

Do Thomists Have Rights?

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In the standard account of the historical development of the idea of natural rights, the watershed innovation is typically said to be the notion that individual persons themselves “possess” rights: not only that we judge something to be “right” by nature, in an objective sense (“objective right” or “objective rights”), but that individual human subjects “have natural rights” that they can maintain over against others (“subjective rights”). Some view this development of the idea of subjective rights in a positive light as the crucial foundation for contemporary doctrines of human rights; others regard it as a corruption of classical theories of justice and the beginning of the decay and decadence of contemporary liberal regimes.¹

For centuries, Thomists—those who lay claim to the principles and heritage of St. Thomas Aquinas—have played a prominent role in this history. In the early sixteenth century, Dominican Thomists like Francisco de Vittoria, Domingo de Soto, and Bartolome de las Casas were instrumental in the development of a theory of natural rights that would serve to limit the power of the Spanish crown and of colonial masters over the natives of the new world. In the twentieth century, in the immediate aftermath of World War II, Jacques Maritain mounted a principled campaign as a Thomist for the Universal Declaration of Human Rights. And contem-

¹ For a moderate critique of the contemporary discourse that views rights as absolute, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991). Patrick Deneen has offered a more trenchant critique along different lines in “Unsustainable Liberalism,” *First Things*, August/September 2012, 25–31.

porary interest in Aquinas's approach to law and justice is increasing, as is evident from several recent publications.²

Yet a lively debate has developed in recent decades over the Thomistic pedigree of subjective rights. Were these Thomists in fact faithful to the principles of Thomas Aquinas?³ Is a doctrine of subjective rights found in Aquinas?⁴ If not, is it an organic development from Thomas's own views? Or can Aquinas's thought be used in a more general way to ground a theory of subjective natural rights? To put it in the terms of Leo Strauss, does Aquinas truly belong in what he terms the classic natural right tradition, or is Aquinas actually a precursor and forerunner of the modern doctrine of natural rights? (In *Natural Right and History*, Strauss himself seems to regard Aquinas as a liminal figure, still within the classic tradition but sowing the seeds of its demise in post-Enlightenment modernity.⁵) The participants in the debate over these questions, whether or not they think subjective rights are a positive development, generally take it for granted that the crucial shift is from a focus on duties based on an objective sense of "what is naturally right, or just, or due" to a subjective theory of "natural rights" that I "possess" as an individual person.

It is my claim that such questions miss the point and, worse, hide the fact that, in the centuries after Aquinas, some putative Thomists diverged in important ways from Aquinas's own principles. The resulting (so-called) Thomistic theories of natural rights involved a shift in perspective that has

² For example, J. Budziszewski's recent *Commentary on Thomas Aquinas's Treatise on Law* (Cambridge: Cambridge University Press, 2016) revives the medieval practice of commenting, line by line, on the text of an eminent authority. That something like this would be published by a major contemporary academic press is a good indication of the growing appeal of scholarship on Aquinas in this area. See also: Douglas Kries, *The Problem of Natural Law* (Lanham, MD: Lexington Books, 2007); Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Wilmington, DE: ISI Books, 2003).

³ Alasdair MacIntyre criticizes Maritain's putatively Thomistic argument for human rights as "quixotic," "an uncharacteristic lapse," and producing "a conception of rights alien to and absent from Aquinas's thought" (*Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition* [Notre Dame, IN: University of Notre Dame Press, 1990], 76).

⁴ Two prominent scholars on the history of natural rights disagree sharply on many issues, but they agree in opining that Aquinas did not have such a doctrine: Michel Villey, *La formation de la pensée juridique moderne: cours d'histoire de la philosophie du droit* (Paris: Montcrestien, 1975), and Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625*, Emory University Studies in Law and Religion 5 (Atlanta, GA: Scholars Press, 1997), esp. 257–60.

⁵ Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1950), 163–64.

worked much mischief in the domain of natural rights theory. Recovering Aquinas's own view is, I believe, quite important if we are to think aright about a healthy political order. But contemporary commentators have generally failed to recognize that some supposedly Thomistic theories are only Thomistic masquerades.

In order to bring this to view, I will first discuss what I consider to be the key principles of Aquinas's own account and how the distinction between objective and subjective rights is a relatively unimportant side issue compared to the critical insight of Aquinas's position: that law and justice, and consequently any theory of natural rights, should always be understood in terms of an overarching order to the good. Then I will speak about how that key dimension was eclipsed, first in the thought of late-medieval thinkers opposed to Aquinas (like William of Ockham), and then in the thought of Francisco Suarez and subsequent Jesuit and Jesuit-influenced Thomists. Finally, I will discuss how the eclipse of this key dimension has widespread and damaging repercussions and will attempt briefly to make the case that, if we wish to have natural rights in a healthy political order, it is important to recover Aquinas's central insight.

Thomas Aquinas on Law, Justice, and *Ius*

Did Thomas Aquinas recognize subjective natural rights? In essence, the answer is yes. But focusing exclusively on this question obscures Aquinas's understanding of the complex interrelationship among justice, law (*lex*), right (*ius*), and the common good.

Let us start with justice. In his great synthetic *Summa theologiae*, Aquinas first discusses justice as an attribute of God. In doing so, he affirms a key principle: justice always refers to *a wise or reasoned ordering among things*. When we speak about justice in God, we are referring first of all to the divine intellect, insofar as God's intellect conceives the perfectly wise plan by which all things are ordered to himself. Justice is only secondarily in God's will, insofar as, by his will, he acts according to the wise order he has conceived.

Since the object of the will is the good as understood [by the intellect], it is impossible that God would will anything but the plan [*ratio*] he conceives by his intellect, which is like a law of justice, according to which his will is right and just. Hence what he does according to his will, he does justly, just as we act justly when we act according to the law.⁶

⁶ Thomas Aquinas, *Summa theologiae* [ST] I, q. 21, a. 1, ad 2: "Cum bonum intellectum sit obiectum voluntatis, impossibile est Deum velle nisi quod ratio suae

Here we are very far from later voluntaristic theories according to which the decree of God's will, which we are bound to obey, is the ultimate root of justice and law. For Aquinas, law is *not* primarily the expression of God's will, but rather, the wisely ordered plan of creation in God's intellect is like the "law" that guides the perfectly just willing of God. Law is an expression of *reason*, an ordering according to reason, even in God. And so justice results from rightly willing according to the wise or reasoned ordering of all things to God.

This understanding of justice, order, and reason is echoed by Aquinas's famous definition of law as "an ordination of reason for the common good, made by one with authority, and promulgated."⁷ Aquinas crafted this definition with care, intending it to account not only for human written laws but also for natural law, divine positive law, and the eternal law in the mind of God. Like justice, law designates for Aquinas an order of reason. It is a rule and measure of acts not primarily because a subordinate is bound to obey his superior, but because the law sets forth the ordered plan to attain the end. Insofar as an act fails to conform to that plan, it does not conduce to attaining the end, and so lacks the rectitude of order.

Later in the *Summa theologiae*, Thomas treats of justice in human affairs. There, he speaks of it as a moral virtue in the soul by which man is made good. That is, he treats human justice as part of a broader account of how man is ultimately ordered to God within the complex network of overlapping relationships he has with others, like his family, his neighbors, his city, and so forth:

Justice by its essence implies a certain rectitude of order . . . insofar as it implies a right order in man's very act. And thus justice is held to be a virtue, either as particular justice, which rightly orders man's act in relation to another individual man; or as legal justice, which rightly orders man's act in relation to the common good of a multitude.⁸

sapientiae habet. Quae quidem est sicut lex iustitiae, secundum quam eius voluntas recta et iusta est. Unde quod secundum suam voluntatem facit, iuste facit, sicut et nos quod secundum legem facimus, iuste facimus."

⁷ ST I-II, q. 90, a. 4.

⁸ ST I-II, q. 113, a. 1: "Iustitia de sui ratione importet quandam rectitudinem ordinis . . . secundum quod importat ordinem rectum in ipso actu hominis. Et secundum hoc iustitia ponitur virtus quaedam, sive sit particularis iustitia, quae ordinat actum hominis secundum rectitudinem in comparatione ad alium singula-

This text brings into the foreground another key dimension of justice for Aquinas: it implies a reasoned or wise ordering, and more specifically, an ordering *to the good, an ordering that makes man good*.

At this point, we have identified three key elements in Aquinas's account of justice: it involves (1) an ordering (2) according to reason (3) to the good. And with these elements in mind, we are now ready to take up a key Latin term for theories of natural rights: *ius*.

Thomas's says that *ius* is the *object* of justice. One is just when one renders to another his *ius*. What does this mean? *Ius* is hard to translate into English. Standard translations usually render it as "right," but it can also mean "the just thing," or "what is due." We could also say that *ius* is "what is right," or perhaps "the fair." The term is drawn from the Roman legal tradition, from Roman legal judgments: a judge would declare the *ius* in a case. (That Aquinas uses this Roman term in an otherwise Aristotelian definition of justice provides a good example of how Aquinas integrates and synthesizes Aristotle with the Roman and Augustinian traditions.) Sometimes *ius* can even be translated as "law," but that is not quite correct, according to Aquinas. Especially when we are speaking of a written law, he explains, the *ius* is the measure and the intelligible form of a law in the same way that the artisan's idea of the table he is going to make is the mental exemplar and measure of what he carves in wood. And more generally, law is a kind of expression of *ius*.⁹

Aquinas's point is that we judge whether an action is just, or whether a law is just, by reference to this objective measure or object of justice: have I rendered to another his *ius*, that is, what is fair, what is due? This has led to a misunderstanding, however. Aquinas certainly thinks that justice always has this objective dimension of *ius* as the object of justice, as something that expresses what is fair or equal in a given human relationship or set of relationships, but this has led some to argue that Aquinas presents an understanding of *ius*, and thus of "right" (or "rights"), as exclusively objective, or at least in a predominantly objective sense. This objective sense of *ius* is then contrasted with later natural rights theories that begin to use the term *ius* to designate a right or claim that belongs to an individual, one that he can assert over against others. Here, the argument goes, we find the origin of a modern understanding of subjective rights: rights as belonging to a person, a kind of moral faculty that characterizes individual subjects.

rem hominem; sive sit iustitia legalis, quae ordinat secundum rectitudinem actum hominis in comparatione ad bonum commune multitudinis."

⁹ ST II-II, q. 57, a. 1, ad 2.

Yet, if one accepts Aquinas's account of *ius* as the object of justice, it does not at all follow that *ius* cannot also be understood as a subjective right, as a claim that one person has over against another. Indeed, this is merely to reformulate Aquinas's account from a different perspective. The reason he emphasizes that *ius* is the object of justice and that it has an objective character is to underline that what is due in a particular case does not depend on the characteristics of the just man, but is rather a measure external to him. This marks a significant distinction between justice and the other moral virtues, which *do* depend on the subjective characteristics of the person who possesses that virtue. You cannot judge whether a man is temperate in eating unless you know what is the right measure of food for him, and that measure will depend on his subjective qualities (for instance, whether he is an offensive lineman on the college football squad or a sedentary professor who lives in the library), whereas you *can* judge that an act is just simply by looking at whether one has rendered what is due, the *ius*. This means that justice has a certain objective quality, because there is a kind of "out-there-ness" to the *ius*, to "what is due," that is a function of the relationship or order between the parties and does not directly depend on their personal qualities.¹⁰

Even so, it is entirely possible to speak about this objective *ius* from the perspective of the person *to whom* it is owed, and even to suggest that a person can make a claim for what is due to him—he has a "right" to it. This is simply to regard the objective *ius* from the point of view of the person to whom it is due. The objective "due" thus becomes a subjective claim or right.¹¹

My argument on this point cuts against the grain of most of the scholarship of recent decades on Thomistic natural rights. No less an authority than Ernest Fortin, the eminent priest and Straussian, claims that the notion of subjective rights based on natural law or natural justice is absent

¹⁰ Some additional qualifications are needed here. For example, for Aquinas, more is due to one holding a particular office than to the average citizen. In the United States, we recognize this in many ways: all in the courtroom stand when the judge enters, whom they address as "your honor"; the president, even though he will someday return to private life, is surrounded by honors and is "due" a personal staff and an executive mansion in virtue of the office.

¹¹ John Finnis makes this point quite persuasively, if briefly, in "Aquinas on *ius* and Hart on Rights: A Response to Tierney," *Review of Politics* 64 (2002): 407–10. Jean Porter makes a similar argument at much greater length, specifically about Aquinas's conception of *ius*, in "Justice, Equality, and Natural Rights Claims: A Reconsideration of Aquinas's Conception of Natural Right," *Journal of Law and Religion* 30 (2015): 446–60.

from, and even foreign to, Aquinas's thought. Fortin concedes that the research of Brian Tierney (a historian of natural rights) shows that, in the century before Aquinas, canonists formulated subjective rights based on positive law (like the Church's canon law). But this is a far cry, Fortin argues, from grounding subjective rights on natural law principles.¹² For his part, Tierney—whose scholarship is regarded as the standard historical account of the development of subjective rights—accepts the dichotomy between objective and subjective rights and regards Aquinas as a representative of the objective rights tradition, in opposition to both earlier and later subjective rights proponents.¹³

In my view, both Fortin and Tierney are mistaken. In fact, if you read beyond the narrow slices of the *Summa theologiae* that political theorists are wont to consult, Aquinas very explicitly speaks of what is objectively “due” to someone as a subjective *ius* or right that he possesses and can assert. I have come across at least twenty-three different examples of “subjective *ius*” in Aquinas.¹⁴ For example, he says that “free men . . . have the right and capacity [*ius et facultatem*] in some cases to resist the precepts of a king or prince.”¹⁵ In other words, the king's just authority is limited, and this same truth can be expressed as a right or faculty belonging to free citizens. Elsewhere, Aquinas says that, in some matters, a free citizen has a right of contradicting a ruler, *ius contradicendi*, which suggests a right to contradict in speech or even oppose a ruler, as well as to refuse compliance with the ruler's commands.¹⁶ Aquinas also says that, if one has suffered an injury, a private person “is able to prosecute his right [*ius suum*] in the

¹² Ernest Fortin, “On the Presumed Medieval Origin of Individual Rights,” in *Collected Essays*, ed. J. Brian Benestad, vol. 2, *Classical Christianity and the Political Order: Reflections on the Theologico-Political Problem* (Lanham, MD: Rowman & Littlefield, 1996), 243–64, esp. 246–47.

¹³ Tierney, *The Idea of Natural Rights*, 257–60. Annabel Brett offers a more nuanced perspective when she identifies different types of subjective right that she contrasts with the objective right tradition exemplified by Aquinas (*Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* [Cambridge: Cambridge University Press, 1997], 89–97; 123–24). Even so, the subjective–objective distinction animates important parts of her analysis.

¹⁴ It is not clear in all twenty-three examples that a subjective *ius* would correspond to what we would call a “right.” In some of these texts, *ius* might be translated as “authority” rather than “right.” My point here is not that Aquinas has a full-fledged enumeration of subjective rights, but that it is commonplace in his thought that an *ius* would “belong to” a person who could assert or make a claim based on it.

¹⁵ Aquinas, *De virtutibus*, q. 1, a. 4: “Liberis . . . habent ius et facultatem repugnandi quantum ad aliqua praecepta regis vel principis.”

¹⁶ *ST* I-II, q. 58, a. 2: “Liberis . . . habent ius in aliquo contradicendi.”

tribunal of his superior.”¹⁷ In other contexts, Thomas speaks of an adopted child having a right or *ius* in the adoptive family’s inheritance,¹⁸ of the finder of buried treasure having a right in it,¹⁹ of a baptized person having a right to receive the Eucharist,²⁰ of the Church as having rights [*iura*] that should be defended against usurpation by civil rulers (referring explicitly to Thomas a Becket and King Henry II of England),²¹ and even of certain communities having a right to provide themselves with a king, and thus also having the capacity to depose a king who becomes a tyrant.²² Many of these are, in fact, quite close to what later theorists will label natural rights.²³

¹⁷ *ST* II-II, q. 40, a. 1.

¹⁸ *ST* I-II, q. 114, a. 3.

¹⁹ *ST* II-II, q. 66, a. 5, ad 2.

²⁰ *ST* III, q. 67, a. 2.

²¹ *Contra impugnantes* IV, ch. 3.

²² *De regno* I, ch. 7.

²³ In addition to the eight examples just cited, and the ninth discussed just below, I have found fourteen other examples, across twenty-three different texts, of a “subjective *ius*” in Aquinas: *ST* I-II, q. 96, a. 3 (to protect the right of one’s friend [*ius amici sui*] may be a virtuous act of courage); I-II, q. 96, a. 4 (in some cases, a man should “go the extra mile” by ceding his *ius* to avoid scandal or disturbance); II-II, q. 87, a. 3 (a cleric with the care of souls has the right of receiving tithes [*ius accipiendi decimas*] from those he serves); II-II, q. 100, a. 2, ad 5 (*ius* in a bishopric or any other dignity or prebendary, acquired either through election or provision); a. 4 (a right of patronage [*ius patronatus*])—that is, a right to present clerics for an ecclesiastical benefice); III, q. 67, a. 6 (a cleric in certain cases has a right of baptizing [*ius baptizandi*] those under his care); III, q. 57, a. 6, ad 3 (Christ “acquired for himself and for us, in perpetuity, the right [*ius*] and the worthiness of a heavenly dwelling-place”); *De decem praeceptis*, prol. (charity acquires for us an *ius* to the inheritance of God, which is eternal life); *Quodlibet* II, q. 5, a. 1 (a father has a right of governance [*ius prelationis*] over his children for the sake of the good management of the household); *In orationem dominicam*, a. 5 (we take away the *ius* of God when we prefer our will to his); *Super Rom* 13, lec. 1 (a king has rights [*iura*] to receive tribute from his subjects); *In orationem dominicam*, a. 2 (a king has an *ius* in his reign even before that reign is declared); *Super Rom* 9, lec. 3 (a king has rights [*iura*] in his kingship which he rightfully defends against others); *ST* II-II, q. 12, a. 2 (the *ius domini* of a prince to govern his subjects); I-II, q. 105, a. 1, ad 5 (it is the king’s *ius* to draft young men into military service and to take things from his subjects in order to secure the common good, though this is often turned into an unjust usurpation by tyrants); I-II, q. 114, a. 1 (paternal *ius* and lordly *ius*); II-II, q. 100, a. 4, ad 4 (Jacob received a right of inheritance [*ius promogeniturae*] by divine election); *Super Heb* 2, lec. 3 (the *ius* of primogeniture); *Super Rom* 8, lec. 6 (a son has an *ius* in sharing in the inheritance); *Super Matt* 25, lec. 3 (Marietti no. 2095; to take possession of an inheritance belongs to one with an *ius*); *ST* III, q. 46, a. 3, obj. 3 (“the devil had no *ius* in man because he deceived

One more notable example is worth mentioning because, in it, Aquinas expressly argues that a right possessed by an individual is based on natural law. It is found in one of his *quodlibetal* disputations at the University of Paris. *Quodlibet* literally means “ask whatever you please,” and it was a demanding academic exercise in which other members of the university could publicly pose to Aquinas a question on any subject they liked, and he would be expected to give a magisterial answer. In this case, a questioner asked whether one may baptize Jewish infants even if their parents object. Aquinas writes:

It would injure Jewish parents if their children were baptized notwithstanding their objections, because it would violate their right of parental governance [*ius patriae potestatis*]. . . . [The reason is that] it is of natural right [*de iure naturali*] that a son is under the care of his father until he gains the use of reason, and hence it would be contrary to natural justice if, before a child has the capacity for free choice [*liberi arbitrii*, the full capacity of free will in someone who has attained the use of reason, normally around the age of seven], he were taken away from his parents’ care, or if something were ordered concerning him notwithstanding his parents’ objections. But after he begins to have the use of free choice, then he begins to be his own [*incipit esse suus*], and he is then able to provide for himself with respect to those things that concern observing divine or natural law. At that point, he can consent to the faith and be baptized even if his parents object, though he must not be induced to accept the faith by coercion, but only by persuasion—yet not before he has the use of reason.²⁴

In this remarkable text, Aquinas speaks of the parents as *suffering an*

him by fraud”); *Super Rom* 8, lec. 1 (the devil has no *ius* regarding the innocent); *Super Ioan* 14, lec. 8 (Marietti no. 1975) (because the devil attacked Christ, over whom he had no right, he deserved to lose what he held justly).

²⁴ *Quodlibet* II, q. 4, a. 2, sc and corp.: “Fieret autem Iudaeis iniuria, si eorum filii baptizarentur eis inuitis, quia amitterent ius patriae potestatis in filios iam fideles. . . . De iure naturali est quod filius, antequam habeat usum rationis, sit sub cura patris; unde contra iusticiam naturalem esset, si puer ante quam habeat usum liberi arbitrii, a cura parentum subtrahatur uel de eo aliquid ordinetur inuitis parentibus. Postquam autem incipit habere usum liberi arbitrii, iam incipit esse suus et potest, quantum ad ea quae sunt iuris diuini uel naturalis, sibi ipsi prouidere, et tunc est inducendus ad fidem non coactione, set persuasione, et potest, etiam inuitis parentibus, consentire fidei et baptizari. Non autem ante quam habeat usum rationis.” *ST* II-II, q. 10, a. 12, duplicates this text, nearly word for word.

injury if they are deprived of their *ius* to raise and govern their children. No positive law can contravene this right, in Aquinas's view, because, according to the order of nature, children are entirely under the care of their parents until they attain the age of reason. *Ius* clearly has here a subjective dimension that is grounded in the natural order of things, and hence it pertains to the natural law: it is the *ius* of the parents to raise their own children, and to violate this *ius* would do an injury to the parents.

Once the children reach the age of reason, Aquinas thinks the situation changes. Parents still have a right to care for their children, and children still have to obey their parents with respect to the good ordering of the household and their education in virtue.²⁵ But as persons now fully possessed of the use of reason and free will, children come into full possession of themselves, which means that they now enjoy the right to worship God according to the judgment of their own minds, notwithstanding a contrary wish of their parents.²⁶ Indeed, this kind of possession of self is, according to Aquinas, the ultimate root of the equality of justice between human beings, and it is what makes it possible for us to be due something in the proper sense of the word, to possess a "right" or *ius*.

It would not seem a great leap from Aquinas's reasoning here to an account of natural rights as belonging to persons in virtue of their nature as free and rational creatures.²⁷ This was precisely the sort of reasoning that later Dominican Thomists *did* articulate in the controversies over the enslavement of the indigenous peoples of the New World. Indeed, in the very text I have been quoting, Aquinas expressly says that, even where the civil law places a man in a state of servitude, he retains his right of parental governance of his children, and also his right to determine how he himself will worship God, because these derive from "the order of natural or divine right [*ius*]."²⁸ "Nor should anyone disrupt the order of natural right, by which a son is under the care of his father."²⁹

This mention of order brings us back to the key dimension of Aquinas's

²⁵ *Quodlibet* II, q. 5, a. 1.

²⁶ It is hardly surprising that Aquinas takes this position about parental authority, since he himself, as a teenager, defied his parents and joined the then-fledgling Dominican Order.

²⁷ Porter emphasizes this aspect of Aquinas's thought and argues that it is a feature of Aquinas's core commitment to our natural equality, which is grounded in our "equality of status as free, self-directed rational agents" ("Justice, Equality, and Natural Rights Claims," 455–60).

²⁸ *Quodlibet* II, q. 4, a. 2, ad 3.

²⁹ *Quodlibet* II, q. 4, a. 2, ad 2: "Nec aliquis debet irrumpere ordinem iuris naturalis, quo filius est sub cura patris."

nas's account that I emphasized earlier. Aquinas never considers law, nor justice, nor *ius* (the object of justice), as belonging to an individual person abstracted from a wider teleological order. Rather, a subjective *ius* or right is, for Aquinas, always a way of looking at how an individual belongs to a larger order and is himself teleologically ordered, according to reason, to a good.

This is true even of the right to worship God according to one's conscience, which belongs to individuals who have the use of reason and free choice. For Aquinas, this right does not belong to them as pure or absolute individuals, abstracted from the wider order in which man exists. Rather, that subjective right is itself another way of expressing how man is ordered to God. Man possesses reason above all so that he can be ordered to God through it: "Man is ordered to God through reason, by which he is able to know God. Hence a child, before he has the use of reason, is, by natural order, ordered to God through the reason of his parents, to whose care he is naturally subject."³⁰

Subsequent Thinkers

Let us now shift our focus from Aquinas to subsequent thinkers. The standard historical account generally accepted by all sides in the contemporary debate over natural rights is that Aquinas lacked a doctrine of subjective rights, and that the development of such a doctrine in later thinkers involved a crucial shift from an objective sense of *ius* to a subjective one. Some praise it and others decry it, but most agree that the shift from objective to subjective marks a major change in approaches to law, justice, and rights. As we have seen, however, Aquinas clearly does sometimes speak of an *ius* as a right or a faculty of an individual derived from natural law or natural justice that he can assert over against other individuals, or even against a civil ruler, the deprivation of which causes him injury, and which he can vindicate by making a legal claim. To be sure, later thinkers develop a much more substantial account of subjective rights than Aquinas has. Some also have a theory of natural rights very different from his, but it is my claim that such theories are different *not* because they shift from objective to subjective rights, but primarily because they have lost sight of the truth that justice, law, and *ius* all depend on, and are facets of, *a wise or reasoned ordering of individuals to the good*.

³⁰ *Quodlibet* II, q. 4, a. 2, ad 4: "Homo ordinatur ad Deum per rationem, per quam Deum cognoscere potest: unde puer antequam usum rationis habeat, naturali ordine ordinatur in Deum per rationem parentum, quorum curae naturaliter subiacet; et secundum eorum dispositionem sunt circa ipsum divina agenda."

William of Ockham

In the history of moral theology, William of Ockham, the fourteenth-century Franciscan nominalist, is typically identified as the primary culprit on this score. As we saw earlier, when Aquinas spoke of justice in God, he held that the plan of God's wisdom by which all things are ordered back to God, a plan conceived by the divine intellect, is like a law for God's willing: God's will is just because he always wills in accord with his wise plan of order. Ockham reverses this because he thinks it denigrates God's omnipotence to suggest any limitation on what God could will. He thus places the divine will in the first and highest place, so that whatever God wills is thereby necessarily just.³¹ Likewise, where Aquinas had defined law as an ordination of reason for the common good (a definition that even applied to divine law), Ockham understood law as ultimately rooted in God's will, as a function of God's command.³²

For Ockham, then, law and justice cease to have a reference to a plan of order to the good and are principally matters of divine will or precept. The divine will becomes a source and measure of justice, and even of reason—a position nearly the direct opposite of Aquinas's. Indeed, Ockham even thinks that God could change what is just and right merely by changing his command: although God presently forbids us to hate, steal, and commit adultery, and therefore these acts are wrong, they would be right and meritorious if God were to command us to do them.³³

These changes to the conception of justice and law are the backdrop to Ockham's transformation of the meaning of *ius* in his political writings.³⁴

³¹ William of Ockham, *In I sent.*, d. 17, q. 3: "Eo ipso quod ipse vult, bene et iuste factum est" (*Opera theologica*, vol. 3, *Scriptum in librum primum Sententiarum (Ordinatio)*, *distinctiones IV–XVIII*, ed. Girardus I. Etzkorn [St. Bonaventure, NY: St. Bonaventure University, 1977], 478).

³² Francis Oakley discusses this point in Ockham's thought in "Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition," *Natural Law Forum* 60 (1961): 65–75.

³³ Ockham, *In II sent.*, q. 15 (*Opera theologica*, vol. 5, *Quaestiones in librum secundum Sententiarum (Reportatio)*, ed. Gedeon Gál and Rega Wood [St. Bonaventure, NY: St. Bonaventure University, 1981], 352–53). God could even command the souls in heaven to hate him, in which case it would be right for them to do so, according to Ockham in *In IV sent.*, q. 16 (*Opera theologica*, vol. 7, *Quaestiones in librum quartum Sententiarum (Reportatio)*, ed. Rega Wood, Gedeon Gál, and Romaldus Green [St. Bonaventure, NY: St. Bonaventure University, 1984], 352). For Aquinas, such a view is nonsensical, since the beatitude of heaven consists in knowing and loving God.

³⁴ Armand Maurer's judgment is correct (*pace* Tierney and other recent interpreters of Ockham's political thought on rights): Ockham's political works should be read

Whereas Aquinas had spoken of *ius* as the object of justice, or what is due to someone in view of the complex ordering of individuals and communities to the good, such a conception of *ius* no longer makes any sense in Ockham's system of thought. Law and justice are principally matters of precepts handed down from above, demanding obedience of the will. For Ockham, the exterior act that one performs (such as eating, drinking, dressing, writing, reading in a book, or riding), considered as a matter of factual occurrence, is morally neutral.³⁵ What gives it its moral character is the *will* of the person who acts, namely, whether the person is actually willing prudently to act in conformity with the divine will according to the judgment of his or her conscience.³⁶ Consequently, he conceives of *ius* as a function of a positive grant of a privilege, a kind of positive enactment by the will of the sovereign. For Ockham, therefore, most rights are positive rights had "by some enactment or human agreement."³⁷ Ockham does acknowledge the existence of natural rights, *ius* "had from nature,"³⁸ but he seems to think of this along the same lines as a positive right: this *ius* arises from a kind of divine grant by which God gives a privilege to man that can be used as man sees fit. Thus, according to Ockham, in creating man, God gave to him a certain dominion, a legitimate sphere of activity and agency on matters not directly controlled by a precept of justice or

in continuity with his theological works (*The Philosophy of William of Ockham in the Light of Its Principles* [Toronto: Pontifical Institute of Mediaeval Studies, 1999], 537). When one does so, one can see the deep coherence between them. After all, Ockham was one of the most brilliant minds of the fourteenth century, and one should expect that the core principles in one domain of his thought would not be abandoned another.

³⁵ Ockham, *Opus nonaginta dierum* 2, in *A Translation of William of Ockham's Work of Ninety Days*, vol. 1, trans. John Kilcullen and John Scott (Lewiston, NY: The Edwin Mellon Press, 2001).

³⁶ This is evident if one examines Ockham's understanding of "actual prudence" (which he distinguishes from "habitual prudence"). Actual prudence, on his view, is something that "in no way is in our power," but rather is generated in us, moment by moment, by God. If God generates this actual prudence in you directing you to do some act and you then will to do it, the resulting act is virtuous. But if, in the midst of carrying out that act, God should cease to generate in you the actual prudence telling you that this act is to be done but you continue to carry out the act, your action is transformed from being virtuous into being vicious (Ockham, *Quaestiones variae*, q. 8, a., in *Opera theologica*, vol. 8, *Quaestiones variae*, ed. Girardus I. Etzkorn, Franciscus E. Kelley, and Josephus C. Wey [St. Bonaventure, NY: St. Bonaventure University, 1984], 409–20).

³⁷ Ockham, *Opus nonaginta dierum* 61.

³⁸ Ockham, *Opus nonaginta dierum*.

divine command.³⁹ It was here that Ockham located a person's natural *ius*, which he defined as a "licit power of a subject."⁴⁰ Within this sphere, an individual can freely use, or not use, whatever belongs to him, his *ius*.⁴¹

In sum, then, order, reason, and the good have been displaced in Ockham's thought from the central role they played in Aquinas's. For Ockham, justice and law do not necessarily involve an ordering to the good according to reason. Rather, they are matters of moral obligation: a precept of the divine will calls for man's will to obey. Consequently, *ius* is no longer understood as a function of an ordering to the good, but rather is a feature of the sphere of personal dominion granted to man by God, where man has the licit power to act as he sees fit as long as he remains within the bounds of the commands of God.

Francisco Suarez

It is important, however, that we not stop here, because some subsequent figures—including those who oppose Ockham's nominalism and claim to be interpreting Aquinas's thought—also lost sight of this crucial dimension of St. Thomas's thought. This is particularly the case with Francisco Suarez, the great Jesuit who, in the early part of the seventeenth century, stands at the origin of the distinctive Jesuit line of interpretation of Aquinas. (The founder of the Jesuits, St. Ignatius of Loyola, had designated Aquinas as the preferred theologian for his new society, and the Jesuits subsequently adopted Aquinas as their principal teacher in "Scholastic theology."⁴²) In 1612, Suarez published his *De legibus ac deo legislatore*, a massive treatise of moral and legal theory. As an obedient Jesuit, he consistently cites Aquinas throughout, which might give the impression that he is simply handing on and elaborating on the teaching of the Angelic Doctor. But he in fact consistently alters the meanings of the terms of Aquinas, ultimately producing a doctrine of law, justice, and rights that is different from the great Dominican thinker in some notable ways.

At the start of his treatise, Suarez sets out to define law, *lex*. For Suarez, the essence of law is not an ordination of reason to the common good, as Aquinas taught. Rather, Suarez reframes it thus: "Law is a certain measure

³⁹ Ockham, *Opus nonaginta dierum* 14: "complete power to subject and rule all temporal things and power to use such things." See also: *Opus nonaginta dierum* 2; Brett, *Liberty, Right, and Nature*, 65–66.

⁴⁰ Ockham, *Opus nonaginta dierum* 61.

⁴¹ Brett, *Liberty, Right, and Nature*, 62–68.

⁴² See Andrés I. Prieto, *Missionary Scientists: Jesuit Science in Spanish South America, 1570–1810* (Nashville, TN: Vanderbilt University Press, 2011), 161.

of moral acts, in the sense that such acts are characterized by moral rectitude through their conformity to law.⁴³ He then adds: “In the strict sense of the term, only that is law which imposes an obligation of some sort.”⁴⁴ Entirely absent from Suarez’s initial definition is any reference to an ordering to the common good. Law is first of all about moral precepts: one’s actions are good when they conform to the commands of a superior. As a result, even the terms “good” and “end” (which pepper Aquinas’s discussion of law and justice) largely disappear from Suarez’s treatment, replaced instead with the terms “right” and “wrong,”⁴⁵ measures not of whether an action produces the good or leads an actor to his proper end, but rather of whether an actor’s will is conformed to the moral command of his superior.

To be sure, Suarez does discuss the common good seventy-five pages later in his treatise, in chapter VII. But his understanding of the common good is far less robust than Aquinas’s, and it does not enter into the very definition of law. Rather, having defined law as a binding moral rule that imposes an obligation, he later adds, as a subsequent “characteristic condition,” that it should be enacted for the sake of the common good.⁴⁶ To put this another way, the central element of law—that law imposes an obligation—is derived from the *will* of the lawgiver who hands down the rule, whereas the fact that a law is ordered to “what is good and necessary” pertains to the lawgiver’s intellect.⁴⁷ And in the final analysis, Suarez affirms that the will of the legislator is primary and that his act of intellect gives shape to what his will has determined. Law, for Suarez, is therefore principally an act of the will of the legislator: “Law . . . as it exists in the lawmaker himself, is the act of a just and upright will, the act whereby a superior wills to bind an inferior to the performance of a particular deed.”⁴⁸

A similar transformation is also evident when Suarez examines the meaning of *ius*. While he acknowledges that *ius* can designate the object of justice, the true meaning of the word *ius*—its more strict and proper mean-

⁴³ Francisco Suarez, *De legibus* 1.1.5. All quotations from the *De legibus* are taken from Francisco Suarez, *Selections from Three Works*, ed. Thomas Pink, trans. Gwladys L. Williams, Ammi Brown, and John Waldron (Indianapolis, IN: Liberty Fund, 2015).

⁴⁴ Suarez, *De legibus* 1.1.7.

⁴⁵ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 46.

⁴⁶ See Suarez, *De legibus* 1.1.7: “It shall be formulated particularly with reference to that good.”

⁴⁷ Saurez, *De legibus* 1.5.21.

⁴⁸ Suarez, *De legibus* 1.5.24.

ing—is, he says, “a certain moral power which every man has, either over his own property or with respect to that which is due to him.”⁴⁹ Suarez’s definition differs from Aquinas’s not so much in the fact that *ius* can refer to a subjective right or faculty, but rather in that *ius* no longer, for Suarez, has any intrinsic reference to a wider order of relationships, nor is there any reference to a teleological ordering to the common good. (For Aquinas, it was precisely an individual’s place in a wider teleological order that gives rise to the *ius*.)

What is more, Suarez reverses the relationship of *ius* and *lex*, or law. In St. Thomas, *ius* is the just thing, the form of law, and thus the exemplar according to which a written law is crafted. For Suarez, however, law is the moral rule handed down by the will of a superior, and *ius* is the faculty or moral power that an individual possesses in virtue of the law.

Drawing Conclusions: Do Thomists Have Rights?

Because Suarez’s teaching was so influential among Catholic natural law thinkers, and especially among later Jesuit Thomists, contemporary commentators often assume that Suarez offers standard Thomistic natural law teaching. Fortin is a good example. He holds that the key break with Thomistic natural law teaching—the line between classical natural right and modern natural rights, if you will—is located not somewhere in the three centuries between Aquinas and Suarez, but in the three decades between Suarez and Hobbes.⁵⁰

Yet, as I hope is now evident, Suarez’s account of law, justice, and rights has a character fundamentally different from Aquinas’s, though not because of a shift from an objective sense of *ius* to a subjective one. Rather, the difference is twofold: (1) the loss of the recognition that law is fundamentally an ordination of reason to the common good, not the imposition of an obligation by the will of a superior; and (2) the loss of the sense that *ius* is a feature of the overarching teleological order to the good in which the rational creature is placed, rather than a moral power of the creature considered without reference to that order. Suarez may not be the source of these changes (one might wonder whether William of Ockham bears

⁴⁹ Suarez, *De legibus* 1.2.5.

⁵⁰ Fortin, *Collected Essays*, 2:273: “The real ‘watershed’ in the history of the rights doctrine is not to be located somewhere between Thomas and Suarez; it occurs with Hobbes, who set the stage for all subsequent discussion of this matter by denying that human beings are political by nature (something that Suarez and Grotius never did) and by proclaiming the absolute priority of rights to duties.” See also 2:248.

some responsibility for them, or even Duns Scotus⁵¹), but he is a major figure in their history. And it seems to me that these two changes together constitute the mainspring of the development of modern theories of natural rights, with their strengths but also the notable weaknesses identified by Strauss and others.

Should we try to return to the purity of the original Thomistic doctrine? Jesuit Thomists after Suarez may have modern rights, but do Dominican Thomists have rights? Can we formulate a Thomistic doctrine of rights that would be plausible today?

I would like to answer by summarizing the essentials of what I take to be Thomas's position. The *ius*, or what is due to another, the object of justice, depends, first, on the overarching order of the cosmos, which is laid out according to God's wisdom, and is therefore both intelligible and teleological, and which is composed of persons endowed with reason and free choice who are members of various communities that are themselves arranged in hierarchical order. Then, second, this *ius* is a function of the relationality that follows from the place that these persons have in this order.⁵² Nor is this order an abstraction: it is *the concrete, particular, historical order in which I find myself*. Man comes into the world as the child of parents, living in a human community, as a creature under God. He has not himself created or generated this order. Consequently, man necessarily and inevitably exists in an interlocking web of relationships, of belonging as a part to other wholes: his family, his clan, his city, the whole human race, the whole body of Christ, the whole of creation. These relationships are not constituted by man's choice. Rather, we could say that man is naturally and originally in these relationships.

Aquinas's understanding of justice, and thus of rights, is therefore quite different from the Enlightenment and post-Enlightenment accounts derived from social contract theory, which postulate that man exists first as a kind of independent individual in a primitive "state of nature," and therefore brings to the relationships he chooses to enter certain fundamen-

⁵¹ MacIntyre, for one, identifies Scotus as a seminal figure, a precursor to Ockham and Kant, in the philosophical line of thought that accords primacy to the will over the intellect, and consequently that sees natural law as a matter of obedience to divine commands (*Three Rival Versions of Moral Enquiry*, 155).

⁵² On this theme generally, see Christopher A. Franks, "Aristotelian Doctrines in Aquinas's treatment of Justice," in *Aristotle in Aquinas's Theology*, ed. Gilles Emery and Matthew Levering (Oxford: Oxford University Press, 2015), 143–47. I got from Franks the idea to conceive of justice as relational. Of course, Aquinas transforms this idea from Aristotle because he understands all men to be in relation to God and to all other men in the *civitas Dei*.

tal rights that are, in a sense, anterior to those relationships. Such theories, whether we are speaking of Hobbes, Locke, or more recent authors like John Rawls, tend to abstract from the concrete historical relationships and, we might say, the initial conditions into which we are in fact born. They aim at developing an account of the basic or fundamental rights that human beings have purely in virtue of being human, such that justice becomes, at least in part, granting what is due in virtue of those rights, and so that individuals can then pursue whatever goods they deem worthy of their choice.

For Aquinas, in contrast, the ultimate end of man is not a matter of arbitrary choice, not even for God. The whole plan of divine providence originates in God's wisdom as an ordination of reason with respect to the good. And so, we are born into the world as creatures who naturally occupy a place in that order, and who are naturally ordered to a final end, a good, that we do not choose. Neither are our relationships matters of choice; we simply are in certain relationships: familial relations, relations with our neighbors, membership in a larger political and civic community, and so on. Justice thus has to do with our right ordering to the good that we do not determine for ourselves. It is based on a reality outside of us, in the order of relations in which we inevitably exist.

For a Thomist, then, rights are not properties of individuals as moral monads. Nor can we find the source of rights in an abstract definition of human nature, but rather by considering man as a rational and free creature ordered to God and to the common good of the hierarchy of communities to which he belongs. This allows us to see, then, how rights are connected to justice, to teleology, and to the common good.

In relation to Justice: Rights are a way of looking at what is due, the *ius* or *iustum*, insofar as it is due to someone who can then seek to have that "due" vindicated. This is, in Thomistic terms, a "right." Because of man's nature, we can draw certain conclusions about what man is, what man ought to be, and therefore how we should treat other persons, since they are equal to us insofar as they are human. Yet rights are not functions of individuals as individuals, but rather of persons who belong in a hierarchy of ordered wholes (families, cities, the whole human race, the whole cosmos), each of which has its own common good.

In relation to Teleology and the Common Good: Law is teleological. It is always ordered to the common good, either real or merely apparent. And rights are likewise teleological: they affirm what is required for persons to be rightly ordered to each other and to the political authority in view of the common good. Thus, to respect the rights of another, to give him what is *due* to him, not only pertains to his private good, but means acting in right

relationship to the order of the whole, to the common good.

Indeed, Aquinas teaches that man's ends are not arranged side-by-side on a horizontal plane, but exist in an ordered hierarchy: he is ordered to individual goods (like the good of his biological life), and then to higher and nobler common goods (like the good life that he shares in a virtuous family, a flourishing and friendly neighborhood, and a just city), and ultimately to God, the universal common good of the whole universe. Laws of various kinds direct man toward these various levels of good. Rights can therefore also be understood as a function of a just ordering of each person toward the common good.

Note, though, how this view differs from a typical contemporary theory of rights. In the classical Thomistic view, the end (the common good) and the ordering of the community to that end are primary. Rights articulate claims of justice in relation to the end. Consequently, rights are not absolute or unlimited claims, nor are they themselves the ultimate foundation of or reason for our political community. Rather, rights always point to something further and nobler than an individual or private good: the common good of the whole. This is not to say, of course, that individual rights must always bow before the demands of the political authority. To the contrary, Aquinas holds that some rights are a function of the order of man to a good that is prior to or transcends the political community (as we saw him argue concerning the right of a parent to care for his child). But even these rights do not stand on their own; rather, they stand in virtue of their relation to a good.

Contemporary rights theorists might object that this classical Thomistic view subordinates the liberty that individual rights guarantee under the common good in such a way that those rights will be endangered whenever the government (or the majority) find them inconvenient. Is this not, they would ask, precisely the reason why we should affirm the primacy of individual rights understood as anterior to political society and independent of the common good? A complete answer to this objection would require much longer treatment than can be provided here, but we can at least identify the confusion about the common good hiding in such questions. From Aquinas's perspective, the common good is not something that competes with the good of individuals, nor is it like other private goods that are diminished when they are shared (e.g., more people invited to the party means a smaller slice of cake for each). A common good is precisely the kind of good that can be shared by many without diminishment, like the good of victory for a sports team, or the good of justice in a city, or the good of peace among states. To say that rights stand in relation to a good, then, is not to say that some kind of alien or hostile "common good"

trumps or even destroys the good of the individual. Rather, the common good *is* a good for the individual, a good of a higher and nobler sort in which the individual participates, and without which it is impossible to have a full measure of human happiness. Human beings are ordered not only to private goods like food and shelter but also to common goods like justice, truth, civic friendship, and peace, and without at least some measure of these common goods, they will neither flourish nor be truly happy. As Aquinas puts it (paraphrasing Aristotle's *Politics*), the city exists "not only that men might live, but that they might live well."⁵³ That individuals have rights that they can assert, rights that the positive law should recognize, pertains, therefore, not only to the private good of individuals, but to the common good of the community: the "Blessings of Liberty" (as the Preamble to the U.S. Constitution puts it) should not be thought of as describing a merely private good, the individual property of discrete individuals, but rather a dimension of the common good. It is part of the common good that the community be just, that it recognize what is due to its members, that it be governed by the rule of law, and that it be composed of free citizens capable of directing their own lives by their own responsible choices. When the law acknowledges and protects the just right of a citizen, it is doing something quite different from pork-barrel spending that hands out material benefits (that is, essentially private goods) to the favored clients of the ruler. Acknowledging what is due to individuals is (at least in part) what makes a society just.

On this view, then, individual rights are not set over against the common good, as if an increase in the common good necessitated a diminishment of individual liberty. Rather, that individuals be secure in their liberties as citizens—that they "possess rights"—is precisely an aspect or dimension of the common good, and the protection of those rights in law is a means for securing the common good of a just republic. In all of this, subjective rights are understood as a function of an overarching order toward a good. To put it another way, rights are important (or even fundamental and indispensable) precisely because of the overarching primacy of the common good and the place that each individual has in the order of the whole.

Does this theory of rights offer a plausible alternative for our present political culture? Whether it would win many votes in a popular election, I will not presume to judge, but I think Aquinas would say that, no matter what theory we construct, in actual fact, by the very nature of the case, rights unavoidably and always are founded on some prior judgment about

⁵³ Aquinas, *In I pol.*, ch. 1.

the good, either the good for individual persons or the good for the human community. If that is true, then our epoch's shrill and proliferating claims of incompatible rights should tell us that, behind this camouflage, there is a deeper and more radical disagreement about what is good. Our political life can improve only if we bring this disagreement out into the open, where we can have an honest debate about the true end of our common life together.

There are some contemporary critics of the rights claims found in classically liberal political regimes who view such rights as the product of an Enlightenment mode of thought, containing a kind of poison pill ultimately destructive of the justice of such regimes. On such a view, one might argue that the American project was doomed to failure from the start: we should not be surprised that expanding rights claims have become the source of deep and enduring political conflict, and they are producing a regime that is increasingly illiberal. This is the inevitable corruption and self-contradiction of a regime built on a foundation of natural rights.

I hope it is evident that my argument is in a way the opposite of this view. While it may be true that certain Enlightenment versions of rights create mischief—namely, they set up insoluble political conflicts—it is not clear that the notion of rights must necessarily produce this kind of situation. My claim is that, underlying all rights claims there is always an orientation to some good, and so there always remains a real possibility to have a classical debate about how a community should order itself to the good. In other words, a regime that recognizes natural rights has not necessarily swallowed a poison pill, and a good Thomist can be a proponent of rights. What is more, our present regime does not necessarily need radical surgery to fix the problem. Rather, we need to recognize what is in fact already there: that rights necessarily involve an ordering to the good. Once one sees this, one can see how a regime like ours can be defended on Thomist terms.

So, in the end, do Thomists have rights? Yes. Does anyone else? Maybe not, at least, perhaps not the kinds of rights that work for a healthy political order.