NOT TO CAESAR BUT TO PETER

Why the Catholic Church is a Perfect Society

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In truth, it was not to Caesar but to Peter that Jesus Christ entrusted the keys of the kingdom of Heaven. From this doctrine touching the relations of politics and religion originate important consequences which we cannot pass over in silence.

—**POPE LEO XIII**, *Sapientiae Christianae* ("On Christians as citizens"), January 10, 1890

To ensure that the voice of the Church, not least through her social doctrine, continues to be heard, is not about the restoration of a past epoch, but of guaranteeing that key resources for future cooperation and integration are not lost.

—**POPE LEO XIV**, *To Members of the "European Conservatives and Reformists" Group of the European Parliament*, December 10, 2025

For us the Church is the Body of Christ, Christ continuing in time, and as such a divine institution. The Protestant considers this idolatry. If the Church is not a divine institution, it will turn into an Elks Club.

—**FLANNERY O'CONNOR**, *Letter to Doctor Ted R. Spivey*, June 21, 1959

INTRODUCTION
Legal Pluralism

IN THE SIXTY YEARS SINCE VATICAN II CONcluded, the Catholic Church gained a robust commitment to religious liberty and lost a distinct sense of her own legal authority. The dichotomy is ironic, because the Second Vatican Council's Declaration on Religious Freedom, *Dignitatis Humanae*, says that religious freedom in the civil order follows from the "stable situation of right as well as of fact" created by the Church "claim[ing] freedom for herself in her character as a spiritual authority."[1] That authority follows from Christ divesting civil governments of all legal power on the direction of religious duties and reinvesting that power into the Catholic Church. Man has a duty to "seek the truth, especially in what concerns God and His Church."[2] As such, religious liberty for all in the civil order is required. Not because of individualism or indifferentism. But because, with Christ's arrival, civil governments no longer have the power to interfere either with man fulfilling his duty to come to know the truth fulfilled in God's Church, or with the Church's authority to bring the gospel to all mankind.

Rather than articulate the link between her legal authority on religious duties and religious liberty in civil law, the Church now speaks of religious liberty without any relationship to the Church. Indeed, in 2019 the Church's International Theological Commission sought a "reasonable renewal of the reception of *Dignitatis Humanae*."[3] The Commission's new reception gave only one mention to the Church's "ecclesial freedom." That mention treated ecclesial freedom as a bygone, pre-Vatican II concept that *Dignitatis Humanae* would "overcome" with a "progressive nuance" around individual freedom.[4] Now, the Church is a voluntary association, a conduit for individual religious

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[1] Paul VI, *Dignitatis Humanae*, Papal Declaration on Religious Freedom — On The Right of the Person and of Communities to Social and Civil Freedom in Matters Religious, December 7, 1965, § 13, https://perma.cc/T5HC-8EA7.

[2] Ibid., § 1.

[3] International Theological Commission Sub-Commission for Religious Freedom, *Religious Freedom for the Good of All: Theological Approaches and Contemporary Challenges*, March 21, 2019, § 15, https://perma.cc/3L2B-HEPV.

[4] Ibid., 15.

freedom like other "intermediary bodies" that stand "between" the individual and the state.[5] Similarly, prominent Catholic leaders — including the United States Conference of Catholic Bishops (USCCB) — treat the Church as part of the "American genius for voluntary association," an entity that seeks "simply the rights of religious freedom for all citizens."[6] To be sure, the Church will sometimes still invoke what used to be known as her *libertas Ecclesiae*.[7] But in general, the folk understanding of *Dignitatis Humanae* — even among Catholics — is that the Church isn't a legal authority on the religious duties of her faithful, nor does she have any necessary connection to religious liberty in civil law. She is, instead, a voluntary association. One of "civil society's" "little platoons" that a Catholic can engage with to the extent he finds it personally meaningful to do so.

A parallel confusion is happening in U.S. religious liberty law. Since 2000, the most consistent religious claimant in U.S. Supreme Court cases is an arm of the Catholic Church.[8] This is not a surprise. That is because the perennial question of U.S. religious liberty — the extent to which religious duties remain beyond the power of civil government — is intersecting with the expansion of state power into areas traditionally dominated by religious institutions, particularly by the Catholic Church. Areas like education, health care, and family relations.

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[5] Ibid., 52–53.

[6] United States Conference of Catholic Bishops Ad Hoc Committee for Religious Liberty, "Our First, Most Cherished Liberty: A Statement on Religious Liberty," United States Conference of Catholic Bishops, approved March 5, 2012, https://perma.cc/DG2M-LE28.

[7] See Plaintiffs' Complaint at ¶56, *Etienne v. Ferguson*, 3:25-cv-5461 (W.D. Wash. May 29, 2025), Dkt. 1, https://perma.cc/F6JS-JHKH, quoting "Note of the Apostolic Penitentiary on the Importance of the Internal Forum and the Inviolability of the Sacramental Seal," Vatican § 1, Sacramental Seal, https://perma.cc/B5LW-TZYJ.

[8] See *Zubik v. Burwell*, 578 U.S. 403 (2016); *Little Sisters of the Poor v. Pennsylvania*, 591 U.S. 657 (2020). Along with those cases, see also *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. 732 (2020), consolidated with *Saint James Catholic School v. Biel*; *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020); *Catholic Charities Bureau v. Wisconsin*, 605 U.S. 238 (2025); *Oklahoma Statewide Charter School Board v. Drummond*, 145 S. Ct. 1916 (2025). *St. Mary's Catholic Parish v. Roy*, No. 25-581 (U.S. Sup. Ct. cert. granted Apr. 20, 2026). Further, some other recent cases don't directly involve a Catholic institution but are informed by historical restrictions (known as "Blaine amendments") crafted around barring Catholic institutions — and now many other religious ones too — from participating in public benefit programs. See, e.g., *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020); *Carson v. Makin*, 596 U.S. 767 (2022).

"At the time of the American Founding, it may have appeared that the limited peacekeeping functions of the state could be distinguished from the more elevated functions of the church."[9] Whether that was true or false then, modern expectations for state power erode any remaining distinction.

Whether threatening the Little Sisters of the Poor, or a Catholic foster agency, or a Catholic Charities bureau, or a Catholic parish, or a Catholic school, or demanding that parish priests break the confessional seal, U.S. law is confronting the same question underlying the Church's treatment of *Dignitatis Humanae*. That is, why should the Church "be treated differently than individuals" and hold her own governance authority on matters that fall within her spiritual competence?[10] Matters like whether to cover certain drugs in health plans, what marriages to validate in placing foster children, how to structure her evangelistic mission, access to Mass during pandemic lockdown restrictions, who should be tasked with teaching the Catholic faith at Catholic schools, or whether legislators can force priests to divulge what they hear in the Sacrament of Confession.

Instead of upholding the Church's independent legal authority on religious duties, the Supreme Court will treat the Church like the Church now discusses herself. That is, as a voluntary association, a mere conduit whose "religious freedom also 'furthers individual religious freedom.'"[11] On this framework, the only sovereign authority is the individual working through the state. Perhaps some individuals exercise their religion through the Church. And insofar as they do, the state protects that choice. The state also has some "special solicitude [for] the rights of religious organizations."[12] That solicitude may produce some unique protections for religious institutions when they do especially "religious" things—like hire and fire their "ministers" or decide bespoke theological issues (like whether a sacrament is valid).

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[9] Michael W. McConnell, "Establishment and Toleration in Edmund Burke's 'Constitution of Freedom,'" *The Supreme Court Review 1995*, no. 1 (1995): 443, https://perma.cc/K7BT-HWUB.

[10] See *Fulton*, 593 U.S. at 544 (Barrett, J., concurring), rhetorically asking this question.

[11] See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709 (2014), citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). Indeed, both the majority and the dissent in *Hobby Lobby* used this individualistic framing. See also *id.*, at 752 (Ginsburg, J., dissenting). They only disagreed on which individuals should have their religious freedom furthered.

[12] *Hosanna-Tabor*, 565 U.S. at 171.

Those protections may even be informed by the history and language of the Church's legal authority.[13] But, at least until now, that history and language give the Court's opinions a "mood," not a mode of analysis.[14] When it comes to the Court's analytical framework, the Court doesn't know how to explain why the Church is free to govern herself. The Church, rather, is "in" the state. Just like everyone and everything else.

This reduction of the Church to a voluntary association, conditioned upon furthering individual religious freedom, raises unsettling questions for the Church's internal coherence and for U.S. law. In particular, when the Church understands herself as a mere voluntary association that is expected to further individual religious freedom, then on what principled basis can she resist new claims of personal liberation backed up by civil law, especially when those claims are advanced by the Church's own members against Church practices that are grounded in the Church's authority (like, say, using civil law to force priests to break the seal of confession)? And for U.S. law, is it even possible for a political community so committed to the individual to maintain a stable understanding of religious duties as transcending the power of the state?

To answer these questions, the Church must recover—and U.S. law must uncover—legal pluralism. Legal pluralism is "the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems."[15] Legal pluralism was brought to Western law by the Catholic Church, turning on the famous fourth century words of Saint Pope Gelasius: "*duo sunt*," meaning there are two legal authorities on religion, the Church (directing religious *duties*) and the state (regulating religion consistent with the natural law). This is the Church's claim of legal pluralism. It is the claim that keeps legal direction on religious duties outside state power. It is the claim that therefore prohibits religious totalitarianism or the

[13] See, e.g., *Hosanna-Tabor*, 565 U.S. at 182, discussing the development of Magna Carta; see also, *Our Lady*, 591 U.S. at 748, referencing this history and seeking to avoid the state supremacy over religion that marked Henry VIII's takeover of the English church; *Fulton*, 593 U.S. at 528, discussing the Catholic Church pioneering foster care centuries before Philadelphia's involvement.

[14] Richard W. Garnett, "'The Freedom of the Church': (Towards) an Exposition, Translation, and Defense," *Journal of Contemporary Legal Issues* 21 (2013): 38, https://perma.cc/5SEC-3Y5N.

[15] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), 10.

reduction of the Church's legal authority to a permission slip from the state. Legal pluralism is what U.S. law must uncover. And a Church that remembered herself as a legal authority is well-poised to do the teaching.

Indeed, U.S. law benefits from the Church renewing her claim of legal pluralism. U.S. law could thereby appreciate the historical, jurisdictional allocation of legal authority that America inherited and that makes possible religious freedom in the civil order and gives religious institutions special solicitude. While modern U.S. legal scholars struggle mightily (and in vain) to find a "secular" reason to understand why the First Amendment considers religious exercise "special,"[16] legal pluralism is not embarrassed to embrace the historical reality of Western law. That reality is this: "the whole debate and tradition [of religious freedom]" comes from the Church's claim "that God has divided life into spiritual and temporal domains and has assigned different authorities to each domain."[17] Because the Church was understood as the God-given legal authority on the direction of religious duties, the Church was not "in" the state. Because the Church was not in the state, then neither was the fulfillment of religious duties. This claim makes the Church "a boulder in the path of monism."[18] Her own God-given authority to direct religious duties makes the Church a physical manifestation of religious duties transcending state power. And because states therefore lack native authority to direct religious duties, then states acting only on their native authority must guarantee religious liberty for all consistent with the natural law. Not because of a fortunate coincidence of private individual judgments about desired

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[16] For instance, when Professor Sherif Girgis surveyed the over three decades of scholarly effort on this question, he concluded that, when the question is "framed" as "whether religion warrants 'special' legal status," "the question is unanswerable"—and that led him to propose another framing around "the rules at stake." Sherif Girgis, "Fragility, Not Superiority? Assessing the Fairness of Special Religious Protections," *University of Pennsylvania Law Review* 171, no. 1 (2022): 152, https://perma.cc/WS3C-WC7W. One could open another front like that. Or, one could form the polity in the historical, theological reason. This book urges the Church, effectively, to take up the latter by building stronger Catholic communities that form the faithful in the historical, theological reason.

[17] Steven D. Smith, "Discourse in the Dusk: The Twilight of Religious Freedom," *Harvard Law Review* 122, no. 7 (2009): 1882, https://perma.cc/B2MN-6FVV.

[18] Patrick McKinley Brennan, "Are Catholics Unreliable from a Democratic Point of View? Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanshard's *American Freedom and Catholic Power*," *Villanova Law Review* 56, no. 2 (2010): 215, https://perma.cc/D5H6-YZAZ.

freedoms. But because God himself divested Caesar of any power to make any other choice. Acting on his own, Caesar is now authorized only to guarantee the conditions for people to come freely to the truth that is fully revealed in God and his Church. All further authority on religious duties now resides with Peter.

As both Catholic and non-Catholic American judges and scholars increasingly recognize — not as a matter of faith but as a matter of historical tradition — U.S. law inherited a version of the Church's legal pluralism.[19] But the version America inherited passed through the Protestant Revolution and the Enlightenment. As such, the American version conceives of spiritual authority in non-institutional terms, often emphasizes the separateness of Church and state — not their potential harmony — and expands the civil government's authority in regulating religious institutional governance. This version complicates U.S. law's ability to develop a jurisdictional vocabulary for religious freedom. The Church is bearing the brunt of those complications, as her internal governance decisions around matters like marriage, education, health care, and discipline increasingly define religious liberty lawsuits.

Lacking legal pluralism permits what Saint Pope Paul VI and Saint Pope John Paul II called "negative confessionalism."[20] Negative confessionalism conditions the Church's participation in public life on redefining herself and her teachings around the *zeitgeist*, not the Church's teaching. And as the state grows into areas traditionally dominated by the Church, the demands become more existential. "Sure," the state says, "you can keep your 200-year-old foster care ministry — so long

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[19] See, e.g., *Catholic Charities Bureau*, 605 U.S. at 256–59 (Thomas, J., concurring); *Hosanna-Tabor*, 565 U.S. at 199–200 (Alito, J., concurring); see also *McRaney v. North American Mission Bd.*, No. 23-60494, 2025 WL 2602899, at *3–4 (5th Cir. Sept. 9, 2025); *Huntsman v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 803–4 (9th Cir. 2025) (en banc) (Bumatay, J., concurring); *McRaney v. North Am. Mission Bd.*, 980 F.3d 1066, 1076–78 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc). For a brief my colleagues and I filed in the U.S. Supreme Court making an argument along these lines, see Brief for The Becket Fund for Religious Liberty as Amicus Curiae, *First Choice Women's Resource Centers Inc. v. Platkin* (U.S. No. 24-781), https://perma.cc/X7BN-GLT5. Some of this book's arguments regarding church autonomy will draw upon arguments in the *First Choice* briefing, as well as other briefs that I have filed as a lawyer with the Becket Fund. I draw on these arguments with Becket's permission.

[20] John Paul II, *Message to the Secretary General of the United Nations*, December 2, 1978, https://perma.cc/WC4C-TEJ6.

as you change your understanding of marriage when evaluating foster parents to fit what we, not you, call a marriage." "Sure," the state continues, "we love your schools, hospitals, and homeless shelters. We just need you to change all your admissions, employment, and offered services to fit the latest demands of personal liberation embodied in state law — like abortion access, new definitions of marriage, or embracing a subjective conception of sex — or else we will force you to close your doors." This is the logic underlying most of the Church's religious liberty litigation with the modern state in America. In one breath, the state insists that the Church can "trust" and "collaborate" with the state. Yet in another breath, the state "takes up positions against the Faith" and conditions all trust and collaboration on the Church's conformity.[21] Negative confessionalism may not have been what the American founding generation desired. But it is what has resulted from an unclear constitutional commitment to legal pluralism. That is, religious duties, like the Church herself, end up in the state and subject to state direction (again, even if that result was not originally intended).

Negative confessionalism rests on treating civil government as a monistic secular sovereign.[22] Monistic secular sovereignty does not deny religious liberty (or at least it doesn't need to). But monistic secular sovereignty does deny legal pluralism. That is, monistic secular sovereignty understands all legal power in a political community — including on religious duties — to reside in one place, the state. But if the state grows, and the state is the only social entity with legal authority, a one-way ratchet is created. Every time the state expands into areas of religious exercise, either the state action must be held totally invalid or the state must choose to disregard the burden on religious exercise. The result is to treat religious liberty as a "grant [of] legally enforceable *rights*" to religious people and (maybe) entities — and only those rights "that the sovereign state chose to confer or recognize."[23] Individuals can thus use state power to come up with a new "balance" that alters what rights religious people and entities retain. When those individuals want to prefer religious liberty, they do that. When they want their

[21] Paul VI, "Address to the Diplomatic Corps Accredited to the Holy See," January 14, 1978, https://perma.cc/G9LU-YMSC.

[22] Steven D. Smith, "The Once and Future Freedom of the Church: Three Stories," San Diego Legal Studies Paper No. 25-008 (2025): 7, https://perma.cc/V7VU-MTZC.

[23] Ibid., 7–8.

religious liberty curtailed to pursue some other form of personal liberation, state power gets to alter the boundaries. What matters is that the individual is the sole spiritual sovereign. He and he alone gets to decide, through the state's machinery, the metes and bounds of religious duties.

The monistic tendencies America inherited cannot stop negative confessionalism against the Church. That is why — even if the Church wins her religious liberty cases — they don't stop happening. With every new demand to redefine freedom in more unbridled terms, the Church is pressured to conform or leave the public square. Without a clear understanding of legal pluralism, negative confessionalism ensures that U.S. law doesn't know how to deal with the Church as she is — her own legal authority on the direction of religious duties. And the Church doesn't know how to explain her legal authority. Both the Church and U.S. law are thus routinely asked whether and how the First Amendment protects religious institutions. But neither the Church nor the United States can offer a full answer. Because no one — not even Catholics — seems to remember, or have ever learned, that the Church has an answer to these questions in legal pluralism.

For the Church to recover the legal pluralism she birthed in Western law — and to answer the negative confessionalism that flows from America's monistic tendencies — this book claims the Church should remember the legal authority underlying her *libertas Ecclesiae*: the authority of the Church as a perfect society.

We will explore what it means for the Church to be a perfect society in more detail. But in general, the Church is following the Aristotelian concept of a "perfect society." That does not mean the Church is sinless or stainless. Nor does it mean that civil governments lack any legal authority on religion, that the Church wins every Church-state conflict, or that Catholicism must be the state religion.

Being a perfect society in the Aristotelian sense means the Church is a complete, self-sufficient society that has her own legal authority to achieve an ultimate end — in her case, the supernatural end of eternal life with God. In disputes with any civil government, Church and state must therefore achieve at least a stability that understands religious duties as responding to a legal authority beyond state power, and reflects the best traditions developed between the Church and a given political community. Because the Church as a perfect society

understands the Church as having legal authority to direct religious duties, the Church as a legal authority understands religious liberty in jurisdictional terms. That is, religious duties are beyond state power, because the civil government isn't the legal authority that God charged with directing them. This means the Church as a perfect society can prevent totalitarianism in religion in a way that the Church as a voluntary association cannot. To the Church as a perfect society, negative confessionalism becomes an impossibility, while for the Church as a voluntary association, it is an endless fact of life.

This is still the Church's teaching, even if the so-called "spirit of Vatican II" gives lay Catholics license to forget it. It is true that neither *Dignitatis Humanae* — nor any other document of the Second Vatican Council — used the phrase "perfect society." But in Archbishop Samuel Aquila's words, "it should be recognized that the Second Vatican Council clearly reaffirmed the substance of the expression."[24] As we will see, the perfect society logic is the baseline of the discussion of *libertas Ecclesiae* in *Dignitatis Humanae*. This logic is also apparent in other documents from the Second Vatican Council, the Church's current code of canon law, and her current compendium of social doctrine. A Church that remembered her legal authority on religious duties would be a Church that remembered Christ founded her as "an existence, a Thing, a visible institution that occupied ground in this world at the same time that it asserted an astounding new freedom on a title not of this world."[25] Far from backing away from this concept, the Church in and since Vatican II relies on it to prevent the Church from becoming an appendage to the state.

With that in mind, here is how the book will proceed:

The first three chapters will explain the Church's self-understanding as a perfect society.

Chapter 1 will discuss what it means for the Church to be a perfect society, what being a "perfect society" does and does not mean, how different this idea is from modern understandings of voluntary association, and how the Church developed the perfect society idea from the early Church into Christendom.

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[24] Samuel J. Aquila, "A Response to 'Forum I' of the German Catholic Synodal Path: An Open Letter to the Catholic Bishops of the World," May 13, 2021, https://perma.cc/9GZZ-T5CJ.

[25] John Courtney Murray, S.J., *We Hold These Truths: Catholic Reflections on the American Proposition* (Sheed & Ward, 1960), 189.

Chapter 2 will explain the monistic world that emerged from Christendom's disintegration. That world created the kind of legal pluralism inherited by the United States and required Pope Leo XIII's nineteenth-century refurbishment of the Church's legal authority. This chapter will raise the philosophical and theological antecedents that make it hard for American law to keep religious duties outside the state, or for the Church's ecclesiology to shape her legal protections. You will thus want to note these antecedents carefully.

Chapter 3 will then explain how Pope Leo XIII refurbished the Church's legal authority as a perfect society to safeguard both the Church's legal authority and an enduring, jurisdictional protection for religious duties in every society. This is also a crucial move. Here is where we see the Church fully differentiate her legal authority from the civil government around her own jurisdictional competence — the direction of religious duties. This distinction means that the Church's legal authority must always be distinctly preserved, even as she seeks stability with civil governments for the sake of the persons both jurisdictions serve. It is this allocation of authority on religious duties that made *Dignitatis Humanae* possible — even if nearly everyone seems to have forgotten that fact today.

By the time we complete the first three chapters, we should be able to see how important legal pluralism is to Western law. Legal pluralism sets Western law off on a course distinct from other civilizations that treat religion as a matter for the state. It made the jurisdictional space for religious liberty possible, and that in turn made other kinds of freedom possible. So, when we lose a sense of the Church as being beyond the state, we unsurprisingly lose the idea that religious duties are outside the state.

Then in Chapter 4, we take the Church's legal identity and start applying it to U.S. law. Chapter 4 will discuss how the refurbished perfect society framework could allow Catholic Americans to improve America's commitment to legal pluralism. Chapter 5 will discuss how such improvements were achieved by nineteenth-century Catholics, especially New York's first archbishop, "Dagger" John Hughes. Chapter 6 will explain why the Church set aside that nineteenth-century project and reduced herself to a voluntary association in the mid-twentieth century, harming both the Church's internal coherence and legal pluralism. Chapter 7 will then critique the emerging Catholic response to the failure of reducing the Church to a voluntary association: "integration from within."

In these middle and latter chapters, I will offer some concrete ways in which the Church, remembering that she is a perfect society, could enrich American law's commitment to legal pluralism. These concrete ways include greater legal protections for the Church's polity and disciplinary decisions in U.S. "church autonomy" law (Chapters 4 and 5), expanding church autonomy law to cover the Church's essential internal management decisions in "mixed" matters like marriage, education, or health care (discussing *Fulton v. City of Philadelphia* in Chapter 6), and rebuilding Catholic culture and Catholic institutions in "Catholic ministates" with a proper understanding of the Religion Clauses (Chapters 4, 5, and 7).

By rediscovering legal pluralism, the Church could help American law uncover its own jurisdictional grounding for religious liberty, one articulated by James Madison. Madison's framework for religious liberty is often invoked, but not often used. His framework doesn't discuss religious liberty as an "exception," an "exemption," or an "accommodation" from a monistic sovereign state. Rather, the Madisonian framework is an individualized version of legal pluralism.

The Madisonian framework understands religious exercise as the manifestation not of personal liberty — but of personal duty to God. Religious exercise is described as the saving of allegiance to another, higher sovereign on the good of religion that transcends state power. Because the Church created this jurisdictional framework in the first place, she could help the Madisonian version overcome its individualistic tendencies that enable monism. Overcoming those individualistic tendencies could allow American law to see what is really going on when there is conflict between religious duties and state power: there is a conflict between the legal directives of two legal orders that do not agree. The right result would recognize these two legal orders *as legal orders*, a recognition that preserves their distinctiveness, accords with their best traditions, and upholds the higher end of religious duties. This approach is increasingly defining what U.S. law calls "church autonomy," an emerging sphere of authority for religious institutional governance. If the Church recalled her legal authority as a perfect society, she could enrich church autonomy law by drawing on the history of the Church's legal pluralism.

To be clear, Madisonian legal pluralism would not be the Church's legal pluralism. That is, the Church's autonomy in U.S. law would not be privileged *vis-à-vis* other religious institutions. Every religious

organization claiming authority over their members' religious duties can claim church autonomy under U.S. law.

At the same time, allowing the Church's legal pluralism to improve church autonomy protections would ensure that the Church's legal authority is held to transcend the power of civil government — and that church autonomy protections would be informed by what the Church needs to fulfill her supernatural end. These developments would be helpful to the Church — in getting her to think in terms of her authority, jurisdiction, and self-governance again — and to U.S. law's frustrated desire to have religious duties transcend state power. As such, if the Church built out church autonomy by leveraging the fact that she is America's largest, most widespread, and most intrinsically institutional religious tradition, she could both rediscover her own legal authority as a complete ("perfect") self-governing society and provide U.S. law a more stable, jurisdictional protection for religious duties. This might achieve what *Dignitatis Humanae* desired: a stable baseline for everyone's religious liberty in civil law. It might also better ensure the Church's salvific mission in America. "Ultimately," as Justice Alito put it, "if we are going to win the battle to protect religious freedom in an increasingly secular society, we will need more than positive law."[26] What we will need (among other things) is to remember that "the rise of limited government" is "an outgrowth of the freedom for which the Church has always fought."[27]

Finally, we will conclude by calling the Church to "remember" that the Church is a perfect society, in the Catholic sense of "remembering." That is, the Church should not simply remember *that* she is a perfect society by relearning the facts that make the case (though that is an important first step, and I try to achieve it in the first three chapters). But more importantly, the Church should *make the reality present again* in how the Church thinks of herself and approaches the outside world, particularly America. In that regard, the epilogue will sketch some ways in which the Church's interior and exterior life could be re-presented around her reality as a perfect society.

By contrast, the alternative approach toward negative confessionalism that has an audience with younger Catholics — "integration

[26] Samuel Alito, "2022 Religious Liberty Summit: U.S. Supreme Court Justice Samuel Alito," speech, given at Notre Dame Law School, https://perma.cc/7P5N-RDS6 at 26:50.

[27] Ibid., 33:00–34:00.

from within"—would only damage the Church's legal authority further. This alternative project acknowledges much of what we've discussed and will discuss. But where recovering the Church's legal authority turns the attention of Catholics toward their Church, integration from within takes an "if you can't beat 'em, join 'em" attitude toward state power. Enabling a kind of Gallicanism, "integration from within" responds to negative confessionalism by claiming a native legal power in the state to direct religious duties, at least in temporal matters. Champions of integration from within would then use that legal power to "integrate" the Church with the U.S. government "from within" the state. This is the inverse error of reducing the Church to a voluntary association. Where reducing the Church to a club *denies* the Church's legal authority, integration from within wants the state to *act without* the Church's legal authority. This is unjustified.

Integration from within permits the rejection of Christ vesting all legal power to direct religious duties into the Church, and instead permits lay Catholics to act as if the state retained a native authority to suppress false religion without the Church's permission. Lay Catholics that do this "take upon themselves to act a part which does not belong to them."[28] But by pursuing this anyway, integration from within overlooks that the law is a moral teacher. By forming Catholics to take "Machiavellian means to achieve Aristotelian ends,"[29] the teachers of integration from within will form their students to misunderstand the roles of Church and state. A proper growth of the Church in America requires instead "integration from without."[30]

By rediscovering her distinct legal authority, the Church can respond to the demands of modern American state power with neither reduction to a voluntary association nor integration from within. Rather, the Church can respond with the authority that is truly her own. She can, therefore, govern herself. To do that, the Church must remember how and why she is a perfect society.[31]

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[28] Leo XIII, *Sapientiae Christianae*, "Encyclical Letter on Christians as Citizens," in Rome, at Saint Peter's, January 10, 1890, § 35, https://perma.cc/3HMJ-XTGW.

[29] Patrick Deneen, *Regime Change: Toward a Postliberal Future* (Sentinel, 2023), 167.

[30] I thank Professor Marc DeGirolami for giving me this term and the related "integrate from without."

[31] I thank Professor Steven D. Smith for helping me formulate my thesis and patiently reviewing many drafts of this introduction.

Two Explanations and a Disclaimer

My main audience is Catholic Americans — especially the ones engaged in the ongoing debate over how the Church has approached her legal authority in American life. This book is an attempt to encourage a reorientation of that debate to a framework that takes *both* the Church's tradition of legal authority seriously *and also* takes America's legal tradition seriously.

The ultimate recommendation is for Catholic Americans to rediscover the Church's legal authority. The Church's legal authority contains a strong focus on achieving stability with a given civil government based on the respective ends and particular traditions of each. For the Church to find stability with America on those terms, there is no need to explore here every single nook and cranny of every single Church-state dispute from the eleventh century forward. What matters, rather, is that the book lays a solid foundation for Catholics to engage with America considering our time and place. It is from that perspective that I focus my discussion on the development of the Church's legal authority.

And now the disclaimer. I am a faithful Catholic layman and an American lawyer who has the privilege of often defending the Church's religious liberty in U.S. law. In that role, I am familiar with the Church's self-understanding, especially around her legal authority. In that role, I also must make any and all professionally responsible arguments to advance my client's position. That means I may have made arguments in cases that are distinct from those I advance in this book. But I am not offering legal advice here. Nor am I offering the views of my law firm. Nor, further, am I a bishop, a priest, a theologian, or a canon lawyer. I am not seeking to resolve disputes that I do not have the authority — or the grace of state — to resolve. Rather I am seeking to further the discussion on disputed questions given my knowledge and experience. All I offer here is my "opinion on matters which pertain to the good of the Church" "according to the knowledge, competence, and prestige which [I] possess."[32]

Finally, I recognize that not everyone who may read this book is Catholic. Admittedly, you are not my primary audience (see above). Even so, as I've already tried to claim, I still think this book has something to offer you. The effect of Catholic ecclesiology on religious

[32] Code of Canon Law, c. 212, § 3, in *The Code of Canon Law: Latin-English Edition* (Canon Law Society of America, 1983).

liberty is underappreciated. But there is no legal pluralism in the Western legal tradition without the Catholic Church. If Americans want to preserve limited government and develop a coherent framework for keeping religious duties transcendent of state power, then they will need to uncover legal pluralism. Even if doing so chafes against our mid-twentieth-century commitments to secularized "public reason." So, if only as a matter of legal pluralism's historical development, Americans should deepen their appreciation for the self-understanding of the Catholic Church and its contribution to the rise and maintenance of limited government.

CHAPTER 1:

Why the Church is a Perfect Society

THIS CHAPTER WILL IDENTIFY THE ELEments which make the Church a perfect society. Understanding the Church as a perfect society rests on three elements. Throughout the book, I will refer to these elements as "the *societas perfecta* framework." This is the framework:

> The Church is a necessary society (a *societas*), authorized by Christ to achieve man's supernatural end (eternal life with God);
>
> The Church thus has an inherent legal power (a *potestas*) to possess all the needed means to achieve that end; and
>
> As between the two powers of Church and civil government — which also, in principle, is a perfect society[1] — the two should achieve harmony in cases of overlap between their respective legal authorities. That harmony should respect that the Church's supernatural end is man's ultimate end, uphold the natural end of civil government, and do this by consulting the traditions developed by the Church and the civil government at issue. With a non-Catholic civil government, harmony consists of a stable baseline for religious duties to transcend state power.

As mentioned in the introduction, "perfect" here does not mean sinless or stainless. Indeed, the Church would make that clear by being, in historical fact, a society of sinners and saints. Rather, as we will explore in this chapter, the Church is following Aristotle. For Aristotle, a "perfect society" is a complete, self-sufficient society.

The Church's claim as a perfect society rests on the fact that Christ, the God-Man, during his earthly ministry, divested the civil government of all legal power to direct religious duties and placed it, instead, into the hands of a new, second power: his Church. Now there would be

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[1] Since the Second Vatican Council, it is common for Church leaders and theologians to speak of states in more instrumental terms. See Russell Hittinger, "The Problem of the State in *Centesimus Annus*," *Fordham International Law Journal* 15, no. 4 (1992): 952–96, https://perma.cc/Q839-JL75. At the same time, both teleologically and in many Church documents — including her current *Compendium of Social Doctrine* — the Church considers states perfect societies for the natural order.

not one legal authority in a community, but two — each possessing their own distinct ends and God-given legal authority to achieve them. The Church, then, cannot be subordinate to the state. At the same time, the two must uphold a kind of separation between their two legal authorities. But this separation is not premised upon notions of individual conscience or a fear of an established religion. Rather, this separation is premised upon preserving the divine allocation of legal authority on religion. Only the Church has the native legal authority to direct religious duties. By "direct religious duties," I mean the power to set forth truths bearing on the supernatural and enforcing those efforts with the Church's own code of law. The Church's law, not civil government's, then, would be what governs the direction of religious duties. And if the Church didn't give the civil government permission to regulate religious duties, then no one could. In such situations then — as in the United States — civil law must uphold religious liberty for all, consistent with the natural law.

What it Does Not Mean

Rediscovering the Church's legal authority in this way prompts the need for some clarifications about what the Church as a perfect society does *not* mean. These will become clearer as we walk through what it means to be a perfect society. But for those anxious for the punchline, the following clarifications may help.

One, the Church as a perfect society does not mean that any civil government lacks all legal authority, either in general or on religion in particular. To the contrary, the *societas perfecta* framework acknowledges that God authorized *two* distinct legal orders, the Church for the achievement of supernatural happiness *and* civil government for natural happiness. The Church, on this understanding, has the needed spiritual and temporal legal authority to direct religious duties. The civil government, by contrast, has the needed legal authority to resolve matters on man's natural end — including the regulation of religion according to the natural law. This means the civil government can and should acknowledge that God exists, allow for expression of its community's religious culture, uphold conditions that promote the exercise of religion, and — as the civil government keeps the peace — it can uphold "due limits" on religious exercise to ensure "just public order" and the "common good."[2]

[2] Paul VI, *Dignitatis Humanae*, § 2.

Two, the Church as a perfect society does not mean that, in case of a conflict between the two jurisdictions of Church and civil government, the Church always wins. Rather, the *societas perfecta* framework is an invitation to harmony. The framework requires the two powers to work together toward a result that preserves both legal orders and respects their distinct ends and the traditions developed between the Church and a given civil government. How a Church and a given civil government reach harmony in a Catholic political community, therefore, may not be how the Church and a given civil government reach stability in a non-Catholic political community. Rather, what always matters is that the two powers are encouraged to work together, recognizing that man's ends are not solely spiritual — but also not reducible to temporal matters.

Three, the Church as a perfect society does not mean that the civil government must be a Catholic state. Indeed, as we will see, the Church was not called a "perfect society" until challenges to the visible structure and temporal power of the Church emerged with the Protestant Revolution. The idea then became systematized by nineteenth-century canonists and was implemented by Pope Leo XIII to ensure the Church's independence against modern secular states and confessional states that sought to subordinate the Church.

This does not mean that the Church as a perfect society rules out her traditional teaching regarding an ideal unity with civil government. To the contrary, the ideal remains.[3] But that ideal also requires a civil government to understand itself as *not only respecting, but furthering*, the Church's distinct legal authority to direct religious duties. By the nineteenth century — when the Church formally articulated herself as a perfect society — that understanding of civil government was precluded by the development of monistic secular sovereignty. Those monistic premises, even in states that had Catholicism as their official religion, reduced the Church to a state agent. Such states thus took control of Church property, temporal discipline, ecclesiastical appointments, educational institutions, and even her sacraments (like

[3] As *Dignitatis Humanae* contemplates, a civil government may grant Catholicism "special civil recognition." See ibid., § 6. This comports with the Church's traditional call to "men and societies" to reason toward their "moral duty . . . toward the true religion and toward the one Church of Christ." Ibid., § 1. Yet even in a society that gives "special civil recognition" to Catholicism, the Church and civil order together must still guarantee religious freedom for non-Catholics. See ibid., § 6.

marriage). These states may have been "Catholic," and there may have been a "unity" between Church and state. But that does not mean they saw the Church in a way that *furthered* her distinct legal authority. Indeed, in certain ways these "Catholic" states did not even *respect* the Church's legal authority. This was a marked contrast from Christendom, where the Church was understood as the earthly "City of God" containing two powers — temporal power held by civil government and spiritual power held by the ecclesiastical hierarchy. What the Church needed given modern, monistic sovereignty was not a new ideal (although that is what the mid-twentieth-century reduction of the Church to a voluntary association would attempt). Instead, she needed a practical policy to ensure that legal authority on religious duties transcend state power. This would enable "each power [to recognize] the other's theological title to rule."[4] This is what Pope Leo XIII sought by defining the Church as a perfect society. Following Pope Leo's teaching, this is what *Dignitatis Humanae* seeks too. And this practical project could improve legal pluralism in America today.

Fourth, it is important to remember the limits of the Church's legal authority. The Church has no legal authority over the unbaptized. Rather, the Church has a salvific mission to them, but not one that can impose religious duties by force. "Even after the rise of Constantinian Christianity, in Byzantium and in the high Middle Ages, there were protections given to the religious consciences of non-Christians."[5] As Pope Pius XII recounted centuries later in *Mystici Corporis Christi*, while the Church makes the "unceasing prayer . . . that all the straying sheep may hasten to enter the one fold of Jesus Christ, yet We recognize that this must be done of their own free will; for no one believes unless he wills to believe."[6] In the same vein, the Church's legal authority on the baptized is limited to reforming their wills.[7] This means the Church cannot use force to uphold her authority to direct religious duties. Acts of faith — both those of baptized Catholics and those outside the Church — must always be free acts. This

[4] Russell Hittinger, "Pope Leo XIII," in *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature* (Columbia University Press, 2007), 63.

[5] Thomas J. White, *The Light of Christ: An Introduction to Catholicism* (Catholic University of America Press, 2017), 254.

[6] Pius XII, *Mystici Corporis Christi*, Encyclical on the Mystical Body of Christ, given in Rome, at Saint Peter's, June 29, 1943, § 104, https://perma.cc/NM4X-WZT5.

[7] Code of Canon Law, c. 11.

does not mean, however, that the Church is deprived of a right to self-defense. That she has—both civilizational (as in Christendom),[8] and as to herself (as when someone unlawfully invades her liturgical ceremonies).[9] Rather, what is always prohibited is the Church forcing someone to practice Catholicism.

Societas, Potestas, and Societas Perfecta

As noted above, the first two elements of the *societas perfecta* framework are (1) the Church being a necessary society, founded by Christ with an ultimate end and (2) the Church receiving from Christ a certain legal power to achieve that ultimate end. These two components have always marked the Church, though their articulation would be refined over time.

Nevertheless, *societas*, *potestas*, and *societas perfecta* are all foreign to modern understandings of what might make the Church "the Church," or justify her legal protection in U.S. law. Among other reasons, that is because modern understandings of legal authority contemplate that any given political community has only one legal authority. That sole legal authority is the state. On this modern view, all other kinds of society are seen as ultimately voluntary, as standing "between" the individual and the state and thus contingent upon the individual's free will and the sovereign state's legal recognition. The idea that *another* legal authority could exist, that it would be *outside* the state with its *own* jurisdiction on some of the *same* people in the *same* political community—because God ordained not only one power to govern them, but two—is obscured by the modern, monistic conception of sovereignty discussed in the introduction.

To clarify what's been obscured, we need to start with the basics. What does it mean to be a society? And what does it mean to have legal power (*potestas*)? How are these components essential to a perfect society?

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[8] Consider, for example, the Battle of Lepanto (1571). There, Saint Pope Pius V partially bankrolled the Holy League and, through Our Lady's intercession, Europe was saved from conquest by the Ottoman Turks. The Church commemorates this victory every October 7, the Feast of Our Lady of the Rosary, formerly Our Lady of Victory.

[9] For example, the Church's current code of canon law says that an excommunicate is not only barred from participating in certain Church ceremonies and functions. In addition, that person "*is to be prevented* . . . or the liturgical action is to stop" if that person is present. Code of Canon Law, c. 1331, § 2 n.1 (emphasis added).

When an American hears the word "society" today, he might think of "civil society," or "third sector," "the space untouched by government and the private sector."[10] Within that untouched space, an American might also think of the groups within it as "societies." These societies are sometimes (and somewhat incorrectly) called "little platoons," or the "intermediary institutions between the individual and the state."[11] This concept of society as an "intermediary" between the individual and the state contains an important implication. That is, whatever else these intermediary societies are — or civil society in general is — nothing about it or them has distinct legal power (*potestas*). Only the state has that. These societies may have legal protection or recognition, but not legal authority. Their authority rather comes ultimately from human will. Societies are — or should be on this modern view — defined around voluntarism.

But this modern idea of society is different from what we find in Aristotle, where we receive the philosophical idea of society.[12] Aristotle does not reduce all societies to human will nor does he assign sole legal authority to the state. An Aristotelian definition of "society" would be, following Russell Hittinger, an intended union bound by a "common social principle" that the intended union achieves.[13] The two crucial pieces in this definition are not voluntarism or human will. Rather, they are the society's "end" and its "means."

Start with a society's "end." For Aristotle, a society's end may be "complete" or "incomplete," and thus either "perfect" or "imperfect."[14] A society with a complete end is a society with an ultimate end. Such

[10] George Ingram, "Civil Society: An Essential Ingredient of Development," *Brookings Institution*, April 6, 2020, https://perma.cc/PAG9-Y6XS.

[11] James McElroy, "Knock It Off With the 'Little Platoons' Already," *The American Conservative*, June 28, 2018, https://perma.cc/AN9S-RG4G.

[12] Pius Pietrzyk, "The Power of Orders and the Power of Jurisdiction: A Theological and Juridical Examination" (JCL diss., Pontificia Studiorum Universitas a Sancto Thoma Aquinate in Urbe, 2015), 38, https://perma.cc/JJ6H-EKLS.

[13] See F. Russell Hittinger, "The Three Necessary Societies," in *On the Dignity of Society, Catholic Social Teaching and Natural Law*, ed. Scott J. Rongier (CUA Press, 2024), 100. I thank Russell Hittinger for his correspondence with me and helping me refine my understanding of necessary and perfect societies. See also Alfredo Ottaviani, *Compendium Iuris Publici Ecclesiastici* (Typis Polyglottis Vaticanis, 1954), 9, https://perma.cc/ZKM2-VL7D (all Ottaviani translations done with ChatGPT).

[14] Francisco Suárez, "Is Law to be Set Up For A Community?" in *Selections from Three Works: A Treatise on Laws and God the Lawgiver; A Defence of the Catholic and Apostolic Faith; A Work on the Three Theological Virtues: Faith, Hope, and Charity*, ed. Thomas Pink (Liberty Fund, 2015), 98.

societies can be perfect societies. By contrast, a society aiming for an incomplete end cannot be a perfect society, because it is not aiming at an ultimate end.

To know what an ultimate end is — and thus whether a society could be a perfect society — we must also know something about the nature of man (because it is man who populates societies). To Aristotle, man has a natural end — the good life in this world. And as we will discuss, Aristotle does not preclude the possibility that man might have a supernatural end too — that is, that man's happiness is only complete in an absolute sense when it can transcend the inherent limitations of man's nature.

This tells us something about the nature of an ultimate end. An ultimate end can be considered either complete "absolutely," or complete as to the "order" in which the society operates, be it the natural order or the supernatural order.[15] When a society's end is complete or ultimate in the absolute sense, that society strives for both man's natural and supernatural happiness.[16] This is the mode of perfection that the Church pursued in Christendom — where she understood her ecclesiastical hierarchy and lay faithful in temporal leadership as two powers within one City of God. Yet a society can also be complete as to its own order, in that it strives for man's happiness *either* in the natural order *or* in the supernatural order.[17] This is how Pope Leo XIII and nineteenth-century canonists would refurbish the Church's legal authority to preserve the Church's self-sufficiency against the monistic claims of the modern state.

When a society has less than a complete end — in that it strives for something less than man's full happiness in the natural order or in the supernatural order — it is an incomplete (or "imperfect") society. For this reason, the classic example of civil society today — a bowling league — is not a complete society. It cannot be a perfect society, no matter how meaningful it may be to its members and however helpful that sense of personal meaning is to a political community's well-being.[18]

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[15] Ottaviani, *Compendium*, 25–26.
[16] Ibid., 25.
[17] Ibid., 25–26.
[18] Robert Putnam's *Bowling Alone* is often invoked to explain the social costs of hollowing out "civil society" institutions. I do not dispute the social costs of hollowing out those institutions. But it is also the case that self-government would lose much by treating all non-state societies as legally fungible with bowling leagues.

At the same time, this does not mean that every society with a complete end is therefore complete (or "perfect") in its order. Just as we must know the truth about the end to know whether a society aims at a complete end, we must also know the truth about the end to know whether a given society that aims at a complete end does so *completely*. For example, a society of medical doctors has as its end the natural happiness of man. This is indeed the ultimate end of the natural order. This does not mean, however, that a society of medical doctors is achieving that complete end *completely*. That is because we know enough about the truth of man's natural happiness to know that it depends on other things besides one's physical health (like natural resources, human relations, social order, etc.). In the supernatural order, a Bible study group may be organized to achieve ultimate, supernatural truth. This is a way of articulating the ultimate end of the supernatural order. But if achieving the truth of the supernatural order requires *more* than studying the Bible, then such a group does not aim at its complete end *completely*. As such, something necessary is lacking to achieve the complete end. This latter issue — what is necessary for a society to achieve a complete end — speaks to the second crucial piece of societies that we flagged above: that is, the society's legal power (*potestas*) or means.[19]

Societies can also be incomplete when their means (or legal powers) are *voluntary*. This means that the society lacks any *necessary* power. A society with necessary power is one that exists because of an obligation of divine or natural law.[20] By contrast, a voluntary society is marked by its means not being obligated by divine or natural law.

Return to the bowling league example. There is nothing obligatory, under either divine or natural law, about being in a bowling league. One can freely choose to join a bowling league or not. He can base that choice on his own personal sense of meaning, talents, or a host of other considerations. And he can leave the league when bowling no longer suits him. There might be membership rules, but no one would mistake these for legal obligations — or at least, certainly not legal obligations that follow from divine or natural law. A bowling league is thus a voluntary society.

Even some societies with *complete* ends are voluntary and not necessary. Return to the Bible study group example. That group

[19] See Suárez, "Is Law to be Set Up For A Community?," 100.
[20] See Hittinger, "The Three Necessary Societies," 100.

might exist as an aid to growing closer to supernatural truth. But there is no obligation in divine or natural law to join a Bible study group to achieve supernatural truth. The group might be helpful, but that doesn't make it obligatory. Nor is there likely to be any penalty for leaving such a group, let alone one that follows from divine or natural law.

To illustrate a necessary society, consider the family. The family is "the original cell of social life," a "natural society."[21] Man did not choose the building blocks of a family (that the unity of a man and a woman would be what creates children). Rather, the family is "instituted directly by God for its peculiar purpose," and this distinction alone does give the family "priority of nature and therefore of rights over civil society."[22] Indeed, an individual's family obligations are treated differently than obligations to a voluntary society. As Edmund Burke nicely put it, "parents may not be consenting to their moral relation"—perhaps they did not *intend* to have a child, and in any case it remains impossible for parents to consent to have *this specific* child with *these particular* challenges—"but consenting or not, they are bound to a long train of burthensome duties towards those with whom they have never made a convention of any sort."[23] Similarly, Burke continues, "children are not consenting to their relation"—they do not choose their parents—"but their relation, without their actual consent, binds them to its duties; or rather it implies their consent, because the presumed consent of every rational creature is in unison with the predisposed order of things."[24] The family is thus a necessary society because it begins with, and held together by, an obligation in divine and natural law.

Burke's discussion of the family as a necessary society also points us to another example of a necessary society: the political community.[25] As with the family, man does not freely choose the political community in which he is born. Rather, often, the political community in which

[21] *Catechism of the Catholic Church*, 2nd ed. (Libreria Editrice Vaticana, 1997), hereinafter "CCC," § 2207, https://perma.cc/Q2G3-DDMV.

[22] Pius XI, *Divini Illius Magistri*, Encyclical on Christian Education, given in Rome, at Saint Peter's, December 31, 1929, https://perma.cc/MC34-RJPB.

[23] Edmund Burke, "Appeal from the New to the Old Whigs," in *The Writings and Speeches of Edmund Burke,* vol. 4, *Party, Parliament, and the Dividing of the Whigs 1780–1794*, ed. P. J. Marshall, Donald C. Bryant, and William B. Todd (Oxford University Press, 2015), https://perma.cc/83QW-BM6M.

[24] Ibid.

[25] Ibid.

we reside both began and continues, as Burke says, "independently of our will" and "without any stipulation . . . on our part."[26] And like the family, the political community's authority is divinely authorized. Sometimes by God himself,[27] and in any case, "there is no power but from God."[28] Even in the United States, where the founding era chose a form of government for themselves and their posterity, the founders recognized that this power did not rest on their own authority, but on what "the Laws of Nature and Nature's God entitle[d] them."[29] Nor does American law allow one to escape the nation's legal obligations simply because one would like to live somewhere else but can't leave. The political community is thus a necessary society.

Yet not all necessary societies are perfect societies. In addition to the originating obligation in divine or natural law, a perfect society also has the legal authority necessary to be self-sufficient. A family, however, is generally not self-sufficient. Such larger communities are required to achieve complete natural happiness. Following Aristotle, the Church would make this same point.[30] As Saint Thomas Aquinas says, while "he that governs a family, can indeed make certain commands or ordinances," they are commands and ordinances that do not "have properly the force of law."[31] Law is "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[32] Lawmaking authority, then, "is ordained to the common good," of which a single family is but one part. But the authority to legislate—that is, to achieve an entire community's complete happiness with law—is not an authority that resides in every individual family. So, while a necessary society has a divine or natural obligation as the binding agent, what makes a perfect society distinct is that it has an additional legal authority.[33] A legal authority that extends to all that is necessary to achieve a community's complete happiness.[34]

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[26] Ibid.
[27] See, e.g., 1 Sam.
[28] See Rom 13:1–5.
[29] The Declaration of Independence (1776), https://perma.cc/L3RP-YD8P.
[30] Pius XI, *Divini Illius Magistri*, § 12.
[31] Thomas Aquinas, *Summa Theologica*, 2nd rev. ed., trans. Fathers of the English Dominican Province (Burns Oates and Washbourne, 1920–1922), first part of the second part, question 90, article 3, reply to objection 3. Accessible online via New Advent website.
[32] Ibid., article 4.
[33] See Suárez, "Is Law to be Set Up For A Community?," 100.
[34] Ibid.

For Aristotle, the "city" — the political community — was the complete society, the "perfect society" (*koinonia teleios*). The city is the perfect society because it has all these elements that we have teased out. That is, the city (1) is a necessary society (it begins out of natural obligation) with a complete end (natural happiness) and (2) can pursue that complete end completely, meaning the society has the legal authority to achieve that complete end entirely on its own. These qualities are apparent in how Aristotle describes "city": a "partnership finally composed of several villages" that has "at last attained the limit of virtually complete self-sufficiency."[35] The city does not just "aim at some good" for itself, but encompasses the other societies aiming at that good.[36] This encompassing of all societies aiming at parts of the complete good allow the city to aim at the "supreme" good, and do "so most of all."[37]

What binds a perfect society, then, isn't voluntarism. It's some kind of higher legal power (*potestas*) to achieve a complete end through that society with the needed means.[38] Importantly, that inherent legal power does not require a perfect society to possess inherently the means to achieve its complete end.[39] A perfect society does not cease being a perfect society because, for example, it might need to trade with another community to access a necessary good, or enlist others to aid in the enforcement of its laws (like enforcing its borders or extraditing criminals). Rather, what the perfect society always holds, by virtue of its authorization and end, is a right to seek the needed means to achieve its complete end.[40]

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[35] Aristotle, *Politics*, trans. Harris Rackham (Harvard University Press, 1944), 1252b, https://perma.cc/BL36-P9MK. Digitized by the Perseus Project.

[36] Ibid., 1252a.

[37] Ibid.

[38] Ottaviani, *Compendium*, 15, explaining that a society's means are determined by its end.

[39] Ibid., 27–28: "*Ad hoc ut societas perfecta habeatur tamquam sibi sufficiens et independens, non est opus ipsam possidere actu omnia media sibi necessaria.*"

[40] Ibid. On this point, an analogy can be drawn to the U.S. Constitution's Necessary and Proper Clause. That clause contemplates that the federal government may not actually possess everything it needs to achieve the powers enumerated by the U.S. Constitution. But the federal government is authorized for a "more perfect" union, and the Constitution authorizes the federal government to do anything "necessary" and "proper" to achieve the Constitution's ends. See U.S. Const. art. I, § 8. Also analogously, what is necessary and proper is determined by the "legitimate" nature of the end sought, and the "means" not otherwise violating the Constitution's reserved authority to the states or the people. See *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

The perfect society "exists for the good life."[41] That is, the perfect society exists for the truth about man's natural happiness. By participating in the perfect society, man becomes formed to achieve complete happiness — for the Aristotelian city, this means complete happiness in the natural order. The formative nature of a perfect society's legal authority is reflected in Aristotle saying citizens have a legal entitlement — an *exousia* — to participate in the governance process by which the highest natural end is achieved.[42] *Exousia* is "similar to [the] Latin *potestas*,"[43] or particular legal authority, not an aimless authority or that of raw force. Rather, this legal authority is one "acquired and based on some antecedent claim of merit."[44] This claim of merit is connected to the end of the society itself. For the "good" citizen, says Aristotle, is the one who can uphold and further the society's end.[45] That end is achieved by citizens exercising the society's legal authority to achieve the complete end, and that in turn helps everyone in the society grow in the virtues that enable natural happiness.[46]

The markers of Aristotle's perfect society demonstrate that while the Aristotelian "city" (and thus, perfect society) is a "political association," that does not necessarily mean all modern states are therefore perfect societies. The modern word "state" comes from Latin, *status*, "in its sense of standing or position," meaning "standing or position of the person (or persons) in authority."[47] By contrast, *polis* (the Aristotelian "city") "means a civic republic, or more particularly, and especially, the city which is its heart" — only later did it come to be equated with "the whole organized political community."[48] This distinction between the modern state and the Aristotelian perfect society is important for our purposes. That's for at least two reasons.

First, what makes Aristotle's "city" a perfect society is not what modern theories of state sovereignty invoke to explain state authority

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[41] Aristotle, *Politics* (trans Rackham), 1252b.

[42] Ibid., 1275a, "A citizen pure and simple is defined by nothing else so much as by the right to participate in judicial functions and in office."

[43] Michael Pakaluk, "Conference: The Foundation of Human Rights: Catholic Contributions, Part I: Article: Aristotle on Human Rights," *Ave Maria Law Review* 10 (2012): 379, https://perma.cc/JYF8-54E9.

[44] Ibid.

[45] Elena Irrera, "Can a Good Citizen be a Good Ruler? An Answer from Aristotle's *Politics*," *Acta Philosophica* 21, no. 1 (2012): 132, https://perma.cc/9JYZ-GS97.

[46] Ibid., 139.

[47] Pietrzyk, "The Power of Orders," 38.

[48] Ibid.

today. That is, the modern state's monopoly on force. This has nothing to do with why a state may or may not be a perfect society. Rather, an Aristotelian "city" — and, teleologically, a modern state — would be a perfect society because it possesses a *complete* end, man's natural happiness, and a *particular* legal authority to achieve that complete end *completely*. Some modern states may be oriented toward that end and possess those means, while others may not. In principle, as we will see, the Church considers states perfect societies. Indeed, that must be so. It is what explains why it is possible for Church and state to have questions of overlapping authority as to man's natural and supernatural ends. For example, a state's authority on marriage extends to man's natural end as completely as the Church's authority on marriage extends to man's supernatural end.[49] But none of this has anything to do with the modern state having a monopoly on force. Rather it has everything to do with the two powers seeking to direct man completely toward his natural and supernatural happiness.

Second, Aristotle's conception of the "city" as a perfect society does not rule out legal pluralism — i.e., there could be more than one perfect society in the same community. That is because Aristotle speaks only of perfection (completion) in the natural order. But there is another complete order that Aristotle does not rule out, one that transcends and ultimately encompasses the natural order: the supernatural order.

The question then is whether a society would exist with the particular legal authority to achieve the complete end of man's supernatural happiness, completely. Such a society would be a perfect society for the supernatural order. And even as the phrase "perfect society" wasn't used until much later, the elements of one would mark the Catholic Church's self-understanding from her earliest days.

"There are Two"

The Church would assume many Aristotelian claims about "man's social nature . . . both in her anthropology and her ecclesiology."[50] This was natural, as both Sacred Scripture and the early Church's practices manifest the Church being both a *societas* (a necessary society with a complete end) and *potestas* (with the legal power to achieve the complete end completely). To see how the Church would develop her

[49] I thank Russell Hittinger for helping me develop this point.
[50] Pietrzyk, "The Power of Orders," 38 n.142.