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The Decreasing Ontological Density of the State in Catholic Social Doctrine

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Patrick McKinley Brennan

Abstract

Over the last century-plus, Catholic social thought has gradually reduced the ontological density of the state, to the point that the state now appears to have only a tentative grasp on the natural law basis of its legitimacy. During the first part of the twentieth century, Catholic social doctrine tended to view the legitimate state as a participant in the divine rule; although draped in a sacred mantle, the state was subject to the limits imposed by the divine and natural law. In response to the totalitarian states' transgressing of those limits at mid-century, Catholic thinkers reduced the scope and stature of the state's place in man's life in society, while insisting that the state remain tethered to the natural law. Today, however, Catholics and others face a laicized state that utterly denies its obligations under the natural law. While Pope John Paul II eventually responded to this denial by emphasizing the natural law limits on the state, Pope Benedict has instead summoned leaders and citizens to acknowledge and develop a state that is committed to "reason," even if this means inviting unbelievers to act "as if God exists." As understood by Pope Benedict XVI, the state, a servant of individuals and diverse societies, is to receive its content and direction from, among other sources, the Church; it is to receive reason purified by faith.

THE DECREASING ONTOLOGICAL DENSITY OF THE STATE IN CATHOLIC SOCIAL DOCTRINE

Patrick McKinley Brennan[1]

"There are a hundred reasons for opposition to the natural law, but this is one of them and at certain times it may be the strongest: obligation in natural law does not hold unless the natural law exists in a state which is actually prior, but which is ultimate in the order of discovery – 'this law is an aspect of God.'"

--Yves R. Simon[2]

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[2] YVES R. SIMON, THE TRADITION OF NATURAL LAW 139 (1965).

INTRODUCTION

"*Dignitatis humane personae hac nostra aetate*:" With these words the fathers of the Second Vatican Council (1962-65) began the "Declaration on Religious Liberty," *Dignitatis Humanae* (1965): "In our day men are becoming increasingly conscious of the dignity of the human person." More than four decades have passed since the Council made this claim on behalf of a dawning awareness of human dignity. Today, dignity is the familiar fountainhead of post-conciliar Catholic social doctrine. Not only the other conciliar documents, but then the teaching documents of Pope John Paul II, the *Catechism of the Catholic Church*, and the recent *Compendium of the Social Doctrine of the Church* alike make the dignity of the human person a primary point of departure for practical reflection on man's life in this world and beyond. In the words of the *Compendium*: "The Book of Genesis provides us with certain foundations of Christian anthropology: the inalienable dignity of the human person, the roots and guarantee of which are found in God's design of creation . . . ."[3]

Less familiar than the train of thought I have just telescoped is one currently under construction by the United States Supreme Court, according to which the fifty states of the union are each possessed of "sovereign dignity." In a rambunctious series of cases decided over the last decade, the Court has propounded and given effect to the view that the states "retain the dignity, though not the full authority, of sovereignty."[4] In sum,

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[3] PONTIFICIAL COUNCIL FOR JUSTICE AND PEACE, COMEPNDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 37 (2004).

[4] ALDEN v. MAINE, 527 U.S. 706, 715 (1999). *See* Patrick Mckinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, NOTRE DAME L. REV. (forthcoming 2007).

it is the judgment of the Supreme Court that states are immune to unconsented private suit thanks to their "sovereignty" and "sovereign dignity."[5]

Some students of the Court have discounted the Court's jurisprudence of "sovereign dignity" and other (as one commentator has dubbed them) "big ideas" on the ground that they are mere "rhetorical flourish."[6] This is an ominous course of action when one pauses to notice that the coercive effect given the Court's rhetoric leads to the denial of an otherwise required legal remedy to injured plaintiffs. Different language would justify or call for a different course, perhaps one closer to a correspondence between legal right and legal remedy.

The denial of an otherwise enforceable remedy is not, however, the leading reason for not blinking the Court's claims on behalf of sovereign states: These ideas make progress in men's minds. As Russell Hittinger has observed, "If we ask a modern person who or what is sovereign, he or she would not say 'reason,' 'the individual,' or 'science,' but instead, without hesitation, 'the state.'"[7] The Court's recent sovereignty and sovereign dignity jurisprudence may, as I have argued elsewhere[8], make hash of the inherited understandings of Article III of the Constitution, of the Eleventh Amendment thereto, and of the common law privilege by which the king was immune to suit. At the same time, however, the Court's ontologically baroque jurisprudence plays right into the

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[5] The exception is when Congress acts under sec. 5 of the 14th Amendment. *See* FITZPATRICK v. BITZER, 427 U.S. 445 (1976), or perhaps under analogous sections of the other Reconstruction Amendments.
[6] Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1040 (2000).
[7] Russell Hittinger, *Introduction to Modern Catholicism, in* I THE TEACHINGS OF MODERN CHRISTIANITY 3, 4 (John Witte Jr. & Frank S. Alexander ed., 2006).
[8] *See* Brennan, *supra* note 4.

modern mind described by Hittinger. The irony is thick. The state that by its own oracular confession is axiologically incompetent to pass on questions of the good, turns out to be free to declare itself sovereign -- and no one arches an eyebrow.[9] The fact that friends and less friendly critics tell me that the Supreme Court's essays in the sovereignty and sovereign dignity of the United States and of the fifty states are in service of the noble goal of "our federalism" just tends to demonstrate that people are strangely *comfortable* with the idea that the state is, in fact, possessed of sovereignty and is, therefore(?), the preeminent locus of dignity.[10]

Of course, whether the proposition that the state is sovereign and possessed of "sovereign dignity" should be judged correct depends on what one means by "sovereign," and it is by no means a univocal term. There was a time when the Church, united with the state, blessed the idea that the state was a *sacrum*, a unity of order possessed of the dignity of a group person in the image of God the sovereign ruler of the universe. In the judgment of modern Catholic social doctrine, however, it is clear, and increasingly so, that the state is not "sovereign" in any ordinary meaning of the term. Indeed, over the course of the last century-plus, the Church gradually converged on the judgment that the state is a servant-instrument of persons and of the societies in which they reach whatever perfection of which they are capable. Though the state enjoys a certain dignity from its end (the service of the common good of the body politic), the trend has been "a steady

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[9] The mandatory cite is of course to the "mystery passage" in the *per curiam* opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), widely thought to have been authored by Justice Kennedy.

[10] Though the Court has not, to my knowledge, explicated the point, it would seem that the claim is that the state's sovereignty entails its (sovereign) dignity.

deterioration of any ontological density to the state."[11] The state has to "achieve its true dignity,"[12] and this it would do by implementing the natural law, for the common good.

Until shortly ago, it would have been largely uncontroversial to observe that the state, though less ontologically thick than it used to be, achieves its end by serving to implement the natural law, as life's contingencies require or allow.[13] The rub comes, though, when the state deems itself not bound by the natural law, that is, when the state becomes absolute, *ab-solutus*, un-bound -- the boast of the modern sovereign lionized by Thomas Hobbes and his ideological descendants, and conjured by the Supreme Court in its incantations of sovereignty.[14] The Church laicized the state on the understanding that the state would of course continue to be bound by the natural law. The rub under which we live is a state that considers itself free, indeed somehow obligated, to disregard the natural law.[15]

Until recently, one could count on the the magisterium of the Church to inveigh against states that proceed in derogation from the natural law. Today, however, Pope Benedict has grown notably taciturn on the state's relationship to the natural law. By not affirming that the state is possessed of access to – and is bound by -- the natural law, by

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[11] Hittinger, *supra* note 7, at 22.
[12] JACQUES MARITAIN, MAN AND THE STATE 19 (1951).
[13] The state's responsibility to implement the natural law does not entail "judicial activism," *pace* what some one hears from some contemporary conservatives. Regarding the limitations on a judge in a state committed to implementing the natural law, *see* RUSSELL HITTINGER, THE FIRST GRACE 77, 115-33 (2003).
[14] In defending its claims on behalf of state sovereignty, the Court explains that natural law is irrelevant: "In an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law. We seek to discover, however, only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system. We appeal to no higher authority than the Charter which they wrote and adopted." *Alden*, 527 U.S. at 758.
[15] *See* Hittinger, *supra* note 7, at 29-31.

not teaching that the state makes positive law by legislating in accordance with or giving determination/specification to the natural law, Pope Benedict has allowed a question about the legal basis of the state's authority to make law.

There will be much more to say about this, but first *nota bene*: This paper does not make the patently false claim that Benedict commends or acknowledges a state founded, as it were, on relativism. Pope Benedict XVI's teaching on society and state are conspicuous for their insistence that we, no matter who we are, must take our social bearings from objective reason.[16] Rather, my claim is that in the writings Cardinal Ratzinger and now Pope Benedict, the state appears no longer to be part of the divine, legal governance. As Benedict describes the state, it undertakes to make law and does indeed produce something that we refer to as "law," but it does so without first having received (the natural) law. My question is this: How a state that has no access to law can proceed to make law, without being itself lawless?

In Part I, I outline the understanding of law, state, and society advanced in the 2005 encyclical letter *Deus caritas est*, Pope Benedict's first major teaching document. Parts II and III chronicle the proximate background against which Benedict was writing, calling attention to ways in which *Deus caritas* seeks to amend or emend relevant facets of the tradition descending from Pope Leo XIII's 1891 encyclical *Rerum novarum* to John Paul II's celebration of its centenary in the 1991 encyclical *Centesimus annus*. Part IV provides a summary statement of the classical twentieth-century Catholic statement on

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[16] *See, e.g.,* JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES 47-49 (2005); WITHOUT ROOTS 127-31 (2006); VALUES IN A TIME OF UPHEAVAL 27-29 (2006).

man, state, and society, relying principally on the work of Jacques Maritain (1882-1973). On that account, the instrumentalist state, no longer ontologically baroque, is the servant of men and women who implement the natural law through pluriform societies, including political society served by the state. The burden of the final two sections is to show several ways in which Cardinal Ratzinger and Pope Benedict deviate from the classical instrumentalist state articulated by Maritain and others, and deliver in its stead a state whose positive "laws" lack divine *legal* warrant.

I. A first statement of the social order according to "*Deus caritas est*"

The encyclical *Deus caritas* comes to consider the state of the state by way of meeting the Marxist's old objection to the Church's historical performance of and encouragement of works of charity.[17] In an encyclical conceived to encourage ecclesial and individual Christians' acts of charity, the Pope concedes that there is "some truth" to the objection that the proliferation of acts of charity can tend to preserve a status quo of dependency and injustice. The Pope's first characterization of the end of the state occurs in this context, and is as follows: "It is true that the pursuit of justice must be a fundamental norm of the state and that the aim (*finis*) of a just social order is to guarantee to each person, according to the principle of subsidiarity (*principio subsidiarietatis*), his share of the community's goods."[18] In adding a layer to the inherited body of social

[17] Pope Benedict XVI, Deus Caritas Est (2005), available at http://www.vatican.edu/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html.
[18] *Id.* at No. 26.

doctrine, Benedict thus begins by teaching that the end of what we call in English the state, for which Benedict's Latin is *civitas*, is the creation of a just social order. The state is not an end in itself. "Politics," the Pope continues, has as "its fundamental task (*munus*) the just ordering of society and the state." The Pope goes on immediately to quote Augustine's aphorism according to which a *civitas* "not governed according to justice would be just a bunch of thieves." Benedict elaborates:

> Justice is both the aim (*finis*) and the intrinsic criterion of all politics. Politics is more than a simple, technical art for defining the rules of public life: its origin and goal are found in justice, which by its very nature has to do with ethics. So the state cannot avoid the question: how is justice to be achieved here and now? But this question presupposes an even more radical one: What is justice? This is a question of practical reason, but, if reason is to be exercised properly, it must undergo constant purification.[19]

Here, Benedict continues, "politics and faith meet." According to the Pope, "Faith," "an encounter with the living God," "liberates reason from its blind spots" and thus helps it "to see its proper object more clearly." "This is where Catholic social doctrine has its place," the Pope explains. It does not "give the Church power over the state," let alone "impose on those who do not share the faith ways of thinking and modes of conduct proper to faith." In sum: "Its aim is simply to help purify reason and to contribute, here and now, to the acknowledgment and attainment of what is just."[20] Lest

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[19] *Id.* at No. 28(a).
[20] *Id.*

there be any ambiguity about basis of the teaching: "The Church's social doctrine argues on the basis of reason and the natural law, that is, on the basis of what is in accord with the nature of the human person," "*a ratione et a naturali iure, id est ab eo quod congruit naturae cuiusque personae humanae.*"[21] We shall have to return to this remarkable formulation in due course.

Next, continuing to develop his thesis about the insufficiency of justice, both as motivator and as end, the Pope explains: "There is no civil ordering so just as to eliminate the need for the service of love." Benedict continues, further characterizing the state: "The State which would provide everything, absorbing everything into itself, would ultimately become a mere bureaucracy incapable of guaranteeing the very thing the suffering person – every person – needs: namely, loving personal concern." Finally, in giving his most concrete indication of what the state can and should be, the Pope reintroduces, and for the first time in the encyclical gives flesh to the bones of, the principle of subsidiarity: "We do not need a state which regulates and controls everything, but a State which, in accordance with the principle of subsidiarity, generously acknowledges and supports initiatives arising from the different social forces (*ex variis socialibus viribus*) and combines spontaneity with closeness to those in need."[22] The Church herself, the Pope immediately adds, "is one of those living forces."

In sum: The encyclical teaches that human persons engage in politics in order to secure justice and also to allow opportunities for charity. The social forces in which

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[21] *Id.*
[22] *Id.* at No. 28(b).

persons are united, for example in the Church, are to be acknowledged and encouraged. This is part of the role of the state, and a state that ignored or dissolved those bonds by substituting itself in their place would violate the principle of subsidiarity. Though properly ecclesial acts of charity must never be confused for acts of the state, the Pope concludes, quoting the *Catechism of the Catholic Church*, that "charity must animate the entire lives of the lay faithful and therefore also their political activity, lived as 'social charity,'" a term of art Benedict receives from Pius XI. Succinctly: "The mission of the lay faithful is . . . to configure social life correctly" and realize the conditions of the "'common good.'" This is "the world of politics," in which the Church herself has only an "indirect office," that of purifying reason and "reawakening . . . those moral forces without which just structures are neither established nor prove effective in the long run."[23]

II. The Social Order in the Proximate Tradition: Leo XIII

In turning now to ask what Benedict has added to or subtracted from the tradition, which disputed questions he has resolved and which he has exacerbated, the place to begin is Pope Leo XIII's social encyclicals, the first papal contribution to what Pope Pius XI (r. 1922-39) termed, in his 1931 encyclical *Quadragesimo anno*, "social . . . doctrine."[24] Benedict credits Leo with ending the papal magisterium neglect to study

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[23] *Id.* at No. 29.

[24] Pope Pius XI, Quadragesimo Anno No. 21 (1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html. *See* Mary Elsbernd, Papal Statements on Rights: A Historical Contextual Study of

individuals' needs in radically changed social circumstances, above all in his landmark encyclical *Rerum novarum*. Among that encyclical's novel and more or less enduring contributions are an articulation of the rights of workers (e.g., time off, limited hours) and an affirmation of the validity of workers' associations, the forerunners of today's trade unions. (Oddly from today's vantage point, Leo reaches novel rights of workers to associate from an analysis of family society and of the natural right to property). In affirming workers' rights to associate themselves, and apart from management, the encyclical rejected the so-called "corporatist" position that would have sanctioned exclusively *hierarchical* associations composed of both management and workers.[25] This was a bold and hard-won development; it was, in a word, modern.

In its assumptions and expressions about the essence of the state itself, however, Leo's encyclical is, in its essentials, utterly traditional, which is to say, committed to an ontologically dense state. Like all subsequent encyclicals that consider the state, *Rerum novarum* declines to endorse any particular form(s) of government. "By the State," Leo wrote in *Rerum novarum*, "we here understand, not the particular form of government prevailing in this or that nation, but the State as rightly apprehended." The exact form is not specified; "the State as rightly apprehended is "any government conformable in its institutions to right reason and natural law, and to those dictates of the divine reason . . . ."[26] More specifically, Leo taught that because God the author of nature "wills that man

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Encyclical Teaching From Pius VI-Pius XI (1791-1939) 587 n. 1 (1985) (unpublished Ph.D. dissertation, Catholic University of Leuven) (on file with author).

[25] Thomas A. Shannon, *Commentary on Rerum novarum*, *in* MODERN CATHOLIC SOCIAL TEACHING 127, 145-46 (Kenneth R. Himes et al. ed., 2004).

[26] Pope Leo XIII, Rerum Novarum No. 32 (1891) (citing Immortale Dei), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

should live in society," that is, that it is in man's nature to associate in (among other forms) civil society, and further because "a society can neither exist nor be conceived in which there is no one to govern the wills of individuals," "God has willed that in civil society there should be some to rule the multitude."[27] Leo never lets his reader lose sight of the "the divine origin of all authority."[28] The people designate the ruler; they in no way confer ruling authority.[29] "[N]o man has in himself or of himself the power of constraining the free will of others by fetters of authority [that calls for obedience]. This power resides solely (*unice*) in God, the Creator and Legislator of all things; and it is necessary that those who exercise it should do so as having received it from God."[30] Leo's state is ontologically dense because it is nothing short of a participation or reception of, or participation in, divine ruling power.

Post-Leonine magisterial teachings do not deny that all authority is from God, but whereas many subsequent magisterial and other Catholic theories argued that such authority passed from God to civil leaders by way of the people (the so-called transmission or translation theory, first developed by Jesuits in the sixteenth and seventeenth centuries), Leo himself stayed far away from this theory.[31] No doubt Leo realized that the theory lends itself to the *mis*understanding that ruling power is from man, not God. On Leo's account of man, state, and society, all authority emanates from

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[27] Pope Leo XIII, Diuturnum No. 11 (1881), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_29061881_diuturnum_en.html.

[28] Pope Leo XIII, Aeterni Patris No. 29 (1879), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris_en.html.

[29] Leo XIII, *supra* note 27, at Nos. 5-7.

[30] *Id.* at No. 11.

[31] For a compendious exploration of the transmission theory, *see* YVES R. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 157-79 (1951).

God alone, and very clearly so. Says Leo, quoting Romans 13:1: "[C]ivil power, considered as such, is from God, always from God: 'For there is no power but from God.'"[32]

How does God give civil power or ruling authority to man? Leo's answer to this question flows from his Thomistic understanding of the *natural law*. Before I describe that understanding, it cannot be said emphatically enough that Leo's concept of the natural law differs *toto caelo* from most conceptions of the same that are debated today, especially the one popularized by John Finnis, Germaine Grisez, and Joseph Boyle, as well as, to pick another example, the revisionist reading of Aquinas advanced by Anthony Lisska.[33] While I cannot here give anything approaching an adequate description, let alone defense, of the teaching on natural law that St. Thomas developed and Leo in due course appropriated, one can, in rather short order, highlight the essentials that distinguish it from the later declension. What is most conspicuous, for Thomas and Leo it's law all the way up and all the way down, as it were. The foundation of Leo's account of man, society, and the state, and specifically of the power to make positive law, is man's natural law participation in the eternal law. "The theme of law is paramount to Leo's understanding of how human persons and their works stand within God's ordering wisdom."[34]

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[32] Pope Leo XIII, Au Milieu Des Sollicitudes No. 18 (1892), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_16021892_au-milieu-des-sollicitudes_en.html. On Leo's not having ruled out the translation/transmission theory, *see* HEINRICH ROMMEN, THE STATE IN CATHOLIC THOUGHT 469-71 (1945).

[33] *See, e.g.,* John Finnis, Germain Grisez & Joseph Boyle, *Practical Principals, Moral Truths and Ultimate Ends*, 32 AM. J. JURIS. 99 (1987); ANTHONY LISSKA, AQUINAS'S THEORY OF NATURAL LAW: AN ANALYTIC RECONSTRUCTION (1996). *See also* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999).

[34] Russell Hittinger, *Pope Leo XIII (1810-1903), in* I THE TEACHINGS OF MODERN CHRISTIANITY, *supra* note 7, at 39, 48.

According to Thomas, to whom Leo turned, the natural law and the eternal law are not "diverse," or entirely different, from each other. In question 91, article 2 of the *Summa theologiae*, which asks whether there is a natural law (and of course answers in the affirmative), Thomas replies to one of the objections as follows: "This argument would hold, if the natural law were something diverse from the eternal law: whereas it is nothing but a participation thereof." This formulation recalls the thesis of the preceding *corpus* of the article:

> Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being both provident for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. . . .

After further analysis, Thomas concludes: "It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law." Consistently, when considering laws *other* than the eternal law, such as the divine positive law, Thomas omits to mention the natural law.[35] This is because, on his view, the natural law is not other than the eternal law. "The natural law is called natural according to the mode of promulgation and reception, not the pedigree of legislation."[36] The natural law is the

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[35] *See, e.g.,* THOMAS AQUINAS, SUMMA THEOLOGIAE, Q. 93, art. 3.
[36] HITTINGER, *supra* note 13, at 97.

eternal law instilled in us so as to be known naturally.[37] God promulgates the natural law in us, and, having received it, we are to abide by it in our individual and collective living.

Just how the reception of the natural law occurs in the rational person is a complex question, vigorously disputed among otherwise mutually congenial Thomists. Some emphasize the rational quality of the knowledge, while others, such as Jacques Maritain, stress the way in which the knowledge is through inclination or connaturality. We need not settle or even further clarify the issue for the present purpose. The cardinal point, from the point of view of the Leonine-Thomistic account of law and the state, is this:

> Every created intelligence not only has a competence to make judgments, but to make judgments according to a real law – indeed, a law that is the form and pattern of all other laws. Thus, the legal order of things does not begin with an acquired virtue, possessed by a few; nor does it begin with the offices and statutes of human positive law; nor does it begin with the law revealed at Sinai. God speaks the law, at least in its rudiments, to every intelligent creature.[38]

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[37] *Id.*

[38] *Id.* at 98. By way of intellectual autobiography, I should say that while it was Russell Hittinger's work on St. Thomas that finally convinced me of this reading of Thomas on law, it was the dissertation of Stephen Louis Brock, which he was completing at the Pontifical Institute of Mediaeval Studies in Toronto in the late 1980s while I was a student there, that first and most comprehensively made the case for me, and I have relied on it here. *See* Stephen Louis Brock, The Legal Character of Natural Law According to St. Thomas Aquinas (1988) (unpublished Ph.D. dissertation, University of Toronto). *See also* James P. Reilly, Jr., "Saint Thomas on Law," 5-6, 12-17 (The Etienne Gilson Lecture, 1988). Reilly was one of Brock's dissertation directors.

In short, having received a law, man can proceed to make more law, in conformity with the received law. This is the consequence of the natural law's being the rational creature's participation in the eternal law.[39]

Turning from Thomas himself to Leo's appropriation of the Thomist doctrine for purposes of articulating a papal theory of man, society, and the state, we find Leo maintaining that all power of governance derives from God "as from a natural and necessary principle."[40] This "necessary principle" is the eternal law, of which the natural law is the human person's first participation of God's (sole) governance of the universe.[41] On Leo's model, those whom the people have designated to rule participate, as do all people, in the eternal law; those designated to rule by law possess authority over political society, and through law give it the order it should have. "Authority," Leo explains,

> is the one and only foundation of law – the power, that is, of fixing duties and defining rights, [and so forth]. But all this, clearly, cannot be found in man, if, as his own supreme legislator, he is to be the [supreme] rule of his own actions. It follows, therefore, that the law of nature is the same thing as the eternal law, implanted on rational creatures, and inclining them to

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[39] Not every human judgment reached in conformity with the natural law is itself a law, however. In order for a person to make law, he or she must be duly charged with the common good. A parent can and should judge according to the natural law, but his binding practical judgment is not a "law" for the child. *See* HITTINGER, *supra* note 13, at 100, 111.

[40] Leo XIII, *supra* note 27, at No. 5.

[41] *See* Russell Hittinger, *The Problem of the State in Centesimus Annus*, 15 FORDHAM INT'L L.J. 952 (1992).

> their right action and end; and can be nothing else but the eternal reason of God, the Creator and Ruler of the world.[42]

Leo's state is ontologically dense, because caught up in and a consequence of the divine rule of the cosmos. "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. The state, [Leo] said, is a 'likeness and symbol as it were of the Divine majesty.' By dint of participation in God's governance, its ruling powers properly can be called 'sacred.'"[43] According to Leo, "in civil society, God has always willed that there should be a ruling authority [principatus], and that they who are invested with it should reflect the divine power and providence in some measure over the human race."[44] The state is no mere instrument, but a reflection of the divine sovereignty. All ruling power is *ad imaginem Dei*.[45]

The ontological density of Leo's state comes into further focus as we zero in on the fact that, for Leo, the Church and the state have the same source of authority and, in fact, a similar mode of possessing it. Both come directly from God, and if there be greater latitude in terms of how authority is to be possessed in the state than in the

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[42] Pope Leo XIII, Libertas No. 8 (1888), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_20061888_libertas_en.html.
[43] Hittinger, *supra* note 41, at 965.
[44] Pope Leo XIII, Immortale Dei No. 4 (1885), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei_en.html.
[45] *See* Pope Leo XIII, Quod Apostolici Muneris No. 6 (1878), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_28121878_quod-apostolici-muneris_en.html.

Church, still "the state was to be the moral mirror of the Church in the secular realm."[46] The Church was the superior society, the *societas perfecta*, but the state, its moral mirror, enjoyed the exalted function of assisting the Church in making men moral and getting them to heaven.

Leo's paternalistic state, for all its undeniable ontological density, is emphatically not, however, totalizing or totalitarian. The state is *limited*. The state -- or we might say, with precision that is not Leo's, political society (or the body politic) under civil authority -- is limited, first of all, by the supernatural society that is the Church.[47] Indeed, as a matter of history, a principal reason for Leo's concern with the state was to see that the Church was left freedom and room to fulfill her mission. (In the Leonine prayers that used to follow Low Mass, the faithful and their clergy prayed for "the freedom of . . . Holy Mother the Church").

Also *limiting* the state, moreover, are the societies that are "rough-hewn[48] by nature" itself, preeminently political society, marriage, and the family.[49] Not only these societies whose forms are given (the Church's supernaturally, the family's both naturally and supernaturally), but also those that humans create, as time and circumstance allow or demand, based on man's natural "tendency to dwell in society"[50] bound the state. For example: sodalities and unions and schools, as well as monasteries and religious orders such as the Carthusians, the Augustinians, the Jesuits. These, too, the state must respect

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[46] Ebersbend, *supra* note 24, at 266.
[47] Leo XIII, *supra* note 26, at No. 53. *See generally* Leo XIII, *supra* note 27.
[48] MARITAIN, *supra* note 12, at 4.
[49] Leo XIII, *supra* note 36, at No. 51.
[50] *Id.*

and not absorb. In sum, the ontological abundance of such smaller societies, each a participated share in the divine rule, *both* gives density to civil society under legitimate authority which, as it were, contains them, *and*, correlatively, places limits on the authority that rules civil society, for it recognizes authority that is not the state's.

Finally, (and this would almost go without saying except that it is exactly what the modern liberal democracies have forgotten or denied), even within its legitimate sphere of action, the state is *limited* by the fact that it cannot obligate or (except on prudential grounds) permit conduct that would violate the natural (or the divine positive) law.[51] Obviously, this is entailed by all ruling authority's being man's natural law sharing in the divine ruling power, according to which, as Leo says, "[God] disposes all things sweetly [suaviter], because to all things He gives forms and powers inclining them to that which He Himself moves them, so that they tend toward it not by force, but as if it were by their own free accord."[52] The sweeping picture is one of God sweetly leading rational creatures to their ends through the internal communication of obligation to be responded to in freedom exercised to implement the content of that obligation.

Not to put the point too sharply, a state whose authorities *both* can *and* are obligated to judge according to a participated share in the divine rule, according to law imbued in man's very own nature, does not profess, as the Supreme Court did in *Planned Parenthood v. Casey*, a judicially enforceable "right to define one's own concept of

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[51] Leo XIII, *supra* note 27, at No. 15; *supra* note 42, at No. 42. *See* Ebersbend, *supra* note 24, at 264.
[52] Pope Leo XIII, Aeterni Patris No. 2 (1879), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris_en.html.

existence, of meaning, of the universe, and of the mystery of human life."[53] This is a principal point to which we must return after assessing Benedict's encyclical's capacity to address it, but first we should lay out more of the structure that Benedict inherited.

III. The Social Order in the Proximate Tradition: From Pius XI to John Paul II

Moving ahead forty years from Leo's publication of *Rerum novarum*, to Pope Pius XI's celebration, application, and development of the same in *Quadragesimo anno*, we reach the high-water mark of the papal effort to create a neo-Thomist synthesis respecting Church, state, and society. "The most significant and vital topic of [*Quadragesimo anno*], was "the re-establishment of a truly Christian social order,"[54] which Pius sketches, quoting St. Paul to the Church at Ephesus, in organic terms that are evocative of Leo:

> If the members of the body social [ ] are . . . reconstituted, and if the directing principle of economic social life is restored, it will be possible to say in a certain sense even of this body what the Apostle says of the mystical body of Christ: "The whole body (being closely joined and knit together through every joint of the system according to the functioning in

[53] 505 U.S. 833 (1992).
[54] JOSEPH HUSSLEIN, SOCIAL WELLSPRINGS II: POPE PIUS XI 205 no. 25 (1943).

> due measure of each single part) derives its increase to the building up of itself in love."[55]

As this language makes unmistakably clear, Pius does not eschew the traditional thesis according to which membership in the hierarchical body of the state constitutes an ontological perfection of the person. However, *Quadragesimo anno* does take a large step toward the "instrumentalist" view of the state that Pius XI's successor, Pius XII, would advance in 1939, a month after the invasion of Poland. The principal contribution of Pius XI to the Catholic understanding of man, society, and the state was to affirm and emphasize a social order rich in diverse societies or associations that, as for Leo, *limit* the state. Pius affirms the following limits on the emergent modern state:

> When we speak of the reform of institutions, the State [ ] comes chiefly to mind, not as if universal well-being were to be expected of its activity, but because things have come to such a pass through the evil of what we have termed "individualism" that, following upon the overthrow and near extinction of that rich social life that was once highly developed through associations of various kinds, there remain virtually only individuals and the State. This is to the great harm of the State itself; for, with a structure of social governance lost, and the taking over of all the burdens which the

[55] Pius XI, *supra* note 24, at No. 90.

> wrecked associations once bore, the State has been overwhelmed and crushed by almost infinite tasks and duties.[56]

In the next paragraph of the encyclical, after conceding that changed circumstances indicate that what was once done by small associations may indeed have to be performed by larger associations, Pius announces "that most weighty principle, which cannot be set aside or changed, [and which] remains fixed and unshaken in social philosophy:"

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community [ ], so also is it an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature nature to furnish help to the members of the body social, and never destroy and absorb them.[57]

This, of course, is the classic formulation of what is known as the principle of subsidiarity, to which Pius gives additional expression in the succeeding paragraph:

> [T]hose in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of

[56] *Id.* at No. 78.
[57] *Id.* at No. 79.

> "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.[58]

What Pius describes as a fixed and unshaken principle of social philosophy had never been mentioned by name, let alone defined, in a prior encyclical, nor would St. Thomas, whose philosophy guided Leo XIII and Pius XI, have quite recognized it, though one can regard it as a legitimate development of inherited Thomistic principles, in response to modern social problems. Pius received the principle of "subsidiary function" or, as it came to be called, subsidiarity, from the work of the Italian Jesuit Thomist Luigi Taparelli, whose self-appointed task it was, in the context of the mid-nineteenth century unification in Italy, to oppose, based true on Thomistic principles, not only the overtly dangerous doctrines of Hobbes, Locke, and Rousseau, but also those of such slippery thinkers as Burlamaqui, Pufendorf, and Grotius.[59]

Taparelli's original work is thick with neologisms, including the Italian phrase, *dritto ipotattico*, the second word of which corresponds to the Greek *hypotaxis*, which refers to the modalities of coordination among the clauses of a sentence. Etymologically, it means "to sit under," and of this the Latin equivalent is *sub sedeo*, from which the Latin substantive is *subsidiarium*. As one scholar explains,

> The Latin expression *subsidia* [the plural of *subsidium*] applied, then, not just to mean "help" but in the first instance to auxiliary troops with the

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[58] *Id.* at No. 80.

[59] *See* Thomas Behr, *Luigi Taparelli D'Azeglio, S.J. and the Development of Scholastic Natural Law Thought As a Science of Society and Politics* J. MARKETS & MORALITY 99, 101 (2003).

> Roman legion, as they "sat below" ready in reserve to support the battle. The "help" in this context is from the bottom up, not from the top down, as the inferior and mediating groups all participate in achieving the common good of the more perfect association.[60]

Rather than, as is often supposed, a principle of devolution or lowest level function, in magisterial Catholic social doctrine, subsidiarity is a principle of respect, ordering, coordination, and, as necessary, help, among plural societies, *viz*., the supernatural society that is the Church, those that come "rough-hewn" by nature, and that those that men create through intelligence and will, for good purposes. The principle of subsidiarity *both* limits the powers of those possessed of civil authority *and* recognizes their given functions.

The social landscape that is the focus of *Quadragesimo anno* can be described as one of *pluralism*. Pius certainly did not imagine for a moment that legitimate authorities could be set up and give effect to what violates the natural or divine law; there exist no pockets of blessed derogation from man's natural law participation in the eternal law. There exist, however, plural societies, each of which, if functioning half decently, is possessed of its own genuine authority, through its participated governing share in the eternal law. The authority of the parent in and over the family, the authority of the bishop in and over the particular church, the authority of the president in and over the sodality, the authority of the abbot in and over the abbey and its monks – these are plural authorities that, though subject to apt regulation by the state with a view to the common

[60] *Id.* at 105.

good of all (individuals and their respective societies), precede the state, with which they stand on the same ontological footing that is the natural law participation in the eternal law.

What, then, can be said of the state specifically? Some commentators have concluded that, in celebrating this plural social order, Pius XI reached the view that the state is (simply) an instrument of said societies.[61] Although Pius moves in this direction, the thesis of organicity and of the state as ontological perfection of the person, quoted and discussed above, renders him a bridge figure in the progression under consideration here. It took until 1939 and Pius XII's first encyclical, *Summi pontifcatus*, for the progression to reach its new term. There the new Pope described the "*civitas*," designed by the Creator "for the natural perfection of man,"[62] as a "*quasi instrumentum*." A summary of the reasons for the emergent clarity of Pius XII on the diminished status of the state follow immediately, in the next paragraphs of the encyclical: the totalizing state, the state that takes over private initiatives, the state that forgets or denies that "man and the family are by nature anterior to the State, and that the Creator has given to both of them powers and rights and has assigned them a mission and a charge that correspond to their natural requirements."[63]

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[61] *E.g.,* W. Weber, "Society and State as a Problem for the Church," in G. ADRIANYI ET AL. THE CHURCH IN THE MODERN AGE, in H. JEDIN AND J. DOLAN (ED.), 10 THE HISTORY OF THE CHURCH 229, 242(1981).
[62] Pope Pius XII, Summi Pontificatus No. 59 (1939) (my translation); Vatican translation available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris_en.html.
[63] *Id.* at No. 60, 61.

The succeeding social encyclicals of Blessed Pope John XXIII and Pope Paul VI differ from those of the Piuses by virtue of their emphasis on human rights and "social justice" (broadly understood), but beneath the surface and frequently in the explicit statements of the texts they remain utterly traditional, discerning ruling power in man's natural law participation in the eternal law.[64] In the teachings of these two popes, the state is an instrument called forth and limned by the natural law (and its correlative natural rights), and the natural law is the human person's participation in the eternal law. In *Pacem in terris*, for example, Pope John XIII writes,

> [M]ischief is often caused by erroneous opinions. Many people think that the laws which govern men's relations with the State are the same as those which regulate the blind, elemental forces of the universe. But it is not so; the laws which govern men are quite different. The Father of the universe has inscribed them in man's nature, and that is where we must look for them; there and nowhere else.
>
> These laws clearly indicate how a man must behave toward his fellows in society, and how the mutual relationships between the members of a State and its officials are to be conducted. . . .

[64] Roger Charles, S.J, argues that natural law provides the coherent framework of Catholic social doctrine up to and including Vatican II. ROGER CHARLES, THE SOCIAL TEACHING OF VATICAN II: ITS ORIGIN AND DEVELOPMENT (1982). This view is criticized in MICHAEL J. SCHUCK, THAT THEY MAY BE ONE: THE SOCIAL TEACHING OF THE PAPAL ENCYCLICALS (1740-1989) 174-78 (1991).

Now the order which prevails in human society is wholly incorporeal in nature. Its foundation is truth . . . . [S]uch an order – universal, absolute, and immutable in its principles – finds its source in the true, personal, and transcendent God. He is the first truth, the sovereign good, and as such the deepest source from which human society, if it is to be properly constituted, creative, and worthy of man's dignity, draws its genuine vitality. This is what St. Thomas means when he says: "Human reason is the standard which measures the degree of goodness of the human will, and as such it derives from the eternal law, which is divine reason . . . . Hence it is clear that the goodness of the human will depends much more on the eternal law than on human reason."

Governmental authority . . . is a postulate of the moral order and derives from God. Consequently, laws and decrees passed in contravention of the moral order, and hence of the divine will, can have no binding force in conscience, since "it is right to obey God rather than men."

Indeed, the passing of such laws undermines the very nature of authority and results in shameful abuse. As St. Thomas teaches, "In regard to the second proposition, we maintain that human law has the rationale of law in so far as it is in accordance with right reason, and as such it obviously derives from eternal law. A law which is at variance with reason is to that

extent unjust and has no longer the rationale of law. It is rather an act of violence."[65]

When we reach the hundredth anniversary of *Rerum novarum* and Pope John Paul II's celebration of it in *Centesimus annus*, his *magna charta* on man, state, and society, we still have an instrumental state, alright, as we have had since Pius XII in 1939. Now, however, we have one to be wary of. John Paul II wrote disparagingly of "the social assistance state," "state administration," the state as a system of "bureaucratic control," and the state as a "secular religion."[66] The reasons for the Polish Pope's suspicion of the modern state do not require elaboration. The resulting teaching is clear: The state is an untrustworthy agent of civil society and particular societies within it. Professor Hittinger explains: "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."[67] "[T]here 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"[68] -- a result of the submersion and disappearance of the natural law, a point to which I shall return. According to the magisterium of John Paul II, the state is limned by the principle of subsidiarity, understood as follows, in terms that Taparelli would approve:

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[65] Pope John XXIII, Pacem in Terris No. 6, 7, 37, 38, 49, 51 (1963) (internal citations omitted), available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html.

[66] Pope John Paul II, Centesimus Annus Nos. 25, 48, 49 (1991), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html. *See* Hittinger, *supra* note 41, at 967.

[67] Hittinger, *supra* note 41, at 974.

[68] *Id.* at 966.

> Subsidiarity, understood in the positive sense as economic, institutional or juridical assistance offered to lesser social entities, entails a corresponding sense of negative implications that require the State to refrain from anything that would de facto restrict the existential space of the smaller essential cells of society. Their initiative, freedom and responsibility must not be supplanted.[69]

IV A Prestatement and a Restatement

Before turning to assess the state of Benedict XVI's state vis-à-vis the classical state of modern Catholic social doctrine, it will be helpful to have in mind a crisp statement of the classical, pre-John Paul II Catholic account of man, state, and society. A statement that is crystal clear and is, moreover, one that more than any other dictated the direction taken in the social teachings of the Second Vatican Council, is the one developed by Jacques Maritain (1882-1973), of whom Pope Paul VI was a disciple. Maritain's mid-twentieth century account is a remarkable contrast to the state as it has mutated in the teachings of John Paul II and Benedict XVI.

The reader of the magisterium's social teaching documents frequently cannot tell whether any given reference to the state -- usually in Latin "*civitas*" or "*res publica*" or "*principatus*" or "*regnum*" or "*regimen civile*" or the like-- is a reference to the body politic under the legitimate authority of its leaders or is, rather, a narrower reference to

[69] COMPENDIUM, *supra* note 3, at sec. 186.

only those leaders possessed of legitimate authority and organized over a given political society. That is to say, one cannot tell whether "the state" is a whole, or is only a part. On this cardinal point, Maritain was singularly clear. According to Maritain, "the basic political reality is not the state, but the body politic with its multifarious institutions, the multiples communities which it involves, and the moral community which grows out of it."[70] "The state," Maritain continues,

> is only that part of the body politic especially concerned with the maintenance of law, the promotion of the common welfare and public order, and the administration of public affairs. The State is the part which *specializes* in the interests of the whole. It is not a man or a body of men; it is a set of institutions combined into a topmost machine. . . . The State is inferior to the body politic as a whole, and is at the service of the body politic as a whole.[71]

Maritain refers to his theory of the state as "instrumentalist,"[72] because it "regards the State as a part or an instrument of the body politic." By insisting that the state is exactly an instrument or a *part* of a larger whole, not a whole itself, Maritain assures that the state cannot claim to be a person -- a group person, that is, a unity of order distinct in dignity, possessed of its own rights.[73] Having surveyed all the temptations to sovereign and irresponsible statecraft that must be resisted, Maritain concludes that dignity can be

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[70] MARITAIN, *supra* note 12, at 202. [M&S]
[71] *Id.* at 12, 13.
[72] *Id.* at 13. *See supra*, text preceding note <>.
[73] *Id.* at 13-14.

predicated of the state only in virtue of its succeeding in properly ordering the body politic of which it is a part:

> Then only will the highest functions of the state – to ensure the law and ensure and facilitate the free development of the body politic – be restored, and the sense of the State regained by the citizens. Then only will the State achieve its true dignity, which comes not from power and prestige, but from the exercise of justice.[74]

Many of those people who remember and celebrate Maritain's work do so for its elaboration of a robust Thomistic account of natural human rights. Whatever one's judgment on the *bonafides* of a Thomistic defense of natural rights, one must remember what many natural-rights admirers forget, to wit, the following linkage, indeed priority: The "true philosophy of the rights of the human person is based upon the true idea of natural law . . . . The same natural law which lays down our most fundamental duties, and in virtue of which every law is binding, is the very law which assigns us our fundamental rights."[75] Natural law, along with the derivative natural rights, sets the basic terms according to which justice is to be done by the state in and for political society, the justice by which the state earns its dignity. And for Maritain, as for Leo, the natural law is true law and binding in virtue of the fact that it is not made by human reason, but promulgated in man, a participation in the eternal law: "Natural Law obliges by virtue of Eternal Law. It is from the divine reason that it possesses its rational character, and

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[74] *Id.* at 19.
[75] *Id.* at 84, 95.

consequently, it is from divine reason that it possesses its genuine nature as law and its obligatory character."[76] Man has been given a share in providential government; all authority comes from God.

Man's participation in the divine ruling authority by way of the natural law is in the background, as it were, counterbalancing or, perhaps better, *motivating* Maritain's instrumentalist theory of the state. Ruling power is transmitted from God through the people, "from below upwards" (as Maritain says, borrowing a phrase from Pius XII),[77] coming to rest from time to time in the state, that part of the united people capable of and tasked with doing justice, as well as in the plural authorities of diverse societies. Although Maritain seems, interestingly, never to have used the term subsidiarity, the political landscape he surveys is one of plural societies respecting and, as necessary, assisting one another.[78] Throughout the social landscape (except that portion which is the Church), the people through their authoritative representatives have genuine ruling power from God, and they earn in fact the dignity they have in potency by implementing the natural law and doing justice. The state is at once servant and participated divine ruler.

It is this latter fact that prevents Maritain from going all the way in the direction taken by that estimable socialist Harold Laski, who described the state as a "public

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[76] Jacques Maritain, *Natural Law and Moral Law, in* MORAL PRINCIPLES OF ACTION 62, 67 (Ruth Nanda Ashen ed., 1952).

[77] JACQUES MARITAIN, INTEGRAL HUMANISM 251 n.10 (1936). This part of the note was added by Maritain in a revision to *Integral Humanism* (1936), based on Pius XII's October 2, 1945, discourse to the Tribunal of the Sacred Roman Rota.

[78] *See* Patrick McKinley Brennan, *Sovereign States? The State of the Question from a Catholic Perspective, in* FAITH AND LAW (Robert Cochran ed., forthcoming 2007).

service corporation," one corporation among many others.[79] Maritain notes Laski's and his own convergence, "from quite different, even conflicting, lines of thought," on a social landscape composed of plural societies, but the different line by which Maritain gets there assures that a purely workaday image of the instrumental state is not sufficient. Though less enthusiastically than his contemporaries Heinrich Rommen and Johannes Messner, Maritain holds that the state is unique among authorities inasmuch as its end is not a partial good, but instead the common good of political society.[80] The Thomistic idea of a common good is alien to Laski's cosmos, as is the claim that all authority is by way of participation in the Eternal Law. The latter delivers an instrumental state that enjoys the dignity of participated regality. Maritain's exegesis of Matthew 12:21's admonition to render unto Caesar respects the fact that what ruling authority Caesar enjoys, is from God.[81]

V. Natural Law: *Quo vadis*?

For Maritain, along with the rest of the pre-John Paul II Catholic tradition in the twentieth century, rootedness in and limitation by the natural law (and derivative natural rights) guaranteed safe passage from a sacred organic state to a more modest, instrumentalist state. I say pre-John Paul II Catholic tradition because, while no one can suspect John Paul of being a relativist, *Centesimus annus* makes absolutely no mention of

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[79] MARITAIN, *supra* note 12, at 12 n. 8.
[80] *Id.* at 23-24. *Cf.* HEINRICH ROMMEN, THE STATE IN CATHOLIC THOUGHT 306-14 (1945); JOHANNES MESSNER, SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD 542 (3d ed. 1965).
[81] JACQUES MARITAIN, THE THINGS THAT ARE NOT CAESAR'S 2 (1930).

the natural law. John Paul's encyclical celebrates *Rerum novarum* without so much as a mention of the ontologico-legal linchpin of the entire Leonine corpus that the Piuses, John XXIII, and Paul VI appropriated and refined. Man's natural law participation in the eternal law is nowhere to be found in *Centesiumus annus*.

Admittedly, in the encyclical *Veritatis splendor* published two years later, in response to growing sectors of putatively Catholic moral theology and philosophy that denied that human ethical judgments can be rooted in an objective moral order, and one that exceeds what is merely "natural," the natural law figures prominently. The term "participated theonomy" is used to describe the human person's access, through reason, to God's rational will for his creatures. Though the terminology differs in various ways from what was traditional[82], the central fact is that in the context of moral theology and philosophy John Paul II was unequivocal that humans are possessed of and measured by a legal, moral norm from God, even though in treating of the state in *Centesimus annus*, John Paul II gives not even glancing attention to the ontologico-legal scaffolding of the Leonine synthesis.

Of course, inasmuch as every rational human can reach a judgment according to the natural law for purposes of *Veritatis splendor*, the Venn diagrams assure that the subset of humans invested with civil authority are ontologically equipped, if you will, to reach judgments according to the same natural law (and proceed to give them coercive effect in the name of the state). Still, John Paul's silence in *Centesimus annus* is signal.

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[82] *See* HITTINGER, *supra* note 13, xxxviii-xli.

Does *Deus caritas* echo this silence? As I mentioned in summarizing the encyclical's stance on the state, Benedict states that "The Church's social doctrine argues on the basis of reason and of the natural law, that is, on the basis of what is in accord with the nature of the human person and the natural law," "*a ratione et a naturali iure, id est ab eo quod congruit naturae cuiusque personae humanae*." (28a) This is a statement about the sources of the Church's social doctrine on man, society, the state, and so forth. Is the referenced natural law the one as understood by St. Thomas, Leo, Maritain, *et al*.? Does Benedict teach that those possessed of civil authority participate, by way of the natural law, in the eternal law? It is not clear that he does, for the following reasons, first from the encyclical itself.

First, Benedict's distance from the classical thesis on natural law is suggested in the curious phraseology just quoted: "*a ratione et a naturali iure, id est ab eo quod congruit naturae cuiusque personae humanae*." Does not the Pope thus reduce the "natural law" to what reason finds congruent with human nature? Recall from my earlier summary that the Pope answers the question, "What is justice?", in the following way: "The problem is one of practical reason." To which the Thomist-Leonine reply would be, "Yes, so long as practical reason is understood to be reaching a judgment in accord with a law that is a participation in the divine governance."

Second, and relatedly, notice that Benedict's identifying, as he does in *Deus caritas*, justice as "the end and intrinsic criterion" of all politics, is pure Aristotle, lacking the Thomist overlay – or, rather, scaffolding -- of law, natural and eternal. This

interpretation of the language of Benedict's encyclical is fortified by the following sentence from Cardinal Ratzinger: "Catholic theology has since the later Middle Ages, with the acceptance of Aristotle and his idea of natural law . . . ."[83] The rest of the sentence that follows the ellipsis does not matter here. Though Aristotle did have a concept of nature, Aristotle did not have a concept of the natural law or of the eternal law, nor could he have had, for he lacked the idea of a personal God ruling providentially and legislatively over his rational creatures.

Benedict's preference for a non-Thomistic idiom is *concessum*, as is the propriety of any pope's choosing to use non-traditional concepts that are capable of effectively mediating the (developing) judgments of the magisterial tradition. Since what the Church asks of the faithful is a *religiosum obsequium* as to the judgments (not the concepts) of the teachings, we must ask whether Benedict's judgment advanced in *Deus caritas* is that civil rulers are not capable of taking decisions according to a true law, that is, the natural law that is not diverse from the eternal law.[84]

What further light I can shed on this question is derived from several additional pre-pontificate texts by Joseph Ratzinger, the first dealing at some length with the natural law itself. In a talk given at the Catholic Academy of Bavaria in January 2004, under the provocative title, "What Keeps the World Together: The Prepolitical Moral Foundations of a Free State," Benedict set as his task to identify "genuinely evidential values – values sufficiently strong to provide motivation and sufficiently capable of being

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[83] JOSEPH RATZINGER, CHURCH, ECUMENISM AND POLITICS 213 (1988).
[84] *See* Aidan Nichols, *Joseph Ratzinger's Theology of Political Ethics*, 68 NEW BLACKFRIARS 380, 390-92 (1987).

implemented."[85] He then offered a brief (and, by his own admission, incomplete) history of natural law theorizing, mentioning Gratian, Ulpian, Vitoria, Pufendorf, Grotius, and others, but not Aquinas, and never the eternal law, let alone a doctrine of participation. Here is Cardinal Ratzinger's statement, on that occasion, about the status, if you will, of the natural law:

> Natural law has remained – especially in the Catholic Church – one element in the arsenal of arguments in conversations with secular society and with other communities of faith, appealing to shared reason in the attempt to discern the basis of a consensus about ethical principles of law in a pluralistic, secular society. Unfortunately, this instrument has become blunt, and that is why I do not wish to employ it to support my arguments in this discussion. The idea of natural law presupposed a concept of "nature" in which nature and reason interlock: nature itself is rational. The victory of the theory of evolution has meant the end of this view of nature. . . . [The] last surviving element [of the doctrine of natural law] is *human rights*. . . . Perhaps the doctrine of human rights ought today to be complemented by a doctrine of human obligations and human limits.[86]

What is clear in this text is that in 2004 Cardinal Ratzinger considered "natural law" unavailing in public discourse, at least *ad extra*. It remains ambiguous in this text whether Ratzinger rejects the Thomist thesis on natural (and eternal) law.

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[85] JOSEPH RATIZINGER, VALUES IN A TIME OF UPHEAVAL 37 (2006).
[86] *Id.* at 38.

As it did in the entire body of teaching of the Second Vatican Council, democracy goes unmentioned in *Deus caritas*. Democracy, however, was a favorite Ratzinger puzzle. The nerve of the problem, to which the Cardinal returned time and time again, is that while, on the one hand, democracy has the virtue of allowing all people to participate in shaping the shared life, on the other hand, democracy as it is practiced seems nearly universally to deny that there is a good that can be imposed by the leaders to whom the population has handed over its power (for a term of years). On the one hand, then, "The participation of everyone in democracy is the hallmark of freedom. No one is to be merely the object of rule by others or only a person under control; everyone out to be able to make a voluntary contribution to the totality of political activity. We can all be free citizens only if we have a genuine share in decision making. The real goal of participation in power is thus universal freedom and equality."[87] On the other hand, "the modern concept of democracy seems indissolubly linked to that of relativism. It is relativism that appears to be the real guarantee of freedom and especially of the very heart of human freedom, namely, freedom of religion and of conscience." Ratzinger continues immediately: "We would all agree on this today. Yet, if we look more closely, we are surely obliged to ask: Must there not be a nonrelativistic kernel in democracy too?" Ratzinger answers his own question as follows: "For is not democracy ultimately constructed around human rights that are inviolable? Does not democracy appear necessary precisely in order to guarantee and protect these rights? *Human rights are not*

[87] *Id.* at 53.

subject to any demand for pluralism and tolerance . . . ."[88] But what, Ratzinger goes on to ask, is the foundation of these?

Here is where things get really interesting, especially as Ratzinger uses Jacques Maritain to help answer the question. The insight that relativists "make the majority a kind of divinity against which no further appeal is possible," Ratzinger reports, "led Jacques Maritain to develop a political philosophy that attempts to draw on the great intuitions of the Bible and make those fruitful for political theory."[89] Ratzinger continues, observing that on Maritain's view, "Christianity is considered . . . as the source of knowledge, antecedent to the political action on which it sheds light. . . . The truth about the good supplied by the Christian tradition becomes an insight of reason and hence a rational principle. . . . Naturally, this presupposes a certain amount of optimism about the evidential character of morality and of Christianity."[90] Having surveyed a range of political theories (including, among the "relativists," Hans Kelsen and Richard Rorty), Cardinal Ratzinger concludes: "Maritain['s] has, [among the theories considered], the greatest confidence in the rational evidential quality of the moral truth of Christianity and of the Christian image of God."[91]

Maritain's position on the relationship between natural moral philosophy and Catholic theology is complex in a way I cannot elaborate here, so I shall simply assert that Cardinal Ratzinger is right to find in Maritain an ally for the thesis that, as a matter

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[88] *Id.* at 55 (emphasis added).
[89] *Id.* at 63.
[90] *Id.* at 64.
[91] *Id.* at 67.

of history, Christianity has been necessary for mankind to develop and implement a practical moral science based on nature and natural law. The light and grace of the Gospel have illuminated and enlivened what would have remained obscure and largely a matter of theory (rather than of practice).[92] For Maritain, however, the foundation of morality (and thence of the state) is not just the Christian revelation and theology, but also natural law (along with natural rights) that is a participation in the eternal law. It is the rational creature's being possessed of a genuine law according to which he can make a judgment that constitutes the basis of politics and positive law – a fact, according to Maritain, that the Church has helped mankind to discover. For Maritain, rulers not possessed of a natural law according to which to make legal judgments cannot but make lawless judgments.[93]

Against the background developed here, is it not puzzling to read in *Deus caritas* that "the formation of just structures . . . belongs to the world of politics, the sphere of the autonomous use of reason," "*rationis sui ipsius consciae*?" This is a juncture at which a Pope who affirms the existence of a genuine natural law might well have mentioned it. Yes, politics should be based on "autonomous reason," but reason reaching judgments according to a received law – or so the tradition taught.

VI. Lawless Politics?

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[92] *See* JACQUES MARITAIN, CHRISTIANITY AND DEMOCRACY 42-56 (1945). On the necessity of moral philosophy's being subalternated to theology if it is to be adequate to its object, *see* JACQUES MARITAIN, SCIENCE AND WISDOM (1940).

[93] *See* Maritain, *supra* note 76, at 67.

We can move toward a conclusion by filling out Benedict's positive contribution to our inquiry into the ontological density of the state in modern Catholic social doctrine. A recurrent thesis in Benedict's writings is that "the state is not itself the source of truth and morality," a nice formulation of the anti-relativist thesis, which he also makes by saying that the state cannot "produce truth via the majority."[94] With this Ratzinger combines the thesis that, because freedom for everyone cannot be achieved if the state does not have "contents" to shape its orderings, "the state must receive from outside itself the essential measure of knowledge and truth with respect to that which is good."[95] That "outside," Ratzinger continues, might ideally be "the pure insight of reason," but in actual fact is from "reason that has come to maturity in the historical form of faith," the Catholic faith.[96] This is the point on which Benedict has an ally in Maritain.

Let us stipulate, first, that Church and state are distinct, and second, that, the Church has things to teach the state that the state or body politic could not as a matter of contingent fact discover for itself. In arguing the *different* point that the state must receive its contents and direction from "outside" itself (indeed, from the Church, among others), however, does not Benedict exclude the possibility that *qua* social creatures under the natural law, humans themselves are, as they associate and then create and designate authorities, doing something that is, through participation, proper to them? Law is not a predicate of the human person, but when humans form societies and create authorities and institutions that we refer to as "the state," one necessary source of the

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[94] RATZINGER, *supra* note 85, at 68.
[95] *Id.*
[96] *Id.* at 68, 69.

authority of those who rule in political society is the natural law promulgated in their very selves. It is by virtue of human persons' participation in the eternal law that they are potentially legitimate rulers. (They must also be duly designated). Theirs is a state whose servant ruling-quality enjoys participated regal dignity. Who, then, are these ruling people Benedict imagines receiving from the Church, but not anchored in the eternal law? Whence their authority to rule with law?

I mentioned above Pope John Paul II's inconstancy with respect to the natural law as between *Centesimus annus* in 1991 and two years later *Veritatis splendor* in 1993. Another two years later, in 1995, John Paul II published *Evangelium vitae*, and by then the Pope's focus, in the encyclical decrying the "culture of death," was the way in which the modern state had become the enemy of the human rights on which it, as a condition of its laicization by the Church, was to be based. The story told in *Evangelium vitae* is one of "betrayal," a word used six times in the document.[97] Rejecting the sufficiency of majority will, the Pope wrote that the values that inform democratic living must respect the dignity of the human person. He continues: "The basis of these values cannot be provisional and changeable 'majority' opinions, but only the acknowledgment of an objective moral law which, as the natural law written in the human heart, is the obligatory point of reference for civil law itself."[98] What the Holy See's English translation renders as "natural law" is "*moralis lex*," not *lex naturalis*, but the Pope's intent is clear.[99] John

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[97] *See* Hittinger, *supra* note 7, at 32.
[98] Pope John Paul II, Evangelium Vitae No. 70 (1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.
[99] *See* HITTINGER, *supra* note 13, xxxix-xli.

Paul also quotes *Pacem in terris* and even Aquinas himself to the effect that putative law that violates the natural law which "derives from the eternal law is really no law at all."[100]

But was it by then too late to put Humpty Dumpty back together again? Even at the time of writing *Centesimus annus*, John Paul felt constrained to acknowledge that persons who are "convinced that they know the truth and firmly adhere to it are considered unreliable from a democratic point of view."[101] Is it a surprise that natural rights disconnected from the natural law wither like cut flowers? John Paul's ontologico-legal half-way house proved not to be habitable. But what of Benedict's plainspoken plea for a non-relativist politics? As John Paul II laying dying, Cardinal Ratzinger told the Benedictine monks at Subiaco that, affirming as she does that the world comes from reason, the divine Logos, and is therefore reasonable, the Church, "from the purely philosophical point of view, [has] really good cards to play."[102] But do these include an account of a universal moral norm that is a *law*? This is the question.

Cardinal Ratzinger's frequent reminders that society must always be in the process of being built up again, that the state is inevitably a "*societas imperfecta*," that there are limits to what we can achieve in the social order, that mechanisms of social justice are inherently insufficient, that social charity is among man's ineliminable needs -- these are salutary hedges against utopian overreaching by a self-impressed state,[103] against people and supreme courts willing putatively to invest instruments of rule with

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[100] John Paul II, *supra* note 98, at Nos. 71, 72.
[101] John Paul II, *supra* note 66, at No. 46.
[102] Joseph Ratzinger, Address at the Convent of Saint Scholastica in Subiaco, Italy (April 1, 2005), available online at www.zenit.org.
[103] *E.g.,* RATZINGER, *supra* note 83, at 214, 217.

sovereignty and sovereign dignity, and without even glancing attention to a received law and ruling power. Also welcome is Benedict's clear insight that both the right sort of culture and preexisting societies shaped by such culture are necessary to sustain (and limit) the work of the state. When, however, Cardinal Ratzinger asserts that "the state is not itself the sacred power but simply an order that finds its limit in a faith that worships, not the state, but a God who stands over against it and judges it,"[104] has not the basis of authoritative rule been evacuated? While a Cardinal, Ratzinger liked to turn Grotius's "*etsi Deus non daretur*," even if God did not exist, on its head, asking the non-believer to take a gamble and act as if God does exist?[105] But does this not leave untouched the question of the legal basis of the state's authority to make law? God "stands over against [the state] and judges it," but on what basis does He judge?[106]

One can affirm that the Church is sacred in a way that the state, properly understood, is not, without having to deny that the state is possessed of a share of sacred ruling authority. If what authority for rule the state possesses is in no way sacred, however, then it can be no part of the divine ruling power. Do we humans have a self-possessed power to rule, a rival to the divine? If we have not received a law, then on the basis of what do we proceed to make law? In one of my favorite lines of all time,

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[104] JOSEPH RATZINGER, SALT OF THE EARTH 240 (1996).

[105] *E.g.,* JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES, 60 (2005).

[106] The omission of "natural law" language from papal teaching documents may be a matter of rhetorical strategy, but in Catholic moral theology more generally, the refusal to predicate "law" of nature is not merely rhetorical. *See, e.g.,* Hittinger, *supra* note 41, at 989 n. 52. Professor Hittinger notes that Cardinal Ratzinger was "more comfortable with the scholastic language of natural law than [was] Pope John Paul II." *Id.* at 988.

Justice Antonin Scalia opined that "God," not man, "applies the natural law."[107] If that be true, what, then, do *we* do? Inasmuch as a devoutly Catholic Justice of the Supreme Court has consigned us to a fate without benefit of the natural law, the question is not merely speculative.

[107] Antonin Scalia, Assoc. Justice, U.S. Supreme Court, The Common Christian Good, Speech at the Gregorianum University Symposium on Left, Right, and the Common Good (May 2, 1996) (transcript available at http://www.learnedhand.com/scalia.htm).