

# CATHOLIC CONSTITUTIONALISM FROM THE AMERICANIST CONTROVERSY TO *DIGNITATIS HUMANAЕ*

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## ABSTRACT

*This Article, written for a symposium on the fiftieth anniversary of Dignitatis Humanae, or the Roman Catholic Church's Declaration on Religious Freedom, traces a brief history of Catholic constitutionalism from the Americanist controversy of the late nineteenth century up until the issuance of Dignitatis Humanae as part of the Second Vatican Council in 1965. It argues that the pluralist experiment enshrined in the First Amendment of the U.S. Constitution was a crucial factor in shaping Church attitudes towards religious freedom, not only in the years immediately preceding the revolutionary Second Vatican Council but ever since the late nineteenth century, when Catholicism became a potent social force in the United States. This history offers an opportunity to reflect on what the new global geography of Catholicism portends in the future.*

## INTRODUCTION

*Dignitatis Humanae* is best known as a watershed moment in the doctrinal history of the Roman Catholic Church's stance on freedom of religion. More than any other document produced by the Second Vatican Council, it was both an exercise in, and the very expression of, the spirit of *aggiornamento* that ushered the Catholic Church into the modern world. Prior to the issuance of the Declaration in 1965, the Church held the view that religious freedom was doctrinally and conceptually erroneous because error possessed no rights. "Truth and error are incompatible; to dialogue with error is to put God and the devil on the same footing," or so went the ultra-traditionalist narrative that persisted even after the conciliar moment but which has since

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fallen into complete disrepute.<sup>1</sup> In addition, only a Catholic confessional state could ensure the protection and promotion of religious truth because religious error was considered damaging to the common good. *Dignitatis Humanae*, also known as the Declaration on Religious Freedom, thus embodied a principled volte-face in its categorical pronouncement that “the human person has a right to religious freedom.”<sup>2</sup> In doing so, it created the conditions for a new kind of Catholicism that made a dialogue between the Church and the secular world possible.

Easily the most celebrated document of the Second Vatican Council, and certainly among non-Catholics, the text of the Declaration itself appears modest. Religious freedom is minimally defined as immunity from coercion in civil society and was explicitly grounded in the dignity of the human person.<sup>3</sup> It appeared to be silent on the issue of the confessional state, notwithstanding the amount and the intensity of the discussion that surrounded the topic preceding the Council. But by emphasizing freedom of religion rather than religious tolerance as held in then-existing church teachings, it was clear that the days of a preferred Catholic establishment were gone. The document thus represented an important paradigm shift. As a principle, religious freedom could attract consensus on many grounds, but it was the first time that Catholic political thought and theology could endorse its substantive basis as innately its own.

It is impossible to discuss *Dignitatis Humanae* without canvassing the biography and intellectual contributions of John Courtney Murray S.J., the American Jesuit priest who briefly served as *peritus*, or expert, during the Council proceedings and who had been writing on the subject of religious freedom long before Pope John XXIII made the surprise announcement of convening a council in 1959. Murray, one of the two towering Catholic intellectuals of the twentieth century, alongside the French philosopher Jacques Maritain, was the one responsible for developing a principled Catholic defense of religious liberty. From his prodigious writings on the subject between the 1940s and 1950s, the defense roughly involved three main, intertwined components: the dignity of the human person, freedom of religion, and the nature of the state. Of the three, Murray’s, and by extension, the Catholic, conception of the state has not merited much scholarly discussion. This lack of attention is unfortunate. While the first two find secure and solid ground in international law and have been the subject of much schol-

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1 MARCEL LEFEBVRE, AN OPEN LETTER TO CONFUSED CATHOLICS 112 (1986). Archbishop Lefebvre had denounced *Dignitatis Humanae*, despite his signature on it. He also founded the schismatic sect Society of Saint Pius X, whose members were excommunicated after ordaining bishops without the approval of the Vatican. In 2009, then-Pope Benedict XVI lifted the excommunication of the other bishops and priests of the society but left Lefebvre’s status unchanged.

2 Paul VI, Declaration *Dignitatis Humanae* para. 2 (Dec. 7, 1965), [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).

3 *Id.*

arly treatment, it is the nature of the state that complicates what freedom of conscience or freedom of religion encompasses and what it might actually look like in practice. In Murray's own words, the central question is the "care of religion by government."<sup>4</sup> Indeed, his tract, *The Problem of Religious Freedom*, which formed his last substantive contribution to the Declaration before a collapsed lung pulled him out of the proceedings, focused on the juridical instantiation of religious freedom as a civil and political right.

*Dignitatis Humanae* and its underlying intellectual foundations navigated the waters between the Aristotelian state of Leo XIII, where the government had a thick substantive duty to "care for religion," and the agnostic and indifferent state that emerged half a century later. In that agnostic mode, the state is neutral with regard to the truth or merit of different religions. And the Declaration's crowning achievement lies precisely in reconciling the notion of separation between church and state with upholding the common good within the context of an objective moral order. A person's right to freely profess his conscience and to seek an objective moral truth requires immunity from government interference. An important premise of this line of argument was a Catholic insistence on the limited nature of government. This was partly Murray's answer to the complaint of Reinhold Niebuhr, a renowned American Protestant theologian, that the Roman Catholic Church had yet to endorse religious liberty in principle. It does now. And it is for this reason that this document is celebrated today.

This Article traces a brief history of Catholic constitutionalism from the Americanist controversy of the late nineteenth century up until the issuance of *Dignitatis Humanae* in 1965 and explains the resulting reconciliation. To be sure, Catholic constitutionalist thought could trace its origins to a variety of historical moments: from Jesus's biblical admonishment to "render unto Caesar what is Caesar's," to the Gregorian struggle of the high Middle Ages,<sup>5</sup> or to the conciliarist movement of the late medieval period.<sup>6</sup> But this period of relatively more recent vintage was notable for one distinctive factor: the United States as a living experiment. In a 2006 epistolary exchange with Marcello Pera, President of the Italian Senate, Pope Emeritus Benedict XVI himself, then writing as Joseph Cardinal Ratzinger, acknowledged the unique American contribution to *Dignitatis Humanae*.<sup>7</sup> It would be inaccurate, however, to confine the focus to the American contribution during the immediate years surrounding the Second Vatican Council, when the American

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4 John Courtney Murray, *The Problem of Religious Freedom*, in *RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM* 127, 130 (J. Leon Hooper, S.J. ed., 1993).

5 HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 87 (1983); BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE 1050–1300*, at 45–95 (1988).

6 JOHN NEVILLE FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS: 1414–1625* (1956); FRANCIS OAKLEY, *THE CONCILIARIST TRADITION: CONSTITUTIONALISM IN THE CATHOLIC CHURCH 1300–1870* (2003).

7 Letter from Joseph Ratzinger to Marcello Pera, in *WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM* 107, 113 (2006).

pluralist challenge to extant Catholic doctrines could be deemed as old as the United States itself. Beginning in the latter half of the nineteenth century, the changing views of the Catholic hierarchy in Rome on the proper relationship between church and state were for the most part influenced by the sharp contrast between two kinds of Catholic polities: the confessional Catholic lands of continental Europe and the religiously pluralistic society of the United States where Catholics formed a distinctive minority. It should not be a surprise then that Murray and the American episcopate played such a pivotal role on matters of ecumenism and religious freedom in the Second Vatican Council.<sup>8</sup> More important to the European clerics who supported the Declaration, the church-state arrangement in the United States provided a more preferable alternative than the dismal Catholic-majority models of Spain or Portugal.

Together with *Nostra Aetate*—the Declaration of the Church in relation to non-Christians, most notably Jews<sup>9</sup>—and *Gaudium et Spes*, which declares the Church's new stance with respect to the modern world,<sup>10</sup> *Dignitatis Humanae* embodied the vision of Vatican II and formed the new core of Catholic constitutionalist thought. What can we take away from recounting its historical trajectory? For one, it shows the importance of the ability to speak with doctrinal authenticity from within the tradition of believers, even if internally contested, in giving the faithful compelling reasons for accepting new ways or reorienting old ones. Legitimacy of argument can only be had by making use of language and resources internal to the faith community, and it is even more important when it comes to non-hierarchical religions. Equally necessary is the underlying condition of this sea change in Catholic doctrine: the freedom of the Church. There is no shortage of struggles over the compatibility of orthodox interpretation and practice of religions and the tenets of modern liberal democracy, as well as the reciprocal more subtle, and yet ubiquitous attempts of liberal constitutionalism to shape religion in more palatable ways.<sup>11</sup> In the current moment, when religion is seen and portrayed in popular discourse more as a source of danger instead of a positive good, it bears repeating that any modicum of religious reform can only take place within an atmosphere of freedom. Moreover, as a general contribution, the surrounding history of the Declaration also showed the capacity

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8 John Courtney Murray, *Declaration on Religious Freedom: Commentary*, in AMERICAN PARTICIPATION AT THE SECOND VATICAN COUNCIL 668 (Vincent A. Yzermans ed., 1967); Joseph A. Komonchak, *The American Contribution to Dignitatis Humanae: The Role of John Courtney Murray, S.J.*, U.S. CATH. HISTORIAN, Winter 2006, at 1.

9 Paul VI, Declaration *Nostra Aetate* (Oct. 28, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_nostra-aetate\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html). For the history behind *Nostra Aetate*, see JOHN CONNELLY, FROM ENEMY TO BROTHER: THE REVOLUTION IN CATHOLIC TEACHING ON THE JEWS 1933–1965 (2012).

10 Paul VI, Pastoral Constitution *Gaudium et Spes* (Dec. 7, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html).

11 See, e.g., Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004).

of one of the most ardent traditional institutions in the world—the Roman Catholic Church—to change its stance in light of new historical experiences. Finally, while this is an American-centric account, what it portends in the future is coextensive with the new cultural geography of Catholicism.<sup>12</sup> *Dignitatis Humanae* is arguably the turning point that unmoored the Catholic Church from its predominant Western paradigm and reoriented it towards the world. If an aptitude for reading the signs of the times is indeed the legacy of Vatican II, the global Church offers an ample set of new challenges.

## I. SEPARATION DURING THE AMERICANIST CONTROVERSY

The figure of Pope Leo XIII loomed large in John Courtney Murray's writings on church-state relations. Leo XIII was perhaps most famous for the social encyclical *Rerum Novarum* ("Of New Things"), wherein the Pope, for the first time, spoke on the matter of social justice and inequality, particularly supporting the right of labor to form unions, and seeking to ameliorate the working conditions of the poor.<sup>13</sup> It has since been one of the foundational texts of Catholic social thought. But Leo XIII also represented the traditional Catholic view on religious freedom that the reformers at the Second Vatican Council sought to change. It is worth pointing out that *Rerum Novarum*, notwithstanding its remarkably progressive social vision, contained no pronouncement about political liberty or democracy. The Leonine encyclicals concerning the place of the Church in the modern world, spanning the years 1878 up until his death in 1902, included *Immortale Dei* (expounding on the nature of the Christian state) in 1885<sup>14</sup> and *Testem Benevolentiae Nostrae* (condemning Americanism) in 1899.<sup>15</sup> Both reinforced the traditional doctrine laid out in Pius IX's 1864 encyclical *Quanta Cura*, which became infamous for its annex, the "Syllabus of Errors," condemning, among others, the notion of liberty of conscience and the separation of church and state.<sup>16</sup>

In some sense, it is hard to fault Leo XIII's combative stance. His pontificate occurred on the cusp of a dizzying modernity the many manifestations of which seemed nothing but hostile to the Church. The late nineteenth century saw the advent of the industrial revolution, Marxist socialism, as well as economic liberalism, nationalism, scientific progress, and the dawn of the

12 CTR. FOR APPLIED RESEARCH IN THE APOSTOLATE, GLOBAL CATHOLICISM: TRENDS AND FORECASTS (2015), <http://cara.georgetown.edu/staff/webpages/Global%20Catholicism%20Release.pdf>.

13 Leo XIII, Encyclical Letter *Rerum Novarum* (May 15, 1891), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html).

14 Leo XIII, Encyclical Letter *Immortale Dei* (Nov. 1, 1885), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_01111885\\_immortale-dei.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html).

15 Leo XIII, Encyclical Letter *Testem Benevolentiae Nostrae* (Jan. 22, 1899), <http://www.papalencyclicals.net/Leo13/113teste.htm>.

16 Pius IX, Encyclical Letter *Quanta Cura* (Dec. 8, 1864), <http://www.papalencyclicals.net/Pius09/p9quanta.htm>.

age of mass democracy. His encyclicals addressed particular instantiations of these challenges in various European states such as Belgium, Italy, Spain, and France.<sup>17</sup> Even in *Testem Benevolentiae*, where he famously condemned Americanism, the target was not primarily the American church but rather its perception by European clergy.<sup>18</sup>

While it is true, as Murray is wont to say, that pluralism is the native condition in the United States, anti-Catholic prejudice nonetheless arrived on American shores as early as its first English colonists.<sup>19</sup> American Catholics thus were confronted very early on by the problem of dual identities. A longstanding complaint against Catholics was that by the very nature of their religion, they professed allegiance to a foreign power—the Pope—and hence were not capable of being, and could not be considered, loyal American citizens. It did not help that a large number of Catholics who moved to the United States in the mid-nineteenth century were poor Europeans. According to American theologian Philip Schaff, no Catholic middle class existed at the time.<sup>20</sup> Moreover, they almost always voted in concert. What is now known as legitimate-interest group voting was then considered a sign of subservience. Catholics were thus generally seen as backwards—politically, socioeconomically, and religiously. The defeat of New York Governor Al Smith in the 1928 presidential election on account of his religion was one more illustration of the deep-seated societal prejudice against Catholics.<sup>21</sup> Smith's protestations that he had experienced no conflict between his official duties and his religious beliefs in the many years he had been in office—and that he had not even heard of papal encyclicals until he was asked about them—were to no avail. Indeed, up until the election of John F. Kennedy as President in 1960, Catholics throughout U.S. history have periodically sought to use major geopolitical events, such as the Mexican-American War and World War I, to prove their loyalty as full-fledged Americans.<sup>22</sup>

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17 Leo XIII, Encyclical Letter *Cum Multa* (Dec. 8, 1882), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_08121882\\_cum-multa.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_08121882_cum-multa.html) (on Conditions in Spain); Leo XIII, Encyclical Letter *Etsi Nos* (Feb. 15, 1882), [https://www.saint-mike.org/library/papal\\_library/leoxiii/encyclicals/etsi\\_nos.html](https://www.saint-mike.org/library/papal_library/leoxiii/encyclicals/etsi_nos.html) (on Conditions in Italy); Leo XIII, Encyclical Letter *Licet Multa* (Aug. 3, 1881), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_03081881\\_licet-multa.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_03081881_licet-multa.html) (on Catholics in Belgium); Leo XIII, Encyclical Letter *Nobilissima Gallorum Gens* (Feb. 8, 1884), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_08021884\\_nobilissima-gallorum-gens.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_08021884_nobilissima-gallorum-gens.html) (on the Religious Question in France).

18 Thomas T. McAvoy, *Americanism, Fact and Fiction*, 31 CATH. HIST. REV. 133 (1945).

19 See JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 5–6 (1955).

20 THOMAS T. McAVOY, THE GREAT CRISIS IN AMERICAN CATHOLIC HISTORY 1895–1900, at 43 (1957).

21 JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 147–50 (2003) (“[A]nti-Catholicism proved the decisive issue for voter behavior, the factor more than any other that ensured his defeat.”).

22 See, e.g., John C. Pinheiro, “Religion Without Restriction”: Anti-Catholicism, All Mexico, and the Treaty of Guadalupe Hidalgo, 23 J. EARLY REPUBLIC 69, 69 (2003).

In the latter half of the nineteenth century, the debate over Americanization preoccupied the minds of the leaders of the U.S. Catholic Church, as well as the larger American society. American bishops fought a continuous uphill battle to demonstrate that being a good Catholic was perfectly compatible with being a good citizen. Public schools were a frequent site of contestation. When Catholics started demanding state funding for their own schools to avoid having their children raised and inculcated with Protestant ideology in the common school, Protestants protested using the language of “separation of church and state.”<sup>23</sup> One of the counterintuitive responses was from Archbishop John Ireland of Minnesota, a well-known reformer and “Americanizer,” who spoke before the 1890 convention of the National Educational Association and stated that he regretted the need for a separate school system in order to provide religious education for Catholic schoolchildren. In his view, “the parochial school was an unnecessary burden and should be abolished.”<sup>24</sup> The suggestion shocked many in Catholic circles who all thought the public school to be a godless institution.<sup>25</sup> But even as their political clout grew as staunch members of the Democratic Party, American Catholics remained somewhat on the defensive at the turn of the century. When the United States entered into war against Spain, for example, Catholics largely supported the government in order to demonstrate their allegiance and patriotism, despite widespread fears that it was another attack against Catholicism.<sup>26</sup>

The term Americanist was not a self-description for this group of clerics. However, as a group—most notably John Ireland, Cardinal James Gibbons of Richmond, Bishop John Keane, and Monsignor Denis O’Connell—they were all known for extolling the virtues and practical benefits of the American separation of church and state as greatly beneficial for the growth of Catholicism in the United States.<sup>27</sup> In 1887, for instance, then-Archbishop Gibbons preached a sermon in Rome that praised the constitutional arrangement in the United States at a time when the papal authorities were having difficulties with the anticlerical governments of Germany, Italy, and especially France.<sup>28</sup> In sharp contrast, in the United States, the government protected the freedom of the Church without interfering in her spiritual mission.<sup>29</sup> The Americanists believed eventually that this arrangement would become the standard for all other nations sooner or later in the same way that democracy or popular rule became a *sine qua non* in many societies.<sup>30</sup> This group also

23 See Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 91, 98 (2002).

24 McAVOY, *supra* note 20, at 71.

25 *Id.*

26 ANDREW PRESTON, *SWORD OF THE SPIRIT, SHIELD OF FAITH: RELIGION IN AMERICAN WAR AND DIPLOMACY* 220–21 (2012); see FRANK T. REUTER, *CATHOLIC INFLUENCE ON AMERICAN COLONIAL POLICIES, 1898–1904* 5, 11 (1967).

27 Thomas E. Wangler, *Americanist Beliefs and Papal Orthodoxy: 1884–1899*, U.S. CATH. HISTORIAN, Summer 1993, at 37, 44, 47.

28 PATRICK W. CAREY, *CATHOLICS IN AMERICA* 61 (2004).

29 *Id.*

30 *Id.*

sought to further Catholic engagement with Protestants and other non-Catholic religions. Ireland in particular thought participating in the 1893 World's Parliament of Religions would allow it to present the Catholic viewpoint on many issues without necessarily running against the Catholic prohibition on indifferentism.<sup>31</sup>

Not all American prelates agreed with these views. In fact, the first papal encyclical concerning the United States, commonly referred to as *Longinqua Oceani* (literally: "Wide Expanse of the Ocean"), issued in 1895, was requested by the apostolic (papal) delegate to the United States, Archbishop Francesco Satolli, partly as an intervention into the conflicts among the U.S. clergy, and partly to get the Pope to disapprove the ecumenical gesture made in Chicago by the Americanists.<sup>32</sup> "Now, although those general meetings have been tolerated by a prudent silence to this day, it would seem, nevertheless, more advisable for Catholics to hold their assemblies apart," wrote Pope Leo, a decision Satolli had anticipated.<sup>33</sup> In the midst of the brewing controversy, Keane was removed as rector of the Catholic University of America in 1896. Addressing the U.S. episcopate, Leo XIII did praise the vibrant state of Catholicism in the United States, and attributed it to, among others, the lack of opposition by the Constitution and the government, and the general state of freedom it enjoyed, protected by law and impartial tribunals.<sup>34</sup> But in the same paragraph, he warned that the separation of church and state arrangement in the United States was not the desired status of the universal Church. He reckoned that the Catholic Church in the United States would be better off if it enjoyed the favor of the laws and patronage of the public authority.<sup>35</sup>

*Longinqua Oceani* was a victory for conservative clerics not only in the United States but also in Europe. The papal chastening of liberal tendencies from across the Atlantic represented a modicum of good news at a tumultuous time. Mildly put, the birth of the French Third Republic in 1870 had not been good for the Catholic Church in France—defunding of religious schools, removal of religious instruction in public schools, as well as the prohibition to display crucifixes, among others, were some of the harsh anticlerical measures undertaken by the new government. Pursuant to his *ralliement* policy, Leo XIII tried to exhort French Catholics to be loyal to the Republic and thus deprive the latter of any arguments opposing the Church.<sup>36</sup> He had little success. Similar, though somewhat less intense, events were hap-

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31 *Id.* at 60.

32 *Id.*

33 *Id.* (quoting James F. Cleary, *Catholic Participation in the World's Parliament of Religions, Chicago, 1893*, 55 CATH. HIST. REV. 585, 605 (1970). CAREY, *supra* note 28, adds the word "own" to the quotation.

34 Leo XIII, Encyclical Letter *Longinqua* para. 6 (Jan. 6, 1895), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_06011895\\_longinqua.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_06011895_longinqua.html).

35 *Id.*

36 Leo XIII, Encyclical Letter *Au Milieu Des Sollicitudes* paras. 19–20 (Feb. 16, 1892), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_16021892\\_au-milieu-des-sollicitudes.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_16021892_au-milieu-des-sollicitudes.html); James E. Ward, *The French Cardinals and Leo XIII's Ralliement Policy*, 33 CHURCH HIST. 60, 61, 72–73 (1964).



pening in Germany and Italy. For example, the tension between the Holy See and the Italian state would not be fully resolved until the Lateran Accords were signed between the two in 1929.

Many American conservative bishops—indeed, the majority of them—shared Leo XIII's preference for an established Catholic Church. In their view, American separationism brought about a tendency to divorce religion completely from social and political life. It would lead to excessive individualism, rationalism, and materialism. A "naked public square," though the exact phrase was not to be coined until the early 1980s, could push political atheism into the forefront and lead to the rejection of any role whatsoever for revelation. That in turn would minimize the authority of the Church as the bearer of truth and tradition. Generally, they adhered to the traditional Catholic teaching on the nature of the state laid down earlier in *Immortale Dei*, which was issued in 1885.<sup>37</sup>

That did not dampen the enthusiasm for the American setup, at least insofar as the liberal clergy in Europe was concerned. Chronicling in any detail the turbulent struggle between the Catholic Church and the forces of republicanism, especially in nineteenth-century France, is beyond the scope of this Article, but suffice it to say that the episode provided fertile soil for the ensuing Vatican attack against the so-called heresy of Americanism. In 1897, an edited French translation of the biography of Isaac Hecker, the American founder of the Paulist fathers who had died in 1888, began to circulate widely.<sup>38</sup> It had a print run of seven editions and a planned Italian translation. With select quotations from the biography, French liberals held up Hecker as the archetypal priest needed for the modern world and emphasized those parts of the biography that, among others, conveyed the need for the individual to be his own "spiritual guide."<sup>39</sup> The translation first appeared after Archbishop Ireland visited Paris where, again, he praised the benefits of American democracy and its constitutional separation between church and state, describing the "Church's happy self-government under a constitution which made Caesarism impossible."<sup>40</sup> As historians have shown, the French translation of Hecker's biography was made deliberately inaccurate to appeal to the French public, who could not relate to certain details

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37 Leo XIII, Encyclical Letter *Immortale Dei* para. 6 (Nov. 1, 1885), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_01111885\\_immortale-dei.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html) ("As a consequence, the State, constituted as it is, is clearly bound to act up to the manifold and weighty duties linking it to God, by the public profession of religion.").

38 The biography itself was an admiring portrait of Hecker by Walter Elliott, a fellow American Paulist and companion of Hecker. See WALTER ELLIOTT, *THE LIFE OF FATHER HECKER* (1891).

39 McAvoy, *supra* note 18, at 142.

40 Vincent F. Holden, *A Myth in "L'Américanisme"*, 31 CATH. HIST. REV. 154, 156 (1945) (quoting Rev. William Barry, D.D., "Americanism," *True and False*, 169 N. AM. REV. 33, 36 (1899)).

Americans could, and to highlight the characteristics of it that supported *ralliement*.<sup>41</sup>

The democratic implications of using the figure of Isaac Hecker as a standard-bearer for the capacity of the Catholic Church to adapt to the demands of the modern world unnerved French conservatives, especially Charles Maignen, a priest from the order Brothers of St. Vincent de Paul and an avowed monarchist, who published vitriolic attacks against the French biography.<sup>42</sup> For instance, one of Hecker's statements, "The form of government of the United States is preferable to Catholics above other forms" was singled out for contradicting *Immortale Dei* and the Syllabus of Errors.<sup>43</sup> But Hecker's writings appeared to belie such interpretation. What Hecker was doing, according to one historian, was to refute the allegation then widespread within the United States that Catholicism and American democracy were incompatible. The text of his tract, *The Church and the Age*, seems to confirm this interpretation. He wrote: "Neither do we wish to plant our American ideas in the soil of other nations. The mission of the American Catholic is not to propagate his form of government in any other country."<sup>44</sup>

Nonetheless, as a result of the European, and particularly French, wrangling over the place of the Church in the new republic, the American constitutional arrangement became the subject of closer scrutiny in Rome, with some accusing the Americanists of bringing a spirit of "false liberalism" that would bring disaster to the Church.<sup>45</sup> The confident, exceptionalist claims of Americanists such as Keane and Ireland that American-style disestablishment and democracy portended the future probably exacerbated the situation, apart from their own underestimation of the Holy See's concerns.<sup>46</sup> In their view, the American victory over Catholic Spain in the Battle of Manila Bay in 1898 only confirmed that the future of the Catholic Church was to be found in the providential path being laid down in the United States. Irrespective of the deliberate translation errors that attracted the controversy and to which Rome later responded, the actual views of Isaac Hecker, which were adhered to closely by the Americanists, would not have entirely pleased the conservative faction in the Roman Curia either. Hecker, like the Americanists, worked within the confines of traditional Catholic doctrine and had no desire to change its content. But he also drew from a distinct frontier Catholicism occasioned by the American system. That is, he sought to adapt Catholicism to American institutions and ideals, which would in turn make America a place no longer alien or hostile to Catholics. More important, a Catholic America would likewise "enlighten" Europe. The changes he advo-

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41 Holden, *supra* note 40, at 156–57.

42 McAvoy, *supra* note 20, at 189–90.

43 I.T. HECKER, *THE CHURCH AND THE AGE* 106 (1887).

44 *Id.* at 109.

45 McAvoy, *supra* note 18, at 144.

46 Gerald P. Fogarty, *The Catholic Hierarchy in the United States Between the Third Plenary Council and the Condemnation of Americanism*, 11 U.S. CATH. HISTORIAN, Summer 1993, at 19, 33–35.

cated, among them, greater involvement in church affairs by the laity and vice-versa, that priests should participate in secular activities, an openness towards other faiths, and a positive view of the separation between church and state, would not have sat well with a Holy See already besieged by various European anticlerical governments.<sup>47</sup>

The French translation precipitated so much furor within Europe that it prompted the Pope to issue an encyclical on the matter. In *Testem Benevolentiae*, Leo XIII condemned the heresy so known by the name of Americanism.<sup>48</sup> The papal admonishment took the wind out of the sails of the Americanist project.<sup>49</sup> But curiously enough, what the precise object of condemnation was has not been clear. It was clearly addressed to Cardinal Gibbons of Baltimore, but the text also contained references that could only refer to the tempest occasioned by the French *Life of Hecker*. The standard historian of the episode, Thomas McAvoy, had argued that Americanism meant different things to different constituencies both in Europe and in the United States, and that what Leo XIII clearly condemned was religious Americanism, referring to those modernist developments that sought theological changes in doctrine and tried to chip away at the exclusive *magisterium* or teaching authority of the Church.<sup>50</sup> These were entirely different from the change sought by the Americanists, which, in their view, was simply to adapt the so-called accidents of the faith to the conditions of the new world. Hence, the encyclical did not really condemn the position of the Americanists themselves or even American religious institutions and practices. Whatever way the encyclical was intended, the brief period of seeming innovation across the Atlantic, however marginal, was ended abruptly by the encyclical and left the status quo intact.

A beleaguered Catholic Church thus entered the new century with *Immortale Dei* as the prevailing authority insofar as separation of church and state was concerned. The Leonine statement was premised on the Gelasian theory of dual powers; that is, it recognized that there is a distinction but also cooperation or concordance between temporal and sacred powers in the governance of Christendom.<sup>51</sup> More important, it also assumed that the sacred or spiritual power, by virtue of its divine origins, is primary in relation to the temporal or civil power because spiritual welfare is a higher end than the temporal one. The state should therefore respect and promote religious

47 See, e.g., William L. Portier, *Isaac Hecker and the First Vatican Council*, 71 CATH. HIST. REV. 206 (1985).

48 See generally Leo XIII, Encyclical Letter *Testem Benevolentiae Nostrae* (Jan. 22, 1899), <http://www.papalencyclicals.net/Leo13/113teste.htm>.

49 For the aftermath, see Thomas T. McAvoy, C.S.C., *The Catholic Minority After the Americanist Controversy, 1899–1917: A Survey*, 21 REV. POL. 53 (1959).

50 McAVOY, *supra* note 20, at 275–76; McAVOY, *supra* note 18, at 134.

51 See *Immortale Dei*, *supra* note 14, para. 13. Western constitutionalism had its origins in various efforts to go against this traditional duality. For instance, the influential fourteenth-century text *Defensor Pacis* by Marsilius of Padua sought to remove any papal role in earthly matters. MARSILIUS OF PADUA, THE DEFENDER OF PEACE 313–20 (Alan Gewirth trans., 1956).

adherence. In the words of *Immortale Dei*, “[a] State from which religion is banished can never be well regulated; and already perhaps more than is desirable is known of the nature and tendency of the so-called civil philosophy of life and morals.”<sup>52</sup>

This also featured what is now famously known as the thesis-hypothesis theory about the relationship between church and state. The ideal thesis is that in principle, there should be a unity of church and society while toleration is but a working hypothesis. This formulation was what fueled skepticism about the ability of Catholics to be good democrats, especially in the United States. Under this view, separation of church and state and its essential corollary, religious freedom, in pluralist contexts was thus simply a *modus vivendi*, something Catholics should live with until they constitute a majority in a state, in which case they should strive to make Catholicism the publicly professed religion in the land. *Immortale Dei* reasoned that the Church cannot approve of a liberty that would “beget[ ] . . . contempt of the most sacred laws of God, and cast[ ] off the obedience due to lawful authority, for this is not liberty so much as license.”<sup>53</sup> Thus, its weight endorsed the previous encyclicals of Pius IX, which held freedom of conscience as unduly enabling indifferentism and the separation of church and state as a pernicious error.<sup>54</sup>

## II. “MR. BLANSHARD HAS ABOUT DONE IT”: JOHN COURTNEY MURRAY AND THE AMERICAN EXPERIMENT

John Courtney Murray confronted the formidable and seemingly uncompromising Leonine theological edifice with two crucial moves: First, he elevated a historicist understanding of the Church and its teachings. A remarkable if radical move at the time, he encouraged Catholics to consider the principle of church-state cooperation as a product of history.<sup>55</sup> And second, in order to resolve the conundrum posed by the statement of “error has no rights,” which underlies the Church objection to freedom of conscience, he emphasized that the locus of the right belongs to the human person who, by virtue of his dignity, has the right to be immune from any kind of coercion in his or her search for God and the truth.<sup>56</sup> What is being protected is not the “error” that the person might come up with, but rather the person’s search for the truth. This is not the first time human dignity appeared in a Vatican document. In 1937, Pius XI condemned communism because it denied the dignity of the human person.<sup>57</sup> And it appeared again in *Pacem*

<sup>52</sup> *Immortale Dei*, *supra* note 14, para. 32.

<sup>53</sup> *Id.* para. 37.

<sup>54</sup> *Quanta Cura*, *supra* note 16, para. 3.

<sup>55</sup> Joseph A. Komonchak, *The Crisis in Church-State Relationships in the U.S.A.*, 61 REV. POL. 675, 698 (1999) (“The principle itself is always valid; but the forms of this cooperation have varied. . . . [T]hey are determined by the special character of particular political societies as these exist in varying and changing historical contexts.”).

<sup>56</sup> *See id.* at 694–98, 700–01.

<sup>57</sup> Pius XI, Encyclical Letter *Divini Redemptoris* para. 10 (Mar. 19, 1937), [http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_19031937\\_divini-](http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19031937_divini-)

in *Terris*, the threat of a global nuclear war lurking in the background, where John XXIII endorsed Leo XIII's view that freedom safeguards the dignity of the human person as a son of God.<sup>58</sup> In this way, Murray, and by extension *Dignitatis Humanae*, could claim an organic development of Catholic doctrine.<sup>59</sup>

While Murray's academic background was in dogmatic theology, he started writing on the problem of interfaith cooperation as a lively debate erupted in the pages of Catholic journals on the theological difficulties posed by Christian cooperation.<sup>60</sup> Oddly enough, the effort was encouraged by the Holy See in order to mount a united religious front against the horrors of fascism. But under then-existing doctrine, Catholics were not allowed to collaborate with other faiths, as it would go against the teaching on indifferentism. That is, putting Catholicism and other religions on the same footing would likely lead people to believe that all religions are equal or that difference of belief is unimportant.<sup>61</sup> In a series of essays published in the journal *Theological Studies* between 1942 and 1943, Murray acknowledged such dangers, but he also argued that secularism posed an equal danger to all faiths.<sup>62</sup> The solution he suggested was more doctrinal instruction for Catholics, not the banning of intercredal cooperation.<sup>63</sup>

In 1945, he began to grapple with the question of religious freedom, in the United States in particular. He cited major historical events—the inclusion of religious freedom among FDR's Four Freedoms, religious issues in the Soviet Union, the recent U.S. Supreme Court flag salute decisions, *Minersville School District v. Gobitis*,<sup>64</sup> and *West Virginia State Board of Education*

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redemptoris.html; see SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* 39 (2015) ("*Divini Redemptoris* was epoch-making, for it gave the concept as an incident of individuals or persons by far its highest profile entry in world politics to that date.").

58 John XXIII, Encyclical Letter *Pacem in Terris* para. 10 (Apr. 11, 1963), [http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem.html](http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html).

59 There is much debate within Catholic academic and theological circles as to the nature of *Dignitatis Humanae*. See, e.g., M. John Farrelly, *Religious Culture and Historical Change: Vatican II on Religious Freedom*, 49 *HEYTHROP J.* 731, 731–33 (2008); Thomas Pink, *Conscience and Coercion*, *FIRST THINGS*, Aug.–Sept. 2012, at 45–46.

60 McGREEVY, *supra* note 21, at 204–15 (discussing John Courtney Murray's work, which focused on how American Catholics and Catholic principles interacted with broader, interfaith efforts to defend religious freedom in a modern western context).

61 John Courtney Murray, *Christian Co-operation*, 3 *THEOLOGICAL STUD.* 413, 415 (1942).

62 *Id.* at 415, 427–29; John Courtney Murray, *Co-operation: Some Further Views*, 4 *THEOLOGICAL STUD.* 100, 100, 111 (1943) [hereinafter Murray, *Some Further Views*]; John Courtney Murray, *Intercredal Co-operation: Its Theory and Its Organization*, 4 *THEOLOGICAL STUD.* 257, 257–58 (1943) [hereinafter Murray, *Intercredal Co-operation*].

63 Murray, *supra* note 61, at 415; Murray, *Some Further Views*, *supra* note 62, at 109; Murray, *Intercredal Co-operation*, *supra* note 62, at 278–79; see also BARRY HUDOCK, *STRUGGLE, CONDEMNATION, VINDICATION: JOHN COURTNEY MURRAY'S JOURNEY TOWARD VATICAN II* 26 (2015) (noting Murray's argument in favor of "an ambitious program of doctrinal instruction for Catholics" to "decrease the threat of indifferentism").

64 310 U.S. 586 (1940).

*v. Barnett*<sup>65</sup> among them, as the impetus for bringing the issue of religious liberty to the fore. He made a passing reference to a movement that would come up with an international bill of rights, the soon-to-be Universal Declaration of Human Rights, and stated the need for a juridical means to protect religious liberty and thus further the ends of international peace. But it was the publication of the book *Religious Liberty: An Inquiry* by M. Searle Bates, released under the auspices of the Federal Council of the Churches of Christ (FCC), an umbrella Protestant organization of various denominations, together with a joint statement that the FCC made in conjunction with the ongoing discussion concerning the Universal Declaration on Human Rights, that gave him an opportunity to address some of the Protestant objections to what was admittedly then an ambiguous official Catholic position on religious liberty. Murray gamely characterized the Protestant mind as “natively confused”<sup>66</sup> and criticized the persistent Protestant invocation of the principle of separation of church and state against Catholics as lacking any grounding in principle.<sup>67</sup> He also took umbrage at the proposition that the First Amendment of the U.S. Constitution presented an article of faith or that it conformed to Protestant dogma, thus making any dissenters un-American. As early as 1946, Murray was already beginning to frame the principle of separation of church and state as historically contingent, not as an abstract principle. Distancing the United States from the European nations, he described the First Amendment as a fact-based constitutional and juridical offshoot of what was, from the very beginning, a religiously heterogeneous society.<sup>68</sup> Given the American pluralist context, the First Amendment simply means that the government has limited powers, and nothing more.

The extensive literature on John Courtney Murray and his contributions to *Dignitatis Humanae* has largely overlooked his early writings, but it was apparent from them that it was the fierce postwar battles between Catholics and Protestants in the United States that drove him to articulate and then later seek a development in Catholic doctrine on religious liberty. In the immediate years after the Second World War, the U.S. Supreme Court inaugurated its modern Establishment Clause jurisprudence with *Everson v. Board of Education*.<sup>69</sup> In that case, the Court decided that the Establishment Clause allowed the reimbursement of parents for their children’s transportation, including those going to religious schools, on the ground that the money goes back to the parents themselves and not directly to any church or religious organization.<sup>70</sup> What was more important than the outcome, however, was the Court’s pronouncement that the Establishment Clause was intended

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65 319 U.S. 624 (1943).

66 John Courtney Murray, *Separation of Church and State*, 76 AMERICA 261, 261 (1946).

67 John Courtney Murray, Book Review, 7 THEOLOGICAL STUD. 151, 155–59 (1946) (reviewing M. SEARLE BATES, RELIGIOUS LIBERTY: AN INQUIRY (1945)); see also John Courtney Murray, *Religious Liberty: The Concern of All*, 78 AMERICA 513, 513–16 (1948).

68 See Murray, *supra* note 66, at 261–62.

69 330 U.S. 1 (1947).

70 *Id.* at 18.

to erect a wall of separation between church and state, and more specifically, that no law could possibly aid religion.<sup>71</sup> Murray emphatically charged that the Court failed to show any proper justification for this absolutist rule.<sup>72</sup> In his view, the Supreme Court's interpretation in fact unwittingly established a religion, that of secularism—the kind that relegates religion to the private sphere. He invoked the unlikely figure of President Woodrow Wilson in advocating for a return to the original political philosophy of the First Amendment, while at the same time emphasizing the new historical realities of the twentieth century.<sup>73</sup> It was not enough to insist on freedom as immunity from government coercion, as that would allow other kinds of tyrannies from other ideologies such as secularism and other false political and educational philosophies. Instead, Murray argued that the realization of freedom of religion also necessitated a positive empowerment by a just measure of governmental aid.

American Catholics later found themselves having to fend off various questions about Spain as the ideal Catholic state (Murray claimed both Spain and the United States are hypothesis, instead of being on opposite ends), as well as allegations that there were plans to alter the U.S. Constitution and institute the legal persecution of Protestants.<sup>74</sup> Similar to the dual-identity challenge that confronted the Americanists of the late nineteenth century, the question whether Catholicism is compatible with democracy again became salient with the publication of Paul Blanshard's hugely successful anti-Catholic polemic, *American Freedom and Catholic Power*, in 1949, which sold forty thousand copies within three months of publication.<sup>75</sup> It bolstered existing accusations that Catholicism constituted a fundamental threat to American democracy, with many equating it to Communism as simply another form of authoritarianism. In response to the *Everson* decision, a group of scholars and clergy formed Protestants and Other Americans United for the Separation of Church and State (POAU), dedicated to the outlawing of any aid to parochial schools. In a surreal development, nineteenth-century papal encyclicals and quotes from clergy and lay theologians featured prominently in mainstream newspapers such as the *Washington*

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71 *Id.*

72 John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 23, 24–25 (1949). He had the same objections to the decision in *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948) (use of public school facilities to give religious instruction to schoolchildren violates the Establishment Clause). Murray, *supra*, at 24 (“[T]he *McCollum* decision gives rise to a decided impression that the state . . . is now neutral *against* religious belief.”).

73 Murray, *supra* note 72, at 40.

74 John Courtney Murray, *Separation of Church and State: True and False Concepts*, 76 AMERICA 541 (1947).

75 McGREEVY, *supra* note 21, at 166. For a broader cultural backdrop as well as popular reception of the Blanshard book, see *id.* at 189–215.

*Post*.<sup>76</sup> The toxic atmosphere also forced the resignation of Myron Taylor, who had been serving as a personal envoy of the President to the Holy See since 1939, and scuttled the appointment of Mark Clark, a Protestant and decorated war veteran, to serve in the same post. No American ambassador would be sent to the Vatican until 1984.<sup>77</sup>

Murray was unsurprisingly negative about Blanshard's book, describing it as offering "material for a study of the New Nativism. That is the only interesting thing about it."<sup>78</sup> But the use of "American" and "un-American" as value categories, he wrote, brought back dangerous echoes of the same evils that Leo XIII confronted when he issued *Immortale Dei* and that arguably, in Murray's view, formed the backdrop for both *Longinqua Oceani* and *Testem Benevolentiae*.<sup>79</sup> Nineteenth-century Jacobinism, or "sectarian liberalism," was a totalitarian, thoroughgoing monism that sought to make everything subject to the State and render the public sphere devoid of any religion. Blanshard's theory was, however, Jacobinism with a twentieth-century and rather American twist.<sup>80</sup> The false idol in this case was the democratic process as the sole criterion of rightness in law.

In the years immediately before and following the publication of *American Freedom and Catholic Power*, Murray came up with a systematic dissection and reconstruction of Catholic theories about the relationship between church and state. One of the characteristic features in his writings was a kind of skepticism toward anything absolute in substance as well as method. "Nothing is more unhelpful than an abstract starting point," Murray wrote in 1948.<sup>81</sup> To its critics, the Roman Catholic Church is hardly the first example that comes to mind when one speaks about non-absolutism. But there is a fine distinction between transtemporal, transcendent principles and the contingent application of such principles. The key is finding where that distinction lies. As Murray emphasized, there is "'an abyss' between Innocent IV and the modern papacy, that is measured by all the social and political trans-

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76 See e.g., *Faith and Freedom*, WASH. POST, Oct. 17, 1947, at 20; Helen Wallace Kelley, Letter to the Editor, *Faith and Freedom*, WASH. POST, Oct. 30, 1947, at 12; *Pope Denies Church and State Can Be Entirely Separated*, WASH. POST, Oct. 31, 1947, at 1.

77 See *About Us*, EMBASSY U.S. HOLY SEE, (2016), <http://vatican.usembassy.gov/about-us.html> ("Formal diplomatic relations with the Holy See were established in 1984 by President Ronald Reagan and Pope John Paul II.").

78 John Courtney Murray, *American Freedom and Catholic Power*, 169 CATH. WORLD 233, 233-34 (1949) (reviewing PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949)).

79 *Id.*

80 *Id.*

81 John Courtney Murray, *Governmental Repression of Heresy*, in PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA 26, 33 (1948) [hereinafter Murray, *Governmental Repression of Heresy*]. This did not extend only to church-state affairs but also to freedom of expression. See also John Courtney Murray, *Free Speech and Its Relation to Self-Government by Alexander Meiklejohn*, 37 GEO. L.J. 654 (1949) (reviewing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)).



formations that have occurred.”<sup>82</sup> This inclination was already apparent in his early postwar essays but received full treatment in a paper delivered during the 1948 Annual Convention of the Catholic Theological Society of America. In response to the controversy that occurred after a 1922 essay by John Ryan citing *Immortale Dei* appeared in the *Washington Post*, Murray sought to subject the common understanding that the principle of civil intolerance was inherent in Catholic doctrine to closer scrutiny.

The first step was to recover the Gelasian conception of dual swords or dual power, followed by an examination of the three extant theories on how to understand the relationship between temporal and spiritual power. A traditional hierocratic view, often associated with the medieval theorist John of Salisbury, is that God has delegated to the Church all power over temporal and spiritual affairs but has temporarily ceded temporal power to the earthly ruler. Another view belonged to early modern theologian and later Jesuit saint, Robert Bellarmine, whose theory of indirect power is also premised on a duality of powers, but with a key difference. The spiritual power could have temporal effects only if done for a spiritual purpose. For instance, a pope could depose an unjust ruler if such would further spiritual ends. Like the previous direct-power theory, Murray thought it erroneously denied the proper autonomy of the state.<sup>83</sup> The second, preferable, but similarly indirect, power theory was that of John of Paris that, again, builds on the duality of powers. But unlike Bellarmine, John of Paris recognized that even as the spiritual power is more important than the temporal one, only the state or secular authority could wield coercive actions. What Murray took from this sustained reflection on various theories throughout Church history was that there were limits to the competences of both state and church.<sup>84</sup>

*Immortale Dei*'s confessional state was thus a recognition of the moral obligation of the state, rooted in natural law, to care for religion.<sup>85</sup> But Murray explained this doctrine in light of Leo XIII's historical circumstances and social necessities, particularly the hostile governments of his day and the ignorant and uneducated masses of his time. The unique example of the United States gave him the assurance that educated citizens informed by their consciences would obviate the need for the paternalistic state in the Leonine encyclicals.<sup>86</sup> There is a distinction between “the public profession of religion by society” and the “care of religion by the public power.”<sup>87</sup> Like Leo XIII, Murray did not believe in a naked public square devoid of religion. What he advocated for instead is the freedom of the Church and other mediating social institutions to act as a buffer between the individual citizen and

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82 Murray, *Governmental Repression of Heresy*, *supra* note 81, at 36.

83 John Courtney Murray, *St. Robert Bellarmine on the Indirect Power*, 9 THEOLOGICAL STUD. 491, 504 (1948).

84 See generally Murray, *Governmental Repression of Heresy*, *supra* note 81.

85 John Courtney Murray, *Leo XIII: Two Concepts of Government*, 14 THEOLOGICAL STUD. 551 (1953).

86 *Id.* at 558–59.

87 Murray, *supra* note 4, at 183.

the state. Care for religion simply consisted of the state assuring the church the ability to fulfill its work, that is, guaranteeing its freedom.

### III. "YOU MAY WRITE POETRY": THE AMERICAN EXPERIMENT AND *DIGNITATIS HUMANA*

In 1955, Murray's Jesuit superiors in Rome advised him to stop writing. It was not surprising that conservative European cardinals, particularly Alfredo Cardinal Ottaviani, did not agree with his position. But his fellow American clergy likewise opposed him. Francis Connell, an American theologian and one of the staunchest critics of Murray, was the one who appealed to the Holy Office in Rome for action against the latter. Among his arguments was that Catholic doctrine could not sanction Murray's view of the state as limited and agnostic.<sup>88</sup> It is the duty of the state to recognize the Church as the one true religion, and therefore the Church had a legitimate right to a special status. Ottaviani cited the American debates being waged in the pages of *The American Ecclesiastical Review* at that time and concluded that these were but mistaken theories. In the ecclesiastical censure that followed shortly thereafter, indeed, one of the propositions deemed erroneous was that "[t]he State organized on a genuinely democratic basis must be considered to have done its duty when it has guaranteed the freedom of the Church by a general guarantee of liberty of religion."<sup>89</sup> This was a direct response to Murray's similarly worded tract that American Catholics regard full constitutional and religious liberty as a valid democratic political ideal and that the democratic state may and in fact must consider that it has done its political duty when it has guaranteed the freedom of the Church by a general guarantee of the freedom of religion.<sup>90</sup>

Inquiring as to what he could write on, if not church-state relations, in the meantime, a fellow American Jesuit working in Rome advised, "I suppose you may write poetry."<sup>91</sup> In the meantime, Pius XII spoke favorably about the American arrangement as an example of the way in which the Church succeeds in flourishing in diverse situations.<sup>92</sup> But it would take more than a

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88 Joseph A. Komonchak, *Catholic Principle and the American Experiment: The Silencing of John Courtney Murray*, 17 U.S. CATH. HISTORIAN, Winter 2009, at 28.

89 *Id.* at 39 (quoting Joseph C. Fenton, *The Ninth Trip to Rome* 163 (unpublished diary); Memorandum from Francis Connell, RABP, "Church-State Letters").

90 See, e.g., John Courtney Murray, *The Problem of 'The Religion of the State'*, 124 AM. ECCLESIASTICAL REV. 327, n.17 (1951) ("I am inclined to say that the only form of *cura religionis* on the part of the state that is inherent in the idea of the political relationship is the *cura libertatis religionis*, which, in the hypothesis of the founding of the Church, must extend itself to a *cura libertatis Ecclesiae*. Everything else is history.")

91 HUDOCK, *supra* note 63, at 98 (quoting DONALD E. PELOTTE, JOHN COURTNEY MURRAY: THEOLOGIAN IN CONFLICT 53 (1975)).

92 Pius XII, Address Vous Avez Voulu Discurso Sobre la Iglesia y la Inteligencia de la Historia [Address Vous Avez Voulu to Participants in the Tenth International Congress of Historical Sciences] para. 21 (Sept. 7, 1955), [https://w2.vatican.va/content/pius-xii/es/speeches/1955/documents/hf\\_p-xii\\_spe\\_19550907\\_vous-avez-voulu.html](https://w2.vatican.va/content/pius-xii/es/speeches/1955/documents/hf_p-xii_spe_19550907_vous-avez-voulu.html).

few years before Murray would be vindicated by the eventual issuance of *Dignitatis Humanae* less than a decade later.

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The American experiment on constitutional church-state separation—distinct at the time of its inception—has continually tested the contours of Roman Catholic doctrine in both substance and method since the nineteenth century. The unsuccessful efforts of the Americanists to make modernity and Catholic doctrine compatible through the example of a vibrant American Catholic community eventually bore fruit in Murray's writings, and with them, the revolutionary documents produced during the Second Vatican Council.

