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IMPLEMENTING RELIGIOUS LAW IN MODERN NATION-STATES: Reflections from the Catholic Tradition

Patrick McKinley Brennan¹

Introduction

The prospect of “implementing religious law in contemporary nation-states” will elicit a range of reactions, the overwhelming number of them condemnatory. Postponing for now the question of *exactly* what is meant by “religious law,” it is unexceptionable that such condemnation is to be expected, for the modern nation-state was forged for the very purpose of blocking an essential end of the traditional Christian polity, viz., acting for the common goods, both natural and supernatural, by implementing higher law. The novel conceptual armature that drove modern nation-states into the world in the first place defiantly rejected the inherited demands of Christendom by eliminating the law of God as the architecture of socio-political life, and that armature, in its varied and sundry manifestations, especially that of political liberalism, accompanies and animates them down to the present day. Today, elected and appointed adherents of the creed of the modern nation-state are dutifully poised to use the coercive force of the state itself, through its legislative, judicial, and administrative arms, to immobilize adherents of Christian religious law as they both strive to work such law into socio-political life through law *and*, in a rearguard action of widening scope, resist the gutting of current law, often of very long standing, of its Christian legal content. The debate about what the law will recognize as marriage is only the most glaring example.

Whether they recognize the fact or not, Christians (and others) who work to implement religious law in contemporary nation-states do so in defiance of the principles that undergird such states. But among those who theorize about the modern nation-state, there is a measure of ambiguity or ambivalence about whether their aim is, on the one hand, merely to stabilize and entrench the nation-states with which they and we happen to be familiar, or, on the other, also to justify the nation-state as such. Nonetheless, it is generally clear that in any such state, the very givenness of the nation-state with its history and conceptual armature is meant to

¹ John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. This paper was prepared at the invitation of the Robbins Collection, Berkeley Law, U.C. Berkeley, for presentation at its symposium on “Implementing Religious Law in the Modern Nation-State: Definitions and Challenges,” February, 2014. I thank the learned participants, speaking variously from Christian, Jewish, and Muslim perspectives, for their insights and learned suggestions and critique.

be a discussion-stopper -- or what Eric Voegelin referred to as an "interdict on the question" -- when it comes to the potential relevance, indeed obligatory force, of religious law as concerns the common life of the polity. The prevailing mindset, variously theorized by political theorists such as John Rawls and Martha Nussbaum, is that the nation-state's insistence on neutral, non-religious reasons for action should be accepted without question.²

But why? Adherents of religious law are not the only ones who have good and sufficient reason to satisfy themselves that the modern nation-state is (or is not) justified. The question any intelligent person can, and indeed must, ask is this: Why obey the interdict on the question? And, more specifically, on what good and sufficient basis is religious law interdicted for purposes of socio-political life? The modern nation-state's self-conferred conclusiveness turns out to be a tough nut to crack, especially after the passage of these last five hundred years when its success has all but silenced the claims against which it once contended in more or less open, and often even bloody, conflict. Consider that it pertains to the very definition of the modern nation-state that it is "sovereign" and that the chief claim of the self-styled "sovereign state" is that it is absolute, *ab-solutus*, that is, unbound, specifically by higher law.³ Again, though, the question, for any intelligent person, is whether a human artifact such as the nation-state can self-exempt from higher law?

As a practical matter, it surely can; the fact proves the possibility. Defiance does not eliminate duty, however; *ipse dixit* does not unbind any true obligation. To put the point tendentiously for a moment, one searches in vain in the Old Law and the New Law for a section of exemptions for modern nation-states and liberal democracies.

The question I wish to pursue here, then, concerns the nature and extent of the obligations of religious law in socio-political life. I ask and answer this question from the perspective of the Christian, and specifically Catholic, theological tradition, noting that Catholic-Christians are here in the same boat as adherents of other traditions of religious law inasmuch as they must question the very premise of the modern nation state, viz., that it is *ab-solutus*, in order to ask what their religious law means for them not just as private individuals -- a question the modern nation-state will usually allow (if in a confused way) -- but also and preeminently as social beings who create and dwell in polity.

I write not from a generically "Catholic" perspective, moreover, but more specifically from within that wide but not exclusive strand of the tradition of reflection that is animated and informed by the thought of St. Thomas Aquinas, his

² See, e.g., Patrick McKinley Brennan, "Political Liberalism's *Tertium* Quiddity: Neutral 'Public Reason,'" 43 *Am. J. Juris.* 239 (1998). (Reviewing Michael J. White, *Partisan or Neutral? The Futility of Public Political Theory* (Rowman & Littlefield, 1997)); Patrick McKinley Brennan, "Equality, Conscience, and the Liberty of the Church: Justifying the *Controversiale per Controversialius*," 54 *Vill. L. Rev.* 579 (2009) (symposium on the work of Martha Nussbaum).

³ See Patrick McKinley Brennan, "The Individual Mandate, Sovereignty, and the Ends of Good Government: A Reply to Professor Randy Barnett," 159 *University of Pennsylvania Law Review* 1623 (2011).

commentators and his expositors including, in a special way, the papal magisterium. I do so aware of (and, as space allows, responsive to) tensions both within that strand and among the many strands of the wider Catholic tradition of thought and reflection on socio-political questions.

A principal source of my analysis will be Aquinas's famed "Treatise on Law" in his *Summa Theologiae*, yet that analysis will reflect the fact that, for Aquinas, his treatment of law, like law itself, could not be, and therefore is not, a freestanding entity. Aquinas's treatment of law in the *Summa Theologiae* forms an integral part of his overall account of how Creation goes forth from God (*exitus*) and returns to God (*reditus*), such that, as we shall see, for Aquinas it is law all the way up, so to speak, because "[t]he very Idea of the government of things in God the Ruler of the Universe, has the nature of a law."⁴

It is this law, which Aquinas refers to as the "eternal law," that must form the starting point of our analysis of the question of "implementing religious law in the contemporary nation-state," because, on Aquinas's account, nothing – not "religious law," certainly not the "nation-state" – stands outside of the scope of the divine government. Note well, however, that the divine governance as understood by Aquinas (and the entire Catholic tradition) does not cancel human freedom: it makes it possible. If, then, humans are to implement "religious law" in their socio-political arrangements, they will do so freely, if at all. The possibility of "free" defiance only underscores the salience of Aquinas's observation, to which I shall return repeatedly, that "[t]he state of mankind may change according as man stands in relation to one and the same law more or less perfectly,"⁵ an eventuality that the nation-state is powerless to alter but powerful to doom.

Part I

Most contemporary accounts of human lawmaking start with what human lawmakers are in fact doing when they make laws, or sometimes they start with those facts and then promptly regress to what the lawmakers ate for breakfast. Thomas's account of human lawmaking, however, starts with the Divine mind under the aspect of the eternal law and proceeds to man's participation therein by virtue of the natural law. For purposes of exposition here, though, it will be useful to start not with the eternal law itself but, instead, with a problematic that surfaces in contemporary jurisprudential discourse, where natural law sometimes appears but without benefit of eternal law. In that discourse, the natural law usually makes its

⁴ ST I-II 91.1 c. Most subsequent references to the *Summa Theologiae* will be cited in the text. I generally quote the standard English language translation by the Fathers of the English Dominican Province.

⁵ ST I-II 106.4 c.

first – and last – appearance, if any appearance at all, in the largely theoretical analysis of the legal status of an apparently “unjust law.”⁶

Aquinas, following St. Augustine and others, famously maintained that “an unjust law would seem to be no law at all.” (I-II 95.2 c; 96.4 c) This thesis is the hallmark of the natural-law school of jurisprudence as it is commonly understood in contemporary jurisprudential discourse. Jurists in the legal positivist school, by contrast, contend that an artifact is a law exactly if it meets the rule of recognition of the particular jurisdiction, regardless of the justice or injustice of the artifact (unless justice or a modicum thereof happens to be required by the rule of recognition itself). On the positivist account, it suffices for an artifact to rise to the level of law that it enjoy the right pedigree. According to the positivist, it might be sufficient, for example, given a particular jurisdiction’s rule of recognition, to point to the command of a sovereign backed by the threat of punishment, irrespective of the justice or injustice of that command, in order conclusively to identify a law. This much is familiar. What is more, inasmuch as it is, as noted above, characteristic of the modern “sovereign” that it be *ab-solutus*, there would be no *legal* purpose in assessing the command of such a “sovereign” for its justice or injustice. In sum, the positivist account renders the natural law simply irrelevant for purposes of saying what the law is (except in the those limited cases when the rule of recognition fingers includes the natural law).

Correct resolution of the dispute about the legal status of an unjust law is important, of course, although less so than might at first be imagined, because Aquinas contends that humans may be under moral obligation to obey certain unjust laws for the sake of the common good. (I-II 96.4 c). In addition, positivists who affirm the existence of the natural law sometimes stress the importance of the natural law as a basis of moral criticism of immoral “laws” that remain, on the positivist’s principles, laws nonetheless.⁷

Be that as it may, the transcendent point is that, on Aquinas’s account, the dispute between the positivist and the (cartoon version of the) natural lawyer impermissibly begins *in medias res*. As Aquinas sees things, natural law does not make its first (and only) appearance if and when humans trot it out from stage left, so to speak, as the basis on which to judge the justice or injustice of a manmade law, as positivists and some natural lawyers alike would have it. On Aquinas’s account, the natural law is never anywhere but on center stage, so to speak, and for that reason the problem of its entering from stage left was illusory from the outset. The reason that the natural law is never not on center stage is that it does not await human agency for its promulgation and, therefore, for its binding force. The natural law awaits human recognition and obedience, of course, but it binds in virtue of its divine promulgation, not in virtue of its contingent introduction from stage left.

In Thomas’s more technical terms, the natural law makes its first and enduring appearance thanks to its being instilled (*indita*) by divine agency in human

⁶ See John M. Finnis, “Natural Law Theories” (2007), Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/natural-law-theories/>.

⁷ See Brian M. Bix, “On the Dividing Line Between Natural Law Theory and Legal Positivism,” 75 *Notre Dame L. Rev.* 1613, 1620-21 (2000).

practical reason. The human mind is not lawless when it deliberates about what to do and pursue. The human capacity to reason about what is to be done and pursued and what is not to be done and pursued, that is, practical reason, is under a real law instilled into the human mind by the divine legislator, and this is what Aquinas calls the natural law. And it is here that we must pick up the thread of our introductory discussion of the eternal law, for, according to Aquinas, “the natural law is nothing else than the rational creature’s participation in the eternal law.” (I-II 91.1 c).⁸

The significance of this arresting definition – that the natural law just is a sharing in the Divine Mind itself – comes 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:

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” “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.”⁹

To recapitulate Thomas’s argument here: *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 pattern or definition of any other law, including of the natural law: an ordinance of reason for the common good, made by him (or them) who have care of the community, and promulgated. (I-II 90.4 c).

As we have just seen, the natural law is defined by reference to the law that is first in the order of being, the eternal law; but what exactly *is* this natural law that is thus defined? Thomas elaborates:

[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

⁸ For exploration and explication of the all-important doctrine of participation as it concerns law, see Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Grand Rapids: Eerdmans, 2010), 59-62; John Rhiza, *Perfecting Human Actions: St. Thomas Aquinas on Human Participation in the Eternal Law* (Washington, D.C.: The Catholic University of America Press, 2009); Pauline C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis* (New York: Leiden, 1998), 1-73.

⁹ The error in the fourth line of the quotation from Hittinger occurs in Hittinger’s original.

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. Hence the Psalmist after saying (Ps. iv. 6): *Offer up the sacrifice of justice*, as though someone asked what the works of justice are, adds: *Many say, Who showeth us good things?* in answer to which question he says: *The Light of thy countenance, O Lord, is signed upon us*: thus implying that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing us than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law. (I-II 91.1c)

In sum, all rational humans are by nature possessed of a real law of divine origin, the natural law, a "rule and measure" of human conduct that is our very participation in the divine mind under the aspect of the eternal law.¹⁰

But what, then, of the content or substance of that law? Keeping in mind that, in Thomas's terms, *the good* is that which perfects something as an end, here is the core of Thomas's answer to the question:

Hence this is the first precept of law, that "good is to be done and pursued, and evil is to be avoided." All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.

Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. (I-II 94.2 c).

Thomas's account of natural law is a morality of the good life, so to speak, for the particulars of the morality of the natural law derive their content from the divine precept that we are to do and pursue what is good for us as humans (and to avoid what is not good for us). And, as Thomas explains, the good life for us is that according to the ends to which we are naturally inclined. "Wherefore according to

¹⁰ On the question of why it was necessary for law to be divinely given to man, see Thomas Aquinas, *Summa Contra Gentiles*, Book III, Ch. 114

the order of natural inclinations, is the order of the precepts of the natural law." (I-II 94.2c). Thomas groups these goods, at the highest level of generality, as *to be*, *to live*, and *to know*. "All these precepts of the law of nature have the character of one natural law, inasmuch as they flow from one first precept." (I-II 94.2 ad 1).

Part II

No sphere of human life is exempt from the natural law, not even the positivist's "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. All humans are under the natural law, but Thomas holds, interestingly, that 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) Lawmaking power requires the addition of authoritative designation as the political authority, that is, an authoritative entrustment from the people (or, as in the case of King David, for example, a divine decree) with the responsibility for the common good of the political community.¹¹ 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 *absolutus* "sovereign," but of making the natural law effective, that is, of implementing the natural law, in the community's living.

Thomas explicates the unique work of the human lawmaker as "deriving" human law from the natural law.¹² According to Thomas, "every 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) Thomas explains that human law is "derived" from the natural law in two ways. According to the first way, it is as a conclusion from premises; Thomas's example is the rule that one must not kill (innocent) persons. According to the second way, it is by way of specification; Thomas's example is the fixing of a punishment. The natural law requires punishment for crime, but it is silent on how the criminal should be punished. Something needs to be made specific. Thomas says unfortunately little about the means or method of derivation, but he is emphatic that all law, including human law, derives from the eternal law by way of the natural law. (I-II 95.2; 93.3)

If Thomas goes into regrettably little detail about the process of derivation, he does provide two foundational principles. The first concerns what I shall call the

¹¹ The principle of subsidiary function (or subsidiary function) limits the scope of the lawmaker's jurisdiction. See Patrick McKinley Brennan. "Subsidiarity in the Tradition of Catholic Social Doctrine," *Michelle Evans and Augusto Zimmermann (eds.), Subsidiarity in Global Perspective (Springer, forthcoming 2014)* at http://works.bepress.com/patrick_brennan/87/

¹² On the human lawmaker's role in positing human law and thus making the natural law effective, see James Murphy, *The Philosophy of Positive Law* (New Haven: Yale University Press, 2005).

freedom of the legislator, a fact that can be obscured by the notion of “derivation.” Unlike some later political thinkers of the Enlightenment, Aquinas does not imagine that laws can be framed and people governed *in more geometrico*. Instead, Thomas explains, “rulers imposing a law are in civic matters as architects regarding things to be built (*sicut architectores in artificialibus*).”¹³ Lawmaking and politics are “free” not in the sense that they can be pursued (as mathematics and geometry can) in isolation from everything else, but in the sense that they are social *art* that aims to preserve the goods of the people’s tradition while adapting it and opening it to new ones.¹⁴

The second, prudence, is closely connected to the first. Whereas art has as its object things *made*, the virtue of prudence has as its object things *done*.¹⁵ Thomas

¹³ Thomas Aquinas, *In Decem Libros Ethicorum* VI Lect. 7, par. 1197.

¹⁴ See Lloyd Weinreb, *Natural Law and Justice* (Cambridge: Harvard University Press, 1987).

¹⁵ “[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. The structural framework of Occidental Christian metaphysics as a whole stands revealed, perhaps more plainly than in any other single ethical dictum, in the proposition that prudence is the foremost of the virtues. That structure is built thus: that Being precedes truth, and that Truth precedes the Good. Indeed, the living fire at the heart of the dictum is the central mystery of Christian theology: that the Father begets the Eternal Word, and that the Holy Spirit proceeds out of the Father and the Word. . . .

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. *Omnis virtus moralis debet esse prudens* – All virtue is necessarily prudent. . . .

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 decree of prudence is the prototype and the pre-existing form of which all ethically good action is the transcript. . . . [T]he free activity of man is good by its correspondence with the pattern of prudence. What is prudent and what is good are substantially one and the same; they differ only in their place in the logical succession of realization. For whatever is good must first have been prudent. . . .

All Ten Commandments of God pertain to the *executio prudentiae*, the realization in practice of prudence. Here is a statement that has become virtually

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 law 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.

Recognizing that lawmaking is an art and that it requires regnative prudence on the part of the lawmaker, we can add additional detail to the job description of the human lawmaker. First, he is enacting ordinances for the *common* good. This is part of the definition of law, such that if the lawmaker should promulgate an ordinance for his private advantage, it would fail to be law. (I-II 90.2) "The nature of law," as one commentator notes, "is not simply that the individual be subject directly to the will of the governing powers, but that both are subject to the requirements of the good of society."¹⁶ Second, it would seem that the good and stable order of the community is the first and indispensable requirement of the common good, for without it common life is not possible. (I-II 95.4; 98.1). This in turn would require, third, that the laws be, in the main, just; they must observe the requirements not only of commutative justice, but above all of distributive justice, giving to each what is his due, that is, ensuring an equitable distribution of benefits and burdens among the citizens according to function and merit. (I-II 96.4; 100.2). A generally just distribution of goods is the hallmark of a polity ruled in accordance with the common good. As Thomas notes, furthermore, because the common good comprises many things (*constat ex multis*; I-II 96.1c.), the law should take account of many things, as concerns persons, matters, and times. (*id.*) If unruly citizens prowl about disrupting good order or violate the terms of distributive justice, the common good is imperiled. Ordinances properly framed for the common good will have as their intent and effect making citizens good. (I-II 92.1)

Sometimes this last point is misconstrued as committing Thomas to the preposterous view that the lawmaker should frame and enforce law to repress every whiff of vice. Thomas unequivocally denies that human law should repress all vice, however, and argues for this denial on the ground, among others, that laws are framed for the multitude, many of whom are not virtuous. If the law were to demand too much of the unvirtuous, they would break out into even greater evils. (I-II 96.2

incomprehensible to people of today. And every sin is opposed to prudence. Injustice, cowardice, intemperance are in direct opposition to the virtues of justice, fortitude, and temperance; ultimately, however, through all these virtues, they run counter to prudence. Everyone who sins is imprudent. . . ." Josef Pieper, *The Four Cardinal Virtues* (Notre Dame: Notre Dame University Press, 1966), 7-9, 25-26.

¹⁶ John Mahoney, *The Making of Moral Theology: A Study of the Roman Catholic Tradition* (Oxford: Clarendon, 1987), 241.

ad2). Regnative prudence will determine the rate, so to speak, at which the lawgiver can lead his subjects to the virtue that is necessary to the common good and the good life. The virtuous, for their part, will not need to depend on human law in the same way for their own happiness. (I-II 96.5c) 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 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 ad 2). The artful and prudent lawgiver, then, navigates between the generality that is necessary for law to have its characteristic breadth, on the one hand, and its appropriate particularity, on the other.¹⁷

Part III

“Easier said than done,” though – as the saying has it. Aquinas’s account as I have presented up to this point is liable to sound hopelessly naïve to the modern ear. After all, Aquinas imagines that the lawmaker will be virtuous! And even before that, he innocently supposes that there will be a “lawmaker,” not separation-of-powers, power-checking-power, and the like. Not to mention the elephant in the room, that Aquinas really does contend that the human lawmaker is obligated by the natural law to be about the business of implementing that law, not merely about satisfying the preferences of constituencies and getting re-elected.

It is commonplace to defend the regime initiated and continued by the U.S. Constitution as a “natural law and natural rights” republic. The phrase in quotation marks is hopelessly ambiguous, but one of its almost invariable implications is that the United States rests on no legal foundation higher or more divine, so to speak, than the “natural law.” The primal mistake in this position is that it downplays or denies, as certain so-called “new natural lawyers” do, that the natural law, strictly speaking, is indeed, as the preceding account makes unmistakable, a divine law. The second mistake, which is genetically related to the first in complex ways, is to exaggerate the human capacity to know and obey the (divine) natural law. Our minds are not, as a matter of fact, as necessarily as enlightened as “the Enlightenment” pronounced. St. Thomas was far more realistic, as his last comments the natural law, preached during Lent in the year he was to die (1273), establish:

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,

¹⁷ Portions of the several preceding paragraphs are adapted from Patrick McKinley Brennan, “Law in a Catholic Framework,” in John Piderit and Melanie Morey (eds.), *Teaching the Tradition: A Disciplinary Approach to the Catholic Intellectual Tradition* (Oxford: Oxford University Press, 2011).

man needed to be brought back to works of virtue, and to be drawn away from works of vice: for which purpose he needed the written law.¹⁸

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. The natural law continues to obligate all rational creatures, but a moment's observation and animadversion will confirm, Thomas is quite certain, 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 misleading, however, because all law *except* human law is, strictly speaking, divine, because Thomas classifies law by what causes it, and it is the divine mind that causes all law except human law.¹⁹ Human law alone is caused by the human mind, ruled and measured as it is by the divine natural law.

In the "Treatise on Law," having defined the eternal law, the natural law, and human law, Thomas asks: "Whether there 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 (ST 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

¹⁸ Quoted and discussed in Russell Hittinger, "Natural Law and Catholic Moral Theology," in Michael Cromartie (ed.), *A Preserving Grace: Protestants, Catholics, and Natural Law* (Grand Rapids: W.B. Eerdmans, 1997), 1, 7.

¹⁹ See Stephen L. Brock, *The Legal Character of Natural Law According to Thomas Aquinas*, dissertation University of Toronto (1988), ch. 2-C.

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).

In explaining why it was right for God not to promulgate the New Law from the foundation of the universe, Thomas teaches 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) 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 truly liberated, as Thomas explains: “[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.) It is also called the “law of love.” (I-II 107.1 ad2).²⁰

Part IV

Our mining of the Thomistic tradition for insight into the prospect of “implementing religious law in the modern nation-state” began with the eternal law, proceeded to the sharing therein that is the natural law, continued to human law considered as a derivation from the natural law, and eventually arrived at the divine law, both the Old Law and the New Law, both of which clarify the contents of the natural law and thus have a claim to shape human law. The New Law, furthermore, ordains the human person to his supernatural end, eternal beatitude. When Pope Leo XIII (r. 1878-1903) wrote nostalgically that that “there was a time when states were ruled according to the philosophy of the Gospel” (encyclical letter *Immortale Dei*, No. 21, 1885), he had in mind that the civil ruling authority, acting under the obligation of higher law and implementing that law, once ordained human conduct both to the natural common good and the supernatural common good. The former it did by using law to prohibit vice and encourage virtue; the latter it did by also encouraging faith in Christ and participation in the sacraments. It did so aware, in the words of St. Thomas quoted 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.”

By contrast, the modern nation-state, inasmuch as it self-describes as *absolutus*, purports to be unbound by higher law and thus not obligated to create human law to serve the common goods, both natural and supernatural. In the name of (negative) liberty for all, the proponents and executors of the nation-state exempt that the state from the very law that, on Thomas account, was promulgated by God to govern his rational creatures not just in private life but, given their naturally social nature, in socio-political life as well.

²⁰ Law has more of a place in Jesus’ teaching in the New Testament than the common accounts (according to which Jesus prefers “standards” to “rules”) would allow. See J. Duncan M. Derrett, *Law in the New Testament* (London: Darton, 1970).

I will conclude with series of questions and observations, some of them more summary than others.

First, as noted above, the expression “religious law” is multiply ambiguous. I have construed the issue to be the one of implementing *divine* law and have emphasized, *pace* the accounts of “natural law” that treat it as no more than the principles of human practical reason, that the natural law is indeed a divine *law*, truly and not merely metaphorically. The whole business of human lawmaking, except as it concerns implementing the still higher law that is the New Law, is about *prudently* implementing the higher law that is the divine natural law. It should be noted, although I do not have space here to pursue the point in the detail it deserves, that this project will often take the form, especially within the context of the conceptual vocabulary of contemporary U.S. constitutional jurisprudence, of implementing natural rights, which are, on Thomas’s account, derivative of higher law.

Second, especially given this last point, it may be objected that the modern nation-state neither poses nor proposes either an objection or impediment to implementing the (divine) natural law through human laws. In other words, laws that aim to implement “human rights,” it will be contended by some, pass the text of “neutral public reason.” I mention this point only to set it aside, noting as I do so that the modern nation-state has all but dispensed with its obligation to make laws on behalf of man’s *summum bonum*.²¹ Consider, for just one example, the contempt in which “morals laws” are held by the Supreme Court of the United States in the name of preferring the “right to liberty.”

Whatever the verdict on the contemporary state’s success in implementing natural rights that are truly and properly derivative of the natural law, it is beyond cavil that the modern nation-state has separated itself from the demands of *religion* as such. So successful has this separation been, in fact, that we moderns think of religion as an inherently *private* matter. Nothing could be further from the Catholic Christian understanding, however, and from Aquinas’s in particular. As Robert Sokolowski explains: “Religion is not simply a genus for Christianity as a species. The way Christian religion and its discourse differ from religion and its discourse is complex, and this difference is based on the way the divine is understood in both cases. Sociologically or anthropologically, natural religion might be considered a genus for Christianity, but it cannot be so considered theologically.”²² On Aquinas’s account, true religion is a component of justice.

²¹ The question of man’s *summum bonum* is what Pierre Manent has described as “a perfectly idle question” for the architects of the modern, liberal nation-state.

²² Robert Sokolowski, “Christian Religious Discourse,” in *Religions and the Virtue of Religion*, eds. Therese-Anne Druat and Mark Rasevic (Washington, D.C.: The American Catholic Philosophical Association, 1992), 45. “What since the start of modern times has been called ‘religion’ was perceived in the Middle Ages as an apparatus established by God within human history to serve as the framework for his encounter with humankind, which was to permit humans to accomplish what the divine design expected of them. . . . [A]s in Christianity, it can consist in an economy of salvation taking place through time to form a whole that comprises

As Aquinas (following Aristotle) understands justice, it is a virtue that concerns relation to another. Man is under an obligation to render to another what is his due (II-II, 122.1 c), and this obligation of justice extends to what man owes to God, though in the following qualified way: “Since justice implies equality, and we cannot offer God an equal return, it follows that we cannot make Him a perfectly just repayment. For this reason the Divine law is not properly called *jus* but *fas*, because, to wit, God is satisfied if we accomplish what we can. Nevertheless justice tends to make man repay God as much as he can, by subjecting his mind to Him entirely.” (II-II 57.1 ad3; see also II-II 81.3). What Aquinas refers to as “religion” is a part of the *natural* virtue of justice that concerns man’s proper response to God. “Justice . . . includes the virtue of religion whereby we give to God the worship that is due him; religion, as an act of justice, is natural to the human creature.”²³ On Aquinas’s account, then, the civil ruling authority acting on the demands of justice will, through law and other means, create the social conditions in which its citizens (freely) perform the acts of religion that are owed to God, including, above all, worship: “Religion has two kinds of acts. Some are its proper and immediate acts, which it elicits, and by which man is directed to God alone, for instance, sacrifice, adoration, and the like. But it has other acts, which it produces through the medium of the virtues, which it commands, directing them to the honor of God, because the virtue which is concerned with the end, commands the virtues which are concerned with the means.” (II-II 81.1 ad 1).

Third, Aquinas’s account of religion, therefore, would, *under certain circumstances*, call for what in English we sometimes refer to as an “establishment” of religion, whereby the state itself can give God the social worship He deserves. I return to this point below.

An additional reason for the establishment of religion, moreover, is for the purpose of the Church’s exercising her “indirect power” to interpret the natural and divine laws for the benefit of the civil lawmaking authority. In Catholic theology and ecclesiology, it falls in a unique way, first, to the Church to share the grace of the sacraments with the lay faithful and, second, to the Magisterium of the Church to teach and act on behalf of the demands of the divine moral law, including the natural law. On the traditional understanding, furthermore, the Church enjoyed by divine right a power, the “indirect power,” to propose and even impose her understanding of the divine law on the human lawmaking authority *for the sake of the supernatural common good*.²⁴ While the Catholic Church today apparently no longer seeks to

history.” Remi Brague, *The Law of God*. Trans Lydia G. Cochrane. (Chicago: University of Chicago Press, 2007), 107-08. See also Nicholas Lash, *The Beginning and End of ‘Religion’* (Cambridge: Cambridge University Press, 1996), 10-11.

²³ Michael Dauphinais and Matthew Levering, *Knowing the Love of Christ: An Introduction to the Theology of St. Thomas Aquinas* (Notre Dame, IN: University of Notre Dame Press, 2002), 57.

²⁴ The classic formulation of the doctrine of the indirect power is by St. Robert Bellarmine in *On the Temporal Power of the Pope, Against William Barclay*, in Stefania Tutino (ed.), *On Temporal and Spiritual Authority* (Indianapolis: Liberty Fund, 2012), 185-90. On the foundations of Bellarmine’s account of the indirect

exercise such a power, the arguments for the existence of such a power retain whatever intrinsic force they once enjoyed, regardless of their lack of contemporary purchase.

Fourth, when in the course of modern history the worldly powers came to be no longer subject -- under countless and varied historically attested political forms - - to the unifying force of the Catholic religion, "pluralism," of a number of kinds, was the result. The pluralisms of religions and of values, in particular, have led in the modern period to the problematization of "toleration," both as a disposition of states toward their citizens and of citizens toward fellow citizens. But if toleration is a reasoned response to a presently intransigent conflict among values and among religions, it is also true that toleration is itself a subject of conflict even among its greatest advocates.²⁵ The undeniable trend has been in the direction of wider and more deeply theorized toleration, of course and the Catholic Church herself is sometimes understood to have "changed" her traditional teaching that the terms of toleration as practiced must serve the common good, not mere public order. For present purposes, I would just note that (1) the Catholic Church is unalterably and unequivocally opposed to forcing the unbaptized to "embrace" the Catholic faith and (2) it is false to contend, as many do, that the Catholic Church no longer claims an in-principle right to be the established Church *in a Catholic society*. It remains the Catholic position that Catholics (and others) *in a Catholic society* enjoy a right, under certain circumstances, to "implement religious law" by establishing the Catholic religion, with all that that entails or implies.²⁶ The United States is by no means a Catholic society, so this question of right is of merely (but great) theoretical interest at present.

Fifth, as should be apparent by now, the Catholic position on "implementing religious law" requires that what can sometimes seem to be mutually inconsistent positions be held in a productive tension. On the one hand, the lawmaking function is an exalted one. Jeremy Waldron has educated us to speak of the dignity of legislation. The Catholic position goes further: "Legislation is the epitome of participation in the eternal law, for it is in issuing the ordering-judgment that we are most imitative of God, who spoke such a word to his creation."²⁷ In ordaining a multitude to its common goods, natural and supernatural, the legislator, imitates

power, see Stefania Tutino, *Empire of Souls: Robert Bellarmine and the Christian Commonwealth* (Oxford: Oxford University Press, 2010), 9-47.

²⁵ See Rainer Forst, *Toleration in Conflict: Past and Present* (Cambridge: Cambridge University Press, 2013), espec. 399-479.

²⁶ For detailed accounts of the Catholic position, see Patrick McKinley Brennan, "The Liberty of the Church: Source, Scope, and Scandal," 21 *Journal of Contemporary Legal Problems* 165 (2014) (symposium on the liberty of the Church); "Resisting the Grand Coalition in Favor of the Status Quo by Giving Full Scope to the *Libertas Ecclesiae*," *Proceedings of the Fellowship of Catholic Scholars* (forthcoming 2014) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341793

²⁷ Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Wilmington: ISI Books, 2003), 100.

God who disposes all creation to its ends. On the other hand, the human legislator, like those for whom he legislates, is a fallen creature, debilitated in both intellect and will by sin. Modern ears will not hear of sin, but the Catholic perspective insists upon the fact of it and upon recognition of its consequences. The Catholic position also insists, moreover, that there is a remedy for sin: the Church, her sacraments, and the Divine law.²⁸ The remedy offered by the Church is anathema to our secular culture, and so it is that we muddle along creating nation-states that *we claim* are “absolute” and “sovereign.” This self-assertion of behalf of artifacts of our making is the root of the problem, to be sure, because “[o]nly insofar as he recognizes his Creator’s sovereign rights over him can man fully recognize his own nature. If he does not discover God, and does not recognize God’s rights, but looks at himself as his own master, he fails to discover the source and object of his being, and then he is like a traveler who has lost way, knowing neither where he comes from nor where he is going.”²⁹

Finally, law is God’s guiding gift to the human pilgrim who would otherwise be lost, not knowing whence he comes or whither he is going, but law is not, however, an end in itself. Legalism is avoided by an ultimate personalism, properly understood, for law, like grace, is a principle by which God leads created persons to union with the divine Persons.³⁰ Recall that law serves the ends of justice, the highest component of which is religion, and religion puts God’s rational creatures in right *personal* relation with God.³¹ Law serves aims other than religion, of course, but law with the object of religion at its source and summit offers to transform created persons in the image of uncreated Persons. And so it is that “the state of mankind may change according as man stands in relation to one and the same law more or less perfectly,” as Aquinas knew. I would conclude, however, by suggesting that mankind today does not much wish to change except in ways more or less

²⁸ This is not to deny the inevitability of a certain but qualified *profanity* in the human lawmaking project. See Nomi Stolzenberg, “The Profanity of Law,” Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey (eds.), *Law and the Sacred*, (Stanford: Stanford U. Press, 2007).

²⁹ M.-D. Philippe, *The Worship of God* (New York: Hawthorn Books, 1959), 7. Trans. by Dom Mark Pontifex.

³⁰ Joseph Vining, almost alone in the legal academy today, has seen the place of personhood “all the way up” in the practice of law. See Steven D. Smith, “Persons All the Way Up,” in Patrick McKinley Brennan, H. Jefferson Powell, and Jack L. Sammons (eds.), *Legal Affinities: Explorations in the Legal Form of Thought* (Durham: Carolina Academic Press, 2013), 121-37.

³¹ For Aquinas, morality is legal, the stuff of the natural and divine laws, but “if morality puts us in intimate contact with the divine Persons, it must necessarily be religious” in religion’s “wider sense, which comprises all activities putting us in relation to God. . . . The principle of union between morality and religion is essential to Christian revelation.” Gerard Gilman, *The Primacy of Charity in Moral Theology* (Westminster, Maryland: The Newman Press, 1959), 216-17.

assurable by pharmaceuticals. Can it be any surprise that the *ab-solutus* nation-state is an ideally well-adapted means to achieving the ends of pharmacy?³²

³² Cf. *Gonzales v. Oregon*, 546 U.S. 243 (2006).