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# THE CHALLENGE OF JOHN COURTNEY MURRAY— CAN AN AMERICAN PUBLIC PHILOSOPHY BE STATED?†

JOSEPH T. TINNELLY, C.M.\*

FOR MANY YEARS Father John Courtney Murray, S.J.<sup>1</sup> has been one of the most articulate Catholic theologians in America. As the *Time* cover story for December 12, 1960 said: "His lucid, well-modulated concern for the United States has long earned him eminence among the cognoscenti with time for learned journals and debate."

Now in his first book, "We Hold These Truths",<sup>2</sup> "[H]e is entering a new, broader area of influence. In the months to come, serious Americans of all sorts and conditions — in pin-stripes and laboratory gowns, space suits and housecoats — will be discussing his hopes and fears for American Democracy."

"We Hold These Truths" is a timely book. At any time it would deserve and command the interest of thoughtful lawyers and warrant attention in legal journals. But today, as Russia pollutes the air with radioactive

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† The present article is reportorial not scholarly. Consequently, the reader will find few footnotes. For the most part the discussion follows the order of the book itself and the subheadings, many of which are Father Murray's own, should serve as sufficient guides to parallel passages in the book, *We Hold These Truths: Catholic Reflections on the American Proposition*, by John Courtney Murray, S.J. © Sheed and Ward, Inc., 1960.

An attempt has been made to express the author's thoughts accurately and, whenever possible, in his own words. Where this attempt has failed or where the argument has been truncated, the reader is referred to the book itself for the complete text.

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<sup>1</sup> Father Murray has been Professor of Theology at Woodstock College since 1937, and editor of *Theological Studies* since 1941. During 1951-52, he was Visiting Professor of Philosophy at Yale University. He is presently a consultant to the Center for the Study of Democratic Institutions of the Fund for the Republic, and Catholic Departmental Editor for the *Encyclopaedia Britannica*.

<sup>2</sup> *We Hold These Truths: Catholic Reflections on the American Proposition*, by John Courtney Murray, S.J. © Sheed and Ward, Inc., 1960.

fallout and shakes the foundations of the United Nations, as our Judaeo-Christian civilization faces attack by philosophical and political barbarians, as intellectual circles celebrate "the demise of God," every American lawyer, Catholic or non-Catholic, philosophical or practical, has a duty to his country and to his profession to ponder well the matters which Father Murray discusses so lucidly and forcefully.

No book review will suffice; no summary is adequate. The book itself must be read. It must be studied. More — it must serve as a starting point for further reflection and discussion. These are not the exuberant words of an over-enthusiastic reviewer. They are the considered conclusions of many lawyers who have a deep concern for the welfare of America.

In the pages of "We Hold These Truths" Father Murray has sketched the outline of a public philosophy of law as the background for a discussion of a series of practical and vital problems which threaten the unity and perhaps the survival of America.

It is by no means a complete philosophy of law. That was not the intention of the author. But it does provide a framework wherein a philosophy may be developed and a starting point from which a beginning may be made.

The lawyer who understands the metaphor of the law's being a "seamless web" will appreciate the difficulty of discussing any part of a philosophy of law without some references to other phases of that philosophy.

Consequently, Father Murray's book is welcomed because of the broad area of philosophy which he has managed to encompass and for the great number and wide range of philosophical and legal problems which he has posed.

Some solutions have been suggested but for the most part the author has merely indicated the direction in which solutions may fruitfully be sought. It remains for many minds over a period of many years and through the media of many volumes to further the development of solutions. There will then still remain the difficulty of demonstrating to the American Bar and the general public that the resultant philosophy of law is compatible with America's history, ideals and aspirations.

The pages which follow constitute to some extent a summary of "We Hold These Truths." An attempt has been made to provide herein a bird's-eye view of Father Murray's philosophy of law for the busy and particularly for the non-philosophically trained lawyer.

It will, of course, satisfy no one. Father Murray himself can find scores of instances where his exact meaning has been lost; his argument truncated; his view misinterpreted or improperly emphasized.

Lawyers will complain that the style is philosophical, the language interspersed with terms such as epistemology, metaphysics, theodicy and cosmology; they will likewise complain that the content lays much more emphasis on philosophy than on law.

Philosophers will dissent according to the various schools whose views they espouse. Even Catholic philosophers will not be satisfied. They will recognize the inadequacy in this summary (and perhaps even in the original) of the treatment of many concepts which are extremely complex and highly technical. Some will even take issue with particular theories which reflect long-standing points of disagreement among Catholic scholars or which represent a departure from venerable and widely held

concepts of the relationship of church and state.

However, the present effort does not strive to satisfy anyone, much less everyone. It merely proposes Father Murray's book and the thoughts which he expresses therein as a vehicle for a discussion of a philosophy of law which will satisfy the needs of America.

Even this limited goal is somewhat presumptuous. No single person can achieve it and by its very nature the task of formulating a philosophy which will provide for changing circumstances will be an unending one. But a start must be made and "We Hold These Truths" is proposed as a starting point.

The foreword to "We Hold These Truths" declares Father Murray's thesis:

It is classic American doctrine, immortally asserted by Abraham Lincoln, that the new nation which our Fathers brought forth on this continent was dedicated to a "proposition." . . .

Every proposition, if it is to be argued, supposes an epistemology of some sort. . . . [T]he American Proposition rests on the forthright assertion of a realist epistemology. The sense of the famous phrase is simply this: "There are truths, and we hold them, and we here lay them down as the basis and inspiration of the American project, this constitutional commonwealth."<sup>3</sup>

Father Murray then makes the flat declaration: "If this assertion is denied, the American Proposition is . . . *eviscerated at one stroke*."<sup>4</sup>

The American Proposition is, he continues,

In many respects a pragmatic proposition; but its philosophy is not pragmatism. For the pragmatist there are, properly speaking, no truths; there are only results. But the Ameri-

can Proposition rests on the more traditional conviction that there are truths; that they can be known; that they must be held; for, if they are not held, assented to, consented to, worked into the texture of institutions, there can be no hope of founding a true City, in which men may dwell in dignity, peace, unity, justice, well-being, freedom.<sup>5</sup>

America is a religiously pluralist society. By pluralist, Father Murray means the coexistence within one political community of groups who hold divergent views with regard to religious questions — those ultimate questions that concern the nature and destiny of man within a universe that stands under the reign of God. Pluralism, therefore, implies disagreement and dissension within the community. But it also implies a community within which there must likewise be agreement and consensus.

If society is to be at all a rational process, some set of principles must motivate the general participation of the community. On the other hand, these common principles must not hinder the maintenance by each group of its own different identity. The problem of pluralism is, of course, practical; as a project, its "working out" is an exercise in civic virtue. But the problem is also theoretical; its solution is an exercise in political intelligence that will lay down, as the basis for the "working out," some sort of doctrine.<sup>6</sup>

In a thought-provoking Introduction, the author sketches the background of the chapters which follow.

### The Civilization of the Pluralist Society

America is a pluralist society. Protestants, Catholics, Jews and secularists, each with their own histories, faiths, prejudices, fears, suspicions, hopes, aspirations, have struggled to attain a society and a government which will protect the legitimate in-

<sup>3</sup> MURRAY, WE HOLD THESE TRUTHS vii-ix (1960).

<sup>4</sup> *Id.* at ix. (Emphasis added.)

<sup>5</sup> *Id.* at ix.

<sup>6</sup> *Id.* at x.

terest of each group without demanding an abdication of principles.

Discourse on public affairs, on the affairs of the commonwealth, and particularly on the problem of consensus, inevitably moves upward into realms of some theoretical generality — into metaphysics, ethics, theology. Rather than carrying the discussants into areas of agreement or disagreement, however, it creates, as a rule, a confusion of ideas, a clash of conflicting positions in which the issue of agreement or disagreement becomes irrelevant.

One does not know what the other is talking about. Moreover, one withholds assent to, if he even adverts to, the immediate argument, wondering what the man who makes it is really driving at.

Take, for instance, the question of natural law, of which there will be much discourse in the pages that follow. For the Catholic it is simply a problem in metaphysical, ethical, political, and juridical argument. He moves into the argument naturally and feels relatively at ease amid its complexities. For the Protestant, on the contrary, the whole doctrine of natural law is a challenge, if not an affront, to his entire style of moral thought and even to his religiosity. The doctrine is alien to him, unassimilable by him. He not only misunderstands it; he also distrusts it. . . . [In fact,] "Catholic appeals to natural law remain a source of friction rather than a basis of deeper understanding" as between Protestant and Catholic. . . .<sup>7</sup>

Protestantism in America has forged an identification of itself, both historical and ideological, with American culture, particularly with an indigenous secularist unclarified mystique of individual freedom as somehow the source of everything, including justice, order, and unity. The result has been Nativism in all its manifold forms, ugly and refined, popular and academic, fanatic and liberal. . . . "You are among us but you are not of us." . . .<sup>8</sup>

Catholic and Protestant distrust each other's political intentions. There is the memory of historic clashes in the temporal order; the Irishman does not forget Cromwell any more readily than the Calvinist forgets Louis XIV. . . . The Catholic regards Protestantism not only as a heresy in the order of religion but also as a corrosive solvent in the order of civilization, whose intentions lead to chaos. The Protestant regards Catholicism not only as idolatry in the order of religion but as an instrument of tyranny in the order of civilization, whose intentions lead to clericalism. . . .<sup>9</sup>

There is the ancient resentment of the Jew, who has for centuries been dependent for his existence on the good will, often not forthcoming, of a Christian community. Now in America, where he has acquired social power, his distrust of the Christian community leads him to align himself with the secularizing forces whose dominance, he thinks, will afford him a security he has never known. . . .<sup>10</sup>

The secularist too, is at war. Historically his first chosen enemy was the Catholic Church and it still must be the enemy of his choice for two reasons.

First, it asserts that there is an authority superior to the authority of individual reason and of the political projection of individual reason, the state. . . . Second, it asserts that by divine ordinance this world is to be ruled by a dyarchy of authorities, within which the temporal is subordinate to the spiritual, not instrumentally but in dignity. This assertion is doubly anathema. It clashes with the socio-juridical monism that is always basic to the secularist position when it is consistently argued. In secularist theory there can be only one society, one law, one power, and one faith, a civic faith that is the "unifying" bond of the community, whereby it withstands the assaults of assorted pluralisms.<sup>11</sup>

In concluding his introduction, Father

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.* at 21.

<sup>7</sup> *Id.* at 17.

<sup>8</sup> *Id.* at 20.

Murray voices expectations which he calls "modest and minimal." We could limit the warfare and enlarge the dialogue. We could lay down our arms and take up argument. Internecine strife, beyond some inevitable human measure, is a luxury we can no longer afford. We can no longer put off a serious effort to solve the problem of religious pluralism and civic unity.

### **Part I: The American Proposition**

The American Proposition is under attack at home and abroad. Never before has America had a greater need to be clearly conscious of what it proposes, to be articulate in proposing, to be purposeful in the realization of the project proposed.

For over a decade, Father Murray has addressed himself to the American Proposition or, as it is otherwise called, with nuances of meaning, the public consensus or the public philosophy of America. His present collection of previously published essays, edited to supply a thread of unity, discusses the Proposition in its uniqueness, in its continuity with, and progress over, the longer civilizational tradition of the West, in certain of its applications and in some of its problematic aspects. In particular, the author has felt obliged to raise the question, whether and to what extent this nation, now no longer new, still remains dedicated to the conception of itself that first constituted us a people organized for action in history.

The first five chapters discuss the American Proposition first with regard to political unity and then with regard to religious pluralism. How are political unity and religious pluralism reconciled? Does the original American consensus still survive? Is there a need for such a consensus? Where may we look for such a consensus to origi-

nate and what is its authority? How can the development of a consensus be fostered?

### *The Nation Under God*

The first truth to which the American Proposition makes appeal is the fundamental thesis of the Declaration of Independence: God is sovereign over nations as well as over individual men.

This conservative Christian tradition of America differs from the Jacobin laicist tradition of Continental Europe which proclaimed the autonomous reason of man to be the first and the sole principle of political organization. In contrast, the first article of the American political faith is that the political community looks to the sovereignty of God as the first principle of its organization.

In support of this position may be cited the proclamations of Presidents John Adams, Lincoln and Eisenhower and opinions of the Supreme Court in 1815, 1892, 1931 and 1952 to the effect that "We are a religious people whose institutions presuppose a Supreme Being."

In its affirmation of what Lincoln called "this nation under God," the American Proposition embraced a whole constellation of principles founded upon the tradition of natural law and natural rights and bearing upon the origin and nature of society, the function of the state as the legal order of society, and the scope and limitations of government. The Constitution defined the areas where authority is legitimate and the areas where liberty is lawful. It is, therefore, at once a charter of freedom and a plan for political order.

### *The Principle of Consent*

The American consensus included a

great act of faith in the capacity of the people to govern themselves.

In distinguishing between the absolute and the constitutional monarch Sir John Fortescue (d. 1476), Chief Justice of the Court of King's Bench under Henry VI, said, "The secounde king (the constitutional monarch) may not rule his people by other laws than such as thai assenten to. And therefore he may set upon thaim non imposicions without their consent."

But in America this principle was given an amplitude of meaning never before known in history and resulted in a new synthesis which Lincoln formulated in the phrase "government by the people." Corollary thereto was an agreement on the necessity of free speech and a free press as conditions essential to the conduct of free, representative, and responsible government.

On reviving the distinction between society and the state, which had perished under the advance of absolutism, the American Proposition likewise renewed the principle of the incompetence of government in the field of opinion. Government submits itself to judgment by the truth of society; it is not itself a judge of the truth in society.

#### *A Virtuous People*

It is not an American belief that free government is inevitable but only that it is possible. Its possibility can be realized only when the people as a whole are inwardly governed by the recognized imperatives of the universal moral law. To be free a people must understand, in Acton's phrase, that "freedom is not the power of doing what we like but the right of being able to do what we ought."

A free civil society demands that order

should not be imposed from the top down, as it were, but should spontaneously flower outward from free obedience to the restraints and imperatives that stem from inwardly possessed moral principles.

#### *Human and Historical Rights*

The American Bill of Rights differs essentially from the Declaration of the Rights of Man in the France of 1789. The latter was a parchment-child of the Enlightenment, a top-of-the-brain concoction of a set of men who did not understand that a political community, like man himself, has roots in history and in nature. They believed that a government could be a work of art which abstract human reason could fashion of itself.

In contrast, the men who framed the American Bill of Rights understood history and tradition. They began with the tradition of freedom which was their heritage from England. Its roots were not in the top of anyone's brain but in history; in the medieval notion of the *homo liber et legalis*, the man whose freedom rests on law. The "man" whose rights are guaranteed in the face of law and government is the Christian man, who had learned to know his own personal dignity in the school of Christian Faith.

#### *The American Consensus Today*

The foregoing principles, according to Father Murray, were basic to the American consensus; the American public philosophy of law. But, he asks, does that consensus exist today?

There are some who contend that it does; that the American people in general still accept the validity of these propositions despite the attack upon them in

American universities by secular philosophers who deny that there are any basic, ultimate, self-evident truths or that we can know them with certitude.

Certainly the participation of Catholics in the American plan of government has been full and free, unreserved and unembarrassed, because the contents of the consensus — the ethical and political principles drawn from the tradition of natural law — approve themselves to the Catholic intelligence and conscience.

Perhaps there will one day be wide dissent from the principles which underlie our American philosophy of government: the idea that government has a moral basis; that the universal moral law is the foundation of society; that the legal order of society — that is, the state — is subject to judgment by a law that is not statistical but inherent in the nature of man; that the eternal reason of God is the ultimate origin of all law; that this nation in all its aspects — as a society, a state, an ordered and free relationship between governors and governed — is under God.

This possibility is not foreclosed. But should widespread dissent from these principles develop, the guardianship of the original American consensus, based on the Western heritage, would have passed to the Catholic community, within which the heritage was elaborated long before America was. It would be for others, not Catholics; to ask themselves whether they still shared the consensus which first fashioned the American people into a body politic and determined the structure of its fundamental law.

#### *The Articles of Peace*

Having discussed the basis of the American consensus with regard to political

unity, Father Murray then pursues an analysis of the American Proposition with regard to religious pluralism, especially as this proposition is embodied in our fundamental law. In the course of this analysis he lays bare the reasons why American Catholics accept on principle the unique American solution to the age-old problem.

The unity asserted in the American device *E pluribus unum* is a unity of a limited order. The one civil society contains within its own unity the communities that are divided among themselves; but it does not seek to reduce to its own unity the differences that divide them. The pluralism remains as real as the unity. Neither may undertake to destroy the other. And the two orders, the religious and the civil, remain distinct, however much they are, and need to be, related.

The American solution to the problem put by the plurality of conflicting religions within the one body politic is deposited in its legal form in the first amendment to the federal constitution: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

When Catholics are asked, "Do you really believe in the first two provisions of the First Amendment?", Father Murray is reminded of the famous query put by Boswell to Dr. Johnson, "whether it is necessary to believe all the Thirty-Nine Articles (of the Creed of the Church of England)," and the Doctor's answer, "Why, sir, that is a question which has been much agitated. Some have held it necessary that all be believed. Others have considered them to be only articles of peace, that is to say, you are not to preach against them."



*Theologies of the First Amendment*

An analogous difference of interpretation seems to exist with regard to the first articles of the first amendment. On the one hand, there are those who read into them certain ultimate tenets. On the other hand, there are those who see in these articles only a law, not a dogma.

The first class may be further divided into three groups:

(1) Those who see in these clauses certain Protestant religious tenets. For this group they are true articles of faith. Hence, it is necessary to believe them, to give them a religiously motivated assent.

(2) A second group is constituted by the secular liberals who see in these clauses certain principles which the secular liberal philosophy requires to be held with all the certainty of a dogma, although the name *dogma* may be anathema.

(3) The differences between these two groups tend to disappear in a third group, the so-called secularizing Protestants, who effect an identification of their Protestantism with American secular culture, consider the church to be true in proportion as its organization is commanded by the norms of secular democratic society, and bring about a coincidence of religious and secular-liberal concepts of freedom.

To those who see in these articles only a law, not a dogma, the constitutional clauses have no religious content. They answer none of the eternal human questions with regard to the nature of truth and freedom or the manner in which the spiritual order of man's life is to be organized or not organized. Therefore they are not invested with the sanctity that attaches to dogma but only with the rationality that attaches to law. In further consequence, it

is not necessary to give them a religious assent, but only a rational civil obedience. In a word, they are not articles of faith but articles of peace; that is to say, you may not act against them, because they are law, and good law.

Father Murray rejects the notion that any sectarian theses enter into the content or implications of the first amendment in such wise as to demand the assent of all American citizens.

If this were the case the very article that bars any establishment of religion would somehow establish one.

The Federal Republic [would] suddenly become a voluntary fellowship of believers either in some sort of free-church Protestantism or in the tenets of a naturalistic humanism. The notion is preposterous. The United States is a good place to live in; many have found it even a sort of secular sanctuary. But it is not a church, whether high, low, or broad. It is simply a civil community, whose unity is purely political, consisting in "agreement on the good of man at the level of performance without the necessity of agreement on ultimates." . . . As regards important points of ultimate religious belief, the United States is pluralist. Any attempt at reducing this pluralism by law, through a process of reading certain sectarian tenets into the fundamental law of the land, is *prima facie* illegitimate and absurd.<sup>12</sup>

*The Appeal to History*

Theologians of the first amendment, whether Protestant or secularist, are accustomed to appeal to history. In the end it is always Roger Williams to whom appeal is made. Admittedly, he was the only man in pre-federal America who had a consciously articulated theory. The difficulty is that the Williams who is appealed to is a Williams who never was. Professor Perry Miller's recent book "Roger Williams"

<sup>12</sup> *Id.* at 54.

shows that Williams was a seventeenth-century Calvinist who somehow had got hold of certain remarkably un-Calvinist ideas on the nature of the political order in its distinction from the Church. His premises and purposes were not those of the secular-liberal democrat any more than his rigidly orthodox Calvinist theology is that of his Baptist progeny. Williams actually exerted little or no influence on institutional developments in America; only after the conception of liberty for all denominations had triumphed on wholly other grounds did Americans look back on Williams and invest him with his ill-fitting halo.

#### *The Work of Lawyers*

From the standpoint of history and of contemporary social reality the only tenable position is that the first articles of the first amendment are not articles of faith but articles of peace. Like the rest of the Constitution these provisions are the work not of theologians, not of political theorists, but the work of lawyers. They are not true dogma but only good law. That is praise enough. This is the Catholic view but it is not a "sectarian" view. It is the view which any citizen with both historical sense and common sense can take.

The artisans of the American Republic and its Constitution were not radical theorists intent on constructing a society in accord with the a priori demand of a doctrinaire blueprint with utter disregard for what was actually given in history. They were for the most part lawyers looking to the common good, which is normative for all law. And social peace, assured by equal justice in dealing with possibly conflicting groups, is the highest integrating element of the common good. This criterion, which is a legal criterion, is the first and most

solid ground on which the validity of the first amendment rests.

#### *The Necessity for Public Peace*

Religious liberty and separation of church and state in America came into being under pressure of their necessity for the public peace. Four factors contributed to this necessity:

(1) *The great mass of the unchurched.* Some were cut off from religion by the hardships of the frontier; others were careless of religion by reason of their preoccupation with material things; others were concerned with religion in the personal sense as indispensable to morality and ordered civil life but were hostile toward organized religion. There was little anti-religion in the sense of militant, anti-clerical Continental laicism.

(2) *Multiplicity of denominations.* The sheer fact of dissent and sectarian antagonisms was a particularly important motive of the federal constitutional arrangement.

(3) *The economic factor.* The merchants of New York, New Jersey, Virginia and the South were as emphatically on the side of religious freedom as on the side of commercial profits. Persecution and discrimination were as bad for business affairs as they were for the affairs of the soul.

(4) *Effect of widening of religious freedom in England.* The struggle between Anglicanism and Nonconformism would eventually result in religious freedom (except for Catholics), conjoined with establishment. America, having no single established religion, was able to go one step farther.

In view of these factors any other course but freedom of religion and separation of church and state would have been disrupt-

tive, imprudent, impractical, indeed impossible. But this solution did not constitute a reluctant concession to *force majeure*. In the science of law and the art of jurisprudence the appeal to social peace is an appeal to a high moral value. Behind the will to social peace there stands a divine and Christian imperative. This is the classic and Christian tradition.

Father Murray then calls attention to Pope Pius XII's reference to the parable of the tares in the course of his discourse to a group of Italian jurists on December 6, 1953. The fundamental theoretical principle, says the Pope (and one should underscore the word, *theoretical*; it is not a question of sheer pragmatism, much less of expediency in the low sense), is this:

[W]ithin the limits of the possible and the lawful, to promote everything that facilitates union and makes it more effective; to remove everything that disturbs it; to tolerate at times that which it is impossible to correct but which on the other hand must not be permitted to make shipwreck of the community from which a higher good is looked for.<sup>13</sup>

This higher good, in the context of the whole discourse, is "the establishment of peace." The quotation from Pius XII continues:

The duty of repressing religious and moral error cannot therefore be an ultimate norm of action. It must be subordinated to higher and more general norms which in some circumstances permit, and even perhaps make it appear the better course of action, that error should not be impeded in order to promote a greater good. . . .

[I]n certain circumstances God does not give men any mandate, does not impose any duty, and does not even communicate the right to impede or to repress what is erroneous and false.<sup>14</sup>

Father Murray concludes that the consent given to the religious clauses of the Constitution is given on grounds of moral principle. To speak of expediency here is altogether to misunderstand the moral nature of the community and its collective moral obligation toward its own common good. The origins of our fundamental law are in moral principle; the obligations it imposes are moral obligations, binding in conscience. One may not, without moral fault, act against these articles of peace.

### *The Distinction of Church and State*

The distinction of church and state, one of the central assertions of the genuine Western tradition in politics, received in the Constitution a special embodiment, adapted to the peculiar genius of American government. The area of state — that is, legal — concern was limited to the pursuit of certain enumerated secular purposes. Thus made autonomous in its own sphere, government was denied all competence in the field of religion.

The concrete applications of this, in itself, quite simple, solution have presented great historical and legal difficulties. It still remains to be seen whether government can make effective the primary intention of the first amendment, the guarantee of freedom of religion, simply by attempting to make more and more impregnable what is called, in Roger Williams' fateful metaphor, the "wall of separation" between church and state.

But for Catholics the embodiment in the American Constitution of the traditional principle of the distinction between church and state is of great and providential importance for one major reason. It serves sharply to set off our constitutional system

<sup>13</sup> *Id.* at 61.

<sup>14</sup> *Id.* at 61-62.

from the system against which the Church waged its long, drawn out fight in the nineteenth century, namely Jacobinism, or (in Carlton Hayes' term) sectarian Liberalism, or (in the more definitive term used today) totalitarian democracy.

The Jacobin free state did not effect separation of church and state but constituted perhaps the most drastic unification of church and state which history had known. Moreover this was done on principle — the principle of the primacy of the political, the principle of "everything within the state, nothing above the state."

This was the cardinal thesis of sectarian Liberalism, whose full historical development is now being witnessed in the totalitarian "people's democracies" behind the Iron Curtain. As the Syllabus and its explicatory documents — as well as the multitudinous writings of Leo XIII — make entirely clear, it was this thesis of the juridical omnipotence and omniscience of the state which was the central object of the Church's condemnation of the Jacobin development. It was because freedom of religion and separation of church and state were predicated on this thesis that the Church refused to accept them as a thesis.

This thesis was utterly rejected by the founders of the American Republic. The rejection was as warranted as it was providential, because this thesis is not only theologically heterodox, as denying the reality of the Church; it is also politically revolutionary, as denying the substance of the liberal tradition. The American thesis is that government is not juridically omnipotent. Its powers are limited, and one of the principles of limitation is the distinction between state and church, in their purposes, methods, and manner of organization. The Jacobin thesis was basically philosophical; it derived from a sectarian concept of the autonomy of reason. It was also theological, as implying a sectarian concept of religion and of the church. In contrast, the American thesis is simply political. It asserts the theory of a

free people under a limited government, a theory that is recognizably part of the Christian political tradition, and altogether defensible in the manner of its realization under American circumstances.<sup>15</sup>

It may indeed be said that the American constitutional system exaggerates the distinction between church and state by its self-denying ordinances. But this is quite different than to abolish the distinction. In the latter case the result is a vicious monistic society; in the former, a faultily dualistic one. The vice in the Jacobin system could only be condemned by the Church, not in any way condoned. The fault in the American system can be recognized as such, without condemnation.

### *The Freedom of the Church*

In contrast to the Jacobin system in all its forms, the American Constitution does not presume to define the Church or in any way to supervise her exercise of authority in pursuit of her own distinct ends. The juridical result of the American limitation of governmental powers is the guarantee to the Church of a stable condition of freedom as a matter of law and right.

The reason for the extension of this guarantee to the Church as an organized society as well as to the individual member lies, according to Father Murray, in the fact that the American state has no sovereignty in the classic Continental sense. Nowhere in the American structure is there accumulated the plenitude of legal sovereignty possessed in England by the Queen in Parliament. Within society, as distinct from the state, America recognizes that there is room for the independent exercise of an authority which is not that of the state.

<sup>15</sup> *Id.* at 68-69.

### *The American Experience*

Although pure pragmatism cannot be made the philosophy of law, nonetheless the value of any given law is importantly pragmatic. The first amendment surely passes this test of good law.

First, America has proved by experience that political unity and stability are possible without uniformity of religious belief and practice, without the necessity of any governmental restrictions on any religion.

Secondly, American experience has been that stable political unity, which means enduring agreement on the common good of man at the level of performance, can be strengthened by the exclusion of religious differences from the area of concern allotted to government.

Thirdly, the most striking aspect of the American experience consists in the fact that religion itself, and not least the Catholic Church, has benefited by our free institutions, by the maintenance even in exaggerated form, of the distinction between church and state.

In the final analysis, any validation of the first amendment as good law — no matter by whom undertaken, be he Protestant, Catholic, Jew, or secularist — must make appeal to the three arguments developed above — the demands of social necessity, the rightfulness within our own circumstances of the American manner of asserting the distinction between church and state, and the lessons of experience.

In a curiously controlling way this tone was set by the *Federalist* papers. It has even been pointed out that the only real slogan the Revolution produced was: "No taxation without representation." It has not the ring of a trumpet; its sound is more like the dry rustle of a lawyer's sheaf of

parchment. It is in the tone of this tradition of American political writing that one should argue for the first amendment.

### *Is There an American Consensus?*

Having discussed the political unity and religious pluralism of America, Father Murray then asks two questions: (1) Does the United States have a public philosophy? (2) Does the United States need a public philosophy?

The Founding Fathers certainly possessed a public philosophy and indicated it in the forthright statement of the Declaration of Independence: "We hold these truths. . . ."

The function of their public philosophy was threefold:

(1) To determine the broad purposes of our nation as a political unity organized for action in history.

(2) To furnish (a) the standards according to which judgment is to be passed on the means that the nation adopts to further its purposes, and (b) the basis of communication between government and the people and among the people themselves; a common universe of discourse in which public issues can be intelligibly stated and intelligently argued.

(3) To indicate the content of the public philosophy.

Moreover, the original American public philosophy had as its focal concept the idea of law. The authors of the Constitution held in common a concept of the nature of law and its relationships to reason and will, to social fact and to political purpose. They had an idea of the relationship between law and freedom; between the order of law and the order of morals. They understood the use of force in support of law. They had an idea of good law, norms

of jurisprudence that judge the necessity of law and determine the limits of its usefulness. They had an idea of justice, of social equality. They distinguished between state and society, between the relatively narrow order of law as such and the wider order of the total public good. They understood the notion of law as a force for orderly change, for social progress as well as for social stability. They knew the value of law as a means of educating the public conscience to higher viewpoints on matters of public morality.

Finally, they understood that the consensus on a public philosophy does not put the dissenter beyond the pale of social or civil rights. But it is the function of the consensus to identify dissent as dissent and it is the function of dissent not to destroy or undermine the consensus but to solidify it and make it more conscious and articulate.

On more than one occasion Father Murray has outlined the case for an American consensus based on reason only to be met with the question of whose reason shall determine the question. By implication the objector takes the position that there can be no philosophy which is public because philosophy is a private affair. Others maintain that the business of America is business and technology and that philosophy has nothing to do with it. Still others maintain that there is no truth but scientific truth, reached by the methods of science, whether classical or statistical.

The pragmatist joins the argument and declares that only those ideas are true which survive competition and that the forces of history have made a vacuum where once there was, or may have been, a public philosophy.

Another dissenter denies the existence

of any morality other than national mores having no greater warranty than custom or fashion or convention; morality is either contextualistic or a matter of situation-ethics, a problem of individual decisions in whose making no appeal may be made to a moral order since there is no moral order.

Inevitably the argument is advanced that the American consensus is nothing more than an agreement to disagree. The consensus is purely procedural; it involves no agreement on the premises and purposes of political life and legal institutions; it is solely an agreement with regard to the method of making decisions and getting things done, whatever the things may be.

As a result of his observation and experience, Father Murray fears that there is at present no American public philosophy. Among all too many men and women equipped by formal education and training to take an intelligent interest in public affairs, there is a vacuum on the intellectual level. Nor can we any longer rely upon the body politic by reason of its patrimony of political wisdom to sense in some instinctive fashion the basic errors in governmental policy, even when the politicians themselves get lost in their technical arguments and partisan feelings.

### *The Need for a Public Philosophy*

The apparent lack today of an American consensus or public philosophy has not discouraged Father Murray. Instead of lamenting the loss of a consensus he would have us examine the need for one. If public affairs are going badly, the basic reason is the absence of a public philosophy. Today there is need for a new moral act of purpose and a new act of intellectual affirmation, comparable to those which launched the American constitutional common-

wealth, that will newly put us in possession of the public philosophy, the basic consensus that we need.

To say that our national purpose is simply "survival" is to indicate the depth of political bankruptcy to which we may have plunged. Moreover, if this be our only goal we shall not even achieve survival. Communism is not the basic cause of our present confusion. Communism merely exploits the world's disorder; it did not create it. The disordered state of the world itself puts to America the question: What are your truths?

The confusion and ineffectiveness in the various areas of American policy are due to the absence of a public philosophy. The Soviet Union does not need to look for a public philosophy with regard to the uses of force; it has one. That philosophy may be damnable but even a damnable philosophy is more effective than no philosophy at all. In the area of foreign aid there is likewise need for a public philosophy. Even if no imperialist advances were being made from Moscow, the United States would have to have a world economic policy of a rational kind, based on a coherent philosophy. Moral altruism awakes no resonance in the public mind and it collides with the "tough" argument that self-interest is the final controlling factor of political or economic policy.

What is our purpose? What are our values? These are crucial questions that need to be answered and the answer cannot be found except in the context of a public philosophy: an American consensus.

### *The Origins of a Public Consensus*

In discussing the nature and origin of a public consensus Father Murray finds valuable aid in the concept developed by Prof.

Adolf A. Berle in "Power Without Property." Eight points are significant.

(1) A public consensus is a set of ideas widely held by the community and often by the (business) organization itself and the men who direct it, that certain uses of power are wrong and generally recognized as being contrary to the established interest and value system of the community.

(2) It is not a spontaneous fact in the minds of many individuals but is the product of a body of thought and experience.

(3) The principles of the public consensus, some of which are well enough defined as to be inchoate law, have never been stated. Yet men in each industry are fairly well aware of them. With time, effort and thought, they could manage a tolerable outline of the public consensus as it applies to them.

(4) It is not a finished but a developing body of doctrine.

(5) It is not identical with public opinion but distinct, though related. It furnishes the basis for public opinion.

(6) The depositaries and agents in the development of the consensus are myriad: educated men and women, students, writers, specialists, financial analysts, business men, economists, university professors, responsible journalists, the solid pronouncements of respected politicians, — all these, and men and women like them, are the real tribunal to which the American system is finally accountable.

(7) The public function of the consensus is to act as final arbiter of the legitimacy of economic power and the rightfulness of its uses.

(8) The consensus itself includes settled principles of law applicable to economic power. But it also includes capacity to criticize that law.

### *The Authority of the Consensus*

Economic life, like all life, is no more than a stream of contingent "facts." The public consensus is not merely the facts. It is a set of principles or standards in terms of which to pass judgment on the facts. The question then recurs: What is the non-contingent element of thought in terms of which the economic facts are transformed into issues that may be argued and then decided in a form of decision that assumes the status of a principle, a criterion of permanent judgment on passing situations of fact?

The consensus cannot be simply a reflection of fact, as if whatever *is* must be considered *right*; nor can it be a mere technique of success, *i.e.*, whatever works must be considered true and good. The consensus must have the character of a moral experience that is public. But moral experience assumes intelligibility only in terms of a moral theory.

The author thus comes to the proposition that only the theory of natural law is able to give an account of the public moral experience that is the public consensus.

### *The Doctrine of Natural Law*

Opponents of the doctrine sometimes object that one cannot accept the doctrine of natural law unless one has antecedently accepted "its Roman Catholic presuppositions." This of course is quite wrong. The doctrine of natural law has no Roman Catholic presuppositions. Its only presupposition is threefold: (1) that man is intelligent; (2) that reality is intelligible; (3) that reality, as grasped by intelligence, imposes on the will the obligation that it be obeyed in its demands for action or abstention.

The structure of natural-law thought rises, and its style of argument appears in the following manner:

(1) Human reason in an a priori manner and without any need for argument can come to the knowledge of the primary truth of the intellectual order that what is true cannot at the same time and under the same respect be false. Likewise it can reach the primary moral truth that what is good ought to be done and what is evil avoided.

(2) After some elementary experience in the basic situations of human life, intelligence can grasp the meaning of "good" and "evil" in these situations and therefore know what is to be done or avoided in them.

(3) Intelligence, with the aid of simple reasoning, can know, and know to be obligatory, a set of natural-law principles that are derivative. These, in general, are the basic moral laws of human life such as are contained in the Ten Commandments, laws sanctioned by reason as well as by their inclusion in the Jewish and Christian codes. This is not to say that men cannot go astray in particular instances since man's guide to moral action is practical judgment and this is not infallible.

(4) Finally, there are the particular principles which represent the requirements of rational human nature in more complex human relationships. The discovery of these principles is difficult and can usually be achieved by those whom George Washington referred to as "the wise and honest."

Technically, the contents of the consensus embrace principles and rules which are among these more remote precepts of natural law. In consequence, they are reached by careful inquiries and by a thorough analysis of all the facts and circumstances.



This is not the job for mere common sense. In consciously articulated and reasoned form, the consensus exists among the "wise and honest." In the form of simple affirmation or accepted conviction, it exists among the people.

The inherent authority of the consensus is that it has been found to be in accordance with right reason. Once they have been instructed, those who are of lesser reflective capacity can grasp the reasonableness of the conclusions even though they are incapable of the "careful inquiry" that led to these conclusions.

We shall always have among us those who have no fear of or regard for God or man. The generality of men, however — even the most powerful — has some strong natural inclination to act according to reason in what concerns their power. That is, they naturally seek to establish the legitimacy of their power and also to have their uses of it publicly recognized as legitimate. They are naturally disinclined to appear to themselves or to others as unreasonable. In a word, they are somehow inclined to be "natural" men who recognize and obey the remote principles of natural law that constitute the public consensus. Or, if this moral inclination fails, as it is likely to fail in the face of the contrary imperatives of self-interest, these men of power are at least "natural" enough to submit to the just interventions of the public power in support of the public consensus.

In search of a term for George Washington's "wise and honest," the men who are to do the work of reason, of reflection on the changing economic facts, Father Murray suggests the word "University" as distinct from the church and the state. The "University" would include universities but it would have a wider connotation and

embrace all who are willing and able to participate in the intellectual task of shaping the consensus. As instances of men who have a "care" for the public good but who are not "interested parties" (in the usual sense of the latter phrase), Father Murray points out:

There was, for instance, a Jeremiah S. Black, who in 1883 refused a retainer to argue the railroad case against public regulation of railroads, because (he said) he was "pledged to the people on the issues at stake." There was a Louis D. Brandeis; when asked to represent the interests of a great investment banking group in a proxy fight involving the Illinois Central Railroad, he "required" (he said) to be "satisfied of the justness" of the bankers' position. This is the style of man one seeks, whose "care" is not an "interest."<sup>16</sup>

#### *Pluralism and the University*

Although Father Murray's earlier use of the word "University" transcends the scope of that word as applied to an organized faculty and student body, the university in the more limited sense of the term has a special function in the development and articulation of the American consensus. One may question, however, how well the university community is assuming its responsibility.

On all sides one may see decadence within the area of intellectual life. There is a dissolution of the idea of the unity of truth. There is the consequent dissolution of the idea of truth itself, to the point where no assertion may claim more than the status of mere opinion, to be granted an equality of freedom with any other opinion. For many to whom the word truth still has a meaning, that meaning is reduced to those conclusions which are based upon the empirical method of science. This

<sup>16</sup> *Id.* at 123.

theory is the denial of the possibility of philosophy in the meaning that the word has had since Plato.

Finally, there has taken place a decay of the political intelligence, a loss of confidence in the power of reason to fix the purposes of political life and to direct the energies of freedom in such a way as to impose a due measure of human control upon the forces of history, upon the automatism of technology, and upon the hurrying pace of events. But perhaps the ultimate tendency of the pluralisms created by the era of modernity is felt. . . . [in the fact that today we not merely] hold different views but that we have become different types of men, with different styles of interior life. We are therefore uneasy in one another's presence.<sup>17</sup>

The university is committed to the task of putting an end, as far as it can, to intellectual savagery in all its forms, including a major current form which is the savagery of the American student (perhaps also the professor?) who in matters religious and theological is an untutored child of the intellectual wilderness. The university is committed to the task of putting an end to prejudice based on ignorance. The university is committed to its students and to their freedom to learn.

Whatever may be the university's duty (or right or privilege or sin) of non-committalism, the fact is that many of its students are committed religiously. They believe in God. They are Protestants and Catholics and Jews. The university as such has no right to ignore the fact of these commitments much less to require that for four years those students be committed to scientific naturalism.

The major issue here is the student's freedom to learn — to explore the full intellectual dimensions of the religious faith to which he is committed. And it is the

<sup>17</sup> *Id.* at 130.

right and duty of the university to require that his quest of religious knowledge should be pursued in the high university style — under properly qualified professors, in courses of high academic content, in accordance with the best methods of theological scholarship.

The university should aim at a genuine understanding of the epistemology of religious truth — or, if you will, an understanding of the nature of religious faith. It should also aim at an understanding of the various systems of belief, precisely as systems, in their inner organic consistency (whatever it may be) and in their relation to other areas of human knowledge (insofar as these relations are intellectually discernible). Moreover, the proper qualification of the professor who would wish to communicate a critical understanding of a particular religious belief is that he believe it himself. That he possess the faith.

Yet the function of the university is not Messianic. If man hopes for salvation, he must set his hope elsewhere than on the university.

Henry Adams' gratitude to Harvard for its contribution to his intellectual development is the highest gratitude that the university can merit from man in search of salvation. Harvard, said Adams in effect, did not get in my way. But this is no small cause for gratitude when the issue at stake is salvation.<sup>18</sup>

## Part II: Four Unfinished Arguments

Part I of "We Hold These Truths" presents the basic principles and postulates of Father Murray's theses that America is a religiously pluralistic society and that it has need for the reaffirmation of a public consensus. The author then turns to what he calls four unfinished arguments in the con-

<sup>18</sup> *Id.* at 139.

tinuous development of the consensus, arguments which have inherent importance and also serve to illustrate and further develop the discussion contained in Part I.

### *The School Question Today*

Changes in the religio-social structure of America have profoundly altered the understanding which nineteenth-century America had of itself. From a socio-religious point of view, American society has assumed a new pluralist structure, notably different from the structure it exhibited a century ago when the public school system had its beginnings. Originally, the public school was viewed as vaguely Protestant or purely secular; a vehicle for the inculcation of "democracy" as a quasi-religious ideology or for the transmission of spiritual and moral values in some non-sectarian sense.

None of these four concepts fits with the present facts of American life. American society is neither vaguely Protestant nor purely secular. The religion of America is not "democracy," nor is it some generalized faith in "values." Religion in America has a form, a precisely defined form, a pluralistically structured form. This is the fact.

In consequence the historical pattern of the public school as the single publicly supported school, and the church-school as barred from public support is outdated. Father Murray believes that the injustice of the present situation will be resolved slowly and with difficulty but certainly. In any event, the dynamism of change will be the familiar one that continually operates in American life, a growth in moral insight, assisted by a realistic grasp of socio-religious reality.

There is some analogy in the development of constitutional doctrine which fi-

nally took into consideration the changed circumstances and resulted in the decision that the doctrine of "separate but equal" facilities for Negroes is incompatible with the present-day American constitutional concept of civic equality within the unity of the body public.

The public school merits strong defense but the notion of "public education" as meaning a unitary and monolithic school system which singly and alone is entitled to public support has been rightly called (by Mr. Robert E. Rodes, Jr.) "an aberration in the general picture of our society, which is pluralistic."

When we think of the religious school as serving, for instance, the Catholic Community, we have not to do with a small eccentric group, existing on the periphery of American society, whose needs might possibly be overlooked in the interests of some greater good. On the contrary we have to do with a segment of our society, fully integrated into its pluralist structure, which has now become so large that its educational needs and interests have become public needs and interests, at the same time that they remain special to the particular community. There is something wrong when American government fails to reckon fairly with the diverse educational needs of the pluralist community which it is supposed to be serving. And the realization that something is wrong is forcing itself upon an increasing number of American citizens who understand both the nature of our society and the principles of our government.

The most fatal thing would be the complacency of supposing that the problem of religion in education is settled by the *McCollum* rule of absolute and complete separation of church and state. So, far from

solving the problem, this has made it more acute. Until the problem is solved with all justice and realism, the American ideal of ordered freedom, for which the Bill of Rights stands, will not have been achieved.

### *The Question of Censorship*

The second unfinished argument is the question of how and to what extent the government should limit freedom of speech or freedom of the press.

Law and morals cannot and should not be equated. To do so would produce chaos. Law would be used to flout morality. Morality would be invoked to sanction any sort of law. Nor should public and private morality be equated.

It is a fact of political history that every government has always claimed what is called police power as an attribute of government. The power in itself is simply the principle of self-preservation and self-protection transferred to the body politic. In the interests of public morals, public health, public safety, public order, and the general comfort of society, the government, acting as the agent of society, is entitled to impose restraints on property rights and personal freedoms. The question is, how far and in what circumstances may the government exercise this principle?

If you impose a constraint on freedom in one domain, in order to increase freedom in another, you may take the risk of damaging freedom in a third domain with consequences more dangerous to the community.

There is a second and consequent consideration. Because social freedoms interlock so tightly, it is not possible to know antecedently what the multiple effects of a regulation will be. For this reason the social reformer whose only strength is a

sense of logic may well be a menace.

The problem of censorship is even more acute in a pluralist society such as America. After noting that all religious groups are — from the sociological, even if not from the statistical, point of view — minority groups, Father Murray lists four rules which the consensus should include.

First, within the larger pluralist society each minority group has the right to censor for its own members. . . .

Second, in a pluralist society no minority group has the right to demand that government should impose a general censorship . . . of materials that are judged to be harmful according to the special standards held within one group.

Third, any minority group has the right to work toward the elevation of standards of public morality in the pluralist society, through the use of the methods of persuasion and pacific argument.

Fourth, in a pluralist society no minority group has the right to impose its own religious or moral views on other groups, through the use of the methods of force, coercion, or violence.<sup>19</sup>

Economic pressures such as trade unions use may be neither undemocratic nor unrightful but Father Murray deems them incongruous when used by a religious group. In the name of prudence he cautions against their indiscriminate use by Catholics lest the Church itself be identified in the public mind as a power-association.

Although censorship gives rise to the question of who shall censor, Father Murray would not discount the value of what is called the "common estimation" of men. People in general have a fairly clear notion of what obscenity is and in general can make for themselves a pretty good judgment on whether a particular work is obscene.

<sup>19</sup> *Id.* at 168.

The aims of censorship should be minimal but one proper area would be the "pornography of violence."

Finally, Pope Leo XIII, who revised the Index of Forbidden Books, also pointed out the great danger in not reading good books.

### *Christianity and Human Values*

The third unfinished argument involves two problems. First, is there a place in good theology for the human values which America has historically emphasized or do the social conditions, institutions and ideals have only the character of a necessary evil? Second, does the cultivation of human values by human energies contribute to the coming of the Kingdom of God or is it irrelevant like the work of the monk who wove a basket one day and unwove it the next as a means of spending an interval, necessary to the frail human spirit, between periods of performance of the only task that did matter, the contemplation of heavenly things?

To ask these questions is to raise the question of the relation between history and the Church and to invite a journey down avenues of mystery, which are legitimate avenues of reverent Christian inquiry. But if in doctrinal affirmations the Church is confident, in the area of practice she is prudent, even cautious. The Church stoutly defends reason and its powers of knowing and of harmonizing its knowledge with its Christian beliefs. She is less certain of man himself in his total being and less confident of his power to harmonize his whole human effort with his Christian faith, in that ever precarious synthesis known as Christian humanism. It is in this same spirit of both confidence and prudence that the problem is to be approached.

### *The Gelasian Thesis*

"Two there are, august Emperor, by which this world is ruled on title of original and sovereign right — the consecrated authority of the priesthood and the royal power."

In this celebrated sentence of Gelasius I, written to the Byzantine Emperor Anastasius I in 494 A.D., the emphasis laid on the word "two" bespoke the revolutionary character of the Christian dispensation. Herein lies the fourth unfinished argument.

The Gelasian text has been called the "Magna Charta of the whole freedom of the Church in medieval times." Not only was the Church free as a spiritual authority to teach, to rule and to sanctify — free of any subordination to the state as *instrumentum regni*, a tool of the state — but the people themselves were free; free 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.

This freedom of the Church as the *spiritual authority* served as the limiting principle of the power of government. The freedom of the Church as the "people of God" furnished the ultimate directive principle of government.

In modern times the distinction between state and society which had been the secular political outgrowth of the Christian distinction between church and state, was to some extent retained but the freedom of the Church as a mediating principle between society and the state was discarded. Instead, a secular substitute was adopted in the form of free political institutions.

The 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 the private conscience. And through free political institutions, again constitutionally guaranteed, the moral consensus of the community would be mobilized in favor of justice and freedom in the secular order. . . .

The rejection of the Gelasian thesis has been common to all the prophets of modernity, from Marsilius of Padua onwards. All of them have been united in viewing the freedom of the Church, in the sense explained, as a trespass upon, and a danger to, their one supreme value — the “integrity of the political order.” . . .

Over the whole of modern politics there has hung the monist concept of the indivisibility of sovereignty: “One there is.” This has been true even in those states in which the sovereignty, remaining indivisible, has been institutionalized according to the principle of the separation of powers.<sup>20</sup>

The dynamism behind the assertion “One there is” has, of course, been varied. In the seventeenth and eighteenth centuries it was royal absolutism. In the nineteenth century the dynamism was the Revolution, that whole complex of forces which created Jacobin democracy and proclaimed the *république indivisible* in the name of the sovereignty of the people, understood as the social projection of the absolutely autonomous sovereignty of individual reason. In the twentieth century the most successful dynamism has been Soviet Communism, which makes the assertion “One there is” in the name of the unitary class which is destined for world sovereignty, and in the name of its organ, the Party, whose function is to be the servant and ally of the materialist forces of history.

In the twentieth century too, the ancient monistic drive to a oneness of society, law and authority has also appeared in the totalitarianizing tendency inherent in the

contemporary idolatry of the democratic process. What is urged is a monism, not so much of the political order itself, as of a political technique, but the underlying idea is a monism of power: “One there is whereby the world is ruled — the power in the people, expressing itself in the preference of the majority; and beyond or beside or above this power there is no other.”

But the unitary hypothesis has not been able to sustain itself under the test of experience. Post-modern man has become most uneasily aware of the limitations of the state even in the discharge of its own functions. He fears that the modern experiment may prove to be simply an interlude between despotisms — between the known and limited despotism of the past and the unknown despotism of the future.

If the post-modern man continues to pursue the mirage which bemused modern man, a spiritual vacuum will increasingly be created at the heart of human experience. The rejection of the Christian mode of existence will result in the development at the heart of human life of an explicitly non-Christian mode of existence.

The non-Christian man of modern times does not yet realize what it means to live in a non-Christian civilization. Yet in these last decades the realization has been dawning on America of what such an existence might be like as it watches the frightening emergence and multiplication of that “senseless, faithless, heartless, ruthless” man whom Paul met on the streets of non-Christian Corinth and described in his Letter to the Romans.

But a dreadful chaos of violence is not inevitable. Reason itself, and its high exercise in argument, could lead us to the recognition of a law, even more basic than

<sup>20</sup> *Id.* at 206-07.

the pragmatic law, which our forebears of the modern era failed to reckon with.

### **Part III: The Uses of Doctrine**

In the first and second parts of the book under discussion, Father Murray expresses doubt as to whether we Americans as a people "hold these truths" or any truths as determinative of our purposes and directive of our policies. History attests that the Founding Fathers — practical men, all of them — were well aware of the uses of doctrine. Today there is evidence that we have no use for doctrine — or perhaps even no doctrines to use.

#### *The Primacy of Communist Dogma*

If now there is a vacuum where once there was substance, this fact is serious in view of our present confrontation with Soviet Russia. Unless one understands Soviet doctrine he cannot understand the logic of Soviet action. How else can one explain the strategy of forceful aggression at the very moment in 1945 when Russia had attained security by sufficient territorial depth on all sides and when in the United States, Britain and France a mood of general, if not unbroken, good will towards Russia prevailed to a degree that was almost pathological.

Communist doctrine holds that the capitalist camp is irreconcilably hostile. Social democracy is inherently untrustworthy and ought to be destroyed because it only deceives the worker and confuses the issue by its pretension to be a third force between communism and capitalism. Conflict is necessary. It is the necessary means to world revolution. Finally, the doctrine holds that at the end of a war the capitalist camp must be in a state of weakness and that that is the moment for the strategy of forceful aggression.

To the pragmatist this is silly. It is silly! But it happened.

It is possible of course that some basic changes may take place in Soviet doctrine but this is unlikely. The official atheism is necessary in order that the individual may claim no moral rights against the state and no freedom except within the "collective freedom" of the state. The exploitation of the individual in the service of the state is necessary as the premise of forcing further the gigantic technological development. The maintenance of the myth of "danger from without" is necessary in order to justify the continuance of the police state and to explain why the state is not withering away. Finally, the personal security of the Soviet rulers and the continuing privileges of the "new class" are dependent upon the maintenance both of the empire and of the revolutionary doctrine that sustains it.

#### *Communist Dogma and American Policy*

In consequence of communist doctrine America can expect the Soviet Union to yield only to calculations of power and success; negotiation in itself will effect nothing. You must first know what you want. This is foreign policy. Negotiation is simply the means of getting what you want.

Two things should be kept in mind. (1) The Soviet Union will always act on its own doctrine. (2) It will ignore arguments based on such things as "freedom" or any other Western "ideals."

Anti-communism in America has advanced to the point where everybody now mortally hates and fears what is known, rather vaguely, as "the communist menace." America owes a debt of gratitude to those who raised the cry of subversion. Yet America would probably not entrust the

task of combatting the menace abroad, in the field of foreign policy where the massive menace lies, to those who were most successful in pointing out the menace. By a contrasting irony, many of those who took a sound view in matters of foreign policy were fuzzy on the issue of internal subversion. It was not strange that the public, with some instinctive feeling that the quarrel was not getting anywhere, should have grown bored with it. We can only hope that the public will finally achieve a more lasting and effective defense against the menace than last-minute rushes to the resources of pragmatism in all its forms (notably including military technology) to meet particular issues as they arise.

### *The Uses of Force*

Soviet doctrine as a whole dictates a policy of maximum security and minimum risk. It does not act under external provocation but under an internal dynamism. Our policy, therefore, should envisage a minimum of security and a maximum of risk. Only by such a policy can we seize and retain the initiative in world affairs.

At the same time, Soviet doctrine serves to warn us to be wary of the facile persuasion now being spread about that "Russia doesn't want war." Russia still wants war—the kind of war, in the time and place, which would help to further the revolution. It is all a matter of the measure of risk that war would entail and of the measure of its usefulness to the world revolution.

America's hope for the future lies first of all in a realization of the nature of the Soviet doctrine and the fact that the Soviet Union will follow that doctrine in every detail. Secondly, it behooves the nation to develop its own doctrine of the use of force

so that it will have ready under every circumstance strategy and tactics and the means of implementing the strategy and tactics for the attainment of carefully planned national goals.

### *War as a Moral Problem*

Father Murray here discusses the uses of a doctrine on the uses of force. In so doing he reviews the classical Catholic moral teaching on war and relates it to statements of Pius XII.

The advent of the possibility of nuclear war has not negated the justification of war under any circumstances but it is apparent that the classical doctrine of war needs more theoretical elaboration. There is need of a far more vigorous cultivation of politico-moral science, with close attention to the enormous impact of technological developments on the moral order as well as on the political order.

It is the function of morality to command the use of power, to forbid it, to limit it, or, more in general, to define the ends for which power may or must be used and to judge the circumstances of its use. But moral principles cannot effectively impart this sense of direction to power until they have first, as it were, passed through the order of politics; that is, until they have first become incarnate in public policy. It is public policy in all its varied concretions that must be "moralized." This is the need of the moment.

### *The Moral Vacuum*

But one may well point out, the real issue does not concern the moral quality of this or that element of American foreign policy. The real issue concerns the nature of morality itself, the determinants of moral action (whether individual or collective),



the structure of the moral act, and the general style of moral argument. One cannot argue moral issues until they are stated; but by what methods do you arrive at your principles and establish their relevance, and what is your analysis of the fact situation? As these issues are touched, or as they are avoided, the whole argument flies off in all directions.

An important event, of relatively recent occurrence, has been the recognition of the shortcomings and falsities of an older American morality that dominated the nineteenth century and still held sway into the twentieth. Its style was voluntarist; it sought the constitution of the moral order in the will of God. The notion that certain acts are intrinsically evil or good, and therefore forbidden or commanded by God, was rejected. In its sources the older morality was scriptural in a fundamentalist sense. It went directly to the Bible and took its words at face value. When the Gospel tells the Christian not to resist evil but to turn the other cheek, the precept is clear and absolute. The old morality was subjectivist. What matters is not what you do but why you do it. An act is moral only when motivated by love. If any element of self-interest creeps in, the act is corrupt and sinful.

Within the last generation this morality has come under severe criticism. It did not go beyond the false notion that society is simply the sum of the individuals living in it and that public morality is no more than the sum of private moralities. It had no sense of the differential character of morality and legality, no distinction between private sin and public crime.

In consequence, the older morality possessed no resources for discriminating moral judgment. It tended to thrust its

simple yeas and nays upon political, social and economic reality without any careful prior analysis of the realities in question.

On the other hand, the newer American morality moves towards a situation in which the absoluteness of principle tends to get lost amid the contingencies of fact. Whereas the older morality saw things as so simple that moral judgment was always easy, the new morality sees things as so complicated that moral judgment becomes practically impossible.

Whereas once this nation was built on the foundation of the tradition of natural law, that tradition, once vigorous in America, is now thought by many to be dead. Except for the Catholic community it may be questioned whether America is the repository of the tradition of reason on any moral issue at all.

### *The Eternal Return of Natural Law*

There can be no doubt that many theories called "natural law" are dead. Father Murray lists a number of what he considers to be misunderstandings of natural law, in order to make the point that:

[T]hose who dislike the doctrine, for one reason or another, seem forever to be at work, as it were, burying the wrong corpse. For my part, I would not at all mind standing with them, tearless, at the grave of any of the shallow and distorted theories that they mistake for the doctrine of natural law.<sup>21</sup>

The nineteenth century exhibited extensive powers of learned misunderstanding which it possessed to an astonishing degree when it supposed that the *law of nature* of the Age of the Enlightenment was the *ius naturale* of an earlier and in many ways a more enlightened age. As late as 1902, Sir John Salmond wrote:

The idea of a law of nature or moral

<sup>21</sup> *Id.* at 298.

law... has played a notable part in the history of human thought in the realm of ethics, theology, politics and jurisprudence. It was long the accepted tradition of those sciences, but it has now fallen on evil days, and it can no longer be accepted as in harmony with modern thought on those matters.<sup>22</sup>

In 1927, when Parker edited the ninth edition he was impelled to add the cautious footnote: "Sir John Salmond's view that the doctrine in all its forms is now discredited cannot be considered correct." Today, when modern thought has caught up a bit more with the past, it would seem that the ancient tradition of natural law is beginning to climb out of the footnotes of the learned books into the very text of our time.

It is beyond the scope of Father Murray's purpose to formulate a complete statement of the natural law. Having dwelt briefly on the law of nature as expounded by Locke and Montesquieu, he contents himself with some brief comments on the vital resources inherent in the idea of natural law, that indicate its new validity.

Of primary importance is its metaphysical character, its secure anchorage in the order of reality — the ultimate order of beings and purposes. As a metaphysical idea, the idea of natural law is timeless and for that reason timely. Our reflection, therefore, on the problem of freedom, human rights and political order must inevitably carry us to a metaphysical decision in regard to the nature of man so that we may be able to justify our assertion that the rights we list are indeed rights and therefore inviolable, and human rights and therefore inalienable.

There are four decisions open to our making and each carries with it the ac-

ceptance of certain political consequences:

(1) Liberal individualism. Individual rights are simply individual material interests so furnished with an armature by positive law as to be enforceable by the power of the government. In this view the state is simply an apparatus of compulsion without the moral function of realizing an order of justice.

(2) The Marxist concept of human rights as based solely on social function, economic productivity; an extreme reaction from individualistic liberalism. In this view all rights are vested in the state which is the sole determinant of social function.

(3) Modern evolutionary scientific humanism; the new "rationalism." It is new because it maintains (with Spinoza) that man is something more than reason. It identifies natural law (though the term is not frequent with it) with the "drive of the whole personality whereby men strive to live ever more fully." It denies to man all transcendental reference. All human values are man-made and all human "rights" which are the juridical expression of these values look only to man for their creation, realization and guarantee. The *ordo juris* is conceived after the fashion of the modern schools of sociological jurisprudence or realistic jurisprudence, as a pure instrumentality whereby lawmakers and judges, recognizing the human desires that are seeking realization at a given moment in human society, endeavor to satisfy these desires with a minimum of social friction. The new rationalism is at bottom an ethical relativism pure and simple. As such it is open to all the criticisms that have been advanced against that ancient mode of thought since Socrates first argued against the Sophists. It is unreasonable and it is ruinous of sound political philosophy.

<sup>22</sup> *Id.* at 299.

These objections will be vehemently repudiated but Father Murray maintains that by a curious but inevitable paradox, the relativism of the new rationalists must find its native political expression in a new and subtle form of state absolutism.

(4) The option of natural law in the old traditional sense. Here the decision is genuinely metaphysical. One does not opt for a rationalization of power but for a metaphysic of right. This philosophy is consequent on the initial furnishing of a philosophy of right, justice, law, juridical order and social order. Man is regarded as a member of an order instituted by God and subject to the laws that make the order an order — laws that derive from the nature of man, which is as essentially social as it is individual. In the natural-law climate of opinion (very different from that set by the “law of nature”), objective law has the primacy over subjective rights. Law is not simply the protection of rights but their source, because it is the foundation of duties.

#### *The Premises of Natural Law*

The whole metaphysic involved in the ideal of natural law may seem alarmingly complicated; in a sense it is. Natural law supposes a realist epistemology. It supposes a metaphysic of nature, especially the idea that nature is a teleological concept, that the form of a thing is its final cause. It supposes a natural theology and a God, Who is eternal Reason. Finally, it supposes a morality, especially the principle that for man, a rational being, the order of nature is not an order of necessity to be fulfilled blindly, but an order of reason and therefore of freedom.

This sounds frightfully abstract. Actually, any man who protests against injustice is thinking in the categories of natural law.

He has an objective idea of the “just” in contrast to the “legal.” His theoretical reason perceives the idea as true; his practical reason accepts the truth as good, therefore as law; his will acknowledges the law as normative of action.

Natural law is the work of reason but not of an absolutely autonomous reason. It is immanent in nature in the sense that it consists in the dictates of human reason that are uttered as reason confronts the fundamental moral problems of human existence. Reason does not create its own law. Above the natural law is the eternal law, the Uncreated Reason of God, which appoints an order of nature — an order of beings, each of which carries in its very nature also its end and purposes; and it commands that this order of nature be preserved by the steady pursuit of their ends on the part of all the natures within the order.

#### *Natural Law and Politics*

The major contents of the political ideal as it emerges from natural law may be summed up as follows:

(1) There is the supremacy of law, and of law as reason, not will.

(2) The source of political authority is in the community.

(3) The authority of the ruler is limited; its scope is only political and the whole of human life is not absorbed in the polis.

(4) Various sub-political groups such as the family, the local community, the professions, the occupational groups, the minority cultural or linguistic groups within the nation, etc., have the right to exist and to unite in the organic unity of the state without losing their own identity or suffering infringement of their own ends, or having their functions assumed by the state.

(5) There is a popular sharing in the

formation of the collective will, as expressed in legislation or in executive policy.

### Conclusion

Here in briefest compass are some of the resources resident in natural law. It does not furnish a detailed blueprint of the order; that is not its function. Nor does it pretend to settle the enormously complicated technical problems, especially in the economic order, that confront us today. It is a "skeleton law," to which flesh and blood must be added by that heart of the political process, the rational activity of man, aided by experience and by high professional competence.

Its concern for the rights of the individual human person is no less than that shown in the school of individualist liberalism. It can match Marxism in its concern for man as worker and for the just organization of economic society, at the same time that it forbids the absorption of man in matter and its determinisms. Finally, it does not bow

to the new rationalism in regard of a sense of history and progress, the emerging potentialities of human nature, the value of experience in settling the forms of social life, the relative primacy in certain respects of the empirical fact over the preconceived theory.

In brief, natural law furnishes the basis for a firmer faith and a more tranquil, because more reasoned, hope in the future. If there is a law immanent in man — a dynamic, constructive force for rationality in human affairs, that works itself out, because it is a natural law, in spite of contravention by passion and evil and all the corruptions of power — one may with sober reason believe in, and hope for, a future of rational progress. And this belief and hope is strengthened when one considers that this dynamic order of reason in man, that clamors for expression with all the imperiousness of law, has its origin and sanction in an eternal order of reason whose fulfillment is the object of God's majestic will.

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