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## Catholicism, Liberalism, and Populism

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# Catholicism, Liberalism, and Populism\*

*Andrea Pin<sup>1</sup> & Luca P. Vanoni<sup>2</sup>*

## CONTENTS

INTRODUCTION: THE CRUX OF CONTEMPORARY CATHOLICISM.....	1301
I. DEMOCRACY AND FREEDOM: MEANS AND ENDS.....	1305
A. The Perils of Liberal Economies .....	1306
B. The Quagmire of Rights .....	1309
1. Human rights as a lingua franca .....	1310
2. The freedoms of the Middle East .....	1312
II. POLITIES, TRADITIONS, AND IDENTITIES .....	1315
III. LEGAL INTERPRETATION AND THE SEPARATION OF POWERS:	
THE ATTACKS ON THE JUDICIARY .....	1322
CONCLUSION.....	1326

## INTRODUCTION: THE CRUX OF CONTEMPORARY CATHOLICISM

Recent developments in constitutional and international law have drawn Catholicism into a formidable controversy. A clash of values that are pitting legal and political thinkers against each other on momentous issues has not triggered an unequivocal, unambiguous response from the Catholic world. Quite the contrary—a plurality of voices has surfaced. Such voices do not simply differ but often conflict with each other.

The constitutional changes that are taking place in many countries are a stress test for Catholic thinking. So-called “populist” regimes or movements—a vast ideological area<sup>3</sup> with uncertain

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\* The authors conceived the Article and drafted the Introduction and the Conclusion jointly. Andrea Pin drafted Part 1, while Luca Vanoni drafted Parts 2 and 3. The authors are grateful to Nicholas Aroney, Frederick M. Gedicks, Joel Harrison, and Dmytro Vovk for their helpful comments on an earlier draft. Miranda Cherkas Sherrill and McKinney Voss’s editing was terrific. All errors remain ours.

1. Associate Professor, University of Padua.

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3. See David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 521–22 (2018) (including Donald Trump, Marine Le Pen, Hugo Chávez, Rafael Correa, Alberto Fujimori, Evo Morales, and Recep Tayyip Erdoğan within his list of populist leaders).

boundaries,<sup>4</sup> often perceived as a constitutional disease<sup>5</sup>—have been challenging the priorities and values of liberal democracies, often trying to replace them with alternative values and institutional arrangements.<sup>6</sup> Catholics are split between liberalism and populism. Despite wide national variations, Catholics have been siding either in favor of liberal democracies and their insistence on the rule of law, human rights, democratic institutions, and globalization, or in favor of forces that criticize the traditionally governing elites, perceive constitutional and political agendas as distant from the concrete needs of the people, and have grown skeptical of globalization and of liberalism.<sup>7</sup> Although few are the Catholic voices that openly support or endorse populist movements and regimes, within Catholic culture dwells widespread criticism of the constitutional canons that liberalism inspires. Some Catholic intellectuals blame liberalism for “generat[ing] titanic inequality, enforc[ing] uniformity and homogeneity, foster[ing] material and spiritual degradation, and undermin[ing] freedom,”<sup>8</sup> so they deem liberalism largely irreconcilable with Catholicism or with religiosity more broadly.<sup>9</sup>

The clash between populism and liberalism—to which Pope Francis’s latest encyclical letter *Fratelli Tutti* (“*All Brothers*”) devotes

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4. Théo Fournier, *From Rhetoric to Action, a Constitutional Analysis of Populism*, 20 GERMAN L.J. 362, 363 (2019) (speaking of populism “not as common ideology, but as a common strategy for implementing various distinct ideologies”).

5. See Rosalind Dixon, *Introduction – Public Law and Populism*, 20 GERMAN L.J. 125, 125 (2019) (talking about democratic “backsliding,” “retrogression,” “rot,” and “decay”).

6. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 546 (2018) (“Around the world, liberal constitutionalism is taking a hit from charismatic leaders . . . whose signature promise is to *not* play by the old rules.”).

7. Viktor Orban famously advocated the development of constitutional “illiberalism” in Hungary. See, e.g., Kim Lane Scheppele, *The Opportunism of Populists and the Defense of Constitutional Liberalism*, 20 GERMAN L.J. 314, 321 (2019); see also Bojan Bugarcic, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 GERMAN L.J. 390, 391 (2019). Bugarcic states that “[p]opulism is Janus-faced; simultaneously facing different directions. There is not a single form of populism,” but emphasizes that “[w]hat is peculiar about the current populist surges” is that they often “challenge the very foundations of liberal order as such.” *Id.*

8. PATRICK J. DENEEN, *WHY LIBERALISM FAILED* 3 (2018).

9. Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism>. On the ideological conflict between modern statehood and Christianity, see CHRISTOPHER DAWSON, *RELIGION AND THE MODERN STATE* 45–58 (1935).

an entire section<sup>10</sup> has thus drawn Catholicism into a controversy that is creating deep rifts within it. Each faction has aligned itself with either the current Pope or his predecessor, as supporters of Pope Francis often clash with those who miss the leadership of Pope Emeritus Benedict XVI.<sup>11</sup> Such a conflict is particularly challenging for Catholicism because one of the trademarks of Catholicism is its strong unity. The Church's unity is not simply made visible by the Pope. The Catholic Church has rarely shied away from speaking its mind on a variety of social issues, ranging from family<sup>12</sup> and sexuality<sup>13</sup> to euthanasia<sup>14</sup> and Marxism.<sup>15</sup> This has not happened by accident: Catholic social teaching is a key component of Catholicism, as Catholicism is quintessentially concerned with social well-being and flourishing.<sup>16</sup> In the Second Vatican Council Pastoral Constitution *Gaudium et Spes's* words, "[a]t all times and in all places the [Catholic] Church should have true freedom . . . to proclaim her teaching about society, to carry out her task among men without hindrance, and to pass moral judgements even in matters relating to politics, whenever the fundamental rights of man or the salvation of souls requires it."<sup>17</sup> This is not a privilege that the Catholic Church claims for itself; in fact, "[i]t is her duty to give utterance to, and authoritatively to teach, that truth which is Christ Himself, and also to declare and

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10. See POPE FRANCIS, ENCYCLICAL LETTER: *FRATELLI TUTTI* paras. 155–69 (2020), [http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20201003\\_enciclica-fratelli-tutti.html](http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html).

11. Paul Elie, "The Two Popes" Gives Way to Pope vs. Pope on the Issue of Celibacy in the Priesthood, *NEW YORKER* (Feb. 2, 2020), <https://www.newyorker.com/news/daily-comment/the-two-popes-gives-way-to-pope-vs-pope-on-the-issue-of-celibacy-in-the-priesthood> ("The conflict between progressives and traditionalists has hardened around the two Popes.").

12. CATECHISM OF THE CATHOLIC CHURCH paras. 2201–06 (1993), [https://www.vatican.va/archive/ENG0015/\\_INDEX.HTM](https://www.vatican.va/archive/ENG0015/_INDEX.HTM).

13. *Id.* paras. 2360–63.

14. *Id.* para. 2276.

15. POPE JOHN PAUL II, ENCYCLICAL LETTER: *CENTESIMUS ANNUS* para. 19 (1991) [hereinafter POPE JOHN PAUL II, *CENTESIMUS ANNUS*], [http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centessimus-annus.html](http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centessimus-annus.html).

16. HENRI DE LUBAC, *CATTOLICISMO* XXIII (1978, Italian edition).

17. POPE JOHN PAUL II, ADDRESS OF THE HOLY FATHER TO THE NEW AMBASSADOR OF MEXICO TO THE HOLY SEE para. 4 (May 18, 2001), [http://www.vatican.va/content/john-paul-ii/en/speeches/2001/may/documents/hf\\_jp-ii\\_spe\\_20010519\\_ambassador-mexico.html](http://www.vatican.va/content/john-paul-ii/en/speeches/2001/may/documents/hf_jp-ii_spe_20010519_ambassador-mexico.html) (citing POPE PAUL VI, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: *GAUDIUM ET SPES* para. 76 (1965)); see also NORMAN DOE, *COMPARATIVE RELIGIOUS LAW* 372 (2018).

confirm by her authority those principles of the moral order which have their origins in human nature itself.”<sup>18</sup>

This Article does not aim to draw a line between what is inside and outside the boundaries of Catholic doctrine, nor does it mean to take a stance on who is right or wrong within the Church. It also intentionally avoids guessing whether populist leaders give fresh political shape to genuine protest movements or rather cynically exploit social unrest, dressing it in ideological robes for purely self-interested goals.<sup>19</sup> This Article’s purpose is more modest. It simply aims to sketch out why and how such contemporary ideological rifts have created distance between groups of Catholics. Notwithstanding the fierce, even hostile, confrontations that now inhabit Catholic circles, this Article submits that Catholics disagree about populism and liberalism because many aspects of both resonate with aspects of Catholicism and its mainstream doctrines. Instead of triggering hostilities, disagreements among Catholics on core societal values could and should therefore be replaced by a gentler, more respectful conversation among factions that mutually recognize each other as worthy of respect and consideration. They could take Pope Francis’s recent offer to engage in a “genuine dialogue and openness to others”<sup>20</sup> – starting with those who share their Catholic faith.

This Article identifies three fields where tensions are pulling Catholicism’s social thinking in opposite directions: first, the relationship between democracy, freedom, the market, and rights; second, the role of identity and tradition; and third, the separation of powers and the importance of constitutional interpretation. It analyzes each topic in light of contemporary legal discourse, discusses how and why Catholics are leaning toward either side, and suggests that many conflicts within Catholicism may become lively conversations that draw upon essential features of Catholic culture. As it focuses on the contemporary confrontations between supporters of liberalism and populism, it does not explicitly deal with longstanding debates around the theoretical compatibility between liberalism and Catholicism and their complex historical

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18. POPE PAUL VI, DECLARATION ON RELIGIOUS FREEDOM: *DIGNITATIS HUMANAE* para. 14 (1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

19. Gabor Halmai, *Populism, Authoritarianism and Constitutionalism*, 20 GERMAN L.J. 296, 300 (2019).

20. POPE FRANCIS, *supra* note 10, para. 203.

relationships.<sup>21</sup> An inherited degree of mutual skepticism between Catholic and liberal thinkers may have pushed Catholics closer to populism—but this Article argues that it is mostly *contemporary* legal, political, and cultural issues that have widened the gaps between Catholics and liberalism. The authors will consider it a success if they are able to reinvigorate the consciousness that, as the great Protestant thinker Richard Niebuhr once noted, “the types of Christian morality are not measures of value.”<sup>22</sup>

#### I. DEMOCRACY AND FREEDOM: MEANS AND ENDS

Contemporary Catholicism has often valued the benefits of modern constitutionalism. Appreciation of the rule of law, democracy, and human rights abounds within papal documents.<sup>23</sup> Since the late nineteenth century’s *Syllabus of Errors* and its condemnation of liberalism, a sea-change has taken place within Catholic doctrine.<sup>24</sup> After opposing gross human rights violations by the Nazis in the first half of the twentieth century, the Catholic Church became a vocal supporter of liberty, equality, and human dignity.<sup>25</sup> Since the 1940s, it has endorsed the human rights revolution and the democratization of the world both at national and international levels.<sup>26</sup> For most of the nineteenth century, Catholics in the United States, who had already been exposed to the ideals of liberal constitutionalism, struggled initially to find their place alongside Protestants but later came to enjoy the blessings of the American constitutional experiment by urging their co-religionaries to reconsider liberalism.<sup>27</sup>

Catholicism promoted the values of democracy and liberty throughout the Iron Curtain era. It was John Paul II’s explicit criticism of the regime in Poland that boosted the collapse of communism in Eastern Europe.<sup>28</sup> The Berlin Wall’s Fall *Zeitgeist*,

21. See, e.g., SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* 3–4 (2015).

22. H. RICHARD NIEBUHR, *CHRIST & CULTURE*, at iv (2001).

23. See generally POPE JOHN PAUL II, *CENTESIMUS ANNUS*, *supra* note 15, para. 44.

24. J. Bryan Hehir, *The Modern Catholic Church and Human Rights: The Impact of the Second Vatican Council*, in *CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* 113–14 (John Witte, Jr. & Frank S. Alexander eds., 2010).

25. On the relationship between Christian and liberal conceptions of human dignity, see Nicholas Aroney, *The Rise and Fall of Human Dignity*, 46 *BYU L. REV.* 1211 (2021).

26. MOYN, *supra* note 21.

27. JOHN C. MURRAY, *THE PROBLEM OF RELIGIOUS FREEDOM* 51–52 (1965).

28. MASSIMO BORGHESI, *CRITICA DELLA TEOLOGIA POLITICA* 256 (2013).

however, probably overlooked important nuances. Captured by the fall of communism, the prevailing political and legal thinking of the time misunderstood the historical victory of Western freedoms and papal support for a perpetual marriage between Catholicism and liberalism.<sup>29</sup>

Within a few years after the Wall fell, this misunderstanding became apparent. Catholic thinkers and movements started warning that democracy and human rights had more than just a bright side. A much broader skepticism about the reputation of liberalism and liberal democracies has more recently surfaced within Catholic circles.<sup>30</sup> The connections that tied together the Catholic Church and the supporters of post-modern liberal constitutionalism seem to have softened, if not dissipated. Catholic thinkers have started questioning liberal values and institutions, targeting liberal economies and liberalism altogether.

#### A. *The Perils of Liberal Economies*

Understandably, the staunch and even vocal Catholic resistance to communist regimes joined forces with supporters of capitalism during the Cold War. While Catholicism targeted the communist thinking that cracked down on religious freedom<sup>31</sup> and “reduced man to matter,”<sup>32</sup> economic liberalism targeted the state monopoly

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29. For a synthesis of the role of the Church in the transition between the communist regime and liberal democracy in Poland, see Jacqueline Hayden, *Solidarity at 40: How the Union that Brought Down Communism Became a Conservative Government Ally*, NOTES FROM POLAND (Aug. 28, 2020), <https://notesfrompoland.com/2020/08/28/solidarity-at-40-how-the-union-that-brought-down-communism-became-a-conservative-government-ally/>.

30. See Frederick M. Gedicks, *Dignity and the Overlapping Consensus*, 46 BYU L. REV. 1245, 1265–66 (2021).

The refusal of conservative Christians to accept some applications of equal rights and equal dignity is not simply the consequence of group self-interest. Conservative Christian religions—especially Catholicism—adhere to one conception of the good; they claim that the truth about God and his creation is accessible to all through the exercise of natural reason. Laws, institutions, and other government actions that do not conform to the natural law are unjust and deficient . . . .

*Id.*

31. POPE PIUS XI, ENCYCLICAL LETTER: *DIVINI REDEMPTORIS* para. 10 (1937), [http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_19370319\\_divini-redemptoris.html](http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19370319_divini-redemptoris.html).

32. MOYN, *supra* note 21, at 38.

over national economies.<sup>33</sup> An alliance between liberalism and Catholicism seemed to provide the “moral-cultural base” or “moral ecology . . . that undergirds, sustains, and guides economic and democratic freedom[s].”<sup>34</sup>

After the collapse of communism in Europe, the two intellectual strands went hand in hand, driving the expansion of market freedoms in Eastern Europe and, later, the strengthening and enlargement of European legal integration. In the 1990s, many countries of the Eastern Bloc, including some post-Soviet republics, applied to join the European Communities, which transitioned into the European Union soon thereafter.<sup>35</sup>

The economic theories of the European Communities and of the European Union between the mid-1990s and mid-2000s supported this process of integration. The free market was, in fact, an overarching theme of the pan-European political and legal integration process, which the Catholic Church welcomed.<sup>36</sup> Economic freedoms had already played a crucial role in replacing national rivalries, industrial dumping, and retaliatory customs policies with open borders for people, goods, and companies in the 1950s and 1960s in Western Europe, and these freedoms could reasonably be expected to do the same within Eastern Europe. This was not the same economic philosophy espoused by the United States, but it was certainly much closer than the alternative of highly nationalized or state-controlled economies.

The alliance between Catholicism and European integration, including its economic policies, lasted until the global financial crisis in 2008. Ties between the European Union, Catholicism, and liberalism faded away, as evidenced by the shift in winners of the Charlemagne Prize. Since 1950, this award has honored the protagonists of European unification under the auspices of pan-

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33. Nowadays, this approach is still particularly evident within various intellectual circles. See, e.g., Peter Berkowitz, *Capitalism, Socialism, and Freedom*, HOOVER INST. (Feb. 2020), [https://www.hoover.org/sites/default/files/research/docs/prosperityproject\\_peterberkowitz\\_updated.pdf](https://www.hoover.org/sites/default/files/research/docs/prosperityproject_peterberkowitz_updated.pdf).

34. R.R. Reno, *The Spirit of Democratic Capitalism*, FIRST THINGS (Oct. 2017), <https://www.firstthings.com/article/2017/10/the-spirit-of-democratic-capitalism> (citing Michael Novak, *THE SPIRIT OF DEMOCRATIC CAPITALISM* (1982)).

35. PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* 14-28, 582 (5th ed. 2011).

36. As to the historical link between Catholicism, the leading Christian Democratic parties that governed much of post-World War II Western Europe, and European legal integration, see BRENT F. NELSEN & JAMES L. GUTH, *RELIGION AND THE STRUGGLE FOR EUROPEAN UNION* 182 (2015).

European institutions,<sup>37</sup> including Adenauer, De Gasperi, Schuman, and George Marshall. In 2002, the prize went to the newborn euro currency, which had reinforced the budgetary constraints on E.U. member states; in 2004, an extraordinary edition of the award was given to Pope John Paul II; Angela Merkel was awarded the prize in 2008. In 2012, the winner was the German Minister of Finance, Wolfgang Schaeuble, who had supported austerity measures within E.U. countries to counter the economic crisis that exploded in 2008. The year Schaeuble won the prize, however, the crisis hit hard on many European countries and caused the tides to turn.

During the crisis, many European countries could not fight the collapse of their economies because of the Eurozone's strong fiscal constraints, which forced them to embark on austerity measures while securing free markets. Vast portions of European society discovered that, by supporting measures to protect the common market and secure the value of the currency that they had warmly welcomed a little more than a decade before, they had tied their hands: many states could not fight the economic depression effectively because of their commitment to protecting the euro and to avoiding unsettling markets.<sup>38</sup> Pope Francis himself, who won the 2016 edition of the Charlemagne Prize, voiced his strong concerns for the flaws of globalized economy and for the price that people in Europe and elsewhere paid for them.<sup>39</sup>

The crisis destroyed the belief that globalization and economic freedom would secure prosperity, or even a decent life. At first, the economic collapse showed that globalization, the free market, and deregulation had not insulated modern states from deep financial and social crises.<sup>40</sup> Or, in the words of Pope Francis in his encyclical letter *Fratelli Tutti*, "[t]he marketplace, by itself, cannot resolve

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37. *Origin*, DER INTERNATIONALE KARLSPREIS ZU AACHEN, <https://www.karlspreis.de/en/charlemagne-prize/origin> (last visited Feb. 9, 2021).

38. See generally KLAUS BUSCH, CHRISTOPH HERMANN, KARL HINRICHS & THORSTEN SCHULTEN, FRIEDRICH EBERT STIFTUNG, EURO CRISIS, AUSTERITY POLICY AND THE EUROPEAN SOCIAL MODEL: HOW CRISIS POLICIES IN SOUTHERN EUROPE THREATEN THE EU'S SOCIAL DIMENSION (2013), [https://www.europe-solidarity.eu/documents/ES\\_crisis.pdf](https://www.europe-solidarity.eu/documents/ES_crisis.pdf).

39. For a deeper discussion of Pope Francis's economic and social views, see ANDREA TORNIELLI & GIACOMO GALEAZZI, THIS ECONOMY KILLS: POPE FRANCIS ON CAPITALISM AND SOCIAL JUSTICE (2015).

40. Andrea Pin, *The Transnational Drivers of Populist Backlash: The Role of Courts*, 20 GERMAN L.J. 225, 238-39 (2019).

every problem.”<sup>41</sup> Later, the austerity policies that the European Union and its members favored or implemented showed that such ideals could even constitute an obstacle to the states’ capacity to provide adequate social protection and strengthen economic safety nets in times of distress.<sup>42</sup> European society split into those who, on one side, acknowledged the harm inflicted by austerity, but justified it as a necessary treatment to resurrect the economy and restore social welfare, and those on the other side who believed that such measures were simply a bad solution, which deprioritized social care, economic stability, and welfare in the name of economic liberalism.<sup>43</sup>

Especially in Europe, Catholics were involved in such clashes. Within the Catholic camp, authoritative speakers such as *Caritas Europa*, the continental network of Catholic relief and development agencies, voiced their concern that austerity was overlooking the basic needs of the poor.<sup>44</sup> Overall, the European Union’s response to the global economic crisis abrogated the decades-long Catholic support of European integration, thereby paving the way for anti-supranational, nation-focused political platforms that embraced populist movements among Catholics.<sup>45</sup>

### B. *The Quagmire of Rights*

While liberalism and Catholicism joined forces under the Iron Curtain to fight communism, they never merged with each other. Among Catholic thinkers has always dwelled the perception that liberalism and the doctrine of the Catholic Church may overlap substantially but do not coincide. For decades, this was mostly a matter for philosophers and theologians,<sup>46</sup> but now it has become a hotly debated political and legal topic. Two factors have brought to light the deep rifts between Catholic and liberal thinkers, namely

41. POPE FRANCIS, *supra* note 10, para. 168.

42. Jan C. Suntrup, *From Emergency Politics to Authoritarian Constitutionalism? The Legal and Political Costs of EU Financial Crisis Management*, 19 GERMAN L.J. 375, 400 (2018).

43. Andrea Pin, *Comparative Constitutional Law, Human Rights, and Belonging in Europe*, RESET DIALOGUES ON CIVILIZATIONS (June 5, 2020), <https://www.resetdoc.org/story/comparative-constitutional-law-rights-and-belonging-in-europe/>.

44. *Caritas: European Austerity Measures Threaten Social Services*, CATH. CULTURE (Dec. 21, 2011), <https://www.catholicculture.org/news/headlines/index.cfm?storyid=12747>.

45. Daphne Halikiopoulou, *Economic Crisis, Poor Governance and the Rise of Populism: The Case of Greece*, 55 INTERECONOMICS 34 (2020).

46. Brian Tierney, *Villey, Ockham and the Origin of Individual Rights*, in THE WEIGHTIER MATTERS OF THE LAW 1 (John Witte, Jr. & Frank Alexander eds., 1988).

the rise of a human rights-based lingua franca and the post-9/11 multilateral intervention in the Middle East.

1. *Human rights as a lingua franca*

The alliance between Catholicism and the human rights revolution in the second half of the twentieth century was strongly substantiated by universalism. In Catholic thought, universalism is based on the idea that all human beings share a common ontological nature because they were all created by God.<sup>47</sup> This belief has resonated with theories of human rights that have chartered a new course in the field of international law.<sup>48</sup> Despite this historical common ground, liberalism and Catholicism have recently started to significantly diverge from one another on practical matters. In fact, although both place the human being at the center of their legal and political theories, they have increasingly disagreed on the substance of this idea. Two issues, in particular, make up this disagreement.

First, Catholic thinking found that the process of secularization promoted by liberalism worldwide was pushing the spiritual and religious component of individual and social life to the margins.<sup>49</sup> The rights-centered edifice of liberal constitutionalism has thus become a rival, rather than a partner of religion, as it has gradually replaced transcendental values with nonreligious values.<sup>50</sup> Catholics, alongside other religious groups, have thus come to perceive that their faith was being walled out of the public sphere and that they were becoming socially and politically irrelevant. Although in different guises, the French theorization of a secular

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47. As the *Compendium of the Social Doctrine of the Church* (432) states, “The Christian message offers a universal vision of the life of men and peoples on earth that makes us realize the unity of the human family.” PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH (2004) [hereinafter COMPENDIUM], [http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html) (last visited Feb. 6, 2021).

48. Paolo G. Carozza & Daniel Philpott, *The Catholic Church, Human Rights, and Democracy: Convergence and Conflict with the Modern State*, 15 LOGOS: J. CATH. THOUGHT & CULTURE 15 (2012).

49. John Paul II warned the international community of states not to prioritize the “[m]aterial goods” over the “spiritual goods.” See Hehir, *supra* note 24, at 127.

50. JAVIER PRADES, NOSTALGIA DI RESURREZIONE 13 (2007) (“[A]ssistiamo a un fenomeno linguistico, sociale e, ormai, anche giuridico, secondo cui la vita, in tutte le sue dimensioni, smette di essere considerata dono per essere invece rivendicata come diritto . . . vorrei richiamare l’attenzione sulla tendenza a trasformare ogni possibilità umana in diritto e a eliminarne, in maniera direttamente proporzionale, il carattere di dono.”).

public sphere and the U.S.-led frenzy for a “naked public square”<sup>51</sup> were perceived as depriving social and political life of the richness of the Catholic tradition.

Second, Catholicism could not follow what many have perceived to be a utilitarian turn within liberalism. To some, secularism has made liberalism not just flat but even self-centered. In their view, contemporary liberalism’s utmost concern is for “the satisfaction of current wants or preferences without worrying much about the formation of those wants and preferences.”<sup>52</sup> Such hedonistic degeneration of liberalism, they argue, has loosened social bonds, disconnected freedom from pursuing good, and legitimized any way of life regardless of its goals.

The late twentieth century’s human rights scenario has thus triggered widespread skepticism within Catholicism. As Mary Ann Glendon emphasized almost thirty years ago, “rights talk” has taken center stage, making individualism the core legal value, and individualist legal claims the main driver of legal change.<sup>53</sup> The idea of fundamental or human rights has celebrated the role of the individual and her isolation from the rest of society. Catholic circles complain that, instead of building bridges between individuals, enabling minorities to fully participate in the public sphere, and insulating them from government overreach, a rights-centered legal discourse has broken the ties between the individual and the polity.<sup>54</sup> It has impoverished political discourse, transforming it into the terrain of reciprocal individual claims.<sup>55</sup> In essence, Catholic circles argue that the rights-centered legal discourse has monopolized politics and hollowed out democratic debate. It has substantially limited room for governmental policies. It has exacerbated social rifts rather than reconciling them.

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51. RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1986).

52. LARRY SIEDENTOP, *INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM* 363 (2014) (arguing that the failure to understand the relationship between liberal secularism and Christianity contributes to two temptations or liberal heresies: utilitarianism and individualism).

53. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

54. DENEEN, *supra* note 8, at 30–31.

55. Pope Francis, in *Fratelli Tutti*, complains about the contemporary “complete division between individuals and human community.” See POPE FRANCIS, *supra* note 10, para. 31.

Catholic culture usually sees such logic at play within most of the rights it considers controversial; euthanasia, birth control, and same-sex partnerships and marriage have found their roots in the ideals of self-realization, privacy, and freedom.<sup>56</sup> Since liberalism seems to have bred these rights and the constitutional engines within which they thrive, many Catholics have come to blame liberalism and its ideals of privacy and freedom. When Catholics endorsed liberalism, they did not embrace self-centered individualism. On the contrary, they maintained that full realization of human potential was conceivable only with reference to an objective good, and that the whole polity had a role to play in identifying it.<sup>57</sup> In other words, many have complained that liberalism's understanding of liberty betrays its own nature, as well as the promises of democracy.<sup>58</sup>

Some Catholic factions have thus grown so skeptical of the ideals of liberty, privacy, and self-realization, that they have leaned toward populist movements as a political antidote to liberalism. They have come to consider the contemporary ideals of freedom and individualism so antithetical to Catholic culture, its social dimension, and the role of democratically elected bodies, that they have gone the other way. Viktor Orban, the Hungarian Prime Minister, has deemed Hungary an exemplary "illiberal" democracy.<sup>59</sup> This moniker might be perceived as an oxymoron, but it resonates with the feelings of those who oppose too sweeping an understanding of freedom—one that dissolves social and political bonds into a mass of self-isolated individuals.

## 2. *The freedoms of the Middle East*

The marriage between Western liberalism and Catholicism also eroded during the events that shook the Middle East in the aftermath of the 9/11 attacks. The coalition that toppled the regime

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56. JOHN PAUL II, *MEMORIA E IDENTITÀ* 22-23 (2005).

57. As noticed by Joel Harrison, *Christian Accounts of Religious Liberty: Two Views of Conscience*, 46 *BYU L. REV.* 1273, 1297 (2021), "[o]n the inter-subjective view of conscience, still present in Christian religious liberty discourse, the person has a duty to pursue God as one's own end. This entailed forming a community—conscience was not simply an act of the individual, but it was directed to social ends. Conscience, in other words, is exercised in aid of a flourishing community."

58. DENEEN, *supra* note 8, at 65-66.

59. Csaba Tóth, *Full Text of Viktor Orbán's Speech at Băile Tușnad (Tusnádfürdő) of 26 July 2014*, *BUDAPEST BEACON* (July 29, 2014), <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

of Saddam Hussein in Iraq was a matter of deep controversy, even within Catholicism. The U.S. and U.K.-led coalition was hoping to replace the rogue state with a stable and just democratic regime, one in which all citizens would enjoy the same rights, be subject to the same duties, and participate in free, competitive elections.<sup>60</sup>

Alongside the Bush and Blair administrations were towering Catholic figures, who forecasted that a just war would succeed in exporting these conditions for a dignified, free Iraq. Among these thinkers were people such as John Neuhaus, the founder of the influential *First Things* magazine;<sup>61</sup> John Paul II's biographer and theologian, George Weigel;<sup>62</sup> and Michael Novak,<sup>63</sup> a Catholic philosopher who had successfully merged Catholic ideals with the fundamentals of American liberalism. They each strongly advocated the military intervention as a necessary means to achieve indispensable goals, borrowing from Catholic doctrine to support their position.<sup>64</sup>

The hierarchy of the Catholic Church, however, largely opposed the war.<sup>65</sup> The justification for a military intervention was fragile from an international law perspective. While military intervention in Afghanistan took place under the umbrella of the United Nations,<sup>66</sup> the Iraqi campaign lacked a similar basis.<sup>67</sup>

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60. George W. Bush, *President Outlines Steps to Help Iraq Achieve Democracy and Freedom*, THE WHITE HOUSE (May 24, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/05/20040524-10.html>.

61. BORGHESI, *supra* note 28, at 267.

62. George Weigel, *Moral Clarity in a Time of War*, FIRST THINGS (Jan. 2003), <https://www.firstthings.com/article/2003/01/001-moral-clarity-in-a-time-of-war>.

63. Michael Novak, *Was the War in Iraq Just?*, 9 NEXUS 11-15 (2004).

64. Richard J. Neuhaus, *The Sounds of Religion in a Time of War*, FIRST THINGS (May 2003), <https://www.firstthings.com/article/2003/05/the-sounds-of-religion-in-a-time-of-war>; see Peter Dula, *The War in Iraq: How Catholic Conservatives Got It Wrong*, COMMONWEAL MAG. (Nov. 30, 2004), <https://www.commonwealmagazine.org/war-iraq>.

65. Gerard O'Connell, *Quando Bush Gnorò la Lettera di Wojtyła Contro la Guerra Irachena*, VATICAN INSIDER (July 10, 2019), <https://www.lastampa.it/vatican-insider/it/2011/09/27/news/quando-bush-ignoro-la-lettera-di-wojtyla-contro-la-guerra-irachena-1.36932734>.

66. U.N. SCOR, 4443rd mtg., UN Doc. S/RES/1386 (Dec. 20, 2001), [https://undocs.org/S/RES/1386\(2001\)](https://undocs.org/S/RES/1386(2001)).

67. Ewen MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, GUARDIAN (Sept. 15, 2004), <https://www.theguardian.com/world/2004/sep/16/iraq.iraq>.

However, John Paul II,<sup>68</sup> as well as other Catholic institutions and U.S. Catholic bishops,<sup>69</sup> did warn against the Iraqi intervention on other grounds. The conditions of a just war, they argued, were not met and the campaign was more likely to bring anarchy and chaos rather than democracy and freedom.<sup>70</sup> Many Catholic circles believed that the ideals of liberalism and democracy would not have the success that supporters of the intervention expected, and that the fall of Saddam Hussein would expose Christian minorities to more violence than they had experienced under his regime.<sup>71</sup>

Regardless of the final outcome of the Iraqi invasion, the intra-Catholic debate on that occasion showed that within Catholicism dwelled various beliefs about the exportability of liberty, the hierarchy of legal values, and the very idea of a military mission with a strong moral character aimed at uplifting the legal and civic standards of another country.<sup>72</sup> Catholic circles disagreed on how to prioritize peace, social stability, democracy, and the enjoyment of freedoms. Overall, the Church indicated ambivalence toward liberalism. As a philosophy that urged political leaders and public opinion to protect and promote basic freedoms, it was certainly welcomed. It was not the paramount ideal, however, that stood above any other consideration, nor was it the yardstick against which international relations had to be measured.<sup>73</sup> In the eyes of staunch promoters of liberalism, the Catholic Church became a lukewarm supporter of this idea, quick to abandon it when it was prone to generate controversy.

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68. Frank Bruni, *Threats and Responses: The Vatican; Pope Voices Opposition, His Strongest, to Iraq War*, N.Y. TIMES (Jan. 14, 2003), <https://www.nytimes.com/2003/01/14/world/threats-responses-vatican-pope-voices-opposition-his-strongest-iraq-war.html>.

69. Paul Moses, *Vatican Diplomacy & the Iraq War*, COMMONWEAL MAG. (Jan. 13, 2020), <https://www.commonwealmagazine.org/vatican-diplomacy-iraq-war>.

70. BORGHESI, *supra* note 28, at 267.

71. John Dear, *The Catholic Campaign to End Iraqi War*, NAT'L CATH. REP. (Aug. 21, 2007), <https://www.ncronline.org/blogs/road-peace/catholic-campaign-end-iraq-war>.

72. See WALTER A. MCDUGALL, *THE TRAGEDY OF U.S. FOREIGN POLICY 270-75* (2016).

73. Catholic disapproval of George W. Bush's decision to topple Saddam Hussein in the name of the imperative to "free the world from evil" was later reiterated in Antonio Spadaro & Marcelo Figueroa, *Evangelical Fundamentalism and Catholic Integralism: A Surprising Ecumenism*, LA CIVILTÀ CATTOLICA (July 13, 2017), <https://www.laciviltacattolica.it/articolo/evangelical-fundamentalism-and-catholic-integralism-in-the-usa-a-surprising-ecumenism/>.

## II. POLITIES, TRADITIONS, AND IDENTITIES

The spatial dimension of legal regimes has also generated controversy between Catholicism and liberalism. While Catholic thinking has constantly maintained that all human beings, regardless of time and place, are endowed with certain unalienable rights, it has also valued the distinct traditions that all peoples have developed throughout their history. Or, in the great theologian Henri De Lubac's words, "civilizations, as original as people are, are irreducibly different."<sup>74</sup>

The universal vocation of the Church and its global reach resonates strongly with globalization. As its jurisdiction covers the whole earth, its concern for human beings and for their dignity is also universal. The local dimension of the Church, however, values the distinct features of any national, subnational, or cultural variation. The *Compendium of the Social Doctrine of the Church* celebrates the centrality of "a true international community"<sup>75</sup> and the importance of "international law" as "the guarantor of the international order," while warning about the risk of "relativizing or destroying the different and distinctive characteristics of each people."<sup>76</sup> More recently, Pope Francis's encyclical letter *Fratelli Tutti* defends each country's "distinct way" to grow and "to develop its capacity for innovation while respecting the values of its proper culture."<sup>77</sup> The Catholic Church has constantly cherished local customs and groups as irreplaceable developers of individual and collective identities as well as of freedoms. Along with other voices that tried to balance universalism and particularism especially after the Second World War,<sup>78</sup> the Catholic Church has therefore urged balance between the opposing poles of universality

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74. DE LUBAC, *supra* note 16, at 221.

75. COMPENDIUM, *supra* note 47, § 433.

76. *Id.* § 434.

77. POPE FRANCIS, *supra* note 10, para. 51.

78. As Eleanor Roosevelt argued when working on the Universal Declaration of Human Rights, "universal human rights begin . . . [i]n small places close to home—so close and so small that they cannot be seen on any map of the world," and "[u]nless these rights have meaning there, they have little meaning everywhere." Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 38 (2003).

and particularity, rather than trying to put them into a hierarchical order.<sup>79</sup>

Balancing universality and particularity has not been easy for the Church itself.<sup>80</sup> It has become especially difficult recently because of the rise of cosmopolitanism and sovereignism, which have exacerbated tensions within Catholicism.<sup>81</sup> As Ulrich Beck emphasized, cosmopolitanism developed as a distinct “methodological concept which helps to overcome methodological nationalism and to build a frame of reference to analyze the new social conflicts, dynamics and structures of Second Modernity.”<sup>82</sup> Cosmopolitanism, however, has promoted a cultural mindset that sees the world as a flat plane, on which individuals and ideas should be capable of moving freely.<sup>83</sup> Within this intellectual framework, local traditions, laws, and customs are often perceived as obstacles to social mobility and cultural amalgamation. Pierre Manent has summarized the cosmopolitanism extreme as follows: “[T]he only humanly significant realities, the only ones which are entitled to incontestable rights, are the individual on the one hand and humanity on the other; between these two, strictly speaking, there is nothing of worth.”<sup>84</sup> Cosmopolitanism has thus affected the delicate balance between universalism and particularism, prioritizing the former over the latter.

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79. As noted by Carozza, the principle of subsidiarity offered “a conceptual tool to mediate the polarity of pluralism and the common good in a globalized world.” *Id.* It underscored and legitimized the “inherent tension in international human rights law between affirming a universal substantive vision of human dignity and respecting the diversity and freedom of human cultures.” *Id.*

80. As for Europe, see Olivier Roy, *Populism and Christianity: The Tale of Two Continents*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS.: GEO. U. (Dec. 18, 2019), <https://berkeleycenter.georgetown.edu/responses/populism-and-christianity-the-tale-of-two-continents> (“[T]he Catholic Church has a problem to find a way to reconcile its claim for universality with its sentimental attachment to the same ‘Christian identity’ of Europe.”).

81. Cosmopolitanism in itself is an ancient political idea, which originated in ancient Greece and survived the ages in philosophical literature. For a recent consideration on the historical relationships between cosmopolitanism and Christianity, see Nicholas Aroney, *Christianity, Sovereignty, and Global Law*, in *CHRISTIANITY AND GLOBAL LAW* (Rafael Domingo & John Witte, Jr. eds., 2020).

82. Ulrich Beck, *The Cosmopolitan Society and Its Enemies*, 19 *THEORY, CULTURE & SOC’Y* 17, 18 (2002).

83. See Noah Feldman, *Cosmopolitan Law*, 116 *YALE L.J.* 1022, 1025 (2007).

84. Pierre Manent, *Populist Demagoguery and the Fanaticism of the Center*, *J. AM. AFFS.* (2017), <https://americanaffairsjournal.org/2017/05/populist-demagoguery-and-the-fanaticism-of-the-center/>.

The history and the present status of European integration provide good examples of how universalism morphed into cosmopolitanism. The project of integrating Western European countries into a bigger legal framework was born out of the will of Catholic political leaders such as Robert Schuman, Konrad Adenauer, and Alcide de Gasperi. They thought that supranational institutions would restore peace and prosperity on the Continent, as well as create a new European polity, deeply rooted in Christian teachings.<sup>85</sup> It is no surprise, then, that Catholics overwhelmingly favored European integration in its early decades, especially in comparison with Protestants.<sup>86</sup>

The pan-European project fleshed out the Catholic ideals of universalism and its commitment to the unity of the human family within the Old Continent, gaining the papal support of Saint John Paul II, who celebrated the alliance between Christianity and European integration more than once.<sup>87</sup>

While praising the integration process, however, John Paul II qualified his judgment. Addressing the European Parliament in 1998, he shared his vision of

[a] common political structure, the product of the free will of European citizens . . . able to guarantee more equitably the rights, in particular the cultural rights, of all its regions. These united European peoples will not accept the domination of one nation or culture over the others, but they will uphold the equal right of all to enrich others with their difference.<sup>88</sup>

In *Ecclesia in Europa* (The Church in Europe), the exhortation that he delivered in 2003 after a Synod of Bishops that focused on

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85. See Rosario Forlenza, *The Politics of the Abendland: Christian Democracy and the Idea of Europe after the Second World War*, 26 *CONTEMP. EUR. HIST.* 261 (2017).

86. Brent F. Nelsen & James L. Guth, *Losing Faith: Religion and Attitudes Toward the European Union in Uncertain Times*, 58 *J. COMMON MKT. STUD.* 909, 909 (2020) (“Surveys dating back to 1970 have demonstrated that, controlling for all other factors, Catholics favor integration, while Protestants express far less support for the EU.”).

87. See Pope John Paul II, Address During the Visit to the European Parliament paras. 3–4 (Oct. 11, 1988) [hereinafter Pope John Paul II, Address to European Parliament], [http://www.vatican.va/content/john-paul-ii/en/speeches/1988/october/documents/hf\\_jp-ii\\_spe\\_19881011\\_european-parliament.html](http://www.vatican.va/content/john-paul-ii/en/speeches/1988/october/documents/hf_jp-ii_spe_19881011_european-parliament.html); POPE JOHN PAUL II, APOSTOLIC EXHORTATION: *ECCLESIA IN EUROPA* para. 12 (2003) [hereinafter POPE JOHN PAUL II, *ECCLESIA IN EUROPA*], [http://www.vatican.va/content/john-paul-ii/en/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_20030628\\_ecclesia-in-europa.html](http://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_20030628_ecclesia-in-europa.html).

88. Pope John Paul II, Address to European Parliament, *supra* note 87.

both the current status and the future of Europe, he further distilled his prophesy:

We joyfully recognize the growing *openness* of peoples to one another, the *reconciliation* between countries which have been hostile and at enmity with each other for a long time, the progressive *opening up* to the countries of Eastern Europe in the process of seeking deeper unity. Mutual recognition, *forms of cooperation and exchanges* of all sorts are being developed in such a way that little by little, a culture, indeed a *European consciousness*, is being created. This we hope will encourage, especially among the young, a sense of fraternity and the will to share. We note as a very positive factor that the whole of this process is developing according to *democratic procedures*, in a peaceful way and in the spirit of *freedom* which respects and fosters legitimate diversity, encouraging and sustaining the process leading to the *growing unity of Europe*. We welcome with satisfaction all that has been done to safeguard the conditions and ways to respect *human rights*. Finally, in the context of the legitimate economic and political unity in Europe, while acknowledging the signs of hope seen by the attention given to the *rights and to the quality of life*, we sincerely hope that, in creative fidelity to the humanist and Christian traditions of our continent, there will be a guarantee of the primacy of *ethical and spiritual values*.<sup>89</sup>

Over the years, a so-called neo-functionalist approach seems to have frustrated these papal expectations and built the Union's image as a technocratic, elitist, and cosmopolitan framework that remains distant from the people's needs and even threatens their particular cultures. While state governments have remained in control of the European Communities' and later of the European Union's institutions, a European polity has never really surfaced.<sup>90</sup> The European Communities' and the European Union's main focus has remained the economy and its globalization, while topics of higher moral or political salience, on which Europeans divide themselves culturally or geographically, have been avoided or tackled from an economic angle.<sup>91</sup> The same transformation of the European Union from an international law into a constitutional law

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89. POPE JOHN PAUL II, *ECCLESIA IN EUROPA*, *supra* note 87 (emphasis in the original).

90. Daniel Innerarity, *Does Europe Need a Demos to Be Truly Democratic?* 1-2 (London Sch. Econ. "Europe in Question" Series (LEQS), Paper No. 77/2014, 2014).

91. Andrea Pin & John Witte, Jr., *Meet the New Boss of Religious Freedom: The New Cases of the Court of Justice of the European Union*, 55 *TEX. INT'L L. REV.* 223, 230 (2020).

framework took place in a sort of sleight of hand, which avoided dealing with the various polities that still make up Europe: after two domestic referenda aborted the project for a European Union's Constitution, the same text that had been rejected later entered into force as a "Treaty."<sup>92</sup> It is quite understandable, then, that the European Union has garnered the reputation of being a technocratic, elitist, and cosmopolitan framework that remains distant from people's cultures and needs.

One episode epitomizes how dramatically the European Union alienated Catholic support before 2012, when the global crisis hit Europe the hardest, by espousing the cosmopolitanism ideal at the expense of particularism. While drafting the Constitutional text, the Union's institutions refused the widespread invitations – including those from then-Pope John Paul II<sup>93</sup> who had done so much for the freedom of the Union's Eastern State members – to include any reference to Christianity within the preamble under the assumption that citing a religious tradition would have made the text partisan. To many, such refusal symbolized the end of the longstanding connection between the Catholic Church and the Union. The pan-Continental institution that so many Catholics had worked for was turning against its origin and even fighting Christianity.<sup>94</sup> Or, to use religious terms, "Europe could unite and gain the whole world, but [was losing] its soul."<sup>95</sup>

Because of those developments, many Catholics now suspect that the cosmopolitan drift of both liberalism and universalism deprives a country of its culture and ideals for the sake of the individual's self-realization. Yet they increasingly also perceive migration as a demographic partner, especially in countries such as Italy, Hungary, or Poland, which have a long story of emigration

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92. Adam Kreidman, *Correcting Past Mistakes: The Failure of the European Constitution and Its Resurrection as the Lisbon Treaty*, 5 MIAMI-FLORIDA EUR. CTR. EXCELLENCE (May 2008).

93. Jason Horowitz, *Europe, Seeking Political Unity, Stumbles Over Issue of Religion*, N.Y. TIMES (Nov. 7, 2004), <https://www.nytimes.com/2004/11/07/world/europe/europe-seeking-political-unity-stumbles-over-issue-of-religion.html>.

94. Matthew Cantirino, *Is The European Union A Catholic Plot?*, FIRST THINGS (Jan. 18, 2012), <https://www.firstthings.com/web-exclusives/2012/01/is-the-european-union-a-catholic-plot> ("EU bureaucrats have become justly notorious for their hostility towards religion, and especially Christianity, in the public square.").

95. Brent F. Nelsen, *European Integration and the Catholic and Protestant Churches* 13 (Am. Pol. Sci. Ass'n, Annual Meeting Paper, 2013) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300620](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300620).

rather than immigration.<sup>96</sup> Populists accuse immigration of political and legal developments that resonate with Catholic concerns for localism: immigrants might dilute a country's cultural specificities, disrupt its economic and societal makeup, and push institutions to change their laws to accommodate newcomers.<sup>97</sup> Although Catholic sensitivity to the needs of migrants that seek a decent life or barely to survive through embarking on inhumane travels, populist forces have thus gained teeth within Catholic circles due to their resistance to immigration.

By emphasizing the necessity of preserving a country's heritage and identity against massive inflows of migrants, populists advocate for the need of what they call the forgotten people and pit their own agenda against the "transnational monster of liberalism and multiculturalism."<sup>98</sup> They develop anti-elitist and anti-cosmopolitan narratives that aim to protect local traditions from supranational institutions as well as from newcomers. Within the hands of populists, localism morphs into an identitarian narrative that advocates the preservation of national collectivities from the arrival of newcomers through an overtly religious rhetoric.

Aiming to restore the link between the individual and the polity through identitarian narratives, populist parties and governments have magnified the historical role of Christianity within their language and legal texts. Once again, the Hungarian constitutional trajectory exemplifies this trend: the Hungarian Constitutional Preamble makes explicit reference to Christianity, and the leading

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96. See MERCATOR FORUM MIGRATION & DEMOCRACY (MIDEM), ANNUAL REPORT ON MIGRATION AND POPULISM 5 (2018) [hereinafter MIDEM], [https://forum-midem.de/cms/data/fm/download/TUD\\_MIDEM\\_Jahresbericht2018\\_Excerpt\\_FINAL.pdf](https://forum-midem.de/cms/data/fm/download/TUD_MIDEM_Jahresbericht2018_Excerpt_FINAL.pdf) ("Culturally grounded arguments for the rejection of migration are particularly pronounced in countries with a low share of foreigners . . . [where] the fear of losing identity and social cohesion promotes opposition to migration."). According to Michał Kowalski, Poland and other Central and Eastern European countries have not been directly affected by the Mediterranean refugee crisis. Michał Kowalski, *From a Different Angle – Poland and the Mediterranean Refugee Crisis*, 17 GERMAN L.J., 967, 968, 970 (2016). This, Kowalski writes, "might explain Poland's most skeptical approach towards the European Commission's proposals aimed at burden sharing among the Member States based on the relocation of refugees." *Id.* at 968.

97. MIDEM, *supra* note 96, at 15 ("Parties like PiS in Poland or Fidesz in Hungary were successful in describing European 'refugee quotas' as a threat to national sovereignty . . . [and] claim[ing] the[ir] role of protectors.").

98. This expression was used by Orban to define the European Union. See Joseph Ewing, *Viktor Orban*, in *THE MIGHTY AND THE ALMIGHTY: HOW POLITICAL LEADERS DO GOD* loc. 2318 (Nick Spencer ed., 2017) (ebook).

party, *Fidesz*, now poses as the defender of European culture.<sup>99</sup> In Italy, Matteo Salvini, the leader of the *Lega* party, consistently uses religious symbols and claims in his political rallies.<sup>100</sup> Disgruntled Italian Catholics easily identify with his narrative because it depicts the European Union as an engine of liberal, cosmopolitan, and secularist ideas, as well as a promoter of global migration, against which they think they should react in the name of their identity and for the sake of their survival.<sup>101</sup> Populists' logic thus conflates Christianity with tradition and religion with ethnicity, but it is certainly appealing to those who feel that localism has been neglected.

Despite their claim to restore a Christian Europe, however, national populists do not always support the comeback of Christian rituals or practices. They rather endorse visions of "secularized Christianity-as-culture" or of a "civilizational and identitarian Christianity."<sup>102</sup> They make religious narratives and symbols into identitarian tools, promoting religion as a matter of belonging rather than believing.<sup>103</sup>

Such an identitarian approach is problematic in two ways for Catholicism. First, the separation of belonging from believing clashes with Catholic social thinking. As Professor Oliver Roy has noted, "[a]lthough the [Catholic] Church does not reject the concept of the 'Christian identity' of Europe, it has stressed, since Pope John Paul II, that this identity should go along with faith and Christian values and norms."<sup>104</sup> Second, the insistence on the political role of tradition that is so widespread among European populists is not quintessentially Catholic. European populists leverage their

99. Religious tradition is explicitly rooted in the Preamble of the Hungarian Constitution (2011), which proudly celebrates King Saint Stephen as the builder of the Hungarian State as "a part of Christian Europe one thousand years ago." See Andras Bozóki & Zoltan Ádám, *State and Faith: Right-wing Populism and Nationalized Religion in Hungary*, 2 E. EUR. J. SOC'Y & POL. 98, 100-22 (2016).

100. Roy, *supra* note 80 (describing Salvini's "constant exhibition of Catholic symbols (crucifix, rosary, invocation of Virgin Mary)").

101. Willfred Spohn, *Europeanization, Religion and Collective Identities in an Enlarging Europe*, 12 EUR. J. SOC. THEORY 358, 358-60 (2009).

102. Rogers Brubaker, *Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective*, 40 ETHNIC & RACIAL STUD. 1191, 1199 (2017) (internal quotation marks omitted).

103. See generally Olivier Roy, *Beyond Populism: The Conservative Right, the Courts, the Churches and the Concept of a Christian Europe*, in *SAVING THE PEOPLE: HOW POPULISTS HIJACK RELIGION* 185, 185-201 (Nadia Marzouki, Duncan McDonnell & Olivier Roy eds., 2016).

104. Roy, *supra* note 80.

countries' Catholic ancestry, rather than the Catholic traditional philosophical style of reasoning. While it is true that prominent Catholic philosophers such as Alasdair MacIntyre value the importance of tradition for moral inquiry,<sup>105</sup> Catholic social thinking has constantly maintained that the liberties and legal values it cherishes are rooted in the nature of human beings,<sup>106</sup> not simply in Christian revelation or tradition.<sup>107</sup>

The mismatch between the support gained by populists through their identitarian and traditionalist narrative and the Catholic distinctive interest in natural law probably further reflects deep rifts within contemporary Catholic culture. As a matter of fact, although the Catholic world abounds with legal philosophers arguing on the basis of natural law theories, the mobilization of Catholics against liberalism, cosmopolitanism, the European Union, or the lingua franca of rights has found its preferential language in tradition instead of natural law. To some extent, the success of populist narratives and their tradition-based language show that natural law language, albeit well-rooted within Catholic philosophy, does not hold much sway among the Catholic multitudes.

### III. LEGAL INTERPRETATION AND THE SEPARATION OF POWERS: THE ATTACKS ON THE JUDICIARY

Many of the worrisome reforms that populist governments have introduced lately focus on the judiciary. Recently, Polish and Hungarian laws have targeted judicial independence, rulings, and powers to review legislation, thereby triggering deep controversy.<sup>108</sup> It is safe to say that, within populist ranks, the ideal of democratic legitimization has obscured the importance of the rule of law more than once.<sup>109</sup> Once in charge, populist parties may

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105. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 7 (1988).

106. NIEBUHR, *supra* note 22, at 135.

107. DOE, *supra* note 17, at 382 (emphasizing that Catholic canon law still gives a special place to natural law).

108. See, e.g., Wojciech Sadurski & Maximilian Steinbeis, *What Is Going on in Poland Is an Attack Against Democracy*, VERFASSUNGSBLOG (July 15, 2016), <https://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>; Gábor Halmai, *Dismantling Constitutional Review in Hungary*, 1/2019 RIVISTA DI DIRITTI COMPARATI 31, 31-47 (2019).

109. See Renata Uitz, *The Return of the Sovereign: A Look at the Rule of Law in Hungary – and in Europe*, VERFASSUNGSBLOG (Apr. 5, 2017), <https://verfassungsblog.de/the-return-of-the-sovereign-a-look-at-the-rule-of-law-in-hungary-and-in-europe/>.

shake the foundations of a constitutional system by implementing reforms that threaten the separation of powers.

Like with democracy and fundamental rights, the Catholic viewpoint on the separation of powers doctrine has dramatically shifted over time. As is well-known, this theory was originally rejected by the Catholic Church because it was seen as a threat to the indivisible and divine nature of authority.<sup>110</sup> Throughout the twentieth century, however, Catholicism has slowly softened its position, eventually coming to embrace the separation of powers as an important pillar for the organization of society. In particular, Pope John Paul II celebrated the separation of powers while demonizing the “absolute power” of Marxist-Leninist totalitarianism.<sup>111</sup> His Encyclical Letter *Centesimus Annus* stated that “a sound *theory of the State*” should embrace the “rule of law” and envision a legal order within which “each power [is] balanced by other powers and by other spheres of responsibility which keep it within proper bounds.”<sup>112</sup> Once again, while the fight against communism supported the alliance between Catholicism and liberalism, praise for the separation of powers enshrined in the Encyclical seemed to confirm that a wedding had taken place between Catholicism and liberal constitutionalism. Similar to what happened to human rights and liberalism, many hopes were misplaced also in respect to the separation of powers. In fact, the clash between liberalism and Catholic legal and political culture has also involved the judicial sphere.

In the late twentieth century, various strands of liberalism entrusted and empowered the judiciary with the role of solving “some of the most pertinent and polemical political controversies a

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110. See, e.g., POPE LEO XIII, ENCYCLICAL LETTER: *IMMORTALE DEI* para. 18 (1885), [http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_01111885\\_immortale-dei.html](http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html) (“[T]he ruling powers are invested with a sacredness more than human, and are withheld from deviating from the path of duty, and from overstepping the bounds of rightful authority . . .”).

111. POPE JOHN PAUL II, *CENTESIMUS ANNUS*, *supra* note 15, para. 44.

112. *Id.* (“[O]ne passage of *Rerum Novarum* . . . presents the organization of society according to the three powers—legislative, executive and judicial—, something which at the time represented a novelty in Church teaching. Such an ordering reflects a realistic vision of man’s social nature, which calls for legislation capable of protecting the freedom of all. To that end, it is preferable that each power be balanced by other powers and by other spheres of responsibility which keep it within proper bounds. This is the principle of the ‘rule of law’, in which the law is sovereign, and not the arbitrary will of individuals.”) (footnote omitted).

democratic polity can contemplate.”<sup>113</sup> Judges thus left their role of “mouth of the law” to take up that of making justice case-by-case.<sup>114</sup> Additionally, in civil law jurisdictions they took on the role of making the law evolve on their shoulders.<sup>115</sup> In Europe, courts became the defenders of democracy and human rights because of their capacity to connect the domestic legal order with the pan-European one in practical ways, even circumventing the political process.<sup>116</sup> In the 1990s to early 2000s, the idea of “judicial dialogue” stimulated and reinforced judicial activism by fostering the practice of borrowing and lending legal ideas across domestic and supranational jurisdictions.<sup>117</sup>

Some have found that such an empowerment of the judiciary takes place at the expense of legislative powers and the political process,<sup>118</sup> and transforms the angle from which formidable societal issues are tackled. Judicial narratives are capable of flattening “questions of meaning, identity, and purpose into questions of

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113. Ran Hirschl, *The New Constitution and the Judicialization of Pure Politics Worldwide*, 75 *FORDHAM L. REV.* 721, 722 (2006).

114. For a discussion on the relationship between judicial activism and the separation of powers doctrine, see Luca Pietro Vanoni, *New Challenges to the Separation of Powers: The Role of Constitutional Courts*, in *NEW CHALLENGES TO THE SEPARATION OF POWERS: DIVIDING POWER* 46, 46-77 (Antonia Baraggia, Cristina Fasone & Luca Pietro Vanoni eds., 2020).

115. In the words of the former Italian Constitutional Court President Paolo Grossi, [y]esterday, in the modern era, a judge’s job was to adapt the fact to the legal rule (legal rules were designed as major premises of a logic-deductive syllogism). Today, in the post-modern legal era, the judge has to *understand* the facts behind the case-law through a uniquely evaluative process and adapt the legal rule to this fact of life, looking for the more adjust solution. The judge’s job is therefore materializing into a process of *invention* [which in Latin designs the act of “finding”] that is opposite to a syllogism because it involves not only the logic and rational abilities of the judges, but especially his axiologic abilities such as intuition, perception, comprehension.

Paolo Grossi, *La invenzione del diritto: a proposito della funzione dei giudici* (Luca P. Vanoni trans., 2017), [https://www.cortecostituzionale.it/documenti/interventi\\_presidente/Grossi\\_Scandicci.pdf](https://www.cortecostituzionale.it/documenti/interventi_presidente/Grossi_Scandicci.pdf).

116. ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 193 (2002) (“In today’s multi-tiered European polity, the sovereignty of the legislature, and the primacy of national executives, are dead. In concert or in rivalry, European legislators govern with judges.”).

117. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 *U. RICH. L. REV.* 99, 99-137 (1994).

118. Manent, *supra* note 84 (“The democratic system which rested on a certain equilibrium between executive power and legislative power tends to be substituted by a system which is dominated by a scattered and diffused judicial power which derives its legitimacy from itself.”).

equality and fairness.”<sup>119</sup> They deal with cultural, ideological, and political issues from the point of view of statutes and judicial precedent.<sup>120</sup> These phenomena clash with the Catholic sensitivity for moral questions and its insistence that political bodies should have a say in them.<sup>121</sup>

Such an individualistic, rights-based narrative that has prevailed within the judicial realm has served the Polish and Hungarian attacks on domestic courts’ powers and independence. The empowerment of the judiciary provided populist parties with the perfect enemy to fight.<sup>122</sup> As populists fight cosmopolitanism and individualism, they can easily target judges as domestic hotspots of such ideals. The attack on the judiciary in Poland, which some have seen as part of “a comprehensive and largely successful assault on its fundamental constitutional institutions by the victorious party,” *Prawo i Sprawiedliwość*,<sup>123</sup> exemplifies this phenomenon. Until recently, the Polish judiciary had the reputation of being one of the most activist judicial branches of Western democracies. Some even found that such activism had led to an “imbalance between powers.”<sup>124</sup> Such charges have lately provided a cheap justification for the national reforms that have undercut judicial independence.

In Poland, such reforms have forced Catholic public figures and institutions to take sides, shaking the unity of the Church. At the beginning of the populist regime in 2015 and 2016, many bishops’ silence was interpreted as a sign of tacit support. The controversial, Catholic conservative and very popular *Radio Maryja*, however, started broadcasting nationalistic programs criticizing the

119. Michael Sandel, *Populism, Trump, and the Future of Democracy*, OPENDEMOCRACY (May 9, 2018), <https://www.opendemocracy.net/en/populism-trump-and-future-of-democracy/>.

120. See Pin, *supra* note 40, at 242.

121. DENEEN, *supra* note 8, at 31 (stating that liberalism fosters anthropological individualism).

122. See Luca Pietro Vanoni & Benedetta Vimercati, *Dall’identità alle identity politics: la rinascita dei nazionalismi nel sistema costituzionale europeo*, 1 QUADERNI COSTITUZIONALI 39 (2020) (arguing that the increasingly political role of litigation triggered populist reactions in Poland in Hungary as well as elsewhere in Europe).

123. Wojciech Sadurski, *Constitutional Design: Lessons from Poland’s Democratic Backsliding*, 6 CONST. STUD. 59, 60 (2020).

124. See IUSTITIA POLUSKA, RESPONSE TO THE WHITE PAPER COMPENDIUM ON THE REFORMS OF THE POLISH JUSTICE SYSTEM, PRESENTED BY THE GOVERNMENT OF THE REPUBLIC OF POLAND TO THE EUROPEAN COMMISSION (Mar. 2018), <https://www.statewatch.org/news/2018/mar/pl-judges-association-response-judiciary-reform-3-18.pdf>.

European liberal order.<sup>125</sup> When the President Andrzej Duda vetoed bills aiming to reform the judiciary system in 2017, Archbishop Stanisław Gądecki “congratulated the turn of the President . . . with a letter in which he outlined the principle of separation of powers in conformity with the Catholic Social Doctrine.”<sup>126</sup> Once again, post-modern rifts penetrated Catholic culture and trapped it in a political and ideological battle.

#### CONCLUSION

Post-modern ideals have reshaped the intellectual frameworks of constitutional and international law. Globalization, supranationalism, and cosmopolitanism, which have marked the passage from “solid” to “liquid” times,<sup>127</sup> have become powerful hermeneutical tools, affecting legal and political thinking. However, they have also sparked much controversy, triggering deep polarization within contemporary societies. Catholicism has been no exception. Challenged by new legal narratives and global phenomena, such as the 2008 economic crisis or massive migration, Catholics have not responded with one voice. Struggles between those who have heeded cosmopolitanism’s call on one side, and the supporters of populism and sovereignty on the other side, have mobilized the equilibrium sought by Catholicism between universalism and particularism, threatening the historical alliance between Catholicism and liberalism and questioning Catholic support for human rights. In short, the polarization of the post-

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125. *Radio Maryja* is a radio station founded in Toruń, Poland, on December 9, 1991, by Father Tadeusz Rydzyk. It endorses a social-conservative vision of the Catholic faith and presents itself as “the Catholic voice at your home.” Alfred M. Wierzbicki, *Present Condition and Role of the Catholic Church in Poland*, 38 OCCASIONAL PAPERS ON RELIGION IN E. EUR. 99 (2018), <https://digitalcommons.georgefox.edu/ree/vol38/iss5/6>. According to José Pedro Zúquete, *Radio Maryja* constitutes a clear example of the “politicization of religious discourse” that morphs into “religious populism” because this radio station “promotes, and is the epitome of, a certain version of Polish Catholicism as an ‘ideology of struggle.’” José Pedro Zúquete, *Populism and Religion*, in THE OXFORD HANDBOOK OF POPULISM 447 (Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo & Pierre Ostiguy eds. 2017).

126. Wierzbicki, *supra* note 125, at 98. Catholic doctrine has highlighted the importance of independence of the judiciary. See, e.g., POPE JOHN XXIII, ENCYCLICAL LETTER: *PACEM IN TERRIS* para. 69 (1963), [http://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem.html](http://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html) (“[J]ustice must be administered impartially, and judges must be wholly incorrupt and uninfluenced by the solicitations of interested parties.”).

127. ZYGMUNT BAUMAN, *LIQUID TIMES: LIVING IN THE AGE OF UNCERTAINTY* 3 (2007).

modern age has spilled into the Catholic world, disrupting its unity and creating new gaps between Catholics.

The rifts within the Catholic Church thus largely reflect the variety of post-modern understandings of liberalism. When liberalism championed the values of the rule of law, human rights, and democracy, Catholicism happily embraced it. When it sought to monopolize the public philosophy and force other political cultures outside the list of marketable ideas, Catholic voices disagreed. Hollowing out spirituality, drying out local cultures, and putting cultures in a straitjacket was not an option for Catholicism.

Recent developments in liberalism have fueled the populist backlash. Through their rhetoric, populist parties magnify the traditional roots and religious identity of Western democracies, aiming to muster Catholic support. A closer look reveals, however, that the populist agenda does not fit comfortably within some of the basic tenets of Catholic culture. It downplays the duty of solidarity that is deeply rooted in Catholic teachings, while its ethnocentrism and nationalism overlook Catholic universalism.<sup>128</sup> Populism may have surfaced to counter the diseases of post-modern liberalism, but it has subsequently become part of the sickness.

Since the end of World War II, the alliance between Catholicism and liberalism has nurtured a sense of respect for the dignity of human beings and fostered the development of a robust constitutional culture. Catholicism as a whole has not abandoned liberalism because it does not endorse such ideals anymore; on the contrary, it has rather distanced itself from liberalism because it does not perceive it as compatible with key ideals such as localism or transcendence, or solidarity with the poor. Those who are sympathetic with populist stances therefore often value aspects of Catholicism that may fail to shine within contemporary liberalism.

Some years ago, writing about multiculturalism, the Catholic theologian Javier Prades identified some aspects of modernity that, in his view, would prove to be significant challenges. He noted the contemporary emphasis on technocracy and the replacement of

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128. See JOHN PAUL II, *MEMORIA E IDENTITÀ*, *supra* note 56, at 86 (“Caratteristica del nazionalismo . . . è di riconoscere e perseguire soltanto il bene della propria nazione, senza tener conto dei diritti delle altre. Il patriottismo, invece, in quanto amore per la patria, riconosce a tutte le altre nazioni diritti uguali a quelli rivendicati per la propria ed è perciò la via per un ordinato amore sociale.”).

narratives focused on goals with those focused on means,<sup>129</sup> the extent to which universality is often opposed to particularity,<sup>130</sup> and the difficulties in reconciling tradition with modernity.<sup>131</sup> This Article has illustrated that similar difficulties are now characterizing the debate between populism and liberalism. After his diagnosis, Prades suggested that cultural differences need not be cured, but better understood as mutually provocative, urging society at large to consider them seriously and attentively.<sup>132</sup> Prades's suggestion holds true within the struggle between liberalism and populism: a lively culture can heed both the calls surfacing within liberalism and populism, without blessing either with the chrism of sacredness while rejecting the other. These disagreements need not drive Catholics apart: rather than fight, Catholic proponents of liberalism and populism can embrace a mutually enlightening open dialogue and talk.<sup>133</sup>

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129. JAVIER PRADES, OCCIDENTE: L'INELUDIBILE INCONTRO 19 (2008).

130. *Id.* at 28.

131. *Id.* at 32–33, 123.

132. *Id.* at 7.

133. See John Witte, Jr., *To Serve Right and to Fight Wrong*, in POPE BENEDICT XVI'S LEGAL THOUGHT 119 (Marta Cartabia & Andrea Simoncini eds., 2015) (suggesting that what modern societies mostly need is a "collective discourse of competing understandings . . . of the divine and the human, of good and evil, of individuality and community").