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The Supreme Court and State Sovereignty

No matter how many times one may read the Constitution of the United States, one will not find the word "sovereign" therein.[1] What Justice James Wilson said in 1793 of the Constitution with ten amendments is equally true today of the Constitution with twenty-seven amendments: "To the Constitution of the United States the term sovereign is totally unknown."[2] Sovereignty—"it was over this issue that the Revolution was fought,"[3] and when the time came for the colonists who had repelled Parliament's claims of sovereignty to frame a constitution for themselves, they left it out.

Somehow, however, sovereignty has slipped in—not into the text, of course, but into the nontextual Constitution of the United States. How it happened is a long and dizzyingly complex story, which we can pick up in 1996. Prior to that year, the Court had held, with various equivocations and qualifications, that the courts established under the U.S. Constitution lack jurisdiction over suits against unconsenting states. In an unexpected, earthshaking decision in 1996, the Court transmuted what had generally been thought to be a question of "jurisdiction" into a question of what is inherent in the nature of statehood under our Constitution:[4] "each State is a sovereign entity in our federal system"[5] and "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."[6] Three years later, the Court stated, "In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I. . . . The States . . . retain 'a residuary and inviolable sovereignty,'" indeed, a "sovereign dignity."[7] By 2006, the Constitution itself had receded from view. Immunity to unconsented private suit respects the states' "preratification sovereignty."[8] In sum, the states enjoyed sovereignty before ratifying the Constitution, and they continue to enjoy some of it today. Sovereignty has not "slipped in"; it was there all along.

A leading commentator on the Court's sovereignty jurisprudence has

described the prosovereignty majority as "five authors in search of a theory."[9] Whatever Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy lacked in terms of theory, they more than made up for in metaphysical boldness: states of the United States are sovereign entities whose dignity privileges them not to be answerable in courts of law absent their own consent.[10] It is quite a thing for a court to say.[11]

Several questions will be pursued in this essay: Can Catholics faithful to the Church's social doctrine be among the defenders of "sovereign" states? What *are* states anyway? What *is* it to be sovereign? How do instruments that humans create to aid self-government become *unaccountable* to their creators? Can Catholics properly impute "sovereignty" to anyone but God? Can what the Court is claiming be *true*?

In answering these questions, our principal guide will be Jacques Maritain (1882–1973). Maritain, one of the most influential Catholic lay scholars of the previous century, was one of the leading expositors of the theory of natural law, a doctrine he regarded to be Catholic but also accessible to all people of good will because of the natural law's being promulgated by God, as well as received by humans, *naturally* (as opposed to supernaturally, that is, through grace). For several reasons, Maritain proves to be an especially helpful illuminator, from a Catholic perspective, of the strengths and shortcomings of American political philosophy and constitutional practice.[12] First, as to first principles, Maritain's position is certainly consistent with Catholic social doctrine as taught by the modern popes and the Second Vatican Council (1962–1965), in part because, second, Maritain's political philosophy actually helped shape the social teachings of the Council. Paul VI, the pope who published the Council's documents, was a disciple of Maritain and understood that they reflected Maritain's understanding of man, society, state, and those institutions' relationship to the Church.[13] Third, Maritain was a towering member of the unofficial group of scholars who responded to the need, first identified by Pope Leo XIII in his 1879 encyclical *Aeterni patris*, to work out the transitions from the principles of traditional Thomist natural law to the exponentially more complex modern world, including a world growing used to liberal constitutionalism. Fourth, Maritain lived in the United States for almost a quarter-century, and his many writings include his concrete judgments on how the American constitutional order, philosophy, and practice square with Catholic social doctrine.

What Maritain saw, earlier and more clearly than almost anyone else, was that "[w]hereas for centuries the crucial issues for religious thought

were the great theological controversies centered on the dogmas of faith, the crucial issues will now deal with political theology and political philosophy."[14] Whereas some scholars have written off the Supreme Court's recent ambitions on behalf of "sovereignty" as mere rhetorical flourishes, it was Maritain's judgment that "[w]e cannot use the concept of Sovereignty without evoking, even unawares, [the] original connotation" according to which the king, the state, or the people were "absolute," that is, in short, *unaccountable.*[15] This led Maritain to conclude, "The two concepts of Sovereignty and Absolutism have been forged together on the same anvil. They must be scrapped together."[16] In the United States today, they are waxing, not waning.

The Court's pronouncing states sovereign does not make them so, but it does introduce the possibility that some people, believing them to be so, will not hold them accountable. Maritain encapsulates the Catholic corrective to the absolutist claims of the modern state in these terms:

> the basic political reality is not the State, but the body politic with its multifarious institutions, the multiple communities which it involves, and the moral community which grows out of it. The body politic is the people organized under just laws. The State is the particular agency which specializes in matters dealing with the common good of the body politic.[17]

In Maritain's thinking, the Court, in service of the dignity of sovereign states, is damaging the dignity of the body politic—and *we* are that body politic.

Sovereignty Defined

What, asks Jacques Maritain, does "sovereignty" (or, "sovereign") *mean*? He argues that "the term needed" to describe the state "is not Sovereignty."[18] This is so, according to Maritain, because

> Sovereignty is a property which is absolute and indivisible, which cannot be participated in and admits of no degrees, and which belongs to the Sovereign independently of the political whole, as a right of his own. Such is genuine Sovereignty, that Sovereignty which the absolute kings believed they possessed, and the notion of which was inherited from them by the absolute States.[19]

According to Maritain, "Jean Bodin is rightly considered the father of the modern theory of Sovereignty."[20] Bodin (1529/30–1596) very self-consciously sought to be the first to define sovereignty,[21] and according to the proffered definition, the sovereign is a person to whom the people have transferred their ruling power. The critical element in the theory, according to Maritain, is that the people have divested themselves of ruling power that was properly theirs and have conferred it on someone *separate and above* themselves. On Bodin's account, Maritain explains, "the Sovereign is no longer a part of the people and the body politic: he is 'divided from the people,' he has been made into a whole, a *separate* and transcendent whole, which is his sovereign living Person, and by which the other whole, the immanent whole or the body politic, is ruled from above."[22]

Unlike later theorists of sovereignty, Bodin acknowledged that the sovereign was answerable to God and the natural law. His signal innovation was the creation of a ruling power that was above the people and not answerable to them. The sovereign's power was "absolute"—that is, *ab-solutus*—because accountable to nothing and no one on earth. Maritain ventures that making the ruler accountable to neither human law nor human beings "is the core of political absolutism,"[23] a point to which we shall return.

After Bodin came Hobbes and "the generation of the great leviathan, *or rather (to speak more reverently) of that* mortall god."[24] As Hobbes saw the world, the people who would save themselves transfer all ruling power to a man (or assembly of men) who then will rule without accountability to any of his (or their) subjects, which is what men and women become upon the transference of ruling power.

What Maritain finds uniting the classical theorists of sovereignty—one could also mention Filmer and Rousseau—is the claim, variously made, that a ruling power, called sovereign, can be beyond claims of justice, beyond claims of accountability to the governed. "In actual fact," Maritain observes, "[l]aw did not need to be *just* to have the force of law. Sovereignty had a right to be obeyed, whatever it might command. Sovereignty was above moral law."[25] This, in capsule form, is Jacques Maritain's argument *against relying on the language of sovereignty*: sovereignty cannot but import shades of its history, a history of postulating a ruling entity that is not accountable either to the people ruled or to the moral law. The unvarnished *point* of the Court's deployment of "sovereignty" is to lead us to believe that the states qua "sovereign" are not accountable.

One can suppose that Maritain would condemn outright the Court's

imputation of sovereignty to the states, to the United States, and to "the people." Though naturally he would concede that the Court is using the term in more benign ways than were its originators, he would insist that it was destined, like a car out of alignment, to go in the wrong direction. Would he be wrong? Or would he be paranoid? Johannes Messner, another giant among twentieth-century Catholic scholars responding to *Aeterni patris,* opposed the plea for scrapping the term: "*sovereignty or supremacy is a distinguishing characteristic of the state.*"[26] Heinrich Rommen, also a towering Catholic layman of the last century, pursued a *via media*: "If someone thinks that the word 'sovereignty' should be given up, this does not matter, as long as its content, as it is traditionally understood in Catholic political philosophy, is not lost."[27] Rommen summarized the traditional content as follows: "The concept of sovereignty is right and not dangerous either internally or externally if it is put into its interdependence with the principle of subsidiarity and the hierarchical order of ends, and subject to the natural and divine law."[28]

Maritain would concur with Rommen in the content and also with the desire to give priority to the authority of the state because of its unique responsibility for the common good of all. He would say instead that the state and its ministers have "majesty" inasmuch as they represent the people in the search for the common good.[29] This verbal distinction is not merely semantic—majesty does not claim unaccountability. Maritain refuses to equivocate on this point: "God alone is sovereign."[30]

Political Society (and the State)

Every theory of the state presupposes a theory of the human person or individual. Maritain starts not with a concept of the state or a theory of justice but with the person: "we admit that there is a human nature," says Maritain, "and that this human nature is the same in all men."[31] It is not just humans that have given natures, however. Every kind, from carrots to cows to humans, has a unique nature; a thing's or a person's nature is the intrinsic form that specifies what it or he is and what is good for it or him. Hay is good for horses, but conversation is not; a balanced diet and conversation and other conditions are good for persons. For a thing or a person to become an excellent (or even decent) instance of its kind is for a thing or a person to achieve what is *good* for it. Conversely, not to achieve

these (and more) is to fail to be a good instance of one's kind. This is a simple matter of biology.

A person's nature is a set of unwritten directions as to how to behave, which he is free to follow or to ignore. "Any kind of thing existing in nature, a plant, a dog, a horse, has its own natural law, that is, the *normality of its functioning*, the proper way in which, by reason of its specific structure and specific ends, it '*should*' achieve its fullness of being either in its growth or in its behaviour."[32] Each natural kind's normality of functioning is to it a natural law. Deflating cartoon versions of natural law that treat it as a brooding omnipresence or rationalist's cosmic index, Maritain discovers the natural law in the very conditions of the possibility of human flourishing. Natural law is law in not a merely metaphorical sense; it is true *law* because it is promulgated by God and then received by humans naturally (as opposed to supernaturally). As this idea is traditionally expressed, the natural law is man's "participation" in the Eternal Law, the mind of God providentially disposing all things to their ends.

Unlike carrots, cows, and horses, which lack power of choice with respect to whether to pursue their respective natures, man can ignore his nature. The human person can flout the natural law. Ignorance is no defense, however. "Men know [the natural law] with greater or less difficulty, and in different degrees, running the risk of error here as elsewhere."[33] Nature is strict liability, even though God may in the end have mercy and grant forgiveness.

Studying human nature, Maritain observes that the human person is not a monadic individual but a social being. The human person is not merely supplemented, so to speak, by associating himself with others; he is, in part, constituted by engaging in *society*. Not to engage in society is to be less than a full, good instance of human kind. Society is not a thing but an activity of communication, a making common among rational persons.[34] Maritain's elaboration of society sometimes takes on a lyrical quality. The human person must live in society, says Maritain, not simply because of his needs or deficiencies but also because "the human person tends to overflow into social communications in response to the law of superabundance inscribed in the depths of being, life, intelligence, and love."[35] In contrast to mere community, which is "the product of instinct and heredity in given circumstances and historical frameworks," "society [is] a product of reason and moral strength (what the Ancients called 'virtue')."[36]

Examples of society are labor unions, schools, guilds, corporations, families, and, last but by no means least, the body politic or *political society.* Where they exist, all of these alike are the product of reason and will, and in forming them, men and women have objects in mind. Every particular society has an object; "the object is a *task* to be done or an *end* to be aimed at, which depends on the determinations of human intelligence and will."[37] Although all *genuine* societies aim at some human *good(s),* then, societies differ among themselves in the critical respect that whereas the last two mentioned above—family society and political society—"are both necessarily required and spontaneously rough-hewn by nature,"[38] the first four, though natural (as opposed to supernatural), are not everywhere necessary. Practical intelligence and choice in response to particular circumstances will indicate which other societies should flourish alongside family within the body politic. The family and political society will exist wherever men and women are using their intelligence about how to live consistently with their human nature; other societies will be situation specific, spontaneous in their first beginnings and importunate of nurturance. "*Political Society,* required by nature and achieved by reason, is the most perfect of temporal societies."[39] "In this sense," Maritain continues, "Aristotle's statement that man is by nature a political animal holds with great exactitude: man is a political animal because he is a rational animal, because reason requires development through character training, education and the cooperation of other men, and because society is thus indispensable to the accomplishment of human dignity."[40]

Maritain modestly defines the state as "a part or an instrument of the body politic, subordinate to it and endowed with topmost authority not by its own right and for its own sake, but only by virtue and to the extent of the requirements of the common good."[41] Not from above the body politic, as theorists of the sovereign state had thought, but from the topmost part of the body politic itself does the state wield its proper authority. It is that part of the body politic "especially concerned with the maintenance of law, the promotion of the common welfare and public order, and the administration of public affairs."[42] The state's work is to take part in implementing the natural law for the common good of the body politic. "It is only on this condition," Maritain explains, "of being in accordance with justice and with moral good, that the common good is what it is: the good of a people, the good of a city, and not the 'good' of an association of gangsters or of murderers."[43]

Maritain's *instrumentalist* theory of the state eschews the unaccount-

ability of sovereignty in favor of disciplined service of the common good of the body politic, thus rejecting the state's bid to make itself sovereign and the person, and his or her societies, its subject. In perhaps Maritain's most famous line, "man is by no means for the State. The State is for man,"[44] who is by nature (and supernature) a rational, social, and political animal.

Plurality

The first and a sufficient reason that the state is not sovereign, then, is that the state is the servant of political society, the agent obligated to implement the natural law in service of the common good. We can add a second and correlative reason: political society is only one among many societies, and each society—from political society and the family to the Church and the school—bears its own, irreducible power to rule. Lodged within, but not contained by, political society are myriad other societies, and each of these—assuming that it is functioning properly—is a locus of genuine authority. This is the doctrine of subsidiarity, which asks that pluriform authorities be respected, not folded into a colonizing state. Authority is "the right to be followed by the minds and by the wills of other men (and consequently the right to exercise power)."[45] Again, every society has its own, proper good(s) to achieve. Correlatively, each has its own right authoritatively to direct its own members toward those goods. Though the properly functioning state has authority by which to lead the body politic, by force if necessary, to the common good, the state's is not the only authority in town; other societies have their own, irreducible goods to achieve. Their ontological reality gives them genuine traction. The second reason for denying that the state is or can be sovereign, then, is that societies and their correlative authorities precede, survive, and should be respected by the state.

From the perspective of Catholic social doctrine, the cardinal sin of modern political theory, and frequently practice, has been to deny the *right* of societies to exist. With the (gaping) exception of the unborn, the modern state has not denied the right of *individuals* to exist. It has been the tendency of the modern state, however, to deny that societies have a right to exist, unless and until the state grants such a (revocable) right. In the contemporary United States, marriage and the family are the obvious example. The Supreme Judicial Court of Massachusetts, for instance,

states, "Civil marriage is created and regulated through exercise of the police power."[46] Law professor James Dwyer agrees: "the reality is that the family is not a separate, primordial sphere that is or can be cordoned off from the power of the state. Quite the opposite. The law creates the family, and things could not be otherwise."[47]

Against this background, we can project the basic texture of Catholic political philosophy, of which Maritain's is exemplary. Although Maritain and the popes offer a profound account of individual persons, their rights, and their dignity, the basic architectonic they advance is not the rights-bearing individual versus the state, as it is in modern liberalism. Rather, it is a situation of *pluralism,* that is, plural societies (with their correlative authorities) and individuals served by the state with a view to the common good. All societies, the body politic not excluded, are limited by the rightful existence of other societies, and the state, for its part, is the servant of these societies and of individuals: this is the heart of the Catholic position, and it entails a defeat of claims to (state) sovereignty.[48]

The plural societies by which individuals go about constituting themselves are to be respected and encouraged. In the "pluralistically organized body politic" Maritain commends, the state would be "a topmost agency concerned only with the final supervision of the achievements of institutions born out of freedom, whose free interplay expressed the vitality of a society integrally just in its basic structures."[49] In the following sentence from his 2005 encyclical *Deus caritas est,* Pope Benedict XVI encapsulated more than a century of Catholic social doctrine on man and the state: "We do not need a state which regulates and controls everything, but a state which, in accordance with the principle of subsidiarity, generously acknowledges and supports initiatives arising from the different social forces and combines spontaneity with closeness to those in need."[50]

The Flowering Forth of the Natural Law

Maritain published his masterwork in political philosophy, *Integral Humanism,* in 1936, before he lived in the United States. In writing the book, Maritain later reported, "I was in no way thinking in American terms, I was thinking especially of France, and of Europe." In his 1958 book *Reflections on America,* Maritain mused that *Integral Humanism* "appears to me now as a book which had, so to speak, an affinity with the American climate by anticipation."[51] Maritain judged that "nowhere in the world" had

the "notion of the essence of political society been brought into existence more truly than in America."[52] He was particularly impressed, as was his countryman Alexis de Tocqueville a century earlier, by the flourishing within the body politic of all kinds of particular societies.

This is not all that Maritain saw and approved. He continued immediately: "At the higher level we see here a plurality of states, each one with its particular life and legislation, which have finally grown into a single great Republic, a single Federal State."[53] Notwithstanding the growing "Federal State," Maritain found the "basic organic multiplicity" in America to be "a particularly favorable condition for the sound development of democracy."[54] And most tellingly in *Reflections on America,* "at the very time when [at present] the necessities of life and the extraordinarily fast growth of the American nation oblige it to increase more and more the powers of the Federal State, the American mind still does not like the look of the very notion of *state.* It feels more comfortable with the notion of *community.*"[55] Had Maritain lived to meet the Rehnquist Court, he would have been obliged to issue a retraction, at least if the Supreme Court can be said to be representative of "the American mind."

What Maritain found in America that he was pursuing from the beginning was *democracy,* democracy understood not as majority rule or even as a form of government but "first and foremost a general philosophy of human and political life, and state of mind."[56] This philosophy is identified above all by the following features: "inalienable rights of the person, equality, political rights of the people whose consent is implied by any political regime and whose rulers rule as vicars of the people, absolute primacy of the relations of justice and law at the base of society."[57] It would be misleading not to add at once that the "true philosophy of the rights of the human person is based upon the true idea of natural law. . . . The same natural law which lays down our most fundamental duties, and by virtue of which every law is binding, is the very law which assigns to us our fundamental rights."[58] Coming from God by way of man's created nature and the natural law promulgated by God, natural rights are not fictive.

"There is a dynamism," Maritain says, "which impels the unwritten [natural] law to flower forth in human law. . . . It is in accordance with this dynamism that the rights of the human person take political and social form in the community."[59] This dynamism works itself out as political society creates a constitution and a state that will in turn create and enforce the constitution and make positive laws that are a "prolongation or an extension of natural law."[60] The right to implement the natural law through

positive law is among the basic human rights affirmed: the body politic has a fundamental right "to take unto itself the constitution and the form of government of its choice."[61] It bears repeating: political society possesses a natural right to have its *lawful*—that is, consistent with the natural law—constitution enforced.[62]

One can ask in passing whether in the prosovereignty cases the Supreme Court has been enforcing the American people's Constitution. If it has, that is, if the American people have purported to endow their state(s) with sovereign unaccountability, one must recall that the people themselves are *not* sovereign; the body politic is not free to violate the natural law. "According to the popular saying," Maritain observes, "the democratic regime is described as the regime of the sovereignty of the people. This expression is ambiguous, for in truth there is no sovereign nor absolute master in a democracy."[63] Legitimate rulers, employed in a legitimate state, are themselves governed by law, and the people are powerless to alter this. "There is no need to add that the will of the people is not sovereign in the vicious sense that whatever would please the people would have the force of law. The right of the people to govern themselves proceeds from Natural Law: consequently, the very exercise of their right is subject to Natural Law."[64] To state a different but related point, justice remains the necessary condition of all that the democratic state does in the name of law.

Remedies

In the Court's hands, sovereignty has as one of its intended effects the denial of a remedy to what would otherwise be a legal right. Is this unjust? Justice is a necessary condition of legitimate state action, but does "true justice" call for a one-to-one correlation between right and remedy? The Latin maxim *ubi ius, ibi remedium* ("where there is a right, there is a remedy") tumbles to mind. However, sovereign immunity has long stood, and stands now with renewed strength, as a bulwark against states' being *made* to answer for their legal wrongs.

It is tempting to conclude that Maritain would insist that *ubi ius, ibi remedium.* However, approving nothing that violates natural or divine law, Maritain acknowledges that the actual working of politics ineluctably depends on gathering and restructuring materials that are not pure. When it appears in politics, "hypermoralism" leads to the impracticability of mo-

rality.[65] Maritain would not be apt to exaggerate the importance of minor injustices. He counsels against the "impracticable and merely ideal."[66]

There is a deeper issue at work here, however. According to Maritain,

> On the one hand, the primary reason for which men, united in a political society need the State, is the order of justice. On the other hand, social justice is the crucial need of modern societies. As a result, *the primary duty of the modern State is the enforcement of social justice.* As a matter of fact, this primary duty is inevitably performed with abnormal emphasis on the power of the State to the very extent that the latter has to make up for the deficiencies of a society whose basic structures are not sufficiently up to the mark with regard to justice.[67]

At the heart of the social-justice mission that Maritain attributes to the modern state is the right to a just wage, along with "[t]he right to work, . . . [t]he right to relief, unemployment insurance, sick benefits and social security."[68]

In one of the Court's leading sovereign-immunity cases of the past decade, the United States had guaranteed state workers certain overtime wages. There was no dispute that the state of Maine had failed to pay a group of probation workers the statutorily required wages. Under the Court's ruling, the statutory right of the workers was trumped by the privilege of the sovereign state of Maine not to be sued without its consent. The same result would obtain if citizens had to sue states for what we call, following Charles Reich, the "new property"[69]—such as public assistance and disability benefits, the stuff of "social justice" as understood by Maritain. These matters of right will evade enforcement absent a state's willingness. In service of the "dignity" of states, persons are denied satisfaction of rights conferred by their general government as a matter of justice. *But what of the dignity of the persons whose rights are trumped?*

A Catholic Perspective on the American State(s)

Russell Hittinger has argued that Maritain's instrumentalist state is exemplary of the trend of modern Catholic social doctrine in which "one detects a steady deterioration of any ontological density to the state."[70] Moreover, although Maritain was conspicuous for his effusive embrace of

democracy considered as a philosophy of human and political life, he was on the same page as Rome in being more concerned to show the limited (but indispensable) role of the modern state than to privilege or insist on specific governmental forms. Denying both the absolutist claims of sovereign monarchy and the absolutist claims of popular sovereignty, the Church has offered a vision of the state and of political society that privileges the state as the servant of the common good,[71] as Maritain taught. The teaching on man and the state begun in the pontificate of Leo XIII and carried forward and developed by subsequent popes received canonical formulation in the declarations, decrees, and constitutions of the Second Vatican Council, which post–Vatican II popes have continued to teach, refine, and apply.[72]

Notwithstanding more than a century's concerted effort by the Church to discredit states' or individuals' claims to or on behalf of sovereignty, there is no exaggeration in Russell Hittinger's observation, "If we ask a modern person who or what is sovereign, he or she would not say, 'reason,' 'the individual,' or 'science,' but instead, without hesitation, 'the state.'"[73] The only wrinkle in the United States today, and it is considerable, is that the Court is simultaneously claiming sovereignty on behalf, first, of the United States, second, of each of the fifty states, and, third, of "the people."[74] The only mercy is that the Court does not *too often* reference the sovereignty of the people in the cases in which it is constructing state and national sovereigns.[75] The incoherence is palpable; tergiversating assignment of nested sovereignties throws the confusion into inescapable relief. If what is wanted is a term for the right of the body politic to independence from other bodies politic, or for the state's right to exercise authority, sovereignty simply is not it. Sovereignty *is* the term to denote unaccountability.

Catholic social doctrine repudiates sovereignty, no matter who on earth claims it, even "the people." The decisive claim made by the Church is that neither state nor people can be "sovereign," as the term has been historically understood, because individuals, their societies, and the state they create in order to serve the common good sought are, whether they acknowledge it or not, *under law*—not just positive law but positive law as judged by the natural law, from which no one is exempt. The servant of the body politic, the state, cannot be exempted from the natural law because political society is called for by the natural law itself. All ruling power is from God, and is under his law, in which man participates.

The reduction of the ontological density of the state has not been with-

out its unintended consequences. In earlier times, the respective governing roles of Church and state were often confused and commingled, enabling the state to take advantage of its cogovernance with the Church to bolster claims to the sovereign status of the state. When, in the face of the totalizing claims of the modern state, the Church acknowledged and affirmed the nonsacral status of the state and the state's independence of the Church, this was in part in order to establish the state's responsibility *to serve* political society. The laicized state, however, has frequently taken advantage of its acknowledged independence to declare itself and its people loosed from the bonds of the natural law and correlative natural right. In the view of Pope John Paul II, Hittinger explains, "the constitutional democracies refused to live up to their end of the bargain."[76] John Paul II's word was "betrayal," used six times in his 1995 encyclical *Evangelium vitae.*[77] If we recall Maritain's warning that government's being responsible to no law other than the natural law is "the core of political absolutism," though, we must add the correlate on which Maritain insisted: "when it comes to the application of basic requirements of justice in cases where positive law's provisions are lacking to a certain extent, a recourse to the principles of Natural Law is unavoidable, thus creating a precedent and new judicial rules. That is what happened, in a remarkable manner, with the epoch-making Nazi war crimes trial in Nuremberg."[78] According to Maritain, "*justice* must always hold sway."[79]

The question whether justice is being done is always concrete. It is arguable that, as concerns the run of matters at issue in typical cases in which sovereign immunity is in play, the current American legal regime is, *at one level,* not far from justice. Statutes and judicial decisions provide a complex but vast arsenal of remedies that serve as end-runs around unwaived sovereign immunity. One of these is the rule that suit against the sovereign state can proceed if the state consents. A second end-run is the rule of *Ex Parte Young,* "one of the cornerstones"[80] of the sovereign-immunity jurisprudence, which allows suits not for money damages but for a court to order agents of the state (but not the state itself) to act or to forebear to act in specified ways. These two devices are just a fraction of what is available.[81] This raises an empirical question: do the alternatives cumulate to remedies close to what would obtain in an American legal regime innocent of sovereign immunity?[82] As I suggested earlier, Maritain would not be apt to exaggerate the importance of minor injustices.

At a deeper level, however, the Court's sovereignty jurisprudence does violence to the dignity of individuals, the dignity of states, and the dignity

of the body politic. Defenders of the Court's sovereignty jurisprudence point out that it is one crucial link in the Court's effort to create a more harmonious federalism. We can stipulate that the Constitution both calls for federalism (as opposed to a unitary national government) and leaves it to the courts and politics, in some combination or another, to determine and give effect to the particulars. Nonetheless, to justify the sovereign-immunity jurisprudence in terms of what it does for or about the relationship between the states and the United States, or between Congress and the states, is not sufficient. *It is not just about states.* As Evan Caminker points out, "according to the Court's phraseology, it is precisely because private persons are deemed beneath the states in station that suits by the former constitute an 'indignity' to the latter."[83] The Court's sovereign-immunity jurisprudence affronts and impairs individuals' dignity. It also ignores the fact of plural social authorities that precede (and survive) state authority.

In addition, the dignity of the states themselves is compromised. The state has what dignity it does, first, from its *commitment* to do justice in the body politic (and individuals and other societies), but also, second, from its *success* in actually bringing justice about. After summarizing all the temptations to irresponsibility that the state must resist, Maritain concludes, "Then only will the highest functions of the State—to ensure the law and facilitate the free development of the body politic—be restored, and the sense of the State be regained by its citizens. *Then only will the State achieve its true dignity, which comes not from power and prestige, but from the exercise of justice.*"[84] There are no substitutes for the exercise of justice, as those who want for justice know best. The state's dignity or majesty is not achieved except through doing justice.

Finally, the Court's sovereign-immunity jurisprudence has inflicted indignity on the body politic, on American political society. Political society is the work of intelligence and choice among people committed to seeking their individual goods and the common good and doing justice among themselves. To the extent that the people themselves have failed to set up legal structures that do true justice under law, *or that fail to assay to do as much,* they have failed in the work of constructing genuine political society. To the extent, moreover, that the body politic's agent, the state, imposes on the body politic structures that treat justice as discretionary, genuine political society is missing. The Supreme Court's imposition on American political society of states that qua "sovereign" are (personally) privileged to be above the law impedes American political society's effort

to become the sort of people it should wish and seek to become. The irony is complete in that the imposition is made by a state/court otherwise so unsure of its sovereignty as to have relocated sovereignty in the individual.[85] The individual made sovereign by his own sovereign state is a phenomenon at odds with, among other realities, the natural pluralism of societies, including political society, affirmed by Catholic social doctrine.

It falls to the Church "politically *in diaspora*"[86] indirectly to build up and sanctify the city of man. It also falls to the Church to remind the state, especially when the body politic grows acquiescent in terrestrial overreaching, that God alone is sovereign. For the Church's reminder, men have reason to be grateful, for as Maritain observes, when power without accountability waxes, even in the grand name of sovereignty, the people "are the very ones who always foot the bill. They are sure to account to their own sweat and blood for their mistakes."[87]

NOTES

1. I gratefully acknowledge the research assistance of Roman Galas. For insights into the political philosophy of Jacques Maritain, I am grateful to James P. Kelly III.

2. *Chisholm v. Georgia,* 2 U.S. 419 (1793).

3. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967), 198.

4. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 67 (1996).

5. Ibid. at 54.

6. Ibid.

7. *Alden v. Maine,* 527 U.S. 706, 715 (1999) (quoting *The Federalist* No. 39 at 245).

8. *Northern Insurance Company of New York v. Chatham County,* 126 S.Ct. 1689, 1693 (2006).

9. Daniel J. Meltzer, "State Sovereign Immunity: Five Authors in Search of a Theory," 75 *Notre Dame L. Rev.* 1011 (2000).

10. There is an exception, of which space limitations do not permit discussion, when Congress acts pursuant to its power under Sec. 5 of the Fourteenth Amendment.

11. For an ecumenical treatment of questions pursued in this chapter, including a more nuanced statement of the technical legal issues presented, see Patrick McKinley Brennan, "Against Sovereignty: A Cautionary Note on the Normative Power of the Actual," 82 *Notre Dame L. Rev.* 181 (2006).

12. A compendious study of Maritain on law, politics, human nature, and

grace is Patrick McKinley Brennan, "Jacques Maritain," in John Witte, Jr., and Frank Alexander, eds., *The Teachings of Modern Christianity on Law, Politics, and Human Nature* (New York: Columbia University Press, 2005), 75–114.

13. Russell Hittinger, "Introduction to Modern Catholicism," in Witte and Alexander, *Teachings* at 3, 27.

14. Jacques Maritain, *The Range of Reason* (New York: Scribner's, 1952), 94–95.

15. Jacques Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951), 38, 24.

16. Ibid. at 53.

17. Ibid. at 202.

18. Ibid. at 49.

19. Ibid. at 38.

20. Ibid. at 30.

21. Jean Bodin, *On Sovereignty,* trans. and ed. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), book 1, chap. 8.

22. Maritain, *Man and the State* at 34.

23. Ibid. at 31n.12.

24. Thomas Hobbes, *Leviathan,* ed. Edwin Curley (Indianapolis: Hackett, 1994), II, xvii.

25. Maritain, *Man and the State* at 48.

26. Johannes Messner, *Social Ethics: Natural Law in the Western World* (St. Louis: Herder, 1965), 575.

27. Heinrich A. Rommen, *The State in Catholic Social Thought: A Treatise in Political Philosophy* (St. Louis: Herder, 1955), 409.

28. Ibid.

29. Maritain, *Man and the State* at 132.

30. Ibid. at 24.

31. Ibid. at 85.

32. Ibid. at 85, 87.

33. Jacques Maritain, *The Rights of Man and Natural Law,* trans. Doris C. Anson (1943; repr., New York: Gordian, 1971), 62.

34. Cf. Russell Hittinger, "Social Pluralism and Subsidiarity in Catholic Social Doctrine," 16 *Annales Theologici* 401n.38 (2002).

35. Jacques Maritain, *The Person and the Common Good* (South Bend, IN: University of Notre Dame Press, 1946), 48.

36. Maritain, *Man and the State* at 3–4.

37. Ibid. at 3.

38. Ibid. at 4.

39. Ibid. at 10.

40. Maritain, *Common Good* at 48–49.

41. Maritain, *Man and the State* at 13.

42. Ibid. at 12.

43. Jacques Maritain, *Scholasticism and Politics*, 3rd ed., ed. Mortimer J. Adler (London: Geoffrey Bles, 1940), 56.

44. Maritain, *Man and the State* at 13.

45. Maritain, *Scholasticism and Politics* at 74.

46. *Goodridge v. Department of Public Health*, 440 Mass. 303 (1993).

47. James G. Dwyer, *Spiritual Treatment Exceptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 *Notre Dame L. Rev.* 147, 167 (2000).

48. Maritain remarks on the affinity between his own and Harold Laski's principle of pluralism. Maritain, *Man and the State* at 22n.14.

49. Ibid. at 23.

50. Pope Benedict XVI, *Deus caritas est* (2005), no. 28.

51. Jacques Maritain, *Reflections on America* (New York: Scribner's, 1958), 175.

52. Ibid. at 168.

53. Ibid. at 162.

54. Ibid.

55. Ibid. at 163.

56. Jacques Maritain, *Christianity and Democracy*, trans. Doris C. Anson (New York: Scribner's, 1944), 33.

57. Ibid. at 68.

58. Maritain, *Man and the State* at 84, 95.

59. Ibid. at 100.

60. Ibid. at 99.

61. Maritain, *Rights of Man* at 87.

62. Ibid. at 88.

63. Maritain, *Christianity and Democracy* at 70–71.

64. Maritain, *Man and the State* at 48.

65. Maritain, *Range of Reason* at 160–63.

66. Ibid. at 161.

67. Maritain, *Man and the State* at 20 (emphasis added).

68. Maritain, *Rights of Man* at 113–14.

69. Charles Reich, "The New Property," 73 *Yale L.J.* 733 (1964); idem, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L.J.* 1245 (1965).

70. Hittinger, "Introduction to Modern Catholicism" at 22.

71. Ibid. at 15.

72. See, e.g., Second Vatican Ecumenical Council, *Pastoral Constitution on the Church in the Modern World* (*Gaudium et spes*) (1965), no. 74.

73. Hittinger, "Introduction to Modern Catholicism" at 4.

74. On the Court's claim for sovereignty of "the people," see *Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 794 (1995).

75. See Meltzer, "State Sovereign Immunity" at 1011, 1041–44.

76. Hittinger, "Introduction to Modern Catholicism" at 32.

77. See ibid.

78. Maritain, *Man and the State* at 95n.12.

79. Ibid. at 145.

80. *Florida Department of State v. Treasure Salvors*, 458 U.S. 670, 685 (1984).

81. See James F. Pfander, *Principles of Federal Jurisdiction* (St. Paul, MN: Thomson-West, 2006), 162–217.

82. Cf. Jesse Choper and John Yoo, "Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings," 105 *Colum. L. Rev.* 213 (2006), with Meltzer, "State Sovereign Immunity" at 1011.

83. Evan Caminker, "Judicial Solicitude for State Dignity," *Annals Am. Acad. Pol. and Soc. Sci.* 574, no. 1 (2001): 87.

84. Maritain, *Man and the State* at 19 (emphasis added).

85. Russell Hittinger, *The First Grace: Rediscovering the Natural Law in the Post-Christian World* (Wilmington, DE: ISI Books, 2003), 137.

86. Hittinger, "Introduction to Modern Catholicism" at 18.

87. Maritain, *Man and the State* at 53.