Working Paper Series

Villanova University Charles Widger School of Law *Year* 2013

THE LIBERTY OF THE CHURCH: Source, Scope and Scandal

Patrick McKinley Brennan
1567, brennan@law.villanova.edu

Forthcoming in **Journal of Contemporary Legal Issues** (2013)

THE LIBERTY OF THE CHURCH:
Source, Scope, and Scandal

Patrick McKinley Brennan[1]

I. *Libertas Ecclesiae*, Not Something Else

Once upon a time I took a tour of the Supreme Court of the United States. When the guileless intern conducting the tour reached the point at which she was charged to disclose the function of judicial opinions, this is what she said: "Dissents are opinions where the minority explains how the majority's opinion is in *bad taste*" (emphasis added). Bad taste is exactly what mention of the liberty of the Church, *libertas Ecclesiae*, is widely thought to exemplify in the polite company of contemporary academic and popular celebration of "religious freedom."[2] Mention of "the Church" -- especially of her freedom and what that freedom is *for* -- imports unwelcome images of essence, organic growth, tradition, final causes, and authority, not to mention the Inquisition and perhaps even Christ the King of the universe. Content-free commitment to "religion," meanwhile, appeals effortlessly to modern man's preference for the

[1] John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. I am grateful to Steve Smith and Larry Alexander for the invitation to participate in the Center for Law and Religion's conference on "The Liberty of the Church" and to so many conference participants for their helpful engagement with my paper, and especially Professor Tom Smith, of the University of San Diego Law School, whose formal commentary on the paper was subtle and insightful. I thank Brian McCall and Michael J. White for their extensive and acute comments on an early draft of the paper.

[2] Conspicuous exceptions include Steven D. Smith, *Freedom of Religion or Freedom of the Church*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412, Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007), and Michael J. White*, Religion and the Common Good*, 12 THE JOURNAL FOR PEACE AND JUSTICE STUDIES 27 (2002). In his contribution to this conference, Garnett described *libertas Ecclesiae* as a "mood" that the courts should adopt. As I said at the conference itself, I doubt that the One whose Mystical Body the Church is would reduce her liberty to the status of a "mood," but lawyers have lawyerly ways of saying things, and I greatly value Garnett's contribution.

formless. The popular favorite in this age of surveys and game shows is "religious freedom," no matter the arbitrariness ineluctably involved in specifying a generic phenomenon called "religion."[3]

Is it just possible -- it remains an open question -- that at a conference verily dedicated to exploring *libertas Ecclesiae* it will be considered, if not in good taste, at least not in bad taste to start with the liberty of the Church? Or will it be considered socially unacceptable -- "intolerant," even -- to expound the concept of the liberty of the Church in its own right, that is, as understood by the Catholic Church with respect to herself, which, after all, is where the concept originated? A further question is whether any possible largesse will extend to my *defense* of that understanding. A still further question is whether my additional argument -- that an adequate conception of the *libertas Ecclesiae* is predicated upon an acceptance of the concrete implications of the social kingship of Christ -- will turn out to be a bridge too far, even for those committed to a generous measure of what counts as good taste.

The point, though, is that *taste* is no guide in matters of jurisprudence, let alone in theology. No matter where you are or where you wish to go, the only sure guide is the truth. Serious attention to *libertas Ecclesiae* cannot but flirt with the truth. Not accidentally, truth is the first casualty of the inexorable but dubious logic of "religious freedom."

II. The Church, Not Just Another Group

"Religious freedom," as it is commonly understood today and celebrated, refers to individuals and, sometimes, groups acting according to (sincerely?) held beliefs, irrespective of the truth or falsity of those beliefs, subject only to the commonsensical limit of not violating the "public order" (as opposed to the "common good," a point to which we shall return).[4] The "right" to such liberty and to its juridical protection is defended on many, varied, and much-vaunted grounds, especially the avoidance of social discord and so-called "wars of religion."[5] Anyone who has read John Rawls, for example, knows how solemnly it is said by the those who are wise in the eyes of the world that the price of keeping the peace is ruling truth inadmissible as a criterion for determining what freedom to permit and what "freedom" to deny. The constitutional (and statutory and regulatory) bracketing of truth claims in the name of protecting "religious freedom" does not officially deny the truth of the Church's claim on behalf of her own liberty, of course. It suffices for the strategy's efficacy that it render the claim irrelevant by situating the Church as just one among as many groups of (sincere?) believers as can be counted, or, as is more likely under current constitutional jurisprudence, recognizing the aggregate rights of the individuals who happen to be her members.[6]

---

[3] Ironically, then, I have some sympathy with the question that forms the title of Brian Leiter's recent book, WHY TOLERATE RELIGION? (2012).

[4] For a telling example of what is involved in arriving at a legal definition of "religion" and the place of sincerity therein, see JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 141-56, 160-76, 231-32 (2000). *See also* KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 109-56 (2006). For an historical account of the problem, see BRAD S. GREGORY, THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY 74-128, 167-76 (2012).

[5] On the nation-building reasons for what are inaccurately styled "wars of religion," see WILLIAM T. CAVANAUGH, THE MYTH OF RELIGIOUS VIOLENCE: SECULAR IDEOLOGY AND THE ROOTS OF MODERN CONFLICT (2009).

[6] *Hosana-Tabor* is not to the contrary, for it provides an affirmative defense rather than a jurisdictional bar. "We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear [the] case.' Morrison v. National Australia Bank Ltd., 561 U. S. ___, ___ (2010) (slip op., at 4–5) (internal quotation marks omitted)." Hosana-Tabor Lutheran Church and School v. EEOC, 565 U.S. __ n.4 (2012). The significance of the constitutional limit's being an "affirmative defense" rather than a jurisdictional bar is unmistakable as Mark Strasser has seen, though from what I regard as the wrong point of view. *See* MARK STRASSER, ON MAKING THE ANOMALOUS MORE ANOMALOUS, *available at* Bepress. *Cf.* Greg Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WILLIAM AND MARY BILL OF RIGHTS

This, though, the Church does not and cannot accept, for it is inconsistent with the Church's self-understanding of her nature. To assimilate the Church to other groups or to dissolve her into her members is to de-nature the Church, as Heinrich Rommen explains:

> [T]here is no avoiding the nature and self-understanding of the Church, if the problem of Church and State should be approached. Otherwise the term "Church" would stand only for utterly private opinions by private individuals in that sphere of irrational feelings and unscientific imagination which for the secularist agnostic is religion. And it is clear that upon such suppositions it would follow that the political authority has exclusive and plenary competency to judge about the compatibility of such a religion with the policy and the public order of the state. The consequence of such thinking is the abolition of the Church-State problem by the complete elimination of the Church.[7]

It is a paradoxical fact that in contemporary culture, the Church must insist upon the socio-juridical relevance *of the truth itself* as a very condition of her insisting upon the particular truth about herself. And, irrespective of culture and time, the Church must insist upon the truth about herself not because to do so is, say, an expression of the collective will of the faithful or of the hierarchy, but because "[t]he Church is 'founded by Christ; therefore it is juridically a 'foundation,' not a corporation, and its constitution, its fundamental law, is given directly by God and not ordained by the people."[8] This is the Church's self-understanding, and any honest consideration of the relationship between Church and state must begin by first acknowledging that understanding for what it is, even as a condition of ultimately rejecting it. To acknowledge it, however, is to set some of the terms of the debate, for an act of popular will is a transparently insufficient reason to contravene the divine will.

None of the foregoing purports to settle the exact terms of the relationship between Church and state, of course. The state is a notoriously changeable and changing institution, and inevitably so -- though within certain limits established by nature and by supernature.[9] History demonstrates that the Church is familiar with a wide range of relationships between herself and another equally wide-ranging spectrum of civil ruling authorities, some more adequate than others. My point, though, is that any potentially adequate analysis on the level of concrete historical development must start with the Church's self-understanding, not with what the philosophers have always already said in order to limit or eliminate the Church. If today the Church defends "religious freedom," she does so as an exercise of her own antecedent mandate and consequent freedom *to be the Church* and thus to teach the human person who he is and who he is called to be. Any religious freedom the Church teaches, however, cannot be inconsistent with her self-understanding or her relationship with her Founder and His divine will.

I will take the precaution of observing here that to give priority to the Church and to Christ is not to bless the coercion of the unbaptized by the baptized. The Church does not approve -- indeed she vehemently denies the legitimacy of -- coercing the unbaptized into "believing" the Catholic faith. Nothing whatsoever in the Church's self-understanding anticipates a world in which Catholics *force* non-Catholics to become Catholics. But tolerance, of which much will be needed in the world of today, does not work by eliding truth and error. The latter work is begun by indifferentism, which is close cousin to

---

JOURNAL, 43 (2008) (defending a subject-matter jurisdictional position). *See also* Michael Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141510.

[7] Heinrich Rommen, *Church and State*, THE REVIEW OF POLITICS 321, 322 (1950).

[8] *Id.*

[9] "The Church's end and constitution are absolute, always the same, above civilizations and historical periods. . . .The Church's activity extends into the 'World.' . . . . In each civilization and era of history the 'idea' of 'the' State finds expression in concrete form, for example, monarchy or democracy, with a Bill of Rights. Thus there is produced beyond the abstract Church-State relationship on the abstract-general level a particular concrete Church-State relationship problem which requires its own concrete answer *without the sacrifice of the perennial principles governing Church-State relations*." Rommen, *supra* note 7, at 323. (emphasis added).

"religious freedom" in its common acceptation. To honor the liberty of the Church is, in the words of John Courtney Murray, S.J., to recognize that

> the advent of Christ the King, the promulgation of the New Law and the supernatural statute of the Church . . . involved a certain dislocation of the natural order, a diminution of the stature and scope which the political power would have possessed in another, purely natural dispensation.[10]

The fact of the Church changes the natural world *by subordinating it* to a "supernatural statute." This is the stuff of worldly scandal, not the product of "neutral public reason."

III. The Problematics and Hermeneutics of Vatican II

Any discussion of the contemporary Catholic understanding of the *libertas Ecclesiae* must take as its point of departure the text of *Dignitatis humanae*, the Second Vatican Council's "Declaration on Religious Liberty," promulgated in 1965 at the conclusion of the Council.[11] The most contentiously debated document of the entire Council, *Dignitatis* has been celebrated ever since by those who regard it as having worked what in Catholic theology is known as *a development of doctrine*.[12] The matter of that alleged development is the human person's right to "religious freedom" *in public*. The interpretive difficulties that attend ascertaining *exactly* what *Dignitatis* teaches on the question of individual religious freedom are impressive, and will tax us considerably as we proceed. It is beyond dispute, however, that "whereas *Dignitatis* proceeds cautiously on other questions," on the matter of the *libertas ecclesiae* the document is "unusually loquacious."[13] Here, from Article 13 of *Dignitatis*, is its central statement on the liberty of the Church:

> Among the things which concern the good of the Church and indeed the welfare of society here on earth – things therefore which are always and everywhere to be kept secure and defended against all injury – this is certainly preeminent, namely, that the Church should enjoy that full measure of freedom which her care for the salvation of men requires. This freedom is sacred, because the only only-begotten Son endowed with it the Church which He purchased with His blood. It is so much the property of the Church that to act again it is to act against the will of God. The freedom of the Church is the fundamental principle [*principium fundamentale*] in what concerns the relations between the Church and governments and the whole civil order.[14]

---

[10] JOHN COURTNEY MURRAY, ON THE STRUCTURE OF THE CHURCH-STATE PROBLEM, 11, 12 (1954) *available at* http://woodstock.georgetown.edu/library/Murray/1954d.htm.

[11] The Vatican's English translation of the Declaration is available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html. Unless otherwise noted, all additional English-language quotations of Vatican documents will be from the translations available on the Vatican website. Latin-language quotations are also taken from the Vatican website.

[12] Noonan, *supra* note 4, at 348-53.

[13] RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD 232, 231 (2003).

[14] Vatican II, *Dignitatis Humanae* No. 13 (Dec. 7, 1965). "Inter ea quae ad bonum Ecclesiae, immo ad bonum ipsius terrenae civitatis spectant et ubique semperque servanda sunt atque ab omni iniuria defendenda, illud certe praestantissimum est, ut Ecclesia tanta perfruatur agendi libertate, quantam salus hominum curanda requirat (32). Haec enim libertas sacra est, qua Unigenitus Dei Filius ditavit Ecclesiam acquisitam sanguine suo. Ecclesiae sane adeo propria est, ut qui eam impugnant, iidem contra Dei voluntatem agant. Libertas Ecclesiae est principium fundamentale in relationibus inter Ecclesiam et potestates publicas totumque ordinem civilem."

According to the Second Vatican Council, then, the *libertas Ecclesiae* -- whatever its still-to-be-specified content -- is nothing less than the "*principium fundamentale*" governing relations between the Church and the entire rest of the world, and such freedom is called "sacred" (*sacra*) "because it is endowed by Christ."[15] This last point must not go unnoticed. As we shall see, *Dignitatis* grounds the general right of religious freedom on the dignity of the human person, but the fundamental principle of the Church's (sacred) liberty "stems from divine mandate directly, rather than via secondary causality."[16]

Immediately following its assertion that the *libertas Ecclesiae* is the *principium fundamentale* governing the Church and the entire civil order, including governments, *Dignitatis* proceeds to specify some of the content of that freedom, that is, what it is in the Church's nature to do (with her freedom). That content, however, as well as the *principium fundamentale* itself, both of which appear in Article 13 of the document, cannot be interpreted except in light of an apparently architectonic statement in Article 1 of the Declaration. That statement, which I shall refer to as the "*relinquit* clause," is this: the Council "leaves untouched [*integram relinquit*] traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ."[17] The question, then, would *seem* to be what the "traditional Catholic doctrine" was and, furthermore, remains.

As I mentioned above, the interpretive difficulties *Dignitatis* presents are impressive, and it is easy to see why the interpretation of the *relinquit* clause is potentially decisive and, therefore, acutely contested. If the document begins in Article 1 by leaving the tradition exactly where it stood, is the rest of the document, including the "*principium fundamentale*," not just a restatement of traditional Catholic doctrine?

As already noted, however, *Dignitatis* is widely celebrated and understood as "developing doctrine." Development of doctrine occurs as "insight grows into what has been handed down,"[18] moving from the general to the more particular in the articulation of the deposit of faith that has been handed down from the time of the death of the last Apostle. The principal interpretive debate over *Dignitatis* concerns whether it merely restates doctrine, which would be the clear indication of the *relinquit* clause, or develops doctrine, notwithstanding the contrary indication of that clause.

The former prospect -- of "leav[ing]" *traditional* Catholic doctrine "untouched" -- calls forth formidable creativity from those who wish to discover in *Dignitatis* a new doctrine on the question of religious freedom. There can be no better example of this resourcefulness than what a young Father Joseph Ratzinger wrote on the question in 1966:

> Most controversial was the third newly emphasized aspect. The text *attempts* to emphasize a continuity in the statements of the official Church on this issue. It also says that it "leaves intact the traditional Catholic doctrine on the moral duty of men and communities toward the one true religion and the only Church of Christ." The term "duty" here has doubtful application to communities in their relation to the Church. Later on in the Declaration, the text itself *corrects* and *modifies* these earlier statements, offering something new, something that is *quite different* from what is found, for example, in the statements of Pius XI and Pius XII. It would have been

---

[15] Hittinger, *supra* note 13, at 233.

[16] Hittinger, *supra* note 13, at 233.

[17] "Pariter vero profitetur Sacra Synodus officia haec hominum conscientiam tangere ac vincire, nec aliter veritatem sese imponere nisi vi ipsius veritatis, quae suaviter simul ac fortiter mentibus illabitur. Porro, quum libertas religiosa, quam homines in exsequendo officio Deum colendi exigunt, immunitatem a coercitione in societate civili respiciat, *integram relinquit traditionalem doctrinam catholicam de morali hominum ac societatum officio erga veram religionem et unicam Christi Ecclesiam*. Insuper, de hac libertate religiosa agens, Sacra Synodus recentiorum Summorum Pontificum doctrinam de inviolabilibus humanae personae iuribus necnon de iuridica ordinatione societatis evolvere intendit." (emphasis added).

[18] Second Vatican Ecumenical Council, *Dogmatic Constitution on Divine Revelation, Dei verbum* No. 8 (Nov. 18, 1965). My quotation is from the translation by Austin Flannery. The Vatican translation is available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651118_dei-verbum_en.html.

> better to omit these *compromising formulas* or to reform them with the latter text. The introduction (Article 1) changes nothing in the text's content; therefore, we need not regard it as anything more than a minor flaw.[19]

The man who would be Pope opted to mitigate the embarrassment of the *relinquit* clause by entering a plea to ignore it.[20] Later, as Cardinal Ratzinger, he apparently rescinded that plea.[21]

It should be uncontroversial to observe that not to reckon with the significance of the *relinquit* clause is profoundly to falsify the Declaration's meaning, whatever that meaning turns out to be. It is documented that the clause was included late in the drafting process. It is also documented that its inclusion was necessary to the passage of the document by the Council Fathers.[22] Without clearly -- if succinctly -- reaffirming traditional Catholic doctrine on Church and state, *Dignitatis* would not have emerged from the Council, and what did emerge from the Council states that it "leaves untouched traditional Catholic doctrine." This clause, then, would seem to provide a hermeneutical key to unlock the meaning of the whole document.

On the other hand, however, the document does explicitly announce its drafters' intention to develop doctrine: "Over and above all this, in taking up the matter of religious freedom this sacred Synod intends to develop the doctrine of recent Popes on the inviolable rights of the human person and on the constitutional order of society."[23] No other document of the Council makes its intent to develop doctrine clearer. Genuine development does not include contradiction, however. For present purposes it will be sufficient to stipulate that it is a basic principle of Catholic theology that genuine development excludes contradiction.[24] Again, insight can grow, and new formulations are sometimes possible, moving from the general to the more specific. Putative doctrine that contradicts earlier doctrine cannot, however, be treated as what it claims to be, viz., doctrine.

What gives the interpretive question its particular salience, then, is the fact that the core of the traditional teaching *on Church and state* was in fact put forward by the Popes as *doctrine*, not as mere changeable opinion. Even those who find something new in *Dignitatis* acknowledge this fact, which, of course, is why they insist that *Dignitatis* developed "doctrine," rather than, say, merely adopted a different prudential view. There can be no serious question but that the principles the Popes taught on what we now refer to as the Church-state problem were understood by those Popes to be permanently valid. These principles, consistently and authoritatively taught, century after century, *cannot be contradicted by later "doctrine,"* though their application will of course vary over time. Writing in the *American Eccesiastical Review* in May of 1953, Alfredo Cardinal Ottaviani summed up the matter as follows:

> These principles [regarding Church and state] are firm and immovable. They were valid in the times of Innocent III [1198-1216] and Boniface VIII [1294-1303]. They are valid in the days of Leo XIII and of Pius XII, who has reaffirmed them in more than one of his documents. . . . I am certain that no one can prove that there has been any kind of change, in the matter of these principles, between *Summi pontificatus* of Pius XII and the encyclicals of Pius XI, *Divini Redemptoris* against Communism, *Mit brennender Sorge* against Nazism, and *Non abbiamo bisogno* against the state monopoly of facism, on the one hand; and the earlier encyclicals of Leo XIII, *Immortale Dei*, *Libertas*, and *Sapientiae christianiae*, on the other.

---

[19] JOSEPH RATIZINGER, THEOLOGICAL HIGHLIGHTS OF VATICAN II 147 (1966).

[20] MICHAEL DAVIES, THE SECOND VATICAN COUNCIL AND RELIGIOUS LIBERTY 204-05 (1992).

[21] Davies, *supra* note 20, at 205.

[22] Davies, *supra* note 20, at 169-74.

[23] Vatican II, *Dignitatis Humanae* No. 1 (Dec. 7, 1965). "Insuper, de hac libertate religiosa agens, Sacra Synodus recentiorum Summorum Pontificum doctrinam de inviolabilibus humanae personae iuribus necnon de iuridica ordinatione societatis evolvere intendit."

[24] Davies, *supra* note 20, at 210-31. It should be acknowledged that this principle is disputed. *See, e.g.,* JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL DOCTRINE (2005).

> "The ultimate, profound, lapidary fundamental norms of society," says the august Pontiff [Pius XII] in his Christmas radio-message of 1942, "cannot be damaged by the intervention of man's genius. Men can deny them, ignore them, despise them, disobey them, but they can never abrogate them with juridical efficacy."[25]

What, then, are those ultimate and unchangeable norms that the Popes have taught? What is the traditional Catholic doctrine on Church and state that cannot be contradicted? And what development of doctrine, if any, did *Dignitatis* effect?

IV. Traditional Catholic Doctrine on Church and State

Speaking in 1955, just two years after Cardinal Ottaviani wrote the language I have just quoted, Pope Pius XII -- whose 1942 radio-address Ottaviani quoted -- said the following to the Tenth International Congress of Historical Sciences in Rome:

> The historian should not forget that, while the Church and State have known hours and years of conflict, there were also from the time of Constantine the Great until the contemporary era and even recently, tranquil periods, often quite long ones, during which they collaborated with full understanding in the education of the same people. The Church does not hide the fact that she considers such collaboration normal, and that she regards the unity of the people in the true religion and the unanimity of action between herself and the State the ideal.[26]

If this unapologetic statement of the "ideal" sounds dated or even (as is more likely) outrageous to the modern ear, consider that Pope Pius XII "[did] not hide the fact" of it a mere ten years before *Dignitatis* was promulgated.

The core of that permanently valid ideal is this: Church and state should be *united* -- without the one being reduced to the other -- *in close cooperation*.[27] Pope St. Pius X summarized the traditional doctrine in his 1906 encyclical *Vehementer nos*:

> That the state should be separated from the Church is an absolutely false and most pernicious thesis. For first, since it is based on the principle that religion should be of no concern to the state, it does a grave injury to God, He who is the founder and conserver of human society no less than He is of individual men, for which reason He should be worshipped not only privately but also publicly.[28]

One could marshal countless papal texts setting forth, century after century, the doctrinal principle that, in a Catholic society, the Church has a divine right to be united to the state as the religion of the state,[29] but here it will suffice to quote a respected scholar's summary of the doctrine:

---

[25] Alfredo Cardinal Ottaviani, *The Church and the State: Some Present Problems in the Light of the Teaching of Pope Pius XII*, 123 AMERICAN ECCLESIASTICAL REVIEW 321, 328-29 (1953).

[26] Quoted in Davies, *supra* note 20, at 179.

[27] See Rommen, "Church and State," supra note 7, at 324-25.

[28] Pope St. Pius X, encyclical *Vehementer nos* No. 3 (1905), *available at* http://www.vatican.va/holy_father/pius_x/encyclicals/documents/hf_p-x_enc_11021906_vehementer-nos_en.html . My translation varies somewhat from the Vatican's.

[29] *See, e.g.*, George Shea, *Catholic Doctrine and 'The Religion of the State*, 123 AMERICAN ECCLESIASTICAL REVIEW 161, 170-73 (1950). The overwhelming number of Catholic philosophers, theologians, and canonists were in accord. *See id*. at 161 n.1, 165 nn.18 & 19.

> The formal, official, and exclusive recognition of Catholicism by the State in a Catholic society as its own one and only religion, in short, the establishment of Catholicism as "the religion of the State," seems necessarily contained in the very notion of the State's duty to accept and profess the true religion, therefore Catholicism, with its creed, code, and cult. How else could the State, *qua* State, in truth accept and profess Catholicism, together with its tenet that it alone is the true religion.[30]

In sum, the principal proposition of traditional Catholic doctrine on Church and state is that the Church, as part of her liberty, enjoys the *right* to be established as the state's one and only religion.

V. The Church's Powers, Direct and Indirect

Before turning to an important condition precedent to the Church's being established, we should be clear about what the Church claims the powers to do. While the discussion today sounds in terms of *libertas*, historically the focus was on *potestas*: what liberty the Church claims is to exercise power. Limitations of space allow only a brief summary of the two powers, direct and indirect, that the Church has claimed over the centuries.

The Church's *indirect power* refers to her right of authority to declare null and void putative civil laws that violate the natural law or the divine law. Summing up centuries of papal teaching and other reflection on the indirect power, Jacques Maritain explains that

> [t]he Church has thus a right of authority over the political or the temporal itself, not because of political things, but because of the spiritual principle involved. *One sword is under the other*: not to be oppressed in it own sphere, but to be controlled and directed by the upper sword as regards the latter's own sphere. The special interventions of the spiritual in temporal matters are motivated by one object only, the avoidance or repression of sin. . . . [I]t is the *ratio peccati* which is alleged by Innocent IV against Frederick II and by Boniface VIII against Philip the Fair. The *ratio peccati* is the essential justification for the intervention of the Church in temporal affairs. This doctrine is unchangeable. . . . Anyone paying sufficient attention to the substance of things underlying the various incidents of history will perceive that one same teaching is imparted by Boniface VIII in the Bull *Unam Sanctam* and by Leo XIII in the Encyclical *Immortale Dei*; and for a complete idea of the indirect power, both these great documents should be simultaneously borne in mind.[31]

This power, Maritain explains, "extends as far as the primacy of the spiritual requires; for the Church is not disarmed, her right is effective and efficient."[32]

The indirect power is derivative of the *direct power*, and the latter is exactly the right of authority of the Church to exercise a real jurisdiction over certain people (e.g., clerics) and certain subject matter (dogma, sacraments, doctrine on natural law, etc.). The point to underscore is that the Church's direct power over herself is every bit as a real as the state's power over itself. When Pope Gelasius wrote that "there are two things by which this world is chiefly governed: the sacred authority of the pontiffs and the power of kings," he was not claiming that the world is ruled by kings but merely exhorted by a

---

[30] *Id.* at 167-68

[31] JACQUES MARITAIN, THE THINGS THAT ARE NOT CAESAR'S 12-13 (1930). Maritain later defended a position that contradicts what he had judged to be "unchangeable doctrine," but although Maritain changed his mind, the "unchangeable doctrine" remained unchanged.

[32] *Id.* at 15. The classic formulation of the doctrine of the indirect power is by St. Robert Bellarmine in *On the Temporal Power of the Pope, Against William Barclay*, *in* STEFANIA TUTINO, ON TEMPORAL AND SPIRITUAL AUTHORITY 185-90 (2012). On the foundations of Bellarmine's account of the indirect power, see STEFANIA TUTINO, EMPIRE OF SOULS: ROBERT BELLARMINE AND THE CHRISTIAN COMMONWEALTH 9-47 (2010).

jurisdiction-less voluntary association known as the Church. Pope Leo XIII restated the two powers doctrine in the encyclical *Immortale Dei*:

> God has divided between the ecclesiastical and the civil power the task of procuring the well-being of the human race. He has appointed the former to divine, the latter to human things. Each of them is supreme in its own sphere (*utraque potestas est, in genere suo, maxima*); each is enclosed within perfectly defined boundaries, delimited in exact conformity with its nature and principle. Each is therefore circumscribed within a sphere in which it can act and move in virtue of its own peculiar laws.[33]

The Code of Canon Law promulgated in 1983 continues to make unmistakable the Church's claim to be a perfect society that exercises a real jurisdiction through law, one that limits and bounds the state.[34] This is the stuff of scandal, not agreement.

VI. In a Catholic Society

Returning to the proposition that the Catholic Church enjoys a divine *right* to be the only established religion of the state, it is, as I mentioned, subject to an important condition precedent. That condition appears quite matter-of-factly in the block quotation at the end of Section IV: "in a Catholic society." Where the people and its leaders are not Catholic, it would be nonsense to suggest that the state should establish the Catholic religion. It is, in fact, ordinarily through the people and those that they designate as their civil authorities that the rights of the Catholic Church are discovered and given effect.[35] The claim one hears frequently today, that states are *in principle* "incompetent" to recognize the truth of the Catholic religion, is sheer prejudice. Our present government may be incompetent in the sense of using the faculty to know the truth poorly, but the failure is not on the ontological level. It is a separate question, calling for a context-specific judgment, as to the fraction of a particular people and its leaders that must be Catholic before the obligation to establish the Catholic religion attaches.[36]

Needless to say, it does not remotely attach in the United States today. My topic, though, is what the Church teaches regarding the *libertas Ecclesiae*, and that teaching in its fullness is not restricted to its application here and now. My account would be incomplete, however, if I did not add that it is the traditional judgment that any society that is not Catholic and therefore cannot mount a Catholic state is in a deficient situation, here in the words of Pope St. Pius X:

> [T]he City cannot be built otherwise than has God has built it; society cannot be set up unless the Church lays the foundations and supervises the work; no, civilization is not something yet to be found, nor is the New City to be built upon hazy notions; it has been in existence and still is: it is Christian civilization, it is the Catholic City. It has only to be set up and restored continually against the unremitting attacks of insane dreamers, rebels and miscreants. OMNIA INSTAURARE IN CHRISTO.[37]

---

[33] Quoted in Maritain, *supra* note 31, at 5-6.

[34] *See* Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 GEO. WASH. L. REV. 1035, 1053 n.117 (1999).

[35] "That the state finds the Church in this wise, indirectly, through the medium of the Catholic citizenry, does not mean that the state has no direct duties towards the Church." Shea, *supra* note 29, at 167.

[36] *See* E.A. GOERNER, PETER AND CAESAR: POLITICAL AUTHORITY AND THE CATHOLIC CHURCH 153-72 (1965).

[37] Pope St. Pius X, Apostolic Exhortation *Notre Charge Apostolique* No. 11 (1910), *available at* http://www.papalencyclicals.net/Pius10/p10notre.htm. This document, which the online reference just given erroneously categorizes as an encyclical, is not available on the Vatican website.

This is not an eccentric position to hold, at least not historically. St. Augustine held that no society can be truly just without the true religion.[38]

VII. Novelty, at Vatican II?

Having now unpacked the lion's share of the contents of the *relinquit* clause, we are almost in position to return to and follow the line of argument of *Dignitatis*. First, however, an anticipatory summary is in order. After loquaciously claiming that the *libertas Ecclesiae* is the *principium fundamentale* between the Church and state, *Dignitatis* fails to go on to make anything remotely resembling the traditional claim that the Church has the *right*, in a Catholic society, to be established as the religion of the state, to exercise a direct power of jurisdiction in all her spheres of action, and to exercise the indirect power with respect to the state. Loquacious is not the same as adequate, and it must be admitted that *Dignitatis*'s appearance of unequivocal insistence on the *libertas Ecclesiae* is, at best, misleading. Many of the most decisive aspects of that *libertas* as traditionally understood in unchangeable doctrine are missing from *Dignitatis*. Where the document has occasion to draw important implications of the *relinquit* clause, it is virtually silent. Silence does not work contradiction, but it can mislead – and intentionally so.

What the document does claim can be usefully (if clunkily) divided into three categories: positive, what the Church has a right to; equivocal, what the Church sort of has a right to; and negative, what the Church does not have a right to.

In the positive category, *Dignitatis* claims the following for the Church:

> In human society and in the face of government, the Church claims freedom for her self in her character as a spiritual authority, established by Christ the Lord. Upon this authority there rests, by divine mandate, the duty of going out into the whole world and preaching the gospel to every creature. The Church also claims freedom for herself in her character as a society of men who have the right to live in society in accordance with the precepts of Christian faith.[39]

Dignitatis goes on to state that for fulfilling her divine mandate, "independence is precisely what the authorities of the Church claim in society." It is the Church's "duty," *Dignitatis* continues, "to give utterance to, and authoritatively to teach, that Truth which is Christ Himself, and also to declare and confirm by her authority those principles of the moral order which have their origin in human nature itself."[40] The Church's freedom and that of the individuals is to be protected by "constitutional law."[41]

In the equivocal category, I place the following one-sentence paragraph that John Courtney Murray described as "carefully phrased"[42] but that might better be described as irritatingly and irresponsibly elliptical:

> If, in view of peculiar circumstances obtaining among certain peoples, special legal recognition is given in the constitutional order of society to one religious body, it is at the same time imperative that the right of all citizens and religious bodies to religious freedom should be recognized and made effective in practice.[43]

---

[38] Augustine of Hippo, *The City of God*, XIX, 25.

[39] *Dignitatis humanae*, *supra* note 14.

[40] Vatican II, *Dignitatis Humanae* No. 14 (Dec. 7, 1965).

[41] *Dignitatis humanae*, *supra* note 14.

[42] THE DOCUMENTS OF VATICAN II IN A NEW AND DEFINITIVE TRANSLATION 685 n.17 (Walter M. Abbot ed., 1966).

[43] *See* Vatican II, *Dignitatis Humanae* No. 6 (Dec. 7, 1965). "Si attentis populorum circumstantiis peculiaribus uni communitati religiosae specialis civilis agnitio in iuridica civitatis ordinatione tribuitur, necesse est ut simul omnibus civibus et communitatibus religiosis ius ad libertatem in re religiosa agnoscatur et observetur."

What seems unmistakable in this paragraph is the Council's intent that the right of "religious freedom" can sometimes operate as a limit on the establishment of a religion, presumably even the Catholic religion. It seems that establishment, even of the Catholic religion, is to be limited by the duty to respect religious minorities. What is less easy to discern is when, provided that that condition is respected, religion, including the Catholic religion, *should* be given special legal recognition. Glossing this text, John Courtney Murray opined that "the Council wished to insinuate that establishment, at least from the Catholic point of view, is a matter of historical circumstance, not of theological doctrine."[44]

Murray, of course, had spent many years before the Council trying to demonstrate that the principles of traditional Catholic teaching on Church and state no longer apply, and these exertions may have contributed to his misreading of *Dignitatis* on the last point. It was Murray's "personal thesis" that *Dignitatis* "renounces all special privileges and establishments for the Church," but, as Russell Hittinger has observed, "[i]n this case, Murray was wrong."[45] The one-sentence paragraph of *Dignitatis* specifically allowing "special legal recognition" does not bear the reading Murray gave it, nor does any other text of the Council support Murray's misreading. Such a misreading, furthermore, would not only contradict tradition – a sufficient ground for ruling it out; it would also suffer the embarrassment of contradicting something *Dignitatis* itself teaches quite clearly and strongly. Specifically, as already noted, *Dignitatis* "insists that the Church's liberty derives first from Christ (hence, the *principium fundamentale*), and also (*etiam*) from her character as a society of men." What Murray sought to write off as (mere) "historical circumstance" was, on the contrary, and as already noted above, a matter of "theological doctrine," a point even *Dignitatis* itself acknowledged, if in conjunction with the additional ground (to which we shall return) that the Church is "a society of men." It is the judgment of Russell Hittinger, *pace* Murray, that the Declaration's "position on religious liberty would probably count as favoring the establishment of religion."[46]

In the negative category, finally, falls the proposition for which *Dignitatis* is most widely celebrated. In order to take the measure of this proposition, it will be useful to start by clarifying the context. We can stipulate that traditional Catholic teaching clearly and consistently maintained the following three principles, even if, alas, historical practice did not always conform to them:

1. No one must be forced to act against his conscience in private.
2. No one must be forced to act against his conscience in public.
3. No one must be forced to act against his conscience in public or in private, but may be forced to act against his conscience when the matter involves a violation of natural law and civil authorities determine that it would be in the interest of the common good to do so.

These three rights of individuals and groups limit the action of both Church and state. The *quaestio disputata* is whether *Dignitatis* adds the following fourth principle – either as a development of doctrine or as a prudential teaching -- to the list of the three traditional principles:

4. No one may be prevented from acting in accordance with his conscience in public, provided the "public order" is not violated.[47]

Such a principle (Principle 4), if valid doctrine, would deny the Church the right to insist, under proper circumstances, that the Catholic religion alone be practiced in public; correlatively, it would also disallow the state from permitting only the Catholic religion to be practiced in public. The question, then, is whether the *libertas Ecclesiae* is limited and reduced by a competing right of "religious freedom" *in public*.

VIII. "*Deliramentum*"

---

[44] Abbott, *supra* note 42, at 685 n.17.

[45] Hittinger, *supra* note 34, at 236.

[46] Hittinger, *supra* note 34, at 239.

[47] The language of these three propositions is borrowed, with only slight but important modification, from Davies, *supra* note 20, at 19, 211.

Prior to the Council there was among Catholic theologians what John T. Noonan, Jr., has described as "unanimity" against the possibility of such a right to "religious freedom" in public. The theologians were united, Noonan explains, because "they followed what [Pope] Gregory XVI had taught in *Mirari vos*, what Pius IX, following Gregory XVI, had taught in *Quanta cura*, what Leo XIII in the wake of his predecessors had proclaimed in *Immortale Dei*."[48] What Gregory had declared that had been followed boils down to this: "From [the] most foul fruit of indifferentism flows that absurd and erroneous opinion, or rather, madness, that freedom of conscience must be affirmed for everyone."[49] Noonan comments: "*Deliramentum*, meaning 'madness,' is the term used by both Gregory XVI and Pius IX. It is sometimes softened by being translated 'aberration'; but 'madness' is what Gregory XVI chose to call liberty of conscience; and Pius IX repeated the term in *Quanta cura*."[50]

In the middle of and amidst the bloodiest century of human history, however, the Fathers of the Second Vatican Council divined that "[a] sense of the dignity of the person" – from which the Declaration takes its very name – "has been impressing itself more and more deeply on the consciousness of contemporary man,"[51] and that that dignity requires "religious freedom."[52] In what has been described as "the most important article" of *Dignitatis*, Article 2, one reads the following:

> This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs.

As Michael Davies notes, "[u]p to this point everything can be reconciled with traditional doctrine."[53] The same holds for the language that immediately follows:

> Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately . . .

But then comes this:

> . . . or publicly, whether alone or in association with others, within due limits.[54]

Even here harmony with traditional doctrine could have been maintained if "within due limits" were specified as "the common good," for the common good was indeed the traditional criterion according to which the state was to determine what to allow and what to forbid.

This last point merits emphasis and unpacking. As understood in the tradition of Catholic political theory, the common good as the object of state action included not just public order, nor just the temporal common good, but also the supernatural common good.[55] The traditional doctrine, without confusing or conflating Church and state, assured that Church and state worked in concert, wherever and to the extent possible, for the achievement of the two common goods in which humans by God's design are called and commanded to participate. As Henri De Lubac (whom Pope Paul VI wished to create a Cardinal and whom Pope John Paul II did create a Cardinal, in each case for his theological work) explained, "[the Church's] power is spiritual in its object, as in its nature and its end; but it extends

---

[48] Noonan, *supra* note <>, at 27.
[49] Pope Gregory XVI, encyclical *Mirari vos*, No. 14.
[50] Noonan, *supra* note <>, at 360.
[51] Vatican II, *Dignitatis Humanae* No. 1 (Dec. 7, 1965).
[52] "The Synod further declares that the right to religious freedom has its foundation in the very dignity of the human person . . . .". Vatican II, *Dignitatis Humanae* No. 2 (Dec. 7, 1965).
[53] Davies, *supra* note 20, at 211.
[54] Davies, *supra note* 20, at 211.
[55] Davies, *supra* note 20, at 63-67.

nonetheless for that to all this is human, for it extends to all that is spiritual in every human affair in which it is engaged."[56] On the traditional view, the state must adhere to the Church's judgment on what is necessary in all that touches man's sacredness.[57]

Aware of all of this, the drafters of *Dignitatis* deliberately rejected "the common good"[58] in favor of the much more limited notion "public order:"

> The right to religious freedom is exercised in human society; hence its exercise is subject to certain regulatory norms. . . . [S]ociety has the right to defend itself against possible abuses committed on pretext of freedom of religion. It is the special duty of government to provide this protection. . . . These norms arise out of the need for effective safeguard of the rights of all citizens and for peaceful settlement of conflicts of rights. They flow from the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice. They come, finally, out of the need for a proper guardianship of public morality. These matters constitute the common welfare: they are what is meant by public order.
>
> For the rest, the usages of society are to be the usages of freedom in their full range. These require that the freedom of man be respected as far as possible, and curtailed only when and in so far as necessary.[59]

Commenting on the last two-sentence paragraph, Murray opined that

> Secular experts may well consider this to be the most significant sentence in the Declaration. It is a statement of the basic principle of the "free society." The principle has important origins in the medieval tradition of kingship, law, and jurisprudence. But its statement by the Church has an accent of blessed newness – the newness of a renewal of the tradition.[60]

The third quoted sentence is actionable: Murray knew perfectly well that this origin also includes a fundamental relationship to the common good. The free society and the limits on civil ruling power are all discussed in light of the purpose of society, viz., the common good. Be that as it may, the "newness" of the retreat from the common good was not lost on Paul Blanshard, who wrote contemptuously of attempts to disguise change as "development." According to Blanshard, *Dignitatis* represented "a great advance in Catholic policy, perhaps the greatest single advance in principle during all four sessions of the Council."[61] He continues: "The star of the American delegation was John Courtney Murray, whose chief function was to give the pedestrian bishops the right words with which to change some ancient doctrines without admitting that they were being changed."[62] A broken clock is right twice daily.

IX. In Public?

What exactly it means to "renew[]" tradition with "newness" has been debated ever since Murray boasted of it. Murray certainly knew how to turn a phrase, but the doctrinal question is whether

---

[56] HENRI DE LUBAC, THE SPLENDOR OF THE CHURCH 198 (Michael Mason trans., 2d ed. 1986).

[57] *Id.* at 193-94 n.127. For a complementary perspective on the Church's understanding of the range of her jurisdiction, see Paul Horwitz, *Freedom of the Church Without Romance*, __ JOURNAL OF CONTEMPORARY LEGAL ISSUES __ (2013) ("bringing the world unreservedly into the sphere of the Church").

[58] On the drafting history that rejected "the common good" in favor of the "public order," see Davies, *supra* note 20, at 191-97.

[59] Vatican II, *Dignitatis Humanae* No. 7 (Dec. 7, 1965).

[60] Abbott, *supra* note 42, at 687 n.21.

[61] PAUL BLANSHARD, PAUL BLANSHARD ON VATICAN II 339 (1967).

[62] *Id.* at 87.

there has been contradiction rather development in the teaching proffered by *Dignitatis*. On the answer to this question turns the scope of the liberty the Church claims for herself.

One position (Position 1) is that the teaching of Article 2, which I have summarized as Principle 4, is authoritatively taught by the Council as a matter of doctrine in open contradiction of traditional teaching. Those who hold this view speak of a rupture in the tradition, and adhere to the traditional view. A variation on this position (Position 2) acknowledges the contradiction between traditional doctrine and the teaching of *Dignitatis* in Article 2, but points out that Pope Paul VI, who closed Vatican II in December of 1965, stated that the Council was purely pastoral in nature and defined no new doctrines.[63] On this latter view, Principle 4 is said to be a prudential concession to the modern world, not a change in doctrine.

Another position (Position 3), and by far the most common, is that what appears to be contradiction is instead "development," a new understanding of what has been handed down and taught authoritatively. As already noted, proponents of this view can indeed point to the fact that *Dignitatis* states its intent to develop doctrine. For his part, Murray confessed (without a trace of irony or compunction) that he had no idea what the principle underlying the touted development was: "The course of the development between the *Syllabus of Errors* (1864) and *Dignitatis Humanae Personae* (1965) still remains to be explained by theologians."[64] Others have struggled to specify a deeper principle that guided a development that avoids contradiction and thus avoids rupture.[65] Where proponents of Position 1 see rupture, advocates of Position 3 see "development in continuity,"[66] although on some accounts advanced for Position 3, rupture is almost admitted and celebrated.[67]

Proponents of Position 1 reply that *Dignitatis* does not develop traditional doctrine but, instead, contradicts it. Here is the claimed contradiction:

> A non-Catholic possesses a natural right not to be prevented from the public expression of error, limited only by the just requirements of public order.
>
> A non-Catholic does not possess a natural right not to be prevented from the public expression of error, limited only by the just requirements of public order.[68]

Dignitatis is celebrated as teaching the former. The tradition plainly, authoritatively, and repeatedly taught the latter, even as the tradition also conceded that sometimes the state will prudently tolerate the public practice of non-Catholic religions, as Pope Leo XIII makes unmistakable here:

> The Church, indeed, deems it unlawful to place various forms of Divine Worship on the same footing as the true religion, but does not, on that account, condemn those rulers who for the

---

[63] "Papal Brief Declaring The Council Completed," in Abbot, *supra* note 42, 738-39.

[64] Abbot, *supra* note 42, at 673.

[65] *See, e.g.*, Brian Harrison's argument in ARNOLD GUMINSKI AND BRIAN HARRISON, RELIGIOUS FREEDOM: DID VATICAN II CONTRADICT TRADITIONAL CATHOLIC DOCTRINE? A DEBATE (2013).

[66] On the hermeneutics of Vatican II, *see, e.g.,* MASSIMO FAGGIOLI, VATICAN II: THE STRUGGLE FOR MEANING (2012). It is a topic for another day that the business of choosing a hermeneutic never gets past the level of description to the level of the normativity of the tradition.

[67] The latter perspective is associated with the "Bologna school" of interpretation. This perspective is criticized mildly but helpfully in AGOSTINO MARCHETTO, THE SECOND VATICAN ECUMENICAL COUNCIL: A COUNTERPOINT FOR THE HISTORY OF THE COUNCIL 637-57 (2010) ("tradition and renewal together"). The best English-language account of what happened at Vatican II is Roberto de Mattei, The Second Vatican Council – An Unwritten Story (2012).

[68] Davies, *supra* note 20, 219-20.

> sake of securing some great good, or of hindering some great evil, tolerate in practice that these various forms of religion have a place in the State.[69]

The just-quoted passage is from Leo's encyclical *Immortale Dei*, in which the Pope also states: "This, then, is the teaching of the Church concerning the constitution and government of the state." *Dignitatis*'s contradiction of *authoritative* teaching is hard to blink.[70]

One final position (Position 4) should be mentioned, and it brings us back to the "*relinquit*" clause of Article 1 of *Dignitatis*. Some interpreters of *Dignitatis* argue, plausibly enough, that the entire text must read in light of Article 1's affirmation of "traditional Catholic doctrine." As Michael Davies has commented, however, "[i]t is all very well . . . to argue that the entire Declaration must be interpreted in the light of Article 1, but, surely, Article 1 must also be interpreted in the light of the entire Declaration."[71] How is *Dignitatis*'s statement, for example, that "it would clearly transgress the limits set to [the state's] power to were it to presume to direct or inhibit acts that are religious" to be read in a way that does not contradict the following statement by Leo XIII in *Libertas humana*:

> To judge aright, we must acknowledge that the more a State is driven to tolerate evil, the further it is from perfection; and that the tolerance of evil which is dictated by political prudence should be strictly confined to the limits which its justifying cause, the public welfare requires.[72]

To take the *relinquit* clause for all it is potentially worth would be mysteriously to vaporize every celebrated statement that comes later (or earlier) in the document, or at least, as suggested in Position 2, to reduce every one of them to the status of prudential guidance for a time in which the possibility of Catholic states seems, as it does, to be next to nil.

This is not the place to attempt a comprehensive resolution of this dispute about the doctrinal status *vel non* of Principle 4, and I specifically prescind from that question.[73] Enough has been said to clarify how the terms according to which it gets resolved settle some of the scope of the *libertas Ecclesiae*.

X. Liberty Not the Fundamental Principle

Regardless of where *exactly* the boundary of that scope gets set, it will not be disputed that I have expounded what in contemporary idiom might be called (not altogether complimentarily) a "thick" concept of *libertas Ecclesiae*. But why -- we must ask -- should the state accede to the Church's demands contained in that concept? As one commentator has observed unexceptionably: "Certainly, it would be a deplorable *petitio principii* to argue: 'The civil rulers must yield to the Church's demands, because the Church so decrees.'"[74] How, then, to defend what the Church teaches about the *libertas Ecclesiae* without, in fact, begging the question?

The argument of *Dignitatis* does encompass the so-called liberal pluralist rationale for respecting so-called "mediating institutions." It does so in the following language, which I first quoted in Section [] of

---

[69] Pope Leo XIII, encyclical *Immortale Dei* No. 36 (1885), *available at* http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei_en.html.

[70] Davies, *supra* note 20, at 223-24.

[71] Davies, *supra* note 20, at 214.

[72] Davies, *supra* note 20, at 214-15.

[73] For present purposes, "[a]ll that I wish to do is to state that I do not see how the traditional teaching and that of *Dignitatis humanae* can be reconciled, which is a fact, and to ask the Magisterium to clarify the matter." Davies, *supra* note 20, at 227. Emile Perreau-Sausinne's book CATHOLICISM AND DEMOCRACY: AN ESSAY IN THE HISTORY OF POLITICAL THOUGHT (2012), while rich in insight concerning the forces at work at Vatican II on the question of "religious liberty" and persuasive on many points, does not address the pivotal question of how a "pastoral Council" can possibly "develop" *doctrine*.

[74] Francis Connell, *The Theory of the 'Lay State,'* 125 AMERICAN ECCLESIASTICAL REVIEW 7, 10 (1951).

this paper: "The Church also claims freedom for herself in her character as a society of men who have the right to live in society . . . ."[75] As a general matter, I have considerable sympathy for the argument that associations having their own ends and ontological structure should be respected, helped when necessary, and not absorbed by the state. This is the learning not just of contemporary liberal pluralists (such as Isaiah Berlin, William Galston, Richard Garnett, and John Inazu,) and of their antecedents (such as F.W. Maitland, J.N. Figgis, Harold Laski, G.D.H. Cole, and E. Barker), but it is also part of the social doctrine of the Catholic Church, wherein it is identified as the principle of subsidiarity (or, as it is sometimes called, the principle of subsidiary function).[76] Arguments along these lines are the ones commonly advanced today where the freedom of the Church is defended as an aspect of a pluralist liberal democracy.

To the extent that these arguments succeed in preserving some of the liberty of the Church, it may prove to be counterproductive to object to them or to oppose them. Or it may not so prove. The trouble is that they succeed, if they do succeed, at the high price of distorting or eclipsing the Church's claim about something antecedent to herself: Christ. To see this is to see what is, at best, insufficient in *Dignitatis*'s assertion, with which we began, that "[t]he freedom of the Church is the fundamental principle."

The Church is the mystical body of Christ, Christ-continued in the world, and it is at best misleading to say that her "freedom" is the fundamental determinant of the state's obligation to recognize her.

> Freedom is not the fundamental principle, nor a fundamental principle in the matter. The public law of the Church is founded on the State's duty to recognize the social royalty of Our Lord Jesus Christ. [The opposition we make between "liberty" and "the social royalty of Our Lord Jesus Christ" is not an opposition of contradiction but an opposition of "the whole and the part," in the sense that the social royalty of Our Lord Jesus Christ does include the freedom of the Church in relation to the temporal power, but that liberty alone is not the whole of the doctrine of the social reign of Christ!] The fundamental principle which governs the relations between Church and State is the "He must reign" of St. Paul (I Cor. 15:25) – the reign that applies not only to the Church but must be the foundation of the temporal City. That is what the Church teaches, and it is what she claims as her first and chief right in the City.[77]

Rather than the *libertas Ecclesiae*, what is fundamental is *the social reign of Christ*. What is meant by this phrase is, in relevant part, that the civil ruler must submit to the Church's judgment *because it is the will of Christ the King* – the "supernatural statute," of which Murray spoke -- *that the civil ruler submit to the Church speaking in the world in the name of Christ the King* on matters touching the sacred. The Church is possessed of legitimate ruling power, a real and final and God-given jurisdiction, not just directionless "liberty." Needless to say, liberal-pluralist arguments do not result in the indirect power by which the Church implements the will of Christ through the direct and indirect powers. On the Church's self-understanding, however, she speaks not in her own name, at least not ultimately, but in the name of Christ, whose Mystical Body she is. As Francis Connell explains, "if the Catholic Church possesses" – as she traditionally has claimed – "the authority to exercise *jure proprio* functions involving a restriction of the rights granted by the natural law to civil rulers, the only possible explanation of this direct power on the part of the Church is the authorization of Jesus Christ, the Son of God."[78] The exemplary case of this reduction of the state's jurisdiction is the Church's demand in Christ's name that, in a Catholic society, the Church alone be established as the religion of the state. What was left indeterminate by the natural law (viz., *how* God was to be worshipped) has been made determinate by Christ and the law of the Church,

---

[75] Vatican II, *Dignitatis Humanae* No. 13 (Dec. 7, 1965).

[76] *See* Patrick McKinley Brennan, *Subsidiarity in the Tradition of Catholic Social Doctrine, in* M. EVANS AND AUGUSTO ZIMMERMANN, SUBSIDIARITY IN COMPARATIVE PERSPECTIVE (forthcoming 2013).

[77] MICHAEL DAVIES, APOLOGIA PRO MARCEL LEFEBVRE volume 2, 122 (quoting Lefebvre); *see also* Davies, *supra* note 20, at 181.

[78] Connell, *supra* note 74, at 9.

and, according to traditional Catholic doctrine "*integram relinquit*" by *Dignitatis* and the Second Vatican Council, this determination binds the state *as a matter of higher law*.

A moment's attention to an ongoing "public policy" debate will clarify the point. The Catholic bishops of the United States are earnestly arguing that the big problem with the Patient Protection Act is that it interferes with "religious freedom" and – as they sometimes add – the freedom of the Church by compelling the Church to provide artificial contraceptives to those who are doing the Church's work. This objection is true but, for reasons already adduced, wildly incomplete. The other problem with this law is not just that it forces *us* (Catholics or the Church) to do what *we* regard as in violation of the divine and natural law; it is not just that it forces us *and others* to do what we and *they* regard as in violation of those higher laws; the problem is also -- and above all -- that it forces us and others *to do what violates higher law*, the will of Christ the King, irrespective of who does or does not consider it to be a violation of higher law. The mission and liberty of the Church is ultimately to transform the world and men's souls in the image of Christ, not *just* to look inward and protect the internal life of the Church. It is by divine right that the Church possesses jurisdiction over her hospitals; Leviathan does not.

XI. Tolerance and Intolerance

To state the obvious, we live in a world that is obsessed with "freedom" and "liberty," understood, of course, in the negative sense of "freedom from." But, as John Garvey (among others) has reminded us, freedoms are *for* something.[79] When the Church claims a right to freedom, she is, in this limited respect at least, in the same position as any other group or individual claiming a right to freedom: we can ask of her, and we should ask of her: What is it for? What is its justification? In respect of the answer she gives, however, the Church is *toto caelo* different. To put the point in its strongest form, it is ancient Catholic doctrine that "the world was created for the sake of the Church."[80] The Church's ultimate claim for her freedom is to vindicate the divine will in the very ends of creation itself by her teaching, sanctifying, and ruling power in the world. This is a claim that the culture does not accept, and for that reason, among others, the Church finds herself in the position of arguing for her freedom on grounds recognized by the liberal pluralist. One must add, however, that there never existed a time when the Church could "count on peace"[81] as she goes about her work of claiming the world for Christ.

On what basis, then, can one defend the teaching Church's own distance, in recent decades, from the doctrine of the social kingship of Christ? *Dignitatis* is silent on this Catholic doctrine, as was the Second Vatican Council in its entire (prolific) corpus.[82] Even Catholic liturgy has been rewritten to mute the traditional claims of Christ's social royalty.[83] Silence, however, does not effect reversal of permanent doctrine. In any event, of course, the teaching-Church's bashfulness about the social kingship of Christ is powerless to uncrown Him, though it is a powerful contributor to His being neglected.

A brief word of autobiography may be apposite en route to some concluding thoughts concerning tolerance. Until several years ago, I saw only dimly the extent to which the foundation of the political order requires theological, not just philosophical, judgments and correlative commitments. Studying (and later reviewing) Michael J. White's book *Partisan or Neutral: The Futility of Public Political Theory*[84] was a start, as was my roughly contemporaneous work on human equality which, within the course of several years, moved from publishing a book titled *By Nature Equal: The Anatomy of a Western Insight* to confessing in an article that "[a]part from marketing purposes the book might well have been titled, *By Super-Nature Equal*."[85] Gradually but insistently my hope for an adequate political philosophy

---

[79] JOHN GARVEY, WHAT ARE FREEDOMS FOR? (2000).

[80] *Catechism of the Catholic Church* Par. 760 (1994).

[81] De Lubac, *supra* note 56, at 194 (1989).

[82] The only whiff of an exception is a brief quotation from the Preface of the Mass of Christ the King. *Gaudium et spes* No. 39 fn.24.

[83] Davies, *supra* note 20, at 243-51.

[84] MICHAEL J. WHITE, PARTISAN OR NEUTRAL: THE FUTILITY OF PUBLIC POLITICAL THEORY (1997); Patrick M. Brennan, . . .

[85] Patrick McKinley Brennan, *Arguing for Human Equality*, XVIII JOURNAL OF LAW AND RELIGION 99, 143 (2002).

was overtaken by a judgment that political theology is not only appropriate but exigent.[86] As a believing Catholic throughout, I eventually came to the understanding that, to adopt a phrase, "Catholicity [Is] Necessary to Sustain Popular Liberty."[87] As I went on to recover more and more of the Catholic tradition that had been hidden from me in my youth (in the 1970s and 1980s, in southern California!), I saw more and more the socio-juridical implications of my Catholic belief that the kingship of Christ is *the only historical inevitability*. No matter now much we, as individuals or as a society, evade it, in the end "He must reign" (I Cor. 15:25). Philosophy cannot succeed where Christ and His law must prevail.

On the traditional Catholic view, there is no *completely principled* middle ground between the demands of the social kingship of Christ and indifferentism. Catholics have always lived in the real world along with everybody else, though, and in every era some sort of *modus vivendi* is worked out. The tradition has amply acknowledged the need for tolerance, even if too often individuals acting in the Church's name have acted coercively when they should have shown tolerance. In any event, no one with an adequate appreciation of the wrong of coercing a person to be baptized can, with consistency, oppose whatever tolerance the facts require or counsel. Catholic states should be, and often have been, conspicuous for their tolerance of practitioners of and the practice of non-Catholic religions. It is too little remembered in the Whig narrative of history, for example, that it was Whigs who opposed James II of England's "Declaration of Toleration." The Catholic position, of which James II was exemplary, defends generous and respectful toleration when prudence calls for it. To claim a "right" to tolerance where what is proposed for tolerance would violate the common good, however, is another matter. The point to underscore is that it is the common goods, natural and supernatural, not mere "public order," that properly set the limits of tolerance.[88]

It is of course obviously true that "we live today in the religiously neutral state."[89] Such neutrality, however, is in derogation from the Catholic ideal. The Catholic tradition denies John Locke's contention that "[t]he magistrate as magistrate hath nothing to do with the good of souls or their concernments in another life, but is ordained and entrusted with his power only for the quiet and comfortable living of men in society. . . . ."[90] Even *Dignitatis*, it should be remembered by that document's Catholic champions and cheerleaders, teaches that government has "the obligation to promote the free exercise of religion."[91]

If the consequences of this obligation sound ominous, consider for a moment that free exercise of religion for individuals, or even for groups, does not destabilize the unitary jurisdiction claimed by Leviathan. *Libertas Ecclesiae* in action does, however, and this promises to be liberating. Individuals cannot stand against the monolith state, as the Whiskey Rebellion, Shays' Rebellion, and such like demonstrate. Political subdivisions cannot do so, as the Civil War proved. The Church alone is the ontological inruption into human history that can put the state, even an otherwise pretty good state, where it actually belongs. It is therefore tragic that, in the heart of the century that produced the Fuhrer and generally exalted the unitary jurisdiction of the state, *Dignitatis* muted the Church's ancient claim to exercise a real jurisdiction in all spheres of her action (sacraments, liturgy, schools, hospitals, etc.), in favor of building up individual religious liberty instead. Only another perfect society possessed of a real jurisdiction can stand against the *blitzkrieg* of the "mortal God" Leviathan, and the good of souls requires nothing less of the Church. I do not hope for a time when the Church will "be sufficiently nothing to live in

---

[86] *See* THADDEUS KOZINSKI, THE PROBLEM OF RELIGIOUS PLURALISM: AND WHY PHILOSOPHERS CAN'T SOLVE IT (2010).

[87] I vary the phrase that is the title of an essay by Orestes Brownson: http://www.orestesbrownson.com/108.html

[88] The *Catechism of the Catholic Church* glosses *Dignitatis*'s concept of public order in the following *corrective* way: "The right to religious liberty can of itself be neither unlimited nor limited only by a 'public order' conceived in a positivist or naturalist manner. The 'due limits' which are inherent in it must be determined for each social situation by political prudence, according to the requirements of the common good . . . ." Sec. 2109.

[89] Rommen, *supra* note 7, at 326.

[90] *Essay on Toleration, in* LOCKE, POLITICAL ESSAYS 134, 144 (Mark Goldie ed., 1997).

[91] Hittinger, *supra* note 34, at 228.

peace with the rest of the world . . . ."[92] Widows, orphans, the poor, and many others whom the world loves not are among the intended beneficiaries of the Church's demand that the state conform its ways to Christ's. Liberal opponents of the *libertas Ecclesiae* would do well to keep all of this in mind when they seek to marginalize or vaporize the Church.

Ours is not remotely a Catholic society, and for that reason, among others, the Catholic state that is the ideal proposed by the Church is not at risk of coming into existence any time soon. Many participants in the discussion at the conference at which this paper was presented were respectfully tolerant of the Catholic model's challenge, at least at the level of theory, to the liberal model that currently enjoys a monopoly. Others, however, made unmistakable that they considered the mere mention of the Catholic ideal to be an offense far more grave than "bad taste." I had committed the unpardonable sin of questioning the American civil religion, an irrefutable body of value judgments that operate at an axiological level. To question them is to apostatize.

I am by no means the first to observe the irony in the blazing intolerance of *some* self-styled liberals, nor am I the first to register the fact that "principled" liberal intolerance of illiberal positions demonstrates the terminal incoherence of liberalism itself. As Nicholas Wolterstorff, himself a defender of the liberal state, has observed, "the resolve not to think about political issues in religious and theological terms has not produced agreement, either on principles or on practice. The dream has failed."[93] It was a dream, and it failed. *Especially* in light of that failure, there is no embarrassment in recovering and advancing political theology. My present plea to the intolerant liberal is for him or her to recognize, at the very least, that the Church does not seek to aggrandize herself; she comes to do the will of Christ the King, whose right she seeks to vindicate.

I shall conclude by suggesting that a *modus vivendi* that makes the room required for genuine and ample tolerance can consist with argument and appropriate action on behalf not only of "free exercise of religion," but also of a principled Catholic society and, in turn, the Catholic state that such a society would help to realize. The twain ends of a Catholic state are to help people be happy in this life and to get to heaven. To offer such help – while never coercing the unbaptized to embrace the Catholic religion – is no less than justice requires, and it should also be understood as an act of *love*. "There was a time," wrote Pope Leo XIII, "when states were governed according to the philosophy of the Gospels."[94] That philosophy, which is at the same time a theology, proclaims God's loving will that *all* be saved (I Tim. 2:4), and freely. But "freely" does not mean without help, including the help of government that can act prudently but decisively on behalf of both common goods, natural and supernatural.

---

[92] LOUIS VEUILLOT, THE LIBERAL ILLUSION 96 (1866; 2005). Hobbes grasped that "[o]nce the church had been co-opted by the state and thus stripped of its power to harass the state's masters, religion could be released entirely into a confessional marketplace of free ideas." JEFFREY R. COLLINS, THE ALLEGIANCE OF THOMAS HOBBES 279 (2005).

[93] NICHOLAS WORTERSTORFF, THE MIGHTY AND THE ALMIGHTY: AN ESSAY IN POLITICAL THEOLOGY 9 (2012).

[94] Pope Leo XIII, encyclical *Immortale Dei* No. 21.