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# THE CONTRIBUTIONS OF CATHOLICS TO THE SOCIO-POLITICAL ORDER

*Patrick McKinley Brennan*<sup>+</sup>

## I.

Do Catholics understand themselves to be obligated to contribute to the public square and to statecraft? If the answer is yes, what gives rise to this understanding? And what should be the content of their contributions? These are the questions I wish to raise, and my title telegraphs an answer. The Catholic tradition teaches that this creation, of which men and women are co-creators, both includes and calls for *order* that is *socio-political*.<sup>1</sup> One of our natural, terrestrial tasks is to build up an order of *societies*, including but not limited to a properly *political* society.<sup>2</sup>

The Catholic tradition also teaches that we are preeminently spiritual beings, of course, but this preference for the spiritual is not to the exclusion or denigration of the natural order. Grace builds on—and does not destroy—nature, as Catholic philosophers and theologians alike have said.<sup>3</sup> That our human nature is a precondition of grace's doing its proper

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<sup>+</sup> John F. Scarpa Chair in Catholic Legal Studies & Professor of Law, Villanova, University School of Law. This paper was prepared for and first presented at the Roundtable on Religion in the Public Square, The Catholic University of America, Columbus School of Law, September 28-29, 2006. For the kind invitation to contribute to the Roundtable, I thank Professors Lucia Silecchia, William Wagner, Robert Destro, and the other members of the Planning Committee. I am especially grateful to Dean Veryl Miles for the warm welcome she extended to me during my visit. The paper has benefited not only from comments received during the Roundtable, but also from comments following its later presentation at DeSales University and again at LaSalle University. My colleague Michael Moreland deserves special thanks for his incisive comments on the first draft of the paper. Though the paper here retains its original form and style as a lecture, I added documentation to give credit where it is due and to point in the direction of fuller treatment of some of its topics and themes.

1. See Selected Writings of Pope Leo XIII (Russell Hittinger ed.), in 2 THE TEACHINGS OF MODERN CHRISTIANITY 3, 20-21 (John Witte Jr. & Frank S. Alexander eds., 2006).

2. See *id.* at 12-14 (discussing the necessary existence of both a large, public, political society as well as smaller private societies among men, and noting that both serve the same principle: “the natural tendency of man to dwell in society”).

3. See ST. THOMAS AQUINAS, EXPOSITIO SUPER LIBRUM BOETHII DE TRINITATE art.3, q.2, at 94 (1965) (“Responsio. Dicendum, quod dona gratiarum hoc modo naturae adduntur, quod eam non tollunt, sed magis perficiunt; unde et lumen fidei, quod nobis gratis infunditur, non destruit lumen naturalis divinitus nobis inditum.”); ST. THOMAS AQUINAS, THE TRINITY AND THE UNICITY OF THE INTELLECT art.3, q.2, at 59 (Rose

work underlines, rather than undermines, the importance of developing and sustaining our natural potential, or normality of functioning. What Jacques Maritain (1882-1973) captured under the epithet “angelism”<sup>4</sup> is to be avoided: we are not disembodied spirits, each going it alone. Created in the flesh, we are spiritual beings with the potential—and exigence—to join together and gift one another with society.

Catholic teaching on the socio-political order has its remote sources in the Church’s early reflections on the revelation of Christ, and its intermediate sources in the systematic, philosophical-theological synthesis worked out, above all, by St. Thomas Aquinas in the thirteenth century. Its proximate sources are primarily in the body of work generated in response to the call of Pope Leo XIII (r. 1878-1903) for a renewed appropriation of the teachings of Aquinas.<sup>5</sup> Pope Leo sought an up-to-date and authentically Catholic understanding of man, state, and society, and the Church’s position vis-à-vis all three of them in a world that was no longer medieval and was less and less visibly Catholic.<sup>6</sup> Some of that understanding came from the popes themselves, but there were also gifted and generous priests and laymen who learned from the popes and went on to develop social philosophies and theologies that are both bold and very Catholic.<sup>7</sup> Arguably the greatest Catholic philosopher of the twentieth century was Jacques Maritain.<sup>8</sup> It was Maritain’s social philosophy more than any other that shaped the Council’s, and thus the Catholic Church’s, modern social doctrine.<sup>9</sup>

The choice of Maritain as principal guide to the Catholic answers to the questions presented may, nonetheless, require explanation. Maritain is today virtually “unknown on the very campuses where, just a generation

Emmanuella Brennan, S.H.N. trans., 1946) (“Response. I answer that it must be said that gifts of grace are added to those of nature in such a way that they do not destroy the latter, but rather perfect them; wherefore also the light of faith, which is gratuitously infused into our minds, does not destroy the natural light of cognition, which is in us by nature.”).

4. JACQUES MARITAIN, *THE DREAM OF DESCARTES* 27-29 (Mabelle L. Andison trans, 1944).

5. See 2 *THE TEACHINGS OF MODERN CHRISTIANITY*, *supra* note 1, at xi-xii.

6. POPE LEO XIII, *AETERNI PATRIS* (1879), *reprinted in THE PAPAL ENCYCLICALS 1878-1903*, at 23, 25-26 (Claudia Carlen IHM ed., 1981).

7. See 2 *THE TEACHINGS OF MODERN CHRISTIANITY*, *supra* note 1, at xi-xii.

8. See *id.* at xii (“The French philosopher Jacques Maritain . . . [was] among the most original and influential of the many European . . . Catholic writers in the mid-twentieth century.”). Pope Paul VI wished to make Maritain, a layman, a cardinal of the Catholic Church at the conclusion of the Second Vatican Council (1962-65). See JEAN-LUC BARRÉ, *JACQUES & RAISSA MARITAIN* 422 (Bernard E. Doering trans, Univ. of Notre Dame Press 2005) (1995) (stating that it was rumored that Pope Paul VI wanted to appoint Maritain a Cardinal of the Catholic Church).

9. See generally Patrick McKinley Brennan, *Jacques Maritain*, in 1 *THE TEACHINGS OF MODERN CHRISTIANITY*, *supra* note 1, at 75, 75-114 (describing Jacques Maritain’s political philosophy and its influence).

ago, he was universally read and admired.”<sup>10</sup> Admiration of Maritain was never universal,<sup>11</sup> but for about half a century he was widely studied and deeply respected in Europe and in the United States, and he did not go unnoticed by Catholic advocates of liberation in South America.<sup>12</sup> A Frenchman by birth, Maritain lived for nearly twenty years in the United States.<sup>13</sup> Originally hostile to democracy, over time Maritain came to lavish praise not only on the American experiment in democratic living, but more broadly on the ideal of democracy and human rights, including a constitutionally enshrined right to religious liberty.<sup>14</sup> As Judge John T. Noonan, Jr. observed, when in 1965 the Church finally championed the right to freedom of religion, it followed the way of Maritain.<sup>15</sup>

Notwithstanding his enthusiasm for rights, Maritain was no proto-Rawlsian political liberal.<sup>16</sup> As Maritain saw things, democracy and a panoply of legally enforceable rights are called for by the natural law itself.<sup>17</sup> The natural law, nothing less, is to be our guide in politics.<sup>18</sup> Maritain thus proved to be “too liberal for conservatives and too conservative for liberals.”<sup>19</sup> This was Maritain’s peculiarly Catholic genius.

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10. Edward Short, *The Maritain Way: ‘Too Liberal for Conservatives, and Too Conservative for Liberals,’* WEEKLY STANDARD, Oct. 2, 2006, at 41, 41 (book review).

11. The University of Chicago resisted strong pressure to hire Maritain as a professor. Maritain taught at Princeton instead. See 1 THE TEACHINGS OF CHRISTIANITY, *supra* note 1, at 80-81; JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY 336 (1998).

12. See Noonan, *supra* note 11, at 336.

13. JACQUES MARITAIN, UNTRAMMELED APPROACHES (1973), reprinted in 20 THE COLLECTED WORKS OF JACQUES MARITAIN xxiii, xxvii-xxix (Ralph McInerny, Frederick Crosson & Bernard Doering eds., Bernard Doering trans., 1997).

14. See JACQUES MARITAIN, REFLECTIONS ON AMERICA 168-70 (1958). Maritain once noted:

The American body politic is the only one which was fully and explicitly born of freedom, of the free determination of men to live together and work together at a common task. And in this new political creation, men who belonged to various national stocks and spiritual lineages and religious creeds . . . have freely willed to live together in peace, as free men under God, pursuing the same temporal and terrestrial common good.

*Id.*

15. See Noonan, *supra* note 11, at 349-50.

16. See BARRÉ, *supra* note 8, at 318 (quoting Maritain as having written “I am neither of the Right nor of the Left”); see also Short, *supra* note 10, at 42.

17. See JACQUES MARITAIN, MAN AND THE STATE 109 (1951) [hereinafter MARITAIN, MAN AND STATE] (“[A] society of free men implies basic tenets which are at the core of its very existence. A genuine democracy implies a fundamental agreement between minds and wills on the bases of life in common . . .”); JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW 64-66 (Doris C. Anson trans., reprint 1971) [hereinafter MARITAIN, RIGHTS OF MAN] (“The same natural law which lays down our most fundamental duties, and by virtue of which every law is binding, is the very law which assigns to us our fundamental rights.”).

18. MARITAIN, RIGHTS OF MAN, *supra* note 17, at 70-71.

19. Short, *supra* note 10, at 42 (quoting philosopher William Sweet).

Frequently within the thicket of controversy, but reliably unburdened by the constraints of partisan loyalty, Maritain sought the truth and spoke it as he discovered it.<sup>20</sup>

The title of one of Maritain's first books captures his—and the principal Catholic—insight about man and the state: *The Primacy of the Spiritual*, which in the English translation bears the title *The Things That Are Not Caesar's*.<sup>21</sup> Christ gave Caesar a perhaps unexpected boost with his response to the Pharisees' taunt about whether or not to pay taxes: "Render unto Caesar the things that are Caesar's, and unto God the things that are God's."<sup>22</sup> In other words, Caesar has stuff that is properly his, notwithstanding the primacy of what is God's. Men and women come together in political society to fulfill their God-given social nature, and in doing so they create a state (that which is Caesar's) with genuine authority, a social and specifically political order.<sup>23</sup> The quality of that order will condition whether humans reach their natural potential and, moreover, whether they reach their spiritual potential—an ominous point of which Maritain does not lose sight.<sup>24</sup> Our associating here below is not our ultimate end, but it is through it that we, in the words of Aquinas quoted by Maritain, "attain to enjoyment of the Godhead."<sup>25</sup>

## II.

For Maritain, and for the tradition he both articulated and developed, the reason persons should participate in politics is arresting: the ordinary development of the human person is absolutely dependent upon participation in society that is political.<sup>26</sup> Lest the import of this claim remain dormant, allow me to repeat it: Political society is a demand of human nature itself. If this still seems toothless, consider that Dame Margaret Thatcher was of the studied view that there is "no such thing [as society]!

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20. See BARRÉ, *supra* note 8, at 318-19 (discussing and quoting Jacques Maritain, *Lettre sur l'Indépendance* (Paris: Desclée de Brouwer, 1935)).

21. JACQUES MARITAIN, *THE THINGS THAT ARE NOT CAESAR'S* (J.F. Scanlan trans., 1931).

22. *Mark* 12:17.

23. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 6; MARITAIN, *supra* note 21, at 11.

24. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 11-13; MARITAIN, *supra* note 21, at 11.

25. MARITAIN, *supra* note 21, at 185 n.22 (quoting St. Thomas Aquinas, *De Regimine Principum*, i, 14).

26. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 6; see also JOHANNES MESSNER, *SOCIAL ETHICS* 99 (J.J. Doherty trans., B. Herder Book Co. rev. ed., 1965) (1958) ("[S]ociety is the association of men for mutual help in the attainment of the full humanity implied in the existential ends.").

There are individual men and women and there are families.”<sup>27</sup> The former Prime Minister of Britain denied the very reality that Catholicism claims is made necessary by human nature itself.

What Catholicism claims is necessary, and what Thatcher denied, can easily be misunderstood (which is perhaps a principal reason for its denial), so please permit me to be somewhat technical as I proceed. First, in the Catholic view, every kind of thing, whether it be carrot, cow, or human person, has its own *nature* or, as Maritain sometimes says, the “normality of its functioning.”<sup>28</sup> Just as a piano functions normally or according to its nature only when it has the right number of strings and is in tune, so too the human person functions normally only when he is, as it were, “in tune”: nourished, physically healthy, and so forth.<sup>29</sup>

To be “in tune,” a human must also engage in society or, as I would prefer to say, *associate*. Society is not a thing, but instead a range of activities—activities in at least some of which humans, if they are to achieve their normality of functioning, must engage.<sup>30</sup> One such society is marriage; there is also the family, the one society Thatcher allows (though without acknowledging that it is, in fact, a society).<sup>31</sup> In addition to these two societies that come “rough-hewn” from nature (in Maritain’s apt phrase),<sup>32</sup> there are also the schools, clubs, cloisters, sodalities, guilds, unions, and so forth—the countless societies men and women create, by reason and will, as time and circumstance allow or demand.<sup>33</sup> There is also the Church, a society that comes from God to humanity.

Third, a given society is not a mere aggregation, the simple sum of its members. The sum is greater than the parts, because something distinct in dignity, capable of accomplishing a unique end or ends, comes into being.<sup>34</sup> Family, for example, is not just “n” individuals, but a unity of order that deserves to be treated as a separate functioning entity.<sup>35</sup> Dissolve the society—drive the monks from the cloister, force them to live isolated from one another—and something real has been lost. Society, fourth, is not merely an add-on to individual humans; humans are *constituted* through their associating(s).<sup>36</sup> Because we are social *by nature*,

27. Margaret Thatcher Foundation, Excerpt from Interview by Douglas Key, *Woman’s Own*, with Margaret Thatcher, in London, England (Sept. 23, 1987), <http://www.margaretthatcher.org/speeches/displaydocument.asp?docid=106689>.

28. See MARITAIN, *MAN AND STATE*, *supra* note 17, at 86-87 (emphasis omitted).

29. MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 60-61.

30. See *id.* at 6-7.

31. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 78-79, 82; Margaret Thatcher Foundation, *supra* note 27.

32. See MARITAIN, *MAN AND STATE*, *supra* note 17, at 4.

33. *Id.*

34. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 7, 12-14.

35. See MESSNER, *supra* note 26, at 117-18.

36. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 6-7.

other-directedness, if you will, is, at least in potency, equally original and simultaneous with the "I." In other words, society, at least in potency, is as primordial and basic a reality as individual humans, *pace* Dame Thatcher's views.<sup>37</sup>

So far forth, then, the landscape as seen by the Catholic eye is one of plural societies by which individuals associate and thus achieve some of the perfections of which, by nature, they are capable.<sup>38</sup> But in addition to multifarious smaller societies beyond numbering, there is political society. Before saying something about political society, we should observe the route by which we have reached it. We come to the heart of Catholics' contributions to the socio-political order by recognizing the equal primacy of individuals and society—not by, say, presuming the sovereignty of the state.<sup>39</sup> One kind of society humans are both capable of forming and crave is the one we call *political* society, where the word political means engaging together in self-government in order to realize individuals' goods and the good that is common to all.<sup>40</sup>

Political society is the architectonic society by which individuals, already associated in other societies (in which authoritative government of a sort also occurs), use reason and will to create the conditions under which they can achieve their normality of functioning.<sup>41</sup> This includes, but is not limited to, creating conditions in which the smaller societies both flourish and harmonize with one another.<sup>42</sup> Families and corporations and churches and schools and monasteries are given legal recognition, and thus protection.<sup>43</sup> Sometimes families and schools are given mutually-reinforcing help. Vouchers for schools are a contemporary ex-

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37. See MESSNER, *supra* note 26, at 97.

38. See *id.* at 96-97 ("In every respect the development of the spirit is dependent upon society. . . . [M]an achieves full integration only in society; only through social completion can he fully develop his being as his nature demands . . . . Thus, man's nature is a social nature as well as an individual nature, so that the social end is one of the fundamental existential ends." (emphasis omitted)).

39. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 11-19 ("The whole as such is greater than its parts. . . . But the human person is something more than a part with respect to society."); see also MARITAIN, *MAN AND STATE*, *supra* note 17, at 42-43 ("The State is not and has never been genuinely sovereign.").

40. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 39; MESSNER, *supra* note 26, at 123-25.

41. See MESSNER, *supra* note 26, at 123-25.

42. *Id.* at 145-46 ("This multifariousness of the common good does not mean a mere sum or coexistence of different communities or associations, but a unity of order in conformity with the order of ends. . . . Each is autonomous within the sphere of its own ends, yet subordinated to the greater society insofar as the wider end of the latter is concerned.").

43. *Id.* at 146 ("All the smaller communities need the 'great community,' the state, to secure law and order internally, peace externally, and to provide certain services for all . . . . The social hierarchy in the pluralism of the common good is thus essentially correlative with the autonomy of the smaller social units, with their own responsibility and competence.").

ample; they allow both families and schools to fulfill their educative functions while allowing the state the opportunity to assist. This is the principle of subsidiarity at work: smaller societies left to do their unique work, helped in that work by the larger society as necessary.<sup>44</sup> Maritain had this kind of subsidiarity in mind when he wrote:

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.<sup>45</sup>

Though these “positive liberties” are nothing *less* than the opportunity to achieve our normality of functioning, they are at the same time much *more* than that. What we have referred to as human nature or the normality of functioning is, to be sure, an opportunity.<sup>46</sup> Each of us has the inherent and well-adapted means to certain kinds of ends, but not to others. Ordinarily, and unless lightning strike, we have the opportunity to become friends, lovers, singers, seekers, and so forth—but not ever cows or carrots.

The question of whether to take advantage, so to speak, of the natural opportunity that has been given to the individual is not, however, an un-governed choice. Yes, each of us is “free” to decide not to become that of which we are capable; however, there is *law* that ordains that we ought to become that of which we are capable.<sup>47</sup> That law is what the Catholic tradition knows as “natural law.”<sup>48</sup>

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44. See JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 334 (1960) (“[The principle of subsidiarity] asserts the organic character of the state—the right to existence and autonomous functioning of various sub-political groups, which unite in the organic unity of the state without losing their own identity or suffering infringement of their own ends or having their function assumed by the state. These groups include the family, the local community, the professions, the occupational groups, the minority cultural or linguistic groups within the nation, etc.”).

45. JACQUES MARITAIN, INTEGRAL HUMANISM 163-64 (Joseph W. Evans trans., 1968) (1936).

46. See MESSNER, *supra* note 26, at 12-14 (discussing the fact that satisfying one’s human impulses through reason, and not just instinct, allows man to fulfill his specific mode of conduct called for by natural law through self-determination).

47. See *id.* at 12-13, 29-30.

48. See *id.*

## III.

As soon as one says “natural law,” a train wreck of misunderstanding impends. According to Maritain, though, no adequate account of the human situation can do without mention of it.<sup>49</sup> This latter claim, about the essential place of natural law in Catholic doctrine on man, state, and society, is itself contested. Some Catholics today would regard human autonomy or human reason as an apt alternative to natural law.<sup>50</sup> Others would agree that the natural law is law, but only in a qualified sense.<sup>51</sup> Maritain, however, holds with St. Thomas, with whom the popes of the twentieth century agreed time and time again, that the natural law is truly a *law*, that is, an “ordinance of reason” promulgated by the person—God, charged with care of the community, for the common good.<sup>52</sup>

This counter-cultural thesis is that God, whose providential wisdom sweetly orders all things to their natural and supernatural ends, legislates or instills in every human person a genuine law that binds the person to realize his nature.<sup>53</sup> Human nature is not a law unto itself, but God induces in man a moral law.<sup>54</sup> Maritain explains,

What emerges from this doctrine . . . is that the Natural Law is known by human reason, but that human reason, in its rational exercise, has no part in its establishment. The divine reason alone is the author of Natural Law. It alone causes that Law to exist, and it alone causes it to be known, insofar as it is the cause of human nature and of its essential inclinations. . . . Let us say . . . that here the divine reason is *the only reason* to be considered. The law, in effect, is essentially an ordinance of reason (*ordinatio rationis*), so that without an ordering reason there is no law. The

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49. See, e.g., MARITAIN, MAN AND STATE, *supra* note 17, at 95 & n.12 (“I need not apologize for having dwelt so long on the subject of natural law. How could we understand human rights if we had not a sufficiently adequate notion of natural law?”); MARITAIN, RIGHTS OF MAN, *supra* note 17, at 58-68 (“[T]here is, by very virtue of human nature, an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human being. The unwritten law, or natural law, is nothing more than that.” (emphasis omitted)); Jacques Maritain, *Natural Law and Moral Law*, in MORAL PRINCIPLES OF ACTION 62, 66 (Ruth Nanda Anshen ed. 1952) (“The divine reason alone is the author of Natural Law. It alone causes that Law to exist, and it alone causes it to be known, insofar as *it is the cause of human nature and of its essential inclinations.*” (emphasis added)).

50. See MARITAIN, RIGHTS OF MAN, *supra* note 17, at 66-67 (“Another altogether opposite philosophy has sought to base the rights of the human person on the claim that man is subject to no law other than that of his will and freedom . . .”).

51. See, e.g., RUSSELL HITTINGER, THE FIRST GRACE 39-62 (2003) (discussing natural law as “law”).

52. Maritain, *supra* note 49, at 65-66.

53. See *id.* at 66.

54. *Id.*

notion of law is essentially bound up with that of an ordering reason. . . .

The fact that the divine reason is the only reason which is author of the Law enables us to understand better the meaning of Saint Thomas' expression: Natural Law is a participation in the Eternal Law. It is the divine reason which is involved. If human reason had a hand in it, the Law would, to that extent, have no more than the value of human authority.<sup>55</sup>

In the Catholic view as expounded by Maritain, then, what human persons are doing when they freely—and it is freely, for, again, we possess the wherewithal to flout the natural law—engage in self-government, is cooperating in the divine governance.<sup>56</sup> Politics is not, *pace* many prevailing views and much practice, just interest-trading and power-checking. It is, if it be legitimate, a following of the natural law and thus a participation in the divine rule.

Before drawing out the implications of this radical doctrine, a few more pieces need to be filled in. We have spoken of societies, including political society. But what of the state? Maritain makes clear what the popes and others frequently leave obscure: the state is not a whole, not a free-standing entity with its own rights, privileges, dignity, and perhaps even sovereignty.<sup>57</sup> The state is, rather, a part of political society, part of the body politic.<sup>58</sup> It is the part of the body politic concerned with the good of the whole, or the common good.<sup>59</sup> The state, Maritain explains, “is a set of institutions combined into a topmost machine,” a “work of art” that “constitutes a superior embodiment of reason.”<sup>60</sup> What the person is doing in civil society, and what the legislator is doing in that part of civil society that we call the state, is *implementing the natural law for the common good of society*.

Given that the natural law is just the inducement in us of a law according to which we are to achieve *the normality of our functioning*, one might ask, what else would we be doing? The point is well taken, though of course we must acknowledge that most of contemporary philosophy and common thought deny that we are bound by a natural law. The point I would hasten to make is that even those who do affirm the natural law do not claim that that law specifies every particular of human living. As to some things, the natural law is under-determinative.<sup>61</sup> St. Thomas Aqu-

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55. *Id.* at 66-67.

56. *See id.* at 67; 1 THE TEACHINGS OF MODERN CHRISTIANITY, *supra* note 1, at 86.

57. *See* MARITAIN, MAN AND STATE, *supra* note 17, at 12-13.

58. *Id.* at 9-10.

59. *Id.* at 10.

60. *Id.* at 12.

61. *See* Patrick McKinley Brennan, *A Quandry in Law? A (Qualified) Catholic Dilemma*, 44 SAN DIEGO L. REV. 97, 112 (2007) (“Using his practical reason, the person does

nas himself noted that many matters governed in a general way by the natural law await specification, or *determinatio*.<sup>62</sup> Against the caricature of the comprehensive “brooding omnipresence in the sky,”<sup>63</sup> as the common law has been described, Maritain explains that the principles of the natural law

are neither theorems nor idols, but the supreme rules of a concrete activity which aims at a work to be done in such-and-such circumstances, with the help of more proximate rules and with the help, finally, of the rules *never traced in advance* of the virtue of prudence, which apply the ethical precepts to particular cases in the climate of a concretely upright will. They do not seek to devour human life, but to build it up.<sup>64</sup>

In other words, in order to give positive-law effect to the natural law, the legislator and the judge need to develop their own respective forms of prudence that are different from those adapted to everyday life.<sup>65</sup>

All this should not obscure the decisive fact that, in the Catholic view, every rational person, no matter whether elector or legislator, is given by God a real law according to which he can reach a practical judgment.<sup>66</sup> Thus, the legislator, having received that law from God, and further having received from the people the law-making office, can proceed to make further law, thereby ordering society according to the natural law. Correlatively, members of civil society, still capable of and required to act according to the natural law, will not, except as prudence may require, obey unjust positive law promulgated by the legislator. The decisive point, lost on modern advocates of a “right to privacy,” is that there are in creation *no lawless pockets*.

Widening the focus from the legislator to the entire government apparatus and bureaucracy standing at the service of political society, we can say that the end of the state and political society is to lead men and women to the natural perfections of which they are capable. But it is not the role of political society and the state to sanctify and lead people to heaven, though it took the Church a long time to get perfectly clear on this point.<sup>67</sup> The end of political society and the state, Maritain insists, “is

not simply reason about nature or something else; he does, or he should, conform to the natural law that is his participation in the divine providence (and, to the extent the natural law is under-determinative, go on to give it *determinatio*.)”).

62. See 2 AQUINAS, *supra* note 3, pt. I-II, q. 95, art. 2, obj. 4.

63. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); see also Steven D. Smith, *Metaphysical Perplexity?*, 55 CATH. U. L. REV. 639, 648 (2006).

64. MARITAIN, *supra* note 45, at 218.

65. See, e.g., HITTINGER, *supra* note 51, at 101-03.

66. See, e.g., *id.* at 98.

67. See MARITAIN, *supra* note 45, at 134.

not to lead the human person to his spiritual perfection.”<sup>68</sup> Rather, as the Second Vatican Council made unmistakably clear, and Pope Benedict XVI reinforced in his first major teaching document, the encyclical letter *Deus Caritas Est*, it is the role of the *Church* to make men holy.<sup>69</sup> It is the work of the *state* to do justice and secure order. A state that fails to achieve order in society will by that failure impede the Church’s work, and for this reason the Church has things to ask of Caesar.<sup>70</sup> If the preacher cannot preach in peace and safety, the Gospel may go unheard—an eventuality of literally cosmic proportions, whether Caesar acknowledges it or not.

#### IV.

“I love America,” wrote Maritain in his 1958 book *Reflections on America*.<sup>71</sup> This Frenchman thrilled at the ways in which the natural law was being made effective in the United States.<sup>72</sup> He saw the mechanisms of our democratic state, the flourishing of societies—religious and otherwise—beyond numbering, and the implementation of structures of social justice as corresponding to the natural human *rights* that he believed derived from the natural law itself.<sup>73</sup> Maritain’s appreciation of America was not based on an abstraction.<sup>74</sup> For example, drawing lessons from reflection on the Tennessee Valley Authority’s contribution to social justice and public welfare, Maritain wrote that, where necessary, “the State itself would launch a movement of progressive decentralization and ‘destatization’ of social life, tending toward the advent of some new personalist and pluralist regime.”<sup>75</sup>

In addition to articulating and pressing for pluralist regimes that serve human persons and their need to freely associate, Catholic social thought of the twentieth century also contributed to and reflected on an emerging sense of the rights of the human person and of his societies. Among

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68. *Id.*

69. See POPE BENEDICT XVI, *DEUS CARITAS EST* 6-15 (Vatican trans., 2006) (explaining the role of the love between man and God and the Church’s responsibility of guidance); see also MARITAIN, *supra* note 21, at 5.

70. MARITAIN, *supra* note 21, at 5-6 (explaining the duties of the state versus those of the Church).

71. MARITAIN, *supra* note 14, at 17.

72. See *id.* at 147-48, 153-54, 166-70, 177-78.

73. See MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 64-65 (“[N]atural law and the light of moral conscience within us do not prescribe merely things to be done and not to be done; they also recognize rights, in particular, rights linked to the very nature of man.”). For a summary of fundamental human rights according to Maritain, see *id.* at 79-80. For Maritain on the existence of these rights in American society, see *id.* at 80, and *supra* note 72.

74. See MARITAIN, *MAN AND STATE*, *supra* note 17, at 22.

75. *Id.* (footnote omitted).

twentieth-century Thomists, Maritain stands out for the fullness of his articulation of a philosophy of natural human rights, a philosophy he deduced from his account of man's natural law participation in the eternal law.<sup>76</sup> The problem that later emerged—and that still exists today—is the possession of these rights without responsibilities, or more technically, the postulation of rights not rooted in the natural law. Cut flowers die. As “rights talk” replaces rights worked out and disciplined in service to the natural law, the necessarily particular conditions of human flourishing are eclipsed.<sup>77</sup> Everything prized becomes a right, but nowhere is there a public discourse by which to prioritize rights, adjudicate rights, or deny false claims of right.<sup>78</sup>

When the Catholic Church came to commend democracy and the rule of law, she did so with the expectation that a consensus that democratic politics is about implementing the natural law, along with the natural rights that are derivative of it, through statecraft and positive law, would hold.<sup>79</sup> Maritain and his American contemporary John Courtney Murray, S.J., perceived such an American consensus.<sup>80</sup> That consensus, if it ever existed, has vanished, and has been replaced by a “right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>81</sup> Today we also have a Catholic Supreme Court Justice, Antonin Scalia, who opines that “God,” not man, “applies the natural

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76. See MARITAIN, *MAN AND STATE*, *supra* note 17, at 95-107.

77. See MARY ANN GLENDON, *RIGHTS TALK* 7-16 (1991). Glendon explains how “the language of rights is the language of no compromise,” *id.* at 9, which often works to the detriment of both the individual and society by foreclosing debate:

The most distinctive features of our American rights dialect are the very ones that are most conspicuously in tension with what we require in order to give a reasonably full and coherent account of what kind of society we are and what kind of polity we are trying to create: its penchant for absolute, extravagant formulations, its near-aphasia concerning responsibility, its excessive homage to individual independence and self-sufficiency, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity. . . .

Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.

*Id.* at 14.

78. See *id.* at x-xii.

79. See MURRAY, *supra* note 44, at 114-21; see also MARITAIN, *RIGHTS OF MAN*, *supra* note 17, at 83-88.

80. See MARITAIN, *supra* note 14 at 166-70 (discussing the “common consciousness” of the American people, and their willingness to live together freely under God in pursuit of the common good); MURRAY, *supra* note 44, at 28-39 (discussing the American consensus regarding “free government,” and its roots in natural law).

81. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

law.”<sup>82</sup> What, then, do we do? And why, we might ask, is the Almighty doing such a demoralizing job?

What the Catholic Church offers the world of potential politicians is a call to associate for the purpose of implementing the natural law. The naturalness of the modes of promulgation and reception of said law makes it a publicly accessible basis for politics, or so the Church and her philosophers continue to teach.<sup>83</sup> That naturalness, however, should not obscure the marvelous fact that, in the traditional Catholic understanding, human beings receiving and implementing the natural law thereby enjoy a participated share in the divine rule.<sup>84</sup> Everyone, whether at home or in the legislature, is under law, always the potential beneficiary of a participated *regalitas*.<sup>85</sup> There is no such thing as a purely private person, a person not under law. Over against modern political theory, the landscape of which is populated by individuals considered simply as citizens, the Catholic tradition regards every person as endowed with the capacity and task to make actual the divine ordering that is at first only potential, that is, the power to rule according to a received law.<sup>86</sup> Yes, humans are free to flout the task of ruling, and at liberty to leave it to God to implement the natural law.<sup>87</sup> God is not going to do it for us, however. This is why, in the judgment of much of Catholic social thought, the achievements and even aspirations of contemporary American politics frequently fall far beneath the dignity of a participated regality: we have effectively given up the terrestrial task that is ours.<sup>88</sup> This sad eventuality calls to mind Maritain’s trenchant observation that the fact

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82. Antonin Scalia, Assoc. J., U.S. Supreme Court, *The Common Christian Good*, Speech at the Gregorian University Symposium on Left, Right, and the Common Good (May 2, 1996) (transcript on file with author).

83. See Selected Writings of Jacques Maritain (Patrick M. Brennan ed.), in 2 *THE TEACHINGS OF MODERN CHRISTIANITY*, *supra* note 1, at 34, 52-53; Selected Writings of Pope John XXIII (Leslie Griffin ed.), in 2 *THE TEACHINGS OF MODERN CHRISTIANITY*, *supra* note 1, at 94, 104-05.

84. See MARITAIN, *supra* note 21, at 147-48.

85. See *id.* at 135-36.

86. See *id.*; MURRAY, *supra* note 44, at 203-05.

87. See Selected Writings of Pope John Paul II (Robert P. George & Gerard V. Bradley eds.), in 2 *THE TEACHINGS OF MODERN CHRISTIANITY*, *supra* note 1, at 175, 182-84; see also *supra* notes 46-48 and accompanying text.

88. JOSEPH CARDINAL RATZINGER (POPE BENEDICT XVI), *VALUES IN A TIME OF UPHEAVAL* 24-28 (Brian McNeil trans., Ignatius Press 2006) (2004) (“Today . . . natural law is considered, no longer as accessible to the insight of all persons, but rather as a specifically Catholic doctrine. This signifies a *crisis of political reason, which is a crisis of politics, as such*. It seems that all that exists today is partisan reason, no longer a reason common to all men, at least as far as the great fundamental structures of values are concerned. All who bear responsibility for peace and justice in the world—and . . . that means all of us—have the urgent task of working to overcome this state of affairs.”).

that mistakes about the natural law are possible proves nothing against the natural law. “[We] . . . run[] the risk of error here as elsewhere.”<sup>89</sup>

## V.

Do we despair? Citing Caesar’s *De Bello Gallico*, St. Thomas Aquinas recalled (mistakenly, as it turns out) that the Germanic people were once ignorant of the fact that garden-variety theft violates the natural law.<sup>90</sup> Some two thousand years later we have a German Pope who invites people of all faiths to construct their common life according to “shared reason,” observing that today, argument from the natural law has become “blunt.”<sup>91</sup> Pope Benedict XVI recently mentioned Maritain by name and remarked on the high level of Maritain’s “confidence in the rational evidential quality of the moral truth of Christianity and of the Christian image of man.”<sup>92</sup> The Pope did not comment, however, on Maritain’s correlative judgment that humans should recognize that they are from the beginning under God’s law, which is to be obeyed in freedom. Perhaps Pope Benedict concludes that we have lost sight not only of the natural illegality of theft, but also of the natural law itself, thus reducing ourselves to the false appearance of lawlessness. This would explain why the Pope has now begun what promises to be a sustained reflection on the natural law basis of worthy politics and social life.<sup>93</sup>

Beyond all this, Maritain and the Pope are in agreement that the true basis of sustainable politics includes the self-sacrificing love by which people reverse the cultural currents that obscure or deny the possibility of a social order in which people flourish and live joyfully.<sup>94</sup> It is appropriate, therefore, that Pope Benedict dedicated his first encyclical, *Deus Caritas Est*, to the love God has shown his people, which they should in

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89. MARITAIN, RIGHTS OF MAN, *supra* note 17, at 62-63 (1971).

90. ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. II, q. 94, art. 4, at 288 (Timothy McDermott ed., 1989).

91. RATZINGER, *supra* note 88, at 38.

92. *See id.* at 67.

93. *See, e.g.*, Pope Benedict XVI, Address to the Participants of the International Congress on Natural Moral Law (Feb. 12, 2007) (transcript available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2007/february/documents/hf\\_ben-xvi\\_spe\\_20070212\\_pul\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/february/documents/hf_ben-xvi_spe_20070212_pul_en.html)); Pope Benedict XVI, Address to the Participants in the 56th National Study Congress Organized by the Union of Italian Catholic Jurists (Dec. 9, 2006) (transcript available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/december/documents/hf\\_ben\\_xvi\\_spe\\_20061209\\_giuristi-cattolici\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/december/documents/hf_ben_xvi_spe_20061209_giuristi-cattolici_en.html)). These Addresses were delivered against the background of the news that the Congregation for the Doctrine of the Faith, of which Cardinal Joseph Ratzinger was Prefect before being elected to Pope, is preparing a major teaching document on the natural moral law. *See* John L. Allen Jr., *New Vatican Documents on Bioethics, Natural Law*, NAT’L CATHOLIC REP., Jan. 29, 2007, <http://ncrcafe.org/node/869>.

94. *See* MARITAIN, RIGHTS OF MAN, *supra* note 17, at 21-22; RATZINGER, *supra* note 88, at 51-52, 112-13.

turn show one another, including in the public square and through statecraft.<sup>95</sup> When Catholics contribute to building up the socio-political order, this is in part because they are governed by the law of charity given by Christ to his followers.<sup>96</sup> As Maritain explains: “By virtue of the Charity which is its essential source and principle, Christian spirituality overflows into things outside; it diffuses its own excellence. It acts upon the world, on culture, on the temporal and political order of human life.”<sup>97</sup>

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95. See POPE BENEDICT XVI, *supra* note 69, at 36-41.

96. See POPE BENEDICT XVI, *supra* note 69, at 1-2, 27-30.

97. JACQUES MARITAIN, *FREEDOM IN THE MODERN WORLD* (1933), *reprinted in* 11 *THE COLLECTED WORKS OF JACQUES MARITAIN*, *supra* note 13, at 1, 59.

