

AN ESSAY ON CHRISTIAN CONSTITUTIONALISM:
BUILDING IN THE DIVINE STYLE, FOR THE COMMON
GOOD(S)

*Patrick McKinley Brennan*¹

“The Reformation superseded an infallible Pope with an infallible Bible;
the American Revolution replaced the sway of a king with that of a document.”

-- Edwin S. Corwin²

I. INTRODUCTION: CONTROLLING THE STATE OF MANKIND BY LAW

An answer is always and only *to* a question (the alternative is called a *non sequitur*), and the question I have been asked to answer is exactly this: “What would a Christian constitution, in a predominantly Christian nation, look like?” My answer can be summarized as follows: the fundamental laws, institutions, and practices that would have as their aim to constitute—and to sustain—that particular people *as a Christian commonwealth*. Contained in this telegraphic summary is a *rejection* of the possibility that an inquiry into a “Christian constitution” can be limited to a constitution in the “thick” sense.³ Also contained in it is an *assertion* that there is a *necessary* connection between a Christian constitution and commonwealth, where commonwealth is opposed to “state” in the usual, modern sense of the latter term. This inquiry into Christian constitutionalism, then, is an inquiry into the necessary and sufficient conditions of constituting a particular people as a Christian commonwealth.⁴

¹ I am grateful to the editors of the Rutgers Journal of Law and Religion for the invitation to contribute to the Seventh Annual Donald C. Clark, Jr.,

² EDWIN S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 1 (1955).

³ On “thick” versus the “thin” senses of “constitution,” see Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 152-57 (Larry Alexander ed., 2001).

⁴ I take the question of “a constitution” to be a subset of the question of “constitutionalism.” On the one hand “[t]he word ‘constitutionalism’ was invented in the late eighteenth or early nineteenth century to refer chiefly to the American doctrine of the supremacy of the written constitution over enacted laws.” HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 395-96 (1983). On the other, the notion of constitutionalism goes way

Before elaborating the answer, some preliminary, ground-clearing observations about the question itself are in order. In addition to its intrinsic difficulty, the question involves a challenge imbued from circumstance. Radical in the abstract, the question becomes iconoclastic, indeed even impious, when asked amid the tangle of our lived experience under the Constitution of the United States. As Max Lerner observed already in 1937, “[e]very tribe needs its totem and its fetish, and the Constitution is ours.”⁵ To question a totem is taboo.

Not only that, however. One of the principal reasons Americans and others fetishize—or, as Henry Monaghan notes, “worship”⁶ it—the U.S. Constitution is its very Godlessness. At the core of the instrument is its celebrated “empty shrine”⁷ that daily attracts more pilgrims than Lourdes and Fatima combined. The emptiness of the instrument is no accident, of course; indeed, it occasioned some impressive *snark* long before the term was invented. When asked at the conclusion of the Constitutional Convention why the document contained no recognition of God, Alexander Hamilton quipped: “I declare, we forgot it.”⁸ This shameless prevarication worked a slight exaggeration, to be sure, as the Framers did give God a formulaic nod in the dating clause (now rarely reprinted as part of the Constitution), but the basic

back. For a sampling of its development since the early Middle Ages, see BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650* (1982); HOWELL A. LLOYD, *CONSTITUTIONALISM*, IN *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700*, at 254 (1991); ANNABEL BRETT, *SCHOLASTIC POLITICAL THOUGHT AND THE MODERN CONCEPT OF THE STATE*, IN *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 130 (Annabel Brett and James Tully, eds., 2006).

⁵ Max Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290, 1294 (1937). See Henry P. Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353-60 (1981) (collecting evidence of worship of the Constitution, including the quote from Lerner). “The American [has] . . . high regard for the Constitution, amounting often to idolatry.” Clinton Rossiter, *Prefatory Note* to EDWIN S. CORWIN, *THE ‘HIGHER LAW’ BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* at vi (1955). “The U.S. Constitution (most notably the Bill of Rights) and the U.S. Supreme Court have long enjoyed a near-sacred position in American political and civic culture.” RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 82 (2010) (citing SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988)). On the ways in which the Constitution should be interpreted like the Bible is interpreted, see JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004).

⁶ Monaghan, *supra* note 5, at 356.

⁷ MICHAEL NOVAK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* 53 (1991).

⁸ See CHRISTOPHER A. FERRARA, *LIBERTY, THE GOD THAT FAILED: POLICING THE SACRED AND CONSTRUCTING THE MYTHS OF THE SECULAR STATE, FROM LOCKE TO OBAMA* 510 (2012) (Foreword by Patrick McKinley Brennan).

point of Hamilton's boast stands: "A reference to 'the Year of our Lord' sneaks into the dating of the instrument. But nothing more."⁹

From that unimpeachable observation about what little slippage was allowed, John Witte Jr. goes on to comment that "[t]he 'Godless Constitution' has been both celebrated and lamented ever since." Though technically correct, Witte's observation could be misleading. After all, when is the last time *you* met someone eager to amend the U.S. Constitution in order to recognize God (and His law)? The celebrators of the Godlessness of the Constitution outnumber its lamenters by 1,000 (or is it 1,000,000?) to 1. Irrespective of the exact statistics, we are not at risk of a run on lamentations. Any contemporary inquiry into constitutionalism per se all but assumes, for its disciplinary integrity, such an instrument's Godlessness and the desirability thereof.

There is still more to the charge that mere inquiry into Christian constitutionalism is downright impious, however. It was the God of Christian revelation in particular—not the god or goddess of any other purported revelation—that the Framers of the Constitution of the United States deliberately excluded from the hegemonic handiwork they sought to make the "supreme law of the land." No other deity was a viable candidate for inclusion, after all, and so it follows that the law of no other "almighty" was deliberately and designedly excluded from its purportedly rightful place. And so, for those living under a constitutional tradition from which the Christian God was wrung with relish at its inception now to ask what form a Christian-inspired alternative would take will appear to many, if not to most, a piece of impious effrontery against, well, the absentee god of the empty shrine and its plentiful pilgrims who devoutly if vacuously worship there in what we now call, in the parlance of the very Constitution's modern tradition of interpretation, "ceremonial deism."¹⁰ It is, therefore, no paranoid delusion that those who would today question the totem of constitutional agnosticism, and would do so

⁹ JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 76 (2d ed. 2005).

¹⁰ See KENT GREENAWALT, 2 *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 94-102 (2008). Cf. Douglas Laycock, *Theology Scholarship, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 235 (2004) (the notion of ceremonial deism is "unconvincing both to serious nonbelievers and to serious believers").

in favor of a Christian constitution in particular, risk a shunning that would make even the Amish blush.

The umbrage I have just described is in part a function of the fact that the bandwidth of contemporary thought about constitutionalism, at least as such thought takes place in the United States, is measurable in millimeters, not meters—as in “We’re all originalists now,” or the like. But the matter is not merely descriptive, but also deeply normative. “Has not our nation’s experience under the Constitution of the United States shown *reasonable* people how conclusively salutary it is when contention-inviting god-questions are no longer thought to be necessary to the socio-political order?,” we can expect the establishment keepers of the Constitution to ask (rhetorically and with dutiful citation to *A Theory of Justice*). Impelled by the normative power of the actual and emboldened to entrench the status quo, these border patrol agents can be counted on to continue with the additional charge, furthermore, that only ungrateful heirs to this grand experiment in agnostic constitutionalism will be so self-indulgent as even to imagine a new and different title to the rich inheritance they go on enjoying as they idly speculate about an anachronism called a Christian constitution.

In sum, most lettered people today, scholars as well as jurists, consider the U.S. Constitution to be an all but incontrovertible object lesson—lost only on the “unreasonable” (usually defined in the terms dictated by Rawls)—in the abundant benefits of dreaming down, so to speak, to a socio-political life wherein God is, at most, a private affair, and certainly no longer a public presence provoking pesky social “problems,” even “wars of religion.” As a result, the very act of hypothesizing “a Christian constitution” for an imaginary “predominantly Christian nation” demonstrates, in a way that a few will celebrate and most will lament, that—*mirabile visu!*—the iconic Constitution has failed in its and its promoters’ attempts to erase, or at least to interdict, the very question of Christian constitutionalism. And woe to those illiberal souls who raise the question in earnest!

Nevertheless, here I will assume the risk of interposing several related questions of my own: Is it not perhaps a *positively* portentous fact that we are still capable of at least imagining a Christian constitution and the benefits it promises? Is it not a sign of hope that this unextinguished capacity to imagine might lead some in our midst to dream up, so to speak, to such a constitutional order, that is, to a commonwealth that, *because it is*

Christian in its aims, is also Christian in its content? And, to be perfectly clear about what is at stake in assessing the import of these questions, the aims of a Christian constitution would not be exhausted by the comparatively anodyne business, pressed by contemporary conservatives and neo-conservatives alike, of giving legal and specifically constitutional effect to “Christian values” or “Judeo-Christian values,” and perhaps even salvaging so-called “religious freedom.”

No, it is the defining mark of a Christian commonwealth that it submits to Christ the King as the supreme lawgiver. This is traditional Catholic doctrine. A true Christian constitution would take as its alpha and its omega Christ the King and, at His command, His Church, and this plainly is not the stuff of garden-variety contemporary political thrust and parry. On the contrary, it is as obvious as the North Star on a clear night that contemporary conservatives and neo-cons alike are no more likely than today’s liberals or libertarians to affirm or even good-naturedly to entertain the thesis I shall defend: The ultimate end of the project of Christian constitutionalism is to lead human persons to the supernatural common good, the God of Christian revelation, but first, in service of that ultimate end, to lead human persons proximately to the natural common good, “the virtuous life of the whole,”¹¹ through subordination to the divine law, for, as St. Thomas Aquinas reminds us, “[t]he state of mankind may change according as man stands in relation to one and the same law more or less perfectly.”¹² And *radical change* is exactly what contemporary constitutionalism, irrespective of whether it comes from the Left or from the Right, is designed to prevent, out of preference for a status quo that denies or ignores a coming eschatological rectification of all that ever was.

II. COMMONWEALTH, NOT “STATE”

For purposes of answering the question presented, I shall treat it as axiomatic that the ultimate final cause of the human person is the common good that is God and that the proximate

¹¹ LEO W. SHIELDS, *THE HISTORY AND MEANING OF THE TERM SOCIAL JUSTICE* 39 (1941).

¹² THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II 106.4 c. (1273). Most subsequent citations to this work (which is also known as the *Summa Theologiae*) will occur in the text, and most quotations will be from the standard translation by the Fathers of the English Dominican Province (copyright 1947), though sometimes with slight, unnoted modifications by the author.

final cause of the person is the natural common good. I will take these basic tenets of Christian theology as given starting points for purposes of my inquiry into Christian constitutionalism. Christians who do not hold these positions on man's ultimate or proximate end are unlikely to reach the tradition's conclusions, defended here, on Christian political order, Christian constitutionalism, and so forth. Those assuming the "original position" will not reach the political conclusions defended by those who proceed from the Garden of Eden.

Given the aforementioned theological (and ethical) starting points I have identified, then, my first contention is that the achievement of the natural common good would be the achievement of what I have referred to—and shall refer to—as a *commonwealth* (of a specific kind). This substitution of commonwealth for the expected-because-ubiquitous "state" will cut against the grain all the way to its root, but for an inquiry into Christian constitutionalism to be genuinely open, rather than completely closed, to where Christian commitments lead in law and politics, it must sedulously avoid the seductions of path dependency. The inquiry must in no way assume, for example, that its end will be somehow to establish a political order basically modeling liberalism, separation of powers, limited government, or the like. A truly Christian constitution cannot but take its still-to-be-specified scope and aims, forms and modes from the path *not* taken by modernity, that is, from fact that *by nature* man is a *social* animal, not a primordial contractor—a fact of nature that may require or counsel basic laws, institutions, and practices that are anathema to the Lockean political order within the confines of which we live, move, and have our cramped being.

"Commonwealth"—the concept that I have placed at the center of my inquiry into Christian constitutionalism—is not a commonplace today. Among the fifty United States four (Kentucky, Massachusetts, Pennsylvania, and Virginia) do refer to themselves as commonwealths in their own constitutions and in some of their contemporary official manifestations (e.g., their official stationery and, no doubt, their paperweights), but it is not clear, however, what difference, if any, their being nominally commonwealths, as opposed to "states" (or tribes or colonies), means to their respective internal socio-political lives. Be that as it may, for purposes of the U.S. Constitution they are merely four among fifty "states," for the term commonwealth is simply unknown to the national Constitution. Under that Constitution, moreover, the fifty states compose one "United States of America,"

that is, a “state”—indeed, one that has served, in turn, as a prototype for such political organization all around the modern globe

While there is no univocal definition of “state,” the term as it has been developed and endlessly retrofitted over the last five hundred years generally refers to that variegated cluster of political arrangements designed to suit individuals of a natural kind that is *not by nature social*. It is the familiar stuff of modern political theory that solitary individuals in a “state of nature,” variously imagined, enter into a “social contract,” variously conceived, and thereupon grudgingly but strategically put on what John Locke referred to as the “bonds” of civil society.¹³ The details of the endless variations on this anti-social thesis need not detain us here. The point that wants underscoring is that, since the time of the Reformation, what is known in English as the “state” amounts to that set of governmental apparatuses that *imposes itself upon “civil society” from without*. More specifically, the modern state is defined to be a kind of *instrument* by which civil society, through “representatives,” dexterously achieves its limited ends at arm’s length, as it were. In the older tradition, by contrast, “state,” when that term was used synonymously with commonwealth or its Latin equivalents (such as *civitas*), referred to that set of institutions that *form* the people into “the body politic.”¹⁴ As the few remaining students of hylomorphism will not need reminding, there is no such thing as a formless body, and, according to the older model, it was the *form* called state that *informed* the people, thus constituting it a commonwealth.

In sum, on the familiar, modern, liberal view, “civil society” is not “formed” by the state; instead, the state slavishly does civil society’s bidding as its tool or instrument. On the older model, by contrast, once embodied in various ways in Christendom, what later came to be known as two distinct entities—civil society and the state—were two sides of the same political coin, an organic unity.

¹³ See MICHAEL J. WHITE, *POLITICAL PHILOSOPHY: A HISTORICAL INTRODUCTION* 273-74 (2d ed., 2012). For the history of how the “individual” of modern political theory was theorized into being see BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* (2012); LARRY SIEDENTOP, *INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM* (2014).

¹⁴ FERRARA, *supra* note 8, at 2-7. On the emergence of “civil society” in contradistinction to the state in normative political theory, see, e.g., CHRISTOPHER PIERSON, *THE MODERN STATE* 67-70 (1996).

It was the transcendent achievement of Christendom that it was an age of unity. The commonwealth of Christendom was the socio-political form according to which humans should organize themselves in virtue of their being, at least, *social by nature*. That was then. Almost a hundred years ago Jacques Maritain commented that “[i]t was five hundred years ago that we began to die,”¹⁵ and it has been the politico-religious achievement of these past six hundred years since the Reformation that we live now in “the age of separations”¹⁶—state from civil society, politics from religion, Church from state, and so forth. What the architects of Christendom had joined together in recognition of the given ontological unity of the natural socio-political order, modern man proudly ripped asunder. The definitors of the modern *state* exclude by design the natural unity of the social order that formed the heart of what the Christian tradition included by design in the concept of *commonwealth*.

The architects of Christendom were not *inventors* of the ideas of a naturally given socio-political unity and of the man-made commonwealth that reflected and embodied that given unity. Nor were they even the first *discoverers* of ontological unity and its social forms. They learned these things from, among others, the pagan Cicero.

Not only a great Roman politician, Cicero was also a great (if uneven) political philosopher, on whose contributions St. Augustine and St. Thomas Aquinas, among other towering Christian theologians, would later build. Like Aristotle before him, Cicero judged life in society—that is, associational life—to be *natural* to man. Whereas Aristotle’s principal model of human social life at the level we call “political” was the *polis*, Cicero’s was the *res publica*, “the public thing,” usually (and rather well) translated as commonwealth, which he defined as follows: “the commonwealth is the concern of a people, but a people is not any group of men assembled in any way, but an assemblage of some size associated with one another through *agreement on law* and community of interest.”¹⁷

The second of the three elements Cicero mentions, “agreement on law,” translates the Latin phrase “*consensus juris*,”

¹⁵ JACQUES MARITAIN, THE THINGS THAT ARE NOT CAESAR’S 74 (trans. J.F. Scanlan, 1930).

¹⁶ PIERRE MANENT, THE CITY OF MAN 82 (1998).

¹⁷ MARCUS TULLIUS CICERO, *On the Commonwealth*, in ON THE COMMONWEALTH AND ON THE LAWS 18 (James E.G. Zetzel ed., 1999) (emphasis added).

and *juris* in turn is the genitive grammatical form of the Latin noun *jus*. *Jus* is often and correctly translated as “law,” as is the Latin noun *lex*. *Lex*, however, usually refers to the written (or sometimes oral) law enacted or adopted by a constitutionally established legislative authority, whereas *jus* embodies a far broader range of meanings: “law, justice, right, rights, procedures of justice, just because, court, righteousness, power, authority.”¹⁸ The point, then, is that when Cicero requires for the existence of a true commonwealth a consensus on *jus*, he is referring to a much more entrenched consensus than a mere agreement on specific laws of a polity. The term *jus* “implies a deeper consensus on justice itself. Such a consensus embodies an agreement on the very nature and purpose of law and its relation to right, equity, and justice.”¹⁹

Cicero was demonstrably aware of the theory according to which justice or “the just” is exactly the product of mere agreement (“*quasi pactum*”) among men, not a deliverance of nature to be discovered by men and embraced by them as true.²⁰ This awareness on the part of Cicero makes all the more poignant his judgment that the “consensus” required for a true commonwealth “is a given, not a product of human consensus building.”²¹ Cicero was not so naïve as to imagine that, even in a true commonwealth, there would be complete agreement on everything included in the consensus *given by nature*. Though deeply committed to the essential unity and equality of all human beings in virtue of their shared nature, Cicero was well aware that humans are often corrupted, even to the point of depravity.²² He therefore warns that the “first principles” should be “well considered” and “carefully examined” “so that they will have the approval of those who believe that all right and honorable things are desirable on their own account, and that either nothing at all should be considered good unless it is praiseworthy in itself or at least that nothing should be considered a great good except what can truly be

¹⁸ CICERO, *Text and Translation*, in ON THE COMMONWEALTH AND ON THE LAWS, *supra* note 17, at xxxvi, xl.

¹⁹ BRIAN M. MCCALL, TO BUILD THE CITY OF GOD: LIVING AS CATHOLICS IN A SECULAR AGE 2 (2014). See also Kenneth Pennington, *Lex Naturalis* and *Ius Naturale*, 68 JURIST 569, 573 (2008).

²⁰ CICERO, *supra* note 17, at 63.

²¹ MCCALL, *supra* note 19, at 2.

²² R.W. CARLYLE & A.J. CARLYLE, 1 A HISTORY OF POLITICAL PHILOSOPHY IN THE WEST 12, 8 n.2, 117 (1930) (Vol. 1 by A.J. Carlyle)

praised on its own account.”²³ In sum, according to Cicero, the makers of laws must “aim[] at making commonwealths sound, establishing justice, and making all peoples healthy.”²⁴

From his starting point according to which associational life is natural to man, Cicero goes on to maintain that, “the great society of [the commonwealth] has grown up gradually on the foundation of the elementary form of human association, the family.”²⁵ The next issue, then, concerns how growth into a *body* with the necessary consensus on *jus* comes about. Cicero recognized that “the constitution of a state [was] an organic growth[,] in contradistinction to conception of it as a mechanical process.”²⁶ And so, at the beginning of Book II of “On the Commonwealth,” he explains, “I will have an easier time in completing my task,” of explaining and defending the true notion of the commonwealth, “if I show you our commonwealth as it is born, grows up, and comes of age, and as a strong and well-established state, than if I make up some state as Socrates does in Plato.”²⁷ On the one hand, then, Cicero insists that a true commonwealth can only be grounded in a consensus about something objective, *jus*; the ultimate norm of the commonwealth is not “a local affair,”²⁸ at least not entirely. On the other, however, he acknowledges that the constitution (or constituting) of the commonwealth requires of the lawmaker (and his advisors, such as Cicero himself) a skillful adaptation to something subjective—the condition, and in particular the receptivity, of the often-corrupt members of the particular commonwealth, a local affair.

While the latter theme is not one that Cicero himself develops in detail, he is clear that while lawmakers are necessary to organize the commonwealth by legal command, their success in their appointed task depends upon their being able to “obey” the people in some respects.²⁹ As A.J. Carlyle summarizes the matter, “[t]he commonwealth is an organic development out of the natural association of the family, and at the same time it is the expression of the common will and consent, for every citizen has his share in its control.”³⁰ And every citizen, if he is using his share of that

²³ CICERO, *On the Laws*, in ON THE COMMONWEALTH AND ON THE LAWS, *supra* note 17, at 118.

²⁴ *Id.*

²⁵ CARLYLE, *supra* note 22, at 14.

²⁶ *Id.*

²⁷ CICERO, *supra* note 17, at 34.

²⁸ WHITE, *supra* note 13, at 115.

²⁹ CICERO, *supra* note 23, at 158.

³⁰ CARLYLE, *supra* note 22, at 17.

control as nature and reason bid, will rationally prefer that the magistrates make laws that *both* recognize the consensus given by nature *and* successfully lead citizens to a deeper cognitive and performative agreement on the demands of that consensus, and the latter simply cannot be achieved in the abstract or in splendid isolation.

In a phrase of Cicero's (which will have to be supplemented and corrected in light of Christian revelation), "*ex natura vivere summum bonum*," to live according to nature is the highest good.³¹ Nature is the measure of the consensus according to which a true commonwealth is shaped, and (again in the words of A.J. Carlyle glossing Cicero) nature itself "is not found by man in solitude or in misanthropy, but in the society and the love of his fellow-man."³²

III. AVOIDING CARICATURE

A commonwealth, then, is, at least, a particular people united in a consensus about the moral demands of nature, and it is this—not a "state" in the usual modern sense of the term—that any "Christian constitution" must arrange and sustain. No two particular peoples are the same, of course. Venetians of the Quattrocento were proudly different from Florentines of the same period, even though both groups were substantially (indeed overwhelmingly) Christian. Those two city-states, each of which qualified as a commonwealth in the Ciceronian sense of the term, enjoyed very different constitutional systems, and those differences at the level of constitution were *both cause and effect* of the different (but overlapping) sets of reasons why those two peoples did what they did. In a word, they enjoyed appreciably different cultures, though both peoples were overwhelmingly Christian. A people's or a commonwealth's culture—where "culture" refers to the reasons its members have for acting or forbearing—must shape its laws, starting at the level of the constitution.

It follows, then, that the task of describing a Christian constitution *for a predominantly Christian nation* calls for a thought experiment on two, interrelated levels. Ours is emphatically not a predominantly Christian nation (due no doubt to the agnostic Constitution's considerable, if partial, success), and so the task of answering the question about the imagined

³¹ CICERO, *supra* note 23, at 126.

³² CARLYLE, *supra* note 22, at 18.

constitution involves imagining the nation whose constitution it would be. This is so because all law, including our to-be-imagined Christian constitution, must be adapted (as I have already contended) to the particular society it is to constitute. I would suggest that one can helpfully conduct this thought experiment as a kind of metaphorical “scissors action,” where the two blades continually meet anew in a progressive and cumulative project. What the constitutional law should be for a particular people (the lower blade) is never an abstract question, even when, as here, the question gets asked against the background of—indeed, in part *because of*—higher law (the upper blade) that is given to man, not made by man. In Cicero’s terms, those making the laws in light of the *consensus juris* (upper blade) must do so in such a way as to assist a particular people (the lower blade), with its unique matrix of biases and aspirations, if they are to succeed in constituting a commonwealth.

Although I am imagining a Christian constitution for a predominantly Christian nation, a body of constitutional law of the sort I have been asked to imagine would not arrive, just as no other law would, from an imaginary place. I take it as given that it is beyond the scope of my assignment to imagine that the imagined predominantly Christian nation would embark on the project of Christian constitutionalism because, say, something labeled “A Christian Constitution” fell out of the sky and landed, miraculously intact, on the front steps of the Supreme Court or those of the Constitution Center in Philadelphia. In the thought experiment worth thinking, the predominantly Christian nation would not only *impose* such a constitution on itself through the action of its members and magistrates; it would first or simultaneously *create* the very constitution to be imposed. In other words, honest inquiry requires that caricatures of Christian constitutionalism—of the “brooding omnipresence in the sky” and other varieties—must be avoided. A Christian constitution would come into being and in turn develop, with the help of ruling authorities (about which more later), as a part of a people’s organic effort to grow and constitute itself as a commonwealth. A Christian constitution would be no exception to the truism that “[a] constitution is the outcome of *historical factors*.”³³ These variegated factors include the need for self-defense in foreign relations, the need for ordered living, the desirability of ordered

³³ JOHANNES MESSNER, SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD 636 (rev. ed. 1965) (trans. J.J. Doherty).

change, and so forth. And one such factor, “among a predominantly Christian people” in particular, would be to constitute itself, through its constitution, a specifically *Christian* commonwealth.

IV. MANUFACTURING KNOW-NOTHINGS

Whatever else remains to be specified about one, it is *by definition* true that “a Christian constitution” would have to affirm Christ. In order for it do as much, moreover, the commonwealth whose expression it is would have to *know* Christ. Before saying why the latter is so, it will be helpful to sketch the argument according to which it is *impossible that it is so*, for in the not so distant past, the *argument from impossibility* (as I shall call it) was made most famously by Fr. John Courtney Murray, S.J. Murray’s powerful rhetoric insisting upon the necessity of nescience on the part of state helpfully called forth eloquent, spirited, timely, and trenchant restatements of the traditional understanding that, in principle, the state can indeed know—and is therefore competent to affirm—Christ.

Murray was intimately familiar with the Catholic Church’s perennial reasons for insisting that the state must be Catholic in a Catholic society, and against that traditional thesis he advocated a “lay state”³⁴—not a “laicized” or “laicizing” state, he insisted, but rather a “lay state.”³⁵ Murray’s lay state was to take as its ground, source of practical content, and end, nothing higher than that which was indicated by the natural law (which I have yet to define) because, according to Murray, “[a]s the law for man emerges from the nature of man as elevated by grace, so the law for the state emerges from the nature of the state, which was not elevated by grace.”³⁶ More specifically, according to Murray, of the Church’s divine commission to teach all truth, including Christ, who is “the way, the truth, and the life” (cf. John 14:6), “the state, as the living action that is public order, ‘*knows nothing*’ (to use the phrase of Durandus, quoted by Bellarmine).”³⁷

Murray was also familiar with the fact—for which one needn’t quote Bellarmine quoting Durandus—that states solemnly

³⁴ JOHN COURTNEY MURRAY, 3 PROCEEDINGS OF THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA, 30 (1948).

³⁵ JOHN COURTNEY MURRAY, 10 CONTEMPORARY ORIENTATIONS OF CATHOLIC THOUGHT ON CHURCH AND STATE, THEOLOGICAL STUDIES 188 (1949).

³⁶ MURRAY, *supra* note 34, at 30.

³⁷ *Id.* at 73 (emphasis added).

claiming to know the Christian God had been the rule, rather than the exception, for centuries. On what theory, then, did Murray contend that the state cannot but “know[] nothing?” On the theory, in part, that the state will no longer be all that the tradition had thought it was, that is, by *redefining* the state—on the theory, that is, that he and whoever were free to theorize a new sort of state into being *by redefinition*. It’s like how McDonald’s has redefined the hamburger, without changing its name, by substituting something vile for what once gave sustenance; it’s also like how McDonald’s has redefined the milkshake, changing its name to “shake” and substituting chemicals for cow’s milk.

As traditionally understood in Catholic (and some other) thought, the basic political unit, sometimes referred to as “state,” was in essence a commonwealth. In that usage, as we have already seen, commonwealth or (properly understood) state referred to a unity with two aspects, two sides of the same coin: a community of persons *and* a set of institutions (including legal ones) by which the community was constituted or formed as a body politic.³⁸ In Murray’s usage, by contrast, also followed by Jacques Maritain among influential Catholic political theorists of the mid-twentieth century, “state” referred only to the set of institutions, no longer also to the community of persons *formed* by that set. And that set of institutions, no longer the inseparable *form* of a community of persons, amounted now to no more than “purely a technical apparatus”³⁹ or (in Maritain’s terms) “a set of institutions combined into a topmost machine.”⁴⁰ *Deus ex machina?*

It is not difficult to grasp how a “machine” “knows nothing” of God. When the state has been re-manufactured to be a mere machine, tool, or apparatus, all that it is fit to do is to act on civil society, from without, according as such society dictates and as its toolishness allows. In a word, the instrumentalist state can do as little or as much as its manipulators choose *among its limited competences*—wage wars, collect trash, subsidize pharmaceuticals, equalize incomes or outcomes, send the children of the poor to impoverished schools, and sometimes sort of even run the telephone company.

³⁸ George C. Shea, *Catholic Orientations on Church and State*, 125 AM. ECCLESIASTICAL REV. 405, 411 (1951).

³⁹ *Id.* at 409.

⁴⁰ JACQUES MARITAIN, *MAN AND THE STATE* 12 (1951).

But to imagine that the telephone company can know God is indeed to blaspheme.⁴¹ This, by self-fulfilling definition, is beyond its competence. How, then, can we avoid blasphemy yet allow that the state can indeed know God? The traditional answer is that the state—the commonwealth—is a group person, and persons can know things.

Only individual human persons are knowers in the strictest sense of the term, of course, because only individuals experience, understand, and judge. But the category of person is not exhausted by individual human persons, nor even by inclusion in the category of angelic and divine persons. There are also group persons. A group person is what the tradition referred to “as a unity of order distinct by reason of its dignity” (I-II 29.3 ad2). Not a substantial unity, a group person is a society or association that is more than the aggregate of its members.⁴² As F.W. Maitland explained, “[w]hen a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted.”⁴³

On the traditional Catholic understanding, the particular society that is the commonwealth is a group person, and as such it is the subject of rights and obligations. Though possessed of rights and obligations, group persons differ from natural persons by not being self-moving. “It is understood . . . that the state is a moral person, able to be subject to duties, and to fulfill them, only through the medium of physical persons, the individual members who compose it.”⁴⁴ The question arises, then: What exactly do the

⁴¹ Cf. ALASDAIR MACINTYRE, *A Partial Response to My Critics*, in AFTER MACINTYRE: CRITICAL PERSPECTIVES ON THE WORK OF ALASDAIR MACINTYRE 303 (1994): “The modern nation-state, in whatever guises, is a dangerous and unmanageable institution, presenting itself on the one hand as a bureaucratic supplier of goods and services, which is always about to, but never actually does, give its clients value for money, and on the other as a repository of sacred values, which from time to time invites one to lay down one’s life on its behalf [I]t is like being asked to die for the telephone company.”

⁴² See RUSSELL HITTINGER, *Society, Subsidiarity, and Authority in Catholic Social Thought*, in CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH 119-23 (Patrick McKinley Brennan ed., 2007).

⁴³ F.W. MAITLAND, *Moral Personality and Legal Personality*, in STATE, TRUST AND CORPORATION 63 (David Runciman and Magnus Ryan eds., 2003) (referencing Prof. Albert Venn Dicey’s lecture on Combination Law published in 17 HARV. L.REV. 511, 513 (1904)).

⁴⁴ George W. Shea, *Catholic Doctrine and “The Religion of the State,”* 123 AM. ECCLESIASTICAL REV. 161, 166 (1950).

natural persons who compose the group person of the commonwealth *know*? The commonwealth can know only what (at least some of) its members know, *but* it can indeed know what its members know. *Given* that its members can know the truth of the Catholic Church, it follows that the commonwealth can know the truth of the Catholic Church and the truth about Christ taught by the Catholic Church. Therefore, Murray's argument from impossibility fails: The commonwealth can affirm the Church because its members affirm the Church, and the Church teaches the truth of Christ, the God-man.

On the Catholic view, the individual and the state are under a *natural* duty to seek God and to worship Him. *In a Catholic society*, however, the state need not go in search of the true God. This is because, as we have already seen, the state *ordinarily* comes to know the true God through what its citizens know, viz., the Church and her guarantee of the truth of the revelation about the triune God. While in imaginable extraordinary cases the state might first come to know the true God through the knowings of its rulers, in a Catholic society, at least, "the state is not in the position of having to discover the true religion. It does not have to seek for that which has been found and is known in advance by the Catholic people of which the state is the body-politic. It has rather to acknowledge what the Catholic populace acknowledges, the divine institution of the Catholic Church."⁴⁵ The state knows the Church indirectly, through the medium of a Catholic citizenry, but the indirectness of the state's knowing does not alter its direct duties to the Church and to God. A state that is a mere instrument—Maritain's "topmost machine"—cannot know the Church or God; the state that is the institutional embodiment of a group person, however, can indeed know the Church and God.

Murray's argument from impossibility rises or falls on a novel conception of the state that is inconsistent with the traditional understanding of the nature of commonwealth and, at the same stroke, with what is naturally true of man. Should it rise, or should it fall? It is as likely that the state can "undergo[] a change in its very essence"⁴⁶ as it is that human nature can change in its very essence. Enough said? It is for this reason—viz., the intransigently social essence of man—that it has been the "essence" of the modern liberal project to reduce everything to the individual,

⁴⁵ Shea, *supra* note 44, at 167.

⁴⁶ Shea, *supra* note 38, at 407.

and then to destroy the individual. At the heart of Christian constitutionalism is a refusal to allow the state to be redesigned so as to make it a know-nothing, because man is by nature a social animal who by nature longs to live in a commonwealth rooted in a *consensus juris* and divine truth, both of which are taught with authority uniquely by the Catholic Church.

Terminological note: Having established that the proper form of Christian political order is a commonwealth (not a “state” in the usual modern sense of the term), I will throughout the rest of this essay use the more common term, state, as a synonym for commonwealth, unless the context indicates otherwise.

V. LESSONS FROM THE NATIONAL REFORM ASSOCIATION

Before proceeding to unpack the constitutional implications of the state’s recognizing the truth of the Catholic Church, I must to pause to meet a predictable objection. The question I am answering asks what a Christian constitution would look like “in a predominantly Christian society,” but in the previous section I assumed that the state would recognize the truth of the Catholic Church—not of a generically Christian denomination—through the indirect medium of a specifically *Catholic*—not a generically Christian—society. It would be pointless not to stipulate that such Christians as Presbyterians and Calvinists, for example, will not affirm the truth of the Catholic Church *simpliciter* (otherwise we would have to regard them as crypto-Catholics). The question then arises: Does their refusal to affirm the Catholic Church *simpliciter* make a difference to the project of Christian constitutionalism? Indeed it does; it makes, in fact, all the difference in the world.

I referred above to a “generically” Christian society, but of course this is a stylized “fact.” In point of empirical fact, instead, there are (I am told) some 40,000 attested Christian denominations in the world today, and it would be a safe bet that the exact number, whatever it is, fluctuates from month to month, if not from day to day. Whatever their numbers, the myriad Christian denominations are united, if in nothing else, in their rejection of the authoritative Magisterium of the Catholic Church, in favor of the Protestant principle of private judgment. The result is that there are not only however many thousands of denominations, there are however many individual consciences, each its own last word. When pressed, a Protestant denomination reduces to an aggregation of consciences that choose to cluster

around roughly the same set of shibboleths, irrespective of whatever elements of truth they may in fact share. What this means for Christian constitutionalism should be apparent, but an historical example will illuminate the point.

During the Civil War a movement known as the National Reform Association emerged in the North. Composed of “conservative Evangelical Protestant ministers, theologians, ministers, lawyers, and jurists, mostly Presbyterians,”⁴⁷ scarred by what they regarded as the national sin of the Civil War (as well as the War of 1812), the Association asked the American people to amend the U.S. Constitution’s Preamble as follows:

We the People of the United States, [*humbly acknowledging Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the Ruler among the nations, his revealed will as the supreme law of the land, in order to constitute a Christian government,*] and in order to form a more perfect union⁴⁸

The Association presented its proposed amendment to President Abraham Lincoln, and also presented it to Congress in a Memorial and Petition. Lincoln apparently read the proposed amendment; it never came to a vote in Congress. Retired Justice Strong of the U.S. Supreme Court was a member of the Association, indeed its third president.

A casual inspection of the annual Proceedings of the NRA will reveal that the members presciently predicted the radiating consequences of the Constitution’s refusal to mention God, and specifically Christ,⁴⁹ but my present point concerns the Association’s incapacity to move past diagnosis and prediction to recommend an adequate cure. The NRA was destined for terminal incoherence exactly because it had no way of delivering what the proposed amendment called for, viz., conformity to the will of Christ. “[T]he NRA movement succumbed to the same fatal deficiency that characterizes Protestantism in all its varieties: the lack of an authoritative teaching Church with final authority to resolve disputes over faith and morals and unite Christians as a force standing in opposition to abuses of state power.”⁵⁰ Paying

⁴⁷ FERRARA, *supra* note 8, at 509.

⁴⁸ *Id.* at 522.

⁴⁹ *Id.* at 533-36.

⁵⁰ *Id.* at 536.

homage to the modern preoccupation with separation, the Association stressed that they were in no way seeking “the union of Church and State,” but only “the relation of religion and the state.”⁵¹ In the end, the NRA was left with—and half-recognized that it was left with no more than—what it started out trying to spare the nation: rule by majority will. The will of the majority was all that the Association had at its disposal to determine the requirements of the divine law, and for that reason “the NRA quietly extinguished its own position in self-contradiction.”⁵²

I would submit that there is no way for a commonwealth to be Christian, or even ordered according to the natural law (a point to which I return below), unless “its relation to the Law of the Gospel is mediated by a universal authority to define and maintain the integrity of faith and morals.”⁵³ Why? A Christian commonwealth cannot be rooted in the quicksand of individual conscience. The problem the NRA was genetically incapable of solving was diagnosed a generation earlier by the renowned American Protestant convert to Catholicism, Orestes Brownson, and Brownson did not shrink from prescribing the sweet cure that the NRA would later find too bitter to swallow:

The Protestant sect governs its religion, instead of being governed by it . . . Protestantism cannot govern the people,—for they govern *it* The Roman Catholic religion, then, is necessary to sustain popular liberty, because popular liberty can be sustained only by a religion free from popular control . . . speaking from above and able to command them, -- and such a religion is the Roman Catholic.⁵⁴

It just might be worthwhile to note, if only in passing, Brownson’s warning that democracy in America was destined for “declivity to utter barbarism” unless the people became submissive to the divine law “as declared and applied by the vicar of Christ and

⁵¹ *Id.* at 537 (quoting MURRAY, *supra* note 33).

⁵² FERRARA, *supra* note 8, at 537.

⁵³ *Id.*

⁵⁴ Orestes Brownson, *Catholicity Necessary to Sustain Popular Liberty*, BROWNSON’S Q. REV. 1845. Available at <http://orestesbrownson.com/108.html> (emphasis added).

supreme pastor of the Church”⁵⁵ Brownson, like Aquinas before him, knew that “[t]he state of mankind may change according as man stands in relation to one and the same law more or less perfectly.”

VI. CHRIST

The argument of the preceding section was that the notion of a Christian constitution is unworkable, indeed incoherent, if what “counts” as Christian for juridical purposes amounts to no more than the latest answers to a Gallup survey of citizens that asks, “What do you think the divine law command on the matter of X at the present moment?” But beware the seduction of yet another *deus ex machina* to dissolve the problem at hand. The *practical imperative* of an alternative to nose-counting the demands of the divine law does not entail the *right* of the Church to command the state; nor does it even entail the right of the Church to be respected or merely tolerated by the state. We can charitably imagine that our imagined predominantly Catholic (and, though it is a stretch, perhaps even an imagined predominantly Christian) society would *desire* its constitution to accomplish what is necessary for the polity to live according to the law of the Gospel. This is not the stuff of which Christian constitutionalism is made, however.

The Church’s claim vis-à-vis the state is emphatically not a matter of majority preference buoyed by a charitable interpretation thereof. It is instead a claim of *right*, which it is the obligation of Christians, as well as others, to honor and satisfy. In particular, the Church claims a right to due juridical recognition, including at the level at which a people constitutes itself as a political unity. It is alone a claim of right, moreover, that can *justifiably* be expected to dislodge the state from what would otherwise be within its lawful jurisdiction, and this is what, in fact the Church does, she shrinks the jurisdiction of the state in favor of a higher jurisdiction.

What right the Church claims vis-à-vis the state is often formulated as “the liberty of the Church,” *libertas Ecclesiae*, as in the following statement by the Second Vatican Council in its “Declaration on Religious Liberty,” *Dignitatis Humanae* (1965):

⁵⁵ FERRARA, *supra* note 8, at 539 (quoting Orestes Brownson, “Introduction to Last Series,”).

Among the things that concern the good of the Church and indeed the welfare of society here on earth-things therefore that are always and everywhere to be kept secure and defended against all injury-this certainly is preeminent, namely, that the Church should enjoy that full measure of freedom which her care for the salvation of men requires. This is a sacred freedom [*libertas sacra est*], because the only-begotten Son endowed with it the Church which He purchased with His blood. Indeed it is so much the property of the Church that to act against it is to act against the will of God. 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.⁵⁶

This canonical passage from *Dignitatis* defends the right of the Church to do her work, “the salvation of men,” on the ground that it is God’s will that she do it, and it defends it in terms of freedom, *libertas Ecclesiae*.

This phrase of mediaeval origin, including as it does the word “*libertas*,” enjoys a remarkably contemporary ring in a culture preoccupied with negative liberty. The Church does indeed claim a negative liberty for herself vis-à-vis the state, and if construed according to its traditional understanding, the concept of *libertas Ecclesiae* is correct as far as it goes. It is, nonetheless, necessarily incomplete. The negative liberty that the Church claims is to fulfill her positive mandate, and that mandate is not manmade, not even majority-made (with or without benefit of the Condorcet method). “The Church’s ‘sacred liberty’ stems from divine mandate directly, rather than via secondary causality [It] cannot be unseated by considerations of ‘prudence,’ whether those considerations be introduced by the Church or by the state”⁵⁷ More specifically still, that mandate is from Christ Himself. What the Church claims she claims not ultimately for herself and in her own name, but for Christ and in His name.

⁵⁶ Second Vatican Ecumenical Council, Declaration on Religious Liberty, *Dignitatis Humanae* No. 13 (1965) (footnote omitted). Unless otherwise noted, all translations of Vatican documents are from the versions to be found on the Holy See’s website.

⁵⁷ RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 233 (2003).

“Freedom is not *the* fundamental principle, nor *a* fundamental principle. The public law of the Church is founded on the State’s duty to recognize the social royalty of Our Lord Jesus Christ! The fundamental principle which governs the relations between Church and State is the ‘He must reign’ of St. Paul, *Oportet illum regnare*,⁵⁸ the reign that applies not only to the Church but must be the foundation of the temporal City.”⁵⁹ The dispositive point, therefore, concerns not the relation between the state and the Church, but rather the relation between the state and Christ the King.

Here we come to the heart of the matter. Many among the few who today defend something called “the liberty of the Church” do so on the ground, cognizable (on some days of the week) under contemporary U.S. constitutional jurisprudence, that the Church is a voluntary association that, like others such as the Boy Scouts, should be respected and thus allowed certain negative liberties.⁶⁰ What the Church claims from Christ, however, is, first, to be a perfect (that is, complete) society, parallel—yet superior to—the state, and possessed, like the state, of a coercive jurisdiction over her members. The Church likewise claims from Christ, second, as an aspect of her superiority to the state, an indirect power over the state. The constitution of a Christian state that recognized the liberty of the Church would recognize, therefore, the *reduction of its own jurisdiction* by the inruption of a parallel and superior jurisdiction, the Church, exercising the power of Christ the King.

The earth-quaking quality of this last claim should not be downplayed or domesticated for polite consumption at a garden party at Maidenhead. As one exponent of the traditional Catholic position explains:

Certainly, it would be a deplorable *petitio principii* to argue: “The civil rulers must yield to the Church’s demands, because the Church so decrees.” But if Jesus Christ has actually granted the Church the authority over certain matters which civil rulers would possess by virtue of the natural law, it follows

⁵⁸ 1 *Corinthians* 15:25.

⁵⁹ MICHAEL DAVIES, *THE SECOND VATICAN COUNCIL AND RELIGIOUS LIBERTY* 181 (1992) (quoting Marcel Lefebvre).

⁶⁰ See, e.g., Richard Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 *ST. JOHN’S J. LEGAL COMMENT.* 515 (2007); Richard Garnett, *The Freedom of the Church: (Towards) An Exposition, Translation, and Defense*, 21 *J. CONTEMP. LEGAL ISSUES* 33 (2013).

that civil rulers have a correlative obligation to obey the divine positive law in respect to these matters – in other words, that they have obligations in respect to Christian revelation.⁶¹

The point to underscore is that unless Christ Himself imposed upon rulers the obligation to submit to the judgments of the Church in certain matters previously governed solely by the natural law, there would be no direct obligation on these civil rulers to yield to the Church in such matters.

[I]f the Catholic Church possesses “the authority to exercise *jure proprio* functions involving a restriction of the rights granted by the natural law to civil rulers, the only possible explanation of this direct power on the part of the Church is the authorization of Jesus Christ, the Son of God.”⁶²

In sum, the state is bound by divine positive law to acknowledge a reduction of the jurisdiction it would otherwise rightfully exercise under the natural law. The state is bound, more specifically, by “laws laid down for all states under the Christian dispensation—whether they be Christian states or not—by Jesus Christ, as King over civil rulers, by which laws they must yield to His Church in certain matters over which they would have had jurisdiction under the natural law.”⁶³ These laws are objectively binding on all, and they become subjectively binding on a particular polity when its rulers examine the claims of the Church on behalf of Christ and find them to be true. It would be a lawless dereliction of duty for a polity to “know nothing” on principle; it would be equally lawless of a polity to yield its natural law jurisdiction without verifying the truth-claims of the Church on behalf of Christ the King. Having discovered the Kingship of

⁶¹ Francis J. Connell, *The Theory of the “Lay State,”* 125 AM. ECCLESIASTICAL REV. 7, 10 (1951).

⁶² *Id.* at 9. “The advent of Christ the King, the promulgation of the New Law and the supernatural statute of the Church . . . involved a certain dislocation of the natural order, a diminution of the stature and scope which the political power would have possessed in another, purely natural dispensation.” JOHN COURTNEY MURRAY, ON THE STRUCTURE OF THE CHURCH-STATE PROBLEM 11, 12 (1954).

⁶³ Connell, *supra* note 61, at 11.

Christ, it follows that the polity must subject itself to “the supreme Rule of all men, both rulers and ruled.”⁶⁴

It bears emphasis, especially in light of anticipated objections from stakeholders in the phone company, that this does not involve a category mistake. “Naturally, the state cannot be bound by all the laws of Christ intended for individuals. The state cannot be baptized or receive the Holy Eucharist or strive for eternal life.”⁶⁵ The state can, however, “be bound by the positive law of Christ in the sense that civil rulers as such can be directly (and not merely through considerations for the beliefs and desires of the citizens) bound to acknowledge in the Church of Christ the authority to exercise certain functions which otherwise would belong to the state itself by natural law, and to promote in certain respects the supernatural activities of the Church.”⁶⁶ As noted in Section IV, ordinarily the state comes to know Christ through the knowings of its citizens, but the state’s obligation comes directly from Christ, not indirectly via the citizenry. The Church’s objective right is not created by plebiscite.

VII. CHRISTIAN CONSTITUTIONALISM

The state’s discovery of the Kingship of Christ has multiple entailments, which of course is the reason so many have striven so mightily for the past six centuries to deform the state into a “know nothing” tool—a utility provider writ large—that is by definition incapable of making such a discovery. But human beings organically unfolding their social nature in light of revelation mediated by the Church, however, are indeed capable of discovering Christ and His Kingship and its socio-political (and other) entailments. The historical fact proves the possibility, even if that fact is now temporally remote and thoroughly obnubilated by centuries of political theory (and derivative practice) designed to demonstrate the in-principle necessity of nescience. I will outline the leading of those entailments in this Section and then, in succeeding sections, elaborate on them. I will do so both by taking up variations on various contemporary jurisprudential topics and themes and by showing or suggesting why some of those topics and themes are of less importance from the perspective of Christian constitutionalism.

⁶⁴ *Id.* at 12.

⁶⁵ *Id.*

⁶⁶ *Id.*

First, a state that recognizes that Christ is King knows that He is a lawgiver and, therefore, that no constitution—not the Constitution of the United States, nor even one that is Christian in its aims—is truly the supreme law of any land. A state that recognizes the Kingship of Christ will acknowledge that the supreme law of the land is the divine law—both natural and positive—and in its constitution will make *appropriate provision* for such law to be, first, the source of the content of laws governing matters that are not morally indifferent and, second, the ultimate standard of interpretation of the constitution and the laws made under its authority.

Second, a state that recognizes that Christ is King knows that civil rulers—whether they be kings, queens, presidents, prime ministers, parliaments, or Commissioners of the SEC—are viceregents of the true King, not rulers in their own right. The earthly “sovereign” is not truly sovereign.

Third, such a state will recognize the rights and vitality of the pluriform, flesh-and-blood associations in which men and women learn what nature, history, and the Church have to teach, and it will coordinate and respectfully harmonize the respective authorities embodied in such groups.

Fourth, such a state will give constitutional recognition to the Catholic Church and her rights. Among these rights is authority to do what Brownson saw was necessary, viz., to interpret the divine law for the benefit of the state. As also previously mentioned, the rights of the Church include the power to exercise coercive jurisdiction over her members, because the Church is not merely a voluntary association (such as the Scouts) but a perfect (that is, complete) society possessed of the power to make and enforce laws (e.g., the Canon Law)

Fifth, a Catholic state will seek through its lawmaking and through other appropriate means (such as public worship by the state) to realize the natural common good, not merely the basic rudiments of public order, and thereby will assist man in achieving his natural *summum bonum*.

Sixth and correlatively, such a state will recognize that, while man’s supernatural happiness is properly the work of the Church (and man’s natural happiness is properly the work of the state), the state is under a divine obligation affirmatively and actively to assist the Church in her work, including through appropriate lawmaking.

Seventh, such a state will establish through artfully crafted law, including in the form of custom, law-making and law-

enforcing institutions that are well-adapted to such a state's given ends and to its chosen ends, and such institutions will necessarily include culturally-appropriate opportunities for the exercise of governmental prudence and equity, as by judicial officials, giving due regard to the will and intentions of the lawmaker. Correlatively, the legal institutions of a Christian commonwealth will eschew jurisprudential and juridical doctrines and practices that confuse human law's genuine positivity with the false notions of legal positivism.

Eighth, the state that constitutionally acknowledges the truth of the Catholic Church will recognize that only Catholic worship suffices to fulfill the state's natural duty to worship God as He desires to be worshipped. Such a state, therefore, will engage in social worship according to the Rites of the Catholic Church.

In all of the above, and at its core, the constitutional law and practice of a Catholic commonwealth will recognize and reinforce the ontological unity of the social order in its pluriform manifestations as such law and its practitioners go about realizing justice and the common goods, natural and supernatural.

Since, in the final analysis, there is only one last end, to be served by the Church immediately and by the state mediately, it is incumbent upon the two to promote and assist each other, in view of the fact that they have, ultimately, a common last end. The Church knows that it has a responsibility for the well-being of the state, a responsibility to be discharged by assistance, not by interference; at the same time, the Church also knows that its own well-being is a responsibility of the state.⁶⁷

The unity of the social order through creation and redemption requires assistance(s) based on distinctions between the two powers, and so it disallows separation.

VIII. HIGHER LAW AND HUMAN-MADE LAW

Turning now to specify some of the basic elements of Christian constitutionalism, we would do well to prepare to be

⁶⁷ Shea, *supra* note 38, at 415. See also Francis Connell, *Christ the King of Civil Rulers*, 119 AM. ECCLESIASTICAL REV. 244, 248 (1948).

underwhelmed by its commitments in certain jurisprudential categories. To be sure, the very project of Christian constitutionalism itself will be first of all and forever *overwhelming*, especially to contemporary sensibilities and judgments exactly because it refuses to settle for anything short of the reign of Christ the King. That much is by now as familiar as it is clear. At the same time, however, the project is apt to seem *underwhelming* precisely because it will treat the question of constitutionalism itself on a continuum with all other questions of *human* law and thus refuse to idolize constitutionalism as such and its component parts and questions. And so, for example, just as a Christian constitution would render a nullity any statutory enactment that purported to make itself “the supreme law of the land,” so too a Christian constitution would not commit the self-serving mistake of declaring itself to be supreme.

Continuing in the vein of the *underwhelming*, the elements of Christian constitutionalism will not ape or mimic the familiar problematics spawned by the U.S. Constitution in particular, especially those that vexatiously cluster around the (purported) benefits of its being a “written constitution.” Chief Justice John Marshall schooled us to believe that our constitution’s being *written* was “the greatest improvement on political institutions?”⁶⁸ But was Homer improved by being reduced from oral transmission and conservation to a written text (accompanied, of course, by a critical apparatus or two)? Are papal teachings on socio-political matters improved—or rather deformed—by being codified?⁶⁹ Does attempting to *reduce* a people’s constitutional law to a writing facilitate, or does it impede, the *essential purpose(s)* of the laws humans make?

As to the last question, Christians and Catholics in particular answer that the essential purpose of all human law is always already imposed by the divine lawmaker through His higher law, that is, to make higher law effective in human living. I will define that higher law shortly, but the present point is that the essential purpose of constitutional law, as of any law, is given, not made. Therefore, whereas the U.S. Constitution self-referentially demands to be treated as “the supreme law of the

⁶⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). For insight into what usually goes in “interpreting” “a written constitution,” see Paul Kahn’s ironically titled *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997), on what was *really* going on in *Marbury* itself.

⁶⁹ Cf. William J. Wagner, *To the Age of Social Revolution: As Papal Rejoinder, the Apocalypse Is Not Now*, 53 VILL. L. REV. 209 (2008).

land,” and thus to be interpreted so as ultimately to achieve its own self-referential purpose, the ultimate and infeasible burden and honor of what we can refer to as “Christian constitutionalism” is, far from being self-referential, to make the divine law active and effective in human life through human lawmaking.⁷⁰

To be clear, it may occasionally, often, usually, or even always be prudent to attempt to reduce at least some, if not quite a bit, of a people’s fundamental or constitutional law to a writing (or writings). The point I wish to stress, however, is that it always remains a *question*—to which only context-particular answers can be given—how a particular people at a particular time can best achieve the given higher purpose of implementing higher law through law of its own making. *To the (contingent) extent that the very notion itself* of a “written constitution” contributes to the false *impression* that the project of constitutionalism can be exhausted by endlessly iterated self-referential achievement within the confines of a writing, Christian commitments imposed by higher law judge it to be imprudent and therefore reprobated.⁷¹ No educated person who is also an honest one can fail to recognize that no legal code or document, not even one entitled “constitution,” can exhaust the sources necessary to create and administer a *just* legal system, but many educated and honest people do indeed underestimate the injustice *invited* by eliding the actual sources of constitutional decision-making by *exaggerating* the status of what has been reduced to parchment. The latter point may seem too obvious to merit mention, but sometimes distinguished jurists are heard to say, to the U.S. Senate even, that Art. III judges and Justices are “just calling balls and strikes.” But not only does a written constitution need to be interpreted (and, in a system of divided powers, even “constructed”),⁷² always in subordination to

⁷⁰ In his treatment of “the inexplicitness of constitutions” of earlier times, Philip Hamburger explains that, “[l]ogically, a law could not establish its own obligation, and there thus was usually no reason for a constitution to assert that it was legally binding. Instead, constitutions were assumed to depend on natural law for their legal obligation [A]lthough a common law judge had to decide in accord with the law of the land, he did so with a divine obligation and in imitation of divine judgment, and he thus had to reach far above earthly things in pursuit of terrestrial law.” PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 578 (2008).

⁷¹ See J. BUDZISZEWSKI, *How a Constitution May Undermine Constitutionalism*, in *CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH* 145 (Patrick McKinley Brennan ed., 2007).

⁷² See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999). I do not suggest, of course, that

the demands of the common good, the common good may counsel or require that a constitution be *altered*: “[W]hereas the common good as the supreme law of the political community must be ever newly actualized, there is no natural law foundation for unalterability in a constitution and none can be considered so final as to be unalterable, even though its originator may have intended it so.”⁷³

What we might refer to as the *essential openness* of Christian constitutionalism to higher law, because of its subordination to that law, does not, however, entail, nor even allow, systematized guesswork as to human law’s sources and specifications. On the contrary, a necessary condition of the achievement of the very purposes of higher law itself is that higher law be made *effective* in human living, and what cannot be known cannot be obeyed. A “regime” of ex post facto law would vitiate both the proper place of authority in a legal system and human law’s purpose of guiding free human conduct, thus becoming a tyranny. I will return to both of these points below.

As we begin to drill down on the question of the process by which higher law is to be made effective through human lawmaking, we can profitably introduce two concepts that are virtually unknown to contemporary jurisprudence but vital to the understanding of law it strove to supplant: art and prudence

First, art. Lawmakers can be thought of on the model of architects designing a building to be built. Enlightenment thinkers often encouraged the image of lawmaking in *more geometrico*, in splendid isolation from the real world and its naturally given ends and purpose, but the older tradition recognized, here in the words of Aquinas, that “rulers imposing a law are in civic matters as architects regarding things to be built (*sicut architectores in artificialibus*).”⁷⁴ When lawmaking is understood as a social art, lawmakers are understood to enjoy a certain, indeed remarkable, freedom of creativity. Artists are not completely free, of course; they cannot switch randomly among impressionist, post-impressionist, and classical ideals within the same project (at the price of ruining the project). Nonetheless, every artist has his or her own style, which is why, for example, there are important differences even between Fra Angelico himself and those of this

Whittington proposes the common good as the touchstone for the required “construction.”

⁷³ MESSNER, *supra* note 33, at 638.

⁷⁴ Thomas Aquinas, *In Decem Libros Ethicorum* VI Lect. 7, par. 1197 (author’s translation).

very own contemporary school. I will further elaborate this point below.

My present point is that this acknowledgment that lawmaking is an art and that every lawmaker has a style does not, however, preempt the possibility—indeed it assures the possibility—that some of what is made is in fact *defective*, perhaps, for example, at the level of drafting. The comparative quality of a particular example of draftsmanship—from excellent to poor—will affect what actors within the particular legal system should do, or forbear to do, on particular occasions. It would be a fool’s errand (though one often accepted) to treat, say, the First Amendment and Article Three, Sec. 2, of the U.S. Constitution as of a piece. A poorly drafted piece of law cannot reasonably be treated the same way a finely drafted piece is treated. But according to what criterion (or criteria) is a law to be evaluated for the quality of its draftsmanship? Or, broadening the scope of the inquiry, on what basis (or bases) should a law or laws be evaluated?

The common good, a concept I introduced at the conclusion of Section I. To develop and elaborate this point, we can continue with Aquinas as one among our guides to the Catholic position.⁷⁵ Students of jurisprudence who are already familiar with what is often anthologized as Aquinas’s “Treatise on Law” would do well to recall the reasons why, for Aquinas, no treatment of law can be freestanding, despite what the term “treatise” misleadingly suggests. Far from being freestanding, Aquinas’s treatment of law in the *Summa Theologiae* forms an integral part of his overall account of nothing short of how Creation goes forth from God (*exitus*) and returns to God (*reditus*). Here is how, within this literally cosmic context of *exitus* and *reditus*, Aquinas frames his inquiry in the Prologue to the section of the *Summa* dedicated to law:

We have now to consider the extrinsic principles of acts. Now the extrinsic principle inclining to evil is the devil, of whose temptations we have spoken in the First Part (Q. 114). But the extrinsic principle moving to good is God, Who both instructs us by means of His Law, and assists us by His Grace:

⁷⁵ Several paragraphs of this Section and those that follow are adapted from PATRICK MCKINLEY BRENNAN, *Law in a Catholic Framework*, in TEACHING THE TRADITION: A DISCIPLINARY APPROACH TO THE CATHOLIC INTELLECTUAL TRADITION 437-55 (John Piderit and Melanie Morey eds., 2011).

wherefore in the first place we must speak of law; in the second place, of grace.

Law then is an extrinsic principle by which God governs His free creatures and leads them where He wills that they should go. As Aquinas explains, “[t]he very Idea of the government of things in God the Ruler of the Universe, has the nature of a law.” (I-II 91.1 c). This law—the very Idea of the government of things in God the Ruler of the Universe—Aquinas refers to as the *eternal law*. A Christian account of human-made law that would slight the eternal law is like a recipe for custard that would go light on eggs.

Note well that the divine governance understood under the aspect of the eternal law does not cancel human freedom; indeed, it makes it possible. The possibility of free defiance only underscores the salience of Aquinas’s observation, quoted more than once above, that “[t]he state of mankind may change according as man stands in relation to one and the same law more or less perfectly.” Whereas God rules irrational creatures through their passive participation in the eternal law (and thus without their “choice”), God rules the rational creature that is man by giving him a law, *the natural law*, that he is free to choose to obey (or to defy). A cow does not decide whether to obey the divine governance; man, however, must decide whether he will obey the natural law.

Especially given the welter of contemporary confusion about the topic of natural law, what Thomas means by the concept merits some elaboration and clarification. Recall from the excerpt to the Prologue (quoted above) that the law by which God rules man is an *extrinsic* principle. Its being an “extrinsic” principle refers to the fact that the natural law is not part of the essence of man. It has, however, been instilled (*indita*) by divine agency in human practical reason. As a result, when it deliberates about what to do and pursue and what to avoid, the human practical intellect is not lawless. Nor is it a “law” unto itself, as Kant would later have it. On the contrary, human practical reason is under a real law instilled into the human mind by the divine legislator, and this is what Aquinas means by the natural law. Its purpose is to rule and measure human action.

[L]aw, being a rule and measure, can be in a person in two ways: in one way, as in him that rules and measures; in another way, as in that which is ruled and measured, in so far as it partakes of the rule or

measure. Wherefore since all things subject to Divine providence are ruled and measure by the eternal law, . . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to the Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. (I-II 91.1c).

The law that governs the free human practical intellect, it bears emphasis, is nothing less than a sharing in the divine governance itself: “the natural law is nothing else than the rational creature’s participation in the eternal law.” (I-II 91.1 c).⁷⁶ In sum, then, all rational humans are possessed of a real law of divine origin, the natural law, and this “rule and measure” of human conduct that is our very participation in the divine mind under the aspect of the eternal law allows—but does not compel—us to be “provident for ourselves and for others.”⁷⁷

The significance of Thomas’s *defining* the natural law as a sharing in the Divine Mind itself comes further into focus as we notice that Thomas arrives at this definition of the natural law by way of arriving *at the very definition of law itself*. As Russell Hittinger explains, “St. Thomas himself makes it clear that the definition of natural law is not arrived at simply by examining the meaning or concept of law; it is defined in reference to what is absolutely first in the order of being.” Hittinger continues:

⁷⁶ On the doctrine of participation as it concerns law, see JEAN PORTER, *MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY* 59–62 (2010); JOHN RZIHA, *PERFECTING HUMAN ACTIONS: ST. THOMAS AQUINAS ON HUMAN PARTICIPATION IN THE ETERNAL LAW* (2009); PAULINE C. WESTERMAN, *THE DISINTEGRATION OF NATURAL LAW THEORY: AQUINAS TO FINNIS* 1–73 (1998). On the metaphysics of participation in Aquinas, consider, FRAN O’ROURKE, *PSEUDO-DIONYSIUS AND THE METAPHYSICS OF AQUINAS* (2005).

⁷⁷ On the question of why it was needful for God to give man a law, see Thomas Aquinas, *Summa Contra Gentiles*, Book III, Ch. 114.

In *Summa Theologiae* I-II, 91.1, where he first outlines and defines the various laws, the existence of the eternal law (in reference to which the natural law is defined in 91.2) follows from the supposition that divine providence rules the entire community of the world [that] “law is nothing but a dictate of practical reason issued by a sovereign who governs a complete community. Granted that the world is regulated by divine providence . . . it is evident that the entire community of the universe is governed by the divine mind.”⁷⁸

Thomas reasons as follows: *Granted* that divine providence rules the entire world through an ordinance of reason promulgated by him [God] who has care of the world, for the common good, this is the eternal law, and it provides the *definition* of—and exemplar for—any other law: an ordinance of reason for the common good, made by him (or them) who have care of the community over which it has charge, and promulgated. (I-II 90.4 c).

Just as, then, the common good is the final cause of the exemplar of all law, that is, of the eternal law and our natural law sharing therein, so too is the common good the final cause of any and all law made in pursuance thereof, viz., of human law. It is by the relative degree of its success in realizing the common good that the human lawmaker’s exercise of his legislative art is to be evaluated and judged. The project of constituting a commonwealth demands no less than ruling and measuring its constitution for its capacity to secure the common goods.

IX. THE DIVINE STYLE

No sphere of human life is exempt from the natural law, but the natural law is made effective in different parts of life in different ways. In families it can work by counsel, encouragement, and rebuke, and likewise in other partial groupings (as with “by-laws,” for example). Furthermore, although all humans are under the natural law, the fact that humans are *by nature equal* makes it impossible for one human being, without more, to make law for others. (II-II 104.5). It pertains to the definition of law that it proceeds from the person or persons who govern—or, as it is frequently translated, *who have care of*—the community. God has

⁷⁸ HITTINGER, *supra* note 57, at 61.

care of the complete community that is His Creation, but no man, however, is born with care of the subordinate but complete community that is the state. “There is no authority except from God.”⁷⁹ For a human to have the power to make law (for the state), he must be invested with that power *by God*—either directly, as in the case of King David, or, as in almost every known case, indirectly through the people.⁸⁰ Human lawmaking power requires that a person have received authoritative designation as the political authority, that is, an authoritative mandate to care for the common good of the political community. It is, in fact, the distinguishing mark of a properly constituted political authority that it can make law for the community, and this work is not a matter of the self-assertion of an “absolute” (*ab-solutus*) “sovereign,” but, again, of making the natural law effective, that is, of caring for the community by making the natural law effective in the community’s living *for the common good*. This is just what it means to be “provident . . . for others.” This is also what it means to be a viceregent: to rule on behalf of the true ruler.

And to rule, Thomas teaches, is to make—and to make effective—law *derived from the natural law*. Thomas is emphatic that all human law is derived from the eternal law by way of the natural law, (I-II 95.2; 93.3),⁸¹ and he explains, furthermore, that the human lawmaker “derives” human law from our natural law sharing in the eternal law in two importantly different ways. According to the first way, it is as a deductive conclusion from premises; Thomas’s example is the natural-law rule that one must not kill innocent persons. A statute criminalizing murder is derived from the natural law as a conclusion from the premise that it is wrong to kill the innocent. When a human law is derived from the natural law as a conclusion from premises, it binds in virtue of the natural law itself. (I-II 94.2).⁸²

⁷⁹ *Romans* 13:1.

⁸⁰ For one account of the tradition’s disagreement concerning whether the people “designated” their rulers or “translated” the ruling power to the rulers, see HEINRICH A. ROMMEN, *THE STATE IN CATHOLIC THOUGHT: A TREATISE IN POLITICAL PHILOSOPHY* 440-55 (1945).

⁸¹ “[E]very human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.” (I-II 95.2c).

⁸² For a searching account of the details of—and some difficulties with—Aquinas’s many statements about “deriving” all human law from the natural law, see JAMES BERNARD MURPHY, *THE PHILOSOPHY OF POSITIVE LAW: FOUNDATIONS OF JURISPRUDENCE* (2005).

The second way or mode of derivation is that of *determinatio* or determination, and because it is in the nature of the case the far more common, as well as the more conceptually challenging mode, it is deserving of more extended treatment. Thomas's example is the fixing of a punishment. While the natural law requires punishment for crime, it is silent on how the criminal should be punished. Something needs to be made determinate, but, because simple deduction is not possible, the lawmaker enjoys a considerable, if relative, freedom in determining what punishment to prescribe. If we are to understand the true dynamics of Christian constitutionalism, it is critical that this second method by which "general principles of natural law are processed into humans laws"⁸³ be understood in its full amplitude and not assimilated to the first method, that of deduction.

The second process, according to Thomas, "is like that of the arts where a special shape is given to a general idea, as when an architect determines that a house should be in this or that style." (I.II 95.2). This description by simile recalls and continues our earlier discussion of lawmaking as an art, which culminated in the claim that the lawmaker's artifacts are to be measured by their success in realizing the common good. Now we see that, according to Thomas, this measure will sometimes require us to ask whether the lawmaker has succeeded in giving "special shape" to a "general idea." But what, more precisely, does it mean for the lawmaker to give "special shape" to a "general idea?"

The notion of a "general idea" is that of an exemplar, as Thomas explains:

[j]ust as in every artificer there pre-exists an exemplar of the things that are made by his art, so too in every governor there must pre-exist the exemplar of those things that are to be done by those who are subject to his government. And just as the type of things yet to be made by an art is the art or exemplar of the products of that art, so too the exemplar of him who governs the acts of this subjects, bears the character of a law, provided the other conditions be present Wherefore as the exemplar of Divine Wisdom, inasmuch as by It all things are created, has the character of art,

⁸³ WESTERMAN, *supra* note 76, at 67.

exemplar or idea; so the exemplar of Divine Wisdom, as moving all things to their due end, bears the character of law. Accordingly the eternal law is nothing else than the exemplar of Divine Wisdom, as directing all actions and movements. (I-II 93.1).

To obey the natural law is to be provident for oneself or for others, as the case may be, and such providence requires looking to the general ideas or exemplars and then to proceed to instantiate them by giving them “special shape.” Much study has been devoted to the question of what it means for the practical intellect to give “special shape” to the exemplars, but perhaps the best way to understand what is required in the second mode of derivation is *the adoption and application of a specific “style.”* Pauline Westerman explains:

We are not expected merely to copy God’s artefacts. To adopt a style is more than the repetition of stereotypes. Conventional examples may constitute a certain style – and there is certainly no style without such examples – but style is much more than the sum-total of stereotypes. Why? Because a style does not contain precise directions in order to perform specific actions. An artistic style is not to be seen as a recipe on ‘how to paint a portrait.’ The term ‘style’ rather denotes a general way of making or doing things. In fact, ‘style’ is better fitted to describe the kind of rationality required to ‘partake in the eternal law’ than ‘law’, for it shows that rational beings are expected to look beyond examples and conventions. Just as a good painter does not merely copy Monet’s waterlillies, but can adopt that style in painting modern industrial landscape, a rational creature is required to do more than doggedly follow God’s precepts.

If we understand ‘natural law’ as the adoption of the divine style, we can also understand why natural law does not only prohibit us to commit evil, but also enjoins us to pursue and to do good[. . .] Style can be a source of creativity, in the same way that law can be a source of actions, associations and

arrangements which would have been impossible without law.⁸⁴

When the natural law cannot be made determinate by deduction from premises to conclusion, we are to adopt the divine style in making the natural law effective, both for ourselves and for those over we may have ruling authority. How better to be provident for ourselves and others than *to adopt the divine style*? Or rather, is there any other way? I return to these questions below.

Given its importance to any non-reductive, non-simplistic account of Christian constitutionalism, more needs to be said here about the metaphysics that underpins the second mode of derivation:

Eternal Law has the system (*rationem*) of art (*artis*) or exemplar (*exemplaris*) or eternal prototype (*ideae* with its allusions to the Platonic concept) Significantly, all these terms contain the concept of origin, direction and perfection. Each word contains the idea of defining and directing the both the end of, and manner in which, a future act or movement is to be done. The analogy to art is strong

The Eternal Law is the idea of the universe in all its particulars flowing from the mind of God. It contains the end to which all things are directed. It also contains the exemplar or pattern for the universe, the style each is to use in pursuing that end. Finally it contains the skill or art to achieve that particular idea.

It is important to understand in what sense the universe is ruled by the Eternal Law. The Eternal Law, although it is the art, exemplar and eternal prototype of all that exists, provides for the participation of man in causing the particular determinations of each individual act or operation. Again the analogy to art is illuminating. Two artists might have the same idea for a painting (of a Madonna and Child). They might even follow the same style of exemplar (that of the school of

⁸⁴ *Id.* at 32.

Raphael) and both have attained the same level of artistic skill. Yet, the individual paintings of each artists flow from these common determinants will nonetheless be unique. The product, the painting, is caused both by the idea, exemplar and style which govern the product as well as the individual cooperation of the artist with this style, or we might say, the artist's participation in this style. Thus, the individual elements of the created world will exhibit variety and difference but are united by the *ratio* of the Eternal Law which directs their due end. "The *exemplar* God has in mind directs the way the world is *and* should be. In short, the world is created in such a way that it is best fitted to these ends. It is because of the directive power of the *exemplar* that it [the Eternal Law] can be properly called 'law'." [citing Westerman]

Eternal Law is not just analogically like law; it is truly law. It is a rule and measure of all that is The Eternal Law is ordained of reason, the Divine Wisdom. The Eternal Law is directed to the most common good, the due end of the created universe. It has its origin in He who has care of the created community of the universe, God the Creator and Sustainer of all things. Finally, it has been promulgated through the act of creation⁸⁵

Appropriate focus on the human mind's relationship to the ideas or exemplars in the Divine Mind reveals the creativity that is frequently required if we are to be provident for ourselves and for others, even or especially in a legal system. Lawmakers obeying the natural law are not to be servile imitators but creative builders: This is what our natural law participation in the eternal law allows but also often requires.

But what if someone should ask *why* we should adopt the divine style, as opposed to some other style, as we make the natural law effective where simple deduction is not possible? The answer is that "[t]here is no variety of styles between which we

⁸⁵ MCCALL, *supra* note 19, at 58-60 (citations omitted). See also WESTERMAN, *supra* note 76, at 29.

can choose,”⁸⁶ exactly because our very rationality is an impression of the divine light.⁸⁷ This does not mean that we cannot avoid adopting that style, because:

just as there are a lot of bad impressionist painters, there are a lot of people who inadequately adopt the divine style to their own doings. But that does not imply that we need an additional source of obligation for the fact that we should adopt that style poorly. We cannot do otherwise If we take natural law as referring to the possibility to adopt the only available style, there is no need to argue that we are obliged to adopt that style.”⁸⁸ The alternative to adopting the divine style is to slip—or to fall—into irrationality. God Almighty looked to the exemplars when He created, and our very created rationality requires us—though it does not compel us—to do likewise when we create, including when the artifact to be created is law.

Closely related to art is the second concept I introduced above: prudence. Whereas art has as its object things made, *things done* are the object of the art of prudence. Caution is required here because we risk misunderstanding prudence as a sort of Victorian euphemism for muddling through. In the older tradition represented by Aquinas, however, it is nothing of the sort. In fact, prudence is the foremost of the virtues, for what is prudent and what is good are substantially the same.⁸⁹ Just as art imitates

⁸⁶ WESTERMAN, *supra* note 76, at 33.

⁸⁷ See LAWRENCE DEWAN, WISDOM, LAW, AND VIRTUE: ESSAYS IN THOMISTIC ETHICS 199-212 (2008).

⁸⁸ WESTERMAN, *supra* note 76, at 33.

⁸⁹ “[N]othing less than the whole ordered structure of the Occidental Christian view of man rests up the pre-eminence of prudence over the other virtues Classical Christian ethics . . . maintains that man can be prudent and good only simultaneously; that prudence is part and parcel of the definition of goodness; that there is no sort of justice and fortitude which runs counter to the virtue of prudence; and that the unjust man has been imprudent before and is imprudent at the moment he is unjust Prudence is the ‘*measure*’ of justice, of fortitude, of temperance. This means simply the following: as in the creative cognition of God all created things are pre-imaged and pre-formed; as, therefore, the immanent essences of all reality dwell in God as ‘ideas,’ as ‘preceding images’ (to use the term of Meister Eckhart); and as man’s perception of reality is a receptive transcript of the objective being of the world of being; and as the artist’s works are transcripts of a living prototype within his creative cognition – so the

nature, so too does virtue, above all the virtue of prudence. (Cf. II-II 31.3). According to Aquinas, prudence (“*prudentia*”) is the virtue of “applying general moral principles to particular conclusions regarding human conduct.” (II-II 47.6). While some prominent analyses of prudence elide or confuse it with conscience (“*conscientia*”), the correct view is that “*conscientia* is as different from *prudentia* as ‘speaking’ is from ‘eloquence’.”⁹⁰ Prudence is a body of undemonstrable wisdom concerning how to reason well about particulars. Its features include “memory, insight, teachability, acumen, prevision, circumspection and caution,” as well as “reason” itself.⁹¹ The prudent person “takes counsel” (II-II 47.2), but the prudent man does not look for recipes. “What taste is in the arts, prudence is in moral affairs. There has never been a recipe for either of these qualities.”⁹² In deciding what is to be done, the lawmaker, like any individual, will need to decide how to resolve uncertainties.

Thomas distinguishes several species of prudence, including individual prudence (for directing one’s own actions) and domestic prudence (for ordering a family). The kind of prudence necessary to implement the natural law through human lawmaking Thomas refers to as *regnative prudence*. While “regnative” refers in its root to kingly rule, of course, Thomas recognizes that the virtue is necessary for, and applicable to, all rightful forms of government. (II-II 50.1 ad2). And Thomas denominates such prudence the “best” form of prudence, (II-II 50.1c; 50.2 ad1) because its exalted task is to allow the ruler to achieve the common good, not just individuals’ goods or the goods of partial societies such as families.

This, then, with an all-important addition still to be specified, is the higher law context within which we are given to pursue human lawmaking, including at the level of a constitution for a Christian commonwealth.

X. THE COMMON GOOD

The first and indispensable requirement of the common good is the rightful and stable order of the community, for without

decree of prudence is the prototype and the pre-existing form of which all ethically good action is the transcript” JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 7-9, 25-26 (1966).

⁹⁰ WESTERMAN, *supra* 76, at 62.

⁹¹ *Id.*

⁹² *Id.* at 65.

it common life is not possible. (I-II 95.4; 98.1) Recalling our earlier discussion of Cicero and of how and why a people creates a commonwealth, we can say that “the people holds the constituent power, that authority and right to give itself a specific form or government, of political unity and existence. In the act of constituting itself a distinct, self-conscious political identity, the people simultaneously perfects its will to live together in a constitutional organization with or without a written document.”⁹³ As a particular people’s creative enactment of the requirements and opportunities of the natural law, then, a constitution will create the conditions of the possibility of a legal system that instantiates the common good. Because the common good is truly a good (that is, that which perfects a community of persons), human law is thus not merely an instrumental good.⁹⁴ To be organized and ordered under law is itself a good, because it is, at its best, “the virtuous life of the whole.”⁹⁵

What I mean by a “legal system” is obviously not just some union of primary and secondary rules, or the like. It also includes appropriate and appropriately functioning institutions, of course, and these need not necessarily conform to the structures with which we are familiar. This is not the place to attempt a complete sketch of such institutions, but a few pointers are in order. First, a full account of the institutional forms necessary or desirable to a particular constitutional regime would include all forms and phases of governance, not just, for example, those that are the focal cases under each of the U.S. Constitution’s three respective branches. For example, the work of what we refer to as an “agency” would need to form part of the analysis,⁹⁶ because on any non-cynical analysis they have a role to play in realizing and sustaining the common good (or, on a cynical analysis, mocking that good).

Second, because higher law does not require any particular form of government, those licitly endeavoring to implement higher law through government are free to create any set of institutions

⁹³ ROMMEN, *supra* note 80, at 500. *See also*, EWART LEWIS, 1 MEDIEVAL POLITICAL IDEAS 150-51 (1954).

⁹⁴ “[A] legal system in good order embodies distinctive and characteristic values, intelligible as such in relation to other human values but not simply as a means to their attainment.” PORTER, *supra* note 76, at 243.

⁹⁵ *Id.*

⁹⁶ *See* Patrick McKinley Brennan, *Lawmaking, Administration, and Traces of Civic Republicanism: Thoughts on the Work of Jean Porter*, 8 J. CATH. SOC. THOUGHT 205 (2011). *See also*, NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 39-60, 171-83 (2008).

that will optimize the possibility of making higher law effective (which, of course, does not include institutionalizing the violation of human rights). The Catholic tradition of reflection on government is generally clear, and it should be perfectly clear, that no one system of government is required by the natural law. On the Catholic view, “[t]he form of government is in itself morally and philosophically rather indifferent. No form has in itself absolute validity. No one deserves a preference always and under all circumstances. Their value is functionally dependent on the actual service they afford in the actual circumstances to the realization of the common good. This alone is their last and most effective legitimization.”⁹⁷

Third, as we saw above, it pertains to the definition of law itself that law can only be promulgated by him or them charged with the care of the commonwealth (parents make decisions and perhaps rules, but not laws). A legal system will distribute lawmaking and law-enforcing functions as those charged with care of the community legitimately and authoritatively determine, again without benefit of a determinate pattern from the natural law.⁹⁸ Once such functions have been assigned and made effective, however, it would be a violation of *the common good* for assignees of such power to usurp such power from other assignees. The common good requirements of the natural law itself prohibit, for example, “judges” to *usurp* “legislative” functions. The frequently lost point is that it is a separate question what a particular constitutional system assigns to “judges” or “legislators.”⁹⁹

The nature of law itself, however, does inform any possible *division* between law-making and law-applying. And so, fourth, when the lawmaker is not the law-applier, those applying the laws

⁹⁷ ROMMEN, *supra* note 80, at 477.

⁹⁸ “For Aquinas the authority to formulate laws and the authority to enforce them were inseparable; and this fusion was the natural consequence of difference between his conception of legislation and ours. When legislation is conceived as a choice made not by an arbitrary will, but by a will governed by higher law, the modern distinction between legislative and judicial activity tends to disappear. Legislation appears as a phase of jurisdiction; the authority to apply the law easily includes the authority to define it. The prince has ‘the care of the multitude’ and a general power to do whatever is necessary for the care of the multitude. And *because* he has power, his rational decisions on the best means of attaining the common good differ from the similar decisions of private persons in being law.” LEWIS, *supra* note 92, at 22–23.

⁹⁹ For the best available discussion of this issue, one that diagnoses and responds to the oversimplifications that plague much of the contemporary debate between the “left” (e.g., Joseph Biden) and the “right” (e.g., Robert Bork) in the United States, see HITTINGER, *supra* note 57, at 63–91.

must interpret them according to the intention and will of the lawmaker. Obviously, the expression “the lawmaker” is a term of art, as it silently resolves (or invites the resolution of) a host of issues about how the intentions of those who enact laws are to be discerned and accounted.¹⁰⁰ A natural-law perspective does not eliminate the well-known epistemic and metaphysical problems regarding (collective) “legislative intent.” This much is clear, however, *given* the context of a natural law-lawmaking framework: *The lawmaker is to be obeyed*, and laws therefore are to be interpreted so as to make such obedience possible, as Jean Porter has explained:

The rationale for interpreting laws in accordance with the will of the lawmaker—as opposed to interpreting them in accordance with general conditions of rationality or political morality—is grounded in the rationale for legislative authority itself, including above all its innovative role and function as a safeguard for the equality and freedom of the individual members of the community.

Porter continues:

The innovative character of legislation presupposes that the lawgiver is free to determine,” by adopting *the divine style*, “the general requirements of collective ideals in a contingent yet relatively final way, and its role in safeguarding the political freedom of individuals demands that its decrees be respected as expressions of legislative will.” The lawmaker who does indeed adopt *the divine style* seeks not his or her own good but the common good of the community.¹⁰¹

Continuing my fourth point and not attempting to be exhaustive, I will mention just two additional specifications of what due regard for the lawmaker requires. First, to use the

¹⁰⁰ PORTER, *supra* note 76, at 267–68.

¹⁰¹ Addressing the issue of usurpation (which I alluded to in the preceding paragraph), Porter observes that “[t]he lawgiver and the judge are both bound to respect the political morality of their community, but the lawgiver does so in a relatively unconstrained way, whereas the judge is bound by the specific determinations of the lawgiver.” *Id.* at 266.

parlance of contemporary constitutional debate, “original understanding” cannot be substituted for “original intent,” unless and to the extent that the former is the best available proxy for the latter.¹⁰² Unless and until original understanding is functioning as an interpretive hermeneutic for the lawmaker’s intent, the lawmaker is not receiving what is due to him as the authority charged by the community with care for its common good.¹⁰³

The second concerns *equity*. The achievement of the common good requires, moreover, that the laws satisfy the conditions of justice, where justice is understood as giving each what is his or its due. The laws must not only observe the requirements of commutative justice; they must also accomplish distributive justice, an equal (in the sense of either arithmetic or proportional, as the case may be) distribution of benefits and burdens among the citizens according to function and merit. (I-II 96.4; 100.2). In addition to distributive justice and commutative justice, they must also guarantee social justice: harmonizing the pluriform associations, groups, and corporations, which are so many organs of the body politic, according to the principle of subsidiarity.¹⁰⁴ Social justice reflects the fact that “[a]ll social entities—the individual, all corporations, all homelands—are part of God’s plan. None of them may be ignored or abolished, none of them dispensed with, none of them have their functions transferred to different corporations.”¹⁰⁵ (Hobbes saw with unique clarity that the creation of the modern state depended on doing what social justice forbids).

Because the common good comprises many things (*constat ex multis*; I-II 96.1c.), as a moment’s reflection on the potential demands of these three species of justice will establish, the law should take account of many things, as concerns persons (including group persons), matters, and times. (I-II 96.1c.). But, as we noted above, Thomas conceives of all law as a “rule and measure,” and he recognizes that “if there were as many rules or

¹⁰² See Monaghan, *supra* note 5, at 375 n.130.

¹⁰³ For a more detailed account of the shortcomings of “original understanding” originalism from the perspective of natural law jurisprudence such as I have developed here, see Patrick McKinley Brennan, *Two Cheers for the Constitution of the United States: A Response to Professor Lee J. Strang*, 82 FORD. L. REV. RES GESTAE 104 (2012).

¹⁰⁴ See Patrick McKinley Brennan, *Subsidiarity in the Tradition of Catholic Social Doctrine*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY 29-47 (Michelle Evans and Augusto Zimmerman eds., 2014).

¹⁰⁵ JOHN RAO, REMOVING THE BLINDFOLD: 19TH CENTURY CATHOLICS AND THE MYTH OF MODERN FREEDOM 45 (2014).

measures as there are things measured or ruled, they would cease to be of use, since their use consists in their being applicable to many things.” (I-II 96.2 ad2). The artful and prudent lawgiver, then, navigates between the generality that is necessary for law to have its characteristic breadth and thus to take the form of rules, on the one hand, and its appropriate particularity, which it is not in the nature of a rule to include, on the other. According to Aquinas, however, the lawmaker “should frame the law according to that which is the most common occurrence.” (I-II 96.6 ad3)

This conclusion leads Aquinas to ask, in turn, whether the law-applier or judge, who is indeed bound by the rational force of the law (I-II 96.5 ad3), may act beside the letter of the law—that is, to do equity or what the Greeks called *epikeia*. His answer is that *epikeia* is not only a virtue but a part of justice itself. (II-II 120.1, 2). It is that part of justice whereby the judge reaches beyond the letter of the law, says Aquinas, “to the intention of the lawgiver, *which is of more account. . .*” (II-II 120.2 ad1) (emphasis added). Russell Hittinger notes that, “[i]nterestingly, Aquinas argued that a judge who refuses equity – who cleaves to the letter of the law where the letter is defective – does not obey, but rather disobeys the will of the legislature. Giving equity is not opposed to judicial discipline To rule out in advance any judicial consideration of natural justice would seem to be the imposition of the judge’s private opinion,” and thus a violation of judicial discipline.¹⁰⁶ The justice necessary to the common good begins with requirements on the lawmaker but extends to the work of those whose office it is to apply the law. A judge’s personal preference for a legal-positivistic approach to law is not a lawful reason for refusing to act beside the letter of the law when to do so is required in order to achieve the purpose of the lawgiver.

Fifth, resuming my elaboration of certain requirements of the common good (in a Christian commonwealth), the constitutional division of power must take artful and prudent account of the fact that *inevitably* the concrete implementation of higher law in human living will not be an algorithmic, unilateral, or once-and-for-all affair. Recalling several distinctions made above, the artful and prudent lawmaker under any conceivable constitutional dispensation will be operating, if he is operating as he should, at the point of the ongoing intersection of the upper and lower blades of the metaphorical scissors. In order to implement the higher law (upper blade), he will need to meet the demands of

¹⁰⁶ HITTERER, *supra* note 57, at 87–88 (citation omitted).

the culture of the people (lower blade). His art will need both to reflect and potentially to correct that culture. Aquinas recognizes that the lawmaker's task is to lead people to virtue gradually, not suddenly, because "[h]e that violently bloweth his nose, bringeth out blood." (I-II 96.2 ad2). Prussian legislative style would be counterproductive in California (I speak as a native), and a state of exception does not threaten to become the rule when the project of human lawmaking is under the upper blade of the demands of the common good.

The world of human-made law as we know it is roughly divisible into kinds their corresponding systems: one in which statutes or codes predominate, another in which cases and the "common law method" predominate. In the U.S. system today, statute law is displacing case law at a startling pace. Whatever sort of law predominates, and in whatever mix, the point I would stress, however, is that in any system of law that is appropriately open to the demands of the common good, the result will be "a dialectical process running from the particular instantiation of a practice up to general principles induced from it, and running back down to the particular practices to evaluate them" ¹⁰⁷ This is endemic to the human situation. Varying slightly the analysis made familiar by Alasdair MacIntyre, we can say that in a legal system, as in life in general, we can discover the demands and opportunities of the common good only by participating in a tradition and "a dialectical process involving three points of reference: (1) man-as-he-happens-to-be, which can be reflected in *customs*; (2) the precepts of the Natural Law; and (3) man-as-he-could-be-if-he-realized-his-essential-nature." ¹⁰⁸

As to the first point of reference, Aquinas acknowledges that a people's custom can have the force of law because of the lawmaker's act of recognizing it as law (I-II 97.3), but of course all human law, including customary law, must be measured by higher law and, as necessary, corrected. A vital legal system in a healthy culture (the lower blade) will contain much customary law, but the more a culture is in need of correction by higher law (the upper blade), the more custom will need to be displaced. But this, too, is not to be gone about lawlessly, artlessly, or imprudently. "Communities are . . . comprised of a mixture of good and bad customs. Although bad customs need to be rooted up, the practical idealism of St. Thomas Aquinas's Aristotelianism recognizes that

¹⁰⁷ Brian McCall, *Decorating the Structure: the Art of Making Human Law*, 53 J. CATH. LEGAL STUD. 23 (2014).

¹⁰⁸ *Id.* at 44 (citations omitted) (emphasis added).

the rooting up is an act of prudence that may take time to achieve Human laws need to be made in the context of particular communities, taking into account the particular state of the virtue of the customs maintained.”¹⁰⁹

Finally, the higher-law structure within which this dialectic goes forward, even at the level of constitutional formation and reformation themselves, assures both that government is *legitimate* and that it is *limited*. The natural rights, of both individuals and groups, that are derivative of natural law, first, launch and sustain the state in the right direction but also, second and at the same time, bound and restrict the state by directing it toward what is in the common good, which includes honoring individual and group rights (both of which are sometimes but not always absolute). As an aside, the often-mooted contemporary debate about the “structural constitution” versus “the constitution of individual rights” is dissolved by the legal system’s intrinsic ordination to the common good and justice. Creating and revising structure in order to satisfy the requirements of justice, the lawmaker is part of a multidimensional process that involves a never-ending dialectic wherein the upper blade and lower blade meet ever-again. The point is that both the universal and the particular are part of the burden the lawmaker bears as he or she artfully and prudently provides law for a world that no one has ever seen before. The vocation of the faithful lawmaker is to care for the community by adopting the divine style and thus serving as *a minister of the law* for the sake of the common good.

XI. DIVINE LAW

This is, properly understood, an onerous burden. The faithful lawmaker, then, if he is to be an effective minister of the law, should heed what St. Thomas preached about the natural law during Lent of 1273, the year he was to die:

Now although God in creating man gave him this law of nature, the devil oversowed another law in man, namely, the law of concupiscence Since then the law of nature was destroyed [*destructa erat*] by concupiscence, man needed to be brought back to

¹⁰⁹ *Id.* at 60.

works of virtue, and to be drawn away from works of vice: for which purpose he needed the written law.¹¹⁰

Thomas does not mean that the natural law ceased to exist; after all, it is our participation in the Divine mind, which does not change. Thomas's point is that our sinfulness wiped out the natural law's efficacy in us. Although the natural law continues to obligate all rational creatures, a moment's animadversion will confirm—Thomas was quite certain, as was St. Augustine before him—¹¹¹ that human efforts to live according to the natural law alone are doomed, on account of original sin, personal sin, and the corrupt culture and social structures which they have already built, to disaster. It was as a remedy for this hopeless prospect that God promulgated what Aquinas refers to in the above passage as “the written law.”

By now we have seen Aquinas identify four kinds of law: eternal law, the Divine Mind governing all of creation; the natural law, the rational creature's participation in the eternal law; human law, manmade ordinances for the common good derived from the natural law; and now “written law,” which Thomas also commonly refers to as the *divine law*. This nomenclature can prove to be somewhat elusive, however, because all law *except* human law is, strictly speaking, divine, for Thomas classifies law by what *causes* it, and it is the divine mind that causes all law except human law.¹¹² Human law alone is caused by the human mind, obviously, and, as a definitional condition of its actually being law, it is to be ruled and measured by the divine law, both natural and “written.”¹¹³

In the “Treatise on Law,” having defined the eternal law, the natural law, and human law, Thomas asks: “Whether there

¹¹⁰ ST. THOMAS AQUINAS, *THE COMMANDMENTS OF GOD* 2 (Laurence Shapcote trans., 1937).

¹¹¹ See, e.g., DONALD BURT, *FRIENDSHIP AND SOCIETY: AN INTRODUCTION TO AUGUSTINE'S PRACTICAL PHILOSOPHY* 55-76, 120-68 (1999).

¹¹² See Stephen L. Brock, *The Legal Character of Natural Law According to Thomas Aquinas* Ch. 2-C (1988) (unpublished dissertation, University of Toronto), available at http://bib26.pusc.it/fil/p_brock/naturallawthesis.pdf.

¹¹³ It might be helpful to recall here the following from the earlier discussion: “[L]aw, being a rule and measure, can be in a person in two ways: in one way, as in him that rules and measures; in another way, as in that which is ruled and measured, in so far as it partakes of the rule or measure. Wherefore since all things subject to Divine providence are ruled and measure by the eternal law, . . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends.” (I-II 91.1c).

was any need for a Divine law?," and having anticipated the objection that the natural law is itself divine inasmuch as it is a participation in the eternal law (I-II 91.4.1), answers as follows:

Besides the natural and the human law it was necessary for the directing of human conduct to have a Divine law [O]n account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err. (I-II 91.4 c).

This divine law that was promulgated, among other purposes, as a remedy for the destruction of the natural law in rational creatures, is of two kinds, viz., the Old Law and the New Law. The former, comprising the Mosaic legislation of the last four books of the Pentateuch, is divisible into judicial, moral, and ceremonial precepts. (I-II 100, 101, 104).

The Old Law is, exemplarily, "written law." The New Law, by contrast, is only secondarily a written law; like the natural law that preceded it chronologically, it is primarily an *instilled* law. Thomas explains:

The New Law is the law of the New Testament. But the law of the New Testament is instilled in our hearts. For the Apostle, quoting the authority of Jeremiah 31:31-33: "Behold the days shall come, saith the Lord; and I will perfect unto the house of Israel, and unto the house of Judah, a new testament," says, explaining what this statement is (Hebrews 8:8-10): "For this is the testament which I will make to the house of Israel . . . by giving [Vulgate: 'I will give'] My laws into their mind, and in their heart will I write them." Therefore the New Law is instilled in our hearts.

I answer that, "Each thing appears to be that which preponderates in it," as the Philosopher states

(Ethic. ix, 8). Now that which is preponderant in the law of the New Testament, and whereon all its efficacy is based, is the grace of the Holy Ghost, which is given through faith in Christ. Consequently the New Law is chiefly the grace itself of the Holy Ghost, which is given to those who believe in Christ. This is manifestly stated by the Apostle who says (Romans 3:27): "Where is . . . thy boasting? It is excluded. By what law? Of works? No, but by the law of faith": for he calls the grace itself of faith "a law." And still more clearly it is written (Romans 8:2): "The law of the spirit of life, in Christ Jesus, hath delivered me from the law of sin and of death." Hence Augustine says (De Spir. et Lit. xxiv) that "as the law of deeds was written on tables of stone, so is the law of faith inscribed on the hearts of the faithful": and elsewhere, in the same book (xxi): "What else are the Divine laws written by God Himself on our hearts, but the very presence of His Holy Spirit?"

Nevertheless the New Law contains certain things that dispose us to receive the grace of the Holy Ghost, and pertaining to the use of that grace: such things are of secondary importance, so to speak, in the New Law; and the faithful need to be instructed concerning them, both by word and writing, both as to what they should believe and as to what they should do. Consequently we must say that the New Law is in the first place a law that is inscribed on our hearts, but that secondarily it is a written law. (ST I-II 106.1 c).

This law that is inscribed on the heart, while also being secondarily a written law, directs the human person to his last end, eternal beatitude, an end that is disproportionate to man's natural ability and the natural law. (ST I-II 91.4 c). It also prescribes and prohibits, as the case may be, those exterior acts that are necessary to virtue, thereby recapitulating the moral precepts of the Old Law. (I-II 108.1 & 2). All Ten Commandments contribute to the realization in practice of prudence.

Students of contemporary natural law jurisprudence (where its "contents" are sometimes thought to amount to no more than

principles of practical reason, which are not precepts of law) are apt to dismiss or, at least, downplay, if only accidentally, the vital importance of divine law to human living and to lawmaking in particular. After all—it might be objected, God did not promulgate the New Law until Christ. But Aquinas, in explaining why it was right for God not to promulgate the New Law from the foundation of the universe, concludes that “it behooved man first of all to be left to himself under the state of the Old Law, so that through falling into sin, he might realize his weakness, and acknowledge his need of grace.” (I-II 106.3c). This divine lesson has been lost on our age, alas, as the Godless Constitution is an essay in going it alone.

Aquinas is emphatic that the divine law is not optional or gratuitous. Exactly “[b]ecause we recognize the weakness of the human intellect, it is necessary to judge the precepts of our reason by the divine law.”¹¹⁴ Aquinas does not equivocate about our need to live by the divine law:

[S]eeing that all are not equal to the strain of acquiring knowledge, the law given by Christ is short so that all can easily know it, and so that none can plead ignorance thereof as an excuse for not observing it: and this the law of divine love And observe that this law is to be the rule of all human acts.¹¹⁵

By acknowledging his need for grace and then receiving the grace of the Holy Ghost by faith in Christ and through the efficacy of the sacraments, the human person is given true liberty:

[T]he New Law is called the law of liberty in two respects. First, because it does not bind us to do or avoid certain things, except such as are of themselves necessary or opposed to salvation, and come under the prescription or prohibition of the law. Secondly, because it also makes us comply freely with these precepts and prohibitions, inasmuch as we do so through the promptings of grace. It is for these two reasons that the New Law is called ‘the law of perfect liberty’ (*James* 1:25). (I-II 108.1 c.).

¹¹⁴ RZIHA, *supra* note 76, at 271.

¹¹⁵ AQUINAS, *supra* note 110, at 4.

It is also called the “law of love.” (I-II 107.1 ad2),¹¹⁶ and it is not just for individuals but also for societies, including the perfect society that is the state. “When the inevitable shortcomings of the artistry of Natural Law Reasoning are manifest, the whole project may be abandoned as intractably flawed. Only [by] restoring the buttress of the instructions of the original architect may Natural Law jurisprudence remain standing.”¹¹⁷

The law of love is given by Christ the King, and Christ founded His Church and charged her with giving authoritative interpretation to the divine law, because, again, “[t]he state of mankind may change according as man stands in relation to one and the same law more or less perfectly.” Christian constitutionalism cannot have a hope of succeeding without ample recourse to the divine law, and recourse to the divine law cannot succeed without the Church. The separation or divorce of the Church from the commonwealth was the necessary condition for inaugurating a regime of law that would not be corrected and transformed by the law of love.

XII. THE CHURCH, RELIGION, AND TOLERATION

There can be no Christian constitution without the Catholic Church’s exercising, thanks to due juridical and customary provision, her God-given authority over the state. Such exercise will take different forms and modes depending on time and place, but the principle of the Church’s superiority over the state, in virtue of her divine mandate and consequent right to protect and nurture man’s final end, must be the guiding principle in any arrangement between the two powers. It once was so, if only imperfectly.

“There once was a time when States were governed by the philosophy of the Gospel.” Thus lamented Pope Leo XIII in 1885 in his encyclical “On the Christian Constitution of States,” *Immortale Dei*. Leo continued:

Then it was that the power and divine virtue of Christian wisdom had diffused itself throughout the laws, institutions, and morals of the people, permeating all ranks and relations of civil society.

¹¹⁶ On law in Jesus’ teaching, see J. DUNCAN M. DERRETT, *LAW IN THE NEW TESTAMENT* (1970).

¹¹⁷ Brian M. McCall, *Consulting the Architect When Problems Arise – The Divine Law*, 9 GEO. J. L.PUB. POL’Y 103, 130 (2011).

Then, too, the religion instituted by Jesus Christ, established firmly in befitting dignity, flourished everywhere, by the favour of princes and the legitimate protection of magistrates; and Church and State were happily united in concord and friendly exchange of good offices.

The result, Leo concluded, was that “[t]he State, constituted in this wise, bore fruits important beyond all expectation.”¹¹⁸

The *unity* of Church and state taught by Leo as the proper relation between the two does not merge, confuse, conflate, consolidate, elide, or collide Church and state. Such a mistake was comparatively easy for Leo and the tradition for which he spoke to avoid exactly because they characteristically thought in terms of two *powers*—the two ruling authorities imposed by God to lead man to his two final ends, natural and supernatural, the latter being man’s one *ultimate* end.¹¹⁹ According to Leo:

The Almighty . . . has given the charge of the human race to two powers, the ecclesiastical and the civil, the one set over divine, and the other over human, things. Each in its kind is supreme, each has fixed limits within which it is contained, limits which are defined by the nature and special object of the province of each, so that there is, we may say, an orbit traced out within which the action of each is brought in to play by its own native right. But, inasmuch as each of these two powers has authority over the same subjects, and as it might come to pass that one and the same – related differently but still remaining one and the same thing – might belong to the jurisdiction and determination of both, therefore God, who foresees all things, and who is the author of these two powers, has marked out the course has marked out the course of each in correlation to the other. “For the powers that are, are ordained of God”! [Romans 13:1]. Were this not so, deplorable contentions and conflicts would often arise, and, not infrequently, men, like travelers at the meeting of

¹¹⁸ Pope Leo XII, Encyclical Letter, *Immortale Dei* No. 21 (1885).

¹¹⁹ ROMMEN, *supra* note 80, at 532.

two roads, would hesitate in anxiety and doubt, not knowing what course to follow. Two powers would be commanding contrary things, and it would be a dereliction of duty to disobey either of the two.¹²⁰

How, then, are we to understand or conceptualize the structure of the relationship between the two powers? Leo continues:

[I]t would be most repugnant to them to think thus of the wisdom and goodness of God. Even in physical things, albeit of a lower order, the Almighty has so combined the forces and springs of nature with tempered action and wondrous harmony that no one of them clashes with any other, and all of them most fitly and aptly work together for the great purpose of the universe. There must, accordingly, exist between these two powers a certain orderly connection, which may be compared to the union of the soul and body in man. The nature and scope of that connection can be determined only, as We have laid down, by having regard to the nature of each power, and by taking account of the relative excellence and nobleness of their purpose. One of the two has for its proximate and chief object the well-being of this mortal life; the other, the everlasting joys of heaven. Whatever, therefore in things human is of a sacred character, whatever belongs either of its own nature or by reason of the end to which it is referred, to the salvation of souls, or to the worship of God, is subject to the power and judgment of the Church. Whatever is to be ranged under the civil and political order is rightly subject to the civil authority. Jesus Christ has Himself given command that what is Caesar's is to be rendered to Caesar, and that what belongs to God is to be rendered to God

Such, then, . . . is the Christian organization of civil society; not rashly or fancifully shaped out, but educed from the highest and truest principles,

¹²⁰ Leo, *supra* note 118, at No. 13.

confirmed by natural reason itself.¹²¹

In tracing out the orbits of the two powers, Leo and the tradition recognized that there are some matters of “mixed jurisdiction,” such as marriage, and as to these Leo taught that “it is in the highest degree consonant to nature, as also to the designs of God, that so far from one of the powers separating itself from the other, or still less coming into conflict with it, complete harmony, such as is suited to the end for which each power exists, should be preserved between them.”¹²² In sum, the order of creation and redemption calls for cooperation between the two powers, not their separation.

The Leonine rhetoric can have the unintended consequence of obscuring the tradition’s—and Leo’s own keen—awareness of the *potential* tension between the two powers, as well as of history’s vacillations, cycles, and, of course, current trajectory. Nonetheless, the tradition’s solution was not to inaugurate “an age of separations,” to recur to Manent’s trenchant phrase. Nor was it to build governments on the shaky foundation of separations (of powers), at least not except as a second-best in a world already grown accustomed to more and more separations. It was, instead, to insist upon and press for the ideal of unity, and specifically for the Church’s role in correcting and transforming the body politic, including by encouraging, according to the principles of social justice, the lives of associations in which charity took concrete form.¹²³ This the Church would do by ensouling (so to speak) that body in its many organs.¹²⁴ Again, this is exactly what the concept of a free-floating “civil society,” separate(d) from the state and from the Church, was *designed* to prevent.

In the passage from *Immortale Dei* quoted at the beginning of this Section, Leo held up the union between body and soul in man as the model for union between state and Church. Again, however, although the union of body and soul is achieved in the moment of a man’s creation, any union between state and Church is an historical achievement, hard-won in fits and starts in the theater of history.¹²⁵ There are sinners on both sides of the aisle,

¹²¹ *Id.* at Nos. 14, 16.

¹²² *Id.* at No. 35.

¹²³ See Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Doctrine*, 16 ANNALES THEOLOGICI 385–408 (2002).

¹²⁴ On the Church as the soul of the body politic, see JOHN OF SALISBURY, *THE STATESMAN’S BOOK OF JOHN OF SALISBURY* (John Dickinson trans., 1963).

¹²⁵ ROMMEN, *supra* note 80, at 516.

but, as our discussion of the New Law established, the Church offers grace to those living in the world. For the Church's part, she *sanctifies* all those who would be blessed and *teaches* all those who would listen. The Magisterium of the Church is the authoritative interpreter of the divine written law, the authoritative interpretations of which can in turn provide a rule and measure for judging derivations from the natural law reached by unaided natural reason. Notwithstanding whatever individual consciences may or may not conclude about what constitutes theft, murder, marriage, or other matters most directly addressed by the Old Law and the New Law, the Church's teachings are authoritative and obligatory, not just for individuals but for the state—both its rulers and its citizens. In sum, a Christian commonwealth would be constituted by laws, institutions, and practices that would make the divine law effective, especially thanks to the Church's role in interpreting divine law and in sanctifying the people and its lawmakers.

With respect to what the Church teaches, I would single out here the Church's social doctrine as deserving far more attention that it receives from contemporary lawmakers. On matters not just of constitutionalism (as in Leo's *Immortale Dei*), but also on economy and just price, on citizenship and immigration, and even on ecology and the environment, not to mention again marriage and the family, the Church adduces the relevant Christian and natural law principles and proposes conclusions that include prohibitions (e.g., usury) and exhortations (e.g., an economy of gift).¹²⁶ A state corrected and transformed by Catholic social doctrine and the medicine of sanctifying grace would be (so to speak) "in the divine style." It would be a commonwealth characterized not just by justice but also by love and civic friendship.¹²⁷

In addition to teaching and sanctifying, the Church is capable of accomplishing her work through what is known as the "indirect power"—the power, that is, "to judge the sins of the political power and to proclaim what is morally right or wrong in politics upon the basis of natural law or positive divine law."¹²⁸ A

¹²⁶ See MCCALL, *supra* note 19, at 43-193. In just economy specifically, see BRIAN M. MCCALL, *THE CHURCH AND THE USURERS: UNPROFITABLE LENDING FOR THE MODERN ECONOMY* (2013).

¹²⁷ See Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* (2005).

¹²⁸ ROMMEN, *supra* note 80, at 581. See also, Benedict, *supra* note 126, at 546-54; JOSEPH HERGENROTHER, *2 CATHOLIC CHURCH AND CHRISTIAN STATE* 174-234 (1876).

vital component of Christian constitutionalism is the juridical recognition and practical application of the Church's power to shape laws that favor man's supernatural end. I return to this point in the Coda.

In addition to exercising the indirect power in service of the ends of the state, the Church also assists the state by satisfying the divine command demand that the state offer proper social worship. The tradition understood that man is under a *natural* duty to worship God not only individually but also *socially*, and in a state that recognizes the truth of the Catholic religion, the obligation to provide fitting social worship will require that the state's worship follow the Rites of the Catholic Church.¹²⁹

A Christian constitution that acknowledges the indirect power and provides for Catholic social worship by the state will also, moreover, give juridical effect to the Church's unalterable and unequivocal judgment that no one is to be forced or compelled to embrace the Catholic faith. As mentioned above, the Catholic Church understands herself to be possessed of the power to exercise coercive jurisdiction over her members, a power that the state must respect and defer to, and this divine ecclesiastical jurisdiction over the faithful provides, in fact, a nonnegotiable—though frequently transgressed—limit on the sovereignty of the state. At the same time as she insists upon her God-given jurisdiction to safeguard the sacred things that pertain to the faithful, the Church condemns all efforts *to compel* non-believers to convert or to desist from their false beliefs. As a consequence of the latter, a Christian commonwealth will make the ample provision justice requires for tolerating the practice of non-Catholic religions, both in private and even in public.

With respect to the *public practice* of false religions, the juridical limit to be imposed by the state will be determined by the requirements of the common good, exactly because the common good is always the touchstone for formulating juridical norms. The rudiments of mere public order are a component of the common good, and an individual's or a group's religious practices that disrupt it can rightly be prohibited by law.¹³⁰ The public order does not, however, exhaust the common good. And so, to take an

¹²⁹ Shea, *supra* note 44.

¹³⁰ Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 J. CONTEMP. LEGAL ISSUES 165 (2013); Patrick McKinley Brennan, *Resisting the Grand Coalition in Favor of the Status Quo by Giving Full Scope to the Libertas Ecclesiae* (Villanova Law/Public Policy, Research Paper No. 2013-3060, 2013).

example, law enforcement officers need not have waited nearly as long as they did wait to put a legal end to what the “Branch Davidians” were doing in David Koreth’s compound in Waco, Texas. The common good sometimes requires government action to suppress public exercise of false religion *before* the public order has been disrupted. In sum, toleration is a reasoned response to a presently intransigent conflict amidst a plurality of values and of religions, but toleration, both as the juridical disposition of states toward their citizens and as the attitude of citizens toward their fellow citizens, is not exempt from the requirements of the common good.¹³¹

XIII. CONCLUSION: THE UNITY OF THE SOCIAL ORDER

There will always be need of toleration, for it is inconceivable that all will one day be united in the Truth. This sad but realistic concession must not, however, be manipulated so as to enlist us one by one, or state by state, in what John Rao has called *the grand coalition for the status quo*.¹³² The transcendent point of Christian constitutionalism is for the state to be corrected and transformed by the Church, raising up fallen human nature in the hope that it might reach its natural *and supernatural* ends and thus true human happiness, first in this life and then in the next. It does this by creating the community or unity of order that is the commonwealth, and “it is the *unitas ordinis*, more strictly, the unity of a sovereign order of any one people in a distinct part of the world, which constitutes the individual state Community is possible only so long as such a *unitas ordinis* exists. Of secondary importance are the constitutional methods by which it is continually produced, protected, and reformed.”¹³³ Constitutional methods are to be judged not solely or even principally by their conformity with what happens to be the case but, instead, by their success in realizing the natural common good and, by cooperating with the Church, preparing in certain respects the way to the supernatural common good. Success in maintaining the unity of order that is the state depends, in turn, on unity of purpose, and such purpose is clarified and reinforced by the work of the Church on and in the state, especially by the state’s respecting and

¹³¹ For a genealogy of toleration, see RAINER FOREST, *TOLERATION IN CONFLICT: PAST AND PRESENT* 399-479 (2013).

¹³² JOHN RAO, *BLACK LEGENDS AND THE LIGHT OF THE WORLD: THE WAR OF WORDS WITH THE INCARNATE WORD* (2011).

¹³³ ROMMEN, *supra* note 80, at 196.

harmonizing all those smaller unities of order—those corporative associations—in which men and women learn together who they are and who they can become.

A contrast will be clarifying. In Federalist No. 39 James Madison defended the proposed U.S. Constitution and its methods for their ability to eliminate or reduce the *effects* of faction, content to contend that the *causes* of human disunity defy correction. Madison was correct if he meant that humans cannot be *reasoned* all the way out of disunity. He was mistaken, however, that the causes of disunity are ineradicable. Madison's position amounts to a defiant refusal to apply the medicine of Christianity, in and through a possible constitution, in order to create a unity of purpose and thus conditions of unity and peace. Madison & Co. refused to acknowledge that the causes of disunity include above all the rejection of the one principle of true unity, Christ the King and Redeemer of all, through his Mystical Body, the teaching, sanctifying, and ruling Church. The Church preaches toleration of those who do not know the truth, but her conviction that God desires all to be saved and to come to knowledge of the truth (1 *Timothy* 2:4) will not allow her to settle into, let alone to bless as the ideal, a regime of social agnosticism. It is not for her own sake that the Church wills to correct and transform the state, but for the sake of Christ and all of those whom He wills to be saved.

The vitiating defect of the age of separations is that it impedes—and sometimes even blocks—man's intelligent appropriation and application of the divine style. Our age does so in an especially destructive way exactly by discarding the ideal of social unity itself. This it accomplishes in an especially insidious way, in the context of constitutionalism, by giving us to believe that institutionally manufactured and managed tension, also known as power-checking-power, is the best we can do. By building fission into the foundation, it predestinates deep disunity by entrenching an anaesthetizing bourgeois *modus vivendi* that assures ample bread and circuses, at least for a time. I reported above that the Christian tradition does not insist upon the singular legitimacy of any form of government, but now I will add the reason that favors monarchy. The conflict-based, power-checking-power state is an acephalous state. A headless state cannot think—it “knows nothing,” after all. Prudence under particular circumstances may counsel division among the powers of the state, but things will go infinitely better when and where

the lawgiver can model himself and his lawgiving on the pattern of Christ, the only true King.¹³⁴

XIV. CODA

I have answered the question I was asked, but I have also done more than that, as I expect that those who asked the question intended I would. I have not only described a Christian constitution, I have argued why a Christian constitution is objectively optimal and, correlatively, why alternatives necessarily fail humanity.¹³⁵ I am, of course, an outlier among contemporary Catholics in virtue of my unqualified defense of a Catholic constitution and my correlative judgment that all alternative constitutions are destined to hinder and hurt souls exactly because of those constitutions' refusal to embrace the vital help God has offered mankind in the Church of Christ the King. But being an outlier does mean that I am alone, and I have cited several contemporary authors who defend, most ably, a fully Christian and Catholic socio-legal order, and they include Christopher Ferrara, Brian McCall, and John Rao.

One final question remains to complete the present account, however: Does the Catholic Church any longer defend, as she once

¹³⁴ See Pope Pius XI, Encyclical Letter, *Quas Primas* (1925). "When once men recognize, both in private and in public life, that Christ is King, society will at last receive the great blessings of real liberty, well-ordered discipline, peace and harmony. Our Lord's regal office invests the human authority of princes and rulers with a religious significance; it ennobles the citizen's duty of obedience. It is for this reason that St. Paul, while bidding wives revere Christ in their husbands, and slaves respect Christ in their masters, warns them to give obedience to them not as men, but as the vicegerents of Christ; for it is not meet that men redeemed by Christ should serve their fellow-men. 'You are bought with a price; be not made the bond-slaves of men.' [1 *Corinthians* 7:23] If princes and magistrates duly elected are filled with the persuasion that they rule, not by their own right, but by the mandate and in the place of the Divine King, they will exercise their authority piously and wisely, and they will make laws and administer them, having in view the common good and also the human dignity of their subjects. The result will be a stable peace and tranquillity, for there will be no longer any cause of discontent. Men will see in their king or in their rulers men like themselves, perhaps unworthy or open to criticism, but they will not on that account refuse obedience if they see reflected in them the authority of Christ God and Man. Peace and harmony, too, will result; for with the spread and the universal extent of the kingdom of Christ men will become more and more conscious of the link that binds them together, and thus many conflicts will be either prevented entirely or at least their bitterness will be diminished." *Id.* at 19.

¹³⁵ On the peace of Christ on earth only in the Kingdom of Christ on earth, see Pope Pius XI, Encyclical Letter, *Ubi Arcano* (1922).

did, the Catholic state and its Catholic constitution? Opponents and skeptics of the propositions I have defended will be quick to argue, and not without some basis, that the Church seems to have abandoned her traditional teaching. I judge their argument to be in error, however, and I will conclude with just a few fairly conclusory remarks suggesting why the traditional view must still be understood to be that of the Church.¹³⁶

First, the many silences and assorted statements of the Second Vatican Council seem to some to signal Church's abandonment of the traditional position. The principal source cited in favor of novelty is *Dignitatis Humanae*, which I cited above for its defense of *libertas Ecclesiae*. Let me speak as clearly as possible: The decisive fact counting against reading *Dignitatis* as rejecting the traditional position is that *Dignitatis* did not reject the traditional position. As I have argued elsewhere, although *Dignitatis* is in general a regrettably (if intentionally) slippery document, it was perfectly unequivocal when it began by proclaiming that the Council "leaves untouched [*integram relinquit*] traditional Catholic doctrine on the moral duty of men and societies [sic] toward the true religion and toward the one Church of Christ."¹³⁷ The Council simply did not undertake the project of a reconsideration of "Church-State" relations, and the parts of *Dignitatis* that seem to some to defend novelty can only honestly be read as articulating a *modus vivendi* for modernity, not a change in principle.¹³⁸

Second, not only does the Council teach that it is a matter of conscience for the laity "that the divine law be impressed on the affairs of the earthly city" ("*ut lex divina in civitatis terrena vita inscribatur*")¹³⁹, but also that:

The whole Church must work vigorously in order that men may become capable of rectifying the distortion of the temporal order and directing it to God through Christ. Pastors must clearly state the principles concerning the purpose of creation and

¹³⁶ I have defended these claims at length in Brennan, *The Liberty of the Church*, *supra*, note 130, and Brennan, *Resisting the Grand Coalition*, *supra* note 130.

¹³⁷ *Dignitatis*, No. 1. On how this formulation we reached in the drafting, see DAVIES, *supra* note 59, at 171.

¹³⁸ See Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 GEO. WASH. L. REV. 1035 (2000).

¹³⁹ Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* (1965) No. 43.

the use of temporal things and must offer the moral and spiritual aids by which the temporal order may be renewed in Christ.¹⁴⁰

Not content to leave matters there, in the same document the Council defines the “apostolate [of the laity] in the social milieu” as “the effort to infuse a Christian spirit into the mentality, customs, laws, and structures of the community in which one lives.”¹⁴¹ As has been pointed out concerning this passage, we should “[n]ote that *laws* and *structures* are very clearly specified here; we are not talking merely about attitudes, social graces, and public demonstrations of piety, but the very content and manner of political life taking their bearings from Christ and His Church.”¹⁴² In speaking this way, the Council was more or less faithfully echoing the words of earlier Popes, such as Leo XIII in *Immortale Dei*. In addition and more broadly, the Council documents, the *Catechism of the Catholic Church*, and many post-Conciliar documents still refer to and cite the unequivocal formulations of earlier Popes (such as Pius IX, Leo XIII, Pius XI, Pius XII, and John XXIII). Those documents intended to state permanent principles objectively binding on all societies, even as they recognized that they would not become subjectively binding except in states with sufficient Catholic population and its political will.

Third and finally, the traditional position reflects aspects of the Church’s authoritative understanding of the relationship between God and man, and in particular that man stands in need of the help of the entire social order, including the state, in order to have a fighting hope of reaching his final end, beatitude. The traditional teaching reflected a studied understanding of human nature as both fallen and redeemed, and, in the meantime, human nature has not changed. It is, therefore, tragic but not in the least surprising how modern constitutionalism’s “great act of trust”¹⁴³—that man could do what God requires of His rational creatures without the Church’s juridically established role in the social order—is showing itself to have been misplaced. A social order

¹⁴⁰ Second Vatican Ecumenical Council, Decree on the Apostolate of the Laity, *Apostolicam Actuositatem* (1965) No. 7.

¹⁴¹ Second Vatican Council, *Apostolicam*, No. 13.

¹⁴² Peter Kwasniewski, *The ‘Catholic State’: Anachronism, Arch-enemy, or Archetype*, LATIN MASS, Fall 2014, <https://thejosiasdotcom.files.wordpress.com/2014/11/tlm-2014-fall-kwasniewski2.pdf>

¹⁴³ JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 206 (1960).

animated by faith, hope, and charity would be in the divine style, all things working for the common goods, natural and supernatural. To this a Christian constitution would make an indispensable contribution, first of all by redirecting worship from a piece of parchment to almighty God.