

Globalism in Natural Law Theory: Pope Benedict XVI and Paul Francis Kōtarō Tanaka

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DOES BENEDICT’S 2009 encyclical *Caritas in Veritate* mark a shift away from an earlier interest in the natural law? Vincent Strand thinks so. In a 2017 article in the English edition of *Nova et Vetera*, he concludes that “because the practical conclusions reached by Benedict in *Caritas in Veritate* rest on an explicitly theological foundation rather than a philosophical foundation of the natural law,” *Caritas in Veritate* marks “a new turn in Catholic social thought” away from Benedict’s earlier interest in Thomism.¹ Strand contrasts the Benedict in *Caritas in Veritate* who is all about “the gift” (grace) with what he calls “the neoconservative position” that draws on “a type of Thomism that separates the natural and supernatural spheres” and he concludes that Benedict’s rejection of this separation of nature and grace in favor of everything as gift explains why he prescinds from the natural law in *Caritas in Veritate*.

I find several problems with Strand’s argument. In the first place, his characterization of a Thomism that draws a sharp line between nature and grace sounds to me like little more than a familiar stereotype in these kinds of theological debates. I think my colleague Stephen Fields has the better theological argument in the same issue of *Nova et Vetera* when he notes that Benedict “understands nature and grace as dialectically anal-

¹ Vincent L. Strand, S.J., “On Method, Nature, and Grace in *Caritas in Veritate*,” *Nova et Vetera* (English) 15, no. 3 (2017): 835–52, at 845 (this issue of the journal was a special issue comprising a symposium in honor of Benedict’s ninetieth birthday, guest-edited by Stephen Fields).

ogous” in his 2005 encyclical *Deus Caritas Est*.² Did Benedict drop his analogic understanding of the relationship of nature and grace in the four years between *Deus Caritas Est* and *Caritas in Veritate* and thus prescind from an earlier commitment to the natural law? One problem with that assumption is that even Strand recognizes (albeit in a footnote) that Benedict explicitly refers to the natural law in several places in *Caritas in Veritate*, although Strand points out that these references to the natural law “are not significantly developed.”³ That is a fair point. In fact, Benedict never fully develops a theory of the natural law. That is not surprising, since he is a theologian, not a jurist. But that does not mean he does not rely on certain assumptions about what the natural law is when he brings up the natural law in his writings. I hope to clarify what those guiding assumptions about the natural law are.

First, let us start with recognizing another problem with Strand’s argument: that European scholars, Germans in particular, who have looked carefully at Benedict’s legal philosophy have come to precisely the opposite conclusion from Strand about Benedict’s interest in the natural law. Martin Rhonheimer argues that Benedict offers a fulsome defense of the natural law in his 2011 address to the German *Bundestag*—two years after his supposed rejection of the natural law in *Caritas in Veritate*. And Manfred Spieker argues that Benedict moves away from an earlier rejection of the natural law in a 1964 article—the only one of Benedict’s publications that has the natural law in its title—to an embrace of the natural law, a move that he traced to sometime around the year 2000 in the context of the “certificate controversy” that arose over the liberalization of abortion in Germany. He reads the same encyclical as Strand, *Caritas in Veritate*, as part of a whole with *Deus Caritas Est*, the Regensburg address of 2006, and the *Bundestag* address. And this whole is a robust defense of basic human rights on the basis of the natural law.

How shall we account for such divergent interpretations of Benedict’s texts and his view of the natural law? To be fair to Strand, the English translation of Spieker’s article did not come out until 2018, a year after Strand’s argument appeared in *Nova et Vetera*. And while Rhonheimer’s English article appeared in 2015, it was included in an anthology of legal scholars, making it easy for a theologian like Strand to miss. First of all, then, we must recognize a difference in the field of Benedict studies between Anglophone scholarship and Germanic scholarship. In the

² Stephen M. Fields, S.J., “On Nature and Grace in *Deus Caritas Est*,” *Nova et Vetera* (English) 15, no. 3 (2017): 817–33, at 832.

³ Strand, “On Method, Nature, and Grace,” 845n24.

Anglophone field, there has been scant attention to the natural law in Benedict's thought. Strand's 2017 article is an important exception.⁴ But that article is really not about the natural law so much as about the broader theological problem of nature and grace in Benedict's thought, and the natural law is only a subset of that problem. As offshoots of Strand's theological analysis of the problem of nature and grace, his conclusions about Benedict's understanding of the natural law are highly susceptible to error. In addition, limitations of language are always important factors in scholarship, and we should not forget this. Benedict's one article that addresses the natural law by name remains untranslated from the German and rarely, if ever, cited in the Anglophone scholarship. It has been introduced briefly to the Anglophone public only this year in David Lutz's translation of Spieker's article. Also only this year, we finally have many of Benedict's writings on political and legal themes available in a convenient English-language volume, *Faith and Politics*, published by Ignatius Press.

In addition to language, history matters. Catholics working in traditions shaped by British, Australian, Canadian, and American experiences, among those of other Anglophone countries, share a different history in terms of the relationship of political institutions to the Church than Germans like Benedict do. As Spieker notes, "German Catholicism was distinguished by its sensibility for institutions that ensure freedom and legal systems, as well as for the separation of church and state."⁵ Spieker's point should not be restricted to theological or cultural implications, although those are also important. To understand Benedict's view of the natural law, we need also to consider German jurisprudence, how the law has been understood by leading German jurists, particular Catholic jurists, in the years leading up to Benedict's intellectual formation.

Allow me a brief digression down the road of German jurisprudence in order to set the context for a better understanding of Benedict's view of the natural law. But I want to note, this digression is led not by a German, but by a Japanese jurist, Paul Francis Kōtarō Tanaka, one of the twentieth century's leading jurists and one trained in German jurispru-

⁴ Catholic University of America law professor Lucia Silecchia has written a fine editorial piece in the *National Catholic Register* that recognizes Pope Benedict's embrace of the natural law in his 2008 address to the United Nations Assembly ("Recalling Pope Benedict XVI's Human-Rights Appeal," *National Catholic Register*, April 29–May 12, 2018, 11). But that is not a scholarly engagement with Benedict's thought on the natural law.

⁵ Manfred Spieker, "The Quiet Prophet: Benedict XVI and Catholic Social Teaching," trans. David Lutz, *Logos: A Journal of Catholic Thought and Culture* 21, no. 1 (2018): 64–82, at 68.

dence. I hope that by allowing a Japanese jurist to lead us into German jurisprudence, I have made a relevant point about the universality of law, even while recognizing the importance of the relativity of knowledge to culture and language. But this Japanese jurist in particular is important, because Tanaka and Benedict have so close an understanding of the natural law that Tanaka provides an important window through which to see more clearly the background and details of Benedict's understanding of the natural law. In his work on the natural law, Tanaka emphasizes the importance of the German legal movement called *Freirecht*, which should not be understood (as the cognate would suggest) as "Free Law," but as the sociological science of law. This early-twentieth-century legal movement sought to turn the tables on legal positivism by locating the source of law in social relationships rather than in the sovereignty of the state.⁶ For those drawn to the German sociological science of law like Eugen Ehrlich (1862–1922), "the primacy of society meant that each state could be home to any number of different societies, each with its own internally binding regulations and mores."⁷ This sociological school of law was the precondition for the early-twentieth-century renaissance of natural law in Germany, and many of the leaders of this school were Catholics: Ehrlich himself, but also François Géný and Josef Kohler (1849–1919). Géný, although French, was in close contact with the German sociological school. He reinforced the connection the sociological school had to the natural law when he wrote "if natural law is called upon to circumscribe the activities of man, it must never forget that man presents himself less as an individual than as a member of society, which puts him in continuous contact and relations with his fellows."⁸

Not all aspects or members of the sociological school accepted the natural law (Gustav Radbruch did not come around to accepting the natural law until late in life, after he had witnessed the horrors of the Third Reich). But this school of legal studies played an important role in the rise of interest in the natural law in the early twentieth century by freeing the concept of law from dependency on the state. And it led in Germany to an interest in the natural law that emphasized its grounding in social rela-

⁶ Kōtarō Tanaka, *Sekai hō no riron* [*A Theory of World Law*] (Tokyo: Iwanami Shoten, 1932), 1: 113–14, 116n8.

⁷ Jason Morgan, "Catholic Critiques of Statism in Interwar Japan: Minoda Muneki, Suehiro Izutarō, and Tanaka Kōtarō," *Logos: A Journal of Catholic Thought and Culture* 21, no. 3 (Summer 2018): 39.

⁸ François Géný, *Science et Technique en Droit Privé Positif* (1915), 18 (cited in Brendan Brown, "Natural Law and the Law-Making Function in American Jurisprudence," *Notre Dame Law Review* 15, no 1 [1939]: 19–20).

tions in contrast to the abstract individualistic natural law of the Enlightenment period.⁹ To bring this back to Benedict, we can turn to Spieker who notes that “when nature is discussed in the texts of Benedict XVI, it does not mean primarily the nature than surrounds human persons. The term always has, instead, an anthropological connotation. It is about the human person. It is at the heart of the entire social order and, according to Benedict XVI, in agreement with Thomas Aquinas, ‘signifies what is most perfect in nature.’”¹⁰ Rhonheimer agrees. He points out that for Benedict, “‘human nature’ . . . is not simply ‘nature,’ certainly not the nature of the environmental movement. And the natural law . . . is not simply a law that ‘nature’ reveals to us in some unambiguous way. Instead, it is always and only an ‘ordering of reason’ (*rationis ordinatio*), as Thomas Aquinas formulated it in agreement with canonical and early scholastic tradition.”¹¹ Of course the human person never exists in isolation as a radically individualistic being. To be human is to exist with and for others, or to be in society. This is what Jacques Maritain meant when he called the human person “an open whole” (*un tout ouvert*).¹²

This highlighting of the social element in the natural law is worth keeping in mind when we encounter Benedict referring to “the social natural law.”¹³ To refer to the social element in the natural law is merely to say that the reason that lies at the heart of the individual person also has a social aspect. Beginning in the Protestant Reformation and intensifying during the Enlightenment, reason became subjectified, seen as the exclusive prop-

⁹ In this broader context, we must not overlook Viktor Cathrein, a Jesuit who advocated for the natural law in many works during this period.

¹⁰ Spieker, “Quiet Prophet,” 71 (quoting Benedict XVI, “Address to the Members of the Pontifical Academy of Sciences and the Pontifical Academy of Social Sciences,” November 21, 2005).

¹¹ Martin Rhonheimer, “The Secular State, Democracy, and Natural Law: Benedict XVI’s Address to the Bundestag from the Perspective of Legal Ethics and Democracy Theory,” in *Pope Benedict XVI’s Legal Thought: A Dialogue on the Foundation of Law*, ed. Marta Cartabia and Andrea Simoncini (New York: Cambridge University Press, 2015), 88.

¹² On Maritain’s concept of the person as *un tout ouvert*, see Kōtarō Tanaka, “Some Observations on Peace, Law, and Human Rights,” in *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup*, ed. Wolfgang Friedmann, Louis Henkin, and Oliver Lissitzyn (New York: Columbia University Press, 1972), 242–59. For Maritain’s own discussion of the idea of man as *un tout ouvert*, see his *The Rights of Man and Natural Law*, trans. Doris Anson (New York: Scribner’s Sons, 1947), 5.

¹³ Cf. Benedict XVI, “Affirming the Right to Combat Injustice: Speech to the Bundestag (September 22, 2011),” in *Faith and Politics* (Ignatius, 2018), 159–68, at 162.

erty of an individual who was increasingly defined against the social whole. This was a radical departure from the classical understanding going back to Aristotle that “man is by nature a social animal,” an understanding that has been accepted and developed by the Catholic Church. Just as reason was seen to order the individual person’s acts in accordance with what is right, so too did it function to order the individual’s relations with others (society) and thus to order society itself. This may not be the appropriate place to fully develop this argument on the right relationship of reason, society, and the natural law. But it is important to grasp the main point: the relationship of the individual and society is not one of mutual exclusion; reason assists in ordering the individual’s moral behavior and at the same time, ordering society for the good. The natural law reflects man’s nature as a social animal, and so the natural law stems from both the individual as a moral actor and from the society in which the individual always exists.

This is a complex question. But perhaps a close look at Benedict’s *Caritas in Veritate* will help clarify his sociological understanding of the natural law. To my knowledge, all the commentators on this encyclical, whether they see it as embracing the natural law or not, have ignored one critical phrase in the text. In §6, Benedict cites the classic legal maxim *ubi societas ibi ius*, which unfortunately the English translation glosses as “every society draws up its own system of justice.” The English translation makes it sound as if justice changes its meaning from one society to another. That would be to assert moral relativism, something which we know Benedict was strongly against. So, what does Benedict mean here by *ubi societas ibi ius*? The English translation not only makes a relativist claim (“every society does its own thing with justice”), but it removes the issue of law and replaces it with the broader philosophical question of justice. We need to interrogate this phrase more deeply because that phrase, I submit, holds the key to Benedict’s understanding of the natural law.

In German, Benedict’s native language, the critical term rendered as “system of justice” in the encyclical is *Rechtssystem* (legal system) which is contrasted later in the paragraph with the term *Gerechtigkeit* (justice). In Latin, the term is *iustitia*, which is translated nicely as “justice”, but *iustitia* is not the same as *ius* which is better translated as “law.” I think the problem of translation here stems from the German language, where the term *Recht* straddles the English distinction between law and justice. And it is not just German that does this. In 1932, Tanaka highlighted this problem of terminology in his sociological study of world law that criticized the positivism of John Austin and others who had reduced law to the command of the sovereign. Of course, for a positivist, law and justice

are one and the same thing and the purpose of both was social control. To Tanaka, law was about more than control of the people (although he certainly would not deny that was one aspect of the law); fundamentally, law was about justice. Any law that was not just was, in serious ways, an imperfect law, at best. Like Benedict, Tanaka defined the essence of law as an effort to achieve the common good (*bonum commune*) of society—which means, to achieve justice. Tanaka, who was quite a polyglot, pointed out that this link between law and justice (or “the right”) is found in the terms for law in many languages other than English (*ius*, *Recht*, *droit*, *diritto*, *derecho*, *pravo*).¹⁴ The important point is that if we understand *ius* (and *Recht*) in Benedict’s citation of the maxim *ubi societas ibi ius* as “law” rather than as “justice,” the moral relativism immediately disappears. To say that every society has its own justice implies a moral relativistic rejection of one universally applicable concept of justice. But it is hardly a relativistic claim simply to note that every society has its own legal system. In fact, the natural law presumes as much—not only that different societies today have different legal systems from each other, but that even a single society will establish different legal systems over time—all as efforts to more accurately codify the natural law through accrued experience and understanding.

To grasp how this phrase *ubi societas ibi ius* reveals Benedict’s understanding of the natural law, we need to look at it more carefully. The phrase has a curious history, or I should say, no history. Often mistakenly attributed to Cicero, Ulpian, Hugo Grotius, and Baron Heinrich von Cocceji, there appears to be no classical source for the exact phrase. It may well have been derived from the following syllogism in Aristotle’s *Nicomachean Ethics*: *ubi homo, ibi societas, ubi societas, ibi ius, ergo: ubi homo, ibi ius*.¹⁵ The legal scholar Alessandro Levi (who titled an essay of his *ubi societas ibi ius*) wrote that “the origin and history of the phrase are as far as I know, still unknown.”¹⁶ The origin of the phrase was also unknown to Tanaka even though the maxim *ubi societas ibi ius* was the leitmotif of his lifelong study of the natural law. His translation of the phrase, which I think is right, is “wherever there is society, there is law.” His point, following Aristotle’s syllogism, was that wherever humans exist there is law

¹⁴ Tanaka, *Sekai hō no riron*, 1:60.

¹⁵ See Frank J. Garcia, “Between Cosmopolis and Community: the Emerging Basis for Global Justice,” *International Law and Politics* 46, no. 1 (2013), 1n1.

¹⁶ Cited in Renato Federici, “Ubi societas ibi ius: Ubi ius ibi societas: alla ricerca dell’origine e del significato di due formule potenti,” July 19, 2017, no. 2 (pp. 3–7), contabilita-pubblica.it/Dottrina2017/Federici.pdf (translation mine).

because law does not presume a state or a king. Law is inherent to human life and in that sense its origins should be sought in society. Law is simply the mechanism by which men, all men, regulate the inevitable conflicts that arise among them. These conflicts are not always with the political state; as corporate law shows, they arise in private life too. The maxim was also a refutation of Protestant jurists like Rudolph Sohm (1841–1917) who famously argued that ecclesiastical law contradicts the very nature of the ecclesia. Sohm believed that bureaucratization of the Catholic Church, replete with something called canon law, was a later development that had betrayed the Church's origins in "charisma." To him, law was a matter for the state and not for the Church. Thus, it is no surprise to find that his Catholic contemporary Ehrlich embraced the maxim *ubi societas ibi ius* "to explain and justify his insistence on the multiplicity of legal orders under any given state framework."¹⁷

One of those social orders, albeit not entirely "under a given state," is the Church. Tanaka, as a specialist in corporate law, used the maxim that "wherever there is a society, there is law" to point out how every society by its nature has laws that regulate its members. Trade groups, scholarly associations, and corporations were all forms of society with their own laws; so too was the Church a society with its own laws to regulate human behavior within it. Of course, the recognition that law had its origins in society was a major contribution of the sociological school—and a direct refutation of the positivists who had rejected the natural law in favor of a theory of law as the commands of the sovereign of a state. But Tanaka went further than most members of the sociological school of law. By recognizing the Catholic Church as a society, he pointed out that if there are societies, or associations, that subsist within the state there are also societies that transcend the state. The existence of the Catholic Church as a visible global society with a canon law applicable to people across the globe pointed to the existence of law as something universal, something not restricted to the constitutions and positive laws of individual nation-states. Society in this global sense indicated something akin to the "nature" in natural law. It was found wherever human beings were found.

So, following Tanaka, we can see that the "nature" in natural law does not refer chiefly to nature as the created material world, or the physical environment. Nature refers to the person and his ends, along with his inherent rational ability to identify his ends and regulate his behavior to achieve those ends. This is not well understood by the positivists who, following David Hume and neo-Kantians like Hans Kelsen, argue that

¹⁷ Morgan, "Catholic Critiques," 40.

natural law theory is based on what they call “the naturalist fallacy” or the idea that an “ought” (*Sollen*) can be derived from an “is” (*Sein*). What they do not understand is that for Benedict and Tanaka, nature refers to the person. And as a moral agent, the person is a being (*Sein*) who always by his very rational nature includes the question of what he “ought” (*Sollen*) to do. This is not to reduce the natural law to ethics but is in fact to recognize that the natural law rests on the metaphysical foundation of the person as a rational, moral agent.

But here we must be careful not to interpret the metaphysical foundation of the natural law as meaning it is transcendent of human reason or is the equivalent of revealed law, the *lex eterna*. We should not forget that the natural law (*lex naturalis*) lies between positive law (*lex humana*) and the revealed law (*lex aeterna* or *lex divina*).¹⁸ This nuance was largely lost during the Enlightenment period in the works of jurists like Hugo Grotius. This is why in 1916 “Kohler recommended that teachers of the law of nations refer to the Spanish natural law thinkers of the sixteenth and seventeenth centuries instead of Grotius.”¹⁹ Tanaka followed suit, at least in adopting a critical view of Grotius. Tanaka emphasized a radical break between Grotius and the Enlightenment tradition of natural law, on the one hand, and Aquinas’s orthodox view of the natural law on the other. And he drew from Kohler to point out that the usual criticism of the natural law as non-responsive to social particularities and historical change should be directed at Grotius and the Enlightenment understanding of natural law, not at Aquinas who recognized flexibility in applying the natural law to the concrete acts of particular men (without going as far as Rudolf Stammler did in his notion of a “natural law with a variable content”).²⁰

Let us now review the major sources of Benedict’s thinking on the natural law, keeping these points in mind as interpretative guides. We must start with Benedict’s 1964 article on “The Natural Law, Gospel and Ideology in Catholic Social Teaching.” It does seem as though Benedict

¹⁸ See Anton-Hermann Chroust and Frederick A. Collins Jr., “The Basic Ideas in the Philosophy of Law of St. Thomas Aquinas as Found in the *Summa Theologica*,” *Marquette Law Review* 26, no. 1 (1941): 11–29.

¹⁹ Wilhelm G. Grewe, *The Epochs of International Law*, trans., Michael Byers (Berlin: Walter de Gruyter, 2000), 187.

²⁰ Tanaka, “Shizen hō no kako oyobi sono gendai-teki igi” [“The History and Contemporary Significance of Natural Law”] (1930), repr. in *Hōritsu tetsugaku ronshū* [Collected Essays on Jurisprudence] vol. 2 (Tokyo: Iwanami Shoten, 1944), 120. Stammler’s concept in German is *Naturrecht mit wechselndem Inhalt*, and is cited by Tanaka on 135.

takes a critical stance against the natural law in this article. But on careful reading, one finds he only criticizes “rationales that only seem to be from natural law or theology, but which have actually come from a historical social structure that feels ‘natural.’”²¹ He even went so far as to refer to these formulas as “the pseudonym of the natural law.”²² In 2016, Benedict reflected on his “contempt for the nineteenth century” and desire to get away from “classical Thomism,” and Spieker sees this as an explanation for why Benedict was hostile to the natural law in the 1964 article. There is more than an element of truth to that interpretation, as it is supported by Benedict’s role as a co-founder of the *Communio* group only eight years later, and their well-known penchant for a *ressourcement* that was not unrelated to their sense of distance from certain kinds of mid-century neo-Thomism. But there may be another explanation, or at least a deeper element in Benedict’s point about “the pseudonym of natural law” in this 1964 article. Note that Benedict criticizes not the natural law per se but what he calls a “pseudonym” of the natural law. The implication of a pseudonym is the misuse of or corruption of something that is not itself necessarily bad. That is, Benedict leaves unaddressed what the true name of the natural law is in contrast to this pseudonym of the natural law.

What Benedict is really critical of is what Tanaka and Kohler—both strong defenders of the natural law (rightly conceived)—had attacked as the Enlightenment concept of the natural law. Benedict wrote in his 1964 article that “the process of Reason in history, as *Windelband* once defined the Enlightenment, has been claiming legitimacy for itself in matters of faith, . . . [and] the continual spread of this type of thinking of ‘natural law’ unfortunately resulted in a strengthening of the purely deductive process from its initially tentative beginnings. The result was a strange type of positivism.”²³ The distinction between these two understandings of the natural law is clarified by Heinrich Rommen, another scholar steeped in

²¹ Joseph Ratzinger, “Naturrecht, Evangelium und Ideologie in der katholischen Soziallehre: katholische Erwägungen zum Thema,” in *Christlicher Glaube und Ideologie*, ed. Klaus von Bismark and Walter Dirks (Stuttgart: Kreuz-Verlag, 1964), 24 (I am indebted to Brian Pinke for translating Ratzinger’s original article for me).

²² Ratzinger, “Naturrecht, Evangelium und Ideologie,” 29: “It was a mistake not to include the special circumstances of the century, but that both—the standard of valuation of the Gospel and the given social facts—were combined under the pseudonym of the natural law and thus a confusion of legitimate elements emerged that hardly allowed the individual combinations their own space” (this is a rough translation).

²³ Ratzinger, “Naturrecht, Evangelium und Ideologie,” 26.

the Germanic tradition of jurisprudence. Rommen describes these two types of natural law in the following terms: "One is the idea of a revolutionary and individualistic natural law essentially bound up with the basic doctrine of the state of nature as well as with the concept of the state as a social unit which rests upon a free contract, is arbitrary and artificial, is determined by utility, and is not metaphysically necessary. The other is the idea of a natural law grounded in metaphysics that does not exist in a mythical state of nature before the 'laws,' but lives and ought to live in them."²⁴ In a similar manner, Tanaka rejected what he called the natural law of Enlightenment rationalism that considered subjective decisions by legislators, judges, or scholars as *ipso facto* rational and thus universal. He insisted that the *idée* of law must be sought in an order above law itself,²⁵ that is, in the world order that was designed by God's reason.²⁶ So we may conclude that what Benedict had criticized as operating under "the pseudonym of the natural law" was not the natural law itself but this kind of authoritarian, hyper-theorized, individualistic understanding of the natural law that Rommen and Tanaka also had criticized.

This means that Spieker is incorrect in asserting that Benedict did not embrace the natural law until his turn-of-the-century criticism of liberation theology and the abortion-rights campaign in Germany. For example, even in Benedict's 1992 speech in Bratislava, Slovakia, he upholds the natural law in addressing the question of what constitutes a just state. He appealed to "the Anglo-Saxon sphere [where] democracy was at least partly conceived and realized on the basis of the tradition of natural law and of a fundamental Christian consensus that certainly had a very pragmatic character."²⁷ Here we can see that Benedict associated democracy with the natural law and with a "pragmatic character"—precisely what he had found lacking in the post-Enlightenment "pseudonym of the natural law."

²⁴ Heinrich Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. by Thomas R. Hanley, O.S.B. (Indianapolis, IN: Liberty Fund, 1998), 5.

²⁵ Here Tanaka seems to be following the vocabulary of Stammler who distinguished between concepts or categories (*Begriff*) and the ideal (*Idee*) of law, in which the latter "represents the goal of a completely systematic explanation in terms of means and end" which never is achieved (George H. Sabine, "Rudolf Stammler's Critical Philosophy of Law," *Cornell Law Review* 18, no. 3 [April 1933]: 321–50, at 335).

²⁶ Kōtarō Tanaka, *Hō to shūkyō to shakai seikatsu* [*Law, Religion, and Social Life*] (Tokyo: Kaizō Sha, 1927), 238–40.

²⁷ Benedict XVI, *Faith and Politics*, 142. Benedict cites here Helmut Kuhn, *Der Staat: Eine philosophische Darstellung* (1967), and later says "Soloviev's reflections on Church and state, which deserve to be pondered anew" (149n48). Tanaka was deeply involved in the study of Soloviev.

We see the same distinction between a good and a bad understanding of the natural law in Benedict's debate on September 21, 2000, with Paolo Flores d'Arcais. In response to Flores d'Arcais's rejection of the natural law, Ratzinger conceded that "there was a certain excess in the use of the natural law in the Church's social doctrine that arose in the late nineteenth century. And then in the twentieth century, until Vatican Council II, there were excesses. But this fact that there was a little, let us say, exuberance does not change the fact that it is still there in the writings of Saint Paul. . . I would say that we can very well and must debate about the expansion of the natural law—how far does it extend?"²⁸ Benedict set himself to that task of exploring how far the natural law extends in his 2003 masterpiece, *Truth and Tolerance: Christian Belief and World Religions*, when he embraced the law as the condition of freedom (and the absence of law as the absence of freedom) and then asked the question, "how do we find the true law?" (the law that liberates, not the pseudo law that oppresses). His answer was to find law in society, in community: "Let us start with a small community we can view as a whole . . . so that a common shape of freedom arises from their coexistence. . . . But no small community exists of itself. . . . In seeking the true yardstick of freedom, the whole of mankind must be kept in view, and—as we see more and more clearly—again, not just today's mankind, but also tomorrow's."²⁹ In short, *ubi societas ibi ius*.

By the early twenty-first century, it becomes increasingly apparent that Benedict's understanding of the natural law is linked to his recognition that politics has a legitimate role to play, independent, if supportive, of the distinctive mission of the Church. Natural law, as already evident in *Truth and Tolerance*, is a key part of the human effort to establish justice in ways not reducible to religious faith or divine revelation. We find this in "Reason and Faith for a Common Ethics," Benedict's 2004 dialogue with Jürgen Habermas. In it, Benedict criticizes a particular approach to the natural law, one that "presupposes a concept of nature in which nature and reason mesh and nature itself is rational"³⁰ as undermined by the force of evolutionary theory. This argument is closely related to what Benedict had said about the natural law in his 1964 article. But now Benedict explicitly offers a legitimate view of the natural law, one that goes back to the pagan jurist Ulpian (ca. AD 170–223) who held that "*Ius naturae est, quod natura omnia animalia docet*" (the law of nature is what nature teaches all

²⁸ Benedict XVI, *Faith and Politics*, 236.

²⁹ Joseph Cardinal Ratzinger, *Truth and Tolerance: Christian Belief and World Religions* (San Francisco: Ignatius Press, 2004), 249–50.

³⁰ Benedict XVI, *Faith and Politics*, 190.

sentient beings). Ulpian's formula is a start, but ultimately insufficient for Benedict who notes that we need to get at, not merely what is true for all *animalia*, but what concerns "specifically human duties that man's reason has created and for which there could be no response without reason."³¹ To supplement Ulpian's understanding of the natural law, Benedict turns to the concept of natural law found at the beginning of the twelfth-century *Decretum Gratiani* where we find that "the human race is governed by two things, namely, natural law and customs. The natural law is the one contained in the Law and the Gospel, whereby everybody is commanded to do unto others what he wishes to be done to himself and is forbidden to inflict on others what he does not wish to be done to himself."³² Putting together these two statements, we conclude that Benedict holds that the natural law is broader than the revealed truths of the Catholic Church, but is also inherent in Church doctrine and has been a part of Church teaching for centuries.

This differentiated understanding of the natural law is evident in Benedict's 2005 encyclical *Deus Caritas Est*. A cursory reading of the encyclical might lead one to conclude that Benedict's focus on the natural law is about the division of duties between Church and state—and that indeed is an element of his argument. But we must not overlook the critical role of society in Benedict's analysis of the conditions for justice. Note that Benedict writes that "the just ordering of *society* and the State is a central responsibility of politics. . . . For her part, the Church, as the *social* expression of Christian faith, has a proper independence and is structured on the basis of her faith as a *community* which the State must recognize. The two spheres are distinct, yet always interrelated."³³ Here Benedict comes close to an explicit endorsement of Tanaka's argument that the Church is a society (and hence has its own laws). But his main point is that a just ordering of the state alone is not the end of politics, even as the establishment of a just society (which is the end of politics) is not the immediate responsibility of the Church. "Justice is both the aim and the intrinsic criterion of all politics," Benedict teaches, and the Church's specific role in this "is simply to help purify reason and to contribute, here and now, to the acknowledgment and attainment of what is just."³⁴ And it does this "on the basis of reason and natural law, namely, on the basis of what is in accord with the nature of every human being. It recognizes that it is not

³¹ Benedict XVI, *Faith and Politics*, 190.

³² Benedict XVI, *Faith and Politics*, 191n3.

³³ Benedict XVI, *Deus Caritas Est* (2005), §28 (emphasis added).

³⁴ Benedict XVI, *Deus Caritas Est*, §28

the Church's responsibility to make this teaching prevail in political life. Rather, the Church wishes to help form consciences in political life and to stimulate greater insight into the authentic requirements of justice as well as greater readiness to act accordingly."³⁵

We can draw two key points from Benedict's writing on natural law in *Deus Caritas Est*: (1) *society* is the ground for the flourishing of justice, not the state; and (2) the Church has an important role to play as one of the members of society in the rational, non-coercive formation and propagation of justice. Such a claim is unimaginable without accepting the main principles of the sociological science of law as expounded by the early-twentieth-century *Freirecht* movement. Informed by this tradition of prioritizing society over the state, Benedict addressed the distinctive roles of the state, society, and religion in his 1992 address in Bratislava. "The state establishes a relative ordering for life in society," he said, "but it cannot answer on its own the question of the meaning of human existence. Not only must it leave space open for something else, perhaps for something higher; it must also receive from outside itself the truth about what is right, since it does not bear this truth in itself."³⁶ Benedict was basically drawing on the Thomist insight that government arises from society, to which it is accountable. He also reminded his audience of how high the stakes are: National Socialism and Marxism were two twentieth-century examples of what happened when this important distinction between state and society was blurred.

Here I will skip for the moment Benedict's 2009 encyclical *Caritas in Veritate*, not merely because I have discussed it at some length already, but also because I want to conclude with it. The two remaining sources of Benedict's thought on the natural law that I will touch on are his 2010 speech in Westminster Hall and his 2011 speech to the *Bundestag*. Both short speeches converge in an emphasis on the natural law as universally valid, across cultural and religious divisions. At Westminster, Benedict reminded the British people that their abolition of the slave trade "was built upon firm ethical principles, rooted in the natural law."³⁷ And he openly worried about where such firm ethical principles would be found today, as Christianity and its values were increasingly marginalized in affluent Western societies. But he was clear that he was not calling for a theocratic response to secularization. He was calling for a renewed appreciation of how "the Catholic tradition maintains that the objective

³⁵ Benedict XVI, *Deus Caritas Est*, §28.

³⁶ Benedict XVI, *Faith and Politics*, 139.

³⁷ Benedict XVI, *Faith and Politics*, 154.

norms governing right action are accessible to reason, prescinding from the content of revelation. According to this understanding, the role of religion in public debate is not so much to supply these norms, as if they could not be known to nonbelievers—still less to propose concrete political solutions, which would lie altogether outside the competence of religion—but rather to help purify and shed light upon the application of reason to the discovery of objective moral principles.”³⁸ I think the most important aspect of Benedict’s Westminster speech was captured by Marta Cartabia and Andrea Simoncini, who argue that in it “Benedict XVI overturns the assumption that the contribution of Christianity to the public debates derives from the command of an authority—*ipse dixit*. In political and legal disputes he does not rely on the statements of the religious authority, but on the authority of reason.”³⁹

In his speech to the *Budestag* the following year, Benedict emphasizes the autonomy of reason, pointing out that “unlike other great religions, Christianity has never proposed a revealed law to the state and to society, that is to say, a juridical order derived from revelation. Instead, it has pointed to nature and reason as the true sources of law . . . [and aligned itself] with a philosophical and juridical movement that began to take shape in the second century B.C. . . . the social natural law.”⁴⁰ Benedict maintains that this social natural law provided the basis for law up to the time of the Enlightenment and again after World War II, but he recognizes that “the idea of natural law is today viewed as a specifically Catholic doctrine, not worth bringing into the discussion in a non-Catholic environment.”⁴¹ In explaining how we have arrived at a situation where what was originally a pagan idea now seems too Catholic to be acceptable to non-Catholics, Benedict points to the broad popularity, especially in European society, of Kelsen’s positivist concept of nature as purely functional, “an aggregate of objective data linked together in terms of cause and effect,”⁴² with no ethical implications. Benedict did not surrender his embrace of the natural law. In his New Year’s Day message of 2013, just weeks before he resigned, he said that “the precondition for peace is the dismantling of the dictatorship of relativism and of the supposition of a

³⁸ Benedict XVI, *Faith and Politics*, 155.

³⁹ Marta Cartabia and Andrea Simoncini, “A Journey with Benedict XVI Through the Spirit of Constitutionalism,” in Cartabia and Simoncini, *Pope Benedict XVI’s Legal Thought*, 4.

⁴⁰ Benedict XVI, *Faith and Politics*, 163.

⁴¹ Benedict XVI, *Faith and Politics*, 163.

⁴² W. Waldstein, *Ins Herz geschrieben: Das Naturrecht als Fundament einer menschlichen Gesellschaft* (Augsburg, 2010); cited in Benedict XVI, *Faith and Politics*, 164.

completely autonomous morality which precludes acknowledgment of the ineluctable natural moral law inscribed by God upon the conscience of every man and woman.²⁴³

These carefully crafted words accurately express Benedict's understanding of the natural law. In his earliest article on the natural law, he had criticized the tendency of some Catholic theologians to equate the natural law with revelation, undervaluing the role and power of human reason in its own right. But he also was critical of the secularist tendency to think that reason could be completely unmoored from the hand of God both in its creation and in its substance and then to relegate the natural law to a kind of fideism with Catholic coloring. Benedict's middle ground may be described as "the analogical autonomy of reason."²⁴⁴ His understanding of the natural law followed from this understanding of human reason. The proper understanding of the natural law in practice should not be to associate it with a state, even a peaceful, democratic state. Rather, drawing on the rich Germanic tradition of locating law in society, rather than as a function of sovereign command, Benedict reminded us that the natural law is found in the conscience of every man and woman. Much of the controversy over *Caritas in Veritate* that arose over fears that Benedict was calling for a world government or a world state was due to a failure to understand Benedict's position that law had its foundations in society—in the interrelationships of rational people—not in the commands of a sovereign. Without rejecting the legitimacy of the national state, and without succumbing to a positivism that put no limits on the rights of the national state, Benedict reminded us that law and justice ultimately require a "true world authority," an authority that he located in the natural law. It was a prescient and courageous stance that reflected the fact that "globalization is continuing apace, and that there is consequently a greater need for a theory of law and justice commensurate with the demands of an increasingly globalized society."²⁴⁵ Not a globalized state. A global society. *Ubi societas ibi ius.* NV

⁴³ Benedict XVI, *Faith and Politics*, 170–71.

⁴⁴ I owe this formulation to my colleague, Stephen Fields, S.J.

⁴⁵ Kevin M. Doak, "Beyond International Law: The Theories of World Law in Tanaka Kōtarō and Tsunetō Kyō," *Journal of the History of International Law* 13 (2011): 234.