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Are Catholics Unreliable From a Democratic Point of View? And What Does it Mean if They Are? Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanshard's American Freedom and Catholic Power

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ARE CATHOLICS UNRELIABLE FROM A DEMOCRATIC
POINT OF VIEW? THOUGHTS ON THE OCCASION OF THE
SIXTIETH ANNIVERSARY OF PAUL BLANSHARD'S
AMERICAN FREEDOM AND CATHOLIC POWER

PATRICK MCKINLEY BRENNAN¹

I. INTRODUCTION

FROM 1949 to 1950, Paul Blanshard's *American Freedom and Catholic Power* dominated the *New York Times* best-seller list for eleven months, having captured the attention and imagination of American intelligentsia and others with its claim that "the Catholic problem is still with us" and its clarion for the formation of a "resistance movement" to the Catholic hierarchy's "antidemocratic social policies."² People in record numbers did not just read the book with the abandon that now greets a new John Grisham novel—they approved of it, agreed with it, even commended it as a work of fact, not fiction or fanaticism. Distinguished contemporary academics reviewed Blanshard's book in glowing terms. Writing in *The Philosophical Review* in 1950, John Boas, of The Johns Hopkins University, explained that Blanshard "has performed a great service to philosophers."³ In *The Philosophical Quarterly* in 1952, John Coatman averred that

1. John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. An earlier version of this Giannella Lecture was delivered at the University of Chicago, as the Yves R. Simon Memorial Lecture, in November 2009. For insightful comments and questions on that earlier occasion, I am especially grateful to R.H. Helmholtz, Thomas Levergood, and John O'Callaghan. I owe the excellent suggestion to revisit Blanshard to Levergood. Ethan Townsend and Mira Baric deserve my thanks for their able research assistance.

2. PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 347 (2d ed. 1958). With one exception to be noted below, all my citations to this book are to the second edition.

3. George Boas, Book Review, 59 *PHIL. REV.* 126, 126-27 (1950) (reviewing PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949)).

Blanshard's "treatment is objective, scholarly, and restrained. There are no mere *obiter dicta* and no judgments without accompanying evidence."⁴ Not to be outdone, John Dewey, Blanshard's former teacher, praised his pupil's "exemplary scholarship, good judgment, and tact."⁵ Albert Einstein and Bertrand Russell were in favor, too, and McGeorge Bundy of Harvard considered the publication of *American Freedom and Catholic Power* "a very useful thing."⁶ Someone called Paul Blanshard had succeeded in taking the intellectual and cultural temperature of his time.⁷

Times change, and today Blanshard's "great service" is generally regarded, when it is not swept under the rug, as the apex of bigotry that some knew it to be at its inception. Sixty years after the fact, Blanshard's contribution is not often defended by the educated. Indeed, it is criticized, including recently by Martha Nussbaum. "Under cover of [a] calm rational manner," she says, "the book purveys all the familiar tropes of anti-Catholicism."⁸ When Nussbaum chides Justice John Paul Stevens for "want[ing] all Americans to assimilate," she is "tempted" to call his jurisprudence "Blanshardesque,"⁹ and people who fear that school vouchers will lead to a "religious takeover of education" sometimes become, she says, "Blanshardian."¹⁰ Neither of Nussbaum's neologisms signals a com-

4. John Coatman, Book Review, 2 PHIL. Q. 284, 284 (1952) (reviewing PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949), and PAUL BLANSHARD, *COMMUNISM, DEMOCRACY AND CATHOLIC POWER* (1951)).

5. Letter from John Dewey to Melvin Arnold (June 7, 1949).

6. See John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97, 97-98 (1997).

7. Further evidence of the significance of Blanshard's contribution was prevalent; a sampling of that evidence follows. "Thoughtful Americans will continue to follow the running controversy between Blanshard and his critics in spite of the tedium of seemingly endless charges and countercharges." Stanley Lichtenstein, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 213, 213 (1952) (reviewing PAUL BLANSHARD, *MY CATHOLIC CRITICS* (1952)). "This book is most carefully and completely 'documented.' . . . The book contains an immense amount of factual information, and, even when allowance has been made for the bias of the author, indicates a situation demanding the serious concern of those who care for democracy and freedom." Nathaniel Micklem, Book Review, 26 INT'L AFF., 143, 143-44 (1950) (reviewing PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949)). "Paul Blanshard undertakes to denounce the peril [of the 'high-pressure methods' of the Catholic Church] for the sake of those who choose to ignore it, through either apathy, illusion, or delusion." George Barrois, Book Review, 30 J. RELIGION 76, 76-77 (1950) (reviewing PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949)). "The book by Blanshard . . . was written for popular rather than professional consumption, and is consequently journalistic in style. This is not to suggest that Blanshard is as ignorant and misleading as most journalists are when they write of law. To the contrary, Blanshard is a lawyer himself and handles the legal aspects in knowledgeable fashion. But the book is not confined to legal issues." William P. Murphy, Book Review, 1965 DUKE L.J. 436, 439 (reviewing PAUL BLANSHARD, *RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY* (1963)).

8. MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 277 (2008).

9. *Id.* at 294-95.

10. *Id.* at 298.

pliment, and I regard Nussbaum's assessment of Blanshard (about which there will be more to say below) as indicative of the current value of his stock.

Questions remain, though, concerning why Blanshard's ideas made progress in some of the sharpest American minds and throughout much of the culture in the mid-twentieth century. Questions also remain concerning whether current condemnation of Blanshard supposes that his target has disappeared. Still more questions remain, moreover, concerning whether those who today condemn Blanshard's bigotry are prepared to accept *the Catholic contribution*—a phrase I leave intentionally vague for the moment—to the American experiment in democratic living. We can ask more broadly, furthermore, whether Catholics true to their principles are thus destined to be *unreliable* from a democratic point of view and, if they are, what this means *as a practical matter*. If Catholics cannot be counted on to be loyal, small “d” democrats, who is the better for it? Who the worse?

What I would like to suggest is that faithful Catholics are indeed, in a specific way, unreliable from a democratic point of view, in part because faithful Catholics are never just “Catholics”; they are always already “Church,” a *corporate* limit on the scope and jurisdiction of the state. On the Catholic view, “two there are,” not one, by which we are ruled: state and Church, the latter just as capable of ruling, within her sphere, as the former, within its sphere. I would also like to suggest, further, that this fact of dualism and its consequences, which have to do with orienting the moral direction of the civil order, are indeed good for all concerned; though, to appreciate as much, one must have a theory of the “good,” not just of democracy. If my conclusion is not surprising (my title pretty much gives it away, after all), I can at least hope that some of my reasons will be of interest, if only because they will seem so outlandish to many. And, *in a way* they should seem outlandish, at least to non-Christians. As the American Jesuit John Courtney Murray once observed, the dualism or diarchy the Church teaches “is not natural; indeed its establishment 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.”¹¹

II. JUST THE FACTS FROM PAUL BLANSHARD

“Abhor that arrant Whore of Rome, And all her blasphemies, And drink not of her cursed cup, Obey not her decrees.” Thus the *New England Primer*, published in 1688, taught Protestant school children to

11. John Courtney Murray, S.J., *On the Structure of the Church-State Problem*, in *THE CATHOLIC CHURCH IN WORLD AFFAIRS* 11, 12 (Waldemar Gurian & M.A. Fitzsimons eds., 1954).

chant.¹² Writing close to three centuries later and six decades before today, Paul Blanshard concluded his bestselling *American Freedom and Catholic Power* in these terms: “Those who have followed my analysis of the Catholic problem thus far will agree that it is already too late to solve the problem by passive measures. The Catholic hierarchy is not passive. . . . It seems clear to me that there is no alternative for champions of traditional American democracy except to build a resistance movement”¹³ Lest he seem to be in the bad taste of the nasty old Protestant nativism exemplified by the *Primer*, Blanshard was sure to distinguish the program he championed by insisting upon a complete disjunction between the Catholic people, who were fine, and the Catholic hierarchy, who were the enemy: “It is scarcely necessary to say that a resistance movement can have no place for bigots or for enemies of the Catholic people.” Scarcely, indeed. “Nor can it have any place,” Blanshard continued, “for those who would curtail the rights of the Catholic Church as a *religious* institution. Its sole purpose should be to resist the antidemocratic social policies of the hierarchy and to fight against every intolerant or separatist or un-American feature of those policies.”¹⁴

The resistance to these “policies,” Blanshard counseled in 1949, “should begin in the minds of all democratic-minded Americans, Catholic and non-Catholic”¹⁵ Writing a decade later, in an updated version of his bestseller, Blanshard congratulated himself and other visionaries: “[I]t is a pleasure to report that the movement has developed more rapidly than I had dared to dream. . . . Yes, the resistance movement is here, and it is growing with remarkable momentum.”¹⁶ That was not the limit of the new triumphalism. “At least once in our history,” Blanshard reminded his readers in conclusion, “the American people have thrown off an alien system of control. . . . The analogy,” he conceded, “is not exact, but it contains a suggestion and a hope for the solution of the Catholic problem in the United States.”¹⁷

There is no substitute for reading the thousands of pages Blanshard devoted to his project, starting in his blockbuster *American Freedom and Catholic Power* and continuing through some dozen more sequel volumes well into the 1970s. Blanshard’s work is rhetorically clever. Blanshard *begins* by saying that “[n]o fair-minded man can fail to render homage to the Church’s lofty moral purpose”¹⁸ Unlike bigots of days gone by, he

12. John Courtney Murray, S.J., *Paul Blanshard and the New Nativism*, 5 MONTH 191, 215 (1951) [hereinafter Murray, *New Nativism*] (reviewing Paul Blanshard, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949)).

13. BLANSHARD, *supra* note 2, at 346-47.

14. *Id.* at 347.

15. *Id.*

16. *Id.* at 348-49.

17. *Id.* at 351-52.

18. *Id.* at 4.

purports to pursue a “documentary approach.”¹⁹ Sensing “the duty to speak,” he “began [his] ten years of research.”²⁰ Why? “Many American liberals have been deterred,” Blanshard laments, “from an honest analysis of the implications of Catholic rule by being associated with anti-Catholic fanatics.” This is no return of the bigotry of the old Nativism. In the past, “the bigoted character of the sources has tended to divert attention from a valid and important question.”²¹ Not any more, Blanshard promises the reader: “I have tried in this book to put down plain facts about the Catholic question, facts that every American should know. The method of treatment is self-evident.”²² What better in a nation dedicated to self-evident truths? And truths don’t change. When Blanshard published the revised version of *American Freedom* almost a decade after its original publication, he added: “My theses remain unchanged. The arsenal of factual weapons has simply been augmented and modernized to meet changing conditions.”²³ The old attack was bigotry; the new attack is to be fair.

What, then, is the basis of the attack Blanshard assures his readership is *fair*? What are the “facts” that tell so strongly against the Catholic hierarchy? Consider the following:

Catholic young women, reared in the free and hearty atmosphere of modern America, are beginning to regard the whole segregated system of nuns, wimples, and convents as medieval posturing and useless mortification. . . . In the long run, . . . I think that the fundamentally democratic and cooperative outlook of the average American Catholic layman will triumph over a medieval ecclesiastical machine—*provided* we cherish and develop our public schools.²⁴

This passage is typical not only in its snarkiness but, more important, in its unceremoniously making Americanism and democracy—for Blanshard, the two concepts are virtually convertible—the touchstone. Without benefit of argument or even a trace of self-consciousness, Blanshard proceeds on the assumed basis that what is *fundamental* to all true Americans is “democracy.” In a phrase, the test Catholics flunk when examined by Blan-

19. *Id.* at 6.

20. *Id.*

21. *Id.* at 302.

22. *Id.* at 4.

23. *Id.* at viii. “After ten years Blanshard’s thesis remains unchanged. . . . Judged by normal standards of scholarship, the book suffers from . . . defects. . . . Blanshard regards his sources as an ‘arsenal’ and his facts as ‘ammunition.’” John Lynch, Book Review, 35 INT’L AFF. 271, 272 (1959) (reviewing PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (2d ed. 1958)).

24. BLANSHARD, *supra* note 2, at 323-24. “Though in some ways harking back to the days of the APA or the Klan, the book also marks a transitional point in the long story of anti-Catholicism. Blanshard’s critique stresses newer ideas, especially the Church’s neglect of the interests of women and its disregard of modern attitudes toward sexuality.” PHILIP JENKINS, *THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE* 38 (2003).

shard is the American commitment to democratic fundamentalism.²⁵ As John Courtney Murray explained in his review of the book, “[Blanshard’s] own indictment of the Church rests on a different set of premises [than the old Nativism, to wit], a new Nativism. The nativist inspiration,” Murray continues, “is visible in the constant use of the adjectives, ‘American’ and ‘un-American,’ as ultimate categories of value, supplanting the usual categories of true or false, right or wrong.”²⁶ Murray does not exaggerate, as becomes unmistakably clear in Blanshard’s wind-up in the book’s final chapter: “It is apparent . . . that the American Catholic problem is . . . that many of the hierarchy’s social and political policies are incompatible with Western democracy and American culture.”²⁷

Many are the Catholic hierarchy’s “policies” that fail on the standard of American democracy as interpreted by Blanshard. The book’s chapters are a catalogue of them, and they concern everything from schools to “eugenic sterilization,” the latter of which Blanshard recommends to combat “overpopulation,” which Blanshard in turn regarded as “the most basic and formidable threat to the future happiness of the human race.”²⁸ As a matter of particular local color at Villanova University, which is an apostolate of the Order of St. Augustine, I would note that Blanshard singles out for special censure someone for whom one of the Augustinians’ other longtime Philadelphia apostolates, Monsignor Bonner High School, was named:

The Right Reverend John J. Bonner, diocesan superintendent of schools of Philadelphia, boasted in 1941 that the increase in the Catholic births in Philadelphia in the preceding decade had been more than 50 per cent higher than the increase in the total population.²⁹

Not willing to let well enough alone, Bonner went on to predict that Philadelphia “will be fifty per cent Catholic in a comparatively short time.”³⁰ A charitable interpretation would be that Monsignor was taking the long view of history. Just four years later, Monsignor died prematurely of a

25. One reviewer summed it up this way: “Opinions will differ about the validity of Blanshard’s conclusions, both as to the extent of Catholic influence in American public life and as to its desirability. To those who believe that man’s destiny is to be a good American democrat his thesis may be entirely convincing. Others will notice that his conception of democracy presupposes an intolerance and conformity as frightening as the Inquisition.” Lynch, *supra* note 23, at 272.

26. Murray, *New Nativism*, *supra* note 12, at 215-16. “[V]iewed from the standpoint of later events in North American Catholic history, it is now clear that Blanshard’s most important Catholic conversation partner was theologian and political theorist John Courtney Murray” MARK S. MASSA, S.J., *ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE* 61 (2003).

27. *BLANSHARD*, *supra* note 2, at 325.

28. *Id.* at 5.

29. *Id.* at 322.

30. *Id.*

heart attack, thereby taking the *sub specie aeternitatis* view of developments in Philadelphia.

Returning to Blanshard's fears about overpopulation *simpliciter*, Blanshard, having duly registered the Church's unqualified opposition to sterilization, proceeds to deliver the good news: "Fortunately, neither the people nor the courts of the United States agree that there is anything necessarily wrong in depriving an insane or feebleminded person of the capacity to reproduce by a simple and relatively painless operation which does not even deprive him of the satisfaction of sex."³¹ Noting further that there was only one dissent (and it was without opinion) from the Supreme Court judgment that infamously upheld compulsory sterilization, *Buck v. Bell*, and that that lone dissenter was the sole Catholic Justice on the Court, Pierce Butler (a daily communicant, by the way),³² Blanshard responds by making his own those unmatched and almost unimaginable words of Justice Oliver Wendell Holmes, Jr., for the Court: "Three generations of imbeciles are enough."³³ Recall, if you have not already, that this was also the Court of Stone, Brandeis, and Taft.

If Blanshard found American law happily at odds with "the hierarchy's" "policy" on sterilization, he ruefully admitted that our law and such "policy" are at least somewhat in accord on the question of education. Observing that since 1925 and the Supreme Court decision in *Pierce v. Society of Sisters*,³⁴ the right of Catholics to operate and populate their own schools has been constitutionally protected, Blanshard then goes on to make the following odd claim: "The American people have no desire to prevent Catholics from having schools of their own."³⁵ Odd, because it is demonstrably false. After all, the Court would not have had occasion to hear the *Pierce* case if the American people known as Oregonians had not through their elected representatives acted to deprive that state's Catholic citizens of schools "of their own." Democratic majorities sometimes do things that it falls to democratically unaccountable judicial actors to undo. Conversely, it bears mentioning that Blanshard's popularity coincided with the period that set Establishment Clause jurisprudence on its unhappy course.³⁶

There will be more to say about *Pierce* in due course, but first and foremost there stands the architectonic "policy" of which the *Pierce* issues are really just a subset.

31. *Id.* at 181.

32. Joseph Vining, *The Resilience of Law*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 151, 163 (H. Jefferson Powell & James Boyd White eds., 2009).

33. BLANSHARD, *supra* note 2, at 181.

34. 268 U.S. 510 (1925).

35. BLANSHARD, *supra* note 2, at 112.

36. See Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 843-46 (1984) (discussing likely effects of Blanshard's description of Catholicism on Supreme Court decisions under religion clauses).

The Church's philosophy of church and state is far more important than the continued existence of a bit of acreage which has its own postage stamps and flag. In fact, the philosophy of church and state espoused by the Vatican is the most important thing in the whole Catholic system because it determines the political and social policies which the bishops and priests will pursue throughout the world.³⁷

What, then, is that philosophy?

Underneath all its ponderous verbiage the Catholic theory of church and state is quite simple. It is essentially a variation on the doctrine of the divine right of kings. . . . The divine authority of the Church is paramount in its own sphere because the Church is God's viceregent on earth. The authority of the state comes next and is decidedly secondary. . . .³⁸

And finally to the heart of the matter:

In particular areas the authority of the Church is superior to that of the United States government and of all governments, and no government is conceded the moral right to deny this. The Pope is a kind of special world monarch who rules a synthetic moral empire that overlaps and penetrates the sovereignty of all earthly governments. His special territory is religion, education, and family life, but he also has supreme power over a vaguely defined area known as "morals." Also he has special and exclusive jurisdiction over any matter which may affect the life of the Church either directly or indirectly.³⁹

Blanshard's formulations here, as elsewhere, leave much to be desired in terms of correspondence to anything the popes, Church councils, serious Catholic scholars, or any other serious souls have actually said on the matter. There is no honestly denying, however, that Blanshard is basically correct that the Church makes *a version* of this last claim. Murray formulates that claim as follows: "[T]he Church stands outside the political order and above it, and that she has a spiritual authority which, remaining spiritual, may reach into the temporal order, there to lay the protective grasp of its authoritative moral judgments on those elements of secular life that have a sacred aspect."⁴⁰ Blanshard is having none of it. The claim that the Church stands outside and above the state is the thesis Blanshard means above all to deny. In perhaps the most telling clause of the entire book, and one that Murray singled out in his review, Blanshard bids the Church "'admit that the Church in the social sphere is simply one agency

37. BLANSHARD, *supra* note 2, at 60.

38. *Id.* at 61.

39. *Id.*

40. *Id.* at 223.

within the State.’⁴¹ So telling was that clause, in fact, that Blanshard silently dropped it from the second edition,⁴² though boasting, as we have already noted, that his theses remained “unchanged.”⁴³ Caught.

III. MANUFACTURING MONISM

One reason for Blanshard’s popularity was that he was preaching to the choir, as they say, not just by appealing to anti-Catholic prejudice, but principally by taking hold of and raising up a countervailing thesis that had lain lodged, if largely unarticulated, in the then-common American mind. That countervailing thesis, that the Church is simply an agency within the state, may *sound* unfamiliar, a tad extravagant, or even mischievous when stated so baldly. After all, it is not usually spoken in polite society, but this is exactly because by now it is almost taken for granted there. The thesis is entailed, however, by what *is* spoken in polite society all the time. As Russell Hittinger has perceptively observed, “If we ask a modern person who or what is sovereign, he or she would not say, ‘reason,’ ‘the individual,’ or ‘science,’ but instead, without hesitation, ‘the state.’”⁴⁴ Do you doubt this? The Constitution of the United States does not so much as mention sovereignty. As Justice James Wilson, himself a signatory of the Declaration of Independence and a Framers of the Constitution, wrote in the towering 1793 case of *Chisholm v. Georgia*,⁴⁵ in which the state claimed immunity to suit on the ground that it was sovereign and above the law: “To the Constitution of the United States the term SOVEREIGN, is totally unknown.”⁴⁶ Today, however, the *U.S. Reports* are thick with imputations to the states of “sovereignty” such that they are immune from unconsented suit by those they may have injured. And it is, I would add tangentially, the conservatives on the Court, the erstwhile textualists, who have led the charge on behalf of state “sovereignty.” That charge may be bad as a matter of how the U.S. Constitution should be interpreted (as I have argued elsewhere),⁴⁷ but it evinces a mentality that is even worse.

41. Murray, *supra* note 12, at 221 (quoting Paul Blanshard, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949)).

42. Compare PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 47 (1949) (clause appearing on page forty-seven), with BLANSHARD, *supra* note 2, at 64 (clause missing from equivalent page sixty-four, though sentence of which it was originally part remains otherwise in place).

43. BLANSHARD, *supra* note 2, at viii.

44. Russell Hittinger, *Introduction to Modern Catholicism*, in 1 *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* 4 (John Witte Jr. & Frank S. Alexander eds., 2006).

45. 2 U.S. 419 (1793).

46. *Id.* at 454.

47. Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 *NOTRE DAME L. REV.* 181 (2006); Patrick McKinley Brennan, *Sovereign States? The State of the Question from a Catholic Perspective*, in *FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW* (Robert F. Cochran, Jr. ed., 2007).

It is, of course, *possible* to speak both of states and sovereigns in a way that does not entail Blanshard's thesis. As a matter of history, however, both modern states themselves and the discourse of sovereignty, if you will, are traceable in large part to a widening wish for monism, a situation in which there is just one plenary power above every nation-state. Hobbes is the obligatory citation for this proposition. And if the power over a given nation-state be not plenary, as in constitutionally limited governments such as our own, the monist insists that at least it should be sole. Rousseau caught the spirit of this aspiration: "It is important . . . that there should be no factions in the State" ⁴⁸

How does this happen? To be concrete, under the French Civil Constitution of the Clergy of 1790, Catholic dioceses were all made "departments" of the state and clergy became salaried state employees.⁴⁹ My own favorite example of the way monism is confected, though, comes a little later, and it is the Law of Associations or the Waldeck-Rousseau Act passed in France in 1901—and still on the books today. According to this law, religious orders and congregations are required to obtain "authorization" from the state in order to form or to continue to exist and operate. Requests for such "authorization" were frequently denied in the post-1901 period, with the intended result that religious orders and congregations were driven into diaspora, their houses closed, their hospitals shuttered, their schools emptied, their good works arrested.⁵⁰ Within a short span of time following 1901, hundreds and hundreds of Catholic communities were dispersed. The aspiration to monism is palpable, even when it is achieved a little bit at a time.

But that is France. What about the United States? After all, the Framers "split the atom of sovereignty," as Justice Kennedy explained in the *U.S. Term Limits, Inc. v. Thornton* case, by recognizing the sovereignty both of each of the several states and of the United States. Again, I have written elsewhere about what I regard as the incoherence of taking what was intended to be a scalar quantity and then giving it degrees, and I will not repeat that argument here. It is enough to note that this aspect of the Framers' achievement or aspiration does not solve or even address the problem of monism; or, to the extent it does, it does so in the wrong direction. The reason is that what the Framers did, at least aspirationally, was to multiply (sovereign?) state governments. The question we are pursuing, by contrast, is whether, in addition to however many or few state governments there turn out to be (each possessed of a final authority over a particular body politic), *another final authority* stands beside each of them, or perhaps even bestrides each of them and all of them. The question, in

48. 2 JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* iii (1762).

49. JAMES F. MACLEAR, *CHURCH AND STATE IN THE MODERN AGE: A DOCUMENTARY HISTORY* 77-83 (1995).

50. Patrick McKinley Brennan, *Differentiating Church and State (Without Losing the Church)*, 7 *GEO. J.L. & PUB. POL'Y* 29, 30-33 (2009).

other words, is whether humans are arranged under one final authority, monism, or under two such authorities, dualism or (better) diarchy.

As we have already seen, it is Blanshard's explicit thesis that the Church exists as an agency within the political order, not outside it, least of all above it. Blanshard reaches monism not by denying the existence of the phenomenon that people commonly call by the name "Church," but by arbitrarily limiting the Church to what he refers to as the "devotional." I say "arbitrarily" because Blanshard offers no *theory* of "church and state" at all, and admits as much.⁵¹ Instead, he accuses the American hierarchy of "impos[ing] its own philosophy of church and state on the American concept . . . , a little like a child who, being unable to find the appropriate piece to insert in a picture puzzle, jams in the wrong piece loosely."⁵² (just the facts from Blanshard). "[The Church's] leaders, in full retreat before the expanding conception of the democratic state," he continues, "have kept repeating the unrealistic thesis of Leo XIII, that there is a natural 'orbit' for church and state and that there are 'fixed limits' between the orbits. No independent political scientist has ever been able to discover those fixed limits."⁵³ If only such independence could be found!

Another fact, according to Blanshard, is that the Catholic hierarchy "uses familiar words with private meanings. . . . The bishop begins by including in the concept 'church' large areas of political, social, and educational life which the non-Catholic regards as part of the normal sphere of democratic government."⁵⁴ The imagined bishop does indeed include within the meaning of Church almost exactly what Blanshard describes. Blanshard, however, gives said bishop both too much credit and too little. The bishop's meaning is hardly private. Nor is the bishop's meaning the only public *Catholic* meaning. As one *Protestant* observed in reviewing Blanshard's book in the *Atlantic Monthly* in 1950:

It is in this dogmatic confidence that Blanshard takes issue with the Roman Catholic Church on the crucial point for all of us: he judges that church to be a sinister threat to the public weal because it "refuses to admit that the Church in the social sphere is simply one agency within the State." What Blanshard ignores, however, is that it is on exactly this point, and this alone, that great empires have dashed themselves to pieces against the Christian Church. This is the point at which Christianity has ultimate and final meaning for all nations; this is where an avowal of faith in the Christian God meets its last judgment. . . . The Gospel writers profoundly believed that the Church is *not* simply one agency within the State, but that it has an authority above the

51. BLANSHARD, *supra* note 2, at 55; accord T. Robert Ingram, *The Blanshard Book*, ATLANTIC MONTHLY 74, 77 (1950).

52. BLANSHARD, *supra* note 2, at 55.

53. *Id.* at 64-65.

54. *Id.* at 55, 65.

State. The Church has believed so ever since. What Blanshard seems unable to comprehend is that both Roman Catholics and Protestants accept the Christian view with all the assurance of truth evident in the secularist religion, and with equal, if not greater, experience and reasoning power, and certainly with as much integrity and candour.⁵⁵

The Christian, not exclusively Catholic, claim made by the imagined bishop originates in the Christian revelation and has received public development through centuries of argument ever since. Refined through centuries of public dialogue, the meaning is hardly private.⁵⁶ To relegate the Church to the sacristy, as Blanshard would do, is to take the side of the argument earlier taken by Gallican and Stuart absolutists. In this respect, someone called Blanshard is nothing new under the sun.

IV. THE CHURCH: AN “ERRATIC BOULDER”

In the recent Anglophone literature, the rejection of political or state absolutism has often sounded in terms of “pluralism.” In the best of this literature, the claims are both descriptive and normative. The *descriptive* claim, as by William Galston, is that the social order “consist[s] in a multiplicity of spheres, some overlapping, with distinct natures and/or inner norms.”⁵⁷ Galston notes that he is proceeding “empirically” when recog-

55. Ingram, *supra* note 50, at 76.

56. George Weigel summarizes the millennial dynamic in these terms: [T]he fact of the Church and its claims to authority over men’s lives meant that the emperor (later the state) could not be all in all. Politics was thereby desacralized: because God was God, Caesar was not God and neither were Caesar’s successors, be they kings, princes, prime ministers, presidents . . . or members of the Politbüro. Because Caesar was not God, the ‘reach’ of public authorities was understood to be circumscribed (at least in principle), the cultural ground on which a politics of consent could be built was prepared, and an antitotalitarian vaccine was injected into Europe’s civilizational bloodstream. By the same token, it was in the school of Christian culture that Europe learned about the proper dignity of the secular: according to the Church, which took this teaching from its Jewish parent, the human task was to humanize the world, which in Christian terms meant learning to be ‘at home’ in the world even as one prepared for the world to come. Thus Christianity taught Europe that the human task was to enable the world to realize its possibilities.

GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 104 (2005). For the story told in the terms of law, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (2001).

57. William A. Galston, *The Idea of Political Pluralism*, in *MORAL UNIVERSALISM AND PLURALISM (NOMOS XLIX)* 95, 107 (Henry S. Richardson & Melissa S. Williams eds., 2009). In an interesting, out-of-the-way essay, Galston has measured his own “liberal” position against his understanding of Catholic social thought. William Galston, *Contending with Liberalism*, in *1 AMERICAN CATHOLICS & CIVIC ENGAGEMENT* 42-57 (Margaret O’Brien Steinfels ed., 2004).

nizing “the diverse forms of human sociability and association”⁵⁸ that politics and government must respect (and sometimes coordinate). The *normative* claim, again to take Galston as our spokesman, is that such associations are valuable exactly because they allow individuals to instantiate and share putative values/goods that others may not recognize or prefer.⁵⁹ A violin club, for example, can encourage excellence in violin for each of the members in a way that the broader society cannot.

A further normative argument for associations, though, is that the associating not only encourages individual achievements of specific goods or values (a line of good violinists), but instead a good or value that cannot be achieved privately or even through merely partnering with others. In what the tradition has understood as a true association (as opposed to a partnership), corporate unity itself is one of the very reasons for action. Marriage is an example: it has extrinsic goods as part of its objective, but the unity itself is one of the very reasons for action. To take another example, the Philadelphia Orchestra playing a symphony achieves not just seventy or how-ever-many fine and diverse performances, but a symphony, and it is that unity of sounds that is one of the reasons for the coordinated musical action. As we multiply examples, from crew teams in perfect synchronicity to well-ordered families, the normative value of such associations becomes unmistakable. The good of united action—the particular common good that is intrinsically of worth to each of its members—is not achievable in diaspora. When a husband and wife split up, they do not each take away half of a marriage; the marriage is no more. They can divide the bank account, but marriage is not divisible. A reason for the state to respect (and perhaps encourage) associations, then, is that they uniquely set the conditions of the possibility of achieving certain goods. If a government wishes to respect and encourage goods (as any just government will), it is not enough to respect Mr. Jones; it is also necessary to respect Mr. Jones’s associations, at least his morally upright ones. A state’s respecting a plurality of such social forms represents a genuine chink in the monist armor, at least so long as the state recognizes that it is truly *obligated* to respect such non-governmental associations.

Pro-pluralism arguments of the sort just elaborated can go a long way toward showing why the state should respect associations, including the particular association that is the Church. I wish to emphasize that such arguments can be of great value in a situation of moral and religious heterogeneity such as our own.

What such arguments miss, however, is that, on the Catholic understanding of the thing, the Catholic Church, unlike every other association or potential association, is a foundation. “The Church is ‘founded’ by Christ[,]” Hans Rommen explains; “therefore it is juridically a ‘foundation,’ not a corporation, and its constitution, its fundamental law, is given

58. Galston, *supra* note 57, at 109.

59. *Id.* at 99-100.

directly by God and not ordained by the people. The Church, though she may participate in certain measures in the essentials of all societies, is nevertheless, a society *sui generis*”⁶⁰ As all American law students learn, corporations may alter their particular ends and constitutions, and may be regulated by the civil authority. Not so the Church, however, as Rommen goes on to explain: “The Church’s end and constitution are absolute, always the same, above civilizations and historical periods.”⁶¹

Needless to say, throughout the more than two thousand years of the Church’s history, the Church has faced governments of varied kinds, and the Church has negotiated different kinds of relationships depending upon the particular aspirations and claims of said governments. The Church is more than familiar with the sort of state that would subordinate the Church to itself. In response, the Church asserts, in the language of the Second Vatican Council’s Declaration on Religious Liberty, *Dignitatis Humanae*, what is necessary for her to achieve the end that is hers from her founder:

The freedom of the Church is the fundamental principle governing relations between the Church and public authorities and the whole civil order.

As the spiritual authority appointed by Christ the Lord with the duty imposed by divine command, of going into the whole world and preaching the Gospel to every creature, the Church claims freedom for herself in human society and before every public authority.⁶²

Whereas *Dignitatis Humanae* “proceeds cautiously on other questions,”⁶³ including the one for which it is best known, viz., the right to freedom of individual conscience, on the question I am pursuing here, by contrast, the *Declaration* is decisive:

Among those things which pertain to the good of the Church[,] . . . things which must everywhere and at all times be safeguarded and defended from all harm, the most outstanding surely is that

60. Hans Rommen, *Church and State*, 12 REV. OF POLITICS 321, 322 (1950).

61. *Id.* at 323.

62. Second Vatican Ecumenical Council, Declaration on Religious Liberty: *Dignitatis Humanae*, no. 13 (Dec. 7, 1965), in VATICAN COUNCIL II: THE CONCILIAR AND POST-CONCILIAR DOCUMENTS 799, 810 (Austin Flannery OP ed., 1975) [hereinafter *Dignitatis* no. 13].

63. Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 GEO. WASH. L. REV. 1035, 1051 (2000). In noting the caution in the expression, I do not question the authoritative nature of the teaching. See Robert P. George & William L. Saunders, Jr., *Dignitatis Humanae: The Freedom of the Church and the Responsibility of the State*, in CATHOLICISM AND RELIGIOUS FREEDOM: CONTEMPORARY REFLECTIONS ON VATICAN II’S DECLARATION ON RELIGIOUS LIBERTY 1, 13 (Kenneth L. Grasso & Robert P. Hunt eds., 2006) (“To deny the moral right to freedom from coercion in religious matters is to place oneself in opposition to an important principle of Catholic faith.”).

the Church enjoy that freedom of action which her responsibility for the salvation of men requires. This is a sacred liberty with which the only-begotten Son of God endowed the Church [T]o attack it is to oppose the will of God.⁶⁴

In the tradition of political theory descending from Aristotle, the *polis* or any of its later alternatives, including the nation-state, is said to be a *societas perfecta*, that is, a self-sufficient society dependent for its complete existence and persistence on no other society. As the Church contended against states that would subordinate her to themselves, the Church appropriated the conceptual armature of the *societas perfecta* for herself.⁶⁵ This claim is evident in the Code of Canon Law (1983).⁶⁶ Canon 113 section 1 asserts: “The Catholic Church and the Apostolic See have the character of a moral person by divine ordinance itself.”⁶⁷ Canon 1254 section 1 asserts: “To pursue its proper purposes, the Catholic Church by innate right is able to acquire, retain, administer, and alienate temporal goods independently from civil power.”⁶⁸ And canon 1311 provides: “The Church has the innate and proper right to coerce offending members of the Christian faithful with penal sanctions.”⁶⁹ Though it is not in the nature of a “penal sanction,” one might mention here the clergy’s responsibility, set out in canon 915, to safeguard the Catholic community by denying Holy Communion to those Catholics who scandalize the faithful by persisting in manifest grave sin.⁷⁰ Whereas the headlines complain of bishops’ “politicizing the Eucharist” by denying holy communion to, for example, a resolutely “pro-choice” elected official, the Church understands herself in that context to be, among other things, protecting her own unity or communion, with any effect on the body politics—that is, on the functioning of that other *societas perfecta*—as simply an unintended, though perhaps anticipated, consequence.

With all due respect to them, run-of-the-pew Catholics have no clue that their Church makes the claims I have just enumerated, which shows, among other things, that the contrary Blanshardian message coming from the culture of monism has enjoyed impressive success. These are the Church’s claims, though, and with respect to them Blanshard was, I would like to suggest, too clever by half. His hysterical myopia with respect to the

64. Dignitatis no. 13, *supra* note 62, at 809-10.

65. ROBERT A. GRAHAM, VATICAN DIPLOMACY: A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE 228-32 (1959); Hittinger, *supra* note 63, at 1052-53.

66. For a discussion of some of the following examples, see Hittinger, *supra* note 63, at 1053 n.117.

67. JOHN P. BEAL ET AL., NEW COMMENTARY ON THE CODE OF CANON LAW 154 (2000). “By divine institution the Catholic Church is a group, and the papacy a succession, of natural persons united by a common purpose and conceived of as a single entity.” *Id.* at 155.

68. *Id.* at 1453.

69. *Id.* at 1533.

70. *Id.* at 1110.

hierarchy led him to overlook the fact, which presumably he would have found even more disturbing, that the hierarchy and the laity cannot be pried apart. Whereas Blanshard opined that “[i]n a very real sense the Catholic Church *is* the clergy,” the reality is that the Church is the entire People of God hierarchically arranged by divine foundation: Pope, bishops, priests, deacons, and the lay faithful.⁷¹ Whereas Blanshard worries that the Church as he defines it (that is, “the hierarchy”) commands individuals who are extrinsic to it (the laity), the reality is that the Church is, on her own understanding, a *societas perfecta* with her own internal norms, including a legal and penal system. Whereas for Blanshard, shaped in the Congregationalist tradition, “‘church’ . . . represented an essentially *private* and voluntary form of religious organization, centered on piety and worship, in which the power and authority are formed ‘from the bottom up[,]’”⁷² the reality is that the Catholic Church understands herself to be a public association formed, by her divine founder, from the top down. Indeed, what has been “most important [for the Church in the modern world] was that the Church could be differentiated [from the states which wished to dominate it] without reducing itself to the status of other private associations.”⁷³

John Finnis once memorably (if dismissively) described Aristotle’s argument from the “function” of natural kinds in Book I, section 7 of *Nicomachean Ethics* as an “erratic boulder”⁷⁴ on an otherwise clean field of moral argument. What I would like to suggest is that the Church’s claims on her own behalf testify to the presence in what would otherwise be our monistic midst of an erratic boulder of an irreducibly associational sort, a foundation. It is not just “Catholics,” then, as if one could size them up them seriatim and thus have taken the measure of the matter, that pose a threat. The threat we are talking about, we should recall, is the one

71. See SECOND VATICAN ECUMENICAL COUNCIL, DOGMATIC CONSTITUTION ON THE CHURCH: LUMEN GENTIUM, c. III 18-29 [hereinafter LUMEN GENTIUM]; see also Avery Cardinal Dulles, S.J., *Authority in the Church, in CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH* 35-55 (Patrick McKinley Brennan ed., 2007). “[I]n the Church authority comes from God through Jesus Christ, who instituted the Church as a hierarchical society. By divine right, the pope and the college of bishops enjoy the fullness of sacred power.” Dulles, *supra*, at 40. You will of course find Catholics who deny the essentially hierarchical structure of the Church, but whatever else may be said about such Catholics, it can be said that they are not in this respect orthodox Catholics. On the topic of “dissent,” Cardinal Dulles adds this: “Generally speaking, Catholics will be disposed to accept determinations that come from the pope and their bishops. In exceptional cases they may be inclined to dissent or disobey. I cannot go into all the distinctions that would be necessary to say when or whether such negative responses might be justified. I shall content myself with saying that disobedience and dissent, if they occur at all, should be rare, reluctant, and respectful.” *Id.* at 42.

72. Mark Massa, *Catholic-Protestant Tensions in Post-War America: Paul Blanshard, John Courtney Murray, and the “Religious Imagination”*, 95 HARV. THEOLOGICAL REV. 319, 331 (2002).

73. Hittinger, *supra* note 63, at 1053.

74. JOHN FINNIS, FUNDAMENTALS OF ETHICS 17 (1983).

Blanshard fingered but could not quite describe. The threat is that there is indeed a self-assertive *imperium* within the democratic *imperium*, the former claiming to limit (though not to de-legitimate) the latter. The threat, then, is not simply “hierarchy” who speak on behalf of a foreign potentate; it is, rather, a Church that, speaking and acting in all the ways that this particular Church does speak and act, both through individuals holding specific offices and through ecumenical councils and national conferences, claims not to be foreign but at least as local and real as any county or state could hope to be. The Church, as a universal spiritual society not dependent on the concession or recognition of Caesar, stands as a boulder in the path of monism.⁷⁵

V. POWER OVER THE *RES SACRA HOMO*

If metaphors sometimes assist thought, they also sometimes block thought. Portraying the Church as a boulder illuminates it as a unity, a spiritual authority. As an authority it claims, first, the right to the freedom to teach, rule, and sanctify her members, and, second, by negative implication from the first, the right to an immunity from politicization, including by subordination to the state. All of this is the first aspect of the principle known as *libertas ecclesiae*, the liberty of the Church, which the Second Vatican Council asserted in the strongest possible terms. The other aspect of that same freedom, obscured by the metaphor, is the right of the Church as the people of God, as Murray explains, “to have access to the teaching of the Church, to obey her laws, to receive at her hands the sacramental ministry of grace, and to live within her fold an integral supernatural life.”⁷⁶ But that is not all that the freedom of the people of God requires, as Murray goes on to elaborate: “[T]he inherent suprapolitical dignity of this life itself claims ‘for the faithful the enjoyment of the right to live in civil society according to the precepts of reason and conscience.’” Murray continues: “And this comprehensive right, asserted within the political community, requires as its complement that all the intrapolitical sacredness (*res sacra in temporalibus*) be assured of their proper immunity from politicization.”⁷⁷ Where the metaphor limps is in failing to suggest that the people of God living their Christian lives in civil society must insist that their sacred things be treated as sacred. This second aspect of the freedom of the Church, the freedom of the people of God in the world, provides nothing less, Murray concludes, than “the ultimate directive principle of government[,] . . . mobilizing the moral consensus of the people and bringing it to bear upon the [public] power, thus to insure that

75. On the idea of the Church as a universal spiritual society, see CHRISTOPHER DAWSON, *THE FORMATION OF CHRISTENDOM* 295-310 (2d ed. 2008).

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

77. *Id.*

the king, in the fine phrase of John of Salisbury, would ‘fight for justice and for the freedom of the people.’⁷⁸

To be more specific, the thesis, which, as Murray comments, “had all the newness of Christianity itself[,]”⁷⁹ is that the Church possesses by right a power over the sacred aspects of man in the world—that is, not just over the Word of God, the sacraments, and the Christian law, but the sacredness of man’s life in civil society, specifically, as Murray elaborates:

[M]an’s relation to God and to the Church, the inner unity of the human personality as citizen and Christian but one man, the integrity of the human body, the husband-wife relationship, the parent-child relationship, the political obligation, the moral values inherent in economic and cultural activity as aspects of human life the works of justice and charity which are the necessary expressions of the human and Christian spirit, and finally that common patrimony of ideas which are the basis of civilized life—the ideas of law and right, of political power and the obligations of citizenship, of property, etc.⁸⁰

The claim with respect to this second aspect of the freedom of the Church, then, is that the sacred power of the Church has been established to advocate, indeed to insist upon, the secular order’s reflecting in appropriate ways the truths about man in the world, what Blanshard regarded as so many odious “policies.” In the words of the Second Vatican Council, which follow immediately upon its declaration of the fundamentality of the *libertas ecclesiae*: “The Church also claims freedom for herself as a society of men with the right to live in civil society in accordance with the demands of the Christian faith.”⁸¹

The history of modern political thought and practice, to which Blanshard was the largely unwitting heir, is nothing short of the history, in identifiable but frequently overlapping stages, of the rejection of the Church’s freedom as a structural and directional principle in a free society. In its beginning, the rejection addressed only the truth of divine revelation and, therefore, the truth of the matter concerning the Church’s being more than an agglomeration of consenting souls. At that stage, the constructive alternative was to install the individual conscience as the sole criterion of political or any other legitimacy. As Murray explains, “[t]he only sovereign spiritual authority would be the conscience of the free man. The freedom of the individual conscience, constitutionally guaranteed, would supply the armature of immunity to the sacred order, which now became, by modern definition, precisely the order of private conscience.”⁸²

78. *Id.* at 205.

79. *Id.* at 203.

80. Murray, *supra* note 12, at 224.

81. Dignitatis no. 13, *supra* note 62, at 810.

82. MURRAY, *supra* note 76, at 206.

If this seems to be a bit of a stretch, consider that the book in which Martha Nussbaum criticizes Blanshard bears the unmistakably modern title *Liberty of Conscience*. The book aspires to be a qualified defense of our American law of religious liberty, and for Nussbaum it turns out to be essentially about freedom of conscience, not at all about freedom of the Church or churches. Even those who, unlike Nussbaum, favor church autonomy and the liberty of the Catholic Church have to admit that American constitutional law probably does not include—at least not yet—the principle of *libertas ecclesiae*.⁸³ In sum, the denial of group rights which is definitive of the modern political project has been part and parcel of the modern rejection of the Church as something more than an assembly of individual consciences, sort of like a sacred railway platform. To return to the *Pierce* case, the Court reached the right result, but this was not because the Court recognized a principle of *libertas ecclesiae*. The opinion's obscure reasoning is what you get, on a good day, when the liberty of the Church is not in your conceptual arsenal.

So much for the first stage. In the second stage of the rejection of the liberty of the Church, the system of moral values that Christianity had articulated as reflecting man's sacredness—values which, by the way, were adopted as the basis of modern political life—are now to be known as “simply immanent in man[.] . . . [T]hese values are now simply a human possession, a conquest and an achievement of humanity by man himself.”⁸⁴ Martha Nussbaum is again exemplary:

If we really think of the hope of a transcendent ground for value as uninteresting or irrelevant to human ethics, *as we should*, then the news of its collapse will not change the way we think and act. It will just let us get on with the business of reasoning in which we were already engaged.⁸⁵

More recently, Professor Nussbaum has embellished this theme in an interview in the *New York Times Magazine*: “I converted to Judaism when I got married. I had kind of gotten to the end of my rope with Christian otherworldliness. I wanted a religion in which justice was done in this world.”⁸⁶ Why Professor Nussbaum supposes that the God of Christian revelation does not command his rational creatures to do justice to one another, especially the least among us, I can only speculate.

83. Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 81-86 (2007).

84. MURRAY, *supra* note 76, at 214.

85. Martha Nussbaum, *Skepticism about Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 740 (1994) (emphasis added).

86. Deborah Soloman, *Questions for Martha Nussbaum: Gross National Politics*, N.Y. TIMES MAG., December 13, 2009, available at http://www.nytimes.com/2009/12/13/magazine/13FOB-Q4-t.html?_r=1&scp=1&sq=martha%20nussbaum&st=cse.

In the third stage, many of those values are themselves rejected, though people continue to talk in terms of individual rights that are both swords and shields, claims and immunities. Here one need do no more than recollect the description of contemporary moral discourse elaborated by Alasdair MacIntyre in 1984 in *After Virtue*. In the fourth stage, which Murray was spared by an early death, it is contended, quite stunningly, that “immunity from a ‘correct anthropology’ is itself a justiciable natural right.”⁸⁷ This, of course, is exemplified above all in *Lawrence v. Texas*, which has been described gleefully, including by serious intellectuals, as Justice Kennedy’s “libertarian revolution.”⁸⁸

Writing in 1960, Murray observed that “[i]t was an essential part of modernity’s hope that the moral consensus upon which every society depends for its stability and progress could be sustained and mobilized in terms of a fortunate coincidence of individual private judgments, apart from all reference to a visibly constituted spiritual and moral authority.”⁸⁹ He then immediately asked: “Has this hope proved valid?”⁹⁰ *Lawrence*, I think, requires a negative answer.⁹¹

Lawrence and its programmatic mentality are not, however, the last word. The Church has not vanished as Blanshard and the other resistance-movement rejecters of the dualist thesis had hoped. The Church knows exactly what we are up against. Writing in 1991 in the encyclical *Centesimus annus*, Pope John Paul II explained that “[a]uthentic democracy is possible only in a state ruled by law, and on the basis of a correct conception of the human person.”⁹² John Paul already knew, though, that it was perhaps too little too late. Writing just four years later in the encyclical *Evangelium vitae*, John Paul tells the story of the “betrayal,” a term he uses six times in the document, by the constitutional democracies of their duty to uphold human rights, beginning with the right to life.⁹³

What is to be done? Gone are the days in which the Church, cooperating sometimes in something approaching monism, could directly impose the truth on society. No worries there. John Paul and now Pope Benedict XVI sound the same note when they say, echoing Murray and

87. Hittinger, *supra* note 44, at 32.

88. Randy Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21 (2003).

89. John Courtney Murray, S.J., *The Freedom of Man in the Freedom of the Church*, in MODERN CATHOLIC THINKERS: AN ANTHOLOGY 382 (A. Robert Caponigri ed., 1960).

90. *Id.*

91. “Once the source of meaning and value came to reside exclusively in the human subject, however, as it did in the modern age, any possibility of reaching a consensus on the common good beyond that of creating an environment conducive to individual self-realization became extremely difficult.” Louis Dupre, *The Common Good and the Open Society*, in CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC POLICY 172, 188-89 (R. Bruce Douglass & D. Hollenbach eds., 2002).

92. Pope John Paul II, Encyclical Letter *Centesimus annus*, ¶ 46 (1991).

93. Hittinger, *supra* note 44, at 32.

Jacques Maritain of two generations ago, that the Church's influence must now be achieved "indirectly, through evangelization and education of society itself."⁹⁴ On this there is agreement, and on it the hope for human rights and social justice rests. The resulting situation is not entirely healthy, however, because, as John Paul II also observed in *Centesimus*, those who are "convinced that they know the truth and firmly adhere to it are considered unreliable from a democratic point of view."⁹⁵ Pope Benedict sees the same problem. Here, for example, is what he said during his 2008 visit to the United States:

Have you noticed how often the call for freedom is made without even referring to the truth of the human person? Some today argue that respect for the freedom of the individual makes it wrong to seek the truth, including the truth about what is good. In some circles to speak of truth is seen as controversial or divisive, and consequently best kept in the private sphere.⁹⁶

In contemporary political theory, the indictment of those who would shape politics and law on the basis of what they regard as a correct anthropology often proceeds from the premise that it violates the requirement of "public reason," which in turn is understood as those minima on which agreement can in principle be expected. I have recently written about this elsewhere and will not repeat the argument here, except to say by way of summary that the "principle of equal respect" is said by some to require the exclusion from law and politics of even those moral judgments on which a convergence of opinion has in fact been achieved in the democratic process, as in the statute held unconstitutional in *Lawrence*. Yet again Professor Nussbaum is exemplary: "The hope is that public institutions can be founded on principles that all can share, no matter what their religion."⁹⁷ The "political" descended from Rawls wishes on principle to limit the political sphere to the uncontroversial, and the remnant is relegated to the private sphere. Pope Benedict saw the trouble with this.

VI. THE CHURCH, CHANGE, AND "DEMOCRACY"

More commonly than through political liberalism enacted into law, though, it is, as Murray referred to it, an "idolatry of the democratic process" itself that carries the day, and it is to this theme that I would like to return. As we have already observed, Blanshard considered it sufficient to convict the Church (or anybody else) to point out that she was "undemo-

94. *Id.*

95. Pope John Paul II, *supra* note 92; accord Hittinger, *supra* note 44, at 33.

96. Pope Benedict XVI, Address to Seminarians (Apr. 19, 2008).

97. NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note 8, at 23. My recent discussion of the shortcomings of political theory that anticipates consensus on the basis of "public reason" is in response to Professor Nussbaum's defense of the same. See Patrick McKinley Brennan, *Equality, Conscience, and the Liberty of the Church: Justifying the Controversiale Per Controversialius*, 54 VILL. L. REV. 625, 625-53 (2009).

cratic.” The Church is an easy target here. It is as true now as it was when Blanshard wrote that the Catholic Church is simply not a democracy; the divinity of her founder assured as much. Blanshard was especially vexed that the undemocratic Church he knew did not find in herself the will to commend to the architects of the political realm the democratic form of government in unqualified terms. “You cannot find in the entire literature of Catholicism,” Blanshard complained, “a single unequivocal endorsement by any Pope of democracy as a superior form of government.”⁹⁸ That was true when Blanshard wrote, and, to the best of my knowledge, it remains true to this day.

A little-appreciated fact is that the Second Vatican Council was utterly silent on the topic of democracy.⁹⁹ Even Blanshard, who attended the Council (he received a personal invitation from Pope John XXIII), seems to have overlooked this pregnant silence, distracted as he was by the Council fathers’ violation (as he called it) of the principle of separation of church and state, their failure to take control and revoke the “policy” against artificial contraception, and the list that goes on for more than three hundred pages in the book modestly titled *Paul Blanshard on Vatican II*. “I am often asked,” he writes in that book’s preface, “[h]ave you changed your opinion about the Catholic Church? The answer is ‘Yes,’” he continues, “but only to the extent that the Catholic Church has changed. I am as hostile as I ever was to the autocracy of its central power structure and to many of the family and church-state policies that flow from that clerical autocracy.”¹⁰⁰

The thought that the Church changed at Vatican II is crucial to my central topic—whether Catholics are unreliable from a democratic point of view—because it is sometimes supposed that those changes render Blanshardism obsolete by removing its target.¹⁰¹ Martha Nussbaum, in her takedown of Blanshard, comments that “it is remarkable that Blanshard, a leading public intellectual, seems utterly unfamiliar with liberal Catholicism, as exemplified in the work of [Jacques] Maritain and [John Courtney] Murray.” Blanshard, for his part, was far from ignorant of the work of those two men, yet interestingly he does not group them together. Maritain, though described by Blanshard as among “the most eminent Catholic scholars,”¹⁰² is excoriated for holding the Catholic position we

98. BLANSHARD, *supra* note 2, at 64.

99. Hittinger, *supra* note 44, at 21.

100. BLANSHARD, *supra* note 2, at iii.

101. On the effect the putative coming of “liberal Catholicism” had on the place of American Catholics in the mid-twentieth century, see MARK MASSA, S.J., CATHOLICS AND AMERICAN CULTURE: FULTON SHEEN, DOROTHY DAY, AND THE NOTRE DAME FOOTBALL TEAM 21-37 (1999). For a careful statement of the ways in which liberalism and Catholicism today stand in relation to one another, including the ways in which the two cannot embrace each other, see John Langan, S.J., *Catholicism and Liberalism: 200 Years of Contest and Consensus*, in LIBERALISM AND THE GOOD 105-24 (R. Bruce Douglass et al. eds., 1990).

102. BLANSHARD, *supra* note 2, at 269.

have already considered, which Maritain states as follows: "It is sufficient that the Pope should consider that a sufficiently spiritual interest is involved in any temporal arrangement for an intervention by him in regard thereto to be legitimate."¹⁰³ Blanshard does, however, show no familiarity with Maritain's later judgment that no civil government should privilege any church, lest the equality of citizens be disrespected and the common good thus violated.¹⁰⁴

Murray is a more interesting case here because he managed to fool Blanshard where Maritain had not. In *American Freedom and Catholic Power*, Blanshard first mocks Murray for holding, as he expressed in the Jesuit magazine *America* in 1947, that "Separation of church and state . . . [is] that negative, ill-defined, basically un-American formula, with all its overtones of religious prejudice." Blanshard then immediately adds, in the revised version of the book, that "Father Murray later became the most advanced of the 'liberal' Jesuit leaders in advocating accommodation of Catholic policy to American values." Later in the same revised edition, Blanshard even described as "rather devious and ambiguous" "Father Murray's rather pleasing attempt to 're-interpret' out of existence some of the more flagrant anti-freedom doctrines of the Papacy," but cautioned that Murray's "analysis represents nothing more substantial than scholarly wishful thinking" and that "few students of Catholicism will trust the Jesuits to reform their Church."¹⁰⁵

Less than a decade later, however, in *Paul Blanshard on Vatican II*, the author had to change his tune yet again, explaining that "the star of the American delegation [to Vatican II] 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. He built verbal bridges to the modern world very effectively . . ."¹⁰⁶ Referring to the Council's teaching, in the *Declaration on Religious Liberty*, on the right of the individual human person to religious liberty, Blanshard concluded: "The final statement on religious liberty was an important achievement. It will make the struggle for religious liberty throughout the world easier. From now on every libertarian can cite an official Catholic pronouncement endorsing the principle of liberty."¹⁰⁷ Blanshard even gave Murray credit for those parts of the *Declaration* that were written in "majestic prose." As Blanshard goes on to criticize portions of the *Declaration*, including the one that holds that under certain cultural circumstances the civil government can, *pace* Maritain, properly give the Catholic Church special civil recognition,¹⁰⁸ he altogether over-

103. *Id.* at 62 (quoting JACQUES MARITAIN, *THE THINGS THAT ARE NOT CAESAR'S* (1930)).

104. JACQUES MARITAIN, *MAN AND THE STATE* 176 (1951).

105. BLANSHARD, *supra* note 2, at 344.

106. PAUL BLANSHARD, *PAUL BLANSHARD ON VATICAN II* 87 (1967).

107. *Id.* at 89.

108. *Id.* at 95-96.

looks, no doubt because he simply could not comprehend, the portions, discussed above, on the liberty of the Church as the “fundamental principle” governing Church-state relations. Fooled.

Had the Church changed her teaching on the liberty of the individual conscience? Some say yes, some say no—the question of whether Church doctrine “changes” is heavily freighted in theology and ecclesiology. The Church teaches that the doctrine had “developed,” and the exact theological issue—as between “change” and “develop”—need not detain us here.¹⁰⁹ What is crucial is that, in addition to affirming the traditional principle of the liberty of the Church, the Council did also affirm the right of individual religious liberty, the right, as it is often and aptly called, to follow one’s conscience. The same Council, however, taught that the state of course enjoyed the right, because it enjoyed the duty, to structure political society, through law where necessary or desirable, according to a correct anthropology, without any limit to what is “uncontroversial.” No individual is to be coerced in matters of belief, but correlatively the state is to uphold the demands of a social order consistent with the natural law and natural human rights, doing so, of course, as the tradition has always taught, with regnative *prudence*. On this the Church had not changed, and whether one calls the result liberal, conservative, mixed, or none of the above, nothing called “democracy” was at hand to exempt either individuals or whole cultures from the demands of the natural moral law and of respect for human rights. The Church would no longer co-govern the political sphere with the emperor (as she sometimes had in the past), but in the words of the Council’s *Declaration on the Church in the Modern World, Gaudium et spes*, the work of the laity is this: “to impress the divine law on the affairs of the earthly city.”¹¹⁰ Are people engaged in such work unreliable from a democratic point of view?

VII. CONCLUSION

I more than recognize that “[t]he democratic idea is close to non-negotiable in today’s world,”¹¹¹ as my old teacher, Ian Shapiro, observed a few years back in taking stock of contemporary democratic theory. The idea, though, is a protean and malleable one, and even more ambiguous is the expression “from a democratic point of view,” which I have borrowed from Pope John Paul II’s observation, which I quoted above, that those are “convinced that they know the truth and firmly adhere to it are unreliable from a democratic point of view.” One sense of “democracy” or “demo-

109. See JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 300-31 (1998); JOHN T. NOONAN, JR., *A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING* 193-222 (2005).

110. See SECOND VATICAN ECUMENICAL COUNCIL, *DOGMAIC CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: GAUDIUM ET SPES* no. 43 (1965); see also *LUMEN GENTIUM*, *supra* note 71, at c. 31.

111. IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 1 (2003).

cratic,” the one favored by Jacques Maritain, refers to a participatory political structure based on human rights. Faithful Catholics today, I believe, can be proud to say that they are reliably democratic in this sense. Recent popes, though sounding the notes of caution I have mentioned, have been fulsome in their defense of participatory governing structures and human rights and, in this context (among others), democracy.¹¹²

Another sense of democracy or democratic refers to majoritarianism and the (virtual?) sufficiency of a political majority’s collective decision. This latter sense of democracy is frequently linked up with the other idea that the people, even when they are not (nearly) unanimous, are nevertheless sovereign. When Justice Wilson denied that the American people undertook to create sovereign states, he did so in part on the ground, alas, that the people had reserved the sovereignty *to themselves*. In the Constitution, Justice Wilson explained in *Chisholm*, “they might have announced themselves ‘SOVEREIGN’ people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.” Each of us is an “original sovereign,” subject to no law unless and until we put ourselves under it.¹¹³ With this assumed “fact,” I believe, faithful Catholics cannot agree.

Why? Sovereignty is a word I try not to use, except when referring to the Almighty. It tends—indeed, is designed—to short-circuit careful argument about ruling authority. This is no doubt a reason for the word’s popularity. Among the word’s meanings are, first, that its possessor has complete (as opposed to partial) authority over something or other, and, second, that its possessor is above (as opposed to subject to) the law. Obviously, the two meanings are related, but they are distinct. For all the reasons I have been developing, the fact of the Church stands as a denial of the first claim; the political “sovereign” does not enjoy plenary jurisdiction over the human person. And the Church herself teaches, moreover, why the second meaning is also false: There are no lawless pockets in history, though there are of course instances and even epochs of disobedience.

A defining claim of a putative sovereign is that he (or she or they) are not under law. With variations that do not here matter, this is the sense in which Jean Bodin, Hobbes, and Rousseau used the term, and the idea is always that the sovereign is not bound by law unless and until he voluntarily puts himself under law. But the Church teaches that there is no time, no place when “the people” are not *under law*. The Catholic contribution to the political sphere includes the claim that we are all, each of us and all of us collectively, always under the divine natural law, which, though di-

112. See, e.g., PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 103, 106, 158, 169, 187, 190, 233, 339, 395, 406-08, 417, 424, 572 (2004). “The pleasure the Catholic might find in mocking growing lists of human rights is dimmed when he finds the Magisterium addressing him with the same language.” Ralph McInerney, *Natural Law and Human Rights*, 36 AM. J. JURIS. 1, 12 (1991).

113. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454, 456 (1793).

vine in its promulgation, is known by the use of our natural powers of intelligence. This is the law on the basis of which human law can be made; this is the law that gives us our natural rights; this is the law that provides the basis for criticizing and perhaps disobeying human laws that are in fact perversions of law through their violations of human rights and their deprivations of what is good for humans. The person who objects to a perversion of law on the basis of the divine natural law is not engaging in the simple self-assertion or aesthetic preference that is sometimes the modern way; rather, he or she is reaching a legal judgment according to a real law of divine provenance. This, the Catholic position, is radical doctrine, as rulers who have been faced with it throughout history have discovered.¹¹⁴ Law does not begin with the human ruler, but instead both makes possible and delimits such ruling.¹¹⁵ This is good not just for Catholics but for all concerned.

The not-so-hidden agenda of modernity and post-modernity has been, though, in the words of Remi Brague, “the reduction of the idea of law to a purely human phenomenon.”¹¹⁶ As Brague goes on to observe, “There is nothing to prove that the Western conception of the political is secure, or even viable in the long run. Whether human action can unfold freely, with no reference to the divine, rather than losing its way in suicidal dialectics, remains to be seen.”¹¹⁷ Meanwhile, though, the Catholic Church and Catholic persons remain at hand to remind us all that there is a higher law according to which we and our artifacts are to be judged (in terms of whether they are *good* for us). It is not surprising that Paul Blanshard was especially disturbed by the Catholic claim that democratically enacted law is not necessarily binding. As Blanshard says, “the word ‘defy’ is not contained in the Papal encyclicals, but the word ‘resist’ is there, and its meaning is unmistakable.”¹¹⁸ Indeed it is. As Blanshard also says, “[i]f the hierarchy once conceded that ultimate sovereignty lies wholly in the people, anything might follow.”¹¹⁹ Right again, Blanshard. In sum, and to quote Murray: “[A]s indictments of the Church go, Mr. Blanshard’s is not very substantial.”¹²⁰

114. See, e.g., ALASDAIR MACINTYRE, *Natural Law as Subversive: The Case of Aquinas*, 41-63, in 2 *ETHICS AND POLITICS: SELECTED ESSAYS* (2006).

115. One perceptive reviewer of Blanshard observed that “[i]n his uniformly condemnatory discussion of Church teaching, law, and practice in these fields, one discerns a basic sociology of law that is hinged to a theoretically naïve revolt against all law as an infringement of liberty.” Albert S. Foley, Book Review, 28 *SOC. FORCES* 226 (1949) (reviewing Paul Blanshard, *American Freedom and Catholic Power* (1949)).

116. REMI BRAGUE, *THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA* 238 (Lydia G. Cochrane trans., 2007).

117. *Id.* at 263.

118. BLANSHARD, *supra* note 2, at 68.

119. *Id.* at 64.

120. Murray, *supra* note 12, at 218.

Are Catholics unreliable from a democratic point of view? It is devoutly to be hoped that they will be *in the second, that is, the Blanshardian, sense I have just identified*: by their insisting and acting to ensure, through prudent means and otherwise in conformity with valid positive law, that the state and its laws be measured and shaped according to the terms of higher law, the law that puts us under higher obligation (and derivatively gives us our natural human rights).¹²¹

What, finally, of the predictable and important objection that what I am suggesting *invites social conflict*?¹²² In answer to this question, I will close by quoting Blanshard on something Hilaire Belloc said:

Some Catholic authorities are frank enough to admit that the conflict goes back to an irreconcilable difference between the Church and American democracy in their attitudes toward governmental power. Hilaire Belloc called it a “necessary conflict between the Civil State and the Catholic Church where the two are not identified.” He then went on to say: “The Catholic Church is in its root principle at issue with the Civic definition both of freedom and authority. For the purpose of the State, religion is either a universally admitted system, or a matter of individual choice. But by the definition which is the very soul of Catholicism, religion must be for the Catholic *First*, a supreme authority superior to any claims of the State; *Secondly*, a corporate thing, and not an individual thing; *Thirdly*, a thing dependent upon authority, and not upon a personal mood; *Fourthly*, a guarantee of individual freedom in all that is not of faith.” Belloc admits that these principles are in fundamental conflict with the American outlook, and he predicts that a struggle that “will seem monstrous” may develop . . . For once, I think Mr. Belloc was a good prophet. The signs of the “monstrous” conflict which he predicted are all about us.¹²³

121. As I have argued extensively elsewhere, this does not amount to a license for, among other things, judges’ doing whatever they want (in the name of “higher law” or of anything else) from the bench. The obligation of a body politic prudently to conform itself, including through the tool of human law, to higher law unfolds against a background in which that body politic creates and assigns jurisdiction to make law. Positive law is a necessary (but not sufficient) condition of what judges (and other government actors) are authorized to do. See Patrick McKinley Brennan, *Delivering the Goods: Herein of Mead, Delegation, and Authority*, 2009 MICH. ST. L. REV. 308.

122. “[C]oncern that Catholicism—or any religion—improperly prepares its adherents for democratic life risks becoming a rival theological claim.” McGreevy, *supra* note 6, at 131.

123. BLANSHARD, *supra* note 2, at 73. “As long as Catholicism in the United States remains loyal to the Bishop of Rome and maintains that it has the authority to teach doctrine as something objective, it will be foreign to the contemporary American ethos.” Gerald P. Fogarty, S.J., *Reflections on Contemporary Anti-Catholicism*, 21 U.S. CATH. HISTORIAN, 37, 44 (2003). Fogarty notes, as have many others, that with the success of presidential candidate John F. Kennedy’s alluring appeal to

Indeed they are, Mr. Blanshard; indeed they are. May you rest in peace.

“conscience” rather than the Church, many “Catholics adopted a Protestant ecclesiology in which religion was ultimately private and invisible, as opposed to the Catholic position that the Church was visible and inserted in the world.” *Id.* at 42.