, and from the duty of self-examination, with respect to how well they are responding to the call that God has extended.

Recall the Pope's warning against the temptation of relying on sprawling, countless, Spirit-drained institutions for the organized practice of love that is the Church's obligation and essence. Benedict has admitted that "[t]he Church . . . needs, on the one hand, the flexibility to accept changed attitudes and laws in society and to be able to detach herself from the inter-connections with society that have existed until now. On the other hand," he emphasizes, "she has all the greater need for fidelity in order to preserve what enables man to be man, what enables him to survive, what preserves his dignity."¹³³ It is true that lawsuits like Ms. Petruska's call for vigorous defense of the Church's independence. It is also true, though, that they call for humble, critical examination and evaluation of the extent to which the Church is exercising her freedom under law in a way that reflects the organized practice of love. Do institutions like Gannon University, in cases like *Petruska*, witness faithfully to the God who is love, or scandal? Are they imbued -- as they should be, in order to be worthy of the freedoms they enjoy -- with a distinctive, "ecclesial spirit"? If not, then what?

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In *Deus caritas est*, the Pope states both that the Church "must practice love" and that "[l]ove needs to be organized if it is to be an ordered service to the community."¹³⁴ It is through the organized practice of love, and through the exemplary engagement of distinctive, faithful institutions, that the Church will, even if smaller, re-evangelize the culture, serving as the salt of the earth.

¹³³ ID. at 222.

¹³⁴ *Deus caritas est* ¶20.