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Differentiating Church and State (Without
Losing the Church)

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Abstract

There is an ongoing debate about whether the U.S. Constitution includes – or should be interpreted to include – a principle of “church autonomy.” Catholic doctrine and political theology, by contrast, clearly articulated a principle of “*libertas ecclesiae*,” liberty of the church, when during the nineteenth and early twentieth centuries the Church differentiated herself from the state. This article explores the meaning and origin of the doctrine of the *libertas ecclesiae* and the proper relationship among churches, civil society, and government. In doing so, it highlights the points at which church and state should cooperate and the points at which mutual assistance would be *ultra vires*.

Differentiating Church and State (Without Losing the Church)

Patrick McKinley Brennan¹

I. Introduction: Harvesting the Lessons of Expulsion

When it comes to *libertas Ecclesiae*, “the liberty of the Church,” what is at stake came tumbling home to me in a flash one morning, in 2005, as I stood high in a remote mountain range in the south of France. Someone once said that there is nothing like a gallows to focus a man’s mind: For me there was nothing like seeing how, in 1903, soldiers enforcing the legislative will of the French Third Republic marched monks from their home in those remote mountains, from the monastery where they and their forebears had dwelt in silence since the year 1084. I refer to the expulsion of the Carthusian monks from their motherhouse, La Grande Chartreuse, and thence from France itself. The images in the pictures I saw there, in the museum just down the hill from La Grande Chartreuse, are *almost* beyond belief. The caption could read: “Armed soldiers arrest contemplatives.”²

¹ John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. For research assistance on this paper, I am grateful to Erin Galbally and Lindsay Bish. I thank my colleague Michael Moreland for most helpful comments on the paper, and I thank the Federalist Society’s Section on Religious Liberties for the invitation to prepare this paper for a conference at the Georgetown Law Center.

² Some of the same pictures can be found in *La Grande Chartreuse Au-Dela Du Silence* (Grenoble: Editions Glenat, 2002), 43-45. That book also offers an excellent introduction to the life and history of the

A statute passed in 1901 required that religious orders, if they wished to remain in France, obtain an authorization from the government, if they could: “No religious congregation may be formed without an authorization given by a law which shall determine the conditions of its operation. . . . Congregations existing at the time of the promulgation of the present law which have not been previously authorized or recognized must prove within the space of three months that they have taken the necessary steps to conform to its requirements.”³ The Carthusians of La Grande Chartreuse could not obtain the required authorization, but not for any lack of trying on their part. As the *New York Times* reported on March 27, 1903:

The Chamber of Deputies to-day completed the Government’s programme regarding the male religious orders which applied for authorization to remain in France. It refused by a large majority, the application of the Carthusian monks. They were separated from the other orders in the consideration of the applications as forming a class apart, they being employed in the manufacturing of a cordial. . . . The Chamber . . . , by a vote of 338 to 231, refused to entertain the Carthusians’ application, and adjourned.⁴

Carthusian monks. A recent English language introduction to the Carthusian way is Robin Bruce Lockhart, *Halfway to Heaven: The Hidden Life of the Carthusians* 2nd. ed.(Spencer, Mass.: Cistercian Publications, 1999).

³ Law of Associations, III, 13, 18, reprinted in J.F. Maclear, *Church and State in the Modern Age: A Documentary History* (New York: Oxford University Press, 1995), 294-96

⁴ On Prime Minister Emile Combes’s zealous enforcement of the 1901 statute, see John McManners, *Church and State in France, 1870-1914* 129-39 (1972).

Without the monks' having enjoyed so much as a proper hearing, the soldiers were dispatched, the monks dispersed, and their common life of cloistered prayer terminated. The soldiers came at three o'clock in the morning while the community was singing the Divine Office in church, and they proceeded to arrest the monks one by one.⁵ With that, the unique amalgam of eremitism and cenobitism that the followers of Saint Bruno had pursued and refined in that remote site since 1084 thus vanished again, the first time being upon their expulsion during that press for liberty, equality, and fraternity called the Revolution. So much for liberty for the possibility of monastic fraternity. The Church, instantiated in the community of La Grande Chartreuse, was no longer at liberty to be herself.

Most denials of the life and liberty of the Church are, we can suppose, less dramatic than monks being pried out of their monasteries by armies. But it was the consequences of that 1901 statute and the expulsion as I saw it memorialized at La Grande Chartreuse that focused for me *the nature of the problem* of the liberty of the Church. Difficult as it may be for us Americans to recognize, religious liberty is not *just* about individuals and their solitary acts of free conscience, however sublime those might be. Religion, or at least the Catholic religion, is something people do *together*, in communion and in communities – or, as I shall prefer – in *societies*. That is, individuals

⁵ Though there were a few dramatic incidents, most of the religious orders whose requests for authorizations were denied at the same time as the Carthusians' dispersed quietly and quickly. "The most serious incident occurred at the Grande-Chartreuse monastery. The colonel entrusted with the task of expelling the monks gave the necessary orders and then handed in his own resignation. When the day arrived, thousands of peasants gathered, armed with sticks. Bonfires were lighted in the mountains and the tocsins rang out from the churches in reply to the great monastery bells. Vehicles, trees, and rocks blocked the road. The soldiers arrived at three o'clock in the morning and the sappers had to use axes on the doors. The fathers, who were singing office in the chapel, were arrested one by one while the crowd intoned the words of *Parce Domine*." Adrien Dansette, *Religious History of Modern France* (New York: Herder and Herder, 1961), vol. II. 201-02.

practice the Catholic religion in part through *associating* with one another, and instances of associating take on almost every conceivable size and shape. Examples include the Church universal, the parish, the sodality, the college, the order, the institute, the convent, the monastery – and yes, even La Grande Chartreuse.⁶

None of the aforementioned ecclesial societies exists in splendid isolation, of course. They exist in a complex web of dynamically overlapping and interlocking flesh-and-blood Venn diagrams of other ecclesial societies, and these in turn interface with and overlap the garden variety facets of non-ecclesial communal human life such as cities, counties, villages, families, clubs, unions, and so forth. The varied rubbings-up-against and crossings-over among all these associational forces are beyond numbering. Not always frictionless, they are among the reasons that leaders and aspiring leaders seek to make their mark by tidying things up. So-called sovereigns and bureaucrats alike delight to get lines of jurisdiction laid down and delimited. And from the project of clarifying it is an easy and almost natural next step -- if it has not already been taken -- to start to usurp.

The expulsion of the community of La Grande Chartreuse may be especially clarifying, after the manner of a gallows, exactly because of the ways in which it was perhaps, if you will, something approaching the pure case. Ejecting Jesuits is one thing; they're always meddling, rousing the rabble, and generally causing trouble, and not just

⁶ Religion is not the only instance of the value of group action. See John Garvey *What Are Freedoms For?* 123-54 (1996).

for Jansenists.⁷ In the case of the Carthusians of La Grande Chartreuse, however, these were recluses dwelling in the obscurity of the most remote valley Saint Bruno and his companions could find when in 1084 they went in search of solitude. Their life hardly implicated Mill's harm principle. Moreover, and more serious, ongoing association, in its many manifestations, was *essential*, and conspicuously so, to what they were about. Communal prayer, the celebration together of the sacraments, not to mention the joint resolve to bear one another along in the monastic pilgrimage – in a word, the act of *associating* (as Carthusian monks): this was not achievable in diaspora. Which is exactly what the French government hoped.

But what could possibly *justify* government's not allowing men⁸ to dwell together in tranquil unity? One possible justification would be that the individuals concerned did not have a right to practice their religion, that is, that none of them *individually* enjoyed a legal right – because none of them enjoyed a natural individual subjective right -- to practice the Catholic religion. Such a putative justification would be false by most modern lights, including my own, but, it was not, in any event, the one which the French government had in the collective mind when it dislodged the Carthusian community from its cloister garth. The rationale that lay behind the particular statute in question, as well as behind hosts of others, was articulated as follows by France's own Jean-Jacques Rousseau: “It is of necessity . . . that no partial society exist in a state.”⁹

⁷ On the relationship among Jesuits, Jansenists, and the French government leading up to the Revolution, see Michael Burleigh, *Earthly Powers: The Clash of Religion and Politics in Europe from the French Revolution to the Great War* 28-47 (2005). See also Dale Van Kley, *Jansenists and the Expulsion of the Jesuits from France 1757-1765* (1975).

⁸ I should note that there also exist monasteries of Carthusian nuns.

⁹ Jean-Jacques Rousseau *Social Contract*, II, iii

In holding this view, Rousseau was not eccentric. The ideal and insistent aspiration of the lion's share of modern political theory and its implementers has been to liberate the individual/citizen, whether he like it or not, from his plural and particularist associations in order to deliver him barnacle-free to that level playing-field where he and his negative liberty would be supervised solely by the solitary sovereign. In aid and justification of this project, it has been characteristic of modern states to claim a monopoly over the rights of societies to exist. Societies spring up quite naturally, of course, but the modern state frequently imagines that any *right* (to continue) to associate is the result of a concession by the state.¹⁰ *If*, in this new world order, individuals/citizens are allowed by right to associate in partial societies, it would be because the sovereign has deigned to concede such a (revocable) right.¹¹ The Third Republic declined to concede that right to the monks of La Grande Chartreuse.

II. Jacques Maritain and Social Ontology

Even today, if in more subtle ways – as subtle as the *Catholic Charities*¹² case, as to which more in due course – many legitimate governments continue to usurp the liberty of the Church. Not everyone, however, has capitulated to the theories that would justify such usurpations. Throughout the middle third of the twentieth century, the layman Jacques Maritain worked out and advanced a robust yet nuanced understanding and defense of the liberty of the Church. I was asked to address the significance Jacques

¹⁰ The expression “concession” was popularized by Otto Gierke. See, e.g., *Natural Law and the Theory of Society 1500-1800* 166 (1950).

¹¹ See Russell Hittinger, “Society, Subsidiarity, and Authority in Catholic Social Thought,” in Brennan *Civilizing Authority* 124-25 (2007)

¹² *Catholic Charities v. Superior Court*, 32 Cal. 4th 527 (2004)

Maritain's thought for the question of *libertas Ecclesiae*, and I am happy to do so because I believe that it is worthwhile to understand and learn from Maritain on this topic as on every other one on which he wrote or spoke.¹³ Maritain lived through the expulsion not just of the Carthusians but of many religious orders from his native France; he also lived through the closing of thousands of Catholic schools as a consequence of the 1901 Law of Associations.¹⁴ These usurpations of the liberty of the Church, moreover, were just one facet of the totalitarianisms with which he became involuntarily familiar before fleeing France, in 1941, for the comparative safety of the United States. Maritain thought hard about the sort of self-aggrandizing, usurping statecraft that predictably, and proudly, mutates into totalitarianism.

It is altogether too easy to forget what Maritain, if we would listen, reminds us of. People today, except when they accede to the temptation to imagine full-swing "globalization" and correlative "world government," tend to take the modern nation state, with its pretensions to "sovereignty," for granted, indeed a cause for celebration. And, starting from a hypertrophied concept of the state, people run aground and amok when they turn their attention -- if they do turn their attention -- to the Church and her liberty. Maritain, by contrast, takes neither concept -- church or state -- too easily. Maritain's precision about what it means to be Church and what it means to be a "state" both clarifies the debate and, by doing so, raises the stakes of judgment. Too liberal for

¹³ For a compendious introduction to Maritain's socio-political thought, see Patrick McKinley Brennan, "Jacques Maritain," in John Witte Jr. and Frank Alexander, *The Teachings of Modern Catholicism on Law, Politics, and Human Nature* 106 (2007).

¹⁴ "Originally, there were about 20,000 Catholic schools in France and by September 1904 [Prime Minister] Combes was able to boast that he had closed almost 14,000." Holmes, *Triumph of the Holy See*, 245. On Combes's zealous enforcement of the Law of Associations, see John McManners, *Church and State in France, 1870-1914* 129-39 (1972). See also M. O Partin, *Waldeck-Rousseau, Combes, and the Church: The Politics of Anti-Clericalism* (1969).

conservatives and too conservative for liberals, Maritain offers all-comers ample food for thought. Maritain's work merits study for its intrinsic value, especially, in this context, his clarity about what is usually discussed under the confused and generally confusing label "subsidiarity."

To this we can add that Maritain's understanding of the differentiation of Church and state is, approximately, the one on which the Church settled at the Second Vatican Council. This was long in the making. Eugenio Pacelli, the future Pope Pius XII (r. 1939-1958), read Maritain and, as is well known, Giovanni Montini, the future Pope Paul VI (r. 1963-1978), not only read Maritain but translated his work and even considered him his mentor and, quite remarkably, cited him by name in an encyclical. Without prejudice to the role of Fr. John Courtney Murray, S.J., in the Church's recognizing and declaring the right to religious liberty, we can observe that it is something close to the layman Maritain's social ontology that one discerns in modern magisterial teachings on Church and state. In the words of the Second Vatican Council's Declaration on Religious Liberty, *Dignitatis humanae*:

The freedom of the Church (*libertas ecclesiae*) is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order (*totumque ordinem civilem*). . . .
The Church . . . claims for herself in her character as a society of men who have the right (*qui iure gaudent*) to live in society in accordance with the

principles of the Christian faith. . . . This independence is precisely what the authorities of the Church claim in society.¹⁵

The principal point I should like to develop here is this: Maritain's -- and the Church's -- account is emphatically one of a social ontology, that is, an ontology of social forms. On Maritain's -- and the Magisterium's -- view, the starting point for a solution to any perceived "problem" of Church and state and, above all, for an accurate statement of the liberty of the Church, is to recover an ontology of plural social forms that are, at least in potency, *given*, either by nature (e.g., the family) or supernature (the Church). The central thesis is that what is to be family or Church or body politic does not await invention, although it may await instantiation or re-instantiation, formation or re-formation. In a world that respects such forms, one is not pinioned among a putatively sovereign state and lone individuals and, *perhaps*, a Church (some of) whose liberty is parceled out by the sovereign. One is instead faced with a plurality of societies, as well as individuals, in need of respect and coordination, perhaps regulation, and sometimes help -- but never brute demolition of a thriving society, never what happened at La Grande Chartreuse.

III. The Decision to Differentiate

¹⁵ Second Vatican Ecumenical Council, Declaration on Religious Liberty, *Dignitatis humanae* (1965), no. 13.

I have been referring to “the liberty of the Church,” but it is needful to recall that what we mean by “the Church” is neither univocal nor immediately clear. There are competing and sometimes complementary “models” of the Church.¹⁶ Some of these models, moreover, emerged and have been refined in the very theological and philosophical work by which the Church differentiated herself from the political realities with which she was historically associated and in which she was sometimes thought to be embedded. For the better part of Christian history, “the Catholic Church was wedded to Western society in the form of a single, though differentiated, *corpus mysticum*.”¹⁷ What we refer to as the problem of “Church and state,” what was sometimes referred to as the relationship between “throne and altar,” was long celebrated (and sometimes vilified) as “Christendom,” a mystical organic unity of the forms of ruling authority in which God allows humans to participate. Though indeed “differentiated” in various permutations, there was a reliable emphasis on their unity in one organic whole.

In short, the Church came into the modern period interlaced and interlocked in all manner of ways, both factually and conceptually, with institutions from which, in the course of the nineteenth century, she would decide that she must decisively differentiate herself. The result of this differentiation would be the end of “Christendom.” Exactly how that differentiation was to take shape, is my principal concern in this paper. Before turning to the particulars of the differentiation, however, it merits emphasis that it was the Church’s will that differentiation occur, and this, not for the advantage of the state or of

¹⁶ See Avery Cardinal Dulles, *Models of the Church* (New York: Doubleday, 2002).

¹⁷ Russell Hittinger, *Dignitatis Humanae*, “Religious Liberty, and Ecclesiastical Self-Government,” 68 *Geo. Wash. L. Rev.* 1035, 1040 (1999). See generally Ernst Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* (1957).

indifferentism, but above all, of course, for the Church's own freedom and work: These salient facts that are lost on many of our own pro-establishment contemporaries were not always lost on our ancestors who favored the puppet national Catholic churches that a decadent Christendom could reliably deliver. In France in 1868, for example, Emile Ollivier declared in the Chamber of Deputies: "Undoubtedly, Gentlemen, I know that Rome earnestly wishes to separate itself from the State, but," Ollivier continued presciently, "she does not want the State to separate itself from Her."¹⁸

It is common to associate the differentiation with the revolution in France, and it is indeed true that from at least the time of Revolution "issues of ecclesiology were deeply interwoven in the mélange of the disputes between the Church and the" new-fangled "states" that were vying for recognition. I say "at least," however, because, as Maritain observed in his 1927 book *The Things That Are Not Caesar's*, "it was five hundred years ago that we began to die."¹⁹ And, it was some five-hundred years before that that "we," the Church, were at the peak of health, at least at a conceptual level. We can take this in stages.

The monk Hildebrand was elected to the Chair of Peter in 1073, from which he reigned as Pope Gregory VII until 1085, effecting what is known as the Gregorian "*reformatio*." Wishing to purify the Church and insulate her governance from lay interference, in 1075 Gregory published *Dictatus Papae*, consisting of twenty-seven crisp

¹⁸ Quoted in Russell Hittinger, "Introduction to Modern Roman Catholicism," in John Witte, Jr., and Frank Alexander (eds.), *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature* 11 (2007).

¹⁹ Hittinger, Introduction, 6.

propositions addressed to himself. One proposition claimed that “he alone [the pope] may depose and reinstate bishops,” and another that “no judgment of his may be revised by anyone, . . . he alone may revise [the judgments] of all.”²⁰ “This document,” Harold Berman explains, “was revolutionary – although Gregory ultimately managed to find some legal authority for every one of its provisions.”²¹

Not everyone agreed with the Pope, but the model was more than amply clear. Gregory excommunicated Emperor Henry IV on account of his disagreement.²² (Henry, it will be recalled, repented, standing barefoot in the snow for three days outside of the castle of Countess Matilda of Tuscany). Thanks to the Gregorian reform, the Church succeeded in a rather significant way in creating what has been called “a church within a church,” such that she – in the form of religious houses (on the model of Cluny and Bec) and religious orders (such as the Benedictines, the Camaldolese, the Cistercians, and yes, the Carthusians) – was exempt not only from lay control but also from that of local bishops. This internal differentiation of the Church was a mighty innovation, the significance of which is easily lost on those of us moderns who willy-nilly fall back into the mode of thinking that the Church is made and constituted sort of the way a bus-stop gets populated, that is, by individuals’ showing up and continuing to hang around, or not.

²⁰ Quoted in Brian Tierney, *Crisis of Church and State*, 49-50. See also Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 95-96 (1983). Berman’s claims for the revolutionary qualities of Gregory’s reform are questioned by Tierney (among others). See Tierney, *Crisis of Church and State*, 46-47. For a brief statement of pre-Gregorian reflection on the duality of ruling powers, see Avery Cardinal Dulles, “The Indirect Mission of the Church to Politics,” 52 *Villanova L.Rev.* 241, 241-42 (2007).

²¹ Berman, *Law and Revolution*, 96

²² In this connection, it will not be amiss to quote an aside by Jacques Maritain: “It makes a Frenchman blush to think that Gallican governments long compelled the episcopate to suppress the lessons in the breviary relating to St. Gregory VII, because that Pope deposed Emperor Henry IV.” Jacques Maritain, *The Things That Are Not Caesar’s* 17-18 (1931).

Beginning from the premise that membership in the particular society that is the Church universal is, if you will, an ontological fact (traceable to baptism, the event of incorporation), the Gregorian reform then went on to clarify, and protect, the other unities of association by which the ecclesial reality was internally differentiated. There will be more to say about this.

Meanwhile, however, the rest of the Church remained, more or less, in the debt of those laity whose generosity to the Church had been rewarded with the *ius patronatus*, a varied bundle of rights that, thanks to the Church's delegation, could be exercised to influence the governance of the Church, as by vetoing potential bishops. (By the way, the Polish state vetoed seven candidates before allowing the future John Paul II to become bishop of Krakow. Too clever by half, I'd say).²³ Such rights date back as far as the sixth century, but approaching the eleventh century, and then again approaching the sixteenth century, when "we began to die," those possessed of the *ius patronatus* were tending to view their *ius* as their own jurisdiction, that is, as not a concession by the Church. Referring to what happened in Spain in the late fifteenth century, where this development was perhaps most notable, Russell Hittinger explains: "The key point . . . is that Madrid did not regard the authority as delegated, but rather interpreted Roman concessions as recognition of authority inherent in state sovereignty."²⁴ He continues: "The architects of the French Revolution did not invent, but rather inherited, the principle that the church, as a visible and temporal society, was the property of the state."²⁵

²³ Hittinger, *Dignitatis*, 1042.

²⁴ Hittinger, *Introduction*, 7

²⁵ Hittinger, *Introduction*, 7

As we have observed, the Church came into the nineteenth century with Christendom as the model of choice. In its purity, the idea was that Church and state were one *body*, “internally differentiated by two authorities, each of which was thought to share in Christ’s triplex munus of priest, prophet, and king. The King participated in Christ’s rule *pedes in terra* (feet on earth) while the episcopal authority imaged Christ’s rule *caput in caelo* (head in heaven).”²⁶ There were many variations on exactly how all this was to be understood, as the research of Ernst Kantorowicz has shown in deep detail, but the core idea remained intact. There was one body, with two authorities, and one authority, the spiritual, was superior. “There was one a time when States were governed by the philosophy of the Gospel,”²⁷ wrote Pope Leo in 1885 as he looked back at a world gone-by.

As the modern nations states grew, most of them remained *de jure* within the Catholic fold, but, *de facto*, they grew independent wings and arrant aspirations to sovereignty; creepingly but insistently, the national Catholic churches were subordinated to their respective national sovereigns. For example, when the Tsar of Russia in 1812 won the right to govern the former Kingdom of Poland, Pope Gregory XVI – no modernist, he – responded by reminding the Polish bishops (in the encyclical *Cum primum*) of their duty to obey the temporal authority. Here we have the Pope telling the Church in Poland to “abandon its self-government to a schismatic tsar.”²⁸

²⁶ Hittinger, *Dignitatis humanae*, 1040

²⁷ Encyclical *Immortale Dei* no. 21; discussed at Hittinger, *Dignitatis humanae*, 1040.

²⁸ Hittinger, Introduction, 9

Throughout the first three-quarters of the nineteenth century, as the Popes scrambled to save face and make the best of many a bad situation, the dysfunction and possible ways forward became the subject of serious study. Shortly before his death in 1878, Pope Pius IX expressed privately that his ways, including his stalwart insistence that the Christendom model -- complete with Papal States, to boot -- was the only correct model, had failed and that it was time for a new approach.²⁹ In the course of the twenty-five year pontificate of his successor, Pope Leo XIII, there emerged the clear-sighted judgment that “the state cannot co-govern the church.”³⁰ The Church was to be what the Gregorian reform of the eleventh century had sought: free to be herself. And she was to be free in virtue of a clear differentiation of Church and state; according to Leo, “there are on earth two principal societies, the one civil, the proximate end of which is the temporal and worldly good of the human race; the other religious, whose office it is to lead mankind to that true, heavenly, and everlasting happiness for which we are created.”³¹ But, though many who would come later would overlook or deny the point, Leo believed that the Church must now reach people through its direct effect on individuals and society (rather than, as before, through the arm of the state). From now on the Church’s temporal mission would focus on “faith embodied in the conscience of peoples rather than restoration of medieval institutions.”³²

IV. Three Elements, Not Two

²⁹ Derek Holmes, *The Triumph of the Holy See* 160 (1978)

³⁰ Hittinger, Introduction, 9

³¹ Encyclical *Nobilissima Gallorum gens*, no. 4 (1884).

³² Hittinger, Introduction, 11

Leo's first encyclical was on "the evils of society" and his second, published within the same year, specialized in the same by condemning "socialism." *Aeterni Patris*, his third encyclical -- the programmatic one of his pontificate -- was published the next year (1879). As is well known, *Aeterni Patris* summoned the faithful to look to the works of the great scholastics and, above all, of St. Thomas Aquinas for resources both intellectual and spiritual with which to forge remedies for the evils afflicting both "domestic and civil society."³³

Re-enter Jacques Maritain, a man who believed that it was his personal vocation to respond to the summons of *Aeterni patris*, that is, to philosophize as a Thomist. He also, like Leo, believed that there was creative work to be done. "Thomas, after all, had no conception of a modern state or an industrialized economy. Nor in Thomas could there be found a ready-made doctrine of subsidiarity, justiciable natural rights, social justice, political parties, or a lay-based democracy."³⁴ These were to be achievements of neo-Thomists, and in an exemplary way, of Jacques Maritain.

When Leo's twenty-five year pontificate ended in 1903, the Magisterium's development of political theology abated until the election of Achille Ratti as Pius XI in 1922. Ratti had been educated by Leo's Thomistic colleagues in Rome, and as Pius XI he immediately set about furthering the Leonine Thomistic project. It was during Ratti's formidable pontificate that Maritain first, and irrevocably, turned his attention to statecraft and politics, recognizing that "whereas for centuries the crucial issues for

³³ No. 28

³⁴ Hittinger, Introduction, 13.

religious thought were the great theological controversies centered on the dogmas of faith, the crucial issues will now deal with political theology and political philosophy.”³⁵ Maritain’s first foray into this area was in 1927; in English it bears the title *The Things That Are Not Caesar’s*, while in French it was known as *The Primacy of the Spiritual*. Together the two titles signal two points on which Maritain never fails to insist. First, there is a jurisdiction other than Caesar’s; second, that other jurisdiction is higher. However, the fact that the Church exercises a higher jurisdiction does not lead Maritain to conflate Church and state or to collapse the state into the Church. It leads him, instead, to distinguish carefully and thus to differentiate adequately. Adequate differentiation is exactly what had not happened in the past to the extent, and that extent was large, that it was thought and believed that the Church was married to society in the aforementioned *corpus mysticum*.

Before following Maritain, we need to be clear on what exactly Maritain will be arguing *against*. When the moderns confronted this mystical organic unity, they wrung from it only individuals and a sovereign that, across a territorially bounded unit, exercised over themselves something called “sovereignty.” Less obvious than the dissolution of the organic unity of the overall *corpus mysticum* is the correlative modern judgment that the only unity individuals can achieve is to be achieved extrinsically, that is, “by contracts, by the serendipitous outcomes of a market, or, more ominously, by the external application of law as the superior force of the state.”³⁶ The characteristic

³⁵ Jacques Maritain, *The Range of Reason* 94-95 (1942)

³⁶ Hittinger, Introduction, 15-16

modern move is to deny the possibility of intrinsic unity (other than of individual substances).

The modern model allows exactly two fundamental elements: individuals and their sovereign, the latter of which frequently is referred to as “the state.” Not only are there no *supernaturally* given intrinsic social unities, such as the Church, there are not even any *naturally* given intrinsic social unities, such as the family. If you think this is fanciful, consider this bald assertion by Yale Law professor Robert Post: “There is no ‘natural’ social order . . .”³⁷ – and, though Post of course does not trouble himself to deny it, no “supernatural” social order either. With no intrinsic social unities *given*, it is an easy next step to suppose that unities need not be allowed. On the modern view, if individuals enjoy a right to associate, they do so simply thanks to the sovereign state’s concession of a right to exist, a right extrinsically to associate.

Re-enter Maritain again. Differentiating the *corpus mysticum*, Maritain finds individuals, alright, but individuals who are, by nature, social – individuals, that is, each of whom is a unity and individuals who are, either in fact or in potency, *participants in the intrinsic unities* of marriage, family, church, and the body politic. Against the view that any unity is extrinsic, Maritain counters that there are *intrinsic* unities, that there is “an ontological landscape to social forms.”³⁸ Though they certainly require our free and constructive contribution (they are not the product of autogenesis such that human freedom is *pro tanto* canceled), these come from nature, our nature; they are, as Maritain

³⁷ Robert Post, *Constitutional Domains* 288 (1995)

³⁸ Hittinger, Introduction, 16

says in a phrase I find memorable, “rough-hewn by nature.”³⁹ The exception to what I just wrote is “the Church;” though the realizing of her essence also requires the contribution of human agency, her form comes not from nature, but from God. All of these given intrinsic unities, both natural and supernatural, deserve to be treated as what they are, not as mere extrinsic aggregations.

So far, then, there are two fundamental elements to reckon with: individuals and societies. There is, though, a third element, and we can discover it by following Maritain in a distinction to which I have not yet called attention, though it has appeared in the course of the argument. The distinction is between that specific social form that we call political society or (as Maritain prefers) the body politic, on the one hand, and, on the other, the “state.” In general usage, the term “state” is almost hopelessly ambiguous. Sometimes, as noted above, “state” refers to the “sovereign,” where the latter is understood as the government/governor that is above and separate from the governed; at other times it refers to the government/governor who is above but not separate from the governed; at still other times it refers not only to the government/governor but also and at the same time to those who are governed. Maritain proposes to limit the term “state” to refer to

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 a part which *specializes* in

³⁹ Jacques Maritain, *Man and the State*, 4

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 machine⁴⁰

Maritain, then, limits state to the second of the three usages noted above: the “state” is above but not separate from political society. The difference is not (as they say) “merely semantic.” It names the third basic element.

Starting from the basic reality of political society, rather than of a merely extrinsically aggregated group of individuals known as, say, “the people,” Maritain observes that those so-constituted govern themselves, and do so through the “state.” The body politic is not (if you will) acephalous; it has a head, and it is its own head. On Maritain’s account, the state is not separate from and above political society. The state is, in effect, that part of themselves that is their servant or instrument. Not some tyrant above the people (and free to pursue its own interests), but the people’s own creation, it is duty bound, in virtue of the purpose of its creation, to serve them and the good that is common to them.

And, since the usual meaning of “sovereign” is to be absolute (which just means, in its Latin etymology, to be unbound, *ab-solutus*), the state cannot helpfully be described as sovereign. It was for this reason (among others) that Maritain counseled us altogether to abandon the word sovereignty. What the state possesses or embodies is *authority* – the legitimate but limited power to rule.

⁴⁰ Maritain, *Man and the State*, 12

V. Pluralism and “Subsidiarity”

With this we come to the heart of the matter. The authority that is embodied in the “state” is just one – though a unique one – among many authorities. *Every* genuine society possesses authority. A society without authority is a society on the way out. Authority is that (topmost) part of a particular society that has the responsibility for the increase and maintenance of the good of the respective society. To recognize a plurality of given social forms and the societies that actually instantiate them is, then, correlatively, to recognize a plurality of authorities: the authority of the father or mother over the family, the abbot over the abbey, the bishop over the diocese, the Pope over the Church, and, yes, the Prior of La Grande Chartreuse over the monks and affairs of La Grande Chartreuse. Furthermore, each of these -- from the remote mountains of the south of France to the top of Vatican Hill – represents a limitation on would-be sovereigns everywhere, a limitation on the authority of the state as well as on the respective authorities of all other societies. The Church, for example, must respect the authority of family; family must respect the authority of the Church. According to Maritain:

As opposed to the various totalitarian conceptions of political society in vogue today, the conception here is of a pluralist body politic bringing together in its organic unity a diversity of social groupings and structures, each of them embodying positive liberties. . . . Civil society is made up not only of individuals, but of particular societies formed by them, and a

pluralist body politic would allow to these societies the greatest autonomy possible and would diversify its own internal structure in keeping with what is typically required by their nature.⁴¹

The “pluralist principle” is Maritain’s synonym for what, in the tradition of modern Catholic social doctrine, usually gets referred to as the principle of subsidiarity.

I am not aware that Maritain ever used the term subsidiarity, and this is, I would suggest, all to the good. His alternative terminology helps clarify what “subsidiarity,” as properly understood in the tradition of Catholic social doctrine, is -- and is not -- about. In common parlance, including about the Maastricht Treaty, one hears that subsidiarity is the principle that ruling power should devolve to the lowest level at which it can be exercised effectively.⁴² In Catholic social doctrine, however, subsidiarity means what Maritain refers to as the pluralist principle: Plural societies and their respective authorities must be respected.

In a world in which no natural or supernatural intrinsic unities are given, even in potency, and in which it is assumed that a sovereign possesses plenary power to parcel out, it may make a certain sort of sense to resist or limit the sovereign by advancing a principle according to which he “ought” to allow his power to devolve. Frequently, including in advertising for the conference for which this paper was prepared, so-called mediating institutions are justified on the somewhat different ground that they usefully

⁴¹ Jacques Maritain, *Integral Humanism*, 256

⁴² Mary Ann Glendon, *Traditions in Turmoil* 75, 266 (2006).

check government's power. Perhaps they do. But in a world in which plural social forms are *given*, at least in potency, the putative sovereign's authority is already and always limited, and ontologically so. In such a world, subsidiarity means two things. First, it is a principle of non-absorption; given social forms are to be respected. Second, and correlative, it is a principle that, when help or assistance flows among such societies, it be aimed at supporting, not absorbing.⁴³ "As opposed to the various totalitarian conceptions of political society in vogue today," Maritain writes, "the conception here is of a pluralist body politic bringing together in its organic unity a diversity of social groupings and structures, each of them embodying positive liberties."⁴⁴

VI. Church, State, and the Body Politic

All of this, then, is the background, the ontological landscape within which Maritain comes to the particular problematic we commonly call "Church and state." From his understanding of this landscape, Maritain draws three "general immutable principles" that are to govern that problematic. By attending to these, and also to Maritain's applications of the same, we can take the measure of what *our* world might look like if it were to be differentiated as Maritain envisioned. It is important to underline that, as Maritain sees the matter, these are not pie-in-the-sky aspirations for another time and place. Maritain knew the state of the liberty of the Church in our country; Maritain knew the *Everson* and *McCullum* decisions enough to complain about

⁴³ See Hittinger, *Pluralism*, 394-95; Patrick McKinley Brennan, "Harmonizing Plural Societies: The Case of Lasallians, Families, Schools – and the Poor," 45 *Journal of Catholic Legal Studies* 131, 157-60 (2006)

⁴⁴ Jacques Maritain, *Integral Humanism* 163 (1973)

them.⁴⁵ Maritain was not daunted; he did not take refuge behind a “thesis” that could not be achieved. He sought, and exhorted others who would come later, to seek concrete historical “ideals which are neither absolute nor bound to an unrealizable past, but which are *relative* – relative to a given time – and which moreover can be claimed and asserted as *realizable*,”⁴⁶ and they include the concrete conditions of the true *libertas Ecclesiae*.

Before getting to Maritain’s three principles, a clarification of context will be in order. While my emphasis has been on the ontology of social -- rather than substantial -- forms, the complete landscape sketched by Maritain includes not only the social but also the personal ontology, that is, the ontology of human persons each with his or her own unique, and irreducible< everlasting destiny: “the human person is both part of the body politic and superior to it through what is supra-temporal, or eternal, in him, in his spiritual interests and his final destination.”⁴⁷ The end of the body politic, the temporal common good, is limited by and subordinated to, *inter alia*, every single human person’s ordination, here and now, to a higher end, that is, to God. It is on this basis -- the individual person’s duty to seek God and worship Him as he finds Him -- that Maritain bases the individual right to religious freedom.

⁴⁵ Jacques Maritain, *Reflections on America*, 183-84 (1958).

⁴⁶ Maritain, *Man and the State*, 157 From the mid-nineteenth century until the time of the Second Vatican Council’s “Declaration on Religious Liberty,” *Dignitatis humanae* (1965), it was common in much Catholic discourse to consider the relationship between Church and state under the rubric known as thesis-hypothesis. Roughly speaking, the thesis was a statement of the ideal position of the Church vis-à-vis the temporal authority (sometimes known as the state) and the spiritual authority that is the Church; the hypothesis was the statement of the achievable position of the two authorities vis-à-vis each other. Long before Vatican II rendered the thesis-hypothesis distinction marginal in Catholic discourse, Maritain had attacked the distinction, on more than one occasion, as diverting attention from the fact that always and everywhere what Catholics must seek in this regard is the concrete realization of several immutable principles.

⁴⁷ Maritain, *Man and the State*, 148

For all his celebration of the metaphysical density and calling of every individual human person, however, Maritain never loses sight of the intrinsic connection between individual persons and the societies on which their identities and fulfillments depend, and, above all, that society that is the Church. The state is limited by individuals' respective natural and supernatural ends; the state is also limited by the Church and her ends. For the Church to be herself, she must be free, and Maritain is concerned to justify the liberty of the Church in the eyes both of believers and of non-believers.

What is the Church that she should be free? In the eyes of the unbeliever (who is not yet “an unbeliever in reason,” Maritain adds), “the Church, or the Churches, are in the social community particular bodies which must enjoy that right to freedom which is but one, not only with the right to free association naturally belonging to the human person, but the right freely to believe the truth recognized by one’s conscience, that is, with the most basic and inalienable of all human rights.”⁴⁸ And what is the Church for the believer? “[T]he Church is a supernatural society, both divine and human – the very type of perfect or achieved-in-itself, self-sufficient, and independent society – which unites in itself men as co-citizens of the Kingdom of God and leads them to eternal life, already begun here below.”⁴⁹ He continues in language that leaves no room for cultured misinterpretation:

In such a perspective, not only is the freedom of the Church to be recognized as required by freedom of association and freedom of religious

⁴⁸ Maritain, *Man and the State*, 150

⁴⁹ Maritain, *Man and the State*, 151

belief without interference from the State, but that freedom of the Church appears as grounded on the very rights of God and as identical with His own freedom in the very face of any human institution. The freedom of the Church does express the very independence of the Incarnate Word.⁵⁰

The first immutable principle, then, is that the Church must be free to “teach and preach and worship, the freedom of the Gospel, the freedom of the word of God.”⁵¹

The second immutable principle is nothing short of “the superiority of the Church – that is, of the spiritual – over the body politic or the State.”⁵² Although the Church is in a way “in” every body politic, both through the presence there of her members and also through her institutions, in her “essence” she is “not a part but a whole; she is an absolutely universal realm stretching all over the world – *above* the body politic and every body politic.”⁵³

The third immutable principle follows from the fact that “the same human person is simultaneously a member of that society which is the Church and a member of that society which is the body politic. An absolute division between the two of those two societies would mean that the human person must be cut in two.” Therefore, “cooperation between the Church and the body politic or the State” is “necessary.”⁵⁴ In view of the pluralist principle (or the principle of subsidiarity, properly understood), we

⁵⁰ MS, 151

⁵¹ MS, 151-52

⁵² MS, 153

⁵³ MS, 152

⁵⁴ MS 153-54

know in advance that help flowing between Church and state, in either or both directions, must aim at support, not absorption.

Maritain explains (quoting John Courtney Murray) that such cooperation will entail, first, that the state fulfill its own duties, by implementing the natural law and securing a workable juridical order.⁵⁵ It will entail, second, the “public acknowledgment of the existence of God:” “a political society really and vitally Christian would be conscious of the doctrine and morality which enlighten for it – that is, for the majority of the people – the tenets of the democratic charter, and which guide it in putting those tenets into force.” And finally, Maritain specifies two forms of mutual assistance between Church and state.

The first and “most basic of them is the recognition and guarantee by the State of the full freedom of the Church.” Maritain continues, countering the “illusion of modern times [according to which] mutual freedom means mutual ignorance:” “[T]he fact of insuring the freedom of somebody is surely an actual, and most actual, though negative, form of cooperation with him and assistance to him.”⁵⁶ The second form of mutual assistance is a positive one, and, according to Maritain, derives first from the body politic and only derivatively from the state (as the body’s politic’s instrument):

It is . . . by asking the assistance of the Church for its own temporal
common good that the body politic would assist her [the Church] in her

⁵⁵ MS 172, see also 167-68

⁵⁶ MS, 177

spiritual mission. For the concept of help is not a one-way concept; help is a two-way traffic. And after all, is it not more normal to have what is superior, or of greater worth in itself, aiding what is of lesser dignity, than to have what is terrestrial aiding what is spiritual.”⁵⁷

What Maritain has in mind is the body politic’s asking and positively facilitating, “within the framework of laws,” “the religious, social, and educational work by means of which she – as well as the other spiritual or cultural groups whose helpfulness for the common good would be recognized by them – freely cooperates in the common welfare.”⁵⁸

Although in his early work Maritain countenanced the possibility of a privileged juridical status for the Catholic Church, on his mature view establishment and privilege are ruled out on account of the conditions for achieving the temporal common good.

Once the political society had been fully differentiated in its secular type, the fact of inserting into the body politic a particular or partial common good, the temporal common good of the faithful of one religion (even though it were the true religion), and of claiming for them, accordingly, a privileged juridical position in the body politic, would be inserting into the latter a divisive principle and, to that extent, interfering with the temporal common good.⁵⁹

⁵⁷ MS 178

⁵⁸ MS 178

⁵⁹ MS 176; see also Brennan, “Jacques Maritain,” 135-36

The resulting situation is one which the Church claims for herself the freedom to be herself, and, although superior to all other societies, is unwilling and disallowed to make “institutional, communal claims on the body politic.”⁶⁰ At liberty to be herself, the Church is to exercise an indirect, vivifying influence on society (and its institutions).

VII. Conclusion: Society and the Conditions of Its Realization

When the Church reached the judgment that the time had come to differentiate herself more adequately from the state and the body politic, it was not without awareness of the risks. The transcendent risk was that she would be reduced, in the eyes of those with power, to the status of associations that governments would consider themselves free to allow or not to allow, and, in any event, to regulate for their own purposes.⁶¹ There was the risk that the Church would be seen and treated as merely an aggregation of individuals privately and extrinsically associated, rather than, in virtue of its public founding by Christ, a truly public society worthy of respect and, perhaps, assistance.⁶² If, as Margaret Thatcher asserted, “there is no such thing as society,”⁶³ the Church is in trouble – as are we all.

⁶⁰ Joan Lockwood O’Donovan, “Subsidiarity and Political Rule in Theological Perspective,” in Oliver O’Donovan and Joan Lockwood O’Donovan, *Bonds of Imperfection*, 235

⁶¹ Hittinger, *Dignitatis*, 1053: “In the modern world, the problem was not so much the establishment of Church by the state, but rather its differentiation from the state. What was most important was that the Church could be differentiated without reducing itself to the status of other private associations.”

⁶² See Hittinger, “Pluralism,” 406-07

⁶³ See Margaret Thatcher Society, interview in *Women’s Own Magazine*.

Dame Thatcher did not have the last word. We have recently witnessed a renewed, though by *no* means universal, attention to society as a phenomenon of political significance and moment, not an illusion to be dispelled.⁶⁴ Especially illuminating, for present purposes, is the discussion of it by Robert Post and Nancy Rosenblum in their 2002 book *Civil Society and Government*. “Civil society,” they observe, “is not a residue on the way to a unified state in which citizenship eclipses other aspects of belonging . . . Pluralism has a normative as well as a descriptive dimension.”⁶⁵ So far, so good. However, there is predictably, and in a way understandably, no recognition that some of the many particular instantiations of civil society, specifically those of the Church, are not malleable in the way that others might be. The Boy Scouts can arrange themselves almost any way they desire. By her own confession, though, the Catholic Church cannot; for example, it would be *ultra vires* of the Pope to try to eliminate the distinction between the laity and the clergy or between priest and bishop⁶⁶ – no matter the egalitarian clamorings of civil society, societies aplenty, and legion individuals locked in an overlapping consensus.

The result of not heeding the dispositive character of *given* social forms is that the way is left open, or at least partially open, to government’s creating a “congruence” between specific moral values of the government and those of particular instantiations or phases of civil society. As Post and Rosenblum observe, “[t]he ‘logic of congruence’ envisions civil society as reflecting common values and practices ‘all the way down.’”⁶⁷

⁶⁴ See Mary Ann Glendon, *Traditions in Turmoil* 127 (2007)

⁶⁵ Robert Post and Nancy Rosenblum, *Civil Society* 4 (2002).

⁶⁶ Avery Cardinal Dulles, “Authority in the Church,” in Brennan, *Civilizing Authority* 44 (2007)

⁶⁷ Post and Rosenblum, Introduction, in *Civil Society and Government*, 13.

Post and Rosenblum presciently mentioned Catholic Charities by name, some two years before the landmark case of that name was decided by the California Supreme Court. What was decided there is that, if Catholic Charities of California offers its employees a health insurance plan, that plan must include contraceptives, despite the Catholic Church's judgment that doing so would make her a material cooperator in conduct that violates the natural and divine moral laws. The argument from "congruence" carried the day. We would be remiss not to ask how many steps separate such usurpation of the Church's self-determination from the requirement for an authorization of the sort the monks of La Grande Chartreuse were denied.

I suggested at the beginning that the case of the monks of La Grande Chartreuse is perhaps something approaching the pure case – remote recluses who could pose little threat to anyone's earthly projects. But that is perhaps to miss the deeper point. The monks, though not involved in any active ministry themselves, funded many institutional works of mercy in the surrounding region, and the beneficiaries and others knew as much. What is more, the Carthusians' ancient presence there within the walls of their cloister -- their venerable witness to the sufficiency of God -- was widely known, celebrated, and hallowed. For those set against the Church, there would be a special vexation at the thought or sight of men dedicated to, if you will, nothing more than the divine service. The revolutionaries and their successors had a particular hatred of the contemplative orders. The corporal works of mercy and deeds of justice could be converted, to some extent, to the purposes of egalitarian reformers.⁶⁸ Not so the divine praises, however; and it was for this reason, in part, that Pope Pius XI made a hallmark of

⁶⁸ See Burleigh, *Earthly Powers*, 26-27.

his pontificate the celebration of the pure contemplative life. Indeed, he took the occasion of approving the Carthusians' required revision of their Statutes (in order to conform to the 1917 revision of the Code of Canon Law) to issue what has become the modern papal charter of the contemplative life.⁶⁹

The Carthusians' cloistered witness to the Divine Persons is a rebuke to those who would create paradise on earth.⁷⁰ It was, then, not without some risk or cost that, in 1941, the monks were finally allowed to return to La Grande Chartreuse. They remain today, as they had since the time of the Revolution, tenants of the French state that had not been invented when, in 1084, Hugh, bishop of nearby Grenoble, gave St. Bruno and his companions a place to call home in the Chartreuse mountain range. The pluralist principle assigns to the state a role in facilitating the existence and interaction of plural social forces – not simply to check power, but to respect an ontology that is both from nature and from supernature. But when we say that these forms are from nature and from supernature, we do well to recall Bertrand de Jouvenel's admonition that such imputations of formal causality, though true, can distract us from the fact that they depend as well as on the efficient causality that is our own human agency.⁷¹ The forms that come in potency from nature or supernature depend, for their temporal, terrestrial realization, on our creation of the necessary or desirable social, juridical conditions. In aid of that, in the world as we know and can foresee it, it would seem that we must write and interpret constitutions (and other laws) that assist in the realization and augmentation

⁶⁹ See Pope Pius XI, apostolic constitution *Umbratilem* (July 8, 1924). See also Pope Pius XI encyclical *Rerum ecclesiae gestarum* no. 28 (1926) (explaining the Pope's intention in using a rare and solemn form of approbation in approving the Carthusian statutes).

⁷⁰ It would be a mistake to imagine that Carthusians did not occasionally speak out, including against the Revolution. See Dansette, *Religious History of Modern France*, I.51.

⁷¹ See Bertrand de Jouvenel, *Sovereignty* (1957, 1977).

of such social forms. It is a further, and not merely speculative, question whether or not it is possible for us to write a just (and enforceable) constitution that does not recognize, as some say our United States Constitution does not, the liberty of the Church.⁷²

⁷² See, e.g., Richard Garnett, “The Freedom of the Church,” 4 *Journal of Catholic Social Thought* 59, 73 (2007).