

Fordham International Law Journal

Volume 15, Issue 4

1991

Article 2

The Problem of the State in Centesimus Annus

Russell Hittinger*

*

Copyright ©1991 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Problem of the State in Centesimus Annus

Russell Hittinger

Abstract

Part I will examine some salient differences between *Rerum Novarum* and *Centesimus Annus* with respect to the nature of the political state. In Part II, we will take up the problem of rights. In particular, we shall ask why the encyclical never mentions the term “natural law” even though it contains several enthusiastic references to natural rights. I conclude by taking a broader measure of the discussion, especially in terms of the cultural and religious issues.

THE PROBLEM OF THE STATE IN *CENTESIMUS ANNUS**

*Russell Hittinger***

INTRODUCTION

At the general audience of May 1, 1991, Pope John Paul II introduced his encyclical letter *Centesimus Annus* (The Hundredth Year) by pointing out that “[o]ne event seems to dominate the difficult period in which we are living: the conclusion of a cycle in the history of Europe and the world. The Marxist system has failed, and precisely for the very reasons which *Rerum Novarum* had already acutely and almost prophetically indicated.”¹ Marxism, the Pope argued, destroyed the institutional prerequisites for economic and political liberty.

On the economic side, the Pope mentioned not only the “individual’s right to private ownership of the means of production,” but also, and perhaps more importantly, “the ethical value of the free market and of entrepreneurial activity within it.”² The Pope warned that whatever kind of political state emerges in these countries, it must set aside the “over-bureaucratic and centralized command economy.”³ On the political and juridical side, John Paul II insisted that “[n]o free economy can function for long and respond to the conditions of a life more worthy of the human person, unless it is framed in solid legal and political structures, and above all, unless it is supported and ‘enlivened’ by a strong ethical and religious conscience.”⁴ As the Pope says in the encyclical itself, “these events are a warning to those who in the name of political real-

* The author wishes to express his thanks to Michael Novak and Richard John Neuhaus for helpful comments on earlier drafts of this Article. The author is grateful to Chris Demuth and the American Enterprise Institute for Public Policy Research for the research fellowship that made this Article possible. Finally, special thanks are due to Jay Aragonés at the *Fordham International Law Journal* for his editorial work.

** Associate Professor, School of Philosophy, Catholic University of America, Washington, D.C.; Adjunct Research Fellow, American Enterprise Institute for Public Policy Research (1991-1993).

1. L’OSSERVATORE ROMANO, May 6, 1991, No. 18.

2. *Id.*

3. *Id.*

4. *Id.*

ism wish to banish law and morality from the political arena.”⁵

Centesimus Annus is, among other things, a “rereading” of Leo XIII’s encyclical *Rerum Novarum* (New Things), which the Pope deems a “lasting paradigm” for the church’s social teaching.⁶ Yet, in both the general audience and in the encyclical, his emphasis upon the events of 1989 indicates that the timing of this encyclical represents something more than an occasion for revisiting his predecessor’s teachings. Pope John Paul II stresses the need to take a view of present and future conditions that bespeak “new things” dissimilar to those that prevailed in 1891. For this Pope, the events of 1989 disclose truths about the human condition that need to be understood in the context of this historical period—truths that have to be learned, as he says, *in historia*,⁷ or, as he puts it elsewhere in the encyclical, *experientia historica*.⁸

In light of recent history, two problems in particular emerge in somewhat sharpened focus: the need, in economics, to protect non-governmental sources and initiatives, and the even more pressing need to set juridical limits to the power of the state. Here, at the outset, it might be helpful to briefly summarize where the Pope’s re-reading of the encyclical tradition bespeaks either new formulations or new applications of principles.

In *Rerum Novarum*, Pope Leo XIII contended that private property must be regarded as a “stable and perpetual,” “inviolable,” and “sacred” right.⁹ Although the notion of property

5. Encyclical Letter *Centesimus Annus* of Pope John Paul II on the Hundredth Anniversary of *Rerum Novarum*, § 25 (1991) [hereinafter CA]. An English translation appears in 21 *ORIGINS* (1991). The Latin text appears in *L'OSSERVATORE ROMANO*, in *Italia*, 2-3 Maggio, 1991. Unless otherwise noted, citations to CA, *supra* note 5, and other papal encyclicals follow the convention of citing the section or paragraph number.

6. CA, *supra* note 5, §§ 3, 5; see Peter Steinfels, *Papal Encyclical Urges to Shed Injustices*, N.Y. TIMES, May 3, 1991, at A1. An encyclical is a major papal statement of policy and theology, but the adherence it can command among Catholics may vary by topic. *Id.*

7. CA, *supra* note 5, § 31.

8. *Id.* § 41.

9. *Rerum Novarum*, §§ 6, 15, 46 (1891). Citations to *Rerum Novarum* and other Leonine encyclicals are taken from *THE CHURCH SPEAKS TO THE MODERN WORLD: THE SOCIAL TEACHINGS OF LEO XIII* (Etienne Gilson ed., 1954). Concerning the Leonine encyclicals, I am much indebted to the work of Ernest L. Fortin, especially his article “Sacred and Inviolable”: *Rerum Novarum and Natural Rights*, 53 *THEOLOGICAL STUDIES* 203 (1992). This Article is a revised and enlarged version of a paper

as an *ius sanctum* was not a new papal teaching,¹⁰ Pope Leo's endorsement of the natural right to private property represented a significant adjustment to the semantics, if not the substance, of modern rights theory. To be sure, the right was contextualized in terms of both the eternal and natural law, as well as duties to the common good. *Rerum Novarum* evinces no unqualified approval of what would have been called—either then or now—"liberalism." The encyclical was issued less than forty years after Pope Pius IX's *Syllabus of Errors* (1854), which declared: "It is an error to believe that the Roman pontiff can or should reconcile himself to, and agree with progress, liberalism, and modern civilizations."¹¹ From all available evidence, Leo XIII regarded the *ius sanctum* of property as something implicit in the traditional political theory of St. Thomas Aquinas. The right could be recognized, and indeed emphasized, without in any way conceding a "liberal" doctrine of the state, or, for that matter, without conceding the religious, moral, and cultural ideals of liberalism.

Pope Leo's task was to bring what he took to be the tradi-

presented at the International Conference on *Rerum Novarum* held at the Lateran University in Rome on May 6-9, 1991. An Italian translation is scheduled to appear in the Proceedings of the conference. Professor Fortin emphasizes the ways in which Leo's rhetoric of *iura sancta* coexisted in a very uneasy tension with the earlier tradition of *lex naturalis*. In short, Professor Fortin argues that the encyclical tradition, beginning with Leo, tried to incorporate an unorthodox philosophical doctrine of natural rights. Leo and his mentors, he suggests, were well-intentioned, but blind to the theoretical implications of their effort to mix the traditional teachings on natural law with modern notions of natural rights. We shall pick up this issue later. Here, it will suffice to say that I emphasize the extent to which Leo's teachings on the political state remained grounded in the older conception of natural law. While I do not disagree entirely with Professor Fortin's approach (on the uneasy relation between natural law and natural rights), I shall emphasize some very apparent differences between Leo and the present Pope (on the relation between natural law and the state).

10. On the fourteenth century papal uses of the idea, see RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1979). In the chapter entitled "The First Rights Theory," *id.* at 5-31, Mr. Tuck argues that the medieval debate over mendicant poverty anticipated modern debates over natural rights. Mr. Tuck's brief discussion of John XXII's bull *Quia vir reprobus* (1329) is a particularly interesting reminder that the notion of property rights as natural *dominia* did not originate in seventeenth century liberal theory. On the subject of the late medieval and early modern sources for natural rights doctrines, see generally MICHEL VILLEY, *LE DROIT ET LES DROITS DE L'HOMME* (1983). For both a criticism of Michel Villey and a survey of contemporary literature on the historical background of the issue, see Brian Tierney, *Villey, Ockham and the Origin of Individual Rights*, in 1 *THE WEIGHTIER MATTERS OF THE LAW* (John Witte, Jr. & Frank S. Alexander eds., 1988).

11. *Syllabus of Errors* § 69 (1854).

tional teachings to bear upon the political and economic crises of the industrial world. On economic matters, he was less interested in understanding the phenomenon of economic freedom on its own terms than he was in asserting moral and juridical principles necessary for answering the twin evils of unrestricted laissez-faire doctrines and state socialism.

In *Centesimus Annus*, Pope John Paul II continues the moral and juridical language of individual rights, including those pertaining to property. As one commentator accurately stated, *Centesimus* is "awash with rights of every kind."¹² However, the Pope also stresses the value of the creativity of work, the production of wealth, and individual access to socio-economic structures. This Pope is interested in economic liberty on its own terms. Complementing the older language of rights with a deeper appreciation of the creativity and institutional dynamisms of the entrepreneurial spirit, he argues that the economic freedoms of the "modern business economy" embody some of the central virtues of well-ordered liberty.¹³ The shift in emphasis from liberty over things (having property and rights thereto) to liberty in activity (invention of wealth and participating in markets) gives the Pope the opportunity to advance a moral teaching on economics that more closely corresponds to the empirical and historical realities of modern economic life. Moreover, the emphasis on activity permits a deeper moral analysis of the virtue of the entrepreneurial spirit. John Paul's thinking in this area advances, by way of application, the more theoretical approach he took in the 1981 encyclical *Laborem Exercens*,¹⁴ where he investigated the relationship between the creativity of human labor and the traditional understanding of human intelligence as the *imago dei*. As Michael Novak has pointed out, this allows the Pope in *Centesimus* to relate capital as wealth to capital as creative intelligence.¹⁵

12. Kenneth Minogue, in *The Pope, Liberty, and Capitalism: Essays on Centesimus Annus*, NAT'L REV., June 24, 1991, supp. at 8.

13. CA, *supra* note 5, § 32.

14. See, e.g., *Laborem Exercens* § 24 (1981).

15. To give credit where it is due, it must be said that Michael Novak's *THE SPIRIT OF DEMOCRATIC CAPITALISM* (1982) anticipated in some extraordinary ways the broad lines of this new phase in papal social teaching. Indeed, some sections of *Centesimus Annus* can be read as though they were lifted out of the pages of Michael Novak's work. See, e.g., CA, *supra* note 5, § 25 ("where self-interest is violently sup-

It is this Pope's view of the rule of law in the political state, however, that best represents the evolution in papal teaching since the late nineteenth century. *Centesimus Annus*, I shall argue, is the first major encyclical that treats the modern state for what it is, at least as recent history has disclosed it: namely, a potentially dangerous concentration of coercive power that requires the most exacting juridical and structural limitations lest it engulf the economic sphere on the one hand, or the cultural-religious sphere on the other. The political state depicted in *Centesimus Annus* is no longer the classical or medieval *civitas*.

The encyclicals of the Leonine papacy typically treated the state as a kind of prodigal child of Christendom that needed to be summoned once again by the Holy See to its proper responsibilities, albeit in the face of certain modern crises. But the state is still the pre-modern state, pictured as an organic *communitas perfecta*.¹⁶ As Pope Leo XIII put it, the state is "some likeness and symbol as it were of the Divine Majesty, even when it is exercised by one unworthy."¹⁷ The medieval conception of the political state as a privileged participant in divine authority is noticeably absent from *Centesimus Annus*. This does not mean that for Pope John Paul II the political state has no moral tasks, nor does it suggest that these moral tasks are not derived from God-given norms, both natural and revealed. These ideas are constantly reasserted in the encyclical.¹⁸ Nevertheless, the Pope regards the state as more of an artificial

pressed, it is replaced by a burdensome system of bureaucratic control which dries up the wellsprings of initiative and creativity"), § 32 ("besides the earth, man's principle resource is man himself. His intelligence enables him to discover the earth's productive potential and the many different ways in which human needs can be satisfied. It is his disciplined work in close collaboration with others that makes possible the creation of ever more extensive working communities which can be relied upon to transform man's natural and human environments. Important virtues are involved in this process such as diligence, industriousness, prudence in undertaking reasonable risks, reliability and fidelity in interpersonal relationships as well as courage in carrying out decisions which are difficult and painful, but necessary both for the overall working of a business and in meeting possible setbacks"), § 35 ("a society of free work, of enterprise and of participation"). Mr. Novak's forthcoming book, *THE CATHOLIC ETHIC AND THE SPIRIT OF CAPITALISM* (forthcoming 1992), takes stock of the development of papal economic theory from Pope Leo XIII to Pope John Paul II.

16. *Rerum Novarum*, *supra* note 9, §§ 32, 33. See also THOMAS AQUINAS, *Summa Theologia*, in 2 BASIC WRITINGS OF SAINT THOMAS AQUINAS I-II, question 90 (Anton C. Pegis ed. & Laurence Shapcote, O.P. trans., 1945).

17. *Sapientiae Christianae* § 9 (1890).

18. See, e.g., CA, *supra* note 5, § 29.

construct, whose end is to serve the legitimate economic and cultural interests of individuals and corporate entities that are irreducible to the state.

It is curious therefore that Professor Kenneth Minogue of the London School of Economics should contend that the encyclical evinces “a failure of match between the values of a free society on the one hand, and Aristotelian organicism on the other.”¹⁹ This “Aristotelian organicism” is precisely what is absent from *Centesimus*, and we shall see that its absence is one of the clearest indicators of the scope of evolution in papal social theory since 1891. Although John Paul II’s effort to demystify the political state stems from his understanding of the European experience that culminated in the events of 1989, the analysis and correctives provided in *Centesimus* closely resemble the modern, Anglo-American understanding of the political state. The Pope argues, for example, that the state must be limited by the rule of law, which he equates with (1) the internal division of powers, according to the various legislative, executive, and judicial organs, and (2) the existence of individual and corporate rights that limit the application of the power that can be brought to bear not merely by the offices of the state, but even more significantly by political majorities.²⁰ A more careful reading will show that the limited political institutions and the rule of law are prominent themes in *Centesimus Annus*.²¹

It would be tendentious to interpret the encyclical as a full-fledged endorsement of “liberalism.” Liberalism, of course, can mean any number of things. It can mean a doctrine of individualism, according to which the well-being of individuals is either the only intrinsically valuable state of affairs,

19. Minogue, *supra* note 12.

20. CA, *supra* note 5, § 44.

21. In this respect, Professor John Gray’s assessment of the encyclical is as curious as Kenneth Minogue’s. Professor Gray maintains that:

The most lasting impression conveyed by the encyclical is of a failure of perception—a failure to grasp the institutional framework of liberty and prosperity in the modern world. It is true that the Christian life has flourished, historically, in a diversity of regimes; but all the evidences suggest that, for us, the civilized life as well as the religious life is possible only in a civil society that shelters a market economy under a rule of law.

Minogue, *supra* note 12, at 5. Our reading will show that, in fact, the distinguishing trait of *Centesimus* is its focus upon the institutional requirements of liberty.

or the only such value recognized by government; it can mean a doctrine of anti-perfectionism, according to which the law must remain neutral on substantive matters of morality, neither helping nor hindering the citizens' particular views of virtue; it can mean a doctrine of individual rights, whereby individual citizens have the capacity to "trump" the enactment of policies by the majority, no matter the intrinsic merit of the policies themselves.²² *Centesimus* no more subscribes to these notions than did *Rerum Novarum*. But it does endorse the following ideas, all of which can be called, in some appropriately broad sense, liberal: (1) that, as a basic principle of political morality, the coercive powers of the state must be limited with respect to the economic, cultural, and religious activities of its citizens; (2) that the rule of law takes its meaning not merely from the need to order and harmonize the citizens of a polity, but also from the need to limit the power of the state; and (3) that limits on the power of the state cannot only be structural in nature, but must also include some rights-based protections against political majorities.

It should go without saying that any developments in the Vatican's understanding of the nature of the political state, as well as its view of the existence and ground of human rights, are of international significance. In the century encompassed by the encyclicals (1891-1991), the Catholic Church has found itself in the unenviable position of maintaining a set of moral, political, and legal principles in the face of three quite different political models: (1) the state Marxism of Eastern Europe, (2) the solidarist conceptions of social justice in the Third World, and (3) the liberal regimes of the Northern Atlantic world. Addressing these three is no easy task, for it is tempting to speak either in generalities that are analytically useless, or to speak in specific terms, that prove either to be interminably controversial, or of limited applicability, depending upon the particular political, economic, or cultural situation.

Virtually all international bodies subscribe to the ideals of democracy, constitutionalism, and human rights. These values

22. The position that government must remain neutral with respect to what contributes to, or detracts from, the moral goodness of its citizens is advanced by John Rawls, Robert Nozick, Ronald Dworkin, and a host of other Anglo-American theorists. For a useful analysis and criticism of anti-perfectionism, see generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

can be recommended without taking a decisive stand on the contest among the three models mentioned above. On the eightieth anniversary of *Rerum Novarum*, Pope Paul VI issued *Octogesima Adveniens* (1971). The encyclical appeared to suggest a third way between the Marxist and Liberal models, both of which are put under the rubric of "ideology."²³ Concerning liberalism, Pope Paul wrote:

[I]t asserts itself both in the name of economic efficiency, and for the defense of the individual against the increasingly overwhelming hold of organizations, and as a reaction against the totalitarian tendencies of political powers. . . . But do not Christians who take this path tend to idealize liberalism in their turn, making it a proclamation in favour of freedom? They would like a new model, more adapted to present-day conditions, while easily forgetting that at the very root of philosophical liberalism is an erroneous affirmation of the autonomy of the individual in his activity, his motivation and the exercise of his liberty.²⁴

Hence, *Octogesima* not only suggested a moral symmetry between the two ideologies, but also the quest for a Catholic middle way. Although Paul VI noted the pragmatic impetus behind the liberal option (the legitimate fear of the power of the modern political state), liberalism nonetheless was held to be an ideology.

While the Catholic Church has persistently delivered its verdict on the ideologies, until *Centesimus* it has been reluctant to do the same at the concrete historical and institutional levels. Apparently, the events of 1989 have prompted Pope John Paul II to render the historical and institutional verdict. This encyclical reaches, much more directly than do any of its predecessors, the institutional questions of the political and legal order. It does so more by way of historical than by philosophical reflection. This historical point of view leads Pope John Paul II to take the impetus toward the liberal position

23. Michael Novak contends that the idea of a Catholic "third way," between liberalism and socialism, first appeared in Pius XI's *Quadragesimo Anno* (1931), which was issued to mark the fortieth anniversary of *Rerum Novarum*. MICHAEL NOVAK, *CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS* 111 (2d ed. 1989).

24. *Octogesima Adveniens* § 35 (1991), translated in *THE GOSPEL OF PEACE AND JUSTICE: CATHOLIC SOCIAL TEACHING SINCE POPE JOHN* (Joseph Gremillion ed., 1976).

more seriously than his predecessors.²⁵

Since many scholars and pundits have already noted how the scales have been tipped toward liberalism with regard to the economic issues,²⁶ I shall concentrate upon the problem of the political state and the rule of law. The purpose of this Article is to demonstrate that *Centesimus* tips the scales toward the liberal model of the state. I do not offer any extensive analysis of how the development in the political-legal sphere is related to the shift in economics. Of course, the two are related, and we may stipulate that it would be impractical to address the economic sphere without rethinking the political and legal facets of liberty. I take it for granted that the new perspective on entrepreneurial activity and the role of markets is but one piece of a more extensive reconsideration of the state in the aftermath of the demise of state Marxism.

Nor do I offer extensive analysis of the cultural issues. Although *Centesimus* moves decisively toward a liberal model in the economic and political spheres, the Pope's understanding of what Michael Novak has called the cultural-religious sphere hardly can be adjudged "liberal," even on the most benign interpretation of what "liberal" connotes. A central question for any thoughtful reader of *Centesimus* is whether it is either theoretically or practically coherent to shift toward a liberal model of economics and politics, and at the same time hold a rather traditional understanding of culture. Though I do not try to resolve this question, I do take note of it throughout this Article. In the conclusion I propose that the "new things" in *Centesimus* make the most sense if we suppose that the Pope is making a bid to protect the Church's traditional cultural mission. That is to say, whatever other merits recommend liberal economic, political, and legal institutions, the subtext of the

25. It is interesting that at a 1991 United Nations seminar on the encyclical, it was not the delegates from countries such as Italy and Canada, but rather those from Poland, the Slovak Republic, and Nicaragua who focused upon what the encyclical has to say about the nature and powers of the political state. *U.N. Seminar*, L'OSSERVATORE ROMANO, Nov. 25, 1991, at 6. The Nicaraguan delegate, Dr. Roberto Mayorga-Cortes, maintained that the encyclical affirms, against the "enemies" of humanity, (1) "[t]he instrumental and subsidiary character of the state," and (2) "[t]he principle that true democracy is only possible under the rule of law." *Id.*

26. Much of the initial response is collected in *A NEW WORLDLY ORDER: A "CENTESIMUS ANNUS" READER*, (George Weigel ed., 1992). Also see *NAT'L REVIEW*, *supra* note 14; op-ed columns in *NAT'L CATH. REP.*, May 24, 1991, at 31-32.

Pope's encyclical is the practical value these institutions have for the protection of religion and culture *vis-à-vis* the state.

Part I will examine some salient differences between *Rerum Novarum* and *Centesimus Annus* with respect to the nature of the political state. This comparative analysis will emphasize two issues: the philosophical and rhetorical differences between Leo XIII and John Paul II on the nature of the state, and the quite different historical contexts regarding the problems their respective encyclicals were meant to address. Then, we shall examine more carefully this Pope's understanding of limits on governmental power. Here, two issues are particularly important: first, the manner in which the Pope's view of the political state sets the terms for his discussion of the rule of law; second, how he distinguishes between the problem of limiting the state and the more general social and cultural value of solidarity.

In Part II, we will take up the problem of rights. In particular, we shall ask why the encyclical never mentions the term "natural law" even though it contains several enthusiastic references to natural rights. Although I cannot offer a completely satisfactory explanation of this shift from natural law to rights, I propose that it is at least partially intelligible in the context of the Pope's concern about the problem of state power. I conclude by taking a broader measure of the discussion, especially in terms of the cultural and religious issues.

I. LIMITS ON THE STATE

At the outset of *Centesimus*, the Pope takes note of the historical context in which *Rerum Novarum* was promulgated.

In the sphere of politics, the result of these changes was a new conception of society and of the state, and consequently of authority itself.²⁷ A traditional society was passing away and another was beginning to be formed—one that brought the hope of new freedoms, but also the threat of new forms of injustice and servitude.²⁸

27. "Nova notio societatis et reipublicae fuerat ideoque auctoritatis." For the "state," Pope John Paul uses the traditional terms *respublica*, *civitas* and *status* more or less interchangeably. See CA, *supra* note 5, §§ 11, 15, 35. Note that in this passage, however, he clearly distinguishes between *societas* and *respublica*.

28. CA, *supra* note 5, § 4.

The problem underscored by Pope John Paul II was not just Pope Leo's response to the economic crises engendered by industrialization, but a wider and deeper change in the relation between the state and society, and indeed, in the understanding of political authority itself. The problem of the "limits inherent in the nature of the state" is not only central to the Pope's exegesis of his predecessor's encyclical of 1891, but also to his own assessment of the contemporary situation.²⁹

The Pope remarks that Leo XIII's encyclical did not depend "on a specific notion of the state or on a particular political theory."³⁰ It is true that the encyclicals of the Leonine papacy frequently mentioned that the Church has no special authority to recommend particular forms of government.³¹ In *Rerum Novarum*, Leo XIII held: "By the State we here understand, not the particular form of government prevailing in this or that nation, but the State as rightly apprehended; that is to say, any government conformable in its institutions to right reason and natural law, and to those dictates of the divine wisdom"³² The Catholic Church addresses the necessary principles, rather than the contingent arrangements of political order. Pope John Paul restates the same position (absent the reference to natural law) with regard in *Centesimus Annus*: "The church has no models to present; models that are real and truly effective can only arise within the framework of different historical situations"³³ Insofar as these popes adhere to the traditional distinction between general principles and prudential applications, their remarks make sense. However, it cannot be said that they prescind from specific notions or theo-

29. *Id.* § 11.

30. *Id.* § 10.

31. See, e.g., *Sapientiae Christianae*, *supra* note 17, § 28:

And since she [the Church] not only is a perfect society in herself, but superior to every other society of human growth, she resolutely refuses, prompted alike by right and by duty, to link herself to any mere party and to subject herself to the fleeting exigencies of politics. On like grounds, the Church, the guardian always of her own right and most observant of that of others, holds that it is not her province to decide which is the best amongst many diverse forms of government and the civil institutions of Christian States, and amid the various kinds of State rule she does not disapprove of any, provided the respect due to religion and the observance of good morals be upheld.

32. *Rerum Novarum*, *supra* note 9, § 32 (citing *Immortale Dei* (1885)).

33. CA, *supra* note 5, § 43.

ries of the state, and in the case of *Centesimus* from recommending a particular model—at least for this “historical situation.”

Pope Leo's treatment of the state relied upon the traditional language of natural law. By “traditional,” I mean the Thomistic concept of natural law as a participation in the eternal law.³⁴ Aquinas' method was rather different from Aristotle's. Aristotle contended that “[w]hat is just in the political sense can be subdivided into what is just by nature and what is just by convention. What is by nature just has the same force everywhere and does not depend on what we regard or do not regard as just.”³⁵ Although Aristotle certainly held that there are natural standards of justice that permit the judgment concerning whether a law is “in accord with nature,”³⁶ he did not predicate a “law” of nature. In short, Aristotle did not compare two kinds of law, but rather compared law to two different principles: namely, nature and convention (or artifice).³⁷ Aquinas, on the other hand, treated natural law as a mode of divine governance. It is given the status of “law” because nature is legislated by a divine creator and lawgiver; it is “natural” because it denotes a distinction between (1) divine governance via secondary causality and (2) divine governance by direct or apodictic command, such as in the *Decalogue*. Thus, for Aquinas the theme of natural law does not first require a contrast between human and natural standards of justice, but rather indicates a contrast between different ways in which God governs. It is a theological issue, and only derivatively an anthropological issue.³⁸

34. “[T]he light of natural reason, whereby we discern what is good and what is evil, which pertains to the natural law, is nothing else than an imprint on us of the divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law.” THOMAS AQUINAS, *supra* note 16, I-II, question 91, art. 2.

35. ARISTOTLE, *NICOMACHEAN ETHICS*, 1134b18.

36. ARISTOTLE, *RHETORIC*, 1373b6.

37. For a thorough study of the Aristotelian texts on natural justice, see Fred D. Miller, Jr., *Aristotle on Natural Law and Justice*, in *A COMPANION TO ARISTOTLE'S POLITICS* (David Keyt and F.D. Miller, Jr. eds., 1991).

38. Lloyd Weinreb has accurately noted one of the principal differences between the pre-modern and modern approaches to natural law. LLOYD WEINREB, *NATURAL LAW AND JUSTICE* 67 (1987). “The puzzles with which Aquinas and others grappled when they tried to understand the place of humankind in nature appear in other [modern] guise as part of the effort to describe the relationship of the individual to

This traditional point of view encourages one to exposit the themes of law from the top down—from the metaphysical or theological point of view to the more ordinary political and legal meanings and applications of the terms. In *De Regno*, for example, Aquinas begins his reflections on the duties of the kingly office by examining the “pattern of the regime of nature” (*a forma regiminis naturalis*).³⁹ The example for kingship is taken from the creation of the world (*ab exemplo institutionis mundi*).⁴⁰ In terms of the principles of order, it is said that as God stands to the multitude of creation, and as the human soul stands to the material parts of the body, so does the king stand toward the multitude of citizens. Both rhetorically and philosophically, Pope Leo XIII adhered to this method of exposition. All power of governance, he asserted, “emanate[s] from God.”⁴¹ It does not derive from consent or contract, but from God “as from a natural and necessary principle.”⁴² This “necessary principle” is the eternal law, of which the natural law is our first participation in divine governance.⁴³ Whereas a modern natural law theorist would be inclined to say that the first limit upon the state is derived from nature (perhaps in the form of a right or a natural principle of justice), Leo’s rendition of the Thomistic participationist scheme emphasizes a descending rather than an ascending order. Nature is not an independent variable; it is not an all-purpose term to be used in contrast with human artifice. Rather, nature is itself measured by the divine mind, and expresses to rational creatures the law and the moral limit of power. The proposition that the origin and limits of political authority stem from the covenant of human contractors, or from autonomous “natural” principles is quite alien to the Leonine encyclicals. Indeed, the notion of a bottom-up scheme of justification for political authority is

the state.” *Id.* This shift from a cosmological picture of multiple jurisdictions within a divine commonwealth to a mundane interest in how to order the relationship between the individual and the political state is very much in evidence in *Centesimus*.

39. *De Regno, Ad Regem Cypri*, II., question 93, art. 1, translated in GERALD B. PHELAN, *ON KINGSHIP* 53 (1949) [hereinafter *De Regno*].

40. *De Regno*, *supra* note 39, at 57.

41. *Diuturnum* § 12 (1881).

42. *Id.* § 5; see *Libertas Praestantissimum* §§ 13, 17 (1888); *Immortale Dei*, §§ 3, 4 (1885); *Rerum Novarum*, *supra* note 9 §§ 7, 52.

43. *Immortale Dei*, *supra* note 42, § 30.

precisely what Pope Leo regarded as the source of the disorder in European political cultures.

In any event, for Leo, the broad metaphysical and theological scheme remained that of a divine commonwealth in which the political state had as its principle and end the imitation (however imperfectly) of God.⁴⁴ The state, he said, is a "likeness and symbol as it were of the Divine Majesty."⁴⁵ By dint of participation in God's governance, its ruling powers properly can be called "sacred."⁴⁶ The reference in *Rerum Novarum* to property rights as *iura sancta* notwithstanding, the principal *sanctum* in the order of political theory remained the state as a participator in divine governance—even, he said, when the power is exercised "by one unworthy." When citizens submit to the civil authority, they submit to divine authority.⁴⁷ On this view, the traditional Thomistic understanding of natural law still controls the language of rights, and the picture of a divine commonwealth, interconnected through various levels of participation in law, controls the notion of authority.⁴⁸ This point of view persisted in papal encyclicals up to the present time—including, Pope John XXIII's *Pacem in Terris* (1963).⁴⁹

While Pope John Paul II is certainly correct when he says that his predecessor faced radical changes in the notion of authority, it is equally important to bear in mind that Pope Leo did not give an inch on the older formulation of the authority of the state. His overwhelming interest was not in the liberal project of limiting the power of the state, but rather was given

44. *Libertas Praestantissimum*, *supra* note 42, § 33.

45. *Sapientiae Christianae*, *supra* note 17, § 9.

46. *Immortale Dei*, *supra* note 42, § 18.

47. In his early work, Thomas Aquinas allowed the people to depose a tyrant on any number of conditions. See *Scriptum super Libros Sententiarum*, II, dist. 44, 2.2. Later, in *De Regno*, he argues that this can only be done by a public authority, lest a worse condition ensue. *De Regno*, *supra* note 39, §§ 44, 48. Indeed, he contends that suffering tyranny can be a punishment for sin. *Id.* §§ 51-52. It bears mentioning that when Aquinas wrote this tract, around 1265, dedicated to Hugh II of Cyprus, the political condition of southern Europe was unstable and subject to internecine struggles. One can imagine the popes of the nineteenth century having a similar view of the fragmentation of political authority.

48. Paragraphs 8 and 9 of Leo's *Libertas Praestantissimum*, *supra* note 42, are perhaps the clearest expression of this scheme.

49. See *Pacem in Terris* § 47 (1963); Pope John XXIII cites Pius XII who said: "the dignity of the state's authority is due to its sharing to some extent in the authority of God himself."

to the project of protecting its majesty and moral ends against ideologies and social movements that threatened either to fragment the *civitas* by subordinating it to private economic interests, or to detach its authority from the broader cosmological order. While it is true that Leo XIII had a keen appreciation of the potential for tyranny in some modern states,⁵⁰ and while he incorporated the modern language of individual rights as one way of countering disordered political regimes, his main response was to reassert the model of the divine commonwealth. Indeed, in *Rerum Novarum* he expressly calls European peoples back to the "primal constitution" of Christian order.⁵¹

Centesimus Annus bespeaks a different historical and philosophical view. Besides the fact that John Paul never once mentions the term "natural law" in the encyclical (about which we shall have more to say later), the "image of God" in *Centesimus* is reserved for human persons, invariably in contrast to the powers of the state:

The root of modern totalitarianism is to be found in the denial of the transcendent dignity of the human person who, as the visible image of the invisible God, is therefore by his very nature the subject of rights which no one may violate—no individual, group, class, nation or state. Not even the majority of a social body may violate these rights by going against the minority, by isolating, oppressing or exploiting it, or by attempting to annihilate it.⁵²

Here, there is no theological mantle draped over the state. Indeed, nowhere in *Centesimus* can there be found any reference to the political state's imaging of divine governance. This absence speaks loudly. The first and most persistent limit upon the state is the "transcendent dignity" of the human person who is the image of God.

The idea that the individual possesses a transcendent dignity is not a novel teaching. However, that this constitutes the moral basis for limitation of civil power is quite different from

50. *Id.* § 13.

51. *Rerum Novarum*, *supra* note 9, § 27; *see also Immortale Dei*, *supra* note 42, § 46 ("to endeavor to bring all civil society to the pattern and form of Christianity which We have described"); *Diuturnum*, *supra* note 41, § 22 ("the institution of the Holy Roman Empire, consecrated the political power in a wonderful manner").

52. *See CA*, *supra* note 5, § 44; *see id.* § 22.

what was evident in the Leonine approach to these matters.⁵³ This difference reflects not merely the differences between the two popes with respect to philosophical method and vocabulary (Leo the Thomist, John Paul the personalist).⁵⁴ It also represents substantively different problems that actuate and orient the two encyclicals. Pope John Paul II does not deal with the threat to Christian princes, but rather with the threat to a remnant of Christian culture on the part of totalitarian states.

In *Centesimus Annus*, the political state is often described in forbidding terms. To mention a few such references, Pope John Paul speaks pejoratively of the "national security state," the "social assistance state," "state administration," "state capitalism," the state as a system of "bureaucratic control," and the state as a "secular religion."⁵⁵ Whereas Leo XIII was generally sanguine about the positive role of the political state, but cautious about modern economic developments, *Centesimus Annus* is generally optimistic about the creative dynamisms of the modern business economy, but palpably suspicious of the state.

53. Ernest Fortin contends that:

Just as *Rerum Novarum* bears traces of the transition from late medieval to early modern thought, i.e. from the divine right of kings to the sacred right of private property, so *Centesimus Annus* bears traces of the transition from early modernity to late modernity, i.e. from the Lockean notion of the sacredness of private property to the eighteenth-century notion of the sacredness of the sovereign individual.

Ernest Fortin, *From Rerum Novarum to Centesimus Annus: Continuity of Discontinuity?*, 17 FAITH & REASON 412 (1991).

In my view, Professor Fortin correctly perceives the transition in the encyclical tradition from the Leonine emphasis upon the state to the present pope's emphasis upon the individual. However, Professor Fortin's interpretation of the Leonine doctrine on property rights is, on my view, overstated. Pope Leo's position is closer to the model of divinely sanctioned kingship than it is to the Lockean position, according to which the power of the state is limited from below by the rights-bearing, propertied individual.

54. For a useful discussion of contemporary "personalist" theories, and how they might be distinguished from "liberal" understandings of autonomy and individualism, see YVES R. SIMON, *A GENERAL THEORY OF AUTHORITY* 67-69 (University of Notre Dame Press 1980) (1962). For a collection of Pope John Paul's locutions on the subject of human nature, see *THE WHOLE TRUTH ABOUT MAN* (James V. Schall ed., 1981). For an analysis of Pope John Paul's "personalism" in areas of moral philosophy and theology, see JANET E. SMITH, *HUMANE VITAE: A GENERATION LATER* (1991).

55. CA, *supra* note 5, §§ 19, 25, 35, 48, 49.

The reason for this shift in emphasis is no mystery. Leo lived at the end of an era in which secular ideologies challenged the authority of Christian princes, and both socialism and radical laissez-faire practices threatened the august responsibilities of the *civitas* as Leo knew it. John Paul, however, witnessed the emergence of totalitarian states which conducted a policy of "total war" within and without.⁵⁶ They obliterated the conditions of economic development, the rule of law, and the cultural dimension of Christianity. The modern state (of the sort criticized by John Paul) has not so much defaced the political image of divine governance vested in the civil authority, but has attacked the image as it subsists in human persons. Hence, where Leo was interested in reconnecting the civil authority to the proper understanding of divine governance under the eternal law, John Paul emphasizes the need to ground the state in a proper understanding of the human person. Whether in the areas of economics, law, or politics, he emphasizes that the root cause of totalitarianism is a false anthropology.⁵⁷

How is the state to be limited? It is one thing to speak of limits drawn from very general first principles, but it is another thing to address the specifically political and institutional levels of the problem. *Centesimus Annus* continues the papal teaching regarding the principle of subsidiarity, a principle drawn not from Leo XIII, but from Pius XI's *Quadragesimo Anno* (1931). In fact, John Paul's most pointed and critical remarks about the welfare state are made in the light of that principle.⁵⁸ The Pope is exceedingly critical of bureaucracies that, however well-intentioned, tend to undermine local initiatives and responsibilities in economic matters. Interestingly, when *Centesimus* addresses the problem of the relation between the state and the poor and vulnerable, it more often speaks of the juridical responsibility to protect rights rather than a responsi-

56. *Id.* § 14.

57. *See, e.g., id.* §§ 11, 13, 46.

58. "Here again, the principle of subsidiarity must be respected: A community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good." *Id.* § 48 (citing *Quadragesimo Anno*); *see id.* §§ 10, 15, 49.

bility to engage in administrative interventions.⁵⁹ While the state has a responsibility to oversee and direct the exercise of economic rights, the "primary responsibility in this area belongs not to the state, but to individuals and to the various groups and associations which make up society."⁶⁰ Significantly, the Pope maintains that the decentralization of power and responsibility promotes greater productivity and efficiency, "even though it may weaken consolidated power structures."⁶¹

The Pope's assessment of the welfare state has drawn immediate comment from the political and public policy sectors. U.S. Senator Daniel Patrick Moynihan observed:

What we have here is a considerable role reversal. A century ago, addressing the social question of that time . . . the church called for more intervention by the state. Now it appears to be saying that the state intervention has to some extent created or at least worsened the social problems of the present age. This is high irony.⁶²

The Rev. J. Bryan Hehir also expresses perplexity about the implications of the encyclical's criticism of the welfare state:

This critique [of the welfare state] is puzzling, however, because the range of activities that Catholic teaching, including this encyclical, require the state to perform, particularly in defense of the poor, is usually identical with the role "the welfare state" has fulfilled in many industrialized democracies. It would not be surprising if critics of these functions try to use this language to limit the state's role in the future.⁶³

These comments are accurate insofar as they note a change of emphasis in *Centesimus*. But the papal remarks on the welfare state should be regarded as instances of a broader reconsideration of limits on the state itself. In fact, the Pope indicates that the principle of subsidiarity needs to be seen afresh, in the light of the contemporary need to limit state

59. *Id.* § 10.

60. CA, *supra* note 5, § 48.

61. *Id.* § 43.

62. *Social Justice in the Next Century*, AMERICA, Sept. 14, 1991, at 137.

63. *Reordering the World: John Paul II's "Centesimus Annus"*, COMMONWEAL, June 14, 1991, at 394. However, it is not critics, but the Pope himself who appears to have this in mind. See *infra* text accompanying note 67.

power: "The relevance of these reflections [concerning subsidiarity] for our own day is inescapable. It will be useful to return later to this important subject of the limits inherent in the nature of the state."⁶⁴

Regarding the reconsideration of limits upon the state, a crucial text is found at section forty-four, where the Pope writes:

[i]n one passage of *Rerum Novarum* [Pope Leo XIII] presents the organization of society according to the three powers—legislative, executive and judicial—something which at the time represented a novelty⁶⁵ in church teaching. Such an ordering reflects a realistic vision⁶⁶ 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'⁶⁷ in which the law is sovereign, and not the arbitrary will of individuals.⁶⁸

"In modern times," he adds, "this concept has been opposed by totalitarianism, which in its Marxist-Leninist form maintains that some people, by virtue of a deeper knowledge of the laws of the development of society . . . are exempt from error."⁶⁹

The first point to be noticed is that John Paul not only presents this conception of the powers of the state as a "novel" teaching, he also credits it to Pope Leo. In this, he is mistaken, but it is an interesting mistake.⁷⁰ *Centesimus* cites sections

64. CA, *supra* note 5, § 11. *Ad grave autem argumentum limitum Status ipsius naturae ingenitorum redire decebit postmodum.* On the Pope's cautious approach to state welfare, see the Papal address to industrial and farm labour representatives in Matera, Italy. L'OSSERVATORE ROMANO, ¶ 19, May 1991.

65. *Novum.*

66. *Ad veritalem versum ostendit.*

67. "*Civilitatis iuris*" *principium.*

68. CA, *supra* note 5, § 44.

69. *Id.*

70. It is not clear why John Paul imputes this idea to Leo XIII. Peter Hebblewaite has complained that John Paul has an overblown estimation "of the importance and influence of *Rerum Novarum*. . . . It would be much better if we stopped talking about 'Catholic social doctrine' as if it were some kind of river majestically sweeping down through history." Peter Hebblewaite, *Big news is that encyclical voted for Democracy*, NAT'L CATH. REP., May 24, 1991, at 31. Section 44 of *Centesimus* perhaps is an instance where the Pope's rhetoric obscures rather than illuminates the difference between himself and his predecessor.

thirty-two and thirty-three of *Rerum Novarum* as the textual source for the notion of the division of governmental powers. Yet it is precisely in these sections that we find the most potent expression of Leo's affinity for the medieval organic view of political society. Here, Pope Leo cites, as a framework for the notion of distributive justice, Thomas Aquinas's dictum: "As the part and the whole are in a certain sense identical, so that which belongs to the whole in a sense belongs to the part."⁷¹ Read in context, this is not even remotely similar to John Paul's notion of limiting the state by means of a pragmatic allocation of its powers, much less an equation between such an arrangement and the rule of law.

The second point to be noticed about this text is that the "rule of law" reflects the point made earlier about the absence of the organic metaphors for the state in *Centesimus*. We notice in section forty-four, for instance, that the check upon the power of the state is not drawn from an understanding of the hierarchical and organic distinction between the parts of the whole. It is taken from a "realistic" understanding of structural limitations which ought to constitute the very institutional form of the state. Although the division of powers can be interpreted as something complementary to the older organic model, the equation of such structural limits with the "rule of law" is modern.⁷² It is modern not only with respect to its historical pedigree in eighteenth century republicanism, but also with respect to its function. One speaks of the division of powers not for the purpose of providing a picture of how the individual members are, by nature, distinguished and fitted to the body, but rather to ameliorate potential abuses of civil power.

Therefore, it is human artfulness, tempered and guided by historical learning about abuses of power, and not the imitation of natural hierarchies, that sets the terms of the discussion

71. See *Rerum Novarum*, *supra* note 9, ¶ 33 (citing THOMAS AQUINAS, *SUMMA THEOLOGIA*, *supra* note 16, II-II, question 61, art. 1, ad. 2).

72. The 1789 French Declaration of the Rights of Man and the Citizen, for example, stated that: "A society in which rights are not secured nor the separation of powers established is a society without a constitution." ¶ 16. For a discussion of differences among eighteenth century American and Continental versions of separation of powers, see FOREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 81-85 (1985).

in section forty-four. We notice that the Pope criticizes Marxism, for claiming to govern according to an indefectible knowledge of "deeper laws," and for eschewing any realistic sense of the imperfectibility of human institutions. The structural division of the *civil potestas* is not a necessary metaphysical principle. Nor does it flow from a knowledge of "deeper laws." Rather, it is learned by trial and error. Among the many philosophical errors John Paul attributes to modern totalitarians, he notes in section forty-four that they took themselves to be "exempt from error."

By emphasizing the pragmatic and historically conscious cast of the Pope's remarks, I do not mean to slight his equally emphatic remarks about the philosophical failure of Marxism. In section forty-four, as elsewhere, he says that the "root failure" of modern totalitarianism is its rejection of the "transcendent dignity" of the rights-bearing human person.⁷³ "Authentic democracy," he warns, "is possible only in a state ruled by law and on the basis of a correct conception of the human person."⁷⁴ Therefore, it would be a one-sided interpretation of *Centesimus* to reduce the issue of the political state exclusively to the pragmatic view of human fallibility, or to the procedural, in contrast to the substantive, facets of justice. The Pope's understanding of what is entailed (not merely privately, but publicly) in the "correct conception" of the human person is not apt to satisfy a liberal proceduralist.⁷⁵ Nevertheless, it is important not to lose sight of the fact that, however adamant John Paul is about the importance of timeless truths, much of what this encyclical has to say about political and legal institutions is not drawn from philosophy, but rather is taken from an experimental and historical assessment of the conduct of modern governments. To put it in another way, a correct conception of history seems to be at least as important in setting the agenda of *Centesimus*—at least on the issue of political institu-

73. CA, *supra* note 5, § 44.

74. *Id.* § 46.

75. See, e.g., Milton's Friedman's comment: "But I must confess that one high-minded sentiment, passed off as if it were a self-evident proposition, sent shivers down my back: 'obedience to the truth about God and man is the first condition of freedom.' Whose 'truth'? Decided by whom? Echoes of the Spanish Inquisition?" Milton Friedman, in *The Pope, Liberty, and Capitalism*, *supra* note 12, at 4.

tions—as any particular formulation of the “correct” view of the human person.

Earlier, we took exception to Professor Kenneth Minogue’s contention that the encyclical evinces “a failure of match between the values of a free society on the one hand, and Aristotelian organicism on the other.”⁷⁶ How, then, do we reconcile the claim that *Centesimus Annus* eschews organic metaphors for the state with the ideal of “solidarity,” which is also evident in the pages of the encyclical? Can the encyclical espouse a liberal (or at least a quasi-liberal) view of the political state, and at the same time speak of social and economic activity implying an “expanding chain of solidarity”?

Man works in order to provide for the needs of his family, his community, his nation and ultimately all humanity. Moreover, he collaborates in the work of his fellow employees as well as in the work of suppliers and in the customers’ use of goods in a progressively expanding chain of solidarity.⁷⁷

One thing that has been learned by this Pope is the inevitability of conflict.⁷⁸ Conflict in the economic and social sectors is not necessarily a *per se* disordered phenomenon. The encyclical recognizes that some states will be religiously pluralistic, and will have to negotiate such differences according to juridically recognized rights.⁷⁹ It is not conflict that is necessarily evil, but rather conflicts which escalate into “total war”—that is to say, conflicts which are not “constrained by ethical or juridical consideration for the dignity of others.”⁸⁰ John Paul’s emphasis on the rule of law, externally regulating conflicts, stands in tension with, but does not contradict, his notion of a “civilization of love.”⁸¹ The state’s principal task is to determine the “juridical framework” of economic and social activities.⁸² It encourages solidarity only in an indirect manner. In

76. Minogue, *supra* note 12.

77. CA, *supra* note 5, § 43.

78. *Id.* § 5 (“This doctrine is likewise a source of unity and peace in dealing with the conflicts which inevitably arise in social and economic life.”).

79. *Id.* § 29.

80. *Id.* § 14.

81. *Id.* § 10 (citing Pope Paul VI, message for the 1977 World Day of Peace (Jan. 1, 1977)).

82. CA, *supra* note 5, §§ 15, 48.

short, the rule of law is not the same principle as solidarity.

In the encyclical *Sollicitudo Rei Socialis* (1987), the term solidarity is used by John Paul to denote various kinds of "collaboration" among individuals and states.⁸³ However, in *Sollicitudo* he also places solidarity into tension with freedom: "In order to be genuine, development must be achieved within the framework of solidarity and freedom, without ever sacrificing either of them under whatever pretext."⁸⁴ Here, the Pope distinguishes between the principle of social and affective unity whereby persons collaborate toward common ends, and the principle of freedom. This tension is maintained in *Centesimus*. The state is not the Balm of Gilead that reconciles every manner of dispute. Rather, the political state establishes the broad, juridical conditions of justice within which solidarity can develop.⁸⁵ This corresponds to what we said earlier about the non-organicity of the state. In contrast to the classical or medieval conception of the *civitas*, the state in *Centesimus* is not the locus or principal expression of cosmic harmony. The state is not to be commissioned to smooth over the rough and tumble of economic and religious differences. Nor does it sacrifice the shaggy and incomplete dynamisms of economic activity to consolidated state power. John Paul recognizes that once it is submitted to proper limits, the power of the state will be weakened.⁸⁶

Cultural, familial, economic, and religious activities are ordained to "solidarity" of various sorts. The Pope speaks explicitly of the "family, and other intermediate communities" as having the primary function of giving life to "specific networks of solidarity."⁸⁷ The state, on the other hand, is obligated to protect the rights of citizens to engage in these activities. Throughout the encyclical the Pope invariably reserves the juridical language for the state's dealings with its citizens, and does not confuse it with the societal and cultural spheres in which the language of solidarity is most appropriate.⁸⁸ The Pope writes:

83. *Sollicitudo Rei Socialis* § 39 (1987).

84. *Id.* § 33.

85. CA, *supra* note 5, § 25.

86. *Id.* § 43.

87. *Id.* § 49.

88. For the contrast between solidarity and the state, see *id.* § 41.

According to *Rerum Novarum* and the whole social doctrine of the church, the social nature of man is not completely fulfilled by the state, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy, always with a view to the common good. This is what I have called the "subjectivity" of society which, together with the subjectivity of the individual, was canceled out by "real socialism."⁸⁹

This text can be taken as but one piece of evidence that John Paul maintains a sufficiently clear distinction between the structures of the state and the "subjectivity" of society. The political state is not the only, or for that matter, even the privileged, locus of the common good. In the older framework of Leo XIII, one could have recognized part of this: namely, that the political state incorporates different levels of social functions. Because the *civitas* is a natural hierarchy, the internal parts are ordered in an asymmetrical fashion. That is to say, the parts are not substitutable. But on Pope Leo's view, the parts nevertheless are ordered to the state as to the common good. Again, it is precisely because of this ordering that the state enjoys its august authority. While not denying the notion of a common good, Pope John Paul II stops short of magnetizing around the state the various levels and meanings of the common good.

Throughout *Centesimus*, for example, the Pope speaks of religion as the very centerpiece of culture, intersubjectivity, and solidarity.⁹⁰ Yet this kind of solidarity is not identified with the state. Rather, religious liberty, protected by juridical rights, is "the primary foundation of every authentically free political order."⁹¹ The external order of justice, for which the state is responsible, is "primary" in a very narrow and specific sense. It facilitates the myriad of cultural, religious, and social activities which bring about the solidarist ends which, according to the Pope, are in accord with the social nature of man. While this point of view does not represent a retreat from the traditional Catholic understanding of the common good, it does bespeak a more nuanced, and in some important re-

89. *Id.* § 13 (citation omitted).

90. CA, *supra* note 5, §§ 24, 29.

91. *Id.* § 29 (citation omitted).

spects, liberal understanding of the role of the state.⁹²

John Paul's stringent attention to the structural limits of the state, his careful efforts to distinguish its sphere from the social, economic, and religious life, as well as his persistent endorsement of individual rights against the state, must be regarded as a rejection of liberation theologians such as Gustavo Gutierrez who deny the "distinction of planes."⁹³ That is to say, *Centesimus* maintains clearly drawn lines between the economic, political, and social spheres. Critics of liberalism, from both the left and the right, have sought to blur these lines, either in the name of an older hierarchical organicism, or in the name of a revolutionary ideal. In North America, for example, theorists in the Critical Legal Studies ("CLS") movement have contended that law is politics, and that politics serves the transformation of society, ultimately toward solidarity.⁹⁴

CLS theorists regard the institutional distinction between law and politics as a stratagem for shielding the vested power of elites, by making the law relatively immune from social struggles.⁹⁵ Roberto Unger, for instance, has contended that

92. Michael Novak has pointed to a chief difference between "solidarist methods" (whether of the left or right) and the institutional procedures of liberal regimes. NOVAK, *supra* note 23, at 117. Whereas solidarist approaches to the common good envisage the public authority "suffused throughout the society from above," the liberal approach emphasizes multiple and coordinate perspectives. *Id.* In this light, the traditional papal doctrine of subsidiarity is amenable to two quite different views of institutions. If we take the older understanding of organic hierarchies, the principle of subsidiarity re-emphasizes the notion of those proper analogies which obtain between the various levels of the body politic. Solidarity could be said to suffuse the entire body, but enacted in analogically different ways. If, however, we take the perspective of liberal institutions, the sectors are more sharply differentiated. Even the powers of the state are to be divided. The organic idea of one power subsisting in another is jettisoned in favor of the idea of externally coordinated powers. Although the term "subsidiarity" has better semantical fit with the former, the latter perspective is also a method of satisfying the principle.

93. GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION* 47 (1977).

94. Duncan Kennedy's remark epitomizes this rejection of the distinction between law and politics: "Teachers teach nonsense when they persuade students that legal reasoning is distinct, as a method for reaching correct results, from ethical or political discourse in general. . . . There is never a 'correct legal solution' that is other than the correct ethical or political solution to that legal problem." Duncan Kennedy, *Legal Education as Training For Hierarchy*, in *THE POLITICS OF LAW* 47 (David Kairys ed., 1982).

95. For a summary of this position, see ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983). The best overall assessment of movement is Andrew Altman's critical, but fair, work in *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990).

the classical liberal technique of dividing government into three coordinate branches is “dangerous,” because it “generates a stifling and perverse institutional logic.”⁹⁶ He recommends that a fourth branch of government be created—a branch whose function it would be to constantly transform social life.

[T]he power responsible for systematic interventions should be a branch apart, staffed and organized according to the principles most suitable to its overriding task. . . . They should have at their disposal the technical, financial, and human resources required by any effort to reorganize major institutions and to pursue the reconstructive effort over time. Such a branch of government must have a wide latitude for intervention. Its activities embrace, potentially, every aspect of social life and every function of all the other powers in the state. If the other powers could not resist and invade the jurisdiction of this corrective agency, it would become the overriding authority in the state.⁹⁷

This can be taken as a North American token of the radical model of the state that the Vatican has faced in its dealings with activists and theologians in Latin America and in the Third World, where the quest for social justice deliberately neglects structural and rights-based limits upon the manner in which political power can be used to achieve human ends.

As Professor Paul Sigmund has observed,

[i]t is ironic, therefore, that at the very time when the Roman Catholic church (in *Pacem in Terris*—1963—and during and after the Second Vatican Council) had finally come to endorse human rights . . . an important sector of its intellectual elite not only ignored them, but even took an approach undermining the theoretical basis for their teachings.⁹⁸

To deny the distinction of planes, and, correlatively, to deny a principled distinction between law and politics, is tantamount to rejecting the liberal ideal of structural and rights-based limits on the state. Insofar as the public rhetoric of the Catholic

96. ROBERTO UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 449 (1987).

97. *Id.* at 453.

98. PAUL E. SIGMUND, *LIBERATION THEOLOGY AT THE CROSSROADS: DEMOCRACY OR REVOLUTION?* 77 (1990). Paul Sigmund's discussion of liberation theology as a reaction and reformist liberalism appears *id.* at 189-98.

Church for several decades has endorsed democracy and individual rights, it still had to recognize more explicitly the institutional logic of that commitment. In the context of modern constitutionalism, the division of state powers and the existence of juridically recognized individual rights do not so much suggest the moral ends of politics, as they indicate the proper means by which those ends are secured. It is precisely this recognition that animates *Centesimus*, and sets it against the radical solidarist position. If we prescind from the encyclical's misgivings about the moral and cultural aspects of the liberal model, and attend narrowly to the political and legal issues, *Centesimus* implicitly rejects any notion of a "third way." There simply is no other kind of political state that fits the bill of particulars enunciated in this encyclical than what we have called the "liberal" model.

Centesimus, therefore, not only represents considerable development with regard to the older political model of organic hierarchies, in which the political *civitas* epitomizes the common good. It is also opposed to the liberationist effort to cancel the "distinction of planes" regarding (1) government and society, and (2) law and solidarity. The encyclical is not a "liberal" account of the destiny of man, but it does reflect the hard won historical lessons of liberal political institutions.

II. RIGHTS-BASED LIMITS UPON THE STATE

The Church's declaration on religious liberty, *Dignitatis Humanae*, and the encyclical *Pacem in Terris*, are mileposts in the Church's pronouncements on human rights.⁹⁹ *Dignitatis* sanctioned the principle of the right to religious liberty. In terms of both its theoretical and practical implications, it can be regarded as the most important pronouncement by the post-war Catholic Church on the subject of rights. The movement toward a liberal conception of political and juridical institutions is at least germinally contained in *Dignitatis*. The chief contribution of *Pacem in Terris* was the exposition and organization of rights in the form of a bill of rights.

The expansive nature of rights language in the post-war encyclicals and pronouncements indicates a considerable

99. See *Dignitatis Humanae* (1965); *Pacem in Terris* (1963). Citations are to the version printed in *THE GOSPEL OF PEACE AND JUSTICE*, *supra* note 24.

change from the pre-war encyclicals. Of course, Pope Leo XIII insisted on the importance of natural rights, and may fairly be credited with making the idea a more or less permanent fixture in papal social encyclicals. Yet something important changed after World War II. Papal and ecclesial documents began to speak of rights in the terms of the ideal of modern constitutionalism. Both *Dignitatis Humanae* and *Pacem in Terris* explicitly refer to rights in the context of modern constitutional and juridical limits upon the political state.¹⁰⁰

No doubt, there are many reasons for this expansion of rights discourse, and of lists that resemble "bills of rights." The Catholic Church appropriated the language used not only by international bodies like the United Nations, but also by the Western allies who subdued the dictatorships after World War II. On another level, however, the Church's appropriation of rights language reflects the process of historical learning. Pre-war popes such as Pius XI understood liberalism to be a doctrine of untrammelled individualism that destabilizes the political state, and hence leads to totalitarianism and international conflict. The post-war interest in individual rights can be attributed to the gradual recognition that a rights-based constitutionalism is a historically proven way to limit the power of the state.

Pope John Paul II says that the Church's defense and promotion of human rights is one of its "important and even decisive contributions" to the promising events of recent years.¹⁰¹ The issue of individual rights is not a minor theme in *Centesimus Annus*. The "root" perversion of totalitarianism, the Pope argues, was disrespect for the human person as the "subject of rights."¹⁰² He described the workers' movement in Poland as a movement for "the liberation of the human person and for the affirmation of rights;"¹⁰³ and the emergent democracies are urged to reform their systems "to give democracy an authentic and solid foundation through the explicit recognition of . . . rights."¹⁰⁴

What are these rights? In *Centesimus*, the Pope does not

100. *Dignitatis Humanae*, *supra* note 99, § 1, pt. 27.

101. CA, *supra* note 5, § 22.

102. *Id.* § 44.

103. *Id.* § 26.

104. *Id.* § 47.

clearly distinguish between their different genera and species. Rather, he appears to use an all-purpose language of natural rights. In some places, he speaks of *iura fundamentalia* (fundamental rights),¹⁰⁵ *iura hominis* (rights of man),¹⁰⁶ and of *iura . . . ab ea abalienari* (inalienable rights).¹⁰⁷ Elsewhere, he refers to one or another right as a *ius naturae* (right of nature),¹⁰⁸ or a *ius ad autonomiam* (a right to autonomy).¹⁰⁹ Of course, a fundamental right need not be the same as a natural right, and all natural rights need not be seen as inalienable rights. The language is not as precise as that which we would expect in an academic treatise or legal brief. This problem notwithstanding, it is generally clear that the Pope has in mind rights that are in one or another sense antecedent to political society.¹¹⁰ He follows not only what he takes to be the usage customary since Pope Leo XIII, but also the mandate of canon law. The *Codex Iuris Canonici* (1983) maintains that:

To the Church belongs the right always and everywhere to announce moral principles, including those pertaining to the social order, and to make judgments on any human affairs to the extent that they are required by the fundamental rights of the human person [*quatenus personae humanae iura fundamentalia*] or the salvation of souls.¹¹¹

These *iura fundamentalia* might include natural rights, or for

105. *Id.* § 6.

106. CA, *supra* note 5, § 22.

107. *Id.* § 7.

108. *Id.*

109. *Id.* § 30.

110. *Id.* § 7.

111. *Codex Iuris Canonici*, canon 747/2 (1983). It is interesting that the canon does not contend that the Catholic Church has authority to interpret and to teach the natural law. This represents a profound shift of perspective. It makes some sense to say that the Church has authority to interpret the natural law, for on the traditional view, the law of nature is a mode of divine governance. As Aquinas argued in the *Summa Theologiae*, sin had corrupted the human ability to make certain and full use of the natural law, and therefore God re-promulgated the *conclusiones* of the natural law in the Decalogue. In turn, the precepts of the Decalogue are completed and fully ordered by the *lex nova*, the new law of grace. THOMAS AQUINAS, *supra* note 16, I-II, questions 100-08. Theologically speaking, the Church would have a plausible claim to interpret the natural law by dint of the authority invested in the Church by divine positive law and by grace. But the term *iura fundamentalia* can be construed to mean human rights, of the sort recognized in the positive law of constitutions. Does the Church have any special insight at this level?

that matter, particularly important legal and constitutional rights.

There is no need here to extract a complete list of the rights mentioned in *Centesimus*. They are enumerated in more than one place in the encyclical. Sometimes the Pope refers to the rights announced in *Rerum Novarum*, while in other places he enumerates rights in light of the events of 1989. But he also refers to rights affirmed by various international bodies, as well as rights mentioned in one or another papal encyclical or conciliar document. Taken together, and with some editing on our part in order to indicate the range and diversity of the rights, a short list includes the following:

- right and duty to seek God, to know him and to live in accordance with that knowledge;¹¹²
- rights to private initiative, to ownership of property and to freedom in the economic sphere;¹¹³
- right to express one's own personality at the workplace without suffering any affront to one's conscience and personal dignity;¹¹⁴
- right to private associations;¹¹⁵
- right to life;¹¹⁶
- right to live in a united family and in a moral environment conducive to the growth of the child's personality;¹¹⁷
- right to develop one's intelligence and freedom in seeking and knowing the truth;¹¹⁸
- right to share in the work which makes wise use of the earth's material resources.¹¹⁹

What is the order and ground of these rights? Perhaps the most surprising aspect of *Centesimus Annus* is the absence of any explicit reference to "natural law." Pope Leo XIII might have been surprised to discover that the encyclical celebrating and recapitulating the centennial anniversary of *Rerum Novarum* had nothing to say about natural law. *Pacem in Terris*, which con-

112. CA, *supra* note 5, §§ 29, 47 (citation omitted).

113. *Id.* § 24.

114. *Id.* § 15.

115. *Id.* § 7.

116. *Id.* § 47.

117. CA, *supra* note 5, § 47.

118. *Id.*

119. *Id.*

tains the most extensive papal compilation of natural rights, was careful to claim that the rights are derived from God via the natural law: “[R]ights as well as duties find their source, their sustenance and their inviolability in the natural law which grants or enjoins them.”¹²⁰ *Dignitatis Humanae* affirmed the existence of a fundamental right to religious liberty. The move in *Centesimus* toward the liberal model of the state would be unthinkable without the earlier groundwork laid in *Dignitatis*. Nevertheless, *Dignitatis* retained the traditional language of the eternal and natural laws:

[T]he highest norm of human life is the divine law—eternal, objective, and universal—whereby God orders, directs, and governs the entire universe and all the ways of the human community, by a plan conceived in wisdom and love. Man has been made by God to participate in this law.¹²¹

Whether or not Leo XIII would have approved of *Dignitatis*, he certainly would have recognized its philosophical vocabulary. How are we to interpret *Centesimus* in this regard? Does the absence of explicit reference to natural law represent a rhetorical anomaly or oversight, or does it bespeak a substantive position? Having jettisoned the older participationist model of the political state, has the Pope taken the next step, which is to drop the metaphysical language of natural law associated with that model, in favor of an all-purpose language of natural rights that covers everything from the desiderata of international legal bodies to the bills of rights in particular constitutions? An alert reader can find bits and pieces of natural law language in *Centesimus*. In one place, the Pope says that man “must therefore respect the natural and moral structure with which he has been endowed.”¹²² In section twenty-nine, the Pope refers to “truth, both natural and revealed.”¹²³ The context for his remark in this section, however, is the need for individual rights, such as those recognized by international

120. *Pacem in Terris*, *supra* note 99, pt. 28.

121. *Dignitatis Humanae*, *supra* note 99, § 3.

122. “*Observanda structura naturalis et moralis qua est donatus.*” CA, *supra* note 5, § 38. The meaning of the conjunctive “*et*” is unclear. John Paul does not say the “natural moral structure.”

123. *Id.* § 29.

covenants like the Helsinki Accords.¹²⁴ In section thirteen, he refers to the various intermediary groups which stem “from human nature.”¹²⁵ But here, he immediately introduces his own philosophical language of the “subjectivity of the individual.” Indeed, where Leo XIII gave a natural law analysis of the right to human association, based upon the natural ordination to society—“all striving against nature is in vain”¹²⁶—Pope John Paul II refers not to the teleological thrust of nature, but to the inherent autonomy, subjectivity, and dignity of the individual. Section thirteen deserves closer attention, for it clearly marks John Paul’s substitution of theological personalism for the older natural law language.

The context of section thirteen is the problem of the atheistic, socialist state. Socialism, he writes, reduces man to “a series of social relationships, and the concept of the person as the autonomous subject of moral decision disappears, the very subject whose decisions build the social order.”¹²⁷ “From this mistaken conception of the person,” he continues, “there arise both the distortion of law, which defines the sphere of the exercise of freedom, and an opposition to private property.”¹²⁸ Reducing the individual to the “social machine and [to] those who control it,”¹²⁹ socialism violates not only the dignity of the individual, but also subverts the social order that is built up—the Pope uses the word “progress”—by the freedom of individual decisions and activities. Turning to the social nature of the individual, the Pope argues that the “social nature of man is not completely fulfilled by the state, but is realized in various intermediary groups . . . which stem from human nature itself.”¹³⁰ Given the autonomy and subjectivity of the individual, his social relations can be described as having a certain “[inter]subjectivity.”¹³¹

We notice, in the first place, that law defines the sphere of the exercise of freedom. Once again, this reflects the general

124. Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292.

125. CA, *supra* note 5, § 13 (*ex hominis natura orientes*).

126. *Rerum Novarum*, *supra* note 9, § 17.

127. CA, *supra* note 5, § 13.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

commitment throughout the encyclical to the theme of protecting individual and corporate liberties against the political state. In the second place, although the Pope speaks of the intermediary societies stemming from nature, the context appears to emphasize "nature" in terms of the subjectivity and dignity of the individual, who builds the social order. The Pope does not go so far as to say that the social order is created, whole cloth, out of individual decisions. Yet the argument does appear to favor a more modern, if not liberal, conception of civil society as constituted by individual freedom. And in this, we find a clear departure from the traditional natural law conception of civil society which, in the order of final causality, is prior to the individual. The argument as a whole needs to be read as the groundwork for a defense of rights against the political state.

Comparing Leo and John Paul, Professor Fortin conjectures, on the basis of section thirteen, that Leo perhaps would be surprised by "John Paul II's unprecedented insistence on the more or less Kantian notion of the 'dignity' that is said to accrue to the human being, not because of any actual conformity with the moral law, but for no other reason than that he is an 'autonomous subject of moral decision.'" ¹³² Professor Fortin is right to note the importance of the Kantian-like language of autonomy. This language is alien to Leo's philosophical and theological sensibilities. But it is not quite accurate to suggest that the human person, in *Centesimus*, has autonomy with regard to the divine image, from which the dignity accrues. Indeed, one of the most perplexing issues posed by the encyclical is whether the case for human dignity, rights, and duties is exclusively theological. In the conclusion of section thirteen, for example, the Pope maintains that the source of the mistaken conception of the person is "atheism." "It is by responding to the call of God contained in the being of things that man becomes aware of his transcendent dignity," and "[t]he denial of God deprives the person of his foundation and consequently leads to a reorganization of the social order without reference to the person's dignity and responsibility."¹³³

132. Fortin, *supra* note 53.

133. CA, *supra* note 5, § 13.

Does this mean that human rights require the recognition of their revealed theistic ground?

There can be no question but that the Pope wants to discuss these matters in the light of a theocentric anthropology—man as the image of God. The truth about man is a central theme to which the issues of rights, markets, and the state are subordinated. Inasmuch as one believes that there is an objective morality based upon the truth about human nature, one could be said to have a natural law position.¹³⁴ *Centesimus*, however, appeals to a very particular truth about human nature—namely, the revealed theology of the Scriptures and Catholic dogma. The need to ground rights in a theistic view of human nature is a disputed issue in the history of philosophy. The point to be made here is that *Centesimus* does not shed any light on this disputed question.

Although the text of *Centesimus Annus* simply does not provide us with a sure way to answer the question about natural law and the ground of rights, we can make three observations which might help to clarify the matter. The first two involve issues that straddle the line of rhetoric and substance; the third pertains directly to the problem of limits upon the state.

In the first place, since the pontificate of Pope John XXIII, the popes have been cognizant of the danger that the term “natural law” will be construed to mean the sub-human regularities and predictabilities of physical nature—that is to say, “natural laws” as they are understood by the modern sciences.¹³⁵ Although Americans perhaps are more liable to recognize the connection between “natural law” and the so-called “higher law” (rather than a lower, biological law), this is not necessarily so for Europeans. Perhaps this is due to the prominence of natural law in the U.S. Declaration of Independence, in the abolitionist discussion leading to the adoption of the Thirteenth and Fourteenth Amendments to the U.S. Constitu-

134. Perhaps this is why Professor Arthur Utz, at the University of Fribourg, has said that the topic of natural law is “re-examined by John Paul II throughout the Encyclical.” Arthur Utz, *Centesimus Annus*, L'OSSERVATORE ROMANO, July 15, 1991. COMMONWEAL might be closer to the truth, however, when it pointed out that the Pope puts forward a “case for human rights based on faith in revealed truth about the transcendent nature of human life.” *After Communism*, COMMONWEAL, June 1, 1991, at 356. On the problem of how natural law has become equated with moral objectivism, see my article, *Varieties of Minimalist Natural Law Theory*, 34 AM. J. JURIS. 133 (1989).

135. See *Pacem in Terris*, *supra* note 99, §§ 4-7.

tion, and in the almost continuous judicial use of one or another version of the concept since the late nineteenth century.¹³⁶

Indeed, there is something distinctively American in John Courtney Murray's *We Hold These Truths*.¹³⁷ Father John Murray argued that respect for natural law theory is a point of convergence between Catholicism and the U.S. political experiment. Americans can return to the commonplace of natural law as a source of consensus about basic political and legal values because the American regime was founded in the eighteenth century upon that consensus. Father Murray, of course, recognized that the philosophical particulars of the eighteenth century are remote, if not obsolete, for most contemporary Americans. Nevertheless, the expectation that the order of law ought to be based upon natural principles of justice is a significant aspect of U.S. political and legal history, whatever shortcomings we might observe in the particular theories of natural law reasoning employed in contemporary jurisprudence.¹³⁸ Catholic theorists, like Jacques Maritain, looked to the American experience to rehabilitate political and legal convictions about natural law. In fact, the Institute of International Law, in its 1929 session held in New York, adopted an International Declaration of the Rights of Man, that referred in passing to the eighteenth century French Declaration of the Rights of Man, but which included a preamble explicitly shaped around the Fourteenth Amendment to the Constitution of the United States. Maritain took this to be a model for such declara-

136. See U.S. CONST. amends. XIII, XIV. For the role of natural law in the U.S. founding and Constitution, see EDWARD S. CORWIN, *THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955) and LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 115 (2d ed. 1985) ("The Constitution talked about natural rights, and it meant what it said."). On the abolitionist uses of the concept, see ROBERT M. COVER, *JUSTICE ACCUSED* (1975). On the natural law background of the Congressional debate over section one of the Fourteenth Amendment, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* (1988). For the role of natural law in the nineteenth and twentieth century history of American law, see CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930). Charles Grove Haines's book can still be recommended as the most comprehensive account of judicial uses of natural law theory. For a broad survey, including contemporary uses of natural law in issues of privacy and abortion, see Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 *WAKE FOREST L. REV.* 429 (1990).

137. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS* ch.13 (1960) ("The Doctrine Lives").

138. See *supra* note 136.

tions.¹³⁹ In his later work, *Man and the State*, Maritain argued for a "basic practical ideology," or what he termed a "secular faith," regarding natural rights.¹⁴⁰ He hoped that an international consensus could be reached about these rights, notwithstanding dissensus over the philosophical principles which might justify or explain them.¹⁴¹ In this, Maritain seemed to assume that the American experience of practical consensus about natural law could be extended to the international level.

In any case, the continual revival in America of natural law not only as a "higher law," but as a rational basis for legislative and judicial activities, is somewhat unique. The English legal tradition has tended to mute the natural law.¹⁴² The English positivist H.L.A. Hart, for example, retains some place for natural law, but it is reduced to the invariable conditions of survival that any system of law must bear in mind. It is, in short, what we have called a kind of "lower law."¹⁴³ Although some U.S. jurists and legal theorists, like Oliver Wendell Holmes, likewise reduced the natural law to psycho-physiological conditions, Justice Holmes himself recognized that the ordinary meaning of natural law bespeaks a higher law of reason.¹⁴⁴ When Martin Luther King cited the natural law in defense of civil disobedience, there was no question that he was referring to a higher law that had been recognized throughout American history.¹⁴⁵

The analysis of natural law and natural rights on the basis of comparative legal cultures is an interesting subject that

139. International Declaration of the Rights of Man, Oct. 12, 1929, reprinted in JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* (Doris C. Anson trans., 1971) (1943).

140. JACQUES MARITAIN, *MAN AND THE STATE* 78 (1951). But see YVES R. SIMON, *THE TRADITION OF NATURAL LAW* (1992) (introduction by Russell Hittinger).

141. *Id.*

142. For a comparative study of U.S. and English legal cultures, especially on the theme of natural law, see P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* (1987).

143. H.L.A. HART, *THE CONCEPT OF LAW* 189-95 (1961).

144. In fact, Justice Holmes assumed that the term "natural law" refers to a Kantian, or idealist, view of the human agent as an end in himself. OLIVER WENDELL HOLMES, *NATURAL LAW* 313 (1920). On Justice Holmes' reaction to Immanuel Kant and Georg Hegel, see Martin Golding, *Holmes's Jurisprudence: Aspects of Its Development and Continuity*, 5 *SOC. THEORY & PRAC.* 192 (1979).

145. Martin Luther King, Jr., "Letter from Birmingham Jail," in *WHY WE CAN'T WAIT* (1963).

would take us beyond the immediate interest of this Article. Here, we simply make the point that although *Centesimus* develops a view of the political and legal order that has obvious affinities with the American *ordo juris*, the Pope does not appeal to a natural law of rights as the underlying basis for consensus. Rather, the Pope recalls Europeans to their cultural, linguistic, and religious background. Europeans "are closely united in a bond of common culture and an age-old history."¹⁴⁶ *Centesimus Annus* gravitates toward the historical, cultural, and religious intelligibility of human nature. For example, the Pope writes:

Man is understood in a more complete way when he is situated within the sphere of culture through his language, history and the position he takes toward the fundamental events of life such as birth, love, work and death. At the heart of every culture lies the attitude man takes to the greatest mystery: the mystery of God. Different cultures are basically different ways of facing the question of personal existence. When this question is eliminated, the culture and moral life of nations are corrupted.¹⁴⁷

Of course, the culturally and linguistically situated human agent is reconcilable with some theories of natural law. Yet it remains true that this Pope is more interested in discussing the universal and transcendent facets of man through the cultural and historical, and ultimately through the theological points of view.¹⁴⁸

In the second place, it must be remembered that the Vatican was stung by the criticism that *Humanae Vitae* (1968) reduced the moral norms concerning birth control to a kind of biologism.¹⁴⁹ Cardinal Ratzinger, who is more comfortable with the scholastic language of natural law than is Pope John Paul II, has nonetheless taken great pains to explain that natural law pertains to a "rational order" rather than to biological necessities.¹⁵⁰ Hence, we can speculate that the absence of

146. CA, *supra* note 5, § 27.

147. *Id.* § 24.

148. As the Pope says, the theological analysis "has great hermeneutical value." *Id.* § 25.

149. For the best historical survey and philosophical study of natural law and *Humanae Vitae*, see SMITH, *supra* note 54.

150. *Donum Vitae*, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day* (Feb. 22, 1987); *id.*, introduction, ¶ 3, at 8.

natural law language in *Centesimus* reflects a rhetorical strategy to avoid a reductionist construal of moral terms to the biological order. The strategy is evident in other Roman documents and locutions. For example, in his remarks on the "Occasion of the Tenth Anniversary of the Encyclical '*Pacem in Terris*,'" Cardinal Maurice Roy states that:

Although the term "nature" does in fact lend itself to serious misunderstandings, the reality intended has lost nothing of its forcefulness when it is replaced by modern synonym Such synonyms are: man, human being, human person, dignity, the rights of man or the rights of peoples, conscience, humaneness (in conduct), the struggle for justice, and, more recently, "the duty of being," the "quality of life." Could they not all be summarized in the concept of "values," which is very much used today?¹⁵¹

Whether the "misunderstandings" about the term "nature" can be alleviated by drawing from a menu of synonyms is open to question. But the Pope's very muted use of natural law concepts in his discussion of human rights represents a more general tendency in Roman documents to avoid predicating "law" of "nature."¹⁵²

Finally, and most importantly, the subject of rights is a ready-made and widely accepted means of addressing the problem of limits upon the political state. Alexander Passerin d'Entrèves once said that "the real significance of natural law must be sought in its function rather than in the doctrine itself."¹⁵³ Although this does not recommend itself as good advice for the philosopher who wishes to understand the doctri-

151. Maurice Roy, *Occasion of the Tenth Anniversary of the Encyclical "Pacem in Terris"* ¶ 128 in *THE GOSPEL OF PEACE AND JUSTICE*, *supra* note 24, at 557; *see id.* ¶ 131 ("For John XXIII, reference to nature also means defining peace as 'absolute respect for the order laid down by God.' But here again, this word jars the modern mentality, as does, even more, the idea that it summons up: a sort of complicated organic scheme or gigantic genealogical tree, in which each being and group has its predetermined place").

152. In contemporary Catholic natural law theory, this is not just a matter of muting the rhetoric. *See, e.g.* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (systematically reformulating natural law tradition with only oblique reliance on any philosophy of nature.); *see my criticism, in A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987).

153. ALEXANDER PASSERIN D'ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 35 (2d ed. 1970).

nal issues,¹⁵⁴ it is a shrewd way to cut through the often bewildering verbal protocols about natural law. Functionally speaking, the purpose of natural rights discourse is the limitation of state power.¹⁵⁵ This explains the Pope's use of natural rights language. It fits hand in glove with his interest in liberal political institutions. On this score, section twenty-nine of *Centesimus* is important, for it summarizes very clearly the functional purpose of rights.

[In totalitarian regimes] man was compelled to submit to a conception of reality imposed on him by coercion and not reached by virtue of his own reason and the exercise of his own freedom. This principle must be overturned and total recognition must be given to the rights of the human conscience, which is bound to the truth, both natural and revealed. The recognition of these rights represents the primary foundation of every authentically free political order.¹⁵⁶

The Pope gives three reasons for the urgency of the rights-based approach to the political order. First, he believes that the older forms of totalitarianism are not completely vanquished. Hence, he recommends that juridically recognized rights be established while the opportunity is at hand. Second, even in developed countries there is what the Pope calls "an excessive promotion of purely utilitarian values."¹⁵⁷ Because the state will be tempted to resolve social, economic, and political crises on a merely utilitarian basis, it is crucial to erect rights-based limits to governmental power. Third, and what is perhaps most fascinating, the Pope worries about the problem that "religious fundamentalism" will deny "to citizens of faiths other than that of the majority the full exercise of their civil and religious rights."¹⁵⁸

154. For a thoughtful criticism of the effort to use the language of natural law and natural rights without reckoning with the philosophical issues, see *supra* note 141.

155. It is interesting, for example, that the Soviet Congress of People's Deputies adopted a "Declaration of Human Rights and Freedoms" on September 5, 1991. It was a bill of rights that functioned as a provisional constitution. The first article states: "Every person possesses natural, inalienable and inviolable rights and freedoms." *N.Y. TIMES*, Sept. 7, 1991, at A5.

156. CA, *supra* note 5, § 29 (citation omitted).

157. *Id.*

158. *Id.*

Section twenty-nine of *Centesimus* is one of the most extraordinary discussions in the encyclical. Among the mischiefs against which rights are supposed to guard against, the Pope underscores those caused by political majorities—either in the name of utility, or in the name of religion. Hence, in addition to the division of governmental powers, it is necessary to provide for individual rights as checks against what majorities can effect through the government. We can recall that in section forty-four, where he discusses the rule of law, he expressly said that rights must be understood as inviolate against “even the majority of a social body.”¹⁵⁹ It is the twofold approach to limits on government—structural and rights-based—that discloses the close correspondence between *Centesimus* and the liberal model.

Once again, it would be wrong to insinuate that the convergence between the Pope’s discussion of rights and the standard liberal accounts of rights means that he operates from the same philosophical premises. The Pope’s sense of urgency for the rights-based limits upon the state is shaped by his reading of the historical events. It does not proceed from a thin account of the human good, advanced by liberal theorists like John Rawls or Ronald Dworkin.¹⁶⁰ In section twenty-nine, the Pope insists that the political order must “recognize and respect the hierarchy of the true values of human existence.” Read in context, and properly understood, the Pope does not say that we need rights to protect ourselves against a hierarchy of true values. Nor does he make anything resembling the classically liberal argument that individuals must be protected against society; rather, the argument is to protect citizens against a state-sponsored preemption of those values. We could imagine a civil situation in which basic issues of justice and human flourishing are not treated in this language of juridical rights. But that is not the political world that *Centesimus Annus* has in mind.

159. *Id.* § 44.

160. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); RONALD DWORKIN, *Liberalism in A MATTER OF PRINCIPLE* 181 (1985). For a survey and analysis of what is sometimes called “anti-perfectionistic” liberalism, see GEORGE P. GRANT, *ENGLISH-SPEAKING JUSTICE* (1985); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* (1986); and RAZ, *supra* note 22.

CONCLUSION

The chief thesis of this Article is that *Centesimus Annus* makes a decisive turn toward the liberal model of the state. It appears that the Pope has worked his way toward this position not on the basis of any particular liberal theory or theorist, but rather through the crucible of a quite different historical experience. The view of the state in *Centesimus* is not drawn from either the theory or practice of the democratic revolutions of the eighteenth century. Rather, it is taken from the experience of the totalitarian states of this century, which, in Eastern Europe and in the Third World, have ruined the institutional prerequisites of economic and political liberty far more extensively than did the despotic royalties of the *ancien régime* in Western Europe. The convergence between these two historical experiences is remarkable. This encyclical gives us reason to believe that the project of limited government is not bound to the peculiar history and experience of Western Europe and North America. Nor is its intelligibility necessarily bound to the home-grown "liberal" philosophies of the West.

We have argued that the clearest achievement of *Centesimus* is the Pope's reckoning with the problem of the modern state. Whether we view the problem from our own historical experience, or whether we see it from the standpoint of the Pope's view of the events in Eastern Europe of 1989, it is clear that liberal political and legal institutions are a good, albeit imperfect, means of limiting the power of the state. John Paul is the first modern pope to fully come to terms with this issue. While it required him to set aside the older notion of the state as the image of divine authority, he clearly understands that that model does not square with modern political realities. Most Catholics have lived in this century under the yoke of despotic political regimes that have not borne the slightest resemblance to the classical or medieval *civitas*.

Although we can only speculate about this, the Pope may be making a bid to return to what he takes to be the original source of European unity, the religious vision of human nature, while at the same time endorsing liberal political structures to protect the recovery of that vision. We should take the Pope seriously when he says that religion is the key to culture. Whereas Pope Leo XIII never compromised with respect to his

understanding of the political *civitas*, John Paul does not compromise on his vision of a religious principle for cultural unity. The principle of individual rights against political majorities, the division of the organs of state power, the warning about and limits on the welfare state need to be in place if the Catholic Church is to be about its mission of creating religiously-centered cultures. He realizes that, even in Europe, the Catholicizing of the culture is a long-term project. Whatever inherent merits there are to liberal political institutions, they are (like the *Pax Romana*) instrumentally valuable to the Church.

Nevertheless, there is a gamble in all of this. The Pope left behind a philosophical approach that is not only familiar to Catholics, but one which has much in its favor. *Centesimus Annus* does not reflect the elegant metaphysical scheme of *Rerum Novarum*. Nor does it maintain the scholastic language that shaped the thought of both conservative and progressive pontiffs over the past century. Whether this Pope's approach to issues of human nature, law, and political society can match the level of theoretical integration achieved in the older method is yet to be seen. The philosophical imprecision of *Centesimus* is not due to the fact that the Pope relies directly upon theology when he articulates the ground of rights and duties in the human person. Pope Leo's understanding of natural law was no less theological. The difference between the two consists principally in the traditional scholastic method that permitted greater clarity of expression, and allowed its practitioner to indicate more precisely how one interrelates faith and reason, grace and nature, and theology and philosophy. This encyclical leaves much to be desired in this respect.

The rights-based strategy for limiting the power of the state harbors a number of potential problems which this encyclical does not address. It is one thing to set aside the older natural law account of the state, but it is quite another thing to argue for natural rights without some grounding in a doctrine of natural law. *Centesimus Annus* seems to ground these rights in a personalist-theological view of the human person, but without any of the intermediate reasons traditionally associated with natural law. Do the declarations of international bodies depend upon the theology of the Catholic Church, or does the theology of the Church merely provide a clearer, surer picture of the ground and end of human rights? This

would seem to be an elementary philosophical issue. But, as we have said, it is left hanging in the encyclical.

There is also the danger that the rights-language, without the older metaphysical scheme, or at least without something that plays the same role, will lead to the "thin" accounts of the human good that are so typical of contemporary liberal thought.¹⁶¹ The Pope insists that the relation between the state and its citizens must be seen in terms of the "hierarchy of the true values of human existence."¹⁶² However, a perplexing issue must be faced in this regard. First, the encyclical does not indicate with any philosophical precision which theory of the correct hierarchy is suitable for legal enactment. Is it reasonable to expect the new democracies to enact a theological conception of the hierarchy of values even as they adopt the political and legal structures advocated by the encyclical—structures that take the right to religious liberty as a "primary" ground for limiting the state?¹⁶³ For example, the former Czechoslovakian President Vaclav Havel recently said at Lehigh University that he is "in favor of a political system based on the citizen, and recognizing all his fundamental civil and human rights in their universal validity."¹⁶⁴ The state, he said,

161. For two recent critical studies of the compatibility of modern rights discourse and the older natural law tradition, see Ralph McNerny, *Natural Law and Human Rights*, 36 *AM. J. JURIS.* 1 (1991); James V. Schall, *Human Rights as an Ideological Project*, 32 *AM. J. JURIS.* 47 (1987).

162. *CA*, *supra* note 5, § 29.

163. The Pope writes:

Nor does the church close her eyes to the danger of fanaticism or fundamentalism among those who, in the name of an ideology which purports to be scientific or religious, claim the right to impose on others their own concept of what is true and good. Christian truth is not of this kind. Since it is not an ideology, the Christian faith does not presume to imprison changing sociopolitical realities in a rigid schema, and it recognizes that human life is realized in history in conditions that are diverse and imperfect. Furthermore, in constantly reaffirming the transcendent dignity of the person, the church's method is always that of respect for freedom.

CA, *supra* note 5, § 46 (citation omitted). Conceding to the Pope his claim that the Christian faith is not an ideology, it nevertheless is a conception of the origin and end of human beings. Can a non-ideological, though religious, conception of the truth be rightfully legislated? To what extent can limits on the state explicitly include provisions which put the legislation of religious views out of bounds? The encyclical is not entirely clear on these questions. The encyclical, for example, calls for a right to "Sunday rest," a human rights "based on a commandment." *Id.* § 9.

164. Vaclav Havel, *On Home, Address at Lehigh University* (Oct. 26, 1991) in 38 *N.Y. REV. BOOKS* 49 (Dec. 5, 1991).

must be based upon rights rather than “nationality” or “religion.” The question, then, is whether the impetus toward rights-based limits upon the state can practically be harmonized with the more traditional theological understanding of values. Lists of rights—even supposing such rights to be objectively important—are not the same thing as a hierarchy of values.¹⁶⁵ In the North Atlantic world, efforts to make constitutional and legally considered lists of rights correspond to any particular hierarchy of values have not met with great success.

The Pope might learn from U.S. historical and institutional experience, in which the all-purpose and vague notions of natural rights have sometimes tended to subvert the appreciation of the common good. Given the Pope’s strong endorsement of the rule of law, there is the related problem of how to litigate, balance, and enforce all of these rights. While *Centesimus* reflects a keen appreciation of institutional limits upon the power of the state, the encyclical is not very illuminating on the institutional problems that attend the expansion of rights claims by individuals. What, for instance, are the judicial and administrative implications of a right to “express one’s personality in the workplace”?¹⁶⁶ Whatever meaning such a right might have in Warsaw, it is apt to have a quite different one in Malibu, California. How might the recognition of this right affect the prospects of economic development and investment in the Third World? Might it not tend to expand rather than limit the power of governmental bureaucracies?

Finally, the jury is still out as to whether the institutional arrangements of liberal political regimes protect the cultural and religious sphere envisaged by Pope John Paul II. Liberal institutions are not neutral devices. Friedrich A. Hayek contended that “[a] Great Society has nothing to do with, and is in fact irreconcilable with ‘solidarity’ in the true sense of unitedness in the pursuit of known common goals.”¹⁶⁷ According to Professor Hayek, the chief common purpose of a liberal order

165. Immediately after the failed coup d’état, the Soviet Congress of People’s Deputies adopted a “Declaration of Human Rights and Freedoms.” The first article states: “Every person possess natural, inalienable and inviolable rights and freedoms.” N.Y. TIMES, Sept. 7, 1991, at A5.

166. CA, *supra* note 5, § 15.

167. 2 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 111 (1976) (citation omitted).

“is the purely instrumental one of securing the formation of an abstract order that has no specific purposes but will enhance for all the prospects of achieving their respective purposes.”¹⁶⁸ Indeed, for Professor Hayek the traits which distinguish a liberal order from the “end-connected tribal society” are (1) the rejection of the notion that the rule of law is not committed to a “particular hierarchy binding upon the members,”¹⁶⁹ and (2) the recognition that the market “serves the multiplicity of separate and incommensurable ends of all its separate members.”¹⁷⁰ This is not the place to engage Professor Hayek’s philosophy at the level of detail that it deserves. But Professor Hayek is surely correct to observe that the liberal view of political, legal, and economic institutions has broad implications for the cultural sphere. While *Centesimus* goes further than previous encyclicals in distinguishing the ideal of solidarity from the institutions of the political state, it certainly does not go so far as Professor Hayek. Is it possible to enjoy the political, legal, and economic institutions of what Professor Hayek calls the “Great Society,” without undermining or rendering irrelevant the traditional conception of solidarity, culture, and religion?

In any event, the historical career of the Marxist state in Eastern Europe is closed; the historical career of how these peoples can forge an appropriate political and legal order is still to be written. *Centesimus* takes the gamble of recommending new institutional ways to engage that project—ways concerning which the Church has had relatively little experience. But given its much longer historical experience, and its capacity to resist the degraded ideological baggage that frequently goes under the name of “liberalism,” the Church could prove to be a crucial force for the project of limited government.

168. *Id.* at 110.

169. *Id.* at 15.

170. *Id.* at 108.