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2013]

"RELIGIOUS FREEDOM," THE INDIVIDUAL MANDATE, AND GIFTS:  
ON WHY THE CHURCH IS NOT A BOMB SHELTER

PATRICK MCKINLEY BRENNAN\*

I.

IN 2007, I published a paper bearing the formidable title, *The Decreasing Ontological Density of the State in Catholic Social Doctrine*.<sup>1</sup> In more modest terms, the thesis of that mostly descriptive paper was that, over the course of the last century and the beginning of this one, much thinking in a Catholic idiom has *downgraded* the state. Many welcomed the possibility of such a downgrading, while others considered it ominous. I was on the fence, though inclined in the latter direction. Further reflection and study have confirmed me in the judgment that the downgraded state, a merely "instrumentalist" state—as it is sometimes called, without a trace of the pejorative—is untenable, for both natural and supernatural reasons.

Some background and context will help to set the stage for the current inquiry. The eminent twelfth-century English jurist John of Salisbury developed the image of the "body politic" to describe, in an unprecedented way, the relationship between civil society, the state, on the one hand, and ecclesiastical society, the Church, on the other. This image structured most Catholic thought on the topic of "Church and state" until recently. According to traditional Catholic thought, the state is nothing less (or other) than the *body politic* of which the Church is the *soul*, which together constitute a single unity of order.<sup>2</sup> My earlier paper, echoing in part work by Russell Hittinger, undertook to demonstrate that recent Catholic thinking, including that of some of the more recent Popes, has

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\* John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. An early version of this paper was presented at the Roman Forum in Gardone Riviera, Italy, in July 2012, and I am grateful for its warm reception there and especially for the questions and suggestions of John Rao, Brian McCall, Chris Ferrara, and Monsignor Barreira. This revised version of the paper was delivered at the Seventh Annual John F. Scarpa Conference on Law, Politics, and Culture at Villanova Law School, on September 14, 2012.

1. Patrick McKinley Brennan, *The Decreasing Ontological Density of the State in Catholic Social Doctrine*, 52 VILL. L. REV. 253 (2007). An early version of the paper was presented at the First Annual John F. Scarpa Conference on Law, Politics, and Culture, at which the late Avery Cardinal Dulles, S.J., gave the keynote address and defended the thesis that the Church now teaches that the state is an instrument of civil society. Avery Cardinal Dulles, S.J., *The Indirect Mission of the Church to Political Society*, 52 VILL. L. REV. 241 (2007).

2. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 286–92 (1983). Jacques Maritain is among the most prominent Catholic dismantlers of this model. See JACQUES MARITAIN, *MAN AND THE STATE* 9–19 (1951). When I wrote *The Decreasing Ontological Density* paper, I was still heavily influenced by Maritain's thought on this cluster of ideas.

sought to shrink the substance, scope, and end of the state, or, in a word, to de-substantiate the state.<sup>3</sup> I meant to sound something of a warning. To separate the soul from the body is, after all, the very definition of death. Which is why Blessed Pope Pius IX condemned so strenuously the proposition that “the Church ought to be separated from the State, and the State from the Church.”<sup>4</sup>

In light of the foregoing, the issue I would like to pursue here, more than suggestively as I did in that earlier paper, is whether the downgraded state—the ontologically emaciated state—of recent coinage can bear the weighty office assigned to the state by permanently valid tenets of Catholic doctrine.<sup>5</sup> The Catholic tradition of reflection on the state is not static, but it does include elements and permanently valid ideals that are not subject to revision, even if their application will vary by time and place. One of these is that the state is responsible, first, for the temporal *common good*, not merely for keeping the peace and preventing rampant violation of the harm principle, and, second, for collateral assistance to the Church in her distinct, superior, and ultimate mission of saving souls.

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3. My title was a variation on part of a sentence by Russell Hittinger: “In twentieth-century Catholic thought, one detects a steady deterioration of any ontological density to the state.” Russell Hittinger, *Introduction to Modern Catholicism*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE 3, 22 (John Witte, Jr. & Frank Alexander eds., 2006). As Hittinger explains (approvingly):

On the part of the states, the solution would require not only jettisoning the idea that the modern state is a *sanctum* in the medieval sense of the term; it also pointed to the need for what the famous Catholic social theorist and politician Luigi Sturzo (1871–1959) termed a “rhythm of social duality.” Society is neither a creature of the state nor the church. It is not a ‘depersonalized whole’ capacitated to act only through the superstructure of ecclesiastical or civil administration.

Id. at 12 (footnote omitted).

4. POPE PIUS IX, SYLLABUS OF ERRORS No. 55 (1864).

5. As Alfredo Cardinal Ottaviani wrote,

These principles [regarding Church and state] are firm and immovable. They were valid in the times of Innocent III and Boniface VIII. They are valid in the days of Leo XIII and of Pius XII, who has reaffirmed them in more than one of his documents.

.....

I am certain that no one can prove that there has been any kind of change, in the matter of these principles, between the *Summi pontificatus* of Pius XII and the encyclicals of Pius XI, *Divini Redemptoris* against Communism, *Mit brennender Sorge* against Nazism, and *Non abbiamo bisogno* against the state monopoly of facism, on the one hand; and the earlier encyclicals of Leo XIII, *Immortale Dei*, *Libertas*, and *Sapientiae christianiae*, on the other.

“The ultimate, profound, lapidary fundamental norms of society,” says the august Pontiff [Pius XII] in his Christmas radio-message of 1942, “cannot be damaged by the intervention of man’s genius. Men can deny them, ignore them, despise them, disobey them, but they can never abrogate them with juridical efficacy.”

Alfredo Cardinal Ottaviani, *Church and State: Some Present Problems in the Light of the Teachings of Pope Pius XII*, 128 AMERICAN ECCLESIASTICAL REV. 321, 328–29 (1950).

My question is what the Catholic tradition teaches about how we *ought* to think about the state, and the contemporary *fact* of the so-called contraceptive mandate of the Patient Protection and Affordable Care Act makes this an opportune time to recall and recover aspects of the permanently valid ideal taught by the Church. I will argue that it is not enough for the Church to be exempted from this law, so as to preserve her internal freedom; the Church's mission includes correcting and transforming the state and civil society for the common good, not just staying at liberty within herself. The latter is necessary but not sufficient.

## II.

I should pause here to anticipate the response of some people who would look exclusively to political philosophy or to whatever else, but certainly not to Church doctrine, to learn what the nature of the state is, if they even believe that the state has a "nature" anymore. The Church and faithful Catholics must resist the fallacy behind this diversion away from doctrine, however, and for reasons that go to the heart of the matter. For the last two thousand years, before any particular state came into existence, the Church was already founded, and from the time of her founding, the Church has provided, among other things, a limit to the state. *Because of the Church, the state cannot be all in all.* As Pierre Manent has written, "the political development of Europe"—but not just of Europe—"is understandable only as the history of answers to problems posed by the Church."<sup>6</sup> To a world that once contained only one perfect society, the state, another perfect society, the Church, was added for the rest of time, and "the gates of hell shall not prevail against her."<sup>7</sup> Without reference to the Church's self-understanding and correlative understanding of what is not the Church, the state cannot but risk usurping what is not its own and pursuing ends that are *ultra vires*. Needless to say, states have not generally leapt to embrace the other perfect society in her wholeness, viewing her instead as the "problem" Manent reported. And so the Church has worked out countless different relations with countless different states, some of them better for the Church's mission than others. Concordats constitute one category of mutual accommodation that the Church has often pursued.

None of this is to say that the magisterium of the Church cannot err as it attempts prudently to determine how best to apply unchangeable elements of tradition in concrete historical circumstances. It is to say, however, that the nature of the state cannot now be accurately established without attention to the Church and what she says about who she is and, correlatively, about what everything else, including the state, can or cannot be. Before the intrusion of the Church into salvation history, Greek

6. PIERRE MANENT, *AN INTELLECTUAL HISTORY OF LIBERALISM* 4 (Rebecca Balinski trans., 1994).

7. *Matthew* 16:18.

and Roman philosophers (and others) were free, indeed obliged, to speculate about the nature of the state without regard to what did not yet exist. After the founding of the Church at Pentecost, however, the nature of the state is *radically* altered, though you would hardly know as much from the decreasing ontological density of the state in some recent Catholic social thought. And this, inevitably, is the context in which we consider the problem of the state today.

The crux of the matter is the following: “If we ask a modern person who or what is sovereign, he or she would not say ‘reason,’ ‘the individual,’ or ‘science,’” let alone God, “but instead, without hesitation, ‘the state.’”<sup>8</sup> The modern mind says this not about the *corpus mysticum* that was the organic union of the Catholic Church and the Catholic state, not about the absolute regimes that followed historically, but, ironically, about the modern nation state that has given up all pretense *to rule* in the name of a higher power in order, instead, relentlessly to expand its jurisdiction so as to achieve its new and substitute end of being an almost infinitely pliable conduit for the self-assertion of endlessly revisable selves. The dangerous irony to be confronted here is that what some magisterial documents *celebrate* as a mere instrumentalist state—what Pope Pius XII in *Summi Pontificatus* referred to as “*quasi instrumentum*”<sup>9</sup>—ought instead to be feared. Why? Because the instrument has morphed from being the servant of the common good, of the *bonum honestum* as the ancients called it, into being the roving and armed agent of inexorable majority will. Paradoxically, the ontologically emaciated, de-substantiated, instrumentalist state is not weak; it is awesomely powerful, indeed as is commonly said “sovereign,” in virtue of its not being inconvenienced or embarrassed by the restraints of higher law or, except by contingent concession, of other unities of order, let alone by that other and superior perfect society that is the Church.

What the world needs is to recover the ontologically dense state, and for this what is needed is a recovery of the deeper strands of Catholic social doctrine, specifically those concerning the state’s place within an order of higher law, and those concerning the rightful place of the Church over and within the state and of a plurality of social forms that deserve not only immunity from state power but freedom to fulfill what I shall refer to (following Pope Pius XI and later Catholic social doctrine) as their *munera*, their proper *functions*. All of this is, as Henri De Lubac—whom Pope Paul VI wished to create a Cardinal and whom Blessed Pope John Paul II did create a Cardinal, in each instance for his theological work—“no more than the Gospel requires.”<sup>10</sup> It is a separate project to construct states in defiance of the Gospel.

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8. Russell Hittinger, *Introduction to Modern Catholicism*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 3, at 4.

9. POPE PIUS XII, *SUMMI PONTIFICATUS* ¶ 59 (1939).

10. HENRI DE LUBAC, *THE SPLENDOR OF THE CHURCH 194–95* (Michael Mason trans., Ignatius Press 1986).

## III.

Lawyers like to work with examples, and here we can do no better than to consider the timely matter of the Patient Protection and Affordable Health Care Act recently upheld by the Supreme Court of the United States. By way of background, recall that President Barack Obama signed the Act into law in March of 2010. The Act requires, among other things, that most employers' group health plans cover women's "preventive care." Congress did not define this term, and so it fell to the U.S. Department of Health and Human Services (HHS) to decide which "preventive services" to include in the mandate. A year after the statute was enacted, the HHS announced that "preventive services" include contraceptives, abortifacients, and sterilization. HHS also announced that some "religious employers" would be exempt from the requirement. According to the HHS, the exemption covers only those entities whose purpose is "the inculcation of religious values" and that hire and serve primarily people of the same religious faith. A parish or a seminary could meet this definition, but most religious charities, schools, and *hospitals* would not. Needless to say, the distinction between "religion," which is exempt, and corporate works of charity undertaken by the Church, which are not exempt, does not reflect the Catholic understanding of what it is to be Church in the world, but that is to get ahead of the story.

In recently upholding the Act against numerous constitutional challenges, the Supreme Court did not answer, indeed it specifically reserved, the question of whether the individual mandate as construed by HHS would survive a challenge under the Free Exercise Clause of the U.S. Constitution.<sup>11</sup> Such a challenge has already been lodged. On May 20, 2012, forty-three religious institutions filed lawsuits in federal courts across the United States, and many others have followed. The terms of many of these legal challenges track the rationale of the challenge pressed for months in the media, led by the United States Conference of Catholic Bishops (USCCB), among others, according to which such a requirement violates the "religious liberty" of the Church by forcing her, as a condition of doing the charitable work of God's Church, to violate the moral law as taught by the Church.

The likely results of the lawsuits are hard to predict, above all for the reason that the U.S. Constitution has never been construed to protect the *libertas Ecclesiae*, strictly speaking, or even of the liberty of churches, generically speaking.<sup>12</sup> It is true, nonetheless, that there are precedents that,

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11. "Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2624 (2012) (Ginsburg, J., concurring and dissenting).

12. "Notwithstanding all of the data points in the previous paragraph, it remains unclear and unsettled what exactly are the content and textual home in the

taken together, could provide the Court some basis for finding in favor of the Church. I will mention just two examples. In *Boy Scouts of America v. Dale*,<sup>13</sup> decided in 2000, the Court upheld, in a 5-4 vote, the right of the Boy Scouts not to have to accept homosexual scoutmasters on the ground that to do so would violate the Scouts' constitutionally protected freedom of expressive association based in the First Amendment guarantee of free speech. In a second and related vein, in January 2012, in *Hosana-Tabor Lutheran Church & School v. EEOC*,<sup>14</sup> the Court held unanimously that the Establishment and Free Exercise Clauses of the First Amendment require the availability of an "affirmative defense" against suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws.<sup>15</sup> These and some other holdings present some filaments that could perhaps be woven together into an argument that Church agencies have a right to be let alone. And this is exactly the point to underscore: these are arguments for groups *to be let alone*.

The cultural and societal push in favor of such argument, to the limited extent there is such a push, sounds in terms of "pluralism," that is, the desirability of a plurality of groups. But why, we might well ask, should such arguments prevail? Why is more better in this context? Or, more technically, why is such pluralism normative? Sometimes the answer is just assumed or assumed away, as a sort of *a fortiori* from the presumed hegemony of "diversity." A more common but still crude account teaches that civil society is stabilized by power checking power, and this is an account with a familiar if dubious intellectual pedigree and aim.<sup>16</sup> A third account, which lends some indirect support to the predicates—though not necessarily the aims—of the second, is that groups or, to speak more tech-

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Constitution for the church-autonomy principle—or even, indeed, if there is such a 'principle.' It does not seem unfair to suggest that the doctrine has something of an emanations-and-penumbras air about it." Richard Garnett, *The Freedom of the Church*, 4 J. CATHOLIC SOC. THOUGHT 59, 76 (2007).

13. 530 U.S. 640 (2000).

14. 132 S. Ct. 694 (2012).

15. "We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear [the] case.'" *Hosana-Tabor Lutheran Church & School v. EEOC*, 132 S.Ct. 694, 709 n.4 (2012) (alteration in original) (citation omitted). The significance of the constitutional limits being an "affirmative defense" rather than a jurisdictional bar is huge, as Mark Strasser has seen, though from what I regard as the wrong point of view. See Mark Strasser, *Making the Anomalous Even More Anomalous: On Hosanna-Tabor, the Ministerial Exception, and the Constitution* (Feb. 2012), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1025&context=mark\\_strasser](http://works.bepress.com/cgi/viewcontent.cgi?article=1025&context=mark_strasser); cf. Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43 (2008) (defending a subject-matter jurisdictional position); see also Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration* 97 (Sept. 4, 2012) (unpublished manuscript).

16. MANENT, *supra* note 6, at 53–64.

nically, associations, have an irreducible ontological reality that calls for acknowledgment, at least by realists.

To this third view the great nineteenth-century English jurist F.W. Maitland gave memorable voice:

"When" . . . "a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted."

. . . .

If the law allows men to form permanently organized groups, those groups will be for common opinion right-and-duty bearing units; and if the law-giver will not openly treat them as such, he will misrepresent, or, as the French say, he will "denature" the facts . . . . For the morality of common sense the group is a person, is right-and-duty bearing unit.<sup>17</sup>

On this account, when individuals, with the intention of stable order, engage in united action for a common purpose, the result is a new existent, a unity that transcends the aggregation of its parts. In other words, a group person or what St. Thomas refers to as a *unity of order* comes into existence.<sup>18</sup> When this happens, Maitland notes, we are required to recognize "n + 1 persons." To do otherwise would be, again, to "de-nature the facts." It is conceded that groups are not ontologically basic in the order of substances or substantial unities. "They are basic, however, in constituting a unity that excels parts (members) which are also wholes (natural persons)."<sup>19</sup> As a bearer of rights and responsibilities, an association, like a substantial unity, "can harm or be harmed in the moral sense of the term."<sup>20</sup>

In its strongest form, then, pluralism of the sort I just have been summarizing is a plea *not to de-nature the facts*. Those who grant the facts, however, can counter that the state may have good and sufficient reason to require through law that associations conform to the extrinsic norms of positive law. The point is *concessum* as concerns a spectrum of associations

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17. F.W. MAITLAND, *STATE, TRUST AND CORPORATION* 63, 68 (David Runciman & Magnus Ryan eds., 2003); *see also* DAVID RUNCIMAN, *PLURALISM AND THE PERSONALITY OF THE STATE* 89–123 (1997).

18. Russell Hittinger, *The Coherence of the Four Basic Principles of Catholic Social Doctrine—An Interpretation*, in *PURSuing THE COMMON GOOD: HOW SOLIDARITY AND SUBSIDIARITY CAN WORK TOGETHER* 75, 87 n.24 (Margaret S. Archer & Pierpaolo Donati eds., 2008)

19. *See id.* at 87; *see also* Patrick McKinley Brennan, *Harmonizing Plural Societies: The Case of Lasallians, Families, Schools—and the Poor*, 45 *J. CATHOLIC LEGAL STUD.* 131, 151–54 (2006).

20. *See* Russell Hittinger, *The Coherence of the Four Basic Principles of Catholic Social Doctrine—An Interpretation*, in *PURSuing THE COMMON GOOD: HOW SOLIDARITY AND SUBSIDIARITY CAN WORK TOGETHER*, *supra* note 18, at 88.



but not, however, with respect to the Church, which is not, in the relevant sense, *just* an “association.” When it comes to the Church, she has a divine right to exercise a direct jurisdiction with which the state may not interfere, at least not without the Church’s concession. To insist on this point is to risk being murdered in a cathedral, however, as T.S. Eliot recalled in 1935 writing of the consequences “the absence of a cathartic moment of a repentant state.”<sup>21</sup> So, for reasons of safety, I merely mention it and move on.

Returning to my main line of argument, we need to augment the analysis by introducing the technical term “civil society,” a protean but prodigious contributor to contemporary debate about the limits of government. In his book *Conditions of Liberty: Civil Society and Its Rivals*, political philosopher Ernest Gellner refers to the “miracle of Civil Society,” which he defines as:

[T]hat set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society.<sup>22</sup>

I will mention two problems with Gellner’s instrumentalist account of civil society. First, it would seem to allow defense of civil society principally on the ground that “useful goods, including liberty, are more efficiently produced and distributed by non-governmental agents.”<sup>23</sup> Indeed, according to Gellner, civil society is the “social residue left when the state is subtracted.”<sup>24</sup> The trouble with this defense of the non-state association is that it reduces the private sector to exactly—neither more nor less than—what it can do most efficiently and to what mutually checking powers are needed to check the power of the state. Harvard political scientist Nancy Rosenblum supplements this *generic* efficiency defense of civil society with the *specific* efficiency that a pluralism of private associations lets off the

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21. Russell Hittinger, *Introduction to Modern Catholicism*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 3, at 17. As the late Harold Berman wrote,

The conflict between Becket and Henry was essentially a conflict over the scope of ecclesiastical jurisdiction; it was thus a paradigm of the Papal Revolution, which established throughout the West two types of competing political-legal authority, the spiritual and the secular. One effect of this dualism was to enhance the political-legal authority of kings in the secular sphere. Another effect was to create tensions at the boundaries of royal and papal jurisdictions. These tensions were resolved in different ways in different kingdoms. Their resolution in England was strongly influenced by circumstances of Becket’s martyrdom.

BERMAN, *supra* note 2, at 260.

22. ERNEST GELLNER, *CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS* 5 (1994).

23. Russell Hittinger, *Reasons for a Civil Society*, in THE FIRST GRACE 269 (2003).

24. GELLNER, *supra* note 22, at 212.

steam of values that are illiberal and therefore inconsistent with the ideals of liberal democracy.<sup>25</sup>

The second and related problem with a purely instrumentalist defense of civil society, also from a functionalist perspective, is that it provides no traction to resist government efforts on behalf of what Rosenblum and Yale Law dean Robert Post refer to disarmingly as "congruence." They explain that:

The "logic of congruence" envisions civil society as reflecting common values and practices "all the way down."

Congruence is often advocated with regard to the egalitarian norms of liberal democracy. The claim is that the internal lives of associations should mirror public norms of equality, nondiscrimination, due process, and so on. In the United States, for example, norms of equality and due process have been imposed on vast areas of social life, even on small, informal associations.<sup>26</sup>

Rosenblum and Post were writing a decade ago, but note how perfectly the Obama Administration's arguments for equal access to "preventive services" exemplify an application of the logic of congruence, one to which Gellner's social residue provides no resistance. Rosenblum and Post perhaps counseled something of a cautious *modus vivendi* between the aspirations of congruence and the particularist pluralism of civil society,<sup>27</sup> but the unavailing quality of such articles of peace is now unmistakable. The downgraded state that is ontologically thin becomes the powerful, imposing agent of the preferences of the majority. As Rosenblum and Post explain:

Advocates of congruence fear that the multiplication of intermediate institutions does not mediate but balkanizes public life. They are apprehensive that plural associations and groups amplify self-interest, encourage arrant interest-group politics, exaggerate cultural egocentrism, and defy government. What is needed, in their view, is a strong assertion of public values and policies designed to loosen the hold of particular affiliations, so that members will be empowered to look beyond their groups and to identify themselves as members of the larger political community. The "logic of congruence" envisions civil society as reflecting common values and practices "all the way down."<sup>28</sup>

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25. See Russell Hittinger, *Reasons for a Civil Society*, in *THE FIRST GRACE*, *supra* note 23, at 269.

26. CIVIL SOCIETY AND GOVERNMENT 13 (Nancy L. Rosenblum & Robert C. Post eds., 2002).

27. See *id.* at 17.

28. See *id.* at 13.

The ontologically thin state Rosenblum and Post defend turns out to be as potentially powerful as one can imagine, even as it masquerades under the unassuming mask of “congruence.”

#### IV.

It is fair to say that since the mid-nineteenth century, liberalism and Catholic social doctrine have been alike in their attentiveness to limits on the state. But whereas liberals valued civil society mainly for its instrumental—and, as we have seen, mostly illusory—ability to check the state, Catholic social doctrine has recognized and sought to multiply the intrinsic perfections of societies or associations. What “social residue” defenses of civil society, such as Gellner’s, systematically ignore (and implicitly deny) is the intrinsic value of such social forms as the family and the Church, including the manifold manifestations of the Church in schools, colleges, convents, monasteries, hospitals, and so forth. What they also ignore or wish to deny, therefore, is that such unities of order are bearers of irreducible *authority*. “Residue” is no repository of genuine authority, but valid associations are.<sup>29</sup>

The Catholic view comes into focus if we attend to the notion of the *munus regale*—that is, the particular function, mission, gift, or vocation that is *ruling*. Beginning with the pontificate of Pius XI, this notion of the *munus regale* in which humans participate—and it *is* a “participation,” for there is only one true King—has been applied beyond its earlier Christological and ecclesiological boundaries to the offices, rights, and duties of social institutions. Properly understood, the notion of *munus regale* preserves but corrects the liberal’s doctrine of social pluralism.<sup>30</sup>

The Latin word *munus* is best, if imperfectly, translated into English as “function.” What is lost in the translation that must be preserved is that the word connotes gift-giving. This is reflected in the English word munificent, from the Latin *munificus*, meaning generous or bountiful. The word community, *communitas*, derives from the sharing of gifts. The Magi gave *munera* to the Christ child. And Christians speak of the *triplex munus Christi*: priest, prophet, and king.<sup>31</sup>

In the encyclical *Divini Redemptoris*, for example, Pope Pius XI wrote as follows:

We have indicated how a sound prosperity is to be restored according to the true principles of a sane corporative system which respects the proper hierarchic structure of society; and how all the occupational groups should be fused into a harmonious unity

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29. See Russell Hittinger, *Reasons for a Civil Society*, in *THE FIRST GRACE*, *supra* note 23, at 272.

30. Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Doctrine*, in *CHRISTIANITY AND CIVIL SOCIETY* 13–17, 22–23 (Jeanne Heffernan Schindler ed., 2008).

31. *Id.* at 389–90.

inspired by the principle of the common good. And the genuine and chief [*munus*] of public and civil authority consists precisely in the efficacious furthering of this harmony and coordination of all social forces.<sup>32</sup>

Pope Pius XI's immediate successor, Pope Pius XII, continued to develop and apply this ontology, as here in the encyclical *Summi Pontificatus*: "It is the noble prerogative and [*munus*] of the [*civitas*] to control, aid, and direct the private and individual activities of national life that they converge harmoniously towards the common good."<sup>33</sup>

The development and application of the *munera* has continued down to the present, and it is worth noting that Latin edition of the *Catechismus Catholicae Ecclesiae* uses the word *munus* at least 125 times, and the 1983 Code of Canon Law uses the term nearly 190 times.<sup>34</sup> My present purpose, though, is not to chart the later development and application of the concept but to establish its meaning in the Pian encyclicals and to see what light it sheds on the current debate about the contraceptive mandate and what the Church has to say about it.

We do not know exactly who or what moved Pius XI to apply the sacral concept of *munera* to the juridical realm.<sup>35</sup> We do know that beginning with Leo XIII's encyclical *Annum Sacrum* in 1899, the popes delved more and more deeply into Christ and His ruling powers, and Pius XI in a series of six encyclicals—beginning with *Ubi Arcano* and *Quas Primas* and finishing with *Divini Redemptoris*—articulated the analogies between Christ's unique *munus regale* and the *munera* of baptized Christians. Whereas in the Leonine period individuals and associations were said to bear *iura et officia*, with Pius XI they were frequently said to bear *munera*, which are in fact the source of the *iura*.<sup>36</sup>

The idea of *munus* beautifully conjoins the Aristotelian notion of an *ergon* or function with the more biblical concept of vocation or mission.<sup>37</sup> With this Pius got at something that was occluded in the conventional Thomism of the time. The key point is that at the time of Pius XI's pontificate (1922-1939), the pressing question of social doctrine was not just whether man was a social animal naturally ordered to a common good in the state, but, more precisely, the status of societies and social roles other

32. POPE PIUS XI, *DIVINI REDEMPTORIS* ¶ 32 (1937)

33. *SUMMI PONTIFICATUS*, *supra* note 9, ¶ 59.

34. Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Doctrine*, in *CHRISTIANITY AND CIVIL SOCIETY*, *supra* note 30, at 13–14.

35. *Id.* at 391. This development occurred in the context of a renewed recovered of a richer ecclesiology. See, e.g., POPE PIUS XII, *MYSTICI CORPORIS* ¶ 61 (1943). Paragraph 61 of the encyclical especially reflects the ontology developed by Pius XI in terms of *munera*.

36. Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Doctrine*, in *CHRISTIANITY AND CIVIL SOCIETY*, *supra* note 30, at 14 n.15.

37. *Id.* at 392. For a discussion of the Aristotelian notion of an *ergon*, see 1 ARISTOTLE, *NICOMACHEAN ETHICS*, 1097b23–1098a19.

than the state. It was these that the totalitarians stripped of their group personality. Therefore, as Russell Hittinger explains, “[I]t wasn’t enough just to repeat the standard formulae of commutative, distributive, and legal justice. Without social content, these formulae serve no useful purpose. In fact, arguments to the common good can prove counter-productive in the face of the modern state, which is more than happy to make common the entire range of goods”<sup>38</sup>—or, more to the point, of *false* goods. Think, for example, of the logic of “congruence” and equal access to “preventive services.” But this is to get ahead of the story again.

The point to emphasize first is that Pius wished to emphasize that rights are not derived from human nature considered in the abstract; instead, the right is settled and rights are then predicated on the basis of antecedent *munera*. We are accustomed in law to consider rights as immunities—*im-munitas*, etymologically, implies the absence of a *munus*.<sup>39</sup> But this gets things backwards. Pius XI’s achievement was to establish that an adequate account of the social order cannot proceed in the first place from immunities or negative rights. We must begin with the *munera* that the immunities and rights in turn vindicate. The civil ruling authority discovers—he does not assign—*munera* that are assigned by creation and redemption, that is, by the natural law and by the divine or ecclesiastical law, respectively. Nor does the civil ruling authority assign a Catholic hospital its *munus*; this the Church does, and it is for the civil ruling authority to discover it.

Discovering is not all the civil ruling authority is to do, however. It must also facilitate or, perhaps better, *harmonize*<sup>40</sup> the plural societies in their achievement of their assigned *munera*, and to do so is exactly to achieve social justice, that misunderstood term that just means, as Pius XI teaches in *Divini Redemptoris*, that the common good is to be realized through *munera*-bearing associations and institutions.<sup>41</sup> The *munus* of the

38. *Id.* at 393.

39. *Id.*

40. I pursued a particular example of this work of “harmonizing” in Patrick McKinley Brennan, *Harmonizing Plural Societies*, *supra* note 19. For a general and helpfully technical treatment of the relationship between parts and wholes in a community as understood by Aquinas, see Michael Baur, *Law and Natural Law*, in *THE OXFORD HANDBOOK OF AQUINAS* 238, 238–44 (Brian Davies & Eleonore Stump eds., 2012).

41. Pope Pius XI wrote,

Verum enim vero, praeter iustitiam, quam commutativam vocant, socialis etiam iustitia colenda est, quae quidem ipsa officia postulat, quibus neque artifices neque heri se subducere possunt. Atqui socialis iustitiae est id omne ab singulis exigere, quod ad commune bonum necessarium sit. Ut autem, ad quamlibet viventis corporis compagem quod attinet, in universum consultum non est, nisi singulis membris ea omnia tribuantur, quibus eadem indigeant ad suas partes explendas; ita, ad communitatis constitutionem temperationemque quod pertinet, totius societatis bono prospici non potest, nisi singulis membris, hominibus videlicet personae dignitate ornatis, illud omne impertiatur, quod iisdem opus sit, *ad sociale munus cuiusque suum exercendum*. Si igitur iustitiae sociali provisum fuerit,

Church is assigned by divine positive law, but most *munera* are assigned by the divine natural law. With respect to the latter point, as St. Thomas argues in his opusculum *Contra Impugnantes*, free associations are valuable and to be respected—and their works harmonized—because they make *communication* possible, by which Thomas means making something *common*, or, more precisely, one rational agent participating in the life of another and generating and sharing intelligibilities that would otherwise go unachieved.<sup>42</sup> To quote Hittinger: “[T]o prevent free men and women from associating for the purpose of communicating gifts is contrary to the natural law. It is tantamount to denying to rational agents the perfection proper to their nature, and denying the commonweal goods it would not enjoy were it not for free associations”—and, I would add, the intrinsic perfections capable only within it.<sup>43</sup>

And it is here that that other frequently misunderstood and abused principle of Catholic social doctrine, subsidiarity, enters, for it is *derived from* social justice. Subsidiarity is the principle that when aid or *subsidium* be given either by the parts to the whole or by the whole to the parts, the “manifold organicity” of the common good is to be respected and aided, not destroyed or absorbed.<sup>44</sup> Properly understood, subsidiarity is not (as is commonly thought) a principle of devolution or smallness of scale; rather, it is a principle of non-absorption predicated on the facts, established by creation or redemption, that groups have irreducible *munera* to fulfill and gifts to give. Subsidiarity cannot create a social ontology; subsidiarity presupposes the existence of social forms, each having its own *esse*

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ex oeconomicis rebus uberes enascentur actuosae navitatis fructus, qui in tranquillitatis ordine maturescent, Civitatisque vim firmitudinemque ostendent; quemadmodum humani corporis valetudo ex imperturbata, plena fructuosaque eius opera dignoscitur.

DIVINI REDEMPTORIS, *supra* note 32, ¶ 51 (1939). Christian employers and industrialists have a proper *munus*: “Quapropter vos peculiari modo compellamus, christi ani heri officinarumque domini, quibus proprium est saepenumero tam difficile *munus*, quandoquidem illam errorum quasi hereditatem ab iniusto oeconomicarum rerum regimine excepistis, quod in tot hominum aetates ruinosae influxit: officiorum memores estote, quibus respondere debetis.” *Id.* ¶ 50.

Catholic working men also have a “*munus*” to make the Church known in their places of work:

Patris heic animo alloqui carissimos Nobis catholicos opifices, vel adolescente vel adulta aetate, libet, qui ob strenue servatam fidem in tanta temporum iniquitate, honestum arduumque onus et *munus*, loco praemii, accepisse videantur. . . . Quod quidem *munus*, ad fodinas, ad officinas, ad armamentaria, quocumque denique opus initur, proferendum, cum incommoda quandoque postulet, meminerint catholici iidem operarii Christum Iesum cum operis exemplo, perpeccionis quoque exemplum coniunxisse.

*Id.* ¶ 70.

42. Russell Hittinger, *Reasons for a Civil Society*, in *THE FIRST GRACE*, *supra* note 23, at 271.

43. *Id.* at 272.

44. Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Doctrine*, in *CHRISTIANITY AND CIVIL SOCIETY*, *supra* note 30, at 15.

*proprium*, its own *munus* to be done and given. These *munera* are participations in the *munus regale* of Christ the King, which means that they are measured and ruled by the measure and rule of Christ's rational will for the community and its common good.

In sum, then, civil society is not accurately conceived as an arbitrary "plurality" or, worse, an undifferentiated and tractionless "residue." What we confront, instead, are individuals with their respective *munera* and associations with their respective *munera*, all of them arrayed *under and within* the state and the Church, as the case may be, sometimes in an overlapping jurisdiction, each of which individual or member association bearing its own respective *munus* to be performed or given. The state's *munus* is the temporal common good and, furthermore, collateral contribution to the achievement of the supernatural common good by, in part, harmonizing plural societies according to social justice and the derivative principle of subsidiarity. And the Church's *munus* is to accomplish the divine will that all be saved,<sup>45</sup> in part by ensouling the state. The result, then, is an ontologically dense state that is not vulnerable to arbitrary impositions by a willful civil society, because it is girded and powered from within, so to speak, by *munera* that must be discharged, by gifts that demand to be given, because they are participations in the *munus* of Christ, who rules from above.

## V.

As I signaled at the outset, the commonly heard "Catholic" objection to the HHS mandate for "preventive services" is that the mandate "violates religious liberty." Perhaps this is so, but I find the expression woefully vague and, to the extent it can be clarified, under-inclusive, so to speak, of the Catholic social doctrine I have just summarized. Here, for example, is the pivotal language in the USCCB's much-discussed document, "Our First, Most Cherished Liberty:"

The mandate of the Department of Health and Human Services has received wide attention and has been met with our vigorous and united opposition. In an unprecedented way, the federal government will both force religious institutions to facilitate and fund a product contrary to their own moral teaching and purport to define which religious institutions are "religious enough" to merit protection of their religious liberty. These features of the "preventive services" mandate amount to an unjust law. As Archbishop-designate William Lori of Baltimore, Chairman of the Ad Hoc Committee for Religious Liberty, testified to Congress: "This is not a matter of whether contraception may be *prohibited* by the government. This is not even a matter of whether contraception may be *supported* by the government. Instead, it is a matter of

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45. 1 *Timothy* 2:4.

whether religious people and institutions may be *forced* by the government to provide coverage for contraception or sterilization, even if that violates their religious beliefs.<sup>46</sup>

I will begin with the last point. The document claims that the problem with the mandate is that “we,” the Catholic Church, are being forced to do something that *we* Catholics regard as immoral, or, as Timothy Cardinal Dolan, the Archbishop of New York and President of the USCCB, put the point elsewhere, something that violates “*our* standard of respecting . . . religious liberty.”<sup>47</sup> With all due respect, this is a remarkably self-referential position. As Francis Cardinal George recently wrote, “Among the sayings of Jesus, there are about as many that start ‘Woe to you . . .’ as there are those that begin ‘Blessed are they . . .’”<sup>48</sup> and Jesus did not limit their effects to “us.” It is a diversion to frame the issue concerning the mandate as exclusively, or even principally, as about what *the Church* is being forced to do. That is only the start of it. The problem with this law is not just that it forces *us* (“the Church”) to do what *we* regard as immoral; it is not just that it forces *us and others* to do what *we and they* regard as immoral. The problem is *also and above all* that it forces *us and others* to do what *is* immoral, regardless of who does or does not consider it to be immoral. It is not anyone’s disagreement with the required act that makes the required act objectionable; the final cause of the act itself is sufficient to make the act immoral.<sup>49</sup> (The degree of individual culpability is, of course, another question—and one that is perhaps affected by the Bishops’ own disavowals and bashfulness).

The *munera* of both the Church and the state include the work of making the moral law effective in human living, yet in the face of the state’s acting in violation of the moral law, the Bishops overtly disowned—in the language I quoted and will quote in part again—their *munus* to exhort state and citizens to conform the positive law to the moral law: “This is not even a matter of whether contraception may be *supported* by the government.” I am afraid that the Bishops’ position boils down to a plea to be let alone. Cardinal Dolan is in accord: “That’s all it’s really about: religious freedom. It’s not about access to contraception, as much as our local newspaper—surprise!—insists it is. The Church is hardly trying to impose its views on society, but rather resisting the government’s

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46. U.S. CONFERENCE OF CATHOLIC BISHOPS, OUR FIRST, MOST CHERISHED LIBERTY: A STATEMENT ON RELIGIOUS LIBERTY (2012), *available at* <http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm>.

47. Timothy M. Dolan, Cardinal-designate, Letter to Bishops (Feb. 10, 2012), *available at* <http://www.nationalreview.com/corner/290854/all-bishops-letter-led-cardinal-designate-dolan-we-strongly-protest-violation-our-free> (emphasis added).

48. Francis Cardinal George, *Chicago Values, Revisited: It’s not About Chicken!*, CATHOLIC CHICAGO BLOG (Aug. 6, 2012), <http://www.archchicago.org/blog/comments.aspx?PostID=278>.

49. POPE PAUL VI, *HUMANAE VITAE* (1968).



attempt to force its view on us.”<sup>50</sup> Cardinal Dolan continues: “Vast and unfettered access to chemical contraceptives and abortifacients—all easier to get, they tell me, than beer and cigarettes—will continue. If you think it’s still not enough, then subsidize them if you insist. Just don’t make us provide them and pay for them!”<sup>51</sup> Needless to say, the Church cannot, as a practical matter, “impose” her views on society, so that’s a red herring. Surely, however, the Church can at least propose “her views,” especially through the episcopal *munus*, rather than just going inside and underground.

Returning from the specific point to the general, here again is Cardinal Dolan’s overall approach in action: “*We just want to be left alone* to live out the imperatives of our faith to serve, teach, heal, feed, and care for others.”<sup>52</sup> Cardinal Dolan’s rhetorical (and theological?) starting point is too cramped. Self-marginalization or abnegation, verging perhaps on self-imposed exile, is exactly what an ecclesial society *with gifts to give* cannot do. If it is to be true to its *munera*, it will seek to correct and transform the culture as God commands and wishes us—*qua* Church—to do. The Church’s claim is not to be “left alone”: it is *to change the world*, including through the good deeds mentioned by Cardinal Dolan. At the risk of belaboring the obvious, the *munus regale* of the hierarchy is not confined to the sacristy and the *munus regale* of the laity is not confined to the home. As to the *munus* of the laity, the Second Vatican Council is quite emphatic that the laity’s role is “to impress the divine law on the earthly city.”<sup>53</sup> To impress is not to remain passive. The Council also teaches that it does not fall to the laity “exclusively” to perform that work.<sup>54</sup> Other than the laity are the clergy (including the hierarchy). There is no additional category of natural actors: the disjunction is exhaustive. (Religious, whether men or women, are not, as such, clergy). This teaching of the Second Vatican Council, about impressing the divine law on the earthly city, is impossible to square with the following: “*Just* don’t make us provide them and pay for them!”<sup>55</sup> The rest of the world can go to hell—just don’t contaminate “us”!<sup>56</sup>

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50. Timothy M. Dolan, *Freedom Is Worth Defending*, CATHOLIC NEW YORK (May 31, 2012), <http://www.cny.org/stories/Freedom-Is-Worth-Defending,7568>.

51. *Id.*

52. Timothy Cardinal Dolan, *Religious Freedom and Protecting Healthcare for Women*, THE GOSPEL IN THE DIGITAL AGE (Mar. 16, 2012), <http://blog.archny.org/index.php/religious-freedom-and-protecting-healthcare-for-women-and-children/>.

53. POPE PAUL VI, GAUDIUM ET SPES ¶ 43 (1965); *see also* POPE PAUL VI, LUMEN GENTIUM ¶ 31 (1964).

54. GAUDIUM ET SPES, *supra* note 53, ¶ 43 (“Laicis proprie, etsi non exclusive, saecularia officia et navitates competent.”).

55. *See* Timothy M. Dolan, *supra* note 50 (emphasis added).

56. Some Catholic thinkers, including the Popes, before the mid-twentieth century saw this coming: “they feared that once the state was depicted instrumental terms, the other organs of society would inevitably follow suit. In other words, they feared that the liberal state, even in its most favorable depiction as an instrument rather than the substance of the common good, would produce atom-

What the argument *exclusively* from "religious freedom" neglects—or, rather, often intentionally suppresses—is the fact that the Church and her charities are entitled to freedom not just because of a brute right to be let alone, a right not to be interfered with, or, in other words, an immunity. Rights to be let alone are derivative, as we have seen, of the various associations' respective particular *munera*, the works and functions they are charged to perform. The sufficient reason to let schools, adoption agencies, and all the rest, *including hospitals*, go about their work unhindered is that social justice and subsidiarity demand it. They demand it because the Church has entrusted her *munus* of charity to these particular associations which are capable, as Pope Benedict XVI stressed in the encyclical *Deus Caritas Est*, echoing Leo XIII in the encyclical *Rerum Novarum*, of delivering what the state could never do or even simulate,<sup>57</sup> and all of that is no less than what Christ the King commands His Church to do. The reason the state is legally obligated, not merely obliged, to respect the Church's governance of her member organs, including hospitals, is that, by divine law, the Church enjoys a real, direct, and final jurisdiction over herself and her members. But this does not mean that the Church is not also charged by divine law to correct and transform the world.

Some defend the exclusivity of the "just let us alone" argument on prudential grounds. I respect those who honestly defend such a position, despite its glaring incompleteness, and although I do indeed see *some* circumstance-specific (viz., late post-Modernity) merit to this line of argument, I am not persuaded, certainly not of its sufficiency. Does it not bespeak a much deeper and unacceptable abdication and resignation, in the face of a deadly political morality, of the *munus regale*? Regardless of the prudence *vel non* of that argument, though, there is, I must concede, some fairly prestigious precedent for such a defense. I refer to the Second Vatican Council's *Declaration on Religious Freedom, Dignitatis Humanae* Par. 13, which states that the *libertas Ecclesiae* is "*principium fundamentale*" governing relations between the Church and government and the whole civil order. The teaching of *Dignitatis* is not infallible as a matter of Catholic theology, however, and I am afraid that on this point, at least, it is mistaken. As Marcel Lefebvre once explained:

Freedom is not *the* fundamental principle, nor *a* fundamental principle in the matter. The public law of the Church is founded on the State's duty to recognize the social royalty of Our Lord Jesus Christ! The fundamental principle which governs the relations between Church and State is the "He must reign" of St. Paul: *Oportet illum regnare* (I Cor. 15:25)—the reign that ap-

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ism and instrumentalism in every other sector of society." Hittinger, *supra* note 25, at 267.

57. POPE BENEDICT XVI, *DEUS CARITAS EST* ¶¶ 28b, 31 (2005); POPE LEO XIII, *RERUM NOVARUM* ¶ 30 (1891).

plies not only to the Church but must be foundation of the temporal city.<sup>58</sup>

It is a permanently valid principle of Catholic social doctrine—because it is *the one historical inevitability*—that Christ must reign. As the early Christians understood and taught, creation itself was for the sake of the Church,<sup>59</sup> and the *munus* of the Church is not merely the maintenance of some internal freedom for the benefit of the faithful already graced to be inside the bomb shelter; it is, as well, as it was *in the first place*, to serve, among other functions, as the soul of the body politic, and thus to contribute to the achievement of the common goods, both natural and supernatural.

## VI.

I will conclude by quoting the last paragraph of my “Decreasing Ontological Density” paper:

One can affirm that the Church is sacred in a way that the state, properly understood, is not, without having to deny that the state is possessed of a share of sacred ruling authority. If what authority for rule the state possesses is in no way sacred, however, then it can be no part of the divine ruling power. Do we humans have a self-possessed power to rule, a rival to the divine [rule]? If have we have not received a law, then on what basis do we proceed to make law? In one of my favorite lines of all time, Justice Antonin Scalia opined that “God,” not man, “applies the natural law.” If that be true, what, then, do *we* do? Inasmuch as a devoutly Catholic Justice of the Supreme Court of the United States has consigned us to a fate without benefit of the natural law, the question is not merely speculative.<sup>60</sup>

The only adequate answer, I see more clearly than I did five years ago, is a proper cooperation between—not the separation of—Church and state. The Church was not founded to repose in a gilded cage but, instead, to save men’s souls and, to that end, to correct and transform this fallen creation. “Although the world knows it not, the most primordial law of ruling is service, which is always the signature of the divine. Not sovereignty as the moderns understand it, but rather a gift communicated for the good of another.”<sup>61</sup>

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58. MICHAEL DAVIES, 2 *APOLOGIA PRO MARCEL LEFEBVRE* 122 (1983).

59. See *CATECHISM OF THE CATHOLIC CHURCH* ¶ 760 (1999).

60. Brennan, *supra* note 1, at 279 (emphasis added) (footnote omitted).

61. Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Doctrine*, in *CHRISTIANITY AND CIVIL SOCIETY*, *supra* note 30, at 19 (footnote omitted).