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Natural right constitutionalism: A theory of political liberalism expounded from contemporary Thomistic resources

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Summary

Natural right constitutionalism: A theory of political liberalism expounded from contemporary Thomistic resources

This thesis outlines a species of political liberalism and an understanding of human rights developed from contemporary interpretations of Thomas Aquinas's moral, legal and political theory.

Working from a reading of Aquinas's ethics that stresses both its eudaimonism and the capacity of practical reason to immediately apprehend certain human goods, the work builds on this ethical understanding by propounding a substantive approach to justice and natural right in the legal-political domain. It is argued that a Thomistic conception of justice and natural right is consistent with the notion of subjective human rights, including both fundamental human rights and certain 'liberty' or 'choice' rights. The thesis demonstrates that Aquinas's innovative approach to justice and the political common good is useful in addressing key points in debates in political theory on human rights practice, ideal theory and forms of social criticism.

Such an approach to natural right is developed into a particular species of political liberalism, based on the genus type put forward by John Rawls and Jacques Maritain before him. The work justifies a form of political liberalism in which public reason is focused on building an overlapping consensus on the political common good between citizens through practical reasoning, but one in which there is a permissive approach to the use of metaphysical or religious arguments in the public domain.

The work concludes by offering a defence of a form of political rather than legal constitutionalism; one that takes normative orientations on the nature of political freedom and the consequent role of government from neorepublican theorists, whose positions are held in some respects to be complementary with those of political liberals.

DECLARATION

This work has not been submitted in substance for any other degree or award at this or any other university or place of learning, nor is being submitted concurrently in candidature for any degree or other award.

Signed ………………………………… (Gregory Walker)   Date …………………………

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This thesis is being submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

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This thesis is the result of my own independent work/investigation, except where otherwise stated. Other sources are acknowledged by explicit references. The views expressed are my own.

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ACKNOWLEDGEMENTS

ABBREVIATIONS

NE   *Nicomachean Ethics*

ST   *Summa Theologiae*

CHAPTER 1

INTRODUCTION

This chapter sets out the issues that spurred the genesis of this work; the originality of its content and its intended impact before outlining the broad methodology employed by way of a brief prolegomenon. The chapter closes with an outline of the overarching structure of the thesis.

1). The genesis of the thesis

The genesis of the work lies in the ongoing dispute between theorists who claim the same philosophical and theological patrimony in Augustine and Aquinas yet come to radically different conclusions about the compatibility of their theoretical approach in relation to contemporary approaches to liberalism and human rights. On the one hand the work of theorists such as John Milbank, Alasdair MacIntyre, Tracey Rowland[1] and Robert Kraynak[2] are examples of those using an ostensibly Augustinian and Thomist framework and who come to positions that are strongly critical of contemporary theories of liberalism and human rights. On the other side of the debate figures such as John Finnis (and his theoretical collaborator Germain Grisez), Paul Weithman,[3] Robert Markus,[4] Jean Porter[5] and numerous other theorists who emphasise the compatibility of Augustine and Aquinas's philosophical and theological approach with some form of liberalism and subjective human rights. How can interpretations of, and constructive orientations from, the same sources differ so widely on such important matters?

While I do not go as far as those who argue that the work of MacIntyre and Milbank has the effect of undermining (American) democracy,[6] if MacIntyre and Milbank are right about liberalism and rights then much, if not most, normative work in English language political theory is fruitless. This work therefore aims to address some of the issues involved in such debates by setting out a constructive approach in relation to political liberalism and rights by working through some of the key issues relating to natural law, justice and the common good

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[1] Tracey Rowland, *Culture and Thomist Tradition: after Vatican II* (London: Routledge, 2003).

[2] Robert Kraynak, *Christian Faith and Modern Democracy* (Notre Dame, IND: University of Notre Dame Press, 2001).

[3] Paul J. Weithman, 'Toward an Augustinian Liberalism' *Faith and Philosophy,* 8 (1991), 461–80.

[4] Robert A. Markus, *Christianity and the Secular* (Notre Dame, IND: University of Notre Dame Press, 2006).

[5] Jean Porter, 'Natural Right, Authority and Power, the theological trajectory of human rights', *Journal of Law, Philosophy and Culture*, 3 (2009), 299-314.

[6] This is the view of Jeffrey Stout who describes Milbank and MacIntyre as the 'new traditionalists' in: Jeffrey Stout, *Democracy and Tradition* (Princeton, NJ: Princeton University Press, 2003).

as theorised by Thomas Aquinas. I arrive at a view of political constitutionalism, grounded in classical and mediaeval conception of natural right and the political common good as received and transformed by Aquinas, which I argue can be viewed as a species of the genus *political* liberalism (using John Rawls's nomenclature).[7]

Attempts have been made by New Natural Law theorists to outline a theory of limited government which is partially perfectionist.[8] Others have drawn direct parallels between liberalism and natural law theory,[9] often in a way that emphasises a neat fit between ancient and medieval natural law theories and modern classical liberalism (after the tradition of Locke or the American Founders).[10] This is not the position taken in this thesis[11] as I instead attempt to construct a form of *political* liberalism using Aquinas's ethical theory (which I see as being a eudaimonistic virtue ethic more than it is a 'basic goods' or even a natural law ethic) and his wider legal theory (founded on the political common good and general justice). In pursuing this aim I set aside questions in relation the scope and limits of civic virtue for future research, and only address explicitly theological questions insofar as they directly impinge on the philosophical matters at hand, such as when the question of eudaimonia or human fulfilment is treated in chapter 2.

2). The originality the thesis and its intended impact

The originality of the thesis is twofold. First, it goes beyond the thirty year stalemate that has been reached between traditionalist natural law theorist and the 'basic goods' natural law theory outlined by John Finnis and Germain Grisez (often called 'New Natural Law' theory). I attempt this by using a eudaimonistic and virtue based interpretation of Aquinas's moral theory (heavily indebted to, but not wholly taken from, the work of the contemporary Swiss moral philosopher Martin Rhonheimer) that nonetheless incorporates a crucial insight from Finnis and Grisez's reinterpretation of Aquinas's ethics. I hold that this synthesised position is textually credible and resolves some of the seemingly intractable disputes between the traditionalist and New Natural Law positions within Thomism.

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[7] By making this claim I am not asserting anachronistically that Thomas Aquinas *was* a political liberal, only that certain political ideas and concepts from Aquinas's oeuvre can be used constructively to come to an understanding of civil association consistent with key aspects of political liberalism.

[8] Robert P. George, *Making Men Moral* (Oxford: Oxford University Press, 1993).

[9] Christopher Wolfe, *Natural Law Liberalism* (Cambridge: Cambridge University Press, 2006).

[10] For a clear example of this see: Harry V. Jaffa, 'Thomas Aquinas meets Thomas Jefferson', *Interpretation: A Journal of Political Philosophy,* 33 (2006), 177-184.

[11] For example, I would hold that the position outlined in this work would be consistent with the public provision of significant welfare services and the universal provision of health and education services financed via direct taxation – something that classical liberals have rarely agreed as theoretically defensible.

Secondly, the originality of the thesis relates to how this understanding of Thomistic moral theory and natural right may usefully cohere with political liberalism. New Natural Law theorists such as John Finnis and Robert George have regrettably focussed their work on their differences with John Rawls on matters such as abortion or euthanasia, or have focussed on particular aspects of Rawls's own species of political liberalism rather than addressing the usefulness or otherwise of Rawls's generic conception of political liberalism.[12] Following Martha Nussbaum's example of developing a conception of political liberalism which is non-deontological (in which the good is conceived as being prior to the right), I develop an outline conception or species of political liberalism that can be seen as compatible with Aquinas's ethical and political theory. Like Nussbaum - though on a Thomistic basis - I depart from Rawls's own species of political liberalism ('justice as fairness' and Rawls's *particular* understanding of primary goods), while retaining central aspects of political liberalism's generic form. This, to my knowledge, has not been outlined before in the rather vast literature on political conceptions of liberalism.

In terms of the intended impact or outcome of this work I hope that those attracted to Thomistic or more generally Catholic orientations in practical philosophy - be they philosophers or theologians - will re-evaluate their predominant scepticism or hostility towards the generic notion of political liberalism as a result of the arguments presented here.[13] This could generate three particular benefits or impacts.

First, I hope that my approach will help theorists who eschew deontological or primary constructivist approaches to normative political theory to actively consider using a generic framework of political liberalism and constitutionalism. Dissatisfaction with deontological moral conceptions of liberalism and human rights as 'side constraints' on the human good has led some public intellectuals and policy thinkers to look for alternatives to 'liberalism' as it has been traditionally conceived. This may be what contemporary public intellectuals and think tank leaders have picked up on with their recent notions of the 'Big Society' or the 'Good Society' in the thought of so called Red Tory or Blue Labour intellectual movements respectively.[14]

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[12] Using an analogy from biological taxonomy, New Natural Lawyers may be confusing the 'type species' of Rawls's own version of political liberalism with its genus. In other words Rawls's form of political liberalism gives its name to the genus as well as being the classic example of the species within the genus.

[13] For a recent example of this deep scepticism see: Thaddeus J. Kozinski, *The Political Problem of Religious Pluralism: And Why Philosophers Can't Solve It* (Lanham, MD: Lexington books, 2010).

[14] See for instance Phillip Blond, *Red Tory* (London: Faber and Faber, 2010) or on the centre left see: Maurice Glasman, 'Labour as a Radical tradition', *Soundings: A Journal of Politics and Culture*, 46 (2010), 31-41. Both Blond and Glasman lay great stress on the common good and a virtuous citizenry.

Secondly, though this would be difficult to prove counterfactually, in my judgement the rise of human rights in the discourse of the public sphere and legal structures of the world order in the twentieth century has led to less domination and repression than would have otherwise have taken place. In reinforcing the arguments for subjective human rights from a Thomistic perspective I aim to sustain the breadth of discourse on human rights so that its remediating impact can be sustained. In a similar way, the United Nations Human Development Reports, which have been influenced by the capabilities approach in social and political theory, have helped develop policy based approaches to solving problems of global poverty and injustice. The theoretical perspective outlined here is consistent in some important ways with the capabilities approach and thus may be seen to widen the breadth of theoretical backing for the work that flows from the UN Development Programme and other associated agencies.

Finally, in a society with a plurality of understandings of final human ends, agreement on legal-political measures that appear both to touch on final human ends and intermediate human goods or needs sometimes requires some conceptual unpicking. A conception of political liberalism can assist with this, especially for some religious citizens or those with a convinced philosophical standpoint. For example, some citizens or politicians who are religious believers, or who have certain metaphysical views on marriage, may hold that the theological and metaphysical fullness of marital union can be found only in the heterosexual 'one flesh union' of husband and wife, may on the basis of practical reasoning (or on a mix of practical and theoretical reasoning) nonetheless recognise that same sex partnerships can realise certain fundamental human goods or meet basic needs and thus recognise the case for substantive forms of legal recognition of such relationships.[15] This could be the case even if the same citizens did not proceed to advocate that the formal marriage rites of their religion be extended to same sex couples. This is, in effect, how many religious believers across several parties in the UK Parliament - including the Prime Minister of the day - were able to justify the passage of the Civil Partnership Act 2004. This Act could therefore be construed as an example of political liberalism in action. In a system of political liberalism, we may say that (*pace* Voltaire) the best (the *summum bonum*) does not have to be the enemy of the good.

3). The methodological approach

In one sense this thesis consciously retrieves the understanding classical notions of philosophy as it was transformed theologically by Thomas Aquinas. As a school of thought

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[15] Some argue that aspects of New Natural Law theory itself can justify recognition of same sex unions, see: Joshua D. Goldstein, 'New Natural Law Theory and the Grounds of Marriage: Friendship and Self-Constitution', *Social Theory and Practice,* 37 (2011), 461-482.

Thomism is subject to a variety of diverse and somewhat incommensurable readings.[16] This may bewilder the general philosopher, but in a way it also shows the fertility of a school of thought that it has adapted to some degree to the prevailing philosophical conditions of the age. In Alasdair MacIntyre's parlance, Thomism has survived various 'epistemological crises'[17] and has come out 'the other side' with proponents convinced of the durability of its key tenets in forms that retain a continuity with central ideas found in St Thomas's oeuvre.[18]

The focus of this thesis is ethics and politics – what Aristotle calls the 'philosophy of human affairs'. In the view outlined here, a theory of *political* right (*droit politique*) or legal justice is distinguishable but not separable from the ethical domain. The challenge for a contemporary interpreter of Aquinas's political theory is that St Thomas himself did not leave an already elaborated or coherent 'Thomistic political science',[19] though clearly he left sufficient material in his treatment of law, prudence and justice to inspire political orientations among those who draw inspiration from him. The pitfalls of interpreting Aquinas are significant - there is precious little agreement on whether his commentaries on Aristotle are representative of his own views and there continues to be a sharp debate about the extent to which Aquinas's works outline a philosophical position as well a theological position. It is important to state that, unlike some early and mid twentieth century neo-Thomists, I do not see Aquinas as offering all the answers to contemporary philosophical or theological problems. I also, by writing of the Thomistic tradition do not wish to underestimate how contested such a label or concept is.[20]

Despite this Aquinas's moral and social theory offers insights into some contemporary ethical and political problems. His ethical theory combines a eudemonistic virtue ethic with

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[16] For an excellent guide see Fergus Kerr, *After Aquinas: Versions of Thomism* (Oxford: Blackwell, 2002).

[17] 'Epistemological crises' arise for MacIntyre when two intellectual traditions come into direct confrontation, forcing the tradition to deal with powerful critical arguments questioning the underpinning elements of that philosophical position. Thomism for MacIntyre is the most successful tradition of inquiry in this respect, having survived a confrontation with voluntarism, Lutheranism, Kantianism and so on. As MacIntyre writes: "To have passed through an epistemological crisis successfully enables the adherents of a tradition of enquiry to rewrite its history in a more insightful way. And such a history of a particular tradition provides not only a way of identifying the continuities in virtue of which that tradition of enquiry has survived and flourished as one and the same tradition, but also of identifying more accurately that structure of justification which underpins whatever claims to truth are made within it..." Alasdair MacIntyre, *Three Rival Versions of Moral Inquiry: Encyclopaedia, Genealogy, and Tradition* (Notre Dame, IND: University of Notre Dame Press, 1990), 169.

[18] Though key aspects of Thomist thought has been formally endorsed by the Roman Catholic Church, this thesis does not proceed on the basis of an official ecclesially endorsed account of Thomas Aquinas's thought. This is important because the Roman Catholic Church claims the competence and authority not only to teach authoritatively the content of revealed divine law (as one might expect), but also to teach in a definitive way the application of natural law precepts in certain moral norms, such as in relation to contraception and other controversial questions.

[19] Mark D. Jordan, *Rewritten Theology: Aquinas after his interpreters* (Oxford: Blackwell, 2006), 46-56.

[20] Mark Jordan writes that "there has always been fierce rivalry among claims on Thomas's authority. "Thomist" like "Christian," is a term that stakes a controversial claim, not one that records a neutral designation", in Jordan, *Rewritten Theology*, 6.

innovative practical principles applied in the moral and political spheres. I use Aquinas's theory by consulting the translated primary texts but mainly by using contemporary interpreters who have constructively used Aquinas to address the social and moral issues of our time.

This is where a brief prolegomenon on the overarching method that I employ in this work of practical philosophy may be helpful.[21] This methodological starting point is based on the classical dialectical method. The genesis of this work is thus a series of questions deriving from the fundamental question of classical political philosophy: Which is the best regime?

Further questions derive from this macro question, and those questions are prompted by the cultural context of modernity where societies face a new set of critical challenges. In this context the sub-questions deriving from the question of the best regime are not entirely original: they relate to the rational or moral basis of legal/political rule in the pluralistic societies:

> "Since the structure provided by the political/legal order will rule over all equally, how can the universalism of *political/legal* structural principles square with the pluralism and self-direction required by human flourishing? Hence, how is it possible to have an ethical basis for an overall or general social/political context…..that will not require, as a matter of principle, that one form of human flourishing be preferred to another? How, in other words, can the possibility be achieved that various forms of human flourishing will not be in structural conflict?"[22]

The converse but related question to those posed above is just as important, as one may ask: "How can we identify social demands that all have sufficient reason to acknowledge as moral demands?"[23] These questions are real 'existential' questions in that they affect how we act in the world and relate to others. They are questions not only for academics but ultimately for all persons. That philosophy should address real questions posed by people is important for a theorist such as Alasdair MacIntyre, who argues that neither the university nor the activity of philosophy is any longer seen as engaging the questions of "plain persons." For MacIntyre these questions include:

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[21] Brevity is helpful in prolegomena as Jeffrey Stout quips that "preoccupation with method is like clearing your throat: it can go on for only so long before you lose your audience." Jeffrey Stout, *Ethics After Babel* (Boston: Beacon Press, 1988), 162.

[22] Douglas B. Rasmussen and Douglas J. Den Uyl, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (University Park, PA: Pennsylvania State University Press, 2005), 284-285.

[23] Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge: Cambridge University Press, 2011), 262.

"What is our place in the order of things? Of what powers in the natural and social world do we need to take account? How should we respond to the facts of suffering and death?...What is it to live a human life well? What is it to live it badly?"[24] "[A]nd [for] those who have hitherto accepted their assigned place in the social order may now ask: "Is this order just?"[25]

I agree with MacIntyre that "[p]hilosophy answers questions that are or should be of interest to everyone"[26] and that philosophers, when acting for the common good, should take care to address the questions of plain persons in addressing life's questions and not only address the technical questions posed by one's academic peers.

Pierre Hadot's reflections of the role of philosophy in Greco-Roman antiquity echo MacIntyre's concerns. Hadot charts how philosophy was seen as 'a way of life' for free men who seek after, but never fully attain, wisdom (a *philo-sophos* rather than a *sophos*).[27] This pursuit of wisdom involves practicing philosophy as a profound self examination, an intellectual, moral and even a *spiritual* exercise – a process not restricted to detached or abstract speculation. Socrates' dialogue with his interlocutors in this understanding was not to impart pre-formulated truths but to draw them into philosophy as process of re-formation and conversion of self. This conversion brought about a change in life as it was lived and "to look on the world in a new way".[28] Philosophy was not seen as a withdrawal from the true concerns of life. Hadot sees Socratic dialogue as a social process of self-criticism or examination of conscience that becomes "a communal spiritual exercise."[29] Similarly the Platonic dialogue, also with its dialectical method, is closely related to the notion of philosophy as a spiritual exercise for Hadot. Painstaking and discursive though this method may appear at times, its fruits are finally to give light to questions on how to live and how to die.

Donald Philip Verene, in his book *Philosophy and the Return to Self Knowledge,* expresses some of the same philosophical sentiments, arguing that the Delphic injunction 'Know

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[24] Alasdair MacIntyre, *God, Philosophy, Universities: A Selective History of the Catholic Philosophical Tradition* (Plymouth: Rowman & Littlefield, 2009), 9.

[25] MacIntyre, *God, Philosophy, Universities,* 10.

[26] MacIntyre, *God, Philosophy, Universities,* 10.

[27] Pierre Hadot, *Philosophy as a Way of Life*, Arnold I. Davidson (Ed.), trans. Michael Chase (Oxford: Blackwell, 1995), 90. Leo Strauss also recognised this point and connected this conception of philosophy with the political when he wrote: "The highest subject of political philosophy is the philosophic life: philosophy – not as a teaching or body of knowledge, but as a way of life – offers, as it were, the solution to the problem that keeps political life in motion", in Leo Strauss, 'On Classical Political Philosophy', *What is Political Philosophy?* (Chicago: Chicago University Press, 1988 [1959]) at 91.

[28] Hadot, *Philosophy as a Way of Life*, 107.

[29] Hadot, *Philosophy as a Way of Life*, 90.

Thyself' gives philosophy one of its core tasks.[30] Though he uses Renaissance thinkers and Vico as much as the Ancients to make his case, Verene holds that critical philosophy is unable to help people solve the problem of how to live and this form of philosophy instead becomes turned in on itself. Descartes' quest for certainty in philosophical disciplines (in his *Discourse on Method*) marginalises the *studia humanitatis* (including moral philosophy) on the basis that it is merely probabilistic. This sets the epistemological bar for critical philosophy, which perpetually seeks foundations that are certain for all forms of reasoning.

The linage from Descartes to contemporary ethics can be seen in the philosophical sub discipline of metaethics, which examines the very basis of ethical action and its fundamental metaphysical and epistemological presuppositions. But as Verene writes "critical reflection can never generate virtue"[31] or the communal virtue the Ancients called civil wisdom. As MacIntyre might claim, the painstaking dissection of the basis of all ethical language by analytical metaethicists may not help a 'plain person' live her life – well or otherwise. As Martin Rhonheimer writes, highly abstract metaethical reflections appear "not to be problems *of* ethics at all, but rather problems that philosophers have *with* ethics", whereas the genuine problems about the nature of the good that metaethicists seek to investigate are in fact "problems that must be answered in the course of undertaking ethical reflection itself".[32]

A year after *Philosophy and the Return to Self Knowledge* was published Pope John Paul II opened his programmatic encyclical letter on the relationship between philosophy and theology by recalling the central importance of self-knowledge to ethical life. He wrote:

> "within the horizon of personal self-consciousness: the more human beings know reality and the world, the more they know themselves in their uniqueness, with the question of the meaning of things and of their very existence becoming ever more pressing… The admonition *Know yourself* was carved on the temple portal at Delphi, as testimony to a basic truth to be adopted.... [A] cursory glance at ancient history shows clearly how in different parts of the world….., there arise at the same time the

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[30] Donald Phillip Verene, *Philosophy and the Return to Self-Knowledge* (New Haven CT: Yale University Press, 1997). I am indebted to Bruce Haddock's article 'Against the Current: Speculative Knowledge and Practical Wisdom' in Glenn Magee (Ed.), *Philosophy and Culture: Essays in Honor of Donald Phillip Verene* (Charlottesville, VA: Philosophy Documentation Centre, 2002), 15-35, for drawing attention to Verene's book.
[31] Verene, *Philosophy and the Return to Self Knowledge*, 58.
[32] Martin Rhonheimer, *The Perspective of Morality: Philosophical Foundations of Thomistic Virtue Ethics* (Washington, DC:, Catholic University of America Press, 2011), 4.

fundamental questions which pervade human life: *Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life?"*[33]

Pierre Hadot, however, disputes whether the development of medieval Christian thought can be seen as consistent with his understanding of classical philosophy. For Hadot the notion of 'Christian philosophy' subalternated philosophy to theology and focused spiritual contemplation on the revealed word of God. Philosophy in late scholasticism thus became abstractly theoretical and divorced from life. Philosophy only regains it orientation for Hadot in the work of Henri Bergson, Nietzsche and the existentialists. This picture may be correct in some respects in relation to late scholasticism and neoscholasticism, but whether this is a valid criticism of Aquinas and his contemporaries is rightly disputed by Wayne Hankey.[34]

Fears about a strong form of foundationalism include that it will require a form of social or political monism that is inattentive to human difference and legitimate forms of ethical or religious plurality. This question derives in part from the ancient philosophical issue of the One and the Many. If there is just one clearly justified form of the human good - a *summum bonum* for all people - then a foundationalist political theorist may feel that there are grounds for the enforcement of this highest good politically through coercive measures. This appears to be how, historically, many Western societies treated some minority groups before the advent of liberalism or human rights,[35] where religious or ethical norms were not infrequently enforced through fear, incarceration, or the pain of death. This last matter is a legitimate concern and it is one that needs to be answered. [36]

As we see in chapter 2, the ethical method I endorse avoids primary constructivism as it contends that ethics is fundamentally eudaimonistic and first person centred. Primary constructivists, be they discourse ethicists or Kantians, hold that ethical norms - not only political norms - should be agreed through the application of universal procedures or principles. They see this as necessary because they hold that practical reason cannot, in any reliable way, apprehend human goods. Eschewing primary constructivism does not

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[33] John Paul II, Encyclical Letter: *Fides et Ratio*, §1, promulgated on 15 September 1998, emphasis in original. Available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html , accessed 9 August 2011.

[34] Hankey denies that the proper Thomist position abnegates or undervalues philosophy maintaining that the medieval universities in fact helped to transmit the legacy of ancient philosophy. Hankey thus maintains that *both* philosophical and theological exercises have a rightful and valuable place from a Christian perspective. Wayne. J. Hankey, 'Philosophy as Way of Life for Christians? Iamblichan and Porphyrian Reflections on Religion, Virtue, and Philosophy in Thomas Aquinas' *Laval Théologique et Philosophique,* 59 (2003), 193–224.

[35] Which is of course not to say that unjust war and oppression has not occurred in the modern period by states that have supposedly adopted aspects of liberalism or human rights.

[36] The counter reaction to the Wars of Religion is cited by John Rawls as one of the key impulses behind the development of liberal constitutionalism in the first place. See John Rawls, *Political Liberalism*, revised edition (New York: Columbia University Press, 1996), xxiii ff.

mean that the application of universal principles is not helpful specifically in a political context (secondary constructivism).

(a) Was Aquinas a foundationalist or an essentialist?

Thomas Aquinas has been seen as an exponent of both foundationalism and essentialism and thus many contemporary theorists would question the fecundity of using his theory as a *point du départ* for moral or political theory. Foundationalism has been considered important in practical philosophy because of the perceived need to ground or justify either a theoretical or normative account of ethics or politics. The justification of an ethical or political theory has often not been fully self standing but related to a wider chain of inferred justifications from foundational premises. Foundations are thus considered basic beliefs beyond which no further or deeper justification should be given. Such foundations in the history of philosophy have often been theistic, naturalistic, empiricist, or based on some other philosophical doctrine. It serves as a basis for the objectivity of justificatory reasons – to oneself or others - in individual or communal judgement. Such foundations metaphorically serve as anchors upon which justifications can be built or constructed. They can serve as the basis for the construction of ethical or political principles upon which moral or social understandings may be elaborated.

Realist forms of philosophical reasoning have been critiqued by a variety of theorists, including (modern) sceptics, emotivists, post-modernists and relativists. I need not explore this wide variety of philosophical critiques of realism – including foundationalism – but will consider in what sense Aquinas may be seen as a foundationalist, if at all. This issue has been recently surveyed and assessed by A.N. Williams, who judges that Aquinas was not a foundationalist because he did not hold to the conventional meaning of the term in modern epistemology. Williams interprets Aquinas's fundamental epistemological stance to be that in "this life there is not so much a hierarchy of *knowers* as a community of *trusters*"[37] as although Aquinas "does not ascribe error to the human formulations which are the articles of faith, or to the divine revelation..,[as] the very process of theological reasoning is theoretically open to error; …, Aquinas is not willing to deem either the church's tradition or philosophy as possessing any kind of certitude ([*ST* I] q. 1, a.8, ad 2)."[38]

Many of Aquinas's other interpreters hold that we can reach an adequation between the subject's knowledge of objects (quiddities) and thereafter their essence or nature, rather

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[37] See A.N. Williams, 'Is Aquinas a Foundationalist?' *New Blackfriars*, 91 (2010) at 20-45, 38. Williams cites other interpreters who support her verdict that Aquinas was not a foundationalist, as well as a number of figures who think he was a foundationalist to a lesser or greater degree.
[38] Williams, 'Is Aquinas a Foundationalist?' at 39.

than *certainty.*[39] It is relevant to note here that Aquinas also maintained that the philosophical knowledge of God in this life was not self-evident or easy to attain, even to the wise.[40] In relation to practical reasoning Aquinas also stresses the difficulties and fallibilities in human action the further away from general principles one moves,[41] which is one reason why Aquinas's ethics gives such an important role to the virtue of prudence.

The moral and political theory outlined in this work eschews both foundationalism and primary constructivism. It eschews foundationalism because the ethical basis on which it is based (on facts or concepts about human nature) are not held to be known with certainty or in a way that makes them immune from revision. I acknowledge that many moral norms or outlooks that have been considered binding or definitive in societies - including Western societies - have shown themselves to be a product of contingency or human prejudice. There is thus a legitimate contemporary philosophical caution in holding that a philosophical concept or a concrete moral or political norm is universally binding, as if determined *sub specie aeternitatis.* This does not preclude a notion of moral objectivity or validate a form of relativism, but it certainly may cause us to treat with some caution the modern conception of epistemic certainty (as first established in mathematics or the natural sciences) as applied to ethics or politics - as if human ethical action was akin to working through a scientific theorem.

The accusation of essentialism against Thomas Aquinas and later Thomists is a related question. Essentialism - the philosophical notion that classes of entities or quiddities (such as 'God' or 'humans') have set universal and clearly definable characteristics or properties - has also come under significant philosophical critique. Skeptics, Kantians, existentialists, phenomenologists, historicists and Heidegerians have all critiqued essentialism in different ways. Essentialism is criticised for its philosophical naiveté and its lack of historical or contextual consciousness. Martin Heidegger's critique is based on what he viewed as a forgetfulness of Being, where the proper metaphysical distinction between Being itself and actually existent beings is overlooked. In relation to theism, Heidegger thought that Aristotle's metaphysics of substance, in his eyes perpetuated by Aquinas and the scholastics, made God into a 'being' somehow on the same plane as finite beings (albeit as

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[39] Adequation should not be seen as synonymous with probabilistic understandings in epistemology.

[40] Something pointed out by John Finnis in his *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 32 (citing *ST*, I, q.2, a.1).

[41] "The practical reason is occupied with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects. . . . In matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles: and where there is the same rectitude in matters of detail, it is not equally known to all. . . . And this principle will be found to fail the more, according as we descend further into detail." Thomas Aquinas, *ST* I-II, q. 94, art. 4.

a 'supreme being') – creating the baleful philosophical outlook he called he called ontotheology.

The extent to which Aquinas might be described as an essentialist is also disputed. Certain strands of neoscholasticism stand accused of propounding an 'essentialist Thomism'. Partly in reaction to this the twentieth century saw a more historically informed understanding of St Thomas's thought emerge, as propounded by figures such as Etienne Gilson. Gilson denied that Aquinas put forward an essentialist understanding of God, or of human beings. A new school of Thomism (inspired by Gilson) - 'existential Thomism' – emphasised what it saw as Aquinas's unique metaphysical innovation. This innovation, a departure from Aristotelian metaphysics as they saw it, was the notion of God as Pure Act or *ipsum esse subsitens* ('being itself subsisting').[42] In Gilson's reading of Aquinas, essence and existence are fully coextensive in God alone - whereas essence and existence can be distinguished in some way in created beings. Thus God is not a 'being' - an entity in the created order - but is wholly on a different metaphysical plane to human beings.

What allows humans to even conceive of God in Aquinas's theory is his doctrine of analogy or the *analogia entis* (the 'analogy of being'). In this understanding the uncreated God and creation is separated by an 'analogical interval' that admits an infinite ontological distance between the transcendent creator and beings in the created order. For one interpreter this idea of the *analogia entis* leaves one with a "largely apophatic, almost antimetaphysical ontology – or even meta-ontology….now that revelation has obliged us to take leave of a naive metaphysics that would oblige us to grasp God through a conceptual knowledge of essences or genera."[43] Therefore any ascribed or predicated commonality between human persons ('beings') and the triune divine Persons (subsistent 'Being') must be accompanied by an acknowledgement of their vastly greater dissimilarity. Aquinas uses a neo-Platonic 'metaphysics of participation' inherited from Augustine and the Greek Fathers to help span this creator / creation distinction.

Aquinas's position on human nature, in my understanding, is not that of a straightforward essentialist, though there are noted interpreters of Aquinas who read his anthropology in such a manner.[44] Aquinas considers the very notion of human nature as "a double

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[42] See Etienne Gilson, *The Christian Philosophy of St Thomas Aquinas* (Notre Dame, IND: University of Notre Dame Press, 1956), chapter 1, 29ff.

[43] David Bentley Hart, 'The Destiny of Christian Metaphysics', in Thomas Joseph White (Ed.) *The Analogy of Being* (Grand Rapids, MI: Wm. B. Eerdemans, 2011), 396.

[44] See, for example, Steven A. Long, *Natura Pura: On the Recovery of Nature in the Doctrine of Grace* (New York: Fordham University Press, 2010).

abstraction",[45] in that he firstly conceives of human persons as 'existents' and he never writes of human nature as if it actually existed apart from the providential order. Some follow Etienne Gilson by writing of Thomas's 'existentialism' - though distinguishing his form of rational existentialism from the "anti-rational" and voluntarist version propounded by twentieth century French existentialists.[46]

Influential readings of Thomas's anthropology have emphasised Aquinas's creative integration of Greek philosophy with scripture and patristic theology. Although Aquinas did employ Aristotelian philosophical categories which are the mainstay of conceptualist metaphysics (form and matter, substance and accident, act and potency), his anthropology is clearly individuated to an important degree. Human beings as existents have individual souls (a form) that interpenetrates the body (as matter) in a way that subsumes into itself all those lower material formalities which the body has as an organised entity. In other words the soul possesses a unique individuality which is not derived from bodily matter.[47] It is the soul – the form of the body – that constitutes the *substantial form* of the entity Aquinas calls a human *person,* a term which is itself is analogously related to the Persons of the Trinity.

(b). The integrative role of metaphysics

Reference to the role of metaphysics will be made at various points throughout this work and so it is appropriate to outline what I may mean by such a term. I see the task of metaphysics as examining the nature of reality to its widest and fullest extent – to think about 'being as being' (in Aquinas's definition of metaphysics' proper object). Thus the proper object of metaphysics is *not* God in himself (as subsistent Being), who cannot be seen or truly known in this life, but the natural order itself. Only insofar as the natural order points, through chains of causality, to an Uncaused Cause then metaphysics concerns itself with what has been called natural theology.[48] This clearly opens metaphysics to a theistic perspective but does not reduce the whole of metaphysics to natural theology. In relation to a philosophical

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[45] Harm Goris writes that for Aquinas a concept of human nature would "not only…[be], abstracted from concretely existent, individual human beings, but it also abstracts from the actual history of salvation of this world, ..… A state of pure nature *(status naturae purae)* does not exist in reality". See Harm Goris, 'Steering Clear of Charybdis: Some Directions for Avoiding "Grace Extrinsicism" in Aquinas', *Nova et Vetera*, English Edition, 5 (2007), 67–80, at 68.

[46] Eric Mascall vividly concludes that Thomas's philosophy is "far from, as is too often imagined, couched on a bed of amaranth and moly in an essentialist nephelococcygia, is concerned above all else to grapple with the obstinate realities of existential fact." See E.L. Mascall, *Existence and Analogy*, (London: Darton, Longman and Todd, 1949), 64.

[47] As Eric Mascall expresses it since "the specific essence is constituted not merely by a mere logical anteriority of the universal to the particular, but by a common life generated by the individual existents in their concrete activity." See Mascall, *Existence and Analogy*, 62.

[48] Natural theology is to be strictly distinguished from revealed theology, which for Aquinas is a deliverance of the theological virtue of faith.

anthropology for example, the findings of the natural sciences (especially psychology), and the social sciences play a role, but in order to fully organise and evaluate the findings of the senses and the findings of the natural and social sciences, an interdisciplinary and integrative perspective is required. This perspective is provided by metaphysics.[49]

Various schools of Thomism delineate the role of metaphysics differently. 'Essentialist' Thomists hold that persons can establish the need to reason metaphysically prior to, or apart from, the findings of natural philosophy or the natural sciences.[50] The special sciences (*scientia*) in Aquinas are disciplines and areas of knowledge with their own formal subject matter and methodological points of departure. They include the 'philosophy of nature', classically considered to be physics. The role of metaphysics is to integrate the findings of the special speculative sciences and to order them to the goal of wisdom. In the contemporary Thomistic understanding of metaphysics I outline here,[51] it is for natural science to establish *a posteriori* the necessity of immaterial being(s) as unobservable causes reasoned to from observed effects, without which metaphysics may not be seen to have a real referent, and thus not be a real science.[52] Some Thomists see modern natural science to be part of the philosophy of nature – the position held here - while others like Jacques Maritain held that natural philosophy and modern science are different. Thus in modern terms the natural sciences (medicine, biology, psychology) have a role in helping to establish some understanding of human nature through speculative reasoning.

Among these speculative special sciences metaphysics would have an integrative role in bringing together and organising the (always provisional and revisable) findings of the natural sciences (and the human sciences in a different way). A metaphysical anthropology would then have the role of bringing such findings together to address more fundamental existential questions such as: When does the life of a human being begin? What is a human *person* (as opposed to a human *being*)? Do humans have souls? Is there a unity between the human self or soul and the human body? Is there life after death? The answers to these questions will be found by the seekers, I do not claim that there is a formulated *philosophia*

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[49] The influence of here of Benedict Ashley's approach to metaphysics is clear, which is that of the 'River Forest School' of Thomism (or Aristotelian Thomism as Ashley prefers to call it) at least as it is concerned with metaphysics. I do not share all of Ashley's views in relation to practical philosophy, which may differ in ways to some of the positions outlined in out chapter 2. Ashley prefers to call metaphysics 'metascience' in order to capture its role eponymously. See Benedict Ashley OP, *The Way towards Wisdom: An interdisciplinary and intercultural introduction to metaphysics* (South Bend, IND: Notre Dame University Press, 2006).
[50] The contemporary Thomist Lawrence Dewan holds such a position. For a collection of his essays on the role of metaphysics see: Lawrence Dewan, *Form and being: studies in Thomistic metaphysics* (Washington, D.C.: Catholic University of America Press, 2006).
[51] See Ashley, *The Way towards Wisdom,* especially chapters 3, 4 and 5.
[52] For a survey of how modern science and neo-Aristotelian conceptions of science can be mutually enriching see John Lamont, 'The Fall and Rise of Aristotelian Metaphysics' *Science and Education*, 18 (2009), 861–884.

perennis that need only to be passed down through the generations like a religious creed. This would be to misunderstand the task of metaphysics, which as Fergus Kerr writes is "not a body of knowledge to be imparted (like British history, physiology, or quantum mechanics) but an activity - a way of being in the world - into which one is best initiated in face-to-face exchange…. Wittgenstein, after all, maintained that "philosophy is not a body of doctrine but an activity" (*Tractatus* 4.112) - a conviction only confirmed in his later work."[53]

The concept of metaphysical realism in contemporary ethical theory is much contested. Many theorists from different background deny the role of metaphysics in ethical thinking, holding to the Humean "is-ought" distinction. Emotivists and noncognitivists for example generally disavow essentialism altogether while other theorists may be considered moral realists (such as like Hilary Putnum or Martha Nussbaum), but appeal to a non-metaphysical form of essentialism often known as 'internal realism' or 'internalist essentialism'. In their understanding, no external metaphysical viewpoint can establish the nature of things, but we can evaluative "from within" what is essential from what is accidental in human life and what "is deepest and most indispensable in our lives".[54] Here it is possible to both agree and disagree with Nussbaum: the evaluation of what is deepest and most indispensible does indeed commence with the person's self-experience as a practical agent, including her speculatively undervied experience of basic human needs and goods - this self-experience can generate some shared understandings of what is necessary and good in human existence.

I disagree, however, with Nussbaum's denial of a teleological or properly metaphysical understanding of human persons and their end(s), and hold that such a understanding can be found - however provisionally (and without modern 'certainty') – through speculative inquiry. I concur, for instance, with Douglas Rasmussen's helpful use of Aquinas's metaphysical distinctions against Nussbaum's and Hilary Putman's critique of naïve metaphysical realism, arguing that a form of metaphysical realism can be useful in underpinning ethical claims, and that relying wholly on interpretative or practice based understandings of ethical understandings is insufficient.[55]

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[53] Fergus Kerr, *'Fides et Ratio,* Analytic Philosophy, and Metaphysics of Goodness'*, Nova et Vetera,* English Edition, 3 (2005): 615–636, at 628.
[54] Martha C. Nussbaum, 'Human Functioning and Social Justice: In Defence of Aristotelian Essentialism', *Political Theory*, 20 (1992), 202-246, at 207-208.
[55] See Rasmussen's effective use of Aquinas in Part IV (a) and (b) of: Douglas B. Rasmussen, 'The Importance of Metaphysical Realism for Ethical Knowledge', *Social Philosophy and Policy* 25 (2008), 56-99. At 91, he quotes Aquinas "For although it be necessary for the truth of a cognition that the cognition answer to the thing known, still it is not necessary that the mode of the thing known be the same as the mode of its cognition." (*Summa contra Gentiles,* II, 76); this distinction, for Rasmussen "allows us to acknowledge many of the

Philosophers in modernity often try to establish what they can about the natural order and the good without first pursuing questions about God's existence. In this regard Fergus Kerr's view is more attractive when in noting the revival of forms of non-theistic ethical naturalism (such as that put forward by Philippa Foot) he affirms that:

> "one might....be happy to delay the introduction of theistic considerations in favor of saying as much as possible within the ambit of a naturalistic ontology and philosophical anthropology. Since analytic metaphysicians are unlikely to turn to natural theology in great numbers in the proximate future, we really have no alternative—unless, of course, we prefer to keep aloof."[56]

Such studied aloofness is not necessary from this perspective as there is already a double delay in the introduction of metaphysics into ethics and politics; first in relation to the proper initial role of the natural (and social sciences) in speculative philosophy, and secondly in the allowance of a significant and initial role for the exercise of practical reason. This double delay may allay the legitimate fears of some that Thomistic approaches have unduly upfront metaphysical commitments - even if it does not persuade those who rigorously maintain the post-metaphysical tenor of contemporary philosophy, or the necessity of understanding religious claims themselves on so called "weak thought".[57]

That said I consider that a position that excludes all reasoning that might be thought of as metaphysical chastens the proper role of philosophy in the academy and in public life, leading to the undue fragmentation of knowledge.[58] Though the intellect is limited in the truth that can be attained through metaphysics, it nonetheless plays an important role in thinking about humanity and the world in which we live. Transcendental reflection on the conditions of moral agency – itself a limited form of metaphysics - offers no substitute for an ultimately

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important points often advanced against epistemological realism by its critics, without having to give up the claim that we can nonetheless come to know things more or less adequately."

[56] Kerr, *'Fides et Ratio,* Analytic Philosophy, and Metaphysics of Goodness', at 630. Kerr suggests fruitful dialogue with neo-Aristotelian and naturalistic philosophers like Foot: "While we have discovered, in recent years, that there is much more to "Thomism" than "Aristotelianism," the possibility lies open for a re-engagement with Aristotle's philosophy in ways that could bring Thomists and some analytical philosophers together to find common ground", at 635.

[57] See for example Gianni Vattimo, *After Christianity*, trans. Luca D'Isanto (New York: Columbia University Press, 2002). Here Vattimo accepts Nietschean, Heideggerian and historicist critiques of the Greek, Medieval and modern understandings of 'truth', which are cited as examples of 'strong thought'. 'Weak thought' for Vattimo eschews truth claims as they have been traditionally conceived and instead rests on interpretative understandings of religion and ethics in a fully contextual and post modern way.

[58] Martin Loughlin, whose project of re-establishing the centrality of political right in theorising about public law I sympathise with, remarks that "modern disciplinary specialisation has contributed to certain losses in understanding" particularly relating to juristic discourse. See Martin Loughlin, *The Foundations of Public Law* (Oxford: Oxford University Press, 2010), 9ff.

(metaphysically integrated) philosophical anthropology.[59] The fact that different varieties of metaphysical realism or forms of ethical naturalism seem to be regaining some credence in analytical ethics is an interesting turn.[60]

(c) The perdurance of the 'the theological-political question'

The subject matter of this work is the philosophy of human affairs and thus the focus of the work is philosophical rather than theological and focussed primarily on the 'natural'. However, it does not exclude Christian theological ideas, especially those theological conceptions as they necessarily relate to discussions of human nature and human ends (as we see particularly in chapter 2).

A perspective in philosophy that is open to a theological or theistic completion can be seen as helpful rather than disadvantageous in some contemporary social and political thought. Though it may not be right to go as far as Carl Schmitt in his bald assertion that "all significant concepts of the modern theory of the state are secularized theological concepts", [61] his statement indicates the indebtedness of Western political theory to its Christian inheritance. I concur with more recent continental theorists that, contrary to some of the sociological theories of the 1960's that forecasted the complete secularisation of Western society within a few decades, there remains for many citizens and social theorists of many stripes an irreducible relationship between human conceptions of God's relationship with the created order and understandings of political life.[62] Whether Western countries are entering into, or have entered into, a 'post-secular era' or are undergoing 'desecularisation' is difficult to discern and depends on one's initial definition of secularisation. The notion of the secular is now, at least, receiving proper theoretical treatment in the hands of a range of scholars in

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[59] In seeing the advantages of an Aristotelian Thomism in speculative philosophy of the kind Ashley espouses, I do not wish to wholly deny the Transcendental Thomist insight, gained from Joseph Marechel's and Karl Rahner's friendly confrontation with Kant, that there are passages in Aquinas that may used to parallel a 'transcendental' reflection on the conditions of agency, in that "every act of knowing and choosing as implicitly knowing and choosing the truth and goodness which is the mystery of the divine being… [the experience of which discloses to the agent] the *a priori* conditions that Thomas took for granted in his understanding of human experience: namely, that in every act of knowing and loving the human being is tacitly and no doubt mostly unwittingly growing closer (or further away) from God." See Kerr, *After Aquinas*, at 208.

[60] Among the philosophers who have made some use of what may be understood as ethical naturalism or metaphysical realism in their ethical theory (apart from those already mentioned such as MacIntyre and Foot), I include Alan Donegan, David Wiggins, John Haldane, David Oderberg, Candace Vogler, Michael Thompson, Warren Quinn, Gavin Lawrence, Anselm Müller, John Cottingham, and before them, the late Peter Geach.

[61] Carl Schmitt, *Political Theology* (Chicago: University of Chicago Press, 1985), 36. This quotation clearly oversimplifies the issues not least because it does not in turn acknowledge the partial indebtedness of Christian theological thought to its forebears in Roman and Greek thought, both philosophical and juristic. In any case I am far from convinced that Schmitt correctly outlined the proper outlines of the theologico-political problem not least because he did not correctly explicate Aquinas's view on the relationship between the political order and theology.

[62] See for example Claude Lefort, "The Permanence of the Theologico Political," *Political Theologies: Public Religions in a Post-Secular World* (New York: Fordham University Press, 2006), 153–159, though it is not clear what normative conclusions Lefort draws from the permanence of the theologico-political in his essay.

a way that will prove useful to the debate regarding multiculturalism in political theory. [63] It therefore appears that Tertullian's question 'What has Athens to do with Jerusalem?' will continue to be a relevant question for the foreseeable future. This is not a question avoided in significant parts of this work.

(d) Philosophy and 'value free' social science

Many social and political theorist in modernity turned to the methods of the natural sciences to help solve the methodological vacuum purported left by metaphysics and theology. Positivism in its various forms took a strong place in legal, social and political studies in the late nineteenth and twentieth century, not least as a result of the rise of the German model of modern research university which differed in scope from the humanistic concerns of the medieval university. To the extent that forms of positivism have attempted to put forward wholly or mainly 'value free' social or political theories, such claims have been contested. Leo Strauss was a particularly trenchant critic of positivism, as was Eric Voegelin, though members of the Frankfurt School and Jurgen Habermas have issued their own rather different critiques of positivism.

John Finnis, on a different basis to each of these critics, also denies the possibility of value free social sciences, claiming that at some stage the analysis of human practices, even on a descriptive basis, "can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them."[64] Though I do not go quite as far as Peter Winch in stating that "any worthwhile study of society must be philosophical in character" we may largely agree with the remainder of Winch's sentence that "any worthwhile philosophy must be concerned with the nature of human society."[65] I hold that the social sciences themselves, including political science, are useful and in some cases indispensible in breaking down and unpicking social phenomena so that value based theoretical inquiry may proceed with a sound factual apparatus. This said, I concur with Peter Wagner that when taken to a reductive extreme, such methods pose the "danger of systematically directing attention away from the nature of the political in modern societies" and that political science methodology "cannot be decoupled from problems of social theory in general, [such as] conceptualising the

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[63] See Charles Taylor, *A Secular Age* (Cambridge, MA.: Harvard University Press, 2007) is a prime example of this trend from a (Catholic) philosopher. A different approach from a non-theist may be found in William E. Connolly, *Why I am not a Secularist* (Minnesota, MN.: University of Minnesota Press, 1999).

[64] Finnis, *Natural Law and Natural Rights*, 1.

[65] Peter Winch, *The Idea of Social Science and its relation to Philosophy*, second edition, (London: Routledge, 1990), 3.

constitution..."[66] I therefore agree that social theory and political theory must to some degree relate to philosophical concerns, as will be clear in particular ways throughout this work.

(e) Normative political theory – controversies on method

My view of philosophy more broadly is that it should proceed via a dialectical method in addressing important and, in some way, relevant questions. The role of abstraction or idealization in political theory has caused significant controversy in the last decade or so. Critics of various currents of normative theory complain that the idealisation of human behaviour in much normative theorising removes political theory from reality, with the consequence that it does not address the world as it is. Theories constructed on the foundations of ideal theory are thus alleged not to have the optimum critical purchase.

Here I may call for assistance from Leo Strauss, who helpfully describes how the antique spirit of philosophy relates to what we now call ideal theory. It is a picture that I find more convincing than modern realist approaches that seemingly sever political morality from ethics, including a conception of natural or political right.[67] Classical political philosophy, in Strauss's interpretation, was about finding the best regime or constitution in accordance with natural right, and its consequent idealism was very different from modern utopianism (such as that of Marx). For Strauss, Plato and Aristotle's legitimate utopianism was:

> "*not a theoretical construction*, but a *practical* ideal. By calling….[the ideal constitution] candidly an object of wish or prayer, they left no doubt as to the gulf separating the ideal from reality, they considered that the realization of the ideal is a matter of *chance*,..… [t]hey did not make any *predictions.* While completely suspending their judgments concerning the *realization* of the ideal, they were definite as to the ideal itself: this ideal was….the standard of sincere, uncompromising judgments on the real. The practical meaning of this utopianism was…..[thus] merely to point out the direction which efforts of improvement would have to take. They did not seriously believe that the perfect order of society would ever become a reality;

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[66] Peter Wagner, *A History and Theory of the Social Sciences* (London: Sage, 2001), 39.

[67] Though sharing criticisms of primary constructivism with realists, I do not share their fundamental criticism of 'political moralism' as Bernard Williams labels even John Rawls's *Political Liberalism*. See Bernard Williams, 'Realism and Moralism in Political Theory', in Bernard Williams and Geoffrey Hawthorne (Ed.), *In the beginning was the deed: realism and moralism in political argument* (Princeton, NJ.: Princeton University Press, 2005), 2.

for, being an object of wish or prayer, there is no necessary reason why it should; but they felt that any actual order could bear improvement, substantial improvement."[68]

I therefore do not accept a general critique made by many political realists, that an 'ethics first' conception of politics is *necessarily* problematic, a fact attested to by the chapter structure of this work. Indeed I concur with G.A. Cohen, though on a very different philosophical basis, that in normative political theory a primacy is accorded to fundamental normative 'principles' rather than 'facts'.[69] Non-normative facts (feasibility considerations or 'principles of regulation') cannot in themselves cancel out or mitigate fundamental normative requirements in this view. Cohen was concerned that John Rawls's acceptance of economic incentives within the structure of his theory of justice would justify undue economic inequality – something contrary to justice for Cohen. What seems a key issue in this debate is that, when adopting a constructivist position, one ought to take care not to include considerations that have an implicit or explicit normative impact into purportedly factual understandings of the 'circumstances of justice'.

I believe that it is important to distinguish a legitimate form of ideal theory from utopianism in two ways. Firstly, some modern utopians hold that the tragic in life is avoidable and perfect justice is attainable - or at least at some stage in the course of human history. I do not hold this position and maintain that, to a lesser or greater degree, earthly social or political utopias are not possible and that the tragic in life is ineliminable.[70] This opposition to certain forms of modern utopianism does not, however, dispense with the need for ideal theory, which I define as the theorising in relation to a perfectly just (as far as this is possible in this life) political society and regime. The view of political theory propounded here still emphasises that a key task of political philosophy must be to eliminate the great harms that are still experienced throughout the world by people in different contexts. Just as a physician's ultimate aim is to promote and sustain the health and well being of the patient, the principle of beneficence includes within it the imperative of "first do no harm".

I may therefore agree with the realist in that much political betterment may not derive from improving the already good but from ameliorating the very bad. Indeed, an enacted theory of political rule aimed at 'the good' may well achieve its greatest advances in people's quality of

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[68] Leo Strauss, 'What can we learn from political theory?', *The Review of Politics*, 69 (2007), 515–529, at 522, italics in original. The article is a previously unpublished a lecture by Strauss from 1942. This citation of Strauss here does not infer an endorsement of other aspects of Strauss's theoretical approach.

[69] Gerald A. Cohen, 'Facts and Principles', *Philosophy and Public Affairs,* 31 (2003), 211–45.

[70] Paul Cornish highlights Augustine's view of the tragic, going so far as to write that his "emphasis on the tragic nature of political action is itself a major contribution to the history of republicanism." Paul J. Cornish, 'Augustine's Contribution to the Republican Tradition', *European Journal of Political Theory,* 9 (2010), 133–148, at 145.

life simply by eliminating the harms that dysfunctional regimes or failed states generate. Thus a political liberalism aimed at protecting and advancing the human good and meeting basic human needs is also one that necessarily addresses human evils. Ideal theory allows us to set ourselves the goal of the best – in a way strongly reminiscent of the ancient approach to political philosophy (as Leo Strauss summarised above) – without undermining incrementalism or a legitimate sense of the tragic.

To this classical model of political moralism I may also add a Thomistic theological consideration, one based on the doctrine of original sin.[71] Though a Thomist may allow for the reality of original sin and the disruption that this brings to just relations in human affairs, such an allowance for the inevitability of human wrongdoing or selfishness should not mean that normative theories should be constructed in a way that unduly builds in the human tendency to wrongdoing, as this may distort the very normative purpose of the theory. In the Augustinian and Thomist perspective, for instance, moral badness and sin do not have an intrinsic *ontological* reality – which is not to deny the actuality of (widespread) evil acts and vicious moral agents – but Augustine held that evil or "what are called vices in the soul are nothing but privations of natural good" (the doctrine of the *privatio boni*).[72]

The theologian John Milbank, rightly cautions Christian theorists against building normative theory upon the superstructure of an 'ontology of violence' or conflict (i.e. an ontology in which evil is an opposite ontological reality to 'the good'), as he holds that the (theo-)ontology of Catholic Christianity is essentially that of an 'ontology of peace'. On the same basis some other Christian theorists have expressed serious reservations about agonistic political theory in that it makes conflict (albeit non-violent conflict) a positive and central part of its normative understanding of politics.[73]

4). The chapter structure

The structure of the thesis reflects the method I have outlined above.

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[71] G.K. Chesterton half quipped that the doctrine of original sin was the only Christian doctrine that was demonstrable through empirical observation. See G.K. Chesterton, *Orthodoxy* (Chicago, IL., Moody Publishers, 2009, [1908]), 28.

[72] St Augustine, The *Enchiridion on Faith, Hope and Love* (Washington, D.C.: Regnery Press, 1996 [1961]) at 11-12 (and chapters 10-23 more generally). John Milbank says that with the notion of the *privatio boni:* "that nothing is evil insofar as it exists, then it is evil insofar as its failure to be related to God, to infinite peace, and to other finite realities with which it should be connected to form a pattern of true desire. Evil becomes the denial of the hope for, and the present reality of, community." John Milbank, *Theology and Social Theory*, second edition, (Oxford: Blackwell, 2006), 440.

[73] See, for example, Charles Matthews in his *A Theology of Public Life* (Cambridge: Cambridge University Press, 2007), 266-274, referring to Chantal Mouffe's democratic theory.

Chapter 1 – this introduction - has set out some of the reasons that has prompted the writing of this thesis, its intended impacts, and some of the background methodological presuppositions operating throughout the work.

Chapter 2 proceeds to outline an understanding of human ends, goods and needs through an exploration of contemporary interpretations of ancient, and particularly, Thomistic ethics. The chapter broadly follows the outlines of the Thomist ethical theory persuasively elaborated by the contemporary Swiss Thomist philosopher Martin Rhonheimer, though this theory is enhanced with the adoption of important ideas derived from Julia Annas (on virtue) and Henry Richardson (on the structuring of human ends).

Chapter 3 establishes how justice, natural right and the political common good can be properly understood. The chapter addresses the development of natural and human rights from the natural right tradition and how they might be philosophically justified. The chapter concludes by addressing the usefulness of the concept of natural right and human rights as a basis for social criticism and the concrete remediation of human injustices.

Chapter 4 draws on a variety of contemporary interpretations of Thomist and second scholastic understandings of political and legal theory to address the question of global justice and human rights through the concept of the universal common good and the *ius gentium*. I then critique and reconstruct Rawls's later conception of political liberalism, taking on board criticisms from other theorists, such as Martha Nussbaum, to elaborate a form of permissive political liberalism which can be seen as a species of political liberalism as a genus type.

Chapter 5 elaborates a species of political liberalism with a reflection on contemporary forms of republicanism and constitutionalism. The chapter concludes by critically marshalling insights from both traditions to specify more clearly a form of political liberalism.

Chapter 6 concludes the work by drawing the various themes in the thesis together while addressing the question of how legal and political duties can impact on one's ethical outlook.

CHAPTER 2

ETHICAL UNDERPINNINGS GROUNDING POLITICAL ASSOCIATION

1. INTRODUCTION

a). Purpose of the chapter

The chapter will explore an approach to practical rationality based on a classical virtue ethic. I examine the eudaimonistic underpinnings of classical and Thomistic ethics, looking at the similarities and differences between classical and modern approaches to human fulfilment. I examine the different ways in which human fulfilment (eudaimonia/beatitude) has been conceived in its contemporary Thomistic guises, critically examining the role of natural law theory in Aquinas's ethical theory with reference to the key primary texts. I argue that Aquinas's natural law theory is one important element within his wider eudaimonistic ethic, which is itself embedded in a metaphysically and theologically grounded framework. In expounding this moral theory I will critique understandings of Aquinas's ethical theory that stray too far from eudaimonism and a virtue based approach (such as John Finnis), and other exclusively theological readings of Thomistic ethics (as propounded by scholars such as John Milbank), on the other.

In the context of this work generally, I argue that the structuring of human ends in classical and Thomistic ethics is consistent with the importance of justice and civil association, as explored in later chapters. I argue, principally using the work of the Swiss philosopher Martin Rhonheimer, that Aquinas's notion of imperfect beatitude takes full account of the goods of civil life. Aquinas's natural law theory, as a part of his eudaimonistic approach, plays an important role in explaining how moral agents apprehend certain human goods that motivate action. This chapter will not address some of the more intricate meta-ethical questions alluded to in chapter 1,[1] though in the course of the chapter I will explore some of the key dividing lines between classical approaches to ethics and deontological ones.

b). Background

The established narrative of twentieth century moral philosophy places G.E.M. Anscombe's uncompromising lecture 'Modern Moral Philosophy' (to the Oxford Voltaire Society) as a

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[1] Not least because I would suggest that "[m]eta-ethics cannot be understood as a separate discipline, but [is best viewed as] as a working out of some of the conceptual implications of our best normative theory." Christopher Tollefsen, 'Natural law and modern meta-ethics', in Mark J. Cherry (Ed.), *Natural Law and the Possibility of a Global Ethics*, (Dordrecht: Kluwer Academic Publishers, 2004) 39-56, at 54.

watershed moment. The lecture, published in 1958, contains Anscombe's long gestated dissatisfaction with English moral philosophy in the 1950's. Her broadsides against deontological ethics and the newly christened 'consequentialism' raised questions that were not addressed fully until the 1980's and later in the academic literature. Anscombe's lecture and other writings helped to reignite academic interest in ethics from the perspective of the acting person (including action theory) and classical notions of human flourishing, virtue and vice. Though Anscombe's authorities in 'Modern Moral Philosophy' are ancient rather than medieval (Aristotle is mentioned repeatedly - Aquinas and the scholastics are not cited), she refers throughout to the divine law conception of ethics and the "Hebrew Christian ethic".[2]

Interest in the classical and scholastic traditions of ethics flowered in the period after Modern Moral Philosophy, a profusion that continues unabated. In the English speaking academy works by Peter Geach, Anthony Kenny, Bernard Williams, Iris Murdoch, John Finnis, John McDowell, Alasdair MacIntyre and later in published works by Phililpa Foot, Julia Annas and Rosalind Hursthouse. The renewed focus on classic ethics has in turn turned attention to neglected elements of the moral philosophies of Kant, Bentham and Sidgwick (Anscombe's putative opponents in Modern Moral Philosophy) that deal with moral psychology and the virtues.

Martha Nussbaum helpfully characterises three common tenets of the revival of virtue ethics – whether classical or Kantian: (1) a concern "with the agent as well as choice and action", (2) a concern with "the inner moral life, and with settled patterns of motive, emotion, and reasoning" and; (3) a focus on "the whole course of an agent's life".[3] Nussbaum sees the retrieval of such aspects of moral theory as indicating a renewal *across* different schools of moral philosophy rather than as an alternative to Kantian or utilitarian ethics. Nussbaum acknowledges that Anglophone moral philosophy in the 1950's through to the 1980's had not paid much to questions of virtue emphasising instead the role of human choice.[4]

I shall structure my discussion in this chapter around Martha Nussbaum's three points of convergence between different ethical schools (which will be taken in reverse order). In addition to these points from Nussbaum's discussion, I consider a fourth: the contested teleological or naturalistic underpinning of classical ethics. I shall discuss these four points

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[2] G.E.M. Anscombe, 'Modern Moral Philosophy', *Philosophy,* 33, no. 124 (1958), 1-19, at 6, 10-13.
[3] Martha C. Nussbaum, 'Virtue Ethics: A Misleading Category?' *The Journal of Ethics*, 3:3 (1999), 163-201, at 170.
[4] Notable exceptions from this period of course includes the (rarely highlighted) third part of John Rawls's *A Theory of Justice* (Oxford: Oxford University Press, 1971) where he explores the idea of an agent's 'plan of life'. Later analyses of Kant's ethics (by theorists (such as Onora O'Neil and Christine Korsgaard) emphasising the importance of the inner life have helped to bridge the gap between universalistic and particularistic approaches to ethics.

with particular reference to classical philosophers and particularly Aquinas as paradigmatic virtue ethicists, considered through the lens of key contemporary Thomistic (and Aristotelian) interpreters.

2). "A focus on the "the whole course of an agent's life", or ethics as 'eudaimonistic'

(a) Classical understandings of Eudaimonia

The view of view of ethics lived over the course of an agent's life is seen most clearly in the notion of eudaimonia or "a life which turns out well".[5] It refers to the final or highest good *of the person or agent*. Though agents may disagree as to what substantively this might constitute, *eudaimonia* (for Julia Annas) is a "thin specification of the final good"[6] and is commonly translated by contemporary philosophers as 'happiness' or 'well being'. Anscombe herself introduces the term 'human flourishing' in 'Modern Moral Philosophy' to describe the something like the eudaimonistic good for the agent.[7] I retain the original term eudaimonia in this discussion to emphasise that I understand the concept in a way similar to classical ethicists. Eudaimonia is a 'thin' specification of the final good because although it names "'true' or 'real' happiness", it specifies that about which "there can be substantial disagreement" that "cannot be resolved by appeal to some external standard". [8] In this sense a eudaimonistic ethic does not necessarily rest on epistemological foundationalism.

The concept of eudaimonia for Aristotle is an active rather than passive term and is not synonymous with the experience of pleasure or various temporary subjective psychological states as it is in some versions of subjectivist and utilitarian ethics. It refers to the state that a person reaches where: (1) no other end or purpose in life as a whole is seen as greater; and, (2) life is experienced as in some sense as satisfactory by the agent. For Robert Spaemann eudaimonia is not "a particular goal in relation to which other goals are subordinated as mere means" but is "the determinate reflectively obtained 'conceptual essence' which allows all that is desirable in all its multiplicity to grow together, into a desirable whole".[9]

J.L. Akrill clarifies eudaimonia in Aristotle's terms as being "what all men want – it is not, he insists the result or outcome of a life time's effort: it is not something to look forward to (like a

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[5] Robert Spaemann, *Happiness and Benevolence,* translated by J. Alberg (Edinburgh: T&T Clark, 2000), 8.
[6] Julia Annas, *The Morality of Happiness,* (New York: Oxford University Press, 1993), at 43-46.
[7] Anscombe, 'Modern Moral Philosophy', 18-19.
[8] Rosalind Hursthouse, 'Virtue Ethics', The Stanford Encyclopaedia of Philosophy, Edward N. Zalta (Ed.) Spring 2009 Edition. URL = http://plato.stanford.edu/archives/spr2009/entries/ethics-virtue/ accessed 5 October 2009, at section 2.
[9] Spaemann, *Happiness and Benevolence,* 14, 22-34. Spaemann amplifies this point by stating that although "Aristotle uses the eudaimonistic language of 'end and means', he saw the objects of the will as contents of the good life do not stand in end-means relation but rather they are related to another like as parts to a whole" (at 22).

contented retirement), it is a life enjoyable and worthwhile all through."[10] It is a truly final end where nothing is lacking, a complete and ultimate good (*summum bonum*) that is therefore not comparable with other goods (*NE* 1097b14-15). Yet Akrill (and others interpreters such as T.H. Irwin) make a strong case for "*eudaimonia* being inclusive of all intrinsic goods", though not in a merely aggregative way.[11] Spaemann's uses a musical analogy to describe the organisation of different intrinsic goods towards eudaimonia - an agent's goal which is not a final end in itself can be viewed as a distinct movement of a symphony – a discrete part of a whole symphonic work while being more than simply a means to the symphonic end. Eudaimonia thus gives "actions a meaning, which they do not possess from the immediate objective of the agent, that is through his or her direct intention".[12] In a eudaemonic ethic the 'ends' of action have three general degrees of finality: [1] means alone, [2] ends which are also means, [3] an absolutely final end (eudaimonia) which are *not* also means.[13]

Both Akrill and Henry Richardson in different ways eschew a 'dominant' or 'monolithic end' view of eudaimonia put forward by other interpreters of Aristotle. In the *Nicomachean Ethics* (book X, 7), Aristotle's own preferred route to eudaimonia was a life of philosophical contemplation. 'Monolithic' end interpreters of Aristotle's concept of eudaimonia see contemplation as being the exclusive 'dominant' end of an agent, inferring that other intrinsic goods, such as *moral* virtue, cannot properly be thought of as included in the eudaemonic good. Akrill acknowledges that Aristotle never spells out how intrinsic goods other than contemplation partly constitute eudaimonia but that it his conception of eudaimonia does allow us to do this through an 'inclusivist' hierarchy of human ends.[14] Unconvinced with both dominant end and aggregative interpretations of *eudaimonia* in Aristotle, Richardson has put forward a persuasive interpretation of eudaimonia, which he terms 'structured inclusivism'.[15] In this reading, non-final ends which constitute intrinsic goods are nonetheless structurally ordered and subordinated to the ultimate eudaemonic end. Intrinsic value is generated not only by the final end alone but also by non-final intrinsic ends, including moral virtue and natural or external goods such as health or one's reputation.

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[10] J. L. Akrill, 'Aristotle on Eudaimonia', in A.O. Rorty (Ed.), *Essays on Aristole's Ethics*, (London: University of California Press, 1980), 15-33, at 19.
[11] Akrill, 'Aristotle on Eudaimonia', at 22.
[12] Spaemann, *Happiness and Benevolence,* 24.
[13] I take this threefold formulation of human ends from: Henry S. Richardson, 'Degress of Finality and the Highest Good in Aristotle', *Journal of the History of Philosophy* 30 (1992), 327-352, at 331.
[14] Akrill, 'Aristotle on Eudaimonia', at 27-28 and 30-32. Scholars continue to differ on this question in interpreting Aristotle, not least because different passages within the *Eudemian Ethics* and the *Nicomachean Ethics* seem to point in different directions on the matter.
[15] Richardson, 'Degress of Finality and the Highest Good in Aristotle', at 349-352.

Philosophers in the modern era, such as Hobbes, Kant and Sidgwick saw the classical preoccupation with personal fulfilment or eudaimonia as unattractively selfish or egotistic. Though Kant does incorporate the achievement of happiness in his moral theory, he does so in a somewhat diminished role. According to one interpreter Kant views happiness "as personal contentment and success in achieving the ends we want" arguing "that morality is a constraint on the pursuit of a happy life rather than the means to it or an element of it".[16] The pursuit of the *summum bonum*, which for Kant is the "union of virtue and the morally appropriate happiness that virtuous persons deserve",[17] is only of moral worth when it is dutifully pursued with good will and according to universal principles established by the '*pure* practical reason'; *pure* in the sense that its independent of the inclinations of our nature and desire for personal happiness. This modern reworking of Aristotelian ethics, founded on the notion that classical ethics is egotistic in a way that militates against just social relations, is much contested by some theorists.

Annas denies that classical ethics are fundamentally egotistic, writing that eudaimonia is only self-centred in this rather basic sense that a person "aims at her own flourishing and not mine just in the sense that she is living her life and not mine. There is no implication that she is furthering her own interests at the expense of mine".[18] She claims that while classical ethics may have been "formally" self-centred, they need not be self-centred "in content"[19] as this would entirely depend on what the agent understood to constitute their ultimate end. Hedonist theories of flourishing, for example, clearly prioritise the experience of pleasure over other criteria. Yet the "moral virtues, such as courage and justice, commit the agent to respecting the good of others" while *philia* (friendship) might also lead an agent to grant "non instrumental weight to the interests of others" as Aristotle argues himself. In other words, one "can care for others for their own sake [, and] consider their good is part of my own" from a eudaimonistic perspective.[20]

Though Aristotle's understanding of *philia* is somewhat restricted to kith, kin (and through civil association) the fellow citizen, Annas argues that the Stoic conception of 'familiarization' broadens the scope of concern to the whole of humanity. It achieves this by simultaneously asserting self concern and other-concern. Annas thus holds that Stoic or Stoic inspired versions of *eudaimonia* can be committed to a form of impartiality or "moral egalitarianism

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[16] Thomas E. Hill, 'Happiness and Human Flourishing in Kant's Ethics', *Social Philosophy and Policy,* 16 (1999), 143-175, at 143.

[17] Hill, 'Happiness and Human Flourishing in Kant's Ethics', 159.

[18] Julia Annas, 'Virtue Ethics', in *The Oxford Handbook of Ethical Theory*, David Chopp (Ed.), (New York: Oxford University Press, 2005), 515-536, at 522.

[19] Julia Annas, 'The Good Life and the Good Lives of others', *Social Philosophy and Policy,* 9 (1992), 133-148, at 135.

[20] Annas, 'The Good Life and the Good Lives of others', at 136-137.

which, though not as thorough as Kant's, is nonetheless reminiscent of it in some way".[21] As is emphasised in chapter 1, this animates the commitment of classical ethical theories to virtue as an ideal, that:

> "ethical thought essentially includes an *aspiration* to be better than we are. Classical virtue theories are marked both by realistic recognition of the socially embedded nature of our ethical life, and by insistence that if we are thinking ethically, we are striving to be better, to reach an ideal that is not already attained."[22]

I take forward the retrieval of a classical virtue ethics, with its accent on virtue and eudaimonia, with Aquinas's transformation of eudaimonia into his central notion of beatitude.

(b). Aquinas's transformation of *eudaimonia*

Thomas Aquinas follows Aristotle and St Augustine in arguing that happiness is a complete and self-sufficient good. Aquinas's questions within the *Summa theologiae* that deal with happiness share some of Aristotle's outline analysis of eudaimonia. At the same time there are crucial elements to Aquinas's understanding of 'beatitude' ('blessedness' - the theological term Aquinas uses for eudaimonia) that stand in distinction to the authority (Aristotle) he named 'the Philosopher'. Following scripture and his forebear Augustine, the complete good (s*ummum bonum)* is only achieved only in union with God in the heavenly life. Aquinas distinguishes three forms or stages of eudaimonia or beatitude as presented in the figure below:[23]

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[21] Annas, 'The Good Life and the Good Lives of others', at 141, f.n. 25.
[22] Annas, 'Virtue Ethics', at 523.
[23] I have adapted somewhat Don Adams's typology of happiness or eudaimonia in this figure. See Don Adams, 'Aquinas on Aristotle on Happiness', *Medieval Philosophy and Theology* 1 (1991), 98-118, at 117.

Figure: Aquinas's structuring of eudaimonia/beatitude

IMPERFECT EUDAIMONIA / BEATITUDE 'Natural' beatitude (i.e. possible without grace)	E1	**The earthly eudaemonic fulfilment of the life lived according to the moral virtues (*vita activa*)** ST I-II q.5 a. 5c & q.4a 6c, a 7c), following *NE*. 1.7. 1098a7-12; 1098a16. (Also called *felicitas civilis* / **civil happiness**) [The formal object of moral philosophy for Finnis and the object of moral philosophy *and* moral theology for Rhonheimer.]
	E2	**The earthly eudaemonic fulfilment of the contemplative life (*vita contemplativa*), including the contemplation of the creator God as First Cause.** (*Summa Contra Gentiles* III, c.37, following *NE* book X.7).
PERFECT EUDAIMONIA / BEATITUDE (only possible by grace)	E3	**'Supernatural' eudaemonic fulfilment to the fullest extent; the eudaimonia / beatitude involving one's speculative intellect and one's resurrected body" (the *Visio Dei*)** (ST I-II, q.3, a.8). [The formal object of moral theology for Denis Bradley, and the formal object of the theological virtues for Rhonheimer and Finnis.]

Key

E = Form of eudaimonia / beatitude

E1 and E2 are aspects of what Aquinas describes as 'imperfect beatitude', a form of happiness that is in some sense qualified (*secundum quid*), while E3, more familiarly known as the *visio dei* or the beatific vision, is eudaimonia in a strict and unqualified sense (*simpliciter*). E2 and E3 clearly indicate what has been described as the intellectualist aspect of Aquinas's approach to eudaimonia/beatitude. E2 clearly parallels Aristotle's argument in book X of the *Nicomachean Ethics,* that the contemplative life is superior to the active life and should be considered truly fulfilling.

Some recent studies of Aquinas's ethics have placed the Treatise on Beatitude (*ST* I-II, qq.1-5), rather than the Treatise on Law (including natural law), as playing an architectonic role in Aquinas's ethical theory. In these five questions in the Treatise on Beatitude, scripture is cited as an authority sixty times, the Church Fathers sixty one times, 'the Philosopher' sixty six times, and Boethius thirteen times.[24] The positioning of the Treatise on Beatitude at the beginning of the second part of the *Summa theologiae* is interpreted as being important by Servais Pinckaers, not least because it precedes the Treatise on Law, but also as it echoes

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[24] Servais Pinckaers, 'Beatitude and the Beatitudes in Aquinas's Summa Theologiae', in John Berkman and Craig Titus Stevens (Eds.), *The Pinckaers Reader: renewing Thomistic moral theology,* translated by M.T. Noble, (Washington, D.C: Catholic University of America Press, 2005), 115-129, at 115.

Aristotle's treatment of eudaimonia in the first book of the *Nicomachean Ethics*. This does not mean that the Treatise on Beatitude and the Treatise on Law (and particularly natural law) have to be seen as offering contradictory emphasises (as Finnis infers, as we shall see). It does this, for Terrence Irwin, because the first precept or principle of natural law simply directs the agent to the good as an end, the same good that reaches its practical terminus in ultimate end of eudaimonia/beatitude ("the first directing of our acts toward the end comes about through natural law", *ST* q. 91. a.2, ad 2).[25] Such interpretations go against many influential readings of Aquinas that give his ethical theory a clear legalistic and deontological orientation, such as that put forward by J.B Schneewind[26] and Alan Donegan.

The structuring of final and non-final ends in Aquinas is also subject to a similar interpretative dispute, though with the added issue of the how eudaimonia relates to heavenly fulfilment (E3). These disputes cluster around two distinct questions. The first question is theological insofar as it relates to Aquinas's understanding of scriptural texts and the testimony of the Church Fathers as much as it relates his use of the philosophical notion of eudaimonia. It concerns whether ultimate human fulfilment is fundamentally 'supernatural' (relating to the heavenly vision of God) or whether the human person can properly be said to have two ultimate ends: one a proportionate 'this worldly' natural end attainable without grace and the other a supernatural end only attainable through grace. The first position is associated with the twentieth century Catholic theologian Henri de Lubac, the Thomist philosopher Etienne Gilson and more recently with the Georgetown philosopher Denis Bradley. Their positions on this question has subsequently been radicalised by the theologian John Milbank and by members and American *Communio* school.[27]

The 'dual end' position is associated with neo-scholastic theologians, certain neo-Thomists such as Jacques Maritain, and contemporary Thomists such as Ralph McInerny and Steven A. Long. This issue is methodologically crucial because the assertion of a single 'dominant'

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[25] See T. H. Irwin, 'Aquinas, Natural Law and Aristotelian Eudaimonism' in Richard Kraut (Ed.), *The Blackwell Guide to Aristotle's Nicomachean Ethics* (Oxford: Blackwell, 2006), 323-341, at 327. Irwin states that "attention to natural law does not turn us away from the eudaemonist outlook, it simply expresses this eudaemonist outlook", at 327.

[26] Terrence Irwin addresses this point in his three volume *magnus opus* on the history of ethics, where he devotes 217 pages to Aquinas's ethics (nearly double the treatment he gives to Aristotle, of whom he is a noted interpreter). Irwin contradicts Schneewind's view (expressed in the latter's influential work *The Invention of Autonomy*) in which Aquinas is portrayed as rendering the virtues as "basically the habits of obedience to laws". Irwin comprehensively documents how this is not in fact Aquinas's position as he sees it. See Terrence Irwin, *The Development of Ethics: A historical and critical study, Volume I: From Socrates to the Reformation* (Oxford: Oxford University Press, 2007), quoted at f.n. 80, at 570. Irwin's discussion in chapter 21 of that work is illuminating on the nexus of questions relating to whether Aquinas in a sense completes Aristotle's eudaimonistic ethics or whether we should view Aquinas as one of the first deontologists. I am very sympathetic to Irwin's interpretation as set out in chapter 21.

[27] Though not every author who publishes in the American edition of the theological journal *Communio: International Catholic Review* can be said to take this position.

supernatural final end has been used by Milbank and others as a key argument to justify the rejection of any substantive form Thomistic ethical or social *philosophy* (as opposed to a moral theology), which in turn is used to reject attempts to defend overlapping practical agreement in a pluralistic society on justice and human rights. These naturally apprehended human goods are called 'infravalent ends' by the neo-Thomist Jacques Maritain and constitute "the good of civil life" (i.e. E1).[28] They relate to non-final ends that are intrinsically valuable or good, but which are hierarchically subordinate to, and ordered towards, human ends such as the philosophical contemplation of God. For Maritain it is upon infravalent ends (such as health, education, material sustenance, and other social goods) that overlapping agreement in the political sphere is possible. This is a "practical moral task" for Maritain and one shared by believers and unbelievers alike, while the higher achievement of a "common doctrinal minimum" - agreement on final ends – is "a pure fiction".[29]

In his wider theological meta-narrative John Milbank, following Henri de Lubac, sees the assertion of a dual end for human persons as inaugurating a clear separation of the natural and supernatural orders, which leads to nature being treated as self-sufficient and fully autonomous within its own order. An extrinsic relationship between the natural and supernatural orders is thus established for Milbank, which helps launch a proto-modern notion of moral autonomy and the questioning of God as integral to human flourishing and thus to social and political life.[30] It is argued that this process evolved over the centuries with the successive emergence of voluntarism, nominalism, neo-scholasticism, rationalism, Kantianism (where God's existence is a postulate of practical reason), culminating in forms of atheistic secularism. Cajetan, and especially Suarez, are seen as the founders within the neo-scholastic era of a notion of 'pure [human] nature', which has nothing but an 'obediential potency' for grace which becomes, over the centuries, an anthropology that asserts that human nature has two ends (*finis duo*) rather than a final end with a twofold aspect (*finis duplex*).[31]

De Lubac claimed that this separation of human ends led to the exiling of the supernatural "both from intellectual and from social life – leaving the field free to be taken over by secularism" which taken to its logical conclusion would end in "total secularization which would expel God not merely from the life of society, but from culture and even from personal

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[28] Jacques Maritain, *True Humanism*, translated by M. R. Adamson. (London: The Centenary Press, 1946 [1938]), 127.
[29] Maritain, *True Humanism*, at 200.
[30] See John Milbank, *Theology and Social Theory*, second edition, (London: Blackwell, 2006), especially chapters 1 and 8.
[31] David Braine is helpful in locating this development and relating it to de Lubac's work: David Braine, 'The Debate Between Henri de Lubac and His Critics', *Nova et Vetera,* English Edition 6 (2008), 543-590, at 560 and 571.

relationships".[32] This account is questioned both in its fundamentals and in its details. De Lubac, in a series of works from the 1940's to the 1960's, sought to recover what he saw as the original Christian and patristic understanding of 'man's last end' which for de Lubac is summed up in Augustine's statement "you have made us for yourself and our hearts are restless until they rest in you".[33] Milbank remarkably asserts that de Lubac's first major publication on this issue *Surnaturel* in 1946 was "almost [as significant] an event of cultural revision as *Being and Time* or the *Philosophical Investigations".[34]*

De Lubac's key thesis is that Aquinas taught that human beings have 'a natural desire for the supernatural end' (E3), which is their sole end. This innate intellectual drive toward the transcendent is a teleological ordering to God imprinted on each human person due to the possession of a 'spiritual' soul.[35] This natural drive is just that - it is not a form of grace.[36] De Lubac is clear that he does not mean that that human persons are able to attain perfect heavenly beatitude without grace, nor does he contest that there is not a twofold aspect to beatitude/eudaimonia (that is the perfect beatitude of the *visio dei* and a 'this worldly' imperfect beatitude.[37] Traditionalist contemporary Thomists such as Steven Long directly contest de Lubac's position.[38] They argue from Aquinas's texts and the neoscholastic commentarial tradition on Aquinas that, apart from grace, human nature has its own proportionate eudaemonic finality which is an essential finality in its own (natural) order. There is thus a clear human 'essence' bearing an ontological density that is, in principle, intelligible to human reason. Imperfect beatitude of the philosophical contemplation of God (E2) is, for Long, the intelligible proportionate finality for human nature as set out by Aquinas. This contemplation is not of God's essence or nature - as in the *visio dei*[39]- but is the successful use of speculative reasoning in coming to know of God as creator through created effects, by way of metaphysical reasoning.

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[32] Henri de Lubac, *The Mystery of the Supernatural,* translated by Rosemary Sheed, (London: Geoffrey Chapman, 1967 [1965]), xi-xii.

[33] St Augustine, *Confessions,* trans. H. Chadwick (Oxford: Oxford University Press, 1992), I.1, at 3.

[34] John Milbank, *The Suspended Middle* (Grand Rapids, MI: Wm. B. Eerdmans), 2005, at 63.

[35] De Lubac strongly emphasises the Pauline and patristic tradition of understanding to human person to be a unified composite of body, soul and spirit, where the spirit "is the principle of a higher life, the place of communication with God", see Henri de Lubac, *Theology in history* (San Francisco: Ignatius Press, 1996), 125. De Lubac holds that this tripartite anthropology was taught by Thomas Aquinas (at 155-163).

[36] It is agreed by all orthodox Christians that divine grace, as a free gift, cannot be in any sense owed to human beings. De Lubac was initially accused of compromising this gratuity, despite his strongest denials, which were present from his earliest writings.

[37] Henri de Lubac, 'Duplex Hominis Beatitudo', *Communio,* 35 (2008 [1948]), 599-612, at 610-612.

[38] Steven A. Long, *Natura pura: on the recovery of nature in the doctrine of grace* (New York: Fordham University Press, 2010).

[39] These interpreters acknowledge that perfect and truly ultimate beatitude was for Aquinas the vision of God revealed in the next life through grace. However, Long argues that this is not properly a human final end because it requires a non-human (supernatural) intervention for it to become known of, let alone achieved.

Responding to this renewed debate between Thomists, David Braine concedes that de Lubac's argument contains some significant argumentative flaws, but argues that de Lubac's core thesis still holds: there is a natural human *appetitus* directed towards the vision of the divine essence (E3). Braine, an analytical Thomist, helpfully distinguishes between the finality of human nature *in abstracto* and the finality of existing human persons in the actually existing order of creation, as Aquinas viewed it within his theological frame.[40] Braine equally sees the later development of a hypothetical postulate of a 'pure' human nature (in an alternative order of providence), as proposed by Suarez and the neoscholastics, as characterising the "tradition of seventeenth and eighteenth century rationalism, and has no place in the interpretation of St Thomas".[41]

Despite insisting on the primacy of the supernatural eudaimonia of the human person, de Lubac does not belittle the integrity or importance of human nature. He holds that although human "nature is not conceived as an order able to an end definitively upon itself" this does not mean "that nature is without proper consistency".[42] He gladly adopts Aquinas's axiom that 'grace perfects nature and does not replace or abolish it' ("gratia perficit naturam, non tollit" *ST* I. q.1. 8 ad 2). De Lubac approvingly quotes a contemporary that "[r]espect for natural values in their own structure is the best measure of our respect for the supernatural in its absolute originality".[43] Indeed, one contemporary and sympathetic interpreter of de Lubac insists (*contra* Milbank) that his position "actually requires the affirmation of such relative perfection or consistency" to nature and thus "Lubacians have good grounds for making common cause with neo-Thomists [such as Maritain] in defence of a robust concept of nature, [and] of natural law…"[44] Despite the obvious interpretative difficulties involved in this matter, I find the interpretation offered Aquinas by Braine and Healy (via de Lubac, but *pace* Milbank) convincing, both as an interpretation of Aquinas's understanding of beatitude,

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[40] As Braine says, in the actually existing order of creation as Aquinas would have seen it "this [supernatural] finality is something to be ascribed to each human *person* as such, and not to his *nature* as a human being, because it is a real attribute of the person but existing in the person only by virtue of a relation": Braine, 'The Debate Between Henri de Lubac and His Critics', at 570. This distinction can perhaps help us explain the problematic paradox of how 'human nature' as an ontological category - which in theology is distinct from grace - can be imprinted with a supernatural finality without grace being in some sense owed to nature. Braine takes his understanding of personal attributes from Aquinas's own understanding of the personhood of the Trinitarian Persons.

[41] Braine, 'The Debate Between Henri de Lubac and His Critics', 588-589.

[42] De Lubac, *Theology in history*, 288.

[43] De Lubac, *The Mystery of the Supernatural*, 30.

[44] Nicholas J. Healy, 'Henri de Lubac on Nature and Grace: A note on some recent contributions to the debate' *Communio*, 35 (2008), 535-564, at 562. I note that in de Lubac's preface to *The Mystery of the Supernatural* (xiv, f.n. 7), where he reflects on the negative contemporary social aspects of the separation between nature and the supernatural, de Lubac cites Jacques Maritain's neo-Thomist socio-political manifesto *Integral Humanism*, in an approving manner. Similarly, de Lubac quotes Maritain approvingly when the latter criticises Descartes, among others, for thinking up "a purely natural man.…upon whom was superimposed the theological virtues and a duty to merit heaven." See De Lubac, *The Mystery of the Supernatural*, 233.

and as a 'structurally inclusive'[45] notion of eudaimonia/beatitude that respects the integrity of the human person's 'this worldly' ends.

How theorists relate the Thomistic conception of eudaimonia/beatitude to his overall ethical theory varies considerably. Those who endorse de Lubac's interpretation of eudaimonia/beatitude in Aquinas often see consequences for the viability of a fully fledged Thomistic ethical philosophy. Denis Bradley - who agrees with de Lubac's view of the natural desire for supernatural eudaimonia/beatitude - claims that "imperfect or civil beatitude is subject to profound restrictions and transformations of meaning that are largely ignored by Thomist philosophical ethics" not least because, Bradley takes imperfect beatitude be the philosophical contemplation of God as First Cause through his created effects (E2).[46] Thus for Bradley imperfect beatitude and perfect beatitude "are objectively and formally diverse, so too are the moral sciences that they respectively ground".[47]

Bradley sees the practical and speculative orders in Aquinas as being clearly distinct, and that contemplative wisdom is difficult and rarely achieved.[48] He states that within a Thomistic schema "speculative knowledge of man's natural end is remarkably inefficacious in promoting moral virtue",[49] asking: "What can an autonomous Thomistic philosophical ethics know of a supernatural end that utterly transcends man's metaphysical and moral capacity to achieve?"[50] This, for Bradley, makes the whole project of a Thomistic moral philosophy methodologically unviable. The natural 'endlessness' of the human person causes a disruptive *aporia* which, according to Bradley, affects any actual project of establishing a *philosophical* ethics. Only a moral *theology* - an ethic explicitly based on scriptural and doctrinal sources - can properly constitute a eudaimonistic ethic. In a sense, I interpret Bradley as holding that supernatural perfect beatitude/eudaimonia (E3) is a 'dominant' or 'monolithic' end in a similar way that some interpreters of Aristotle's notion of eudaimonia as contemplation sometimes do.

Theologians in the 'Radical Orthodoxy' school (such as John Milbank) and leading members of the American *Communio* school interpret this dominant supernatural end argument to mean that an ethics founded on natural law is of extremely limited use. They argue that

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[45] Referring of course to Henry Richardson's aforementioned construal of eudaimonia in Aristotle: Richardson, 'Degress of Finality and the Highest Good in Aristotle'.
[46] Denis J. M. Bradley, *Aquinas on the twofold human good* (Washington, D.C.: The Catholic University of America Press, 1997), at 488.
[47] Bradley, *Aquinas on the twofold human good,* at 509.
[48] Bradley (in *Aquinas on the twofold human good)* also notes that Aquinas believed that only the old, learned and leisured have the time and wisdom to engage in the sort of metaphysical speculation that the contemplation of God requires, at 489.
[49] Bradley, *Aquinas on the twofold human good,* 489.
[50] Bradley, *Aquinas on the twofold human good*, 53.

natural law is certainly not utilisable as a basis on which to establish practical agreement on human goods which can be used to build a shared commitment to justice or human rights in a pluralistic society. They assert, for instance, that natural law ethics cannot in any significant way be detached from an explicitly Christological and Trinitarian ethics.[51]

The question of the 'detachability' of Aquinas's ethical theory from its undoubted metaphysical basis is therefore strongly contested by John Milbank. Finnis initially proposed a detachability thesis in his *Natural Law and Natural Rights* by pointing to the fact that Aquinas does not take the existence of God - arrived at through speculative reasoning - to be self evident, even though Aquinas does believe theistic belief to be philosophically intelligible.[52] On Finnis's reading human goods are understood immediately through the practical reason. In chapter 13 of *Natural Law and Natural Rights* Finnis gives his own formulation of Aquinas's cosmological argument, giving a theistic underpinning to his natural law theory. Finnis, however, claims that this - and other such philosophical arguments – are initially *speculative* and so he views them as "detachable" from natural law reasoning.

Martin Rhonheimer agrees with Finnis on this key point and further states that the acting person does not initially apprehend the moral good (through natural law principles) to be an imperative dictated by a *promulgated* form of 'law', literally or analogically. He takes the fundamental moral experience of humans as experiencing the truth of the good and of "the good to be done" rather than of rule following in a conscious way.[53] This does not mean that when a virtuous agent acts toward "the good to be done" they are not, in doing so, complying with natural law in a preceptive (rule following) sense. It is, however, in subsequent theoretical (including metaphysical) reflection that agents may recognise the 'participated' and lawful character of the natural law. This means that the experience of practical reasoning does not require foreknowledge that the natural law is a "participation of the eternal law in the rational creature" (*ST* I-II q.91. a.2).

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[51] See for example D. Stephen Long 'The Way of Aquinas: Its Importance for Moral Theology', *Studies in Christian Ethics,* 19 (2006), 339-356 at 354; and, F.C. Bauerschmidt, 'Aquinas' in William T. Cavanaugh & Peter Scott (Eds.), *The Blackwell Companion to Political Theology* (Oxford: Blackwell, 2004), 48-61at 54-55, and 58. This approach also can be seen to a remarkable degree in the three opening essays on natural law theory by David L. Crawford, Glenn W. Olsen and Tracey Rowland, in the 'Natural Law' issue of the American *Communio*, 35 (2008).

[52] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 48-49.

[53] He writes "even if the natural law…possesses in the real sense the character of law, the *ratio legis* is not made explicit or concomitantly reflected at the moment when these practical judgements of the natural law are carried out", Martin Rhonheimer, 'The Cognitive Structure of Natural Law and the Truth of Subjectivity', in *The Perspective of the Acting Person: Essays in the Renewal of Thomistic Moral Philosophy*, by Martin Rhonheimer, trans. by Joseph T. Papa, (Washington, D.C.: Catholic University of America Press, 2008) 158-194, at 170.

With Denis Bradley, Rhonheimer agrees that the natural *appetitus* for supernatural fulfilment married to the incapacity of humans to reach their ultimate end without divine aid creates an *aporia* that renders a complete ethical philosophy unviable. A philosophical ethic that seeks, but fails to find, a *natural* ultimate end that fulfils human yearnings will, for Rhonheimer, yield a truncated and seriously deficient ethical product - a moral torso in need of proper embodiment.[54] Like Bradley he views the imperfect beatitude of the *contemplative* earthly life (E2) as being not particularly helpful in guiding the 'this worldly' *active* life.[55]

Despite this common ground Rhonheimer and Bradley disagree on two key points. First, Rhonheimer believes that even this moral torso as a leaves a philosophical ethic that, despite its thinness, provides a fundamental orientation towards true human goods that can help constitute, through a life of moral virtue, a certain practical orientation. Secondly, Rhonheimer – following the Thomistic maxim 'grace perfects nature', argues that the supernatural end (E3) does not abolish the 'this worldly' imperfect beatitude of the virtuous active life (E1) with its bodily and external goods. The pursuit of and reflection on 'imperfect beatitude' in the earthly active life constitutes at least a fragment of an ethical *philosophy* for Rhonheimer. The theological virtues of faith, hope and charity direct Christians to their ultimate human fulfilment in the life of the world to come (H3) but this does not negate the importance of the penultimate 'this worldly' active life of virtue. In this way perfect beatitude does not become for Rhonheimer an exclusive or dominant final end.[56]

I find Rhonheimer's position more persuasive than Bradley's or Finnis's on the question of imperfect eudaimonia. Finnis takes a non-intellectualist reading of imperfect beatitude arguing that the contemplative end (E2), is subsidiary to the active life of virtue (E1).[57] Yet in a more recent article, Finnis seemingly questions the persuasiveness of Aquinas's understanding of beatitude altogether, writing that it "yield[s] for a philosophical ethics little or

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[54] Martin Rhonheimer, trans. G. Malsbary, *The Perspective of Morality: Philosophical Foundations of Thomistic Virtue Ethics* (Washington, D.C.: Catholic University of America Press, 2011), 81-82.

[55] Rhonheimer, *The Perspective of Morality*, 83ff.

[56] As perfect beatitude (E3) is speculative and achieved in the heavenly realm is not apt to generate a practical science of moral *theology* for Rhonheimer. Instead the orientation given by faith, hope and love in this life sheds new light on, and gives a new orientation to, the *earthly* active life (H1) of the Christian rather than establishing a heavenly practical science relating to the life of the world to come. The effect of grace on the active life of the Christian for Rhonheimer is thus to strengthen and radically elevate the natural virtues - allowing them to more faithfully and effectively realise true human goods and fulfil the precepts initially apprehended by the agent's practical reason (i.e. through the natural law). See Martin Rhonheimer, 'Is Christianity Morally Reasonable? On the Difference between Christian and Secular Humanism', in Martin Rhonheimer, *The Perspective of the Acting Person: Essays in the Renewal of Thomistic Moral Philosophy*, (Washington, D.C.: The Catholic University of America Press, 2008), 1-17, at 6-13.

[57] John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), at 221, n.11, and also see 110.

no fruit beyond the paradoxical notion… [of] *imperfecta beatitudo*".[58] Against T.H. Irwin, Finnis sees a clear separation between Aquinas's view of practical reasoning directed clearly towards the achievement of ultimate ends in the Treatise on Beatitude and Aquinas's natural law theory. Finnis thus views Aquinas's eudaimonism as being of peripheral importance for a revived Thomistic ethic when contrasted with the central importance of his natural law theory.[59] As the active life of virtue is ordered to the human good for Aquinas, Finnis interprets imperfect eudaimonia/beatitude as fulfilment of the basic human goods that practical reason apprehends through the disposition of *synderesis,*[60] and the first principles of the natural law. It is to the theory of law and natural law as expounded in the *Summa theologiae* that I now discuss.

c). Law and Natural Law in Aquinas

The Treatise on Law in the *Summa theologiae* is clearly an important part of Aquinas's ethical approach. For Aquinas law is an exterior principle of human action in the sense that it originates from beyond the person. Law is a rule and measure of actions, a rule that helps guide the agent to her eudaimonia/beatitude ("the law regards most of all the direction towards happiness", *ST* I-II q.90. a.2). Aquinas also states that all "law is something pertaining to reason" (*ST* I-II q.90. a.1). However, the Treatise on Law itself is not centred on natural law as for Aquinas law exists in various modes, all of which in some way participate or share in the ordering Divine Wisdom of the 'eternal law', which is "a set of archetypes in the divine mind" rather than a promulgated form of law.[61]

Law, for Aquinas, is a rule of action promulgated by an authority that has care of a particular community (*ST* I-II q.90, a.4). Promulgated law is fourfold for Aquinas. The divine law is the law revealed by God to the community of humanity in history – firstly the Decalogue and precepts (the Old Law) revealed to Israel, and the New or Evangelical Law revealed in the person of Jesus Christ. Divine law became necessary for Aquinas because of the Fall, and it operates as an exterior principle leading people to their beatitude in his theological system of

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[58] John Finnis, 'Foundations of Practical Reason Revisited' *American Journal of Jurisprudence,* 50 (2005), 109-131, at 120.

[59] Finnis seems to hedge his bets by describing Aquinas's moral theory as both ""teleological" and "deontic", and not more the one than the other". See the untitled introduction to John Finnis, 'Aquinas' Moral, Political, and Legal Philosophy' in *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, edited by Edward N. Zalta, <http://plato.stanford.edu/archives/fall2008/entries/aquinas-moral-political/> , accessed 23 February 2009.

[60] *Synderesis* is not a power or a law, but is an innate habit that enables the agent to hold to the first principle/precept of the natural law (*ST* I-II, Q. 94, a.2).

[61] Anthony J. Lisska, 'On the Revival of Natural Law', *American Catholic Philosophical Quarterly,* 81 (2007), 613-638, at 622. The eternal law is thus a metaphysical concept used by Aquinas to name the providential ordering of the universe.

exitus and *reditus*.[62] The natural law is promulgated by God for the community of humanity and is universal in that it is authoritative over all humans and is naturally knowable to humans on the basis that they are unique in creation in that they are rational animals (*ST* I-II q.94 4 & q.94 a.6). Human positive law is derived from natural law - not from divine law - and is promulgated by a constitutionally established authority within a political community.

The first precept of the natural law is that 'the good is to be done and evil avoided' (*ST* I-II q.94, a.2, ad.2). This is a parallel axiom for the operation of the practical reason as the principle of non-contradiction is for the operation of speculative reasoning. Many contemporary interpreters treat this precept as a 'first principle of practical reason', as well as being preceptive in nature. Aquinas then describes how certain "natural inclinations" specify this precept, inclining agents to particular human goods. Some of these inclinations Aquinas writes, relate to a human's animal nature, such as self preservation and the nurturing of offspring, while others pertain to a person's rational nature; such as living in society, knowing "the truth about God", and neighbourly conduct. This "order of natural inclinations" Aquinas states "is the order of the precepts of the natural law" (*ST* I-II q.94, a.2). There are thus many precepts of the natural law, though each derives from the root of the first precept: the good is to be pursued and the bad avoided. These are some of the *primary* precepts of the natural law, and, as Aquinas states at the outset of this same *quaestio*, they are known to the acting person immediately and undemonstratively ('*per se nota*').

Aquinas believes that the second tablet of the Decalogue - the last six commandments ordering people to the love of neighbour – reflect primary precepts of the natural law and the duty of justice toward other human beings (*ST* I-II, q.100, a.3). The 'summary of the law' in the Gospel according to Matthew including the imperative that "one should love thy neighbour as oneself" is cited alongside Aristotle's statement that "friendship towards another arises from friendship towards oneself" (*NE* 9.4. 1166) by Aquinas (*ST* I-II q.99. 1, ad.3). He further alludes to the maxim 'grace presupposes nature' in referring to the fact that the moral precepts of the Old Law are known naturally as well as being known as revealed divine law (ST I-II q. 99, 2, ad.1). Commandments against murder or theft which, though revealed in the Torah, are thus part of the natural law and as such are capable of being known immediately to humans by the use of natural reason. The impulse to the natural virtue of justice (rendering to others their due) is thus a precept of the natural law for Aquinas - unlike the impulse to some other virtues which are, by implication, preceptive only in a

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[62] Aquinas, following the Pseudo-Dionysius, establishes an overarching schema of an *exitus* from God (in creation *ex nihilo*), followed by a *reditus* back to the Creator through God's providential action and salvation. Some see this *exitus-reditus* schema in the very structure of the *Summa theologiae*, though this interpretation is contested.

secondary sense. Aquinas also considers that the virtue of justice, unlike other virtues, generates clear *moral duties* to others - as the nature of the justice – 'rendering due' - would infer (*ST* I-II q.99, 5, ad.1). These points will become particularly important when considering natural right and civil association in chapter 3.

The 'secondary' precepts of the natural law are known, not immediately or *per se nota,* as with primary precepts, but by demonstration ('as conclusions following closely from first principles' (*ST* I-II q.94, a.6). As the secondary precepts are known less immediately they are far more susceptible to transgression in action. Indeed, the transgression of the secondary precepts can be very widespread in societies according to Aquinas (*ST* I-II q. 94, a.6, ad.1), and can occur through poor reasoning from first principles, as a result of concupiscence, or because of negative social mores or customs. From this point the interpretation of the questions dealing with natural law in the *Summa theologiae* begins to diverge. For many theorists - including the New Natural Law school – the ends of the natural inclinations provide "the normative specifications for the first practical principle or at least provide the immediate justification of the relevant norms".[63] On Finnis and Grisez's reading, the first principles of practical reason "picks out and directs one toward a distinct intelligible good, which,….can be called basic".[64]

The New Natural Law approach to *quaestio* 92 was established in contrast to the traditional or classical understanding of Aquinas' theory of natural law and practical reason, as established by Suarez and the commentarial tradition. This classical Thomistic tradition stressed the priority of speculative reason over the practical reason in human action. In the characterisation given to this approach by Germain Grisez, having become aware of the natural law precept to do good and avoid evil, "man would consult his nature [through the speculative intellect] to see what is good and evil. He examines his action in comparison with his essence to see whether the action fits human nature or does not fit it".[65] Traditional natural law theory was thus perceived as a clear form of ethical naturalism.

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[63] As Jean Porter portrays it, in her 'Does the Natural Law provide a Universally Valid Morality?', in Lawrence S. Cunningham (Ed.), *Intractable Disputes about the Natural Law: Alasdair MacIntyre and his Critics* (Notre Dame, IND.: University of Notre Dame Press, 2009), 53-95, at 61.

[64] Finnis, 'Aquinas' Moral, Political, and Legal Philosophy', section 2.4.1. Mark Murphy describes this as Finnis and Grisez's "principle of intelligibility of action", in which "only action that can be understood as conforming with this principle, as carried out under the idea that good is to be sought and bad avoided, can be understood as an intelligible action." See Mark Murphy, 'The Natural Law Tradition in Ethics' *The Stanford Encyclopedia of Philosophy.* Fall 2008. Edited by Edward N. Zalta. http://plato.stanford.edu/archives/fall2008/entries/natural-law-ethics/, accessed 18 February 2009, section 1.3.

[65] Germain Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2', *Natural Law Forum*, 10 (1965), 168-201, at 168. This article in many ways marked the inception of New Natural Law theory.

Jean Porter is one contemporary interpreter of Aquinas who espouses a form of unabashed ethical naturalism based on Aquinas's natural law theory. She rightly comments that Aquinas does not spell out exactly how the natural inclinations ground specific norms in *quaestio 92,* and instead propounds her own understanding of the importance of the natural inclinations, in which they are not viewed as precepts of the natural law as such, but as providing a naturalistic foundation on which "theoretical reflection on their significance and normative import" begins.[66] It is from this theoretical reflection on human nature that moral normativity is *derived* for Porter. On either the 'inclinationalist' (Finnis/Rhonheimer) or 'derivationalist' (Porter) readings of *quaestio* 92,[67] Aquinas affirms the priority of the good over the right in the sense that whether a human action is "*right* is logically posterior to whether that action brings about or realizes some *good".*[68] According to this (somewhat contested) interpretation, right action according to Aquinas's natural law theory is "that action which responds nondefectively to the good".[69]

Martin Rhonheimer is critical of the dervationalist understanding of natural law, characterising it as positing "a kind of code of moral norms, found in nature as an object of knowledge"[70] which "once known, imposes itself immediately as a norm of moral action."[71] He sees the neoscholastic reception of natural law as essentially 'dualistic' – with the objective order of nature standing over the subjective order of moral knowledge and human reason. For Rhonheimer this leads to "a physicalist notion of the natural law" in which law is identified with the merely natural structure and natural ends, upon which moral normativity is conferred in an immediate way.[72] Rhonheimer sees this as a misreading of Aquinas and better reflects the position of Stoic natural law theory. The Stoics, for Rhonheimer, saw the eternal law in the cosmic order which is then "decipherable through a knowledge of nature"[73] or as Cicero put it: "right reason, in agreement with nature". Despite its partial influence on the early Church this Stoic tendency to 'read off' ethical norms from nature for Rhonheimer is not fully consonant with the Christian natural law tradition properly understood, which originates in the Church Fathers and reaches its apex in Aquinas. In this understanding the

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[66] Porter, 'Does the Natural Law provide a Universally Valid Morality?' at 76.

[67] I owe this twofold characterisation to Mark Murphy, who sees moral normativity as emerging in the New Natural Law approach in an 'inclinationalist' manner while that of Suarez and natural law theories similar to Porter's see them emerging in a 'derivationalist' way from human nature. Mark C. Murphy *Natural law and Practical Rationality* (Cambridge: Cambridge University Press, 2001), 6ff.

[68] Murphy, 'The Natural Law Tradition in Ethics', section 1.3.

[69] Murphy, 'The Natural Law Tradition in Ethics', section 1.4, (cf. *ST* I-II q.18, a.1).

[70] Rhonheimer, 'The Cognitive Structure of the Natural Law and the Truth of Subjectivity', 159.

[71] Rhonheimer, 'The Cognitive Structure of the Natural Law and the Truth of Subjectivity', 159.

[72] Such 'physicalist' or 'naturalist' understandings of the natural law can be seen in some teachings of the Roman Catholic Church, where, in the 1950's, certain organ transplants were deemed to be against natural law (a stance soon altered by subsequent Papal teachings). 'Perverted faculty' arguments that used to reign in Thomistic discussions of sexual ethics were another good example of this approach.

[73] Rhonheimer, 'The Cognitive Structure of the Natural Law and the Truth of Subjectivity', 171-172.

natural law is "the light of natural reason" which "impresses the divine light within us" which allows the acting person to discern good and evil in deliberating contingent actions (*ST* I-II q.91, a.2).[74]

In Finnis (and Rhonheimer's reading) the human goods apprehended through the primary precepts (or principles) of the natural law are self-evident and non-deduced but are *not* intuitional as they "they require insight (intellectus) into data of experience".[75] As they are immediate apprehensions rather than deductions Finnis claims that these basic goods are not subject to G.E. Moore's naturalistic fallacy, something that Finnis is at pains to avoid. As example of how these goods are to be conceived, Finnis gives the example of the basic good of knowledge (and thus overcoming ignorance). He says that by a "well nigh simultaneous insight one comes to understand that this knowledge is not merely a possibility but a good (*bonum*), that is to say an opportunity, a *benefit,* something desirable as a kind of improvement (a *perfectio)* of one's or anyone's condition, and as *to be pursued*".[76] For Finnis and other New Natural Law proponents, this means that 'objective' human goods are benefits to the person and are directly linked to the 'subjective' motivational sets of persons.[77]

John Finnis attempts to resolve what he believes to be Aquinas's problematic understanding of beatitude by introducing the concept of 'Integral Human Fulfilment'. Alongside other New Natural Law theorist he develops this approach in an original way by categorising the basic goods apprehended by natural law practical reasoning into seven irreducibly separate 'basic human goods',[78] which are each alike in being non-instrumental goods *of* persons. The basic human goods posited by Finnis, Grisez and Boyle have been summarised in the following manner:

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[74] A Stoic natural law theory does not include the 'participation metaphysic' that Aquinas took from the Old and New Testaments (rendered philosophically intelligible through the Middle and Neo-Platonic categories used by the Fathers) and which makes this 'natural light' aspect of natural law theory comprehensible.

[75] Finnis, 'Aquinas' Moral, Political, and Legal Philosophy', section 2.4.1.

[76] Finnis, 'Aquinas' Moral, Political, and Legal Philosophy', section 2.4.3.

[77] This addresses the point that the analytic philosopher Bernard Williams wished to address when he wrote about internal and external reasons for action. In Williams's view, only 'internal' reasons related to subjective desires can truly motivate moral actions, thus providing a genuine 'reason for action' for the agent. In view of New Natural Law theorists, intelligible goods subjectively motivate the agent to pursue goods beneficial to the agent - but do so in a way that is at the same time 'objective' and true. See Finnis's New Natural Law collaborator Joseph Boyle's article: 'Reasons for Action: Evaluative Cognitions that Underlie Motivations', *American Journal of Jurisprudence,* 46 (2001), 177–197; and Bernard Williams, 'Internal and External Reasons', in Bernard Williams, *Moral Luck* (Cambridge: Cambridge University Press, 1981), 101-113.

[78] Each basic human good is incomparably good in its own way and thus incommensurable for New Natural Law theorists. Therefore there can be no lexical or hierarchical ordering among the basic goods. Trade-offs between the basic human goods to maximise overall human fulfilment are therefore conceptually impossible, though this incommensurability does not mean for New Natural Law proponents that the agent has to give equal weight or emphasis to the achievement of each of the basic goods.

(1) "self-integration or inner peace (practical reasonableness)

(2) peace of conscience between oneself and its expression

(3) peace with others; friendship, neighbourliness

(4) peace with God or some other non-human source of meaning or value."[79]

These four basic human good are 'reflexive' in the senses that they are based on human choices between good and bad. The final three basic human goods are 'substantive' and are:

(5) "human life and health

(6) knowledge of the truth and appreciation of beauty

(7) playful activities and skilful performances – humans as sharers of culture." [80]

'Integral Human Fulfilment' for Finnis is constituted by these basic human goods; as "a kind of synthesis of them: [namely] satisfaction of all intelligent desires and participation in all the basic human goods… and thus a fulfilment which is complete and integral".[81] In contrast to classical eudaimonism and many readings of Aquinas's notion of beatitude, Finnis and Grisez posit a master moral principle that "all one's acts of will be open to *integral human fulfilment*, that is to the fulfilment of all human persons and communities now and in future".[82] It is not clear to us that in posting such a strongly universalistic 'master principle' in their understanding of eudaimonia/beatitude New Natural Law theorists do not dispense with the classical, and for many, Thomistic notion of eudaimonia/beatitude.[83] In this understanding

[79] William E. May, *An Introduction to Moral Theology*, second edition (Huntingdon, IND.: Our Sunday Visitor, 2003), at 95.

[80] Ibid., 95.

[81] Finnis, *Aquinas: Moral, Political and Legal Theory*, 85-86.

[82] Finnis 'Aquinas' Moral, Political, and Legal Philosophy', section 3.2. New Natural Law theorists take this to be an outworking of Aquinas's endorsement of the 'summary of the law' commandment to love one's neighbour as oneself, which is itself a natural law precept and a form of the cross cultural Golden Rule. Remarkably, Finnis writes that this 'neighbour-as-self' master moral principle that he reads in Aquinas's moral theory "functions… rather like the categorical imperative of the kingdom of ends in Kant." Finnis, *Aquinas: Moral, Political and Legal Theory*, 131.

[83] This is something that, at times, Finnis writes candidly about: "it may be thought that the primary moral principle of love of neighbor as oneself is another reason to doubt (despite appearances) the strategic role of eudemonism in his ethics. Aristotelianising interpretations of Aquinas' ethics normally make central the notion of fulfillment, understood (it seems) as the fulfillment of the deliberating and acting person – to which the requirement of neighbor love does not have a perspicuous relationship." See Finnis, 'Aquinas' Moral, Political and Legal Philosophy', section 3.2. Reacting to Finnis's 'modern' interpretation of Aquinas's ethics, Rhonheimer holds that Finnis's ethical theory remains in the logic "of a moral theory in the "After-Virtue-age" and criticises Finnis as holding that Aquinas's treatment of the virtues "fails to provide a basis for the formulation of the propositional contents of moral rationality", inferring that in Finnis's treatment, speaking of the virtues "has not a normative, but rather an exclusively a 'parenetic' sense" which does not help resolve how an agent might act rightly. The modern distinction between the right and the good is crucial here, as analysed by W.D Ross. 'Right making' properties refer to normative questions of what action one is to take in a specific situation while 'Good making' properties are refer to intentions and inner dispositions such as the qualities of the heart and the will. See Martin Rhonheimer, 'Norm Ethics, Moral Rationality and the Virtues', in Martin

one acts, in a fundamental sense, for one's *own* fulfilment, rather than acting *directly* for the universal attainment of human goods for all persons. In the classical understanding already outlined, the good of others becomes part of the eudaemonic end of the agent through the *habitus* of virtue, for example through friendship or the virtue of justice. This is not to say that Aquinas did not think of the 'neighbour-as-self' commandment as a precept of the natural law (being a moral precept of the Old Law), but that he saw it as a practical principle related to the virtue (and duty) of justice (*ST* I-II q.99, a.4, ad.3) and to friendship (*ST* I-II q.99, a.1, ad.3).

Finnis interprets Integral Human Fulfilment in the active life of virtue as being perfective in its own order, in a way reminiscent of the *duplex ordo* (duel end) approach to beatitude. He does not give any indication of the 'disruption' that Rhonheimer and Bradley see as created by the *aporia* of a naturally 'endless' life. Finnis's sees in Aquinas a clear methodological distinction between the revealed theology in Aquinas's works, and the philosophical elements outlined within the same works.[84] He appears to hold that there is in some sense a complete and stable ethical philosophy to be found in Aquinas's oeuvre, one that can be held up against other ancient and modern ethical philosophies.

Rhonheimer's view of imperfect beatitude avoids both the Scylla of Finnis's implausibly complete Thomistic ethical *philosophy* and the Charybdis of Bradley and Milbank's negation of the viability of any ethical *philosophy*. Rhonheimer further takes on board the valid critique neo-scholastic forms of Thomism, commenced by Grisez, that focussed ethics principally on the achievement of the natural contemplative end of imperfect beatitude (E2), wherein metaphysics in some ways precedes and, to a certain degree overlooks, the original self-experience of the acting person in their practical reasoning towards intelligible and subjectively motivating human goods as proximate ends of action. Rhonheimer's disavowal of natural law theory as a comprehensive or fully formed universal philosophical ethic (*pace* Finnis) is persuasive - not least in the face of widespread pluralism about final ends. He rightly sees no requirement to specify a list of basic goods beyond the open ended list that Aquinas sketchily outlines (in *ST* I-II q.94, a.2) and because of the truncated nature of natural ethics he does not posit a complete or 'integral human flourishing' in the fulfilment of such goods.

Rhonheimer, William F. Murphy (Ed.), *The Perspective of the Acting Person: Essay in the Renewal of Thomistic Moral Philosophy*, (Washington, D.C.: Catholic University of America Press, 2008), 18-36, quotations at 22 and 21 respectively.

[84] Finnis writes that Aquinas views perfect beatitude as being "dictated by the needs of a specifically theological pedagogy, as open to telling objections, and as detachable from (or at least as methodologically posterior to) the working and sound foundations of his moral philosophy and his treatment of specific moral issues – detachable, that is to say, in a way that Aquinas would not need to regard as inappropriate in the different context of today's discourse." Finnis, 'Aquinas' Moral, Political, and Legal Philosophy', section 1.2.

3). A concern with "the inner moral life, and with settled patterns of motive, emotion, and reasoning"

Aristotle opened the *Nicomachean Ethics* by arguing that "the good is that which all men seek", following Plato and other Ancient philosophers who place the moral agent's participation in the good at the centre of ethical concerns. Martha Nussbaum has herself contributed substantially to the revival of the passions in contemporary ethics, though she does not offer an account of the emotional life in Aquinas' moral theory.[85] In fact, the passions play a central role in Aquinas' understanding of human life. His Treatise on the Passions in the *Summa theologiae* is longer than the Treatise on Beatitude, with 27 questions and 132 articles (more questions than that on law and grace).[86] For Aquinas, discerning what is a 'true' good for the agent rather than just an 'apparent' good is a central challenge of morality. This discernment is not only a matter for the rational aspect of the person but also the affective and sensate (or 'sensible') part of the human person. The human volitional appetite is, by nature, attracted to the good through the intellect (*ST* I-II q.34, 1). In Aquinas, the emotions are also a key way in which the agent is moved by her animal nature, rather than her specifically human *intellectual* nature, to the goods experienced by the moral agent.[87]

The right ordering of the emotions in Aquinas theory is disrupted by the theological doctrine of original sin. The loss of original justice that humanity possessed before the Fall[88] in which there is a right relationship between the reason and emotion, leads the emotions to become disordered within the soul. Thus reason and emotion lose their proper relationship with the emergence of concupiscible desires, which by their nature prevail over the workings of the practical intellect in pursuing 'true' rather than merely 'apparent' human goods.

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[85] Carol Leget among others have tried to fill in Nussbaum's lacuna, see: Carol Leget, 'Martha Nussbaum and Thomas Aquinas on the Emotions', *Theological Studies*, 64 (2003) 558-581.

[86] See Servais Pinckaers, 'Reappropriating Aquinas's Account of the Passions' in John Berkman and Craig Steven Titus (Eds.), translated by M.T. Noble, *The Pinckaers Reader: renewing Thomistic moral theology*, (Washington, D.C: Catholic University Press of America, 2005), 273-287, at 273.

[87] In Aquinas' philosophy and theology this transcendent good is capable of being shared as the Thomistic principle '*Bonum est diffusivum sui'* (the good pours itself out) suggests, though human goodness can only be considered to be analogical to God's transcendent goodness. In Aquinas's anthropology the soul has a vegetative part (concerned with growth, nutrition, reproduction) a sensate part, and an intellectual part. The sensate part and the intellectual part each have apprehensive and appetitive faculties. The emotions found in the sensate appetite are known as the *passiones animae* those of the intellectual appetite (the *voluntas* or will) are called *affectus*. Love, fear, pain, hatred and so on are all produced by the appetitive functions. These faculties are directed at being moved by the good as apprehended either by the intellect or the internal or external senses. The lower appetitive faculties participate in reason in that they are designed to follow the higher part of the soul. See Pinckaers, 'Reappropriating Aquinas's Account of the Passions', at 274.

[88] The Roman Catholic Church, for example, follows Augustine of Hippo in teaching that the Fall, as narrated in Genesis 3, is figurative and should not be read as a record of a specific historical event. That said, the Roman Catholic Church maintains that the story of Adam and Eve in Genesis 3 signifies a kind of primeval reality ('Adam' being a translation of the Hebrew 'Man').

Concupiscence is the affective desire of the lower appetite that is contrary to reason.[89] For example, the practical intellect and the emotions incline agents to the true good of certain external goods (such as material possessions and honour) and bodily goods (such as health), which in due moderation can be virtuous (under the cardinal virtue of temperance). However, the postlapsarian disordered relationship between reason and emotion results in the vice of avarice or greed where the emotional attraction to material and bodily goods is not properly moderated and governed by reason.

The Fall for Aquinas does not lead, as in certain forms of Calvinism, to the decimation of the natural inclination to true human goods. The effect of original sin instead leads to the emergence of concupiscence, which is a distortion of the proper relationship between the emotions and human reason. This is consistent with Aquinas's insistence, received from Augustine and the Fathers, that sin is fundamentally a privation of the Good. Aquinas holds that the emotions play a crucial and fundamentally positive role in the moral life of person, but that a person's emotions should be regulated by reason. The emotions in Aquinas can thus be described as "a foretaste or herald of meaning that reason can then bring to light".[90] We can say that the emotions – and not just the moral agent's strictly rational capacities - are teleologically oriented to the human good. Establishing a virtuous harmony between the emotions and reason is therefore critical. The emotions in this understanding are linked to the question of eudaimonia or beatitude. Servais Pinckaers views the emotions in Aquinas as "a direct and necessary component of the response to the question of beatitude" and links the marginalisation of the passions from moral philosophy in some modern philosophers to the loss of the primacy of eudaimonia in ethics.[91]

The soul for Aquinas is the unique 'form' (or 'principle of life') of the body, in which human nature is fundamentally constituted. In spite of the internal conflicts people experience, Aquinas affirms "a substantial union and natural harmony between the body and the soul" and a "harmony in the interplay between the human faculties: reason, will, sensation and sense perception, they tend to function together in coordination in, for example, in free choice".[92] Broadly following Aristotle's analysis of choice, *personal* freedom (not in this sense *political* freedom) for Aquinas is:

> "a faculty *processing from* reason and will, which unite to make the act of choice. For him, free will was not a prime or originating faculty, it presupposed intelligence and

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[89] Concupiscence is not a sin, but is a result of the loss of prelapsarian righteousness.
[90] Livio Melina, 'An Ethics of the Good Life' in Livio Melina, trans. William E. May, *Sharing in Christ's Virtues* (Washington, D.C: Catholic University of America Press, 2001), 34-58 at 44.
[91] Pinckaers, 'Reappropriating Aquinas's Account of the Passions', 276
[92] Pinckaers, 'Reappropriating Aquinas's Account of the Passions', 278

will. It was rooted, therefore, in the inclinations to truth and goodness that constituted these faculties."[93]

According to some recent readings of moral theology and philosophy the progressive transformation of this Thomistic conception of virtue and practical reason towards modern conceptions of human freedom begins with the emergence of nominalism of the fourteenth century. Pinckaers writes that "[n]ominalism disrupted the harmony between the human faculties" by concentrating freedom in the will, and morality in the law, leaving no other choice than "strict obedience or rebellion" to the moral law.[94] The medieval philosopher and theologian William of Ockham begins this transformation by losing the key notion that natural appetites and inclinations are in a sense the foundation of moral virtue - albeit a foundation that must be governed ultimately by reason. Virtue begins therefore to be reduced to the habit of observing obligations or rules while *eudaimonia* is lost as the key focus of ethics.

The close bond between personal freedom and human fulfilment that abided in classical and Thomistic ethics was thus obscured. Human free will teleologically oriented to the good and the true is thus replaced by a 'freedom of indifference' in Ockham and his successors. In this Ockhamist schema free will begins to be conceived primarily as a power of self-determination with the potential to countermand reason, a sort of existential "first fact of human experience".[95] Antinomies of law and freedom, reason and appetite, subject and (moral) object begin to emerge. Instead of agents acting to pursue their eudaemonic fulfilment, they act according to an external obligation. From this process the familiar approach of 'divine command ethics' begins to emerge, where moral agents are subjected to extrinsic commands from an inscrutable and omnipotent God. It is in this context that modern moral philosophy emerges, with its concern to resolve problems arising from moral agency – something clearly seen in Kant's attempt to overcome the autonomy/heteronomy problematic. The lineage from Ockham's approach and the Kantian notion of 'pure practical reason' (reason freed from the perceived distortions of natural inclinations) and the centrality of a 'good will' in dutiful obedience to rationally constructed universal moral laws is apparent.

4). Concern "with the agent as well as choice and action"

The stance of classical virtue ethics has been (over)simplified as characterising an 'ethics of being' whereas deontological ethics is essentially an 'ethics of acting'. Standard versions of classical virtue ethics see a strong conceptual link between virtue and eudaimonia, though

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[93] Servais Pinckaers, trans. Mary Thomas Noble, *The Sources of Christian Ethics* (Edinburgh: T&T Clark, 1995), 331.
[94] Pinckaers, 'Reappropriating Aquinas's Account of the Passions', 278.
[95] Pinckaers, *The Sources of Christian Ethics,* 331-332.

the nature of the link differs in particular accounts. The virtues themselves, at least in their classical interpretation, are dispositional and attend to the agents as practical reasoners. The virtues are habits of excellent (areteic) *moral* being and not merely skilled performance that make the agent a *good* person. Good action thus cannot be notionally separated from the good actor, and good action is that which a truly virtuous person might choose to pursue as a potential course of action in a contingent circumstance.

Virtues become part of an agent's character by habit and acquisition through repeated successful performance (what Aquinas later classified as the 'acquired virtues'). For Julia Annas:

> "This is because the centrality of practical reasoning in the classical version links a virtue as a disposition to the agent's reflective reasoning and thus to her character; virtue is not just a disposition in the sense of a reliable habit productive of something, but is the way the agent is, constitutive of the way she is living her life as a result of her own decisions."[96]

Thus in classical virtue ethics (which includes Aquinas in this reading), the fully virtuous person will thus "do the virtuous thing not only for the right reason but also gladly", whereas "a merely self controlled person has to fight down contrary inclinations."[97]

Despite the focus on the natural law in many of his writings, Martin Rhonheimer sees Aquinas's philosophical ethics as being fundamentally a classical virtue ethic where the moral task is to lead a virtuous life, pursuing the *vita activa* to achieve (imperfect) eudaimonia/beatitude (E1). Using the Aristotelian doctrine which considers practical reason as a process or "practical syllogism" in which practical and speculative reason are closely interlinked, Rhonheimer gives an account of the mirror or *speculum* (an element of contemplative knowledge) which is intrinsically embedded within practical knowledge. For Rhonheimer the moral virtues establish practical truth in concrete personal choices. Imperfect eudaimonia/beatitude is impossible to achieve without the natural law, which through its practical precepts or principles helps to rationally underpin moral virtue. In this sense Rhonheimer also sees Aquinas as completing the work of Aristotle, with natural law being a complement to Aristotle's teleological ethics. [98] This interpretation of Aquinas is not

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[96] Annas, 'Virtue Ethics', at 529.

[97] Julia Annas, "Reply to Commentators", *Philosophy and Phenomenological Research,* LV (1995), 929-937, at 929.

[98] End seeking action and 'rule following' have often been viewed as playing roles in Aristotelian ethics that should be "contrasted" rather than seen as in harmony. See for example: Alasdair C. MacIntyre, *After Virtue: a Study in Moral Theory,* second edition (South Bend, IND: University of Notre Dame Press, 1984), at 232 and 150ff. For Rhonheimer's comments about Aquinas's completion of Aristotle's ethics see: Martin Rhonheimer,

shared by other theorists, many of whom see a disjunction between Aquinas's understanding of natural law and his understanding of the operation of the natural virtues.[99]

Whether a virtue ethic can generate normative imperatives or 'deontic constraints' is a matter of considerable academic dispute.[100] Indeed, whether Aquinas's ethical outlook is fundamentally deontological is, as we have discussed, a contested matter. Rhonheimer for his part understands natural law precepts as working cognitively and spontaneously within the acting person as deontic constraints in the very operation of agent's practical reason (necessarily so for Rhonheimer, as the natural law is not a promulgated form of law in Aquinas's understanding).[101] Therefore the self-experience of the moral agent is centred on the striving to be a good or virtuous person - seeking 'the good life' - more than as being a 'rule follower'.

Rhonheimer wishes to reject the clear normative/eudaemonic distinction between right and good respectively: "what is right to do is precisely the action that is "morally good", and what must always be abstained from is "morally evil.""[102] Moral good and evil is directly connected to the question of whether the person becomes, as a result of her actions, a good or evil

'Review Article 'Nature as Reason: A Thomistic Theory of the Natural Law'', *Studies in Christian Ethics*, 19 (2006), 357-378, at 371.

[99] Edward Goerner makes such an interpretation in two notable articles on Thomistic ethics and politics. Taking the view that natural law and natural right in Aquinas's oeuvre are in some ways contrasting concepts, he holds that natural law precepts in Aquinas generate only *external* negative constraints on the 'bad man' to avoid manifest evils, but that the putative 'good man' is guided towards the truly good life and perfection through natural right (which "transcends" mere natural law restraints), involving the *intrinsic* action of the virtues, particularly the virtue of prudence. We concur, however, with Pamela Hall's critique of Goerner's understanding of the role of prudence vis-a-vis natural law principles when she writes that Goerner's interpretation of Aquinas "divorces his bad men's minimal obedience to the law from practical wisdom. [Separating]… observance of the law from an understanding of its point and purpose. On my view, this separation produces an incoherence in his account. I want to argue that effective discovery and use of the natural law requires the operation of *prudentia* (practical wisdom). Moreover, I assert that prudence continually requires the active presence of the natural law. This law is never, as Goerner claims, "transcended"." See Pamela Hall, 'Goerner on Thomistic Natural Law' *Political Theory* 18:4 (1990) 638-655, at 644. Goerner's articles are: E.A. Goerner, 'On Thomistic Natural Law: The Bad Man's View of Thomistic Natural Right', *Political Theory* 1 (1979), 101–122, and E.A. Goerner, 'Thomistic Natural Right: The Good Man's View of Thomistic Natural Law', *Political Theory* 3 (1983), 393–418.

[100] This dispute is well surveyed in Mark LeBar's 'Virtue Ethics and Deontic Constraints', *Ethics* 119 (2009), 642-671.

[101] As Rhonheimer writes: "This is how moral reasoning proceeds: when we come to know that something is against justice...[or another virtue depending on the action considered], we also know that it is against the moral law—both natural and evangelical—and thus also against God as the origin of this law. But from the Eternal Law *as it is in the mind of God*, we cannot deduce anything, because we simply do not know it. Even if the Eternal Law is the foundation and origin of another moral standard, we cannot refer to it in a moral argument because, as Aquinas emphasizes, we know it only as far as it manifests itself through natural human reason or supernatural revelation [citing *ST* I-II, q. 19, a. 4, ad 3]". See Martin Rhonheimer, Letter to Editor in 'Colloquy', *National Catholic Bioethics Quarterly*, 11:4 (2011), 627-629, at 629.

[102] Rhonheimer, 'Norm Ethics, Moral Rationality and the Virtues', at 35.

person.[103] Moral norms in this conception are "not in their fundamental meanings, "rules" serving the regulation of human behaviour….[but] are a linguistic expression of something much deeper, something rooted in what we call 'human nature'...",[104] thus one will "understand what a norm is through the concept of virtue, instead of… understanding virtue as an internalised norm or as the habitual fulfilment of a norm."[105] This is the key to understanding Rhonheimer's understanding of the nexus between the eudaimonistic and deontological (rule following) elements present in Aquinas's natural law theory.[106] Rules (including natural law precepts), though present in the process of practical reasoning, cannot directly generate prescriptive (linguistic) moral norms according to this view. Normativity is thus always linked to the moral virtues and what the (perfectly) prudent person may do.

For Rhonheimer, natural inclinations internally direct the acting person toward human goods - but the inclinations themselves cannot be morally prescriptive without the use of human reason and the attainment of virtue.[107] Following Aquinas, Rhonheimer (and Finnis) argue that the ends of the natural inclinations, which are the goods apprehended by the practical reason, are the 'seeds of the virtues' as the Stoics argued.[108] The virtues in turn make a constitutive contribution to the person's (imperfect) eudaemonic end of the *vita activa* (H1). Rhonheimer particularly stresses this point, arguing that the moral virtues are the habit of choosing what is a true good (*bonum honestum*) for the acting person, especially through the virtue of prudence. Without the virtues, the goods apprehended by the practical intellect

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[103] "The morally right which involves the rightness of the will and therefore purity of heart. This precisely is the work of moral virtue", see Rhonheimer, 'Norm Ethics, Moral Rationality and the Virtues' at 36. This does not mean that normative ethical discourse is no longer important, but that it is "no longer the real, foundational theme of ethics" in Martin Rhonheimer, 'Practical Reason and the "Naturally Rational'": On the Doctrine of the Natural Law as a Principle of Praxis in Thomas Aquinas' in Martin Rhonheimer, William F. Murphy (Ed.) *The Perspective of the Acting Person: Essays in the Renewal of Thomistic Moral Philosophy*, (Washington, D.C.: Catholic University of America Press, 2008), 95-128, at 128.

[104] Rhonheimer, 'Norm Ethics, Moral Rationality and the Virtues' at 35.

[105] Rhonheimer immediately adds "To grasp the moral norm by way of the concept of moral virtue means explaining it through the concept of "intentional action."" Rhonheimer, 'Practical Reason and the "Naturally Rational" at 128.

[106] I refer specifically here to Aquinas's natural law theory rather than his moral theory generally as the latter includes moral specifications promulgated through scripture, i.e. in revealed divine law. Rhonheimer is critical of those interpreters of Aquinas and Aristotle, such as Daniel M. Nelson and Martha Nussbaum, who place so much emphasis on prudence in Aquinas's and Aristotle's ethics respectively, that the generation of clear moral norms is not possible because, in their understanding of Aristotle and Aquinas, practical reason can only deal with the contingent singular circumstance. See Rhonheimer, *The Perspective of Morality*, f.n.63 and f.n.64, 290-291 and main text also at 290-291.

[107] As Thomas Hibbs helpfully sheds some light on how deontic constraints operate in Aquinas's ethics when he writes: "Thomas's theory of obligation involves the natural inclinations and the judgment of reason. Both are operative in his discussion of the command *(imperium)* of practical reason. Given the close correlation of intellect and will in Thomas's philosophy, we should expect the command of practical reason to reflect this reciprocity. Thomas says, "to command is an act of the reason, presupposing an act of the will, by whose power reason moves through the command to the exercise of the act." (citing *ST,* I-II, q.7, a.1). See Thomas Hibbs, 'A Rhetoric of Motives: Thomas on Obligation as Rational Persuasion, *The Thomist*, 54:2 (1990) 292-309, at 303.

[108] Martin Rhonheimer, *Natural Law and Practical Reason* (New York: Fordham University Press, 2000), 85-87.

may not translate into contingent actions that would be performed by a virtuous person - or may do so only sporadically. Vice may divert the person's pursuit from true goods towards merely apparent goods.

Prudence, the intellectual virtue of practical wisdom (pertaining to acting in contingent circumstances), thus plays an architectonic role in the moral life in determining what is a wise course of action in concrete situations for Aquinas as well as Aristotle. Conscious of hermeneutic and MacIntyrean critiques of universal moralities, Rhonheimer affirms that "independently of culture and a societal environment, natural law is not sufficient to generate in a univocal manner – as a 'universal morality' – [a] concrete practical orientation"[109] A 'concrete practical orientation' is thus centrally dependent on prudential reasoning and not solely on the application of universal rules to the moral life. The particular moral act for Rhonheimer is a "concretization" of natural law principles not merely an accomplishment of, or derivation from, such universal principles where prudence is "carried out under the cognitive direction of practical principles whose meaning and importance are clarified for the unique situation and thereby become practical in the fullest sense."[110]

5). The 'teleological' or 'naturalistic' underpinning to virtue ethics

What Martha Nussbaum in her initial threefold typology of virtue ethics omits is whether the teleological element of virtue theories relies on an explicit underpinning in a theory of human nature.[111] This shall be understood as the *fourth* main element of a classical virtue ethic. The extent to which a contemporary reformulation of classical or Aristotelian ethics is necessarily based on a *naturalistic* teleology (including what Alasdair MacIntyre described in *After Virtue* as Aristotle's 'metaphysical biology') is a matter of considerable contention.[112] I shall briefly turn to the vexed question of the relationship between human nature, metaphysics and moral normativity as explored by contemporary philosophers who look to ancient and medieval theorists as key sources. The influence of modern science has made philosophers re-envisage the way in which agents move towards certain ends or goods by fulfilling certain capacities or potentialities. Metaphysics was seen to be a central element in ancient and medieval ethics, which had become at least partly redundant as a result of a scientific understanding of nature in the modern era.

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[109] Rhonheimer, 'Review Article: Nature as Reason', at 361.

[110] Rhonheimer, *The Perspective of Morality*, 291.

[111] By teleological ethical theories I have referred not to various ethical theories that have subsequently become labelled consequentialist (including utilitarianism), but those theories that see human action and character as related to certain human purposes and ends, whether conceived in a traditionally naturalistic manner or not.

[112] MacIntyre, *After Virtue,* 162.

Julia Annas, questions this assumption by arguing that classical ethics always began its consideration of human fulfilment without recourse to metaphysics. She helpfully summarises her distinctive understanding of the relationship between classical virtue ethics, human nature and metaphysics, writing that:

> "virtue ethics is not by definition naturalistic, and those forms of it that are take their start from the actual state of knowledge in biology, ethology, and psychology rather than from metaphysics. Indeed, the growth of virtue ethics has provided one challenge to the idea that metaphysics is somehow privileged with regard to ethics; many workers in ethics are impatient of the idea that metaphysics is `first philosophy' that can lay down rules for ethics prior to any work in ethics. The rapid growth of modern virtue ethics has gone along with an explosion of interest in applied ethics that likewise takes it that our first task is to get the ethics right and then ask about metaphysical implications, rather than vice versa".[113]

Martha Nussbaum has interpreted Aristotle in an avowedly essentialistic way, albeit what she has called an 'internalist essentialism'. Her approach eschews a strong metaphysical or religious underpinning in the sense that her interpretation of Aristotle's moral theory does not "derive from any source external to the actual self-interpretations and self-evaluations of human beings in history".[114] For example, Nussbaum sees Aristotle's claim that people are 'by nature' political animals, not primarily as a speculative claim about the nature of human beings considered metaphysically but as a claim that natural social roles fulfil the person as "an activity of the soul in accordance with reason", as they unfold in practical reasoning.[115] She outlines a "thick vague theory of the good" and a theory concerned with human '*ends*' rather than all purpose '*means*' to human ends, as she characterises Rawls contrasting 'thin theory of the good' with its 'primary goods'.[116] The contemporary neo-Aristotelian philosopher Douglas Rasmussen takes a similar approach, seeing the human good as an "aspect of reality *in relation* to the needs of living things" rather than a non-relational intrinsic feature of things, or as subjective states of consciousness.[117]

One key way in which ethics has been seen as naturalistic has been the way in which Aristotelian and Thomistic ethicists have interpreted the *ergon* argument in Aristotle's

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[113] Annas, 'Virtue Ethics', 533.
[114] Martha C. Nussbaum, 'Human Functioning and Social Justice', *Political Theory* 20 (1992), 202-246, at 215.
[115] Martha C. Nussbaum, 'Aristotle on Human Nature and the Foundations of Ethics' in J.E.J. Altham and Ross Harrison (Eds.), *World, Mind and Ethics* (Cambridge: Cambridge University Press, 1995), 86-131, at 113 (see also 102-114).
[116] Nussbaum, 'Human Functioning and Social Justice', 219.
[117] Douglas B. Rasmussen, 'Human flourishing and the appeal to human nature', *Social Philosophy and Policy,* 16 (1999), 1-43, at 36-37.

Nicomachean Ethics (1097b22-1098a20) and Aquinas's *Commentary on the Ethics*. This *ergon* argument posits that, like different crafts or different human organs, human beings might themselves (literally or analogously) have a distinctive or peculiar 'function' that can be established through scientific inquiry or through a philosophical anthropology. This in turn, for Aristotle, would help decide what constituted a life well lived. This functioning would require speculative reflection on what a human being is as a rational animal.

For some Aristotelians and Thomists, this *ergon* argument structures and prefaces their discussion of human goods and ends, rendering the argument a naturalistic or essentialistic one. The contemporary Analytical Thomist John Haldane sees this as a viable ethical approach, and one where the good life is considered to be as much about "the integrated and balanced operation of various natural [human] functions, including physiological, psychological and social ones" as much as free floating objective 'goods' and 'values'.[118] John Finnis, however, rejects an *ergon* based approach, arguing that Aquinas's ethics are not naturalistic in this sort of way. Finnis clearly states that "the basic human goods and first practical principles pertain to human nature".[119] He makes this assertion for a number of reasons, not least because he writes that Aquinas consistently taught that:

> "coming to understand the nature of a dynamic reality such as human being, one must first understand its capacities, to understand which one must first understand its act(ivities), to understand which one must first come to understand those activities' objects. But the objects of human activities are intelligible opportunities such as coming to know, being alive and healthy, being in friendship with others, and so forth – objects whose attractiveness, fittingness, opportuneness, or appropriateness is in no way dependent upon, or even much enhanced by, the thought that they are distinctively characteristic of human beings as opposed to other animals."[120]

Capacities (or active potentialities) are fulfilled in the actions of the active life, which participates in human goods relating to those capacities as *perfections or fulfilments* of human persons. For Finnis, Aquinas's discussion of natural inclinations should be seen in this light – as intelligible goods and thus reasons for action rather than as natural inclinations that we first recognise speculatively to be in accordance with our human functions. Traditionally naturalistic Thomists argue that the speculative reason grasps the objects of natural inclinations as something pertaining to what human nature 'is', thus allowing the

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[118] John Haldane, 'Natural Law and Ethical Pluralism' in Richard Madsen and Tracey B. Strong (Eds.), *The Many and the One: Religious and Secular Perspectives on Ethical Pluralism in the Modern World* (Oxford: Princetown University Press, 2003), 89-114, at 97.
[119] Finnis, *Aquinas: Moral, Political and Legal Theory*, 90.
[120] Finnis, 'Aquinas's Moral, Political and Legal Philosophy', section 1.1 (v)

acting person to pursue the good related to that nature through the use of practical reason.[121] Finnis here makes a distinction between the *epistemological* and *ontological* levels when thinking about Aquinas' ethics. The metaphysician or philosophical anthropologist may rightly see human goods (such as friendship or health) as constituting an aspect of human nature at the ontological level of analysis, yet epistemologically they are understood by the practical reason as goods to be pursued or as reasons for action.[122]

Martin Rhonheimer both agrees and disagrees with Finnis on this point. He shares with Finnis the view that human goods are not initially known cognitively through the operation of *speculative* reason, but are rendered intelligible to the acting person through the operation of the *practical* reason. Where he differs somewhat with Finnis is that he sees an important *subsequent* role for a philosophical and a metaphysical anthropology as the acting person reflects on her self-experience of human goods as apprehended through practical reason. In this sense, Rhonheimer seemingly does not wish to let go of the Aristotelian *ergon* argument that it is possible to build up a human function argument that develops from reflection on the apprehension and pursuit of human goods in *praxis*, in contradistinction to naturalistic Thomistic ethical understandings.[123] But the ordering of knowledge has to be right: "First we are moral subjects, and only afterwards we are able to theoretically understand human nature, to recognize its place as foundation and guide toward moral perfection, and to elaborate a sound metaphysical anthropology upon it".[124] Rhonheimer especially emphasises that the experience of natural inclinations and the operation of practical reason should be seen as intrinsically intertwined because the Thomistic conception of the human person is that of a profound ontological unity between the body and the spiritual soul.[125]

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[121] Stephen Brock has finessed this traditionally naturalistic viewpoint, viewing the natural inclinations as themselves the product of the work of practical reason - rather than the data upon which practical reason works to apprehend true human goods. Thus the natural inclinations (in ST II-I q. 94 a.2) are *already* the product of the practical reason's apprehension of true human goods (*bonum honestum*), rather than, for example, concupiscible desires that leads the person to merely apparent goods. The crucial point for Brock in this understanding is that the intellect to grasp a good as a good it must first understand the good as 'being' according to the measure of truth, because 'goodness', 'truth' and 'being' are all transcendentals that are 'convertible' in scholastic parlance, with truth being prior to the good. Thus, although Finnis and Rhonheimer are right to say that practical reason grasps goods to be pursued, Brock claims that they do not take account of the fact that, the intellect must first apprehend the good as 'true' to the nature (being) of the human person. In this sense, Brock claims that the naturalistic position holds. Stephen Brock, 'Natural Inclination and the Intelligibility of the Good and Thomistic Natural Law', *Vera Lex*, VI, 1-2 (2005), 57-78.

[122] Finnis, *Aquinas: Moral, Political and Legal Theory*, 91-92.

[123] Rhonheimer, 'The Cognitive Structure of the Natural Law and the Truth of Subjectivity', 178, f.n.53.

[124] Martin Rhonheimer, 'The Moral Siginificance of Pre-Rational Nature in Aquinas', in Martin Rhonheimer, *The Perspective of the Acting Person: Essays in the renewal of Thomistic Moral Philosophy*, (Washington, D.C.: Catholic University of American Press, 2008),129-157, at 129.

[125] He stresses this not least because some critics of this understanding of natural law theory have accused its proponents of a 'rationalistic' or quasi-Kantian understanding of the natural law, treating the natural inclinations as marginal or irrelevant to what is truly good for the person.

The difference between the traditionally naturalistic position and the New Natural Law theory has been characterised helpfully as being the difference between a form of "naturalist objectivism" (Finnis and Grisez) and "objectivist naturalism" (Porter, Brock) - though the difference between the positions has rightly been described as "overstated".[126]

6). Conclusion

This chapter has briefly expounded an understanding of human fulfilment from a Thomistic perspective. My presentation has focussed on a first person ethic which begins with the fundamental question: "What constitutes good for one who acts?"[127] I have found that Martin Rhonheimer's interpretation of Aquinas's moral theory is persuasive as an attempt to fully work through the implications of a virtue ethic in the classical tradition. I have used the work of other contemporary theorists, such as Julia Annas and Henry Richardson, to bolster our understanding of a eudaimonistic ethic and to fend off undue criticisms of it. Such an approach is helpful as the ethical basis upon which an understanding of political association can be developed. Rhonheimer weaves various elements of Aquinas's thought into a coherent ethic of human fulfilment, yet his reading of Aquinas allows for the autonomy of practical reasoning in relation to certain human goods that may help explain how people may engage conscientiously in political association without necessarily subscribing to a theory of final ends. The openness to a theological completion of human ethics in Rhonheimer's reading is also important as religious believers will wish to see their moral life as in some way participating in the ordering of divine wisdom.

The theory I have presented also does not sideline or dismiss the importance of philosophy in ethics, as certain readings of Aquinas propounded by the Radical Orthodox and American *Communio* schools tend to. In this regard the understanding of ethics advanced here begins with the striving of the moral subject, using her autonomous practical reason to fulfil her good(s) as ends. In this sense I have put forward a view of an inclinationalist (rather than derivationalist) understanding of the apprehension of certain fundamental human goods, while stressing the potential of a subsequent philosophical anthropology in deepening the understanding of the goods that fulfil persons. However, this inclinational and spontaneous apprehension of human goods through the first principles of practical reason (the natural law) will not give each agent a determinate understanding of their final end(s). Each person adopts a plan of life, by design or default, in which certain final ends may be attained.

In summary, I have presented an approach to moral theory that is neither deontological or constructivist, yet is one that is consistent with an understanding of political association in

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[126] Haldane, 'Natural Law and Ethical Pluralism', 97.
[127] Rhonheimer, *The Perspective of Morality,* 9.

which overlapping consensus on intermediate goods or ends can be achieved without the necessity of agreement on final ends.

CHAPTER 3

CIVIL ASSOCIATION, JUSTICE AND NATURAL RIGHT

1). Introduction

This chapter aims to outline and justify certain positions in relation to natural right and human rights. I take as my point of departure key debates between Thomist philosophers and theologians, while at key points comparing Thomist perspectives with those of analytic political and legal theorists. In comparing contemporary understandings of Aquinas's work with philosophical positions from other traditions, I hope to demonstrate shortcomings in representative analytical accounts of human rights. I will propound an approach to justice, the political common good and human rights based on contemporary expressions of a Thomist position that can, in my judgement, address such some of those shortcomings.

The first position outlined is that of the fundamental conceptual continuity of Aquinas's legal theory within the classical natural right tradition embodied in Greek philosophy and Roman jurisprudence and at the same time with Hebrew and New Testament understandings of justice. Differences in the understanding of natural right over the ages are acknowledged but a core conceptual continuity is deemed more important than historical changes, significant though these are.

The second position relates to Aquinas original development of the virtue of justice and its enactment through positive law to fulfil the political common good. In doing so I will help demonstrate that the autonomy of positive law is not an invention of modern legal theory but was first asserted in the West by scholastic jurists and theologians, and is thus "at least consistent with, and perhaps promotes genuine theological commitments".[1] I will discuss whether the political common good is wholly instrumental to the person, or is a distinct human good in its own right.

I will then outline and propound the conceptual continuities between natural right (*ius naturale*) outlined in Aquinas and the philosophical notion of subjective natural rights, conceding that while Aquinas did not explicitly articulate a subjective natural rights theory, he possessed the conceptual apparatus from which rights could be seen as a *subjective* reflection of *objective* natural right. At the same time I will note the inconsistencies between a development of subjective natural rights from a Thomistic framework, with certain conceptions of subjective natural right (for example by Ockham and Hobbes) whose genesis

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[1] Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Cambridge: Wm. B. Eerdmans, 2010), xiv.

was influenced directly or indirectly by a voluntarism inconsistent with Aquinas's moral and legal theory. I will examine, and ultimately reject as too simplistic, more recent claims that natural rights and human rights are conceptually very different and that the ultimately theistic basis of natural right renders it unhelpful in articulating a contemporary human rights theory.

I will conclude the chapter with an assessment of the importance of human rights theory in advancing human rights practice, defending the potential of a natural law based underpinning to human rights theory against conventionalist or sentimentalist accounts of human rights.

2). Natural right and virtue of justice

The centrality of natural right and justice in political philosophy dates from classical times. Leo Strauss dates the emergence of the natural right tradition to the emergence of the philosophic age of Socrates, Plato and Aristotle. Strauss held that "[t]he distinction between *physis* [nature] and *nomos* [law] is therefore coeval with the discovery of nature and hence with philosophy"[2] and this "fundamental distinction was the necessary connection for the emergence of natural right".[3] For Strauss the pre-Socratics - typically Heraclitus - the distinction between just and unjust was merely human supposition or ancestral convention, as reported by Aristotle in the *Nicomachean Ethics* (*1178b7-22).* In Plato's dialogues and in the *Laws* we also observe a dialectical confrontation at points between skepticism and discussion of the 'law of nature' (*Laws,* bk X, 889).

The notion of natural right was thus founded on an understanding of human nature and the requisite standards of conduct that attend to such an understanding. In Strauss's reading justice is thus in some sense at least related to philosophical anthropology for the first time, whether or not this philosophical anthropology should be understood as being naturalistic in the traditional sense. This conception of natural right was in contrast to the sophists and pre-Socratics for whom justice was conventional and particular to cultures. Natural right thinking did not necessarily presume that each polis had exactly the same social or moral practices, only that a core sense of justice was universal to all societies on account of a shared human nature, even if some local conventions militated against their unfailing implementation in every polis or tribe.

Whether Aristotle propounded such a conception of natural right or was even the founder of natural law theorising remains a controversial question. Some interpreters go far as to state

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[2] Leo Strauss, 'The Origin of the Idea of Natural Right', *Social Research*, 19, 1/4 (1952), 23-60, at 32.
[3] Strauss, 'The Origin of the Idea of Natural Right', 34.

that Aristotle put forward a natural law theory of sorts,[4] or at least "laid the foundation"[5] of natural law thinking in later Roman and Christian thinkers, a position I consider more convincing. Much interpretative ink is spilled on, for instance, interpreting passages in *On Rhetoric* which at least superficially refer to an unchanging "law based on nature" (*On Rhetoric*, I.1373b)[6] and what can drawn from such language. Being also an art or craft, politics is at least partly contingent for Aristotle (*NE* 1140a10-13) and thus be thought of as philosophically distinguishable from metaphysics or natural philosophy. Humans are political animals for Aristotle *(Politics* 1253a; *NE* 1097b9-12) in the sense that without civil friendship (political association) no one could reasonably attain their final and self-sufficient fulfilment (Politics 1253a26-29). Aristotle also argues that human animals, with their unique capacity for speech and moral judgement, are intrinsically social beings (*Politics* 1253a9-18).

The polis is not the only association that contributes to the *eudaimonia* of persons for Aristotle. The domestic society (economia) also fulfils a human good in Aristotle's account. For Aristotle, Aquinas and in medieval corporate philosophy, the family is not simply a partnership of two persons, but a distinct *society* (a household). As such it has a status and value that is not merely instrumental, but constitutes a distinct aspect of the human good. In this sense Aristotle can be seen as the philosophical originator of what in the twentieth century came to be known as the principle of subsidiarity.

Justice itself is a virtue that governs right or just relationships between persons in the many domains of life (be they domestic, economic, or wider social relations). Justinian's classic definition of justice "the constant and perpetual will to render to each one that which is his due" is still a useful one. The nature of justice will differ depending on the context of human association. The justice owed to children in a domestic context is, for Aristotle, clearly different in kind to the type of justice owed to one's fellow citizen. Some interpreters of Aristotle have argued that, though friendship it is not named as a virtue in classical ethics, it

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[4] Tony Burns points to Aristotle's notion of equity and the attendant understanding of human equality underpinning it as indicating a nascent (but conservative) natural law theory: see Tony Burns,'Aristotle and Natural Law Theory' *History of Political Thought*, 19 (1998), 142-166. Bernard Yack disagrees with interpreting Aristotle as a natural law thinker on the basis, among others, that the term 'natural' in Aristotle's Nicomachean Ethics and the Politics does not necessarily infer universal moral standards or benchmarks against which positive law can be measured, but simply refers to the fullest 'natural' development of citizens practical capacities through moral virtue and prudence: Bernard Yack, 'Natural Right and Aristotle's Understanding of Justice' *Political Theory*, 18 (1990), 216-237.

[5] As Paul E. Sigmund argues in his *Natural Law in Political Thought* (Cambridge, MA: Winthrop, 1971), 12.

[6] Quoted in Sigmund, *Natural Law in Political Thought*, at 18-19.

does indicate a form of moral perfection that transcends the cardinal virtue of justice.[7] Robert Sokolowski argues: "justice can be seen as a participation in friendship".[8]

This development of natural right was also present in a theological form in the development of the Judaic religion. The Jewish philosopher Leo Strauss, however, seemingly denies that the notion of natural right was present in the Hebrew Scriptures, on the basis that there was no distinctly articulated philosophical notion of nature in the Old Testament.[9] Strauss may be correct in writing of the lack of a developed philosophic concept of nature in the Hebrew Scriptures, but recent Christian[10] and Jewish thinkers see in the teachings of the Torah - such as the commandment to "love your neighbour as yourself" (Leviticus 19:18) – a manifestation of a underlying understanding of universal justice. According to the contemporary Jewish philosopher and theologian David Novak, certain moral aspects of Mosaic Law presuppose and represent a universally binding natural law.[11] This law of nature doubtless has a transcendent origin in the Hebrew Scriptures, but in Novak's reading it nonetheless constituted an objective and binding basis of justice as it applies to all human beings.

3). Aquinas's development of justice and natural right

Thomas Aquinas developed his understanding of natural right from both philosophical and theological sources. Though natural law is not a pronounced theme in Augustine's writings, he refers to St Paul's early observation in his Letter to the Romans (1:18ff; 2:14-15) that the Gentiles without the Law were still, in principle, able to recognise God's authority, reject 'unnatural' forms of conduct as a certain moral code was "written on their heart". Augustine follows this Pauline view in his *De Trinitate* when he writes that:

> "Where then are these rules written, if not in the book of that light we call the truth? In it is written every just law; from it the law passes into the heart of the man who does justice, not that it migrates into it, but that it places its imprint on it, like a seal on a ring that passes onto wax, without leaving the ring."[12]

An acceptance of natural law was not confined to the Latin Fathers. The Greek Ante-Nicene Fathers, especially John Chrysostom, speak of a law of nature providing guidance

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[7] Robert Sokolowski, 'The Christian Difference in Personal Relationships', in *Christian Faith and Human Understanding* (Washington, D.C.: Catholic University of America Press, 2006), 199-213, at 206.
[8] Sokolowski, 'The Christian Difference in Personal Relationships', 207.
[9] Strauss, 'The Origin of the Idea of Natural Right', 23.
[10] E. Clinton Gardner, *Justice and Christian Ethics*, (Cambridge: Cambridge University Press, 1995), 40-53.
[11] David Novak, *Natural Law and Judaism* (Cambridge: Cambridge University Press, 1998).
[12] De Trinitate, 14, 15, 21. quoted in the *Catechism of the Catholic Church*, definitive edition, (London:; Burns and Oates, 2000), para.1955. Though it is worth noting that Augustine frequently did not explicitly distinguish natural law from the 'eternal law'.

universally in relation to action.[13] The Greek Fathers again lay emphasis on the theocentric aspects of natural law, but it is clear that they understand the natural moral law as universal and action guiding, and accessible not only to those who accept the revealed Mosaic law or the New Law. This theological understanding of natural law is thus transmitted through the scriptures to the Church Fathers (such as Augustine and Irenaeus), to the early Scholastics such as Albert the Great and his student Thomas Aquinas.

The philosophical sources of natural right in Aquinas are also significant. In writing of the precepts of the natural law, Aquinas sees "living in society" as a natural inclination of human beings (in ST I-II q. 94, a.2). Servais Pinckaers observes that Aquinas's treatment of the natural inclinations bears a striking resemblance to a passage in Cicero's *De officiis* (I.4) in which the inclination to self preservation, reproduction, truth, and common forms of speech and life are listed.[14] This dual understanding is a typical methodological move for Aquinas, who held that in order "to throw some light on many [theological] doctrines one must necessarily refer to the natural order" by means of certain analogies (*similitudines*).[15]

Aquinas appears to concur with Aristotle that political association is a weaker form of friendship than the strongest type (*NE* 1160a11-15) and is in some sense based on mutual advantage. This mutual advantage can be rationalised for Aristotle as the common good or common interest of the polis (*Politics* 1279a 18-22).

Justice for Aquinas is a practical rather than intellectual virtue. It is the virtue pertaining to right relations with other persons *(ST* I-II q.60. a.2, 3c; II-II q. 58. a.8). The object of the virtue of justice is 'the right' or 'the just thing' - that which is owed to others (*ST* II-I q.57. a.1). The definition of justice employed in his oeuvre is subject to three interchangeable terms, namely "one's own" (*suum)* or "due" (*debitum*) or "right" (*ius*)" - *ius* being the key term for 'right' taken in the ancient Roman legal tradition.[16] We can thus state that say that natural right (*ius naturale*) for Aquinas refers to that which is just in relation to oneself (in due self-love) and others - and its content or object is precisely *what* (thing, action, forbearance) is due to persons under the virtue of justice.[17] Unlike the other practical cardinal virtues (temperance and fortitude), justice is a virtue of the will and not the passions; and it is only

[13] Stanley S. Harakas, 'Eastern Orthodox Perspectives on Natural Law', *American Journal of Jurisprudence*, 24, (1979), 86-113.
[14] Servais Pinckaers, *The Sources of Christian Ethics* trans. M.T. Noble (Edinburgh: T&T Clark, 1995), 405-407.
[15] Leo J. Elders, 'Faith and Reason: The Synthesis of St Thomas Aquinas' *Nova et Vetera*, English Edition, 8 (2010), 527-552, at 539, (citing ST I-I, q.99, a.1.)
[16] See Thomas D. Williams, 'Francisco de Vitoria and the Pre-Hobbsian Roots of Natural Rights Theory', *Alpha Omega*, 7 (2004), 47-59, at 51.
[17] Here I draw heavily on John Finnis's definition of ius in Aquinas in: John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), at 135 (which draws on ST II-II, q. 57 a.1).

justice and its associated virtues are the only virtues of the will that can be obtained without grace.

Natural law and the virtue of justice are directly connected because the order of the virtues, as Aquinas states, is the end of the natural law (ST I-II, q. 94, a.3). As Martin Rhonheimer notes "the natural law contains within itself the *ordo virtutis*, in this case the order of justice".[18] Natural right for Aquinas according to Rhonheimer is "the expression of the part of the natural law that is related to the virtue of justice",[19] or more broadly "the realisation of the natural law or application of natural law to the human social order".[20]

Thomas Williams argues that natural right presupposes a moral relation which is based on what Aquinas describes as the 'becomingness' (*convenientiam*) of the thing: "from which becomingness we derive the notion of something due which is the formal aspect of justice: for, seemingly, it pertains to justice that man give another his due".[21] As we have seen, in the Thomistic framework, a living thing has capacities or potentialities, which if moved by the appropriate goods, can attain its proper end(s) constituting the fulfilment or perfection of the being in question. Aquinas further remarks "that which is required for a thing's perfection is necessarily due to it".[22]

The object of *ius* in this understanding is thus the due promotion of human goods of persons (whether individual or common goods) - which one renders to oneself and others in order to appropriately assist the fulfilment or perfection of oneself and others. Natural human perfection or fulfilment in this reading is that of the imperfect eudaimonia/beatitude of the 'felicitas civilis' (E3, as described in chapter 2). The notion of natural imperfect beatitude affirmed by Aquinas and taken from Aristotle's notion of eudaimonia as a virtuous life (*NE.* 1.7. 1098a15-18) is also cited a key underpinning of the basis of political authority by some Thomists. As Wayne Hankey notes:

> "His [Aquinas's] notion of an imperfect philosophical and moral happiness that humans can achieve by natural reason and the moral virtues in this present life is the "secular humanism" that I think his thought contains. This notion of an imperfect philosophical felicity is essential to Thomas's thought and is part of what made it revolutionary in the thirteenth century. It has, in fact, the potential to give an integrity

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[18] Martin Rhonheimer, trans. G. Malsbary, *Natural Law and Practical Reason* (New York: Fordham University Press, 2000), 498-499.
[19] Rhonheimer, *Natural Law and Practical Reason*, 532, f.n. 25.
[20] Rhonheimer, *Natural Law and Practical Reason*, 522.
[21] Williams, 'Francisco de Vitoria and the Pre-Hobbsian Roots of Natural Rights Theory', 51-52, citing ST I-II, q.60, a.3.
[22] Aquinas, *Summa Contra Gentiles*, II, 28, cited in Williams, 'Francisco de Vitoria and the Pre-Hobbesian Roots of Natural Rights Theory', at 52.

to secular political authority. Bellarmine used it 350 years later to limit papal authority, maintaining that the pope had only *indirect*, not direct, power in temporal matters."[23]

The ultimate ground of justice and thus natural right in Aquinas's conception is the twofold foundation of the fundamental *equality* of human persons, and the *freedom* of the person. Aquinas appears to follow Aristotle in posting these two principles as important for moral and social theory. Unlike in John Rawls recent 'political conception of the person'[24] - which is similarly founded on positing the equality and freedom of persons - Aquinas's conception is not simply a freestanding political postulate but has an ethical and metaphysical underpinning. Classical and Thomistic natural right fundamentally originates, as Rawls correctly observed, in the "pre-political domain" which is "ontologically prior…. to political values".[25]

John Finnis's influential presentation of Aquinas's ethical and political thought also gives a central role to Aquinas's understanding of freedom and equality. In his reading of Aquinas, "justice is between equals", citing texts (such as ST II-II, q.104, a.5c) stating that all humans are, by nature, fundamentally equal.[26]

Equality in this Thomistic perspective is underpinned by the notion of a certain *basic equality in personal dignity*. Personal dignity, at least in its fundamental sense, "is not a distinct property or quality, like a body's color", or based on the *exercise* of capacities, but is based on an entity's natural capacities, that is "the kind of substantial entity one is, [and in the case of a human person] a substantial entity of a rational nature".[27] In this reading, having a substantial rational human nature – whether rationality is actually exercised or not (in the case of infants or the disabled), is the basic ground for moral worth and respect. Persons, by virtue of this moral worth, are to be rendered their due. This Thomistic perspective, as interpreted here, is not so far from a certain interpretations of Kant's ethics in relation to human dignity in the 'formula of humanity' (such as in the interpretation put forward by Allen Wood against Christine Korsgaard).[28]

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[23] See Wayne J. Hankey, 'Aquinas at the Origins of Secular Humanism? Sources and Innovation in Summa theologiae I, Question 1, Article 1', *Nova et Vetera*, English Edition, 5 (2007), 17–40, at 20.

[24] See §3 and especially §5 of Lecture I in: John Rawls, *Political Liberalism,* revised edition (New York: Columbia University Press, 1996).

[25] Rawls, 'Reply to Habermas', Lecture XI in, Rawls, *Political Liberalism*, at 407. This clearly contravenes the strictures of Rawls's 'political liberalism' as it is not a completely freestanding conception, as I shall see in chapter 4.

[26] Finnis, *Aquinas: Moral, Political and Legal Theory*, at v.7, 170ff.

[27] See the contemporary Thomistic formulation of personal dignity and rights which attend to human dignity outlined in Patrick Lee and Robert P. George, 'The Nature and Basis of Human Dignity' Ratio Juris, 21 (2008), 173-193, at 174.

[28] "Kant's claim, as I understand it, is that we necessarily regard rational nature as an end in itself *objectively* and *unconditionally*. Its being an end in itself could therefore not be contingent on any act of ours through which

In relation to the foundation of freedom in Aquinas's theological and philosophical anthropology, theorists cite Aquinas's view that a human person was considered created in the image of God (with the attendant dignity conferred by this status), and thus an "intellectual [being], endowed with free choice, and having dominium over his own self (*per se potestativum sui*)".[29] This self-dominium, as found later in John Locke's approach, is often claimed to be the foundation of modern subjective natural right*s*, but as Brian Tierney points out, moral self-direction and free choice is clearly a scholastic inheritance present in Aquinas[30] and Vitoria among others.[31] The concept has even been traced back to the Hebrew scriptures.[32]

While the modern reaction against divine command ethics and towards the notion of moral autonomy exemplified in Kant may be seen as an understandable reaction to the voluntarism of Ockham and his successors (Gerson, de Novo Castro, and more latterly in Descartes), the early scholastic understanding of moral self-dominium is compatible with certain notions of moral autonomy. Brian Tierney specifically points to Rhonheimer's epistemologically (though not ontologically) autonomous understanding of natural law practical reasoning as a specific example of this.[33]

The virtue of justice for Aquinas is founded, paradoxically for some, on the notion of self love. Jean Porter interprets the passages in the *Summa Theologiae* as indicating that persons should, after prioritising the love of God, place love of self next.[34] Self-love is prevented from veering into a sinful egotism by the fact that it is ordered first to the love of God - and to God as the ultimate end of the person – and secondly, that people are attracted to the universal good. As we saw in chapter 2, in the work of classical theorists, it is through virtue that the good of others becomes the part of the good of the acting person. Hence the inclination to the universal good does not require that others' good is actually placed *before*

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that value might be conferred". [i.e. through a procedure of construction as, according to Wood, Korsgaard interprets Kant]. See Allen W. Wood, *Kantian Ethics* (Cambridge, Cambridge University Press, 2008), 91-92. Wood later suggests that Kant holds "that humanity and personality are necessarily coextensive" in terms of dignity, and that Kant's ethics rest on "the single fundamental value…[of the] the absolute worth" of a "rational nature in a person" (95). Emphasis in original.

[29] Prologue to ST I-II, as quoted in W. Norris Clarke, 'Freedom, Equality, Dignity of the Human Person: The Roots of Liberal Democracy' *Catholic Social Science Review*, 9 (2004), 61-66, at 63ff.

[30] Brian Tierney also points to Aquinas's De perfection, 560 and to *ST* I-II, q.1 a.1, in his 'Dominium of Self and Natural Rights before Locke and After', in V. Makinen and P. Korkmann (Eds.), *Transformations in Medieval and Early Modern Rights Discourse* (Dordrecht: Springer, 2006), 173-203, at 180, f.n. 26.

[31] See Tierney, 'Dominium of Self and Natural Rights before Locke and After' 176-194.

[32] The Fathers of the Second Vatican Council in 1965 cite the Book of Sirach ("God made man in the power of his own counsel", Sir 15:14), Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, n.17, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html accessed 4 January 2011.

[33] See Tierney, 'Dominium of Self and Natural Rights before Locke and After' at 180.

[34] Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (Cambridge: Wm B. Eerdmans, 2005), at 205ff.

the good of the acting person.[35] As Jean Porter points out, the attraction of the person to the universal good in a Thomistic framework means that more universal and communal goods can be thought of a being 'higher' than the goods experienced solely by the person.[36] The case of a doctor of teacher who forgoes more lucrative or easy work in a prosperous suburban area to work in an inner city area, where there was a shortage of staff and the social benefit of her work would be greater, could be seen as a contemporary example of the how a fully just person would act in accordance with the common good of a society.

Justice, or specifically *legal* justice, for Aristotle is the virtue that promotes the common good (NE 1129b 15-18). This is echoed by Aquinas who views legal justice as a being ordered to the political common good of a *civitas*. Aquinas is clear that political association is founded particularly on the virtue of general justice which in the political sphere, following Aristotle, is the virtue of civil friendship. This civil friendship between citizens is regulated by legal justice which is a key function of the positive law, as outlined in Aquinas's Treatise of Law. The political common good is a pivotal concept in Thomistic theory for, according to one interpreter, the "central claim of natural law political philosophy is that [positive] law has this reason giving force through the common good of the political community".[37]

Legal justice is the general aspect of the virtue of justice which has several elements: 'particular' (rendering to others their due bilaterally), 'commutative', 'distributive' or 'retributive'. These distinctions were neatly summarised by Thomas Gilby who wrote: "Justice is an analogical value pitched at various levels according as it renders what is due for the common good of the political community (*justitia generalis*), to one private person from another (*justitia commutativa*), and to one person from the political group (*justitia distributiva*)."[38]

General justice, according to Aquinas, directs all the virtues and external human acts to the common good by the use of law (ST II-II q.58, a.5).[39] By writing in places specifically of the *duties* of justice (such as in ST I-II q.100 a.2. ad.2. and q.100 a.3, ad.3), Aquinas appears to hold that that deontological right and the teleological good - though directly connected in the

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[35] The kenotic (self emptying) aspect of Christian ethics (exemplified by Christ's incarnation and Passion), is thus to be interpreted in Aquinas's thought as a radical superordination of the love of God over love of self - rather than as an abnegation of the self.

[36] Porter, *Nature as Reason*, 208.

[37] Mark Murphy, *Natural Law in Jurisprudence and Politics* (New York: Cambridge University Press, 2006), at 1.

[38] Thomas Gilby, 'Introduction,' *Summa Theologiae*, New Blackfriars Edition, vol. 37: "Justice" (New York: McGraw-Hill, 1975), xv.

[39] Though I note the disagreement (which I think Finnis gets the better of) between Finnis and Michel Villey on whether natural right is derived from *lex* (Finnis and Rhonheimer's position) or "the just portion due between individuals" which is Villey's view, cited in Annabelle S. Brett, *Liberty, Right and Nature* (Cambridge: Cambridge University, 1997), at 94-95.

virtuous life aimed at beatitude - are distinguishable moral concepts. This presumably leads a Thomist, such as Martin Rhonheimer, to declare that there is "some truth" in John Rawls's distinction between the "two moral powers" of a sense of political justice and the power of a person to pursue a conception of her ethical good.[40] This is apt as Rawls himself describes the complete separation of the political 'right' from the ethical/teleological 'good' as "impossible".[41]

Matthias Lutz-Bachmann considers Aquinas's understanding of justice as a significant development of Aristotle's understanding, holding that it is the genuine 'discovery' of a *normative* theory of justice. Lutz-Bachmann cites *questio* 57. a.1 (from *ST II-II*) where Aquinas that states that justice has a regulative role in ensuring "some kind of equality (*aequalitas quaedam*) between the agents"[42] involved in a social exchange. Using this and other passages he contrasts Aquinas's normative understanding of the "fundamental provisions of the legal system" proceeding from "the requisite human habit of justice and practical reason" with Aristotle's view of justice which is "already given [descriptively] on the basis of the respective form of rule or political constitution".[43] This allows the impulse towards justice in Aquinas's theory to operate as a force for social critique.

In her study of political association in Aristotle and Aquinas, Mary Keys writes that Aquinas's treatment of legal justice is "indebted to" Aristotle but "is not identical"[44] with the latter philosophers' treatment of the subject. For Keys, Aquinas in the *Summa Theologiae* enhances the concept of legal justice with an "enlarged emphasis on the common good, and by incorporating his novel natural law theory and an explicit account of the will into the dialectic concerning justice."[45] Keys concludes by arguing that Aquinas's understanding of legal or general justice "comprises a significant resource for political theorists today".[46]

Justice in this Aristotelian-Thomistic outlook is understood in the first instance as a personal virtue, though one that has a wider application in the concept of legal or general justice. John Rawls understood justice in a focal sense as fair general principles applied to a framework for social and political institutions. David Wiggins reads this early Rawlsian conception as a

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[40] See Martin Rhonheimer, 'Rawlsian Public Reason, Natural Law, and the Foundation of Justice: A Response to David Crawford', *Communio*, 34 (2007) 138-167, at 166.

[41] Rawls, Political Liberalism, at 203.

[42] Matthias Lutz-Bachmann, 'The Discovery of a Normative Theory of Justice in Medieval Philosophy: On the Reception and Further Development of Aristotle's Theory of Justice by St Thomas Aquinas', *Medieval Philosophy and Theology*, 9 (2000), 1-14, at 7.

[43] Lutz-Bachmann, 'The Discovery of a Normative Theory of Justice in Medieval Philosophy', 7-8.

[44] Keys, *Aquinas, Aristotle and the Promise of the Common Good*, 174.

[45] Ibid., 174.

[46] Ibid., 174.

different conception of justice to the Aristotelian or neo-Aristotelian conception.[47] From this perspective justice can have a legal-juridical element, but only after it is founded on the practice of just acts by citizens who possess a disposition towards justice. Wiggins describes this shift from a pre-modern to a modern conception of justice as one involving "a distrust about practical reason".[48] John Finnis echoes this point by arguing that the 'modern' natural right tradition (including Kant, a clear philosophical forebear of the early Rawls) is founded on an increasing scepticism about practical reason where human goods are no longer intelligible to moral actors.[49] The modern natural law theory of Locke and others is essentially voluntaristic according to Finnis and based on God's assertion of "superior will" which generates human law and obligation.[50]

4). Distinguishing the political and ethical domains

The relationship between natural right and legal justice by definition involves enactment in human (positive) law. Contrary to what one might assume about a theocentric thinker such as Aquinas he does not seek to derive positive law (which he subdivides between civil law and the *ius gentium*) from divinely revealed law or directly from the eternal law. Instead, following Cicero, Aquinas derives positive law from natural law. Natural law, as we have seen, is unrevealed law apprehended by the person without the requirement for religious texts or mediating institutions (though its precepts overlap with the moral precepts of the Decalogue).

Following Aristotle's conception of natural right, *positive* law in Aquinas is metaphysically understood as 'craft', a product in large part of human culture. Aquinas considered all forms of human law in a polity to be positive law, and was the first theorist to do so.[51] For contemporary natural law jurisprudents, positive law is worthy of study and description as a social fact and positive law should never be seen as a simple transposition from the moral law. Even legal theorists not categorised as natural law philosophers consider that contemporary natural law theorists offer "the best accounts of the nature and importance of positive law".[52] In these accounts, though law and morality *can* and *should* be connected to

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[47] David Wiggins, 'Neo-Aristotelian Reflections on Justice', *Mind,* 113 (2004), 477-512. Wiggins here cites Bertrand de Jouvenel as an Aristotelian in this respect.

[48] Wiggins, 'Neo-Aristotelian Reflections on Justice', 500.

[49] John Finnis, 'Natural Law: The Classical Tradition', in Jules L. Coleman & Scott Shapiro (Eds.) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) at 3.

[50] Finnis, 'Natural Law: The Classical Tradition', 5-6.

[51] John Finnis, 'The Truth in Legal Positivism' in Robert P. George (Ed.), *The Autonomy of Law* (Oxford: Oxford University Press, 1996), 195-214, at 195-196ff.

[52] Jeremy Waldron, 'Torture, Suicide and *Determinatio*', *American Journal of Jurisprudence,* 55 (2010), 1-29, at 1.

an appropriate degree by natural lawyers, they are methodologically distinct so that positive law cannot be reduced without remainder to morality.

Thus for the natural lawyer "the central claim of natural law jurisprudence is that there is a positive connection between [positive] law and decisive reasons for action: law is backed by decisive reasons for action".[53] In this conception, legal philosophy is about how the enactment of a positive law in a jurisdiction can create moral obligations that did not exist prior to the enactment of the positive law. Natural lawyers thus maintain that all genuine 'internal' reasons for action can be viewed as *moral* reasons in that they relate in some way to the well being or flourishing of persons. Legal authority and positive law can be seen as generating internal reasons for action which advance opportunities for human coordination towards a common good. Contemporary natural lawyers reject the claim of pure legal positivists that there can be no connection between law and morality whilst at the same asserting there is no *necessary* connection between every positive enactment and morality,[54] as the former has extensive aspects that are technical, not moral.

The formulation of positive law from natural law reasoning (and the human goods it makes intelligible) according to Aquinas proceeds by way of certain *determinatio* "whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape" (*ST* I-II q.95, a.2). Thus a statute may be presented by the practical reason of a legislator as having a certain outline form and basic content but there may be a wide variety of reasonable ways technically by which this form may be enacted - traffic laws being a classic example.

The question of the binding (or non-binding) nature of an unjust law is important here. Augustine and Aquinas both held that in some sense an 'unjust law is no law'. Legal positivists have seen this axiom as betraying all that is wrong in natural law theory: that it ignores the central importance of the social reality (law as 'rules of recognition' in H.L.A Hart's language) and the technical or cultural nature of law. However, contemporary natural lawyers interpret this Augustinian axiom to mean only that law and morality are connected in some irreducible ways, and that grossly unjust laws (such as *apartheid* laws) do not *by necessity* command obedience because they can in no way be rendered compatible with the public or common good and therefore cannot provide 'reasons for action' for agents to obey them.

In Aquinas's ethics, *moral* law – which has natural law within its ambit – is the light of natural reason helping to order the person to her ultimate end. Unlike divine law, which directs the

[53] Murphy, *Natural Law in Jurisprudence and Politics*, 1
[54] Finnis, 'Natural Law: The Classical Tradition', at 14.

person's *inner* dispositions to achieve their ultimate end, Aquinas views the civil law (deriving from natural law) as regulating people's *external* acts. While the divine law leads people to God, Aquinas states that:

> (1):"human law's purpose is the temporal tranquillity of the state, a purpose which the law attains by coercively prohibiting external acts to the extent that those are evils which can disturb the state's peaceful condition" (STh I-II q.98 a.1c);

> (2) that "human law is directed to civil community which is a matter of relating to one another";[55] and,

> (3) that "people are related to each other by external acts in which people communicate…this sort of communication/dealing is a matter of justice…..so human law does not put forward precepts about anything other than acts of justice".[56]

Inversely, Aquinas furthermore states that positive law should not fully suppress personal vice but should address "above all…those [vices] that harm others, without which the prohibition of which the preservation of society would not be possible, just as human law forbids murder, theft and similar things" (*ST* I-II, q.96, a.2). In the case of justice considered here, morality may require a virtuously just person to act in a perfectly just way, but the civil law is not tasked with the promotion of the perfect virtue (including justice). The civil law is distinguished by its aim in relation to the attainment and maintenance of social relationships between persons in order to achieve the common good. There may be cases where even ethically unjust actions do not threaten the common good of a political community and therefore do not require formal legal regulation. However, when a *personal* vice of injustice, such as in the case of lying, comes in the form of impersonation or fraud, there is a logic for legal intervention in order to maintain justice between persons. As in such a case, only when such ethically unjust actions impact adversely on the just order of a political community or the maintenance of peace should they be considered liable for regulation in civil law.

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[55] Aquinas quoted from a deleted draft of *Summa contra Gentiles* III, cited in John Finnis's essay 'Public Good: The Specifically Political Common Good in Aquinas' in *Natural Law and Moral Inquiry* (Washington D.C.: Georgetown University Press, 1998), 174-209, at 177 f.n.29.

[56] Ibid., also at 177, f.n. 29. For those who rightly raise Aquinas 'illiberal' position on religious freedom, John Finnis points to a major aporia in Aquinas relating to his position towards the status of so called 'heretics' in a civitas. For Aquinas paradoxically holds, on the one hand, that faith itself is a freely willed interior act (*ST* II-II q.1a c, q.10 a.8c) and thus is an act that cannot be compelled by law (*ST* II-II, q. 104 a.5c) and also that one's conscience should be obeyed even in the face of great challenge (*ST* I-II, q.19, a1), yet on the other he allows for the execution of heretics. For Finnis this is a contradiction that cannot be resolved other than by affirming a clear subjective human right to religious freedom, in which the state is not authorised to impose religious adherence on a citizenry, and cannot restrict religious practice on anything other than strict public order grounds. See Finnis, *Aquinas: Moral, Political and Legal Theory*, note B, at 292-293.

Civil law, according to Martin Rhonheimer, is therefore "not subject to the same practical logic" as matters relating to the moral law alone and is thus "saturated with a *specific* ethical-practical rationality" different to that relating to the natural moral law. Rhonheimer accordingly refers to "political goods"[57] in a way that distinguishes them from purely ethical goods. John Finnis appears to makes less of a clear distinction between the ethical and political domains. He states, in contrast to Rhonheimer, that ethical philosophy and political philosophy are subject to the same essential "normative… purpose and method", though Finnis of course acknowledges that legal philosophy involves a wider technical aspects. Finnis's characterisation of politics as a "specialised extension"[58] of ethics does not seem to fully capture the proper distinction between ethics and politics, and we may more helpfully say that politics is a domain of practical philosophy with a *distinct* but related purpose and method.

This perhaps reflects Finnis's view that political association does not constitute an intrinsic human good. John Finnis and Mark Murphy,[59] see the political common good as instrumentally (Finnis) or aggregatively (Murphy)[60] fulfilling the natural goods of persons. Finnis, while acknowledging the complexity of the question,[61] concludes that "the common good.…is not basic but, rather, instrumental to securing human goods which are basic [such as health, play, knowledge, friendship etc.]....and none of which is in itself specifically political"[62] citing the fact that Thomas lists 'living in *society*' as a natural inclination of practical reason rather than *political* association (S*T* I-II, q.94, a.2). The role of the political community for Finnis is to facilitate these basic human goods such as sociality and family life, and Finnis cites several texts from across Aquinas writings in defence of his position.

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[57] See Rhonheimer, 'Rawlsian Public Reason, Natural Law, and the Foundation of Justice: A Response to David Crawford', 151 and, 157-158. Rhonheimer also writes: "To be apt for public justification [and thus considered as political goods], natural law reasons must first be converted into public reasons. They are becoming [sic] public reasons only insofar as they can be justified in terms of referring to the common good of political society", Martin Rhonheimer, "The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason: Rawls's 'Political Liberalism' Revisited," *American Journal of Jurisprudence* 50 (2005), 1–70, at 48.

[58] Finnis, 'Natural Law: The Classical Tradition', at 19.

[59] It is worth making clear that Mark Murphy should not be seen as a member of the New Natural Law School as such, and holds some positions at variance from John Finnis and Germain Grisez.

[60] Murphy makes no claim as to whether this is actually Thomas's teaching but Finnis sees this as essentially Aquinas' view. Mark Murphy seems to argue that all apparently 'irreducibly social goods' such as the political common good must in a methodological sense be experienced by persons if they are to be true goods at all. He therefore suggests that such social goods including the political common good are not truly distinctive or substantive but are best understood as 'aggregative' goods. See Murphy, *Natural Law in Jurisprudence and Politics*, 72-80.

[61] Finnis openly wrestles with the conflicting nuances of various texts on the political good in Finnis, 'Public Good: The Specifically Political Common Good in Aquinas' at 180 and 185.

[62] Finnis, *Aquinas: Moral, Political and Legal Theory*, 247. Finnis hedges this point somewhat by leaving as an open question whether the retributive punishment of criminals is an intrinsic public good proper to the political community.

Accusations of an anachronistic 'Whig Thomism' are a frequent accusation against the picture painted by figures such as Finnis. Other traditionalist Thomist scholars point to passages within Thomas's oeuvre that infer that he believed that the purpose of political leadership was to bring the King's subjects to all round virtue, to their *beatitudo imperfecta.* Passages in the early *De Regno* seem to support such an interpretation,[63] as do passages which emphasise that aspects of political life are 'higher' in the metaphysical 'Chain of Being' and thus more important than personal or domestic goods. These passages indicate to interpreters such as Steven Long[64] and Lawrence Dewan[65] that the political common good is very much an intrinsic human good.

Finnis is not wrong to say there is *an* instrumental aspect to political community as it is clear that a well ordered political association can advance natural human goods such as family life or friendship. The key point is whether the political common good is *also* in some way substantive. Such a position was held by the neo-Thomist Jacques Maritain, who thought that the political common good (as well as pre-political familial goods) were important "infravalent ends" and "practical goods". Maritain thought that the common good of the *civitas* is:

> "neither the mere collection of private goods, the proper good of a whole which, like the species with respect to its individuals or the hive with respect to its bees, relates the parts to itself alone and sacrifices them to itself. It is the good human life of the multitude, of a multitude of persons; it is their communion in good living. It is therefore common to both *the whole and the parts* into which it flows back and which, in turn must benefit from them".[66]

Common goods in his understanding are higher than individually experienced human goods as 'wholes are great than their parts' in Aristotelian and Scholastic metaphysics. Therefore political goods are *both* instrumental and substantive. Maritain denies that his understanding

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[63] Where St Thomas states that the King should "establish a virtuous life in the multitude subject to him; second, to preserve it once established; and third, having preserved it, to promote its greater perfection" 'On Kingship' (*De Regno*) 4(1.15), in Oliver O'Donovan and Joan Lockwood O'Donovan (Eds.) *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Cambridge: Wm. B. Eerdmans, 1999), 330-354, at 340. Finnis acknowledges such passages but sees them as unimportant compared to Aquinas's more comprehensive and constructive theological and philosophical works.

[64] Steven A. Long, 'St. Thomas Aquinas through the Analytic Looking-Glass', *The Thomist*, 65 (2001), 259-300. Long interprets Aquinas as characterising humanity as being "teleologically ordered to God through hierarchically ordered, progressively more communicable common goods, terminating in the common good who is God himself, communicated in the beatific vision." Long's specific critique of Finnis on Aquinas's understanding of the political common good is found at §V, 291-299. Long accuses Finnis of nominalism and argues that the he fails to explicate Aquinas's understanding of political common good as part of Thomas' wider theology and philosophy.

[65] Lawrence Dewan O.P, 'Aquinas, Finnis and the Political Good', *The Thomist*, 64 (2000), 337-374.

[66] Jacques Maritain, *The Person and the Common Good* (Notre Dame, IND. University of Notre Dame Press, 1966 [1946]), 50-51, original emphasis.

of the common good is susceptible to totalitarian leanings as he accords people human rights and that he holds, with Aquinas, that there is a greater loyalty than to the political community, that of loyalty to God.[67]

This substantive view of the political common good is expounded by the Thomistic theorist Jean Porter who maintains that "the [political] community, in and through, the distinctive configuration of meaning and value that it instantiates, offers its individual members possibilities and capacities for flourishing as rational creatures which they could not develop or enjoy in other ways. At the same time, the distinctive values of the community can only be realized in and through their attainment by individuals singly, and in relation to one another".[68] This intrinsic conception of the political common good is implicitly supported by Charles Taylor's arguments in favour of what he calls 'irreducibly social goods'.[69] Such goods for Taylor are not wholly 'decomposable' down to the experience of the individual. Such a perspective for Taylor indicates a 'methodological individualism' and an 'atomism' that are undermined in their philosophical credibility by the post-Wittgensteinian understanding of the intrinsically social aspects of language and cultural forms.

This point about the substantive nature of the common good is closely linked to the issue of whether Aquinas believes that the role of the political community is to promote virtue generally (or the 'integral good' as Finnis calls it) or merely to promote the goods of justice and peace as Finnis and Murphy suggest.[70] This interpretation is important because on Finnis's reading Aquinas could be seen to be arguing for something approaching state neutrality, as a modern liberal might conceive it. I argue that the *focal* purpose of the political common good is the achievement of peace and justice – a position that can be traced to Augustine in *The City of God* (Bk. XIX). But I maintain that Aquinas's view of *beatitudo imperfecta* as civil felicity means that political association may in some way aim to inculcate virtue in citizens in a more comprehensive manner. This is consistent with Aquinas strictures regarding not coercively regulating interior acts or the *legal* suppression of private vice, as political association can involve *political* action that falls short of *legal* sanction. Political office holders have influential positions as moral leaders and can use their status as a bully pulpit for a 'good society' considered in all its aspects. Governments may non-coercively

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[67] Maritain, *The Person and the Common Good*, 71.

[68] Porter, *Ministers of the Law*, 151, also at 149-156.

[69] Charles Taylor, 'Irreducibly Social Goods', *Philosophical Arguments* (London: Harvard University Press, 1995), 127-145.

[70] Murphy writes "as I understand him, for Aquinas the common good consists of 'justice and peace'….where justice and peace are conditions of the community entire" in Murphy, *Natural Law in Jurisprudence and Politics,* 73.

promote or discourage virtue/vice without legal sanction through education, public information campaigns or the structured choices of 'libertarian paternalism'.[71]

Some figures in the analytic tradition have begun to rediscover the notion of the common good. The key consideration on the common good for Philip Pettit, following Brian Barry, is that it "should be identified with the common interests that people have as *citizens* – with public interests – not with the [all encompassing] avowable net interests that they have in common".[72] Pettit limits the role of the common good to the public interest of citizens rather than the holistic (i.e. public and private) interests of persons in all their social dimensions because of pluralism in conceptions of the full human good. For Pettit "[t]he fact that people differ in their capacities and circumstances, their tastes and commitments"[73] means that it would be nigh impossible for a single set of policies to match the all round net interests of all people in a political community. Pettit's argument here is consistent within the contemporary Thomistic framework considered here; for as Michael Oakeshott recognised Aquinas did not hold that individuals were "mere role performers in a *bonum commune*", but participated as persons in human goods which were capable of being distinguished from public or common goods.[74]

5). Objective natural right and subjective human rights

The natural right of the ancient Greeks (*diakon*) and the *ius naturale* of Stoic and scholastic thought have long thought to have been directly linked, though the nature of the link is somewhat disputed as we have seen. Disputation escalates, however, when the question of the link between objective natural right, subjective natural rights and human rights is raised. With, and since, the publication of *Natural Law and Natural Rights* in 1980 (commissioned by his colleague H.L.A. Hart), John Finnis has elaborated more fully than any other theorist an understanding of human rights founded on Aquinas's political and social theory.[75] A similar

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[71] This is the view of the libertarian paternalist theorists of 'Nudge', such as Cass Sunstein, See Richard H Thayler and Cass R. Sunstein, *Nudge: Improving decisions about health wealth and happiness* (London: Penguin, 2009). I may also cite as an example public health campaigns, which are state sponsored activities that encourage healthy eating or safe sexual activity in a way that goes beyond the strict necessities of the 'harm principle'.

[72] Philip Pettit, 'The Common Good' in Keith Dowling (Ed.), *Justice and Democracy: Essay for Brian Barry* (Cambridge: Cambridge University Press, 2004), 150-169, at 169, italics added.

[73] Pettit, 'The Common Good', 153-154.

[74] Oakeshott quotes Aquinas (*Summa contra Gentiles*, III, ch. 80) stating that there is a "human good which does not consist in a community but pertains to each individual as a self" quoted in 'On the Character of a Modern European State' in Michael Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975), 223.

[75] Finnis, *Aquinas: Moral, Political and Legal Theory*, 133-140, where Finnis comprehensively considers the question of Aquinas on natural right(s).

method has been used by Fred Miller (who cites *Natural Law and Natural Rights*) to develop a notion of rights from Aristotle's political and ethical theory.[76]

Acknowledging that Aquinas uses *ius* to denote the objective order of justice, Finnis concedes that Aquinas "never uses a term translatable as human rights, [yet] Aquinas clearly has the concept" of human rights.[77] He argues that certain precepts of justice are "owed to everyone in common" and their inverse violations listed by Aquinas:

> "implicitly [constitute] a list of rights to which one is entitled simply by virtue of one's being a person. Aquinas would have welcomed the flexibility of modern languages which invite us to articulate the list not merely as forms of right-violation *(in-jur-iae)* common to all, but straightforwardly as rights common to all: human rights".[78]

The intellectual historian Brian Tierney, in contesting Finnis's apparent claim that Aquinas had a theory of subjective rights, argues that that such a conceptual-linguistic apparatus was available to Aquinas as canonistic contemporaries were referring to *ius* as a personal faculty (*facultas*) or moral power (*potenstas*) - yet Aquinas did not use these terms. The relevant aspect of Tierney's work in this discussion is the argument that the concept of explicitly subjective natural rights extended back to the 1180s where English canonists were referring to a concept of a 'permissive natural law' based on a subject's faculty for choice in situations where actions "are neither commanded nor forbidden by the Lord or by any Statute".[79] Tierney argues that the scholastics and early modern theorist then pick up on the 'rights' flowing from permissive natural law and further develop them.

For Finnis, the normative foundation of subjective rights is the "principle of neighbour-as-self love, and the primary principles of the practical reason….[b]ut the ultimate ontological (first order) foundation of natural rights is the radical equality of human beings, as all members of a species of beings of a rational nature and thus all persons".[80] In his constructive presentation of a natural law jurisprudence (in *Natural Law and Natural Rights*), he characterises the maintenance of subjective rights as being "a fundamental component of the common good"[81] rather than a deontological constraint or trump to the common good, as

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[76] For a reference to Finnis's *Natural Law and Natural Rights* see: Fred D. Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: Oxford University Press, 1995), f.n. 224 at 107, and 87-139 for Miller's treatment of 'Aristotle on rights'.
[77] Finnis, *Aquinas: Moral, Political and Legal Theory*, 136.
[78] Finnis, *Aquinas: Moral, Political and Legal Theory*, 136-137.
[79] Quoting the English canonist author of *Summa, In Nomine*, in Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, MI.: Wm. B. Eerdmans, 2001 [1997]), at 67. Tierney's research on the development of natural rights is widely recognised as original and revisionist, superseding the previous work of Richard Tuck and Michel Villey in some significant ways, though his substantive historical conclusions are not uncontested.
[80] Finnis, *Aquinas: Moral, Political and Legal Theory*, 136.
[81] Finnis, *Natural Law and Natural Rights*, 214-218, at 218.

Ronald Dworkin suggests they should be viewed.[82] Richard Bellamy, writing from a (non-Thomist) republican perspective echoes this approach claiming that "[r]ights do not trump notions of collective good because they only make sense in so far as they contribute to that good and provide a suitable range of individual opportunities for all members of the community."[83]

Finnis does not deny the advantages of 'liberty' rights[84] as they emerged in the later scholastics (such as Suarez) and early modern theorists as long as certain rights were based not only on 'choice' or 'will' rights but on "basic or fundamental [human] needs" (in H.L.A. Hart's expression).[85] Jean Porter agrees that such 'liberty' or 'choice' rights have to supplement more fundamental 'right order' natural rights and that these are based on the faculty or moral power of the person, itself a reflection of a moral agents' self-dominium and free will.[86]

The conception of rights outlined by Finnis here is coherent and attractive - filling in gaps left by Jacques Maritain's mid twentieth century natural rights theory - and is a view of human rights acceptable to other Thomist theorists not aligned to the Finnis/Grisez New Natural Law school.[87] One can take the view of the historian (Tierney) that Aquinas did not explicitly articulate a subjective rights theory, with the argument of the philosopher (Finnis) that to render someone her *right* (*ius suum*) can be seen from the recipients' perspective as subjective *ius*. I believe that both Tierney and Finnis are both correct within their respective methodological domains.[88]

The justification of natural rights presented here is similar in its underlying rationale to that of the neo-Aristotelian theory of human rights propounded by Martha Nussbaum. Nussbaum

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[82] Ronald M. Dworkin, 'Rights as Trumps' in Jeremy Waldron (Ed.), *Theories of Rights* (New York: Oxford University Press, 1985), at 153ff.

[83] Richard Bellamy, *Political Constitutionalism* (Cambridge: Cambridge University Press, 2007), 31. Much of chapter one, especially 29-31 echoes a common good oriented political philosophy, and Finnis's Natural Law and Natural Rights is cited at f.n. 36, at 30.

[84] Although by 2002 Finnis held that his earlier interest in the difference between ius based subjective rights and liberty rights is now less important than he thought in his Natural Law and Natural Rights. John Finnis, 'Aquinas on ius and Hart on Rights: A Response to Tierney', *The Review of Politics*, 64 (2002), 407-410, at 410, f.n. 7. Finnis's article is a response to: Brian Tierney 'Natural Law and Natural Rights Old Problems and Recent Approaches' *The Review of Politics*, 64 (2002), 389-406.

[85] Finnis, *Natural Law and Natural Rights*, at 205, f.n. 6. Here Finnis quotes H.L.A. Hart who conceded in 1970 that the 'choice' and 'liberty' rights outlined in his earlier works do not preclude basing the "core notion of rights" on a more fundamental basis, such as the right to life and other fundamental developmental aspects of life.

[86] Jean Porter, 'Natural Right, 'Authority, and Power: The Theological Trajectory of Human Rights', *Journal of Law, Philosophy and Culture*, 3 (2009), 299-314.

[87] See for example, V. Bradley Lewis, 'Theory and Practice of Human Rights: Ancient and Modern', *Journal of Law, Philosophy and Culture*, 3 (2009), 277-296.

[88] See the exchange between Finnis and Tierney where Finnis says he advances philosophical arguments whereas Tierney puts forward [historical-textual] exegesis. Finnis, 'Aquinas on *ius* and Hart on Rights: A Response to Tierney', at 408.

notes that natural rights arguments usually proceed "by pointing to some capability-like feature of a person (rationality, language) that they actually have…. And I actually think that without such a justification, the appeal to rights is quite mysterious".[89] Nussbaum acknowledges the similarities between her theory and "Catholic Thomist Aristotelianism" but rejects this perspective partly on the grounds that some of its forms are illiberal and "do not emphasise liberty in the way my [capabilities] approach does".[90] Nussbaum holds this on the basis that New Natural Law theory does not distinguish clearly enough between the ethical and the political domains[91] – a point I have made from a Thomist position. She believes that her approach by emphasising *capabilities* rather than *functionings* (or goods in the Thomist lexicon) preserves a pluralistic degree of choice on how human functions or human goods can be actualised by moral agents. She views her capabilities theory as a "freestanding moral idea" in Rawlsian parlance;[92] that is, an essentially *political* understanding (that has a moral basis) but one that can be asserted independently of a pre-political and 'comprehensive' moral theory involving, say, a definite teleology or metaphysical anthropology.

The philosopher James Griffin criticises Finnis's 'right order' basis to subjective rights on the grounds that this is more of a theory of justice than a helpful theory of human rights.[93] According to Griffin, Finnis's rights theory is a fully congruent general moral-political understanding of justice and not specifically distinctive *human rights* theory that can helpfully be applied to contemporary human rights practice. The need for a theory of human rights that can aid the practical application of those rights is a central concern for theorists such as Charles Beitz, and, for other reasons, Joseph Raz[94]- though importantly neither Raz nor Griffin deny that contemporary human rights practice can 'overlap' with fundamental matters of justice broadly conceived.[95]

Charles Beitz attacks pre-political natural rights claiming that to identify them with modern human rights (as Finnis does) as in the Universal Declaration is "a form unwitting dogmatism…..[leading] to a damaging misconception of the legitimate scope of international

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[89] Martha Nussbaum, 'In Defence of Universal Values', *Idaho Law Review* 36 (2000), 379-447, at 438.
[90] Nussbaum, 'In Defence of Universal Values', 439,
[91] Nussbaum, 'In Defence of Universal Values', 428.
[92] Nussbaum, 'In Defence of Universal Values', 432.
[93] James Griffin, *On Human Rights*, (Oxford: Oxford University Press, 2008) f.n. 3, at 278.
[94] Joseph Raz, 'Human Rights without Foundations', University of Oxford Faculty of Law Research Paper: Working Paper No. 14/2007 (2007) available at http://ssrn.com/abstract=999874 (accessed 1 November 2010). Here Raz worries that natural right based or personhood based accounts of human rights do not address the enforceability of human rights in international law and in international action to address global injustices.
[95] See Raz, 'Human Rights without Foundations', 16.

human rights and of their potential for remediating injustice".[96] Yet Beitz examines only Locke when considering 'classical natural rights' theorists and Nozick as a contemporary natural rights exponent. His objection relates to the fact that these classical liberal theorists see natural rights as merely negative restraints on potentially oppressive government action and not to the establishment of "social conditions conducive to the living of dignified human lives" taken in a global context.[97] Yet as we have seen, the Thomistic conception of natural right (and its subjective reflection in natural right*s*) is fundamentally a key component of the common good: which is itself *precisely* that people should, in a political context, be acted towards with respect to their human capacities, through the promotion of certain fulfilling goods, towards their proper human ends.

The nature of rights as 'pre-political' should equally not be misunderstood, as they might have been by Beitz and others in relation to Aquinas. 'Pre-political' or 'natural' in this nomenclature does not mean that they are wholly abstract rights postulated in a hypothetical state of nature where humans are viewed as monads. For the Thomistic framework itself philosophically presupposes the natural sociability of humans, following Aristotle and the Stoics, so that when we speak of natural right we are clearly referring to a state of justice in relation to social or political life (rather than simply as an abstract metaphysical idea) and one that is not wholly derived from convention alone.[98]

The specific criticism of Finnis that his 'right order' human rights theory is not sufficiently distinguished from his wider theory of just moral action is fair and I hold that this relates to his reluctance to use constructively the notion of the *ius gentium* ('the law of nations') in *Natural Law and Natural Rights* as bridging concept between subjective human rights as they reflect the objective order of justice. As we shall see in chapter 4 the *ius gentium* provides, not without difficulty, a way of understanding that part of the objective order of justice that has universal or global scope *in positive law* and thus can be used as a way of conceiving (and evaluating) human rights *practice*.

One of the foremost contemporary critics of liberalism has been the self described 'post modern Augustinian Thomist', John Milbank. His view of natural right and human rights has

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[96] Charles Beitz, 'What Human Rights Mean', *Daedalus,* 132:1 (Winter 2003), 36-46, at 38, f.n.5. It is not clear that Beitz correctly cites Finnis here as a sceptic of human rights, to be mentioned in the same breath as Maurice Cranston and other doubters of the Universal Declaration. For Finnis in the passage cited by Beitz defends rights-talk as useful and only critiques certain articles in the Universal Declaration insofar as it they could be interpreted as advancing a utilitarian approach to human well being and that human rights should be seen as an important aspect or component of the common good, as outlined above.

[97] Beitz, 'What do Human Rights Mean', 41ff.

[98] I owe my thoughts here to Martin Rhonheimer, trans. G. Malsbary, *The Perspective of Morality: Philosophical Foundations of Thomistic Virtue Ethics,* (Washington, D.C.: Catholic University of America Press, 2011), 235-236.

evolved since the publication of Milbank's study *Theology and Social Theory* in 1990, partly as a result of Brian Tierney's research on rights. Milbank, who previously viewed subjective rights (through a radically theological lens) as a bastard child of modernity, has tempered his opposition to them. Milbank still decries subjective rights understood as 'liberty' or 'choice' rights, but appears to partly accept their usage strictly when connected with an objective 'right order' conception of justice. His position is distinct from that put forward by Leo Strauss (and his school) or C.B. Macpherson, even though some of the language he uses to describe the deterioration of natural right theory is similar. Milbank is still, however, critical of subjective rights as founded on voluntarist or nominalist metaphysics, as in Ockham or Hobbes. He sees the Franciscan poverty debate in the twelfth century as the key turning point towards a voluntaristic understanding of *dominium* and property rights.

While Tierney emphasises consistent continuities between objective natural right theorists (such as Aquinas) and the first subjective rights canonists and later scholastic thinkers such as Suarez and Ockham, Milbank sees the break from a 'participation' metaphysics (held by Augustine and Aquinas) to a 'voluntarist-nominalist' metaphysics (such as in Ockham) as shattering any coherent connection between objective *ius* and subjective rights.[99] Milbank concedes Tierney's point that that "something like 'claim rights' are well rooted in medieval corporate law and independently of voluntarism-nominalism"[100] yet he still holds that natural rights in the later nominalist and modern era becomes an impoverished and 'possessive(ly) individualist', emphasising property rights over oneself and the ownership of land. This is in contrast to pre-modern Christian thinkers, who largely opposed absolute property rights and emphasised the common destination of created resources.[101]

Yet in the final analysis Milbank implicitly sees some sense in speaking of subjective claim rights if these are part of a fully relational framework of justice in which duties and 'claim rights' are directly and reciprocally related.[102] He holds out at least some hope that "we can

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[99] John Milbank, 'Against Human Rights' Working Paper, Centre of Theology and Philosophy, University of Nottingham, (2009), at 26-36, accessible at
http://theologyphilosophycentre.co.uk/papers/Milbank_AgainstHumanRights.pdf accessed 2 February 2011. This paper contains Milbank's more recent view of human rights theory.
[100] See John Milbank, *Theology and Social Theory*, second edition (Oxford: Blackwell, 2006), f.n.56, at xxxi.
[101] The notion of the 'universal destination of goods' is still a strong one in the social doctrine of the Catholic Church, which can be summaried as the view that "God has entrusted the earth and its resources to the common stewardship of mankind to take care of them, master them by labour, and enjoy their fruits. The goods of creation are destined for the whole human race. However, the earth is divided up among men to assure the security of their lives, endangered by poverty and threatened by violence. The appropriation of property is legitimate for guaranteeing the freedom and dignity of persons and for helping each of them to meet his basic needs… It should allow for a natural solidarity to develop between men. The right to private property,….does not do away with the original gift of the earth to the whole of mankind. The universal destination of goods remains primordial, even if the promotion of the common good requires respect for the right to private property..." *Catechism of the Catholic Church*, definitive edition, (London: Burns and Oats, 2000), §2402-2403.
[102] Milbank, 'Against Human Rights' 12-13.

revive doctrines of objective *ius* that will better protect and also help to interrelate and mediate those various good causes which we now try to protect through incoherent notions of 'human rights.'"[103]

From a historical perspective Cary Nederman also believes that in modernity metaphysical and political assumptions about the world "shifted, so did the political lexicon, with the result that the same or similar words and their attendant conceptual structures took on different meanings and transformations occurred in discursive spheres".[104] Nederman brands Tierney a 'neo-Figgisite', and claims that medieval concepts of natural right derived from natural law provide "merely one element of a large and multidimensional story"[105] which Tierney oversimplifies. Two responses can be made to Nederman's criticism. Firstly, one can defend and elaborate the historical claims made - as Tierney does in his later research.[106] Secondly, one can defend the universality of natural right in wholly philosophical terms arguing, as Finnis and Rhonheimer do, that even the myriad historical ambiguities of *ius naturale as a doctrine* cannot methodologically obscure the actual existence of certain universal principles of practical reasonableness.[107] This being the case Finnis argues strikingly that "of natural law itself there could, strictly speaking, be no history".[108]

I acknowledge that the shift in metaphysical frameworks that occurred in the scholastic period affected the philosophical and theological coherence of natural law and natural right theory. Even Tierney sees in Hobbes (like Strauss) a version of natural right and natural rights that is far removed from his scholastic forebears and one that is barely coherent. One can grant that "modernity in general wrought profound and permanent changes upon which authors thought and wrote about politics"[109] without letting go of the claim that there is a certain fundamental continuity between ancient and medieval natural right thinking and the

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[103] Milbank, 'Against Human Rights', 43-44.

[104] Cary J. Nederman, *Lineages of European Political Thought: Explorations along the Medieval/Modern divide from John of Salisbury to Hegel* (Washington D.C.: Catholic University of America Press, 2009), 48

[105] Nederman, *Lineages of European Political Thought*, 48. Nederman's reference is to John Neville Figgis, the historian and political philosopher.

[106] Tierney for example addresses the question of self dominion in the transition into modernity in his, 'Dominion of Self and Natural Rights before Locke and after'.

[107] As Rhonheimer writes "The difficulty some authors have in distinguishing between "natural law" and [an] "account (or doctrine) of natural law" seems therefore to spring from their holding that natural law, as an order of natural ends or teleology, is first and originally an object of theoretical reason, and only afterwards applied to practical thinking; and from their simultaneously failing to notice that natural law originally belongs to practical reason, and that only subsequently…… it becomes an object also for theoretical reason and eventually a "doctrine." According to Aquinas's conception, therefore, natural law is a reality in the human soul, a cognitive and appetitive reality all human beings share by their very nature, even though they do not hold or even know any doctrine of natural law." Martin Rhonheimer, 'Natural Law as a "Work of Reason": Understanding the Metaphysics of Participated Theonomy', *American Journal of Jurisprudence*, 55 (2010), 41-77, at 61. Emphasis in original.

[108] Finnis, *Natural Law and Natural Rights*, 24-25, at 24.

[109] Nederman, *Lineages of European Political Thought*, 48.

emergence of modern human rights theories: namely that there are some universal ethical standards against which human social and political practices and conventions can critiqued and evaluated. Such a critique and evaluation thus informs subsequent efforts at the remediation of injustices when they are located. John Milbank's insistence on a fundamental rupture at the point at which voluntarism and nominalism arrives on the philosophical scene does not seem credible. As Milbank's himself notes Michel Villey, a key historical authority for Milbank, sees the Second Scholastic School of Vitoria, de Soto and Las Casas as developing natural right in a way that was "inherently in keeping with the thought of Thomas himself who had further Christianised the Aristotelian and Roman legacy in the wake of Gratian."[110]

It is in these later scholastics that the shape of modern human rights becomes much clearer. Vitoria undermines Aristotle's doctrine of *natural* slavery (without disowning all forms of slavery in principle), while Las Casas upholds the natural right of liberty of all human beings based on the Thomistic *ius naturale* and canonistic sources. Both rely in significant measure on the idea that natural rights attend to all people in possession of a human nature, and denied the prevalent claim at the time that some human beings (i.e. the American Indians) did not have a *rational* human nature and were thus not deserving of natural rights.[111]

6). Natural/human rights and God

A further thesis positing a rupture between natural rights and human rights has been put forward. Some political theorists such as David Boucher hold that natural rights and human rights should be seen as very clearly distinct. The common ground between natural and human rights is undercut for Boucher because natural rights are based on (i) foundationalism; and, (ii) on moral obligation grounded on belief in God, whereas contemporary human rights theories are generally post-metaphysical and eschew foundationalism.[112]

Boucher's account of Aquinas's moral and legal theory is thorough and nuanced, rightly pointing out the rational element of his ethics. However, he lays too much stress on the theonomic aspects of early Christian ethics in general and St Thomas in particular,[113] though he is not alone in this.[114] Law does indeed have a divine source in the eternal law (and thus

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[110] Milbank, 'Against Human Rights', 19-20, at 20.
[111] See chapter XI 'Aristotle and the American Indians' in Brian Tierney, *The Idea of Natural Rights*, 255-287.
[112] David Boucher, *The Limits of Ethics in International Relations* (Oxford: Oxford University Press, 2009), 3.
[113] Though Boucher does mention that one interpreter of Aquinas "does not consider natural law to be an imposition" and stresses the importance of empirical experience in the moral life. Boucher, *The Limits of Ethics in International Relations,* 50.
[114] Michael Zuckert sees a strongly theistic and foundationalist element to Aquinas's natural law theory, though he does so only by not examining (only summarily dismissing) Finnis's interpretation and not considering

the natural law) but Aquinas argues that humans, having a rational nature, are "provident" in their own moral life and in their relations with others - what Rhonheimer calls a "participated autonomy".[115] Thus to treat the pre-modern / modern ethical divide as implicitly one of heteronomy (theistic) versus autonomy (modern) may be an oversimplification, as Tierney contends in relation to Knud Haakonssen's history of natural law.[116]

Boucher argues, as I do, that natural law and natural rights are closely related, and he is justified in insisting that some early modern theories are based on notions of natural rights grounded in obligations to God and therefore it is anachronistic to call them secular theories (as Arthur Nussbaum and others had described them). Speaking of the natural rights thinkers generally, Boucher contends that "[r]eason, for the most part, could not in itself create obligation [a foundation provided by God….but] enables us to come to know what our rights and duties are".[117] This diagnosis might apply to some late scholastic and early modern natural rights thinkers but it is here argued that this is not the position of Aquinas in that law generally is an ordinance of reason and is thus binding as law *on the basis of its rationality.*[118] Natural law "is something pertaining to reason, namely reason that is natural, that is, which in itself in a way belongs to the order of nature".[119]

As a result of this fundamental shift towards autonomy in modernity and away from foundationalism, Boucher claims that "[a]ny element of Christianity or deism, of course, is in contemporary discussion of human rights an embarrassment, especially when one wants to emphasise their universality".[120] On one level he is correct to point to difficulties in agreeing human rights or remediating action based on human rights if the substantive conception of rights is formulated and expressed in an exclusively theological or metaphysical form. But this does not preclude certain conceptions of *natural* rights (with their *ultimate* theistic origin),

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Rhonheimer's similar stance. Michael Zuckert, 'The Fullness of Being: Thomas Aquinas and the Modern Critique of Natural Law' *The Review of Politics* 69 (2007), 28-47.

[115] Rhonheimer, *Natural Law and Practical Reason*, at 142 and 248.

[116] Tierney, 'Dominion of Self and Natural Rights before Locke and after', 194-195.

[117] Boucher, *The Limits of Ethics in International Relations*, 3.

[118] Though, as we have noted, Rhonheimer's understanding is that the natural law is a participated theonomy and that natural reason ('created' reason understood theologically) derives from the key Patristic and Augustinian notions of participation and divine illumination respectively. Rhonheimer therefore does not see Aquinas as a rationalist in the modern sense of the term.

[119] See Rhonheimer, 'Natural Law as a "Work of Reason", at 42, and also very clearly at 67-68. Or as Rhonheimer adds in the same article: "At least Thomistically speaking, in order to understand that what natural reason commands as good to be pursued, actually "ought" to be pursued (and its opposite avoided), no explicit reference to God as the source of this "ought" is needed (even though, in some circumstance and as a an additional motive to do what reason commands, the explicit reference to God as the source of human reason's authority can be helpful and even decisive). What explains the origin of the moral ought and obligation, however, is precisely the auto-possession of God's providence through the naturally and spontaneously preceptive acts of practical reason." (at 62).

[120] Boucher, *The Limits of Ethics in International Relations*, 142.

such as the one presented here, from being formulated as *human* rights and for common action to remedy injustices to be taken on that basis.

Jacques Maritain, who played an important role in the formulation of the Universal Declaration of Human Rights, subtitled a lecture on 'The Rights of Man': "Men mutually opposed in their theoretical conceptions can come to a merely practical agreement regarding a list of human rights".[121] Maritain recalls a discussion in UNESCO in 1947-48 at the time when a draft list of rights were discussed. When participants were asked about the list of rights they had considered their response was: "Yes…we agree on these rights, *provided we are not asked why.* With the 'why', the dispute begins."[122] Maritain thought the reasons behind the different justifications of rights are "essentially important" and not incidental, but nonetheless rejoiced that diverse groups can "formulate together common principles of action".[123] At the same time Maritain believed that the answer to the question of justice in diverse and pluralistic societies is not "a theoretic common minimum, it is..the effectuation of a practical common task".[124]

In Maritain's position, as Martha Nussbaum suggests, I see the beginnings of the idea of political liberalism later developed by John Rawls and Charles Larmore.[125] On this reading, arguments from a natural law doctrine to the development of human rights are distinguishable from that doctrine's theological or metaphysical grounding. For Maritain this was possible because the natural law has a twofold aspect, the gnoseological (epistemological) element and the ontological element.[126] The former for Maritain meant that the moral agent had a spontaneous inclination toward acting in accord with the natural moral law, whereas the latter ontological element was based on a "conceptual" understanding of human functioning (or "normality of functioning" as he put it).[127]

7). Conclusion

In this chapter we have seen how contemporary understandings of Aquinas's social and moral theory can contribute to some of the theoretical problems addressed in recent debates within political theory. These debates are especially important in relation to contemporary discussions of human rights.

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[121] Jacques Maritain, *Man and the State* (Washington D.C.: Catholic University of America Press, 1998 [1951]), 76.
[122] Maritain, *Man and the State*, 77.
[123] Maritain, *Man and the State*, 78-79.
[124] Jacques Maritain, *Integral Humanism*, (Notre Dame, IND., University of Notre Dame Press, 1973), 206.
[125] Martha C. Nussbaum, 'Political Liberalism and Respect: A Response to Linda Barclay', *Sats – Nordic Journal of Philosophy*, 4 (2003), 25-44 at 27.
[126] Maritain, *Man and the State*, 85-94.
[127] Maritain, *Man and the State*, 86.

On the matter of the deterioration of natural right thinking I see a greater break in early modernity when (as in Locke and Kant) natural inclinations are seen primarily as distortive of sound practical reasoning and Hume's scepticism about the basic truth attaining capacity of practical or speculative reasoning. With Finnis, I view this as undermining the basis of the natural right theorising as it develops in modernity. That being stated, I hold that that much of the useful work in developing subjective rights theory had occurred prior to this point with the canonists and the Second Scholastics. Thus we can resist Milbank's fears and the claims of Straussians that human rights are necessarily tainted by the philosophical or theological failures of modernity, as they would see them. I therefore view subjective human rights as a genuine linguistic and conceptual advance in that they help clarify how objective *ius naturale* might apply to subjects, by naming injustices in their concrete application to the persons who actually experience them. This cannot be a retrograde development in itself.[128]

The Universal Declaration of Human Rights and other early declarations in the post-war period perhaps provide evidence of the ability of *natural* rights thinking to operate as a *human* rights theory. In the Universal Declaration rights are founded on the notion of the "inherent dignity" of human beings[129] - though the source of that dignity deliberately remains unspecified philosophically or theologically in the text itself. The relatively shallow justification of human rights ('practical agreement' as Maritain called it) in twentieth century human rights declarations, helps to galvanise coalitions around human rights practices focussed on the attainment of human goods (and, more likely, the resistance of human evils). Scholars have rightly pointed out that the metaphysically underdetermined understanding of human rights and human dignity in the Universal Declaration and subsequent charters of rights have an important heuristic use and, as such, can positively contribute to human rights practice.[130]

Human rights founded on human dignity can be used appropriately to help name specific injustices *against subjects,* helping to start or assist a properly political process whereby an objective injustice (the act of violating rights) can be addressed. Non-Governmental

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[128] Referring to the task of politics in the classical era as securing progress towards an ideal - much as outlined in chapter 1 - I concur with V. Bradley Lewis when he writes that "The key task of political philosophy that is properly connected to practice, then, is to (a) interpret existing political institutions in light of the true principles and (b) recommend improvements in them that are realistic and not potentially disruptive of the fabric of practical life. It is in that spirit that one should consider human rights as a kind of political institution or practice from the classical perspective." See Bradley, 'Theory and Practice of Human Rights: Ancient and Modern', 277-296, at 283.

[129] Preamble, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.unhcr.org/refworld/docid/3ae6b3712c.html , accessed 12 August 2011.

[130] Glenn Hughes, 'The Concept of Human Dignity in the Universal Declaration of Human Rights', *Journal of Religious Ethics*, 39 (2011), 1-24, at 11-13. Hughes defines "an intrinsically heuristic concept [as] an intelligible reality of which we have some understanding, but whose full or complete content remains, and will always remain to some degree, unknown to us" at 8, emphasis in original.

Organisations and governments can then begin the task of positive action to remedy these injustices. Equally, when 'rights talk' is abused, such as when it is used as a polemical trump or as a way of stopping conversation in relation to fundamental matters of justice or the common good, the usefulness of the concept is somewhat undermined.[131]

Without a degree of implicit or explicit agreement on what the 'just thing' in the objective order of justice may consist in, the helpfulness of subjective human rights is circumscribed. This is no intrinsic flaw in itself as moral pluralism cannot be expected to have been overcome by the development or use of rights language. Rights, at a certain point, can only refer us back (or forward) to more fundamental questions about the content of the human good and a philosophical anthropology. As such rights cannot be separated from the political common good.

The challenge for Charles Beitz and Joseph Raz is how a foundationless human rights theory can genuinely critique pervasive social or cultural practices without some form of underpinning moral realism. For the contemporary natural lawyer an important basis of critique can occur through the goods and evils apprehended by practical reasoning through the operation of natural law. A lack of speculative agreement on the origin of moral obligation and human rights detracts little from their *basic* role in this way.[132]

In the case of Las Casas and the American Indians, moral outrage was married to a theoretical analysis of human rights that extended someway into a philosophical anthropology. The less directly engaged Vitoria and his scholastic and canonistic forebears provided the basis of Las Casas's compelling and passionate arguments.[133] I am not persuaded that human rights practice based on a conventionalism or sentimentalism alone -

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[131] See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991) for an account of how rights talk can be distorted in this way, though I do not agree with all the positions outlined by her.

[132] Michael Walzer sees natural right arguments as exemplifying a moral philosophy of 'discovery' or 'invention', in which one either externally receives or goes out of oneself to discover moral truths against which social practices are critiqued, see: Michael Walzer, *Interpretation and Social Criticism* (Cambridge, MA.: Harvard University Press, 1993). Walzer himself prefers a morality of 'interpretation' where existing social understandings are internally reinterpreted by prophet-like figures who are capable of renarrating the story of a society in a way that social criticism is not seen as an external or alien imposition. There is much sense in this interpretative ethic as a effective means of social criticism and this understanding is compatible in large part with the understanding of natural right expounded here as natural law reasoning is seen, in the first instance, as the acting person's 'internal' self experience of practical goods through the light of natural reason. Subsequent theoretical understandings of the human good that may be developed (in a philosophical anthropology) flow from this original experience of the acting person and is not, as Walzer characterises natural law, an exercise of discovering moral truths "*de novo*" (at 16 and 20).

[133] Walzer seems to think that Vitoria's application of natural law to the American Indians was "ideological" and was designed to justify the conquest of the American Indians rather than as a (highly imperfect) critique of the worst abuses of the Spanish conquest and the basis upon which subjective natural rights may be conceived. See his *Interpretation and Social Criticism* , f.n. 6, at 45.

as in Richard Rorty's approach[134] - can lead to fundamental critique of existing social practices.

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[134] See Richard Rorty 'Human rights, rationality, and sentimentality', in Stephen Shute and Susan Hurley (Eds.) *On Human Rights: the Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993), 112-134.

CHAPTER 4

POLITICAL LIBERALISM AND THE POLITICAL COMMON GOOD

1). Introduction

This chapter will set out an outline justification for universal human rights and aspects of what has become known as political liberalism. This will be done principally by way of a process of conversation and critique with two of political liberalism's most influential exponents, John Rawls and Martha Nussbaum. Their respective theories will be appreciated and improved by using some of the key insights of the Thomistic moral and political theory expounded in previous chapters. My own species of political liberalism will emerge from this process.

I will firstly outline the origin and usefulness of the concept of the universal common good (section 2) in the justification of human rights (section 3) and in approaching matters of national and global allegiance. As I argued initially in the previous chapter, the *ius gentium* (law of nations) which the Second Scholastics saw as a part of the universal common good, remains an important way of understanding that part of the objective order of justice that has universal or global scope *in positive law,* and thus can be used as a way of conceiving (and evaluating) human rights theory and practice.

In section 4 I outline the usefulness of political liberalism, through a constructive critique of Rawls's own interpretation of this important idea. I see the advantages in Martha Nussbaum's somewhat looser model of political liberalism, which itself follows the example of Jacques Maritain. Such a political liberalism is underpinned by the idea of equal respect for persons which is turn is grounded in the notion of human dignity or worth discussed in chapter 3. In section 5 I further adapt Nussbaum's approach along the lines suggested by some contemporary political theorists to develop a notion of 'permissive political liberalism' which in principle permits a greater admissibility of metaphysical and religious views in public reasoning while preserving the primacy of a political conception of justice including basic liberties and human rights.

2). The Universal / Global Common Good in natural law theory

The development of the notion of the universal or global common good is one that has developed and evolved since the scholastic period. The concept originates with ideas propounded by the Church Fathers, and was taken forward by Aquinas and later scholastic thinkers before being received into the social teaching of the Catholic Church in the twentieth

century.[1] Aquinas's role in this for some interpreters is very important. In his *Commentary on the "Ethics"*, he echoes Aristotle's notion that humans are 'political animals'. In Aquinas's own constructive works, Jean Pierre Torrell notes that his preferred usage is that of 'animale politcum et sociale'. This is significant for Torrell as "*sociale* is a translation of *koinonikon*, a term used by the Stoics to mean that man is the citizen not merely of some city, but of the *oikoumene*, the entire inhabited world of his time. We might translate this today as 'citizen of the world'".[2] Whether this is simply a reflection of the influence of Stoic cosmopolitanism, and/or an analogy in nature for a theological anthropology is matter of speculation.

This is echoed in other writings by Aquinas, where he refers to the fundamental unity of the human race as 'one community' (*quasi unum collegium*).[3] Consequently for John Finnis and other contemporary natural law thinkers the concept of general justice for Aquinas can, in principle, be seen as universal and not confined to relations among citizens in a *civitas.* This would be consistent with Aquinas's fundamental claim that justice is based on the basic equality between human beings.[4]

From these Thomistic (and Stoic) roots scholastic philosophers and theologians began to consider what has become known in Catholic social doctrine as the universal common good. For some contemporary natural law theorists such as Robert George, the universal common good can be used to justify envisaging "something like a world government" which "would attend to the common good of mankind".[5] This would address international "coordination problems" (recalling the 'salient coordinator' account of legal authority) that are encountered at a global level in relation to, for example, war and environmental pollution. For such reasons John Finnis denies Aristotle's position that the *polis* is the autarchic 'complete community' where all (natural) goods are fulfilled. Such a description better fits the global or international community for Finnis,[6] even though he notes that when Aquinas usually writes of the complete or perfect (earthly) community he does so, following Aristotle, in relation to

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[1] See Paolo G. Carozza, 'The Universal Common Good and the Authority of International Law', *Logos: A Journal of Catholic Thought And Culture,* 8 (2006), 28-55, for an overview of the development of the universal common good in natural law theory and the especially helpful and comprehensive article: William A Barbieri**,** '*Beyond the Nations*: The Expansion of the *Common Good* in Catholic Social Thought', *The Review of Politics* 63 (2001), 723-754.

[2] Jean-Pierre Torrell, *Saint Thomas Aquinas - Volume 2*, trans. Robert Royal (Washington D.C; Catholic University of America Press, 2003 [1996]), 279-280.

[3] Aquinas, *Quaestiones Disputataed et Malo* q. 4, a. lc: "The whole multitude of human beings is to be considered as like one community", cited in John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), at 115, f.n. 60.

[4] ST II-II q.104 a.5c "by nature all humans are equal".

[5] Robert P. George, 'Natural Law and International Order' in Robert P. George, *In Defence of Natural Law* (Oxford: Clarendon Press, 1999) 228-246, at 236.

[6] John Finnis, *Natural Law and Natural Rights*, (Oxford: Clarendon: 1980), 147-150.

the political community rather than the whole world.[7] In their positions outlined here both Finnis and George follow arguments pursued by their natural law forebear Jacques Maritain. In his Walgreen Lectures at Chicago University in 1949 (published as *Man and the State*) Martiain identifies the earthly perfect or complete community with the entire world and argued for the establishment of a world government.[8]

Such an emphasis on the global common good is not the same position as some purer forms of Kantian cosmopolitanism, whereby membership of communities (be they political, academic or familial) are substantially irrelevant to one's obligations in terms of social or distributive justice. The proper role and function of incomplete or imperfect communities (such as the political community for George and Finnis) is to be respected as a result of the principle of *subsidiarity* (from the Latin *subsidium*: to help, assist) which was defined classically by Pius XI as:

> "That most weighty principle [which]... remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice…. to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them."[9]

This concept of subsidiarity can be traced back to Aristotle, and through him to Aquinas and the scholastics, with their recognition of the natural function of communities in promoting human goods (the family or household paradigmatically, as shown in Book I of Aristotle's *The Politics*). The concept has a positive and a negative aspect – that higher entities should rightfully assist those lower communities with their proper social functions, but that the higher authority should take care not to usurp those functions in doing so.

For the purposes of this thesis this principle requires that the universal or global common good does not become a dominant or exclusive end (in terminology used in relation to personal eudaimonic goods). This means that nation states will still have crucial and enduring functions in relation to political goods that cannot be taken over by a higher

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[7] Finnis, *Aquinas: Moral, Political, and Legal Theory,* 122-123.

[8] Jacques Maritain, *Man and the State* (Washington D.C.: Catholic University of America Press, 1998 [1951]). Chapter VII, 188ff. Though Finnis and George, however, do not refer to Maritain's work in relation to this matter.

[9] Pope Pius XI, Encyclical Letter *Quadragesimo Anno*, promulgated 15 May 1931 http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html §79, accessed on 10 May 2011.

authority. I would also argue that this principle helps justify a moderate allegiance to such a nation state as morally acceptable. As we recall from Aquinas's exposition of licit self-love from the last chapter, political or national self-love (patriotism) can analogously be legitimate as long as it is proportionate and consistent with the duties of justice to lower and higher associations – including to the 'complete community' of all humankind itself.

Martha Nussbaum frames this question well in some of her more recent philosophical writings, emphasising that there should be a reflective equilibrium within ourselves, as we accept "the constraints of some strong duties to humanity, and then ask ourselves how far we are entitled to devote ourselves to the particular people and places that we love".[10] Nussbaum's stance on the legitimacy of patriotism is not far from that of the natural law perspective. Speaking on the relationship between nations and global considerations (in the same period – 1993 - that John Rawls was delivering his Amnesty lecture 'The Law of Peoples'), Pope John Paul II refers to nations as indispensible *natural* societies,[11] though societies founded on *culture* rather than racial or kin identity. He states that:

> "Whereas nationalism involves recognizing and pursuing the good of one's own nation alone, without regard for the rights of others, patriotism, on the other hand, is a love for one's native land that accords rights to all other nations equal to those claimed for one's own. Patriotism, in other words, leads to a properly ordered social love."[12]

In this respect I conclude that persons rightfully have bounded responsibilities between different forms of social groups that range from licit love of self, through to various different kinds of associations (including the family) all the way up to universal obligations based on natural right to all members of the human race regardless of their proximity or national membership.

3). Universal human rights as an expression of the global common good – the *ius gentium*

The development of the *ius gentium* derives from Roman Law and was transmitted to modernity via the scholastics, though its significance was manifest with the Second Scholastics and early modern theorists such as Grotius and Pufendorf. The brief treatment I offer here will focus on the development of the *ius gentium* firstly by Aquinas himself, and

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[10] Martha C. Nussbaum, 'Toward a globally sensitive patriotism', *Daedalus,* 137 (Summer 2008), 78–93.
[11] John Paul II stated: "The term 'nation' designates a community based in a given territory and distinguished from other nations by its culture. Catholic social doctrine holds that the family and the nation are both natural societies, not the product of mere convention. Therefore, in human history, they cannot be replaced by anything else." John Paul II, *Memory and Identity*, (London: Weidenfeld & Nicolson, 2005), 77-78.
[12] John Paul II, *Memory and Identity*, 75.

then by the Second Scholastics on the basis that these figures broadly founded their understandings of the *ius gentium* on a natural law theory consonant with Aquinas's own.

The *ius gentium* as *civil law* originated with the problem faced by the ancient Romans when applying laws to foreigners within their boundaries who were not subject to Roman civil law. For legal philosophers the *ius gentium* is essentially positive *or* natural law, with Jeremy Waldron concluding that "at various times and for various purposes it has been both, as well as the product of a sort of reflective equilibrium between the two."[13]

The brevity of Aquinas's writings on the *ius gentium* is a challenge for interpreters and those who wish to creatively retrieve some of his key moral and political ideas. It is clear that the presentation of the *ius gentium* in the *Summa theologiae* is underdeveloped and somewhat opaque while the distinction between natural law, civil law and the 'law of nations' is not precisely distinguised. That said we can still understand and define the *jus gentium* in Aquinas's theory as the law which derives from the application of natural law principles by way of conclusions or deductions "not very remote" from those principles"[14] (rather than by *determinatio)* to the enactment of positive law as it relates *between peoples or polities* rather than the relationship between citizens within a polity. It is that aspect of the natural moral law enshrined by peoples generally in their separate codes of civil law in individual polities. It can thus be distinguished from the general body of civil law of a state *per se* and distinguished from *ius naturale* (natural right) generically, which guides individual human actions towards others. Aquinas himself cites theft and breach of contract as examples of breaches of the law of nations.

Like all elements of the broader *ius naturale*, the law of nations is a work of reason ordered to the human good. The uniqueness of the law of nations, in contrast to other aspects of the natural right referring to justice between persons at a moral level (which is not necessarily regulated by civil law) and political justice (regulated by the civil law), is its universal scope in terms of its application between nations and their application regardless of their location. This is not to say that other aspects of natural right are not in their own way universal, only that it is universally binding in a different way to natural right as expressed in the civil law of a polity, or the narrower sense of the moral law.

The transformation of the *ius gentium* as customary international law (for instance in the law of the seas, mercantile law or on diplomatic law) into the Second Scholastic and early modern understanding of the *ius gentium* as the basis of international human rights law is

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[13] Jeremy Waldron, 'Foreign Law and Modern *Ius Gentium'*, *Harvard Law Review*, 119 (2005), 129-147, at 136.
[14] *ST* I-II, q 95 a.4c.

subtle and complex. The Second Scholastics originated this trend, seeing the action of the Spanish *conquistadors* in South America as being contrary to the *ius gentium*. Though Vitoria saw the *ius gentium* as being, strictly speaking, conceptually anterior to international law (*ius inter gentes*), he conceived its scope as including the protection certain fundamental human interests, as it flowed from the *ius naturale* (natural right).

For Vitoria, the manner of the Spanish conquest of the American Indians transgressed the law of nations. The murder and subjugation of the American Indians was not defensible under natural right as expressed in the *ius gentium*. Vitoria wrote:

> "And, indeed, there are many things in this connection which issue from the law of nations, which, because it has sufficient derivation from natural law, is clearly capable of conferring rights and creating obligations. And even if we grant that it is not always derived from natural law, yet there exists clearly enough a consensus of the greater part of the whole world, especially in behalf of the common good of all."[15]

This landmark argument by Vitoria (followed by the Second Scholastics and Suarez) that the *ius gentium* was not simply that positive law which empirically existed to govern transnational activities but one that had a normative element, helped to prepare the philosophical ground for the development of international law in relation to human rights. Vitoria also, as indicated in the passage above, crucially linked or incorporated the *ius gentium* into the *universal or global common good* in a way not explicitly elaborated by Aquinas, but is consistent with his social and moral theory.

Some significant contemporary Thomist theorists, however, give little emphasis to the role of the *ius gentium* in Aquinas's legal and political theory. John Finnis makes very little of the *ius gentium* in his extensive presentation of Aquinas's social philosophy and refers to the *ius gentium* only in a footnote in *Natural Law and Natural Rights*.[16] Equally, the Georgetown natural lawyer Mark Murphy, in an article on the prospects of a 'uniform planetary ethic',[17] avoids all mention of the *ius gentium*.

Finnis' relative neglect of the *ius gentium* in his normative theory is perhaps related to the fact that he holds that natural right can be immediately legislated into civil law. His basic goods theory propounds the view that moral norms on all important matters of basic justice are immediately transparent to people not blinded by partiality, bias or ignorance. Jeremy

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[15] Francisco de Vitoria, *De Indis et lure Belli Reflectiones,* quoted in Bernard V. Bradley 'An Analysis of the use of Rights language in pre-modern Catholic social thought', *The Thomist*, 57 (1993), 97-121, at 114.

[16] Finnis devotes but a scattered few sentences in *Aquinas: Moral, Political and Legal Theory*, and a foot note on page 296 of his *Natural Law and Natural Rights*.

[17] See Mark C. Murphy, 'Natural Law, Common Morality, and Particularity' in William M. Sullivan and Will Kymlicka (Eds.), *The Globalisation of Ethics* (Cambridge, Cambridge University Press: 2007), 134-150.

Waldron rightly identifies this point as a key issue arising from modern natural law theories: as individuals have immediate access to universal moral truths on a wide range of important norms, the relevance or importance of a body of internationally recognised positive laws is reduced. As Waldron writes "if true law is independently discoverable, why would one defer to other people's answers to these moral questions [via the *ius gentium*]....? Why not just ask and answer the questions oneself?"[18] This is perhaps Finnis's unspoken underlying issue with the *ius gentium* – it can play no significant role within his own theory, as the work of establishing a universal ethic and human rights is done straightforwardly by practical reasoning.

Natural right in its widest sense is, in the context of a political community, legislated for through statute and case law by judges, via *determinatio*. Natural right is legislated with broad scope and, as we have seen, includes in its enactment in human law much that is contingent and technical as well as purely practical-moral. Though the *ius gentium* also springs from the human natural inclination to sociality and justice it is, however, formulated not principally through *determinatio,* but due to its 'thinness' and universality is encapsulated through broad understandings of just conduct shared across cultures and national boundaries.[19] Actual attempts to codify the *ius gentum* into international law through treaties, international legal conventions and human rights declarations inevitably involve some degree of *determinatio* but the *ius gentium* itself can be conceived as that aspect of the *ius naturale* (natural right) expressed in its highest degree of universality.

I hold that the concept of the *ius gentium* retains its particular importance and should remain a crucial aspect of natural right theory. This is because the *ius gentium* specifically refers to that part of natural right that has an application and relevance across the boundaries of nation states, in the modern era developed through international law. This does not mean, of course, that the general norms embodied in the *ius gentium* should not be enacted into the positive law of states, only that the *ius gentium* relates to that which can be expected to be common among decent nation states.

This understanding has some commonalities with the view of the *ius gentium* espoused by John Rawls in his work *The Law of Peoples* - though Rawls is clearly inspired by Kant's political theory rather than the approaches of Grotius or Pufendorf. For Rawls, the Law of Peoples is a theory of the "particular political principles for regulating the mutual political

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[18] Waldron, 'Foreign Law and Modern *Ius Gentium'*, 129-147, at 137.
[19] Here the distinction between 'thin' and 'thick' ethical concerns is of course drawn from: Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad,* (Notre Dame, IND: University of Notre Dame Press, 1994).

relations between peoples".[20] I credit Rawls with emphasising once again the importance of the *ius gentium* (albeit renamed and reformulated as a 'Law of Peoples') and with the important project of bringing international relations and political theory once again into a closer relation - a trend that has continued since his Amnesty lecture in 1993.

I find especially attractive Rawls' position in relation to *human* rights in *The Law of Peoples*. These rights are not the constitutional or civil rights of a liberal polity (such as those established by the first principle of justice in *Political Liberalism)* but are a "special class of urgent rights such as freedom from slavery, and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide."[21] Their violation for Rawls is condemned by all international actors other than outlaw states that routinely abuse such human rights. I share this minimal scheme of universal human rights as that which is protected by the *ius gentium* as an expression of the universal common good, and which can be protected by other states by proportionate and lawful action in line with traditional just war criteria. This conception of human rights is similar to the understanding outlined in chapter 3 of this thesis – truly universal rights, which are in turn based on the idea of human dignity, without which the attainment of any range of substantive human goods cannot be attained. They are rightly distinguished by Rawls from civil or liberal rights, which are those 'choice' rights that are the subjective reflection of a well ordered polity.

Martha Nussbaum develops some aspects of Rawls' theory of global justice in her monograph *Frontiers of Justice*, but goes as far as to say that her own theory has roots in "exponents of the natural law tradition", including Grotius himself.[22] Despite this reference to the natural law tradition, the concept of the *ius gentium* appears to do little or no work in Nussbaum's theory of human rights. I judge this to be a weakness in her theory as expounded – as she seems only to have one overall category of 'rights' that does not seem to distinguish between fundamental human rights (concerning, say, genocide) and certain 'softer' civil or political rights.[23] The language of capabilities is in one way attractive in that it leaves a range of ways in which persons may wish to fulfil their innate human capacities. But using the full range of capabilities to draw up absolutely universal human rights is more difficult to justify and, importantly, place in a sensible hierarchy or scheme of priorities.

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[20] John Rawls, *The Law of Peoples*, (London, Harvard University Press; 1999), at 3.

[21] Rawls, *The Law of Peoples*, 79.

[22] Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, Belknap Press: 2006), 227.

[23] Samuel Freeman also sees this as a weakness in Nussbaum's theory. See Samuel Freeman, 'Frontiers of Justice: The Capabilities Approach vs. Contractarianism', *Texas Law Review* 85 (2006-2007): 385-430, at 425-426.

In my own variation on the concept of political liberalism, I prefer to distinguish between fundamental human rights (of the sort outlined by Rawls in *The Law of Peoples*) linked to the *ius gentium* and retain the distinct notion of intrinsic political goods (fulfilled in persons) through the attainment of a community's political common good. Respect for fundamental human rights is, for sure, a political good, but human rights and personal political goods are not coextensive in the way that they sometimes appear to be in the capabilities approach.

4). Overlapping Consensus and the Political Common Good – the promise of political liberalism

This section proceeds by examining how aspects of a virtue politics born of natural law virtue ethic can contribute to the establishment of a well ordered political regime, an ideal constitution if you will. On a methodological note I concur with Finnis's caution at the outset that it would be:

> "a mistake of method to frame one's political theory in terms of its 'liberal' or 'non-liberal'….character. Fruitful inquiry in political theory asks and debates whether specified principles, norms, institutions, laws, and practices are 'sound', 'true', 'good', 'reasonable', 'decent', 'just', fair', 'compatible with proper freedom' and the like". [24]

While Finnis is right that the primary task of political philosophy should be the consideration of the good or best regime rather than the consideration of particular theories of politics, the social conditions of modernity make some sort of consideration of political liberalism[25] important for a political theorist, including those with comprehensive ethical views. The need to address the issue of liberalism in political theory is important because 'liberalism's problem' is one that social philosophers can scarcely ignore: "how can the universalism of political/legal structural principles [which apply to all persons equally] square with the pluralism and self-direction required by human flourishing?"[26]

Two opposing but ultimately unconvincing tendencies can be seen in the attempt to resolve this central problem. First, the Scylla of 'discourse ethicists' who altogether disavow classical 'first-person' ethics altogether, seeking instead to use strict procedures of public reason to universalise personal moral perspectives in ways that seem more appropriate for the legal-

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[24] John Finnis. 'Is Natural Law Theory Compatible with Limited Government?', Robert P. George, (ed.) *Natural Law, Liberalism, and Morality*. (Oxford: Oxford University Press 2006), 1-26, at 9.
[25] I refer here not to the many and varied forms of philosophical or theological liberalism but to liberalism as a set of ideas relating to the right ordering of a political community. Though through history there has doubtless been some overlap between these types of liberalism, I hold that they are distinguishable from each other.
[26] The relationship between ethical goodness and political goodness and the challenges this poses to political theory are well explored throughout this work: Douglas B. Rasmussen and Douglas J. Den Uyl, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (University Park, PA: Pennsylvania State University Press, 2005): 284-285.

political domain than to ethics itself.[27] Second, it is seen in the (inverse) Charybdis of some quasi-Aristotelian or communitarian perspectives - such as that proposed by Alasdair MacIntyre - which implicitly fuses the ethical and political domains.[28]

Against such contemporary forms of communitarian Aristotelianism I would wish to direct attention, as I did in the previous chapters, to Aquinas's development of certain practical principles (in the *lex naturalis*) that help develop and take forward the classical first-person conception of ethics in a way which is helpful in dealing with intersubjective matters in the political domain. These insights help avoid some of problems of accommodating legitimate pluralism within political societies. Indeed, natural law theory in its traditional formulation offers some clear constraints on the proper functions of governments in political communities. It has done so, as we saw in the last chapter, through natural rights and the maintenance of 'right order' in social relations. Michael Pakaluk helpfully summarises some of these in a maximalist (and metaphysical) interpretation of what he calls the 'limits of government in Aristotelian-Thomistic theory'. These limits include:

> [1] "The view that positive law is derived from or based upon a natural law, which is furthermore well-expressed in an actual legal code of a particular nation, that is, the Ten Commandments and the Law of Moses.
>
> [2] That rulers need to be virtuous, so that, in particular, procedures for the selection of public officials must aim at this.
>
> [3] That human nature is real; that it has an actual character; and that good government must be based upon an adequate understanding of it.
>
> [4] That there are real "forms," or natures in things, which imply a difference in kind and not merely degree in levels of authority, that, generally, no higher authority commands all of the actions of a lower, but simply corrects and directs.
>
> [5] That there are natural differences in authority (for example, the knowledgeable have a natural claim to direct the ignorant…)…of which political authority is a development or rationalization. Political authority…. is simply the highest instance of something common and widespread…([and thus is not] an artificial and unjustifiable constraint imposed upon sovereign individuals.)

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[27] Martin Rhonheimer elaborates this point in: Martin Rhonheimer, trans. G Malsbary, *The Perspective of Morality: Philosophical Foundations of Thomistic Virtue Ethics* (Washington D.C.: Catholic University of America Press, 2011), 11-12.

[28] Thomas Hibbs diagnoses clearly the problem with MacIntyre's approach to politics: "In his reaction against the modern separation of ethics from politics, MacIntyre seems at times to go to the other extreme, to fuse his politics to an ethical conception of the good life. How Aristotelian is such a fusion? While closely related, politics for Aristotle is not simply an elaboration or expansion of ethics. The *Ethics* depicts the model of the good man, whereas the *Politics* operates with the distinction between the good man and the good citizen. No such distinction seems to be operative in MacIntyre's political thought." Thomas S. Hibbs, 'MacIntyre, Aquinas and Politics', *The Review of Politics*, 66 (2004), 357-383, at 375.

[6] That, since the role of any sort of governance is to inculcate virtue, and virtue itself implies authority and power, the role of governance is to increase the power and ability to govern of those subject to it….

[7] That every association involves some sort of exchange or reciprocity (a kind of amity), so that the political community as well must be arranged so that the reasonable consent of the governed is gained".[29]

These are clearly significant constraints on the role of the state which would project some features of human flourishing. The picture painted above by Pakaluk is somewhat akin to a form of comprehensive liberalism - classical liberalism - with its references to hierarchies, the moral law and an ahistoric notion of essential human nature. Citizens or theorists not persuaded by such a basis to liberalism, such as those who advocate a constitutive version of rational autonomy,[30] will not be able to subscribe to Pakaluk's particular metaphysical vision of social life. Achieving agreement on such metaphysical matters, even as they relate to social life, is a much harder task as this involves agreement on aspects of human nature considered speculatively. Much contemporary political theory is propounded on the basis of a bracketing of substantive ethical and metaphysical considerations. John Rawls is the most prominent advocate of something like this approach, though other theorists have chosen similar paths independently, or as a result of, Rawls's work.

An acknowledged key question for political theorists in modernity is how a citizens' comprehensive moral doctrines, through a process of public/political reasoning, can become politically relevant and can serve as the basis of lawmaking and the determination of a political conception of justice. For Rawls religious and ethical understandings of the good may be advanced in the public domain by persons but will only become public reasoning (and thus politically relevant) to the extent that such arguments are capable of being recognised as reasonable by those who do not necessarily share those ethical or religious doctrines. Rawls includes within comprehensive moral/ethical doctrines secular or Kantian conceptions of ethics that do not purport to be forms of moral realism. In this sense Rawls's late political theory (as exhibited in his *The Idea of Public Reason Revisited,* the 'Reply to

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[29] This is an edited and renumbered list of the 'limits to government' from Michael Pakaluk. 'Is the Common Good of political society something limited and instrumental?' *The Review of Metaphysics,* 55 (2001), 57-94 at 86-87.

[30] See Martin Rhonheimer's discussion of 'constitutive' autonomy in his *Natural Law and Practical Reason*, trans. G. Malsbary, (New York: Fordham University Press, 2000), 195-213. Rhonheimer contrasts constitutive autonomy (absolute moral independence) with personal autonomy (which is defined as self dominium) or functional automomy. The latter two he sees as consistent with a natural law ethic while the former is characteristic of Kant's ethics for Rhonheimer.

Habermas' and in the 'Commonweal interview') cannot be described as arbitrarily antireligious or akin to radical doctrine of laïcité.[31]

One aspect of Rawls's theory that has proved controversial and has been disputed is his view that the legitimacy of the political order should be 'political not metaphysical' in order to ensure its ongoing stability.[32] He feared that an overlapping consensus on matters of basic justice and constitutional essentials constructed by reasons that were metaphysical or substantively ethical by their nature, or directly as a by-product of such views, would ensure only a *modus vivendi* that would be unstable and transient.[33] Instead Rawls thought that an overlapping consensus must be based on freestanding political conception of justice, which may be fitted like a 'module'[34] within one's wider comprehensive ethical or metaphysical *weltanschauung*.

Such a 'module' must have its own internal principles and reasons which may be consonant with the wider metaphysical or moral comprehensive doctrine but not simply be a simple extension of, or be directly derived from, the comprehensive doctrine. A political conception

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[31] Though I do not agree with Rawls's particular form of political liberalism ('Justice as Fairness'), I view Finnis's trenchant critique of Rawls's political liberalism on this specific point as being unduly severe. Finnis founds his rather outspoken written comments on *Political Liberalism* on the basis of Rawls's conclusion that positions stating that abortion should not be lawful in the first trimester are not in accordance with public reason as he viewed it (John Rawls, *Political Liberalism,* second edition, [New York, Columbia University Press: 1996], f.n. 32, at 243). Rawls's comments on abortion was in fact his own *applied* political opinion on the question rather than as an intrinsic expression of political liberalism as a metatheory – indeed this was Rawls's own view (Rawls, *Political Liberalism,* Introduction to the Paperback Edition, lvii). Rawls's initial comments in the first edition footnote mislead some readers - including Finnis and other Catholic critics - that his metatheoretical notion of public reason is was narrower than it actually is. Rawls himself later wrote that certain Catholic and natural law arguments advanced about the political (in)justice of abortion might well be admissible as public reasoning even if there are also non-public reasons why a Catholic would wish to oppose legalised procured abortion (Rawls, *Political Liberalism*, Introduction to the Paperback Edition, at f.n.32, lvi). See John Finnis's article directed against Rawls: 'Public Reason, Abortion, and Cloning', *Valpariso University Law Review*, 32 (1998), 361-382. Finnis is in fact closer to the mark on evaluating Rawls's theory when he says that Habermas's and Rawls's positions are, in some ways "so close to [Finnis's interpretation of] natural law theory in intention, and in some respect, results", John Finnis, 'Natural Law and the Ethics of Discourse', *American Journal of Jurisprudence*, 43 (1998), 53-73, at 72.

[32] Rawls sets out the linaege of his theory in the historical context of the emergence of liberalism resulting from (a particular reading) of the problems encountered in medieval Christianity and the Wars of Religion (see Rawls, *Political Liberalism*, Introduction, at xxiii-xxx). This history is itself contested by some Radical Orthodox theologians, and though I do not concur with some of the exaggerated aspects of this historical and theoretical critique, such thinkers are right to question this particular historical narrative. See William T. Cavanaugh, '"A fire strong enough to consume the house": the Wars of Religion and the rise of the State', *Modern Theology*, 11 (1995), 397-420.

[33] Though I doubt, with the Analytical Thomist John Haldane, that a *modus vivendi* would necessarily be as unstable as Rawls feared. Haldane points to the British constitution, with its important and overt historical and religious elements (such as an Established Church in England), and writes: "This [British] order exists, and (to the extent that it offers any justification) justifies itself independently of a theory of the right. Even if it originates in and is maintained by a series of pragmatic resolutions, these quickly come to be the object of civic allegiance, particularly as they are given the protection of law. If this is a *modus vivendi* writ large, it certainly seems no less stable than an overlapping consensus". See John Haldane, 'The Individual, the State, and the Common Good', *Social Philosophy and Policy*, 13 (1996), 59-79 at 78.

[34] Rawls, *Political Liberalism*, 145.

of justice would be freestanding in the sense that it includes "no specific religious, metaphysical or epistemological doctrine beyond what is implied by the political conception itself"[35] though it should be seen openly as a partial "moral conception" as it necessarily includes certain primary goods, which are essentially goods of persons in relation to their role as citizens.[36] Following criticism of the first edition of *Political Liberalism*, Rawls clarified his position somewhat in his 'The Idea of Public Reason Revisited' when he outlines a 'Proviso': that "comprehensive doctrines, religious or non-religious, may be introduced into public political discussion at any time, provided that in due course proper political reasons.... are presented" in relation to the matter under discussion.[37]

The freestanding nature of the political conception of justice has been disputed from two opposing directions. From Jurgen Habermas's more rigorously Kantian perspective, political liberalism unduly limits the universalising normativity of practical reason to the legal-political domain.[38] Other theorists criticise the 'freestanding' theory for illegitimately negating or disguising the proper role of either ethics or metaphysics in politics. Finnis, for instance, faults Rawls's theory for negating the relevance of moral truth in matters legal and political. Disputing what Rawls sees as the 'fact of *reasonable* pluralism' specifically in the domain of ethics (though not contesting the existence of *actual* pluralism in moral choices or cultural difference), he refuses to concede that certain moral truths about human goods cannot be known, in principle, through the light of natural human reason. On such matters Finnis infers that disagreement on matters of moral truth (and not in contingent situations where prudence determines rightful actions) results from ignorance, uncontrolled passions, or arbitrary partiality or self interest.[39] At the same time Finnis, for some reason, fails to recognise the 'Proviso' in relation to public reason that Rawls introduces in his later writings and this brings in question whether a tendentious interpretation of *Political Liberalism* is being advanced.

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[35] Rawls, *Political Liberalism*, 144.

[36] Rawls writes that notwithstanding the priority of the right over the good this "does not mean that ideas of the good need to be avoided: that is impossible": Rawls, *Political Liberalism*, 203.

[37] See John Rawls, 'The Idea of Public Reason Revisited' *University of Chicago Law Review*, 64 (1997), 765-807 at 783-784. Rawls, was also later asked if Political Liberalism is a veiled argument for secularism, and responded: "I emphatically deny it. Suppose I said that it is not a veiled argument for secularism any more than it is a veiled argument for religion. Consider: there are two kinds of comprehensive doctrines, religious and secular. Those of religious faith will say I give a veiled argument for secularism, and the latter will say I give a veiled argument for religion. I deny both. Each side presumes the basic ideas of constitutional democracy, so my suggestion is that I can make our political arguments in terms of public reason". Quoted in chapter 27 ('Commonweal interview with John Rawls') in John Rawls, in Samuel Freeman (Ed.), *Collected Papers* (Cambridge, MA.: Harvard University Press, 1999), 616-622, at 619-620.

[38] Habermas writes "[f]or my part [implicitly contrasting himself with the Rawls of *Political Liberalism*], I follow Kant in assuming that, with the concept of autonomy, the practical reason shared by all persons offers a reliable guide both for morally justifying individual actions and for the rational construction of a legitimate political constitution for society. Kant understands "autonomy" as the ability of persons to bind their will to universal norms that they give themselves in the light of reason." Jurgen Habermas, 'Reply to my Critics', in *Habermas and Rawls: Disputing the Political*, (New York: Routledge, 2011), at 284.

[39] Finnis, 'Public Reason, Abortion, and Cloning', 369-370.

I judge that Finnis is correct to object to the notion that any aspect of practical truth should be absent from a normative political theory of liberalism. Although a relatively wide scope pluralism (or "normative openness")[40]resulting from divergent practical situations (governed by prudence) and cultural difference (which can be easily mistaken for *moral* difference) is fully consistent with natural law theory, some core moral truths are clearly advanced, typically in the form of exceptionless moral norms (for example, the slaying of innocent human beings).

This raises the question of why Rawls did not link his theory more explicitly to a natural law position. Rawls at times says that his theory is consistent with certain Catholic political perspectives[41] whilst at the same time contrasting 'justice as fairness' at other points with natural law theory.[42] This may be because Rawls associated natural law theory with the 'old' late scholastic or early modern perspective (with its 'upfront' metaphysical anthropology) rather than the reinterpretation of Aquinas's theory presented by the New Natural Law school.

The lack of admissibility of any form of moral truth in Rawls's political conception of justice does raise questions in relation to the extent to which some physical harms to the person (according to many people's understanding of moral truth) that fall short of breaches of core universal human rights (in *The Law of Peoples*) may be permitted within polities operating on the basis of Rawls's understanding of political liberalism. Andrew Koppleman, for example has provocatively argued that there is nothing in Rawls's schema of political constructivism that could definitively ensure that practices such as female genital mutilation could not be legally permitted in states where this practice has popular support. Koppleman argues that species of political liberalism that are not based on political constructivism, such as the capabilities approach, would be in a position to prohibit such practices in principle.[43]

Martha Nussbaum's reformulation of political liberalism in many ways takes Rawls's theory as its point of departure. In elaborating her understanding of justice she helpfully corrects some questionable aspects of Rawls's theory, not least by removing some unconvincing

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[40] See Mark Murphy, 'Natural Law, Common Morality, and Particularity', 138-145 where Murphy, a natural law philosopher, lays out a least four broad reasons why there is much "normative openness" to a natural law ethic despite natural law's moral realism, including its commitment to certain core moral absolutes.

[41] See for example Rawls, 'The Idea of Public Reason Revisited' at 774-775 when he says that "political liberalism also admits …Catholic views of the common good and solidarity when they are expressed in terms of political values".

[42] See John Rawls, 'Reply to Habermas' in Rawls, *Political Liberalism*, 405, where he describes natural law as a comprehensive doctrine establishing moral truths in the pre-political domain, and thus it "is not part of justice as fairness".

[43] See Andrew Koppleman, 'The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?', *The Review of Politics*, 71 (2009), 459-482, and at 480-481 for Koppleman's reference to Nussbaum's version of political liberalism.

aspects regarding the priority of the right and some elements of the basic structure.[44] Like Nussbaum, I retain the genus type of 'political liberalism' without Rawls' specifically elaborated example of political liberalism, justice as fairness.[45] As we have seen in previous chapters, Nussbaum, developing positions first put forward by Amartya Sen, addresses the question of a 'thin theory of the good' not by means of all purpose primary goods, but by outlining certain key human capabilities, such as bodily health, life, affiliation and so on. These capabilities are fundamentally meant to reflect a respect for human dignity in the political domain, as without them it is difficult to see how the worth or value of a person is maintained in a society. In this approach a well ordered liberal society will aim to attain a threshold level of capabilities for its citizens.

These human capabilities are arrived at not through a heuristic device such as the Original Position, but simply by citizens deliberating and philosophising *ethically* (not metaphysically) on what a human person's basic *capacities* and potentialities are, and then developing these insights into what *capabilities* a political society ought to secure for its citizenry. In this theory, Nussbaum prioritises the good over the right, though acknowledges that both "are thoroughly intertwined".[46] This aspect of her approach is welcome, as it clears up some of the unhelpful ambiguities in Rawls' later understanding of primary goods. Therefore her theory is therefore not really a constructivist theory, as Rawls' theory is.[47] Citizens pointedly do not, in the capabilities approach, seek to agree the *summum bonum* of human life, as this is not deemed directly relevant to political association. Thus Nussbaum draws the line at the inclusion of some metaphysical arguments in the public domain as politically relevant. Like Rawls (and Habermas in more recent lectures), Nussbaum has no issue with religious doctrines having a full airing in the discourse of the 'background culture', but she holds that only arguments about human fulfilment that eschew metaphysical aspects are strictly admissible as good reasons when considering matters of basic justice and constitutional essentials.

In the capabilities approach the exercise of these capacities are left to individuals to choose to exercise (or not to exercise) each capability, according to their particular plan of life. She

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[44] I do not here endorse communitarian critiques of liberal theory that hold that the self is prior to the ends affirmed by it, as I maintain that persons theoretically and empirically have the freedom to rationally revise their 'plans of life' (their chosen path to eudaimonia) in terms of their religion or comprehensive moral viewpoints. Holding this view, however, should not be interpreted as a denial of the fact that human beings have a teleological nature (see chapter 3 of this thesis) from a metaphysical or theological perspective, only that the *exercise* of human freedom is compatible with different (and changing) specifications of the good life.

[45] Rawls apparently held that genus of 'political liberalism' is not conterminous with his own species of political liberalism: Justice as Fairness. See Rawls, *Political Liberalism*, Lecture I, especially at 15.

[46] Nussbaum, *Frontiers of Justice,* 162.

[47] Although Rawls's later theory is a species of what he calls 'political constructivism'. See Rawls, *Political Liberalism*, Lecture III, 89-130.

therefore maintains that the capabilities approach is sensitive to conditions of moral pluralism. In the central capabilities list Nussbaum outlines, political rights such as freedom of association mingle alongside capabilities such as bodily health and emotional development. Nussbaum sees each item in the list as being equally fundamental and are not to be given either a structural ranking in political liberalism, though individuals will rank and prioritise which capabilities to exercise through their own free choices.

The capabilities approach is often contrasted with Rawls's notion of primary social goods, which originated in Rawls' discussion of a 'thin theory of the good' in *A Theory of Justice*.[48] In *Political Liberalism,* Rawls is right to focus on social primary goods as *goods for citizens* rather than as goods for persons holistically. His explanation of the social primary goods themselves - as goods that anyone would want regardless of whatever else they wanted - are of a very broad scope and include political rights (including the right to hold all public offices), the "social bases of self respect" and "income and wealth". The advantages of the capabilities approach over the social primary goods are clear for us. The social bases of self respect seem so conceptually broad to us as to be potentially indeterminate in terms of their concrete content. "Income and wealth" as an index of primary goods appears as if it is more of a particular societal outcome measure or an index of positional goods than a name for an actual human good (or citizen-good). Rawls's wrote at times of his own sympathies with the idea of capabilities (as outlined by Amaryta Sen) when he affirmed that that "basic capabilities are of first importance and that the use of primary goods is always to be assessed in the light of those assumptions", though in this passage he appears to have held that the capabilities should come into play as a constructivist throughput from, rather than an ethical input into, the Original Position.[49]

Rawls apparent scepticism of the ability of practical reason make ethical value intelligible to persons - one of the original criticisms of *The Theory of Justice* among natural law critics[50]- appears still to be a background philosophical operating assumption in *Political Liberalism*. Thus his political theory needed a form of constructivism (now political rather than ethical) to do the work that natural practical reasoning does for Finnis and Nussbaum in specifying human goods or capabilities.[51] Rawls's eschewal of attempts to specify a somewhat more determinate range of primary goods is outlined on the basis that it would constitute a comprehensive ethical conception of the good. However, this criticism is blunted by the fact that Nussbaum's capabilities (and my notion of 'political goods') build in an element of choice

[48] John Rawls, *A Theory of Justice*, (Cambridge:, MA, Harvard University Press, 1971), 395ff.
[49] Rawls, *Political Liberalism*, 183.
[50] See, for example, Finnis's critique in *Natural Law and Natural Rights*, at 108-109 and 130-131.
[51] See 'Lecture III, Political Constructivism' in Rawls, *Political Liberalism*, 89-129.

for persons in exercising capabilities in order to allow for a degree of pluralism. I would contend that Rawls constrained his conception of primary goods so much that it ceases to do any helpful work in relation to the actual goods of persons in their role as citizens.

Nussbaum also significantly adapts the basic structure of Rawls's theory. Two aspects of this I see as useful and would seek to adopt.[52] Firstly, Nussbaum's shift away from the problematic aspects of Rawls's 'burdens of judgement' as a criterion of political 'reasonableness', which she implicitly sees as a weak form of scepticism and thus an encroachment from a comprehensive doctrine into the political structure.[53] She rightly shifts the central underlying basis of political liberalism from controversial distinctions in relation to human rationality (in 'Lecture II, the Powers of Citizens…') to the notion of respect for human worth or dignity,[54] though she at the same time contends that equal respect, based on the inviolability of the human person, is actually one of two core ideas advanced in Rawls understanding of political liberalism (along with the 'fair terms of cooperation').[55] Focussing on equal respect (based on human dignity) has many advantages from the philosophical perspective presented here, and it is a focus that other notable political liberals such as Charles Larmore have placed at the centre of their own conception of political liberalism.[56]

It is worth quoting Nussbaum here at length as the passage concisely summarises the key differences in the way she philosophically anchors her version of political liberalism:

> "Equal respect is a political, not a comprehensive, value; thus one might in principle accept it while continuing to use the idea of respect, respect for persons is not a subjective emotional state, such as a feeling of admiration. It is a way of regarding and treating persons, closely related to the Kantian idea of treating humanity as an end and never as a mere means. Respect is thus closely linked to the idea of dignity, to the idea that humanity has worth and not merely a price. Equal respect would then be respect that appropriately acknowledges the equal dignity and worth that persons

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[52] I remain to be convinced that Nussbaum's critique of the 'mutual advantage' aspect of Rawls theory necessarily hits the mark, and recognise Samuel Freeman's proxy defence of the late Rawls on this aspect of *Political Liberalism*. See Freeman, 'Frontiers of Justice: The Capabilities Approach vs. Contractarianism'.

[53] See Martha C. Nussbaum., 'Perfectionist Liberalism and Political Liberalism', *Philosophy & Public Affairs*, 39 (2011), 3-45, at 30-33.

[54] As Nussbaum puts it: "I am not denying that a Catholic might also accept the burdens of judgment, if he or she thought that authority pronounced only some matters, that is, that the scope of papal infallibility is narrow enough that it doesn't answer many of life's questions. What I want to emphasize is that one can get to political liberalism through respect alone, without alluding to the special difficulties of judgment." Nussbaum, 'Perfectionist Liberalism and Political Liberalism', at 19.

[55] See Martha Nussbaum, 'Rawls's Political Liberalism. A Reassessment', *Ratio Juris*, 24 (2011), 1-24, at 1-2, quoting John Rawls comment "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override" in Rawls, *A Theory of Justice*, 3.

[56] Nussbaum indeed credits Larmore with convincing her of the centrality of the notion of respect in liberalism. See Charles Larmore, 'The Moral Basis of Political Liberalism', *Journal of Philosophy*, 96 (1999): 599-625.

have as ends. Although this idea has a definite ethical content, it has long been recognized (for example, in the framing of the Universal Declaration of Human Rights) that one may endorse it for political purposes without thereby endorsing a comprehensive Kantian doctrine or any other specific comprehensive doctrine: thus one may endorse it while believing a form of religious doctrine that Kant would not accept, or while holding a view about freedom of the will that is not Kant's." [57]

This minimalist basis for political liberalism on the grounds of human dignity presents fewer philosophical hostages to fortune (an important point when considering the irenic purpose of political liberalism) than Rawls's more expansive justification. It is true, as Nussbaum admits, that different conceptions of human dignity have a widely divergent basis leading to different kinds of valuation on human worth, but is also true that few agents would wish to reject the position that persons have a baseline worth or value simply by virtue of them being a member of the human race.

In the natural law or Catholic tradition the notion of liberal freedoms or rights founded on human dignity and its correlate, equal respect, remains a contested one. This comes through clearly on one side of the argument when John Paul II spoke of the Enlightenment ideals of liberty, equality and fraternity as "the positive fruits of the Enlightenment"[58] and commented that "it is striking how often the logic of Enlightenment thought led to a profound discovery of the truths contained in the Gospel".[59] In this vein we can see something in Kant's second categorical imperative - to treat persons as an end, and never merely as a means to an end - that represents a fruitful philosophical development of the Golden (or Silver) Rule found in the revealed doctrines and philosophical traditions of many of the world's religions and cultures. Others, including the *Communio* school and Radical Orthodox thinkers, are far less sanguine about taking emphases from the Enlightenment into the Thomist or Catholic philosophical tradition as if they were 'spoils of the Egyptians'. For example, Tracey Rowland cautions Thomists that borrowing from what she sees as a radically incompatible philosophical tradition ("the Liberal tradition")[60] has profound long term philosophical dangers because if the "conceptual forms of the Liberal natural right tradition are adopted, then this is

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[57] Nussbaum, 'Perfectionist Liberalism and Political Liberalism', at 18.
[58] See John Paul II, *Memory and Identity*, chapter 18: 'The Positive Fruits of the Enlightenment', 121-129. Though at the same time John Paul II speaks of the negative legacy of modernity when he points to the rise of Cartesianism and its successor philosophies that marginalise or eliminate the role of God in social life (at 8-9).
[59] Ibid., at 123. Charles Taylor makes some similar points in his lecture 'A Catholic Modernity?', in James .L. Heft (Ed.), *A Catholic Modernity?* (Oxford: Oxford University Press, 1999), 13-38.
[60] Rowland uses Alasdair MacIntyre's notion of 'liberalism as a tradition' (following from his notion of 'tradition constituted rationality') throughout her monograph, in which political ideas of human rights and freedoms are intrinsically tied to a substantive Enlightenment philosophy and anthropology.

an instance of 'taking a garland' [i.e. the mechanical adoption of alien chains of thought], and its alleged merit can only be rhetorical, that is political rather than philosophical."[61]

Because this capabilities approach allows a significant role for 'the good' it has been accused of being a form of comprehensive liberalism by some[62] - an accusation that could also be levelled at the particular 'variation on the theme' of political liberalism presented here. I disagree with this judgement on the basis that Nussbaum's abstention from making metaphysical reasoning part of the basis for developing the capabilities allows a shallow or thin notion of the ethical good to contribute directly to the conception of political justice via an overlapping consensus. In fact, I see this thin ethical element as an important part of any theory of political liberalism, as constructing matters of political justice *solely* from 'the right' is not philosophically tenable within the ethical-political approach set out in this and previous chapters.

In this context the capabilities approach is a useful allied approach to the virtue ethic and natural law approach we have set out. Nussbaum's theory is a helpful internal critique of *Political Liberalism* that helps improve several aspects of Rawls's schema.[63] As we have already observed, the approach bears many similarities with the Finnis/Grisez basic goods theory, and this is not surprising given the common Aristotelian underpinning to their theory. The capabilities approach may therefore be useful in helping citizens understand how the political common good should be pursued in the legislature and in the background culture of civil society. Nonetheless the position outlined here on the optimal form of political liberalism is one step further along the continuum from Nussbaum's neo-Aristotelian theory.

5). Natural Law theory, 'Permissive Political Liberalism' and secondary political constructivism

I hold that in core matters of political justice, such as the upholding of universal human rights and constitutional essentials, political reasoning (ordered to just relations *between* free and equal citizens, that is, natural right) *should* be based on fundamental human goods apprehended by practical reasoning (a thin theory of the good), but *can* in certain prescribed circumstances also include the outcome of speculative reasoning on a philosophical anthropology, or on the origins of ethical obligation. Such matters of basic justice will clearly

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[61] See Tracey Rowland, *Culture and the Thomist Tradition*, (London: Routledge, 2003), 155. Rowland uses her definition of 'taking a garland' from a different philosophical system ('the mechanical adoption of alien chains of thought') from the Catholic theologian Hans Von Balthasar, at f.n. 83, 154.

[62] See Linda Barclay, 'What Kind of Liberal is Martha Nussbaum?', *Sats – Nordic Journal of Philosophy,* 4 (2003), 5-24.

[63] Though I agree with some of Eric Nelson's sympathetic critique of Nussbaum's approach in: Eric Nelson, 'From Primary Goods to Capabilities: Distributive Justice and the Problem of Neutrality', *Political Theory,* 36 (2008), 93-122, at 96-103.

include matters such as; that governmental and private power be constrained by the Rule of Law (i.e. be non-arbitrary), that citizens are treated equally before the law, that access to key public offices be on the basis of non-discrimination, and that those who are subject to the law participate in the setting of the laws by one means or another (either through participatory or representative democracy). Though such approaches can be found in contemporary natural law theories, they are also familiar aspects of Rawls's first Principle of Justice (especially the 'political liberties'). Rawls's insistence that such basic liberties are not traded off for other social goods would also be shared by the strongly anti-consequentialist position taken by most contemporary natural law theorists and neo-classical virtue ethicists.

I would argue political liberalism would be strengthened further were the strictures on consensus building relaxed further. With Ryan Davis I would say "that justice *can be* political and not metaphysical" but reject the position "that justice *must be* political and not metaphysical".[64] Though this sentence is, strictly speaking, consistent with Rawls' final view as expressed in his Proviso, it places a different emphasis on the tenor of public reasoning. Such a view fits well with the idea that natural law as a theory of practical reason, gives cognitive access to knowledge of fundamental human goods without an immediate (metaphysical) knowledge of the ultimate origin of the moral law, without necessarily closing off the relevance and importance of the metaphysical and theistic basis of the natural law. This would be important as for some moral agents who accept this ultimate grounding (through revelation or metaphysical reasoning) the love of neighbour derives from, and is inseparable from, the love of God.

Kyla Ebels-Duggan has coined the expression 'permissive political liberalism' to describe a form of liberalism in which an overlapping consensus on a conception of political justice is *centrally* built on a non-metaphysical and religious basis, but where citizens' positions on political justice that are expressed only in metaphysical or religious language are not *ipso facto* barred from the overlapping consensus building deliberation process.[65] This says nothing, of course, about the likely persuasiveness of such exclusive metaphysical or religious argumentation to other citizens who do not share their position.

Such a 'permissive political liberalism' would be more than a *modus vivendi* in that it would be an overlapping consensus that would still focally revolve around citizens providing *good reasons* (in this case in relation to specifically *political* goods) to each other and thus an overlapping consensus in this context would be more than just a random coincidence of

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[64] Ryan W. Davis, 'Justice, Metaphysical after all?', *Ethical Theory and Moral Practice,* 14 (2011), 207-222, at 208. Emphasis in original.
[65] Kyla Ebels-Duggan, 'The beginning of community: politics in the face of disagreement', *The Philosophical Quarterly,* 60 (2010), 50-71 at 51.

varying opinions or a regime founded on toleration.[66] In this permissive political liberalism citizens may ultimately choose how to express their views on the content and nature of basic justice and constitutional essentials. Should citizens give what they see as the whole truth about justice in political domain, and not just in the background culture? Rawls's position, as we have seen, is that an exclusive "zeal to embody the whole truth in politics is incompatible with an idea of public reason that belongs with democratic citizenship"[67] but that advancing arguments in the public political domain alongside comprehensive doctrine simultaneously, or near simultaneously, is acceptable as civil behaviour (the 'Proviso'). John Haldane sees the profession of the 'full truth' in public political forums as not being problematic and, following Maritain, sees fanaticism primarily as a facet of bad people rather than a feature of philosophical ideas. Wishing to uphold the intellectual integrity of citizens, Haldane fears the restriction of public political debate to matters upon which everyone might agree. He thus views political liberalism as more of a humane "sensibility" than a "set of principles".[68]

From my perspective the strictures of public reason may well not be problematic for many citizens of faith, including those for whom 'faith' and 'reason' (i.e. *graced* reason and *natural* reason) are held to be compatible when held in a close balance (following Aquinas). Terrence Irwin, for example, suggests that Aquinas's understanding of the natural inclination to the good of sociability in Aquinas's first precept of the natural law means that one is bound to "respect the judgement of others, since I regard their judgement as being possibly relevant to me about the ends it would be best for me to pursue. This kind of respect for others places us in a kind of "community of reason" with them".[69] Despite his hostility to Rawls's own conception of public reason Finnis himself quotes Aquinas in a passage that would seem to indicate that, in disputations, an exchange of reasons that are publically accessible to all is fully in accordance with a position in which thicker metaphysical or theological arguments are also important for the participant. For as Aquinas writes:

> "Any activity is to be pursued in a way appropriate to its purpose.…Our sort of academic disputation is designed to remove doubts about *whether* such-and-such is so. In disputations of this sort you should above all use authorities acceptable to

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[66] This is where my account appears to differ from that of the Thomist John Haldane, who wishes "to settle for a *modus vivendi*" in which toleration plays a seemingly important role, being dissatisfied with Rawls's conception of public reason. I appreciate, with Haldane, that the prospect of a *modus vivendi* is not as problematically unstable as Rawls fears it may be, but I would also wish to affirm the realistic prospect that significant public goods are attainable through reasoning on political goods that are in principle accessible to all. See John Haldane 'Public Reason, Truth, and Human Fellowship: Going Beyond Rawls', *Journal of Law, Philosophy and Culture*, 1 (2007), 175-190, at 190.

[67] Rawls, 'The Idea of Public Reason Revisited', 767.

[68] Haldane 'Public Reason, Truth, and Human Fellowship: Going Beyond Rawls'. 190.

[69] See T. H. Irwin, 'Aquinas, Natural Law, and Aristotelian Eudaimonism', in Richard Kraut (Ed.), *The Blackwell Guide to Aristotle's Nicomachean Ethics,* (Oxford: Blackwell, 2006), 323- 341 at 334.

those with whom you are disputing… *And if you are disputing with people who accept no authority, you must resort to natural reasons*".[70]

Justice in the classical and Thomist tradition, as I have sought to demonstrate, is primarily a virtue of the person and not principally an abstract attribute of a set of social institutions. Natural right or political right (*droit politique*) is the expression of the virtue of justice in general social relations having an application in relation to positive law and the executive actions of governments. This is a substantive ethical view but it is one at the same time that affords some distinction between those virtues that more closely relate to personal goodness (perhaps chastity) and that of the virtue of justice which focuses directly on relations with others. That Aquinas writes of 'duties of justice' does indicate that intersubjective considerations were not neglected, though it is to be recalled that justice is to be linked to other personal virtues through the doctrine of the 'unity of the virtues' (deriving ultimately from Plato's *Republic)*. But it is difficult to see how a first person eudaimonistic ethic can be said to prioritise the right over the good, even within the limits of the political domain (as Rawls proposes). In the domain of political life, a classical virtue ethicist may speak of the 'duties of justice', but this is always ultimately an aspect of the agent's own eudaimonistic good.

As we have seen in the case of Michael Pakaluk the philosophical and theological schools purporting to follow Aquinas's overall lines of thought have traditionally emphasised the importance of metaphysics, including in political matters. Thomist philosophers have often had recourse to metaphysics *early* in the philosophical process, an assumption that proves a stumbling block in societies where there is a plurality of philosophical and religious views. For some such theorists any attempt to erect a wall within a philosophical anthropology at the point at which metaphysical issues arise is the archetypal move of many modern political philosophers, for whom human nature is not dynamically ordered (with a *telos*) but is static and inert. Thus, for example, James Schall boldly states that "[t]he struggle for politics remains at bottom a struggle about metaphysics and its openness to intelligibility".[71] The Catholic philosopher Robert Sokolowski in his own way concurs with this - citing Aristotle's emphasis on the superiority of the theoretical life in the *Politics* (VII, 1325a31-b32) - in

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[70] Here Finnis quotes Aquinas in *Quodlibetal Questions* IV q.9 a. 3c. See John Finnis, 'Abortion, Natural Law and Public Reason,' in Robert P. George and Christopher Wolfe (Eds.), *Natural Law and Public Reason*, (Washington, D.C,: Georgetown University Press, 2000), 71–105, at 78. Emphasis in Finnis's quotation.

[71] James V. Schall, 'Nature and Finality in Aristotle', *Laval theologique and philosophique*, 45 (1989): 73-85, at 85.

arguing that the concept of teleology is essential, not only "in regard to human nature but in regard to things like life, politics, and religion".[72]

Other, more theological critiques of political liberalism, somewhat misrepresent Rawls's later theory claiming that, despite his repeated and explicit protestations, political liberalism is essentially a species of Enlightenment liberalism based on an instrumental rationality, an asocial or monadic anthropology, and even a concealed 'metaphysic of violence'. However, these authors typically err by failing to mention highly relevant aspects of Rawls's later theory that would decisively go against such an interpretation, such as Rawls's theory of primary goods, his emphasis on notions such as reciprocity and mutual respect, and Rawls refutation in the clearest possible terms in *Political Liberalism* that the Original Position is based on a metaphysical anthropology or a pre-social 'state of nature'.[73]

In the moral and social theory propounded here, however, this important metaphysical element is in one way distinguishable, in that the initial moral experience provided by the agent's practical reason is distinct from theoretical reasoning that may come to subsequent metaphysical conclusions. This allows a two stage overlapping consensus building process. The first stage is a result of practical reasoning on 'thin' ethical goods (the human goods) and the second on matters of metaphysical importance, such as deeper notions of human personhood (philosophical/psychological anthropology), and the origin and fullness of moral obligation (in God or Nature, and in a theological completion of ethics). Such a two stage process does not imply that metaphysics is somehow subordinated to practical reasoning or

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[72] Robert Sokolowski, 'The Human Person and Political Life' in *Christian Faith and Human Understanding*, (Washington, D.C.: Catholic University of America Press, 2006), 179-198, at 197.

[73] Such interpretations of John Rawls's *Political Liberalism* display a lack of interpretive attention to the texts, perhaps betraying an ideologically coloured reading. Typical of this is the work of the David L. Schindler, a leading member of the Roman Catholic American *Communio* school whose positions are similar to those of the Radical Orthodoxy school. Schindler's somewhat polemical position in relation to political liberalism is well represented in David L. Schindler's 'Civil Community inside the Liberal State: Truth, Freedom, and Human Dignity', *Josephinum Journal of Theology*, 16 (2009), 232-287. Though Schindler bases his theological critique of political liberalism on the theology of Joseph Ratzinger / Benedict XVI, Benedict XVI himself has a nuanced and more accurate appreciation of Rawls's work, when he wrote "that John Rawls, although denying to comprehensive religious doctrines the character of "public" reason, nevertheless sees at least in their "nonpublic" reason a reason that cannot, in the name of a secularly hardened rationality, simply be disregarded by those who support it. He sees a criterion for this reasonableness in, among other things, the fact that similar doctrines derive from a responsible and validly grounded tradition in which, over a long period of time, sufficiently good argumentation has developed to support the respective doctrine. What seems important to me in this affirmation is the recognition that experience and demonstration over the course of generations, the historical background of human wisdom, are also a sign of its reasonableness and its enduring significance." See Benedict XVI, 'The Truth Makes Us Good and Goodness Is True', a planned lecture at La Sapienza University, Rome, (18 January 2007), trans J. G. Trabbic, available at http://www.zenit.org/article-21526?l=english accessed on 8 July 2011.

that the person in her innermost being can be conceived principally as an autonomous practical agent.[74]

This is a particular issue when public reasoning over the role of religion in the public square is involved. Though not sharing John Rawls's avoidance of 'political truth' or Jurgen Habermas's more thoroughgoing post-metaphysical political theory, *it is not necessary or helpful to build metaphysical questions into the deliberative democratic process at an unnecessarily early stage* (i.e at the first stage of overlapping consensus building). This is not to say that fundamental questions on the nature of the human person should never be addressed in public reasoning or that they are somehow of secondary importance in philosophy or in human life integrally conceived. In relation to some relevant issues concerning basic justice, such as abortion, cloning, or capital punishment, it may well be appropriate at some stage of the public reasoning process to introduce arguments from a philosophical anthropology not easily understood through practical reasoning alone. It means only that the limited agreement on what can be agreed in a core political conception of justice should be sought before questions of a metaphysical nature are addressed, where agreement might be more difficult to attain.

I do hold however, that once a polity has established or agreed such fundamental matters of justice and human rights, there should be no bar on political public reasoning (or democratic deliberation) going beyond these restrictions, as long as such reasoning respects and does not impinge upon the (prior) established tenets of natural right by *citizens*' and legislators' *practical* reasoning. I take something like this point from Jean Hampton's important and nuanced position on the importance of not excluding metaphysics from political life.[75] A more permissive form of political liberalism in principle allows laws and public policies to be promulgated in a way that would permit the promotion of civic virtues, liberal education and public morality - were they to have due democratic support.[76] There is no pretence here that strict state neutrality is observed. This form of political liberalism therefore has parallels with 'moderate perfectionism' in Peter de Marneffe's fourfold typology of the neutrality/perfectionism spectrum, which he holds as being consistent with a form of

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[74] This is clearly a major concern of David L. Schindler who critiques political liberalism as *necessarily* (though often implicitly) denying "a metaphysical anthropology of being as gift". Nothing I write here implicitly or explicitly denies such an anthropology, or else what Schindler calls the 'anterior' or 'constitutive' constitution of the human person as intrinsically related to God and other people. See David L. Schindler, 'The Embodied Person as Gift and the Cultural Task in America: *Status Quaestionis', Communio* 35 (2008): 397-431 at 399.

[75] Hampton writes "The public pursuit of the truth about these aspects of justice need not threaten the security of anyone in a pluralist society as long as there are universally shared (and enforced) guidelines for people's argumentative interaction with one another that insist, as Socrates did.….on respect for everyone's effort to construct his or her own belief system". See Jean Hampton, *'Should political philosophy be done without metaphysics?' Ethics,* 99 (1989), 791-814 at 811.

[76] As argued in chapter 3, section 4.

liberalism.[77] The approach put forward here has clear parallels with Maritain's own nascent schematics of a political liberalism to which Nussbaum often alludes to in her own constructive work on political liberalism.[78]

The form of political liberalism advanced here replaces the human capabilities with a similar idea of 'political goods' or 'political human goods'. These goods focally relate to persons in their roles as citizens, reflecting that which is consistent with natural right. They therefore differ somewhat from Finnis's basic human goods[79] in that they refer specifically to goods considered insofar as the political community may duly promote or advance them - in accordance with the principle of subsidiarity. Political goods are thus human goods relating to intersubjective life; that is; focally, goods relating to peace and justice and not in relation to the final ends of life or other substantive ends, as they might in a typical Enterprise Association. In this sense the political society I envisage remains a *societas* and not a *universitas*, where the latter is understood as aiming for comprehensive human ends of a substantive scope.[80] This does not mean that political society is a night-watchman state as in libertarian thought, only that it should eschew the sort of ideological goals foisted on the state familiar from the history of the twentieth century, such as state socialism on the left or fascism on the right.[81]

Political goods are for citizens to attain through political association via organs of government designated as the proper authority for the salient coordination of the civitas's common good. An overlapping consensus on that which constitutes natural right within a political community thus relates to this political common good. As we saw in the last chapter, this common good conception contains *within it* an understanding of subjective human rights, and not only those basic universal rights that are part of the *ius gentium*, but certain 'liberty' or 'choice' rights where these are appropriate. This compressed summary is one way of specifying the notion of a 'political conception of justice' from my perspective.

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[77] Here I would concur with de Marneffe's judgment that "moderate perfectionism is compatible with the principles of acceptability and basic liberty" and that: "Moderate perfectionism is formally compatible with the priority of liberty since the priority of liberty allows the government to limit *nonbasic* liberties to discourage unworthy activities." See Peter de Marneffe, ''Liberalism and Perfectionism'', *American Journal of Jurisprudence* ,43 (1998), 99–116, at 115.

[78] Also particularly helpful in situating Maritain's proto-political liberal position in relation to Rawls is: Patrick Neal, 'Three readings of political liberalism: Rawls, Maritain and Crick', *Journal of Political Ideologies*, 5 (2000), 225-246.

[79] As we have seen, Finnis's human goods are integral human goods and the *instrumental* role of the political community is to promote them all in line with the political common good.

[80] I refer here to Michael Oakeshott's conceptual distinction in his essay 'On the Character of a Modern European State', in *On Human Conduct* (Oxford: Clarendon Press, 1975), 185-326.

[81] Though there is not a moral equivalence between these two ideologies.

That this kind of political conception of justice could be seen as consistent with a broad understanding of political liberalism is an important point to address. My answer is in the affirmative. Rawls himself refers to the political conception of justice as constituting a "common good conception" for liberal societies, though he also refers to 'decent hierarchical people' as propounding a more determinate and non-liberal 'common good' conception of justice.[82] Also relevant to this assertion is the claim by Paul Weithman – a noted interpreter of Rawls - that the structure of political justifications offered by John Finnis in *Natural Law and Natural Rights* in relation to the political common good*,* would qualify as being consistent with a political conception of justice as outlined in *Political Liberalism.*[83]

In what sense can this understanding of a 'natural right' political conception of justice be seen as a form of political liberalism, as Nussbaum or Rawls's theories might be interpreted? Is does so first by limiting government by protecting minimal universal human rights (conceived as the *ius gentium*) across all states, and secondly by establishing certain political or liberal rights (in Rawls's nomenclature) in the context of a political community. In more positive terms such a conception contributes to the eudaimonia of all citizens in a *civitas* by legislating and developing public policy that promotes the attainment of the political common good leading to the fuller flourishing of a citizens' life. Though I refrain from asserting a Rawlsian lexical priority between the political liberties and the other political human goods, I hold that liberties and other goods cannot be directly traded off in a consequentialist fashion as they both ultimately derive from the political common good of the *civitas* and the citizens who make up the society.

In this sense, contra John Haldane, liberalism is not just a spirit of liberality (though it certainly involves such political virtues) but is a set of political principles designed to resolve the aporia of the necessary universality of the political-legal order (in the Rule of Law for example), with the personal and variable nature of human flourishing - what Rasmussen and Den Uyl called 'liberalism's problem'. This does not infer a form of moral scepticism or relativism but only that eudaimonia, in the sense of the selection and pursuit of final ends, are always the free determination of persons and should not generally be subject to directive regulation in the political-legal order. What can be promoted universally, however, in the legal and political order of a political community is a thin theory of the good that in the schema presented here is the enactment of the political common good of *citizens* within the framework of a (common good) political conception of justice.

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[82] Rawls, *The Law of Peoples*, §9.1, f.n.10, at 71.

[83] See Paul Weithman, 'John Rawls's Idea of Public Reason: Two Questions', *Journal of Law, Philosophy and Culture*, 1 (2007), 47-67, at 54-55.

Therefore it is possible to endorse the notion of constructivism in one limited respect. The approach to ethics outlined in chapter 3 is not a species of moral or primary constructivism insofar as agents, through the use of practical reason in a 'naturally rational' manner apprehend certain fundamental human goods including the urge for justice and the good of social cooperation (through the precepts of the *ius naturale*). However, the approach I have outlined in relation to the legal-political domain can be conceived as a form of political 'secondary' constructivism (in Peri Roberts parlance), inasmuch as it allows the specification of political principles (i.e. principles of political justice) centrally on the basis of practical reasoning. Secondary political constructivism, in contrast to primary universal constructivism (which is constructivist 'all the way down' to a minimally bare conception of human rational agency), includes certain "grounding assumptions"[84] which do not have to be formally constructed 'from the ground up' in a proceduralist manner as, in my view, they are capable of *apprehension* through practical reason.[85] One of these grounding assumptions, as I have argued, is the inherent value of human dignity and the baseline equal respect that is inferred by the recognition of this human dignity, the starting point for many human rights declarations. And like Rawls's version of political liberalism, ours is a *secondary* form of constructivism in that it rests on "prior assumptions of a [background] democratic culture",[86] such as that civil association is between people who consider themselves free and equal as citizens and who see the general sense of some degree of social cooperation and civility.

This political conception of justice as outlined above perhaps fulfils the idea of a "*meta*norm" which, unlike moral norms, are "directly tied to politics [not personal ethics] and concern principles that establish the political/legal conditions under which the full moral [eudaimonistic] conduct can take place".[87] This concept, advanced by Douglas Rasmussen and Douglas Den Uyl, is an attempt to formulate a minimal but perfectionist conception of political liberalism. Such a distinction is helpful in distinguishing the ethical from the political-legal domains, but I cannot concur with Rasmussen's and Den Uyl's identification of such a metanorm solely with individual negative natural rights in what I see as a reductive and narrowly libertarian manner. Rasmussen's and Den Uyl's radically libertarian solution to liberalism's problem is based on their contention that human flourishing is *agent relative* 'all the way down', so to speak. For these two philosophers there can be no determinate thin theory of the good (or 'thick vague' theory of the good, as Nussbaum argues) that is *agent*

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[84] Peri Roberts, *Political Constructivism*, (London: Routledge, 2007), 148. As we saw in chapter 3 of this thesis, this is similar to the understanding Allen W. Wood has advanced in relation to Kant's own view of the 'formula of humanity'.

[85] Though I would stress that this recognition or apprehension is far from unproblematic in its application to social or political situations as it can be distorted by uncontrolled passions (such as wilfulness), vice (such as selfishness), or fundamental ignorance of relevant facts.

[86] Roberts, *Political Constructivism*, 138.

[87] Rasmussen and Den Uyl, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics*, 15.

neutral in this picture other than universal negative political rights that allow persons to pursue their own agent relative ends. I see this position as reductive as it is difficult to see how final ends/goods can be pursued with any coherence without the attainment of a variable mix of 'lower' intrinsic human goods such as health, education/knowledge, social association, or the stability and peace afforded by political association, and so on.

The case of the public recognition of religion, or a specific religion, is a controversial question that divides many contemporary political and social theorists. How would a permissively political liberal regime approach the recognition of religion in the laws of a polity? Practices in liberal democratic states are widely divergent, from the strict laïcité laws in France and the non-establishment clause (as interpreted by the courts) in the USA[88] to an established church in England and the constitutional affirmation of Christianity in the Republic of Ireland and more recently in Hungary.[89] As the social theorist Veit Bader suggests: "Religious equality does not as such require disestablishment, if only because constitutional law has its limits and because all institutionally pluralist options may deliver on the promise of substantive religious equality".[90] According to a permissively politically liberal view, religious establishment would not be excluded as a possible legal arrangement as long as religious liberty and other basic freedoms were in place to prevent such an arrangement from unduly excluding other religious groups, or citizens without a religious allegiance.

6). Conclusion

I recognise fully the case for a form of political liberalism that includes a notion of public reasoning in relation to a political conception of justice. This would help citizens of a political community transform natural right into the political common good. I judge that the classical natural law position of negative limits to government's role is a necessary but not sufficient condition for the good ordering of a polity. Fundamental universal human rights, of the kind described by John Rawls in *The Law of Peoples,* can be justified as being part of the universal common good and as part of a binding *ius gentium*. However, these principally

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[88] Though Bader notes that even after the passage of the federal non-establishment amendment in the US constitution "a number of states-New Hampshire (till 1817), Connecticut (till 1818), New Jersey, Georgia. North Carolina, South Carolina-and, depending on definitions. also Massachusetts (till 1833) had established churches." Veit Bader, 'Religious Pluralism and Democratic Institutional Pluralism', *Political Theory*, 31 (2003), 265-294 at 288, f.n. 4.

[89] See 'Christianity enshrined in constitution', *The Tablet*, 7 May 2011, at 29. The report states that the preamble to the 2011 Hungarian Constitution explicitly recognises the key role of Christianity in "the upholding of the nation" but in the same preamble also expresses appreciation for the "different religious traditions of our country".

[90] Bader, 'Religious Pluralism and Democratic Institutional Pluralism', at 284. The distinguished legal philosopher Kent Greenwalt concurs "Can religious liberty exist *with* establishment? Of course. Many countries in Europe maintain established churches and afford religious freedom to their citizens." in Kent Greenawalt, 'Secularism, religion, and liberal democracy in the United States' *Cardozo Law Review* 30 (2009) 2383-2400 at 2386-2387.

negative restraints may help advance a defensive 'liberalism of fear',[91] but would not necessarily help establish a well ordered polity in its positive aspects. These negative limits can be advanced as important public political reasons for setting constitutional essentials and matters of basic justice, but further *positive* public reasoning about political goods is desirable.[92]

This reasoned approach to the determination of the basic political structure is consistent with the strongly rational moral element in a natural law virtue ethics. The broad 'normative openness' of natural law theory in fact constitutes a form of (not unbounded) moral pluralism which, through the use of public reason, can help to form a conception of political justice via an overlapping consensus. Public reason in this conception would be focally and primarily based on practical reasoning in relation to specifically political goods, but would not bar substantively ethical or metaphysical argumentation in relation to those political goods. The *exclusive* reference in public reasoning about the basic structure to final ends alone is clearly not recommended, though there would be no bar on this (even a bar as weak as Rawls's final Proviso). The use of reasons that all rational agents in democratic deliberation could reasonably accept would be the normative basis of public reasoning in this approach - though the simultaneous reference to final ends in these deliberations would not only be permitted (as in the Rawls proviso) but in some circumstances may be important in ensuring that public political reasoning is not mistaken for a form of pure proceduralism and only in relation to instrumental reason. In this way political communities can democratically decide to include reference to religious or metaphysical matters (as Britain and Ireland currently do in their different ways) in their political structures.

This approach begins to help understand how a certain conception of political liberalism is consistent with a 'virtue politics' and a moderate political perfectionism. This may help persuade religiously inclined citizens, for example, to commit to a fair system of social cooperation in which justice and basic liberties are advanced without putting in place 'rules of the game' that may appear to force those citizens to unduly bifurcate their views on the nature of human flourishing and the role of political life in promoting it. As we shall see in the following chapter, such a conception of political liberalism is consistent with a form of democratic or political constitutionalism that emphasises important political freedoms within certain constitutional constraints.

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[91] Judith N. Shklar, 'The Liberalism of Fear' in Nancy Rosenblum (ed.) *Liberalism and the Moral Life* (Cambridge, MA.: Harvard University Press, 1989). Here Shklar emphasises the protective qualities of liberalism as against 'great evils', many of which scarred the philosophical imaginations of political theorists in the post-war period.

[92] I thus reject the agonistic contention made by Alasdair MacIntyre's "modern politics is civil war carried on by other means." *After Virtue*, second edition. (Notre Dame, IND: University of Notre Dame Press, 1984), 253.

CHAPTER 5

RE-CONCEIVING POLITICAL LIBERALISM AS 'CONSTITUTIONAL REPUBLICANISM'

1). Introduction

Having established the outlines of a political conception of liberalism which includes a conception of public reason, I aim to specify how a 'good' and 'just' regime may come to its optimum constitutional form. My task in this chapter corresponds with the central question of classical political philosophy, what is the form of the best 'regime'?

The chapter addresses some controversial questions in political and legal philosophy. Through a discussion of neorepublicanism, in sections 2 and 3 look at how 'political' and 'liberty' rights in a just regime (akin to Rawls's first principle of justice) can conceived in relation to human freedom. Should the freedoms that such rights underpin be seen conceptually as the absence of coercive rule, or as the freedom to achieve ends worthy of human beings, or should they correspond to the specifically *political* freedoms commensurate with the status of persons as free and equal citizens in a constitutional regime? My response would be to favour this last approach, in a way similar to the traditions influenced by republican thought (including the traditions inspired by Augustine's[1] and Aquinas's thought).

Section 4 addresses the specific principles that should underpin the form of a just and politically liberal regime. Should government take a form emphasising the unitary goals of the organs of the state, or should it clearly demarcate a division of powers? Which branch of government should have the primary role in legislating for rights or the enactment of the political common good? Should constitutional limits principally take a 'political' or 'legal' form, and correspondingly, should laws agreed following democratic deliberation in the legislature be overruled by courts empowered to enforce political or human rights provisions (the issue of judicial review)?

As in previous chapters I outline the possible contribution that theoretical orientations taken from Aquinas's oeuvre can make to these debates. Several aspects of his thought are held to be pertinent in approaching constitutionalism. I conclude the chapter by synthesising the

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[1] Paul Cornish argues that Augustine follows Cicero's republicanism on several key points: "First, civil rule differs from mastery over slaves. Second, political life is indeterminate, so a republic could be any regime suitable for governing free human beings. Third, the prudent man may not abstain from public service". Paul J. Cornish, 'Augustine's Contribution to the Republican Tradition', *European Journal of Political Theory,* 9 (2010), 133–148 at 133.

insights of political liberals and neorepublicans, taking key aspects from both theories into my own constructive approach.

2) Republicanism revived and given a normative form

The neorepublican revival has focussed on the prevailing understanding of freedom in political theory. This approach, however, originated in the work in the history of ideas pursued by Quentin Skinner and J.G.A. Pocock in the 1970's and 1980's in their studies of Renaissance and early modern political thinkers and the Roman influences in their work. In the 1990's Philip Pettit and Quentin Skinner began to bring a normative perspective to the discussion on republicanism, heralding what has become known as neorepublicanism. This viewpoint in political theory has quickly established itself it as a major school of political thought that has spawned its own "normative and institutional research programme"[2] and a political following (in the form of the former Spanish Prime Minister Jose Zapatero).

The principal contribution that neorepublicans consider that they have made relates to the philosophical understanding of human freedom. Isaiah Berlin's twofold categorisation of liberty as either negative or positive has dominated discussion among political theorists since it was raised by Berlin in the 1950's. The tradition of negative liberty in this understanding is associated with the philosopher Jeremy Bentham, William Paley and, before them, Thomas Hobbes. Freedom in this sense is considered to be the absence of external interference or coercion in the life and choices of a person (freedom as non-interference). Positive liberty by contrast is often defined as the conditions through which persons are enabled to achieve self-mastery or self-realisation of their chosen ends (freedom as self-mastery). The two conceptions are clearly quite different in their theoretical role and scope.

The neorepublican conception of liberty, principally based on Roman and Renaissance understandings of freedom, conceives freedom through the prism of the classical question of the master-slave relationship. A slave is subject to the master's whim, whether exercised in a benevolent or malevolent way, while a citizen as a full member of the *polis* or *civitas*, participated in some way in the formation of the laws he was expected to obey. The intellectual historian Annabelle Brett, following on from work by Quentin Skinner, helpfully recounts how the intellectualist view of human moral freedom established by Aquinas (from Aristotelian and scriptural sources) is altered by later Jesuit understandings of human

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[2] Frank Lovett and Philip Pettit, 'Neorepublicanism: A Normative and Institutional Research Program', *Annual Review of Political Science*, 12 (2009), 11-29.

freedom and more radically by Calvinist theologians, whose views are taken up and altered further by Hobbes.[3]

Thus liberty in the republican conception is defined being not subject to public rule or private power that can be exercised arbitrarily and in a way that those who govern are in some way forced to track the interests of the governed. Pettit's version of neorepublicanism includes a significant role for democratic deliberation, echoing understandings of citizen participation in the rule of the Roman Republic. Public or private interference or coercion in the lives of citizens that is not exercised arbitrarily and without regard to the interests of citizens is not an infringement of liberty, but may even be beneficial to, or constitutive of, personal liberty.

This normative neorepublican view of freedom has been challenged by unsympathetic political theorists, and there are some unanswered questions about quite how much of the neorepublican view of liberty differs from Berlin's conception of negative freedom. But I nonetheless hold that their view is useful because it helps it helps expound a political understanding of freedom that is complementary to the Thomistic understanding of moral or metaphysical freedom. Moral freedom in this perspective, as we have seen, is 'freedom-for-the good': the freedom of the will (interplaying with the intellect) striving for the moral objects that fulfil human potentialities, leading to the agent's eudaimonia. It is not a 'freedom of indifference' or of individual autonomy considered in an absolute or constitutive sense. This might have parallels with a conception of positive freedom as self-mastery but the difficulty here is that political freedom has a different scope or role to freedom considered from a metaphysical standpoint. A political conception of freedom must be consistent with this more fundamental view but it must, at the same time, pertain to the legitimate role of the state in the lives of citizens.

This is where I see a difficulty with the conceptions of positive and negative liberty. The notion of negative freedom seems in some way to presuppose that political non-interference is an intrinsic good and that government intervention in citizens' lives should, *ipso facto*, be suspected as being illiberal. While this may appeal to libertarians or anarchists it would not be conducive to a Thomistic conception of the role of political association which allows for a significant role for government in enabling the fulfilment of the political common good - which can properly be considered a true good of the citizen.

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[3] Annabelle S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton, NJ.: Princeton University Press, 2011), at chapter 2 on 'Human Agency', especially 37-59. Hobbes understood freedom as pure willing uninterrupted by any external agents, with the role of the intellect radically sidelined.

At the same time adopting positive freedom as a political conception of freedom also seems to have its own problems. Though self-mastery or self-dominion may be one aspect of a flourishing life, it is but one element. Attempts by the state to comprehensively legislate or secure the means to each person's full self-mastery or self-realisation appears too all encompassing and unrestricted to be the basis of political association. In the perspective I have outlined here, the role of the state is not fully comprehensive in promoting eudaimonia, as it is focally aimed at the attainment of political goods, leaving the onus for achieving key aspects of a person's all round fulfilment to other intrinsically valuable human societies.

Republican liberty, according to is proponents, addresses the key matters rightfully addressed by Berlin in his twofold typology. It takes on board the need for protection from the undue interference (domination) from the state, or from private persons, in areas of life that are outside the proper domain of state competence. Yet by permitting the exercise of state interventions, including directly coercive legal interventions, the role of government in fulfilling a range of political goods seems to have been taken on board. Government power can thus assist a citizen in the realisation of their ends as long as in doing so it does not lead to the domination of any other person. The notion of the common good or the public interest (a synonymous term) is clearly central in this conception, and this has emerged clearly in Pettit's more recent writings.[4] As Pettit puts it:

> "If there is a plausible conception of the public interest, and a feasible means of giving the public interest the required control over law-making, then there will be some hope of establishing a regime where the laws are not arbitrary and government does not represent a form of domination over individual citizens."[5]

Though the notion of republican liberty has not resolved the issue of the relationship between freedom from a metaphysical perspective and the proper role of specifically political liberties, it appears to offer an attractive - if partial - solution to some of the key political questions outlined here.

3). Overlaps between neorepublicanism and political liberalism

Neorepublican theorists have alluded to the "considerable overlap"[6] between their approach to political association and the capabilities approach set out by Nussbaum and Sen. Other

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[4] Though Pettit does not explicitly link his discussion of the public interest or common good to Aquinas's thought, the unique contribution of the Thomist tradition on the common good (following Aristotle's and Cicero's thoughts) must surely inform the background to Pettit's discussion.
[5] Philip Pettit, 'Law and Liberty' in Samantha Besson and Jose Luis Marti, (Eds.), *Law and Republicanism*, (Oxford: Oxford University Press, 2009), 39-59.
[6] Lovett and Pettit, 'Neorepublicanism: A Normative and Institutional Research Program', see section 'Nondomination as an aim'.

theorists see significant consonances between neorepublicanism and political liberalism. Some political liberals have acknowledged Pettit and Skinner's revival of a helpful normative understanding of political freedom but have questioned whether it constitutes quite the breakthrough in political theory that its proponents hold it to be. Charles Larmore, for example, questions some of the historiographical assumptions Pettit employs and his characterisation of Rawls's *Political Liberalism* as implicitly endorsing a Bethamite conception of freedom.[7] More fundamentally Larmore claims that, despite Pettit's protestations, an essentially liberal conception of fundamental respect for persons seems to be operating in an unspoken way in Pettit's normative presentation of neorepublicanism.

John Rawls's remarks expressing a compatibility between aspects of republicanism and his view of political liberalism predates the normative theories expounded by Pettit and Skinner in the late 1990's. Rawls himself writes that political liberalism is not necessarily inconsistent with all forms of republicanism, though he does claim that a perfectionist neo-Aristotelianism is inconsistent with his approach.[8] The remark indicates an interesting potential overlap between the theories. Both theories have a form of deliberative democracy, both purport to establish and protect human and political rights, both justify representative and constitutional government. Henry Richardson for one concludes that "in short, there seems to be no fundamental incompatibility between Rawls's liberalism and Pettit's republicanism."[9] What Richardson does suggest, however, is that a pure republican view does not fully take on board the fair value of political liberties that can only be addressed by "supplementing it with distinctive liberal concerns with equality and procedural fairness" to create a form of 'liberal' republicanism.[10] I consider that Larmore and Richardson's critical but positive assessment is correct. I hold that neorepublicans, openly in some cases, operate with a notion of the value or persons in themselves and the basic respect owed to them on that basis. These distinctive concerns are not immediately explicit or philosophically elaborated in pure republican theory.

I concur with this judgement and argue that mining the strengths and complementarities of the three theoretical approaches (neorepublican, neo-Aristotelian, political liberal) will assist in explicating some of the fundamental principles that may help develop an understanding the form of the best regime. We may see neorepublicanism as bearing a family resemblance

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[7] Charles Larmore, 'Liberal and Republican Conceptions of Freedom', in Daniel M. Weinstock and, Christian Nadeau (eds.) *Republicanism: history, theory, and practice* (London: Frank Cass: 2004), 96-119, at 114-117.
[8] Rawls says that a form of classical republicanism could be consistent with political liberalism but that an Aristotelian inspired 'civic humanism' would not be. See John Rawls, *Political Liberalism*, revised edition, (New York: Columbia University Press, 1996), at 205-206.
[9] Henry S. Richardson, 'Republicanism and Democratic Injustice', *Politics, Philosophy and Economics*, 5 (2006), 175-200, at 180.
[10] Richardson, 'Republicanism and Democratic Injustice', 195.

to political liberalism, founded on a contemporary reading of republican sources, in contrast to a political liberalism based on a contemporary reading of Kant (as in Rawls or Onora O'Neil) or, as in the theory presented here, a form of political liberalism that borrows key elements from the contemporary reception of Thomas Aquinas's social and political thought. Neorepublicanism may even be seen as an internal critique of forms of political liberalism that implicitly include, or at least do not distance themselves from, a reductively Bethamite or Hobbesian conception of freedom.

The debate about political freedom, as opposed to the classical question of the freedom of the will (and its interplay with reason), should be set within a framework of what governmental (and private) actions lead to citizens' lives being subject to domination or arbitrary rule. Thus democratically sanctioned government action designed to secure civic goals or goods that nonetheless do not trespass on citizens' fundamental liberties or interests (i.e. that are consistent with a regime of *non*-domination regarding basic justice and constitutional essentials), should not be seen as an infringement of due political (or moral) freedoms and thus be deemed illicit (as they are by libertarians and anarchists). Libertarians and anarchists would claim that a positive role for government in promoting civic goods is indefensible and that any governmental understanding of the human good should be fully subject to each individual's choice and consent.

4). The form of the republic: the role of constitutionalism as a legal-political doctrine

The rise of neorepublicanism in political theory has been accompanied by a revival in a range of normative understandings of constitutionalism.

Normative treatments of constitutionalism by political theorists fell somewhat out of fashion in the field of *political* theory from the 1960's (after the important works of on the subject by Carl J. Friedrich and others) as political science approaches and New Left theories gained influence in the academy. The United States was perhaps an exception to this, where the issue of judicial review of statue involving controversial political questions, such as abortion and school prayer, kept the issue of the nature of the constitution on the agenda, though mainly for *legal* philosophers (and politicians).[11]

However, from the mid 1980's onwards political theorists began to think anew about how constitutionalism could be considered to be an important element of political theory. This

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[11] John Hart Ely and Ronald Dworkin's constitutional jurisprudence in the 1970's and early 1980's buck the trend of a lack of interest in constitutionalism. Dworkin's prolific output during this period can be sampled in: Ronald Dworkin, *A Matter of Principle* (Cambridge, Harvard University Press, 1985). Many of the issues discussed in legal journals about the scope of judicial review in the US in this period were about historical and hermeneutical questions rather than about normative ones. The controversy about the doctrine known as 'originalism', or the opposite view of a 'living constitution' would be an example of this.

revival has developed a clear and distinct normative aspect which has led constitutional theory and political philosophy back into a closer relationship. Much fruitful work has emerged from this dialogue between the fields of legal philosophy and political philosophy.[12] The revival of constitutionalism has arisen from within different traditions of political theory. In Kantian influenced political theory both John Rawls and Jurgen Habermas have in their own ways taken a 'legal' or 'constitutional turn',[13] focussing their theories to a lesser or greater degree on the theoretical underpinnings and justification of a constitutional democracy.

Hegelian influenced versions of constitutionalism have also emerged,[14] as have explicitly leftist versions.[15] Also noteworthy is an older neo-Thomist constitutionalism[16] and some more recent attempts from Thomist perspectives that have come from engagement with analytic philosophy in the form of John Finnis's oeuvre and in work by Martin Rhonheimer.[17] In keeping with the methodology already outlined I take Aquinas's theory and that of his recent interpreters as being particularly important in helping to constitute a normative theory of constitutionalism. In doing so I clearly cannot but avoid some of the basic questions of classical political philosophy about what constitutes the best political regime.

My approach is exemplified in applied political theory by examining the controversial question of the use of constitutions by the courts in the judicial review of statutes - the 'Counter majoritarian difficulty' as it is named in the United States. This difficulty is expressed in the question: To what extent and on that basis - if at all - should the courts overrule the decisions of legislatures, especially in statutes, ostensibly to protect the fundamental principles of the political regime as expressed in the constitution? This is a particularly acute challenge in legal constitutionalist regimes where the courts have been assigned, or have assumed, a role as the final and decisive arbiter of the constitution. This

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[12] For an example of this see Alan Brudner's impressive work *Constitutional Goods* (Oxford: Oxford University Press, 2004).

[13] Though this change in approach is not uncontested as some interpreters do not see a discontinuity in Habermas's social theory in *Between Facts and Norms* and subsequent publications by Habermas. See Matthew Specter, 'Habermas's Political Thought, 1984-1996', *Modern Intellectual History*, 6 (2009), 91-119, at 92-93.

[14] See part III of Alan Brudner's *Constitutional Goods* for his use of Hegel's social theory.

[15] See Mark V. Tushnet, *Taking the Constitution Away from the Courts*, (Princeton, NJ, Princeton University Press 1999). Tushnet identifies himself as a socialist.

[16] See for example, Jacques Maritain, *Man and the State,* (Washington, D.C.: Catholic University of America Press, 1998 [1951]) and Yves R. Simon, *Philosophy of Democratic Government* (Chicago: Phoenix Books of the University of Chicago Press, 1961 [1951]).

[17] See for example, John Finnis, 'Is Natural Law Theory Compatible with Limited Government?', in Robert P. George (Ed), *Natural Law, Liberalism and Morality*, (Oxford: Oxford University Press, 1996), 1-26; John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998) especially chapters V, VII and VIII on justice and the role of the state in Aquinas's theory; and Martin Rhonheimer, 'The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason: Rawls "Political Liberalism" Revisited', *American Journal of Jurisprudence*, 50 (2005), 1-70.

brings into question philosophical ideas about the nature of democracy and its relationship with justice and political right.

a). Defining a normative conception of constitutionalism

The descriptive and comparative approach to constitutionalism which takes up the greater part of scholarship on constitutionalism is legitimate and should not necessarily be disparaged. Following the general methodology of this work I allow for the due role of descriptive and comparative approaches to politics as pursued by political scientists with the proviso that such approaches do not systematically and reductively marginalise the importance of normative questions.

Often constitutionalism has been identified with a concern to protect the rights of persons from state power. Giovanni Sartori criticised those who take a largely descriptive approach to constitutionalism, or those whose conception of constitutionalism is closely linked to certain theoretical questions relating to modern constitutional practice (paradigmatically in the USA) such as 'checks and balances', the separation of powers and bills of rights. This form of modern legal constitutionalism has become particularly associated with classical liberalism and the work of John Locke and the American Founders, even though the roots of constitutional thought go back much further than the early modern period.

I would argue with Sartori that the deepest root or underlying *telos* of constitutionalism is the painstakingly and dialectically determined answer to the question: "How can we be governed without being oppressed?" For Sartori a constitution is the "frame of political society, *organized through and by the law*, for the purpose of restraining arbitrary power."[18] I agree that the rights of the individual may be one issue relevant to the notion of constitutionalism, but the protection of negative individual rights does not *centrally define* the legal-political doctrine of constitutionalism. Constitutionalism is not therefore intrinsically a species of classical liberalism or libertarianism.

In pursuing the meaning of constitutionalism on a normative rather than descriptive level I would tentatively define constitutionalism as "the constraining of government in order to better effectuate the fundamental principles of the political regime".[19] Sartiori elaborates this normative approach by contending that the *telos* of both American and British

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[18] Giovanni Sartori, 'Constitutionalism: A preliminary discussion', *The American Political Science Review*, 56 (1962), 853-864, at 860.
[19] Keith E. Whittington, 'Constitutionalism', in Keith E. Whittington, R. Daniel Keleman and Gregory A. Caldeira,(Eds.), *The Oxford Handbook of Law and Politics*, (Oxford: Oxford University Press, 2008), 281-299, at 281.

Constitutionalism was the same - despite the differing form of their political institutions – namely a "fundamental law, or a set of fundamental principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a limited government".[20] In doing so normative constitutionalism seeks to prevent arbitrary rule where arbitrariness "consists in the capacity of rulers to govern wilfully – that is, with complete discretion - and to serve their own interests rather than those of the ruled. Constitutionalism attempts to avoid these dangers by designing mechanisms that determine who can rule, how and for what purposes."[21] The imprint of republican thought in these definitions is clear and recent work by neorepublicans such as Philip Pettit[22] and Richard Bellamy[23] bear this out very clearly.

b). The reaction to absolutism: the development of constitutionalism in modernity

Legal theorists argue that modern constitutionalism takes over understandings of fundamental law derived from understandings of natural right once the autonomy and positivity of law was established and processes of secularisation gained momentum. The original American constitutionalists used the term 'fundamental law' frequently in their discussions of the US Constitution.

It is worth exploring how modern constitutionalism arose from this historical and theoretical background. Christian political theology developed apace in the Early Church. The most influential presentations included Augustine's notion of the Two Cities (in *The City of God*); heavenly and earthly, the former being an eschatological destination to which Christian journey spiritually through the latter earthly City. The temporal state in this life cannot offer the true justice of the New Jerusalem in the world to come, yet Augustine sees certain limited goods – peace and a basic level of justice - as being possible to attain in the transient earthly City.[24] The Gelsian development of this Two Cities theology - granting *auctoritas* to the *sacerdotium* (priesthood) and *potestas* to the King - had its various corruptions including

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[20] Sartori, 'Constitutionalism: A preliminary discussion', at 855.

[21] Richard Bellamy, 'Constitutionalism', (September 13, 2010), *International Encyclopaedia of Political Science*, B. Badie, D. Berg-Schlosser and L. Morlino, (Eds.), (London: IPSA/Sage, Forthcoming), available at SSRN: http://ssrn.com/abstract=1676321, accessed 9 May 2011.

[22] Philip Pettit, for example, argues that neorepublicans should make a case for: "constitutional and legal regime that enables people to claim the status of free persons in relation to one another. And though the regime required will license quite a rich form of intervention in civic life.....considerations of liberty will also argue for constraining the regime in important ways. They will make a case for embodying constraints within the regime that help to make its imposition on citizens assume the profile of a controlled, nonarbitrary form of interference in their lives". See Pettit, 'Law and Liberty', 39-59.

[23] Richard Bellamy, *Political Constitutionalism* (Cambridge: Cambridge University Press, 2007).

[24] Augustine, *The City of God against the Pagans*, edited and translated by R.W. Dyson, (Cambridge: Cambridge University Press, 1998), at Book XIX.

the baleful notion of 'political Augustinianism' and the later ideas of papal supremacy and the medieval canonists theory of the Church's *potestas directa.* Some of these theories never fully came to pass historically, not least because "in practice Augustinian dualism was replaced by a political-ecclesiastical monism in which secular power had the Church at its service".[25]

The nature of sovereign power is especially relevant to the development of constitutionalism in reaction to absolutism. It begins with a theological question. In Christian theology the sovereign Body after the Ascension was considered to be the glorified Christ. Christ was seen as the heavenly Sovereign, and his bodily presence was, in the early centuries of the Church's existence, considered to be that made present sacramentally in the Church's Eucharistic celebration. The Jesuit Henri de Lubac charts the gradual change in the ecclesial understanding of the sovereign Mystical Body of Christ and how it moves over time to the *institution* of the Church itself rather than in the Eucharistic action.[26] Ernst Kantorowitz, in his canonical history of medieval political theology in *The King's Two Bodies,* relays the passage through the period of Constantinianism to medieval political theology after the Gelasian 'two swords' *regnum-sacerdotium* duality emerges.[27]

In these later developments the Divine Body and its sovereignty is shared and *directly received from God* – full spiritual authority is invested in the institutional Body of the Church (through the 'Princes' of the Church – the Bishops - especially the Pope) while full temporal authority is granted to the King's Body. Thus a sacral dimension was granted to the temporal exercise of political authority, something barely envisaged in pre-Constantinian Christian political theology. With the advent of voluntarism the picture evolves in unpredictable ways. The doctrine of the Divine Right of Kings is one expression of this while in the late medieval and early modern period theorists envisaged the citizens of a *civitas* consenting to grant extensive powers to a secular sovereign (in Marsillus of Padua's *Defensor pacis* and in Hobbes *Leviathan),* who would respectively restrain papal power and the violence generated by 'hot' religious disputes. Martin Rhonheimer sees the early modern theories of the state advanced by Marsillus and Jean Bodin as being precursors of modern constitutionalism in correcting the distorted and undue claims of the Medieval church. He sees in Bodin's approach a "nuclear political ethic" distinguishing higher existential claims clearly from lower

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[25] Rhonheimer: 'The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason' at 15.
[26] See Henri Cardinal de Lubac, *Corpus Mysticum: The Eucharist and the Church in the Middle Ages* (London: SCM Press, 2006).
[27] Ernst H. Kantorowitz, *The King's Two Bodies: a study in mediaeval political theology* (Princeton, NJ.: Princeton University Press, 1957).

political goods (though he does so in a way that grants too much power to the secular sovereign for Rhonheimer). Later modern political theorists such as Rousseau align plenary sovereign power clearly with the temporal state. The historical development of sovereign states in the post-Westphalian era in some ways accompanied this theoretical perspective. The absolutist monarchies of France and Britain in the sixteenth and seventeenth century are examples of this.

Jean Bethke Elstain, in her 2005-2006 Gifford Lectures, sees this gradual development as representing a shift in sovereignty from God in the early Church, to the King's Body in the medieval era, to the State in modernity, and then to the autonomous individual in nineteenth century and twentieth century liberal thought. [28] The development of liberal political theories with their conception of subjective natural rights, such as those of Thomas Paine or John Locke, occurred in contradistinction to theories of the 'divine right of Kings' and absolute sovereignty. The sequence of revolutions in Britain, US and continental Europe from 1689 to 1848 were the clearest signs of resistance to the notion and practice of absolute state sovereignty. As modern constitutionalism developed from these revolutions some of the more fundamental philosophical underpinnings of constitutionalism as a doctrine were gradually superseded by a somewhat different understanding. Modern constitutionalism is thus often described as the process by which a political society experiences a 'constitutional moment' - typically a revolution or regime change - at which point a constituent body formulates a codified written constitution which clearly describes and delimits the powers and role of various parts of government within a political society. Often in modern constitutions this is accompanied, initially or later, by a Bill of Rights, as paradigmatically seen in the American or French Constitutions.

Grappling with the challenge of conceiving sovereignty in the twentieth century Jacques Maritain attempted to use Aristotelian-Thomist resources to tease out the appropriate theoretical nature of the state, the 'body politic' and political sovereignty. For Maritain, the body politic is the modern term for the *polis* or *civitas*, not the state. The state thus serves members of the body politic ('a people') by enacting and enforcing the common good through positive law. The state, in a philosophical sense, is part of the body politic and is accountable to it as its "instrumental agency".[29] The state is thus not sovereign, and even the autonomous body politic is sovereign in only an analogous (and temporal) sense and does not bear a legal or political omnicompetence. Maritain's neo-Thomist normative

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[28] Published as Jean Bethke Elshtain, *Sovereignty: God, State and Self* (New York: Basic Books, 2008).
[29] See Maritain, *Man and the State*, at 42.

understanding helps us conceive of how questions on the role of the state in relation to the political community may helpfully be framed.

c). Political constitutionalism and the internal relation between rights and politics

For us the theoretical question of the relationship between constitutional law and democracy or popular sovereignty has what Habermas has called a fundamentally "internal relation".[30] In other words law and democracy are not capable of being fundamentally traded off or opposed, as if they were principles that essentially contradict each other. The democratic principle 'one person, one vote' in elections or referenda is a concrete expression of this common root principle. Treating 'like cases alike' (the generality principle) is also an example of a legal principle predicated on human equality. Thus we can say that to maintain consistency and to avoid a performative contradiction, the embrace of the theoretical basis for democracy will also entail a baseline respect for core human rights through some generalised restraints on sovereign power.

Philip Pettit, advances a form of deliberative democracy ('contestatory democracy') that he sees as sharing certain characteristics with Habermas's discourse theory.[31] Neorepublican thinkers have emphasised the importance of deliberative democracy in their political outlook in a way that also has similarities with Rawls's conception of public reason. For the purposes of this thesis we can broadly define deliberative democracy as:

> "a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future."[32]

Habermas sees a clear connection between law and morality despite rejecting natural law theory as an antecedent theory of law that connects law and morality. He views natural law as being a 'higher law', founded on the recognition of a theistic metaphysics. In this reading,

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[30] See Jurgen Habermas 'On the Internal Relation between Law and Democracy', in Ciaran Cronin and Paolo De Grieff (Eds.), *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: The MIT Press, 1998), 253-264.

[31] As Pettit says we let the people rule when each person "can claim an equal part, being equally party to the acceptance of the reasons by which that interest is defined. If the public rules in this sense, then members of the public can see the laws imposed as the laws selected by criteria in the ratification of which they are fully and equally complicit. They can see the laws, not as affronts to their freedom as non-domination, but rather as constraints that are sourced, like the actions of Ulysses' sailors, in their own will". Pettit, 'Law and Liberty', at 58.

[32] Amy Gutmann, and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, NJ.: Princeton University Press, 2004), 7.

positive law is hierarchically subordinated to the higher law of nature. Though this picture may be not wholly inaccurate from a 'God's eye' perspective, as we have seen this is not how theorists such as Rhonheimer or Finnis see the relationship between natural law and positive law. In their different ways these authors – as I do – see natural law as a theory of practical reason through which human goods are apprehended by the agent, without the person *necessarily* accepting any metaphysical conclusions from their experience of striving for human goods.

From the 'God's eye' perspective natural law is indeed the rational person's participation in a higher law (the eternal law) representing the *logos* in the created order. However, this is *not* how natural law is experienced by the acting person – as a form of moral autonomy – and without a supplementary (and intellectually challenging) metaphysical exploration though theoretical reasoning. On this view natural law, through its expression in natural right, may be legislated into positive law in order to help coordinate the life of a community in a way oriented to the common good of that society - or even the global community. As we have seen however, once natural law or natural right is seen not as an external metaphysical imposition on political association, but itself a theory of practical reasoning positing moral self dominion the picture changes.[33] Just as Habermas's (Kantian-based) fears about the heteronomy of the natural *moral* law is in this picture allayed, can his concerns about the viability of natural law as a basis of the public autonomy of a political society be properly addressed?

Habermas fears a vision of human rights that is pre-political and determined through natural law would serve as an undue and "imposed… external constraint"[34] on the legislator, thus breaching the *public* autonomy of a political society, which is a *legal* autonomy that "demands that the addressees of law be able to understand themselves at the same time as its authors."[35] He sees human rights as *internally related* to popular sovereignty through a procedure of rational communicative discourses in which each agent can accept as her own the reasons for a proposed legislative measure. Through such a process private autonomy becomes a public autonomy for the constitutional republic.

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[33] This view is expressed even in contemporary Catholic Social Teaching, as in Benedict XVI's Encyclical *Deus Caritas Est* attests: "Politics is more than a mere mechanism for defining the rules of public life: its origin and its goal are found in justice, which by its very nature has to do with ethics. The State must inevitably face the question of how justice can be achieved here and now. But this presupposes an even more radical question: what is justice? *The problem is one of practical reason*" (§28); and that "the formation of just structures….belongs to the world of politics, *the sphere of the autonomous use of reason.*" (§29), emphases added. See Benedict XVI, Encyclical Letter *Deus Caritas Est,* promulgated 25 December 2005, accessible at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html, accessed 2 July 2011.

[34] Habermas, 'On the Internal Relation between Law and Democracy', 259

[35] Habermas, 'On the Internal Relation between Law and Democracy', 260.

I hold that Habermas's concerns miss the mark, however, in relation to the eudaimonistic and natural law ethic propounded here. In such a view, proposed laws significantly addressing matters of human rights are subject to a process of public reasoning in democratic deliberation which, though not the same as Habermas's discourse theory, serves much the same purpose. Our view of democratic deliberation, as a (secondary) political constructivism that is in principle open to metaphysical argumentation, equally allows one's *personal* ethical autonomy and striving for the human good to contribute to the *public* autonomy of a republic. In Habermas's case constitutional law is superior to other legislation and enumerates justiciable rights guaranteeing equal respect. For legal constitutionalists such as Habermas and Rawls, judicial review of statute is thus an essential ballast to democracy.

Habermas's claims about the intrusion of pre-political rights and their grounding in ethics into political morality seems misplaced to us. Some of this may reflect in part the ongoing misunderstanding in relation to the concepts of *lex* and *ius* in legal theory since the twelfth century, and how it developed over time into a pervasive imprecision in juristic terminology that hastens the development of strands of thought that later emerge as legal positivism. It is the polarity between legal positivism and natural law (or between facticity and validity in Habermas's nomenclature) that philosophers such as Habermas and Rawls try to reconcile with their political-legal theories. According to the canonist Kenneth Pennington, *lex* and *ius* do not have the same conceptual underpinning but have become very much confused in modern legal and political theory.[36] He argues that theorists, including Thomas Aquinas, did not consistently distinguish between *lex* and *ius*. The importance of this distinction was also stressed by Michael Oakeshott who noted the clear conceptual differences, but some limited overlaps, between *lex* and *ius*.[37]

Oakeshott and Pennington follow the Roman and canonist view that *lex* refers to the non-instrumental character of law. Its rational basis is its basic conformity to the rules of natural justice and what we would now call due process (for example, 'hear the other side'), though Gratian also linked it to the notion to consent. The *ius* of *lex* was often limited to establishing 'the Rule of Law' rather than enshrining a notion of human flourishing. Pennington quotes a gloss on Justinian that "[j]ustice and *ius* are in effect the same or ought to be the same",[38] and writes that:

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[36] Kenneth Pennington, 'Lex naturalis and Ius naturale', *The Jurist*, 68 (2008), 569-591.
[37] See Michael Oakeshott, 'The Rule of Law', in Michael Oakeshott, *On History and other Essays* (Indianapolis, IN: Liberty Fund, 1999), 129-178, at 151-178.
[38] Pennington, 'Lex naturalis and Ius naturale', 574.

> "*Ius* reminded the jurists constantly of the transcendental significance of a legal system. It existed not just to establish right and wrong and to punish the wicked. It was the source of justice, equity, and rights. ….[T]he penumbras of *ius* were justice, equity, and the common good."[39]

The early mediaeval thinkers thus referred to *ius naturale*, *ius gentium* and *ius divinium* as deliberately referring to these penumbras and principles such as the Golden Rule, which they saw as a natural law precept. From the twelfth century a further development occurred as Christian thinkers started to draw on the Stoic (but not Roman law) tradition that *ius* was linked to the common good. This can be seen in the work of Abelard and Aquinas. Pennington argues that even Aquinas's mixed usage of *ius naturale* and *lex naturale* to refer to natural right or natural law may well indicate that he was not fully appraised of the significance of the philosophical differences between *lex* and *ius* in Roman legal thought.

I would wish to link this general line of argument to the notion of the 'internal morality of law' as outlined by Lon Fuller (in chapter 2 of *The Morality of Law*).[40] Here Fuller outlines how key legal principles constitute "a procedural version of natural law … concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be."[41]

The difference between *lex* and *ius* can also be drawn in some later juristic distinctions analysed by the contemporary legal philosopher Martin Loughlin.[42] Loughlin makes a similar but important point about positive law and 'political right' (*droit politique*) in the formation of a constitution of a state. Political right can be clearly linked to natural right, the topic of chapter 5.[43] Fundamental law, which in turn was thought in some sense to be derived from the *ius naturale*, refers to law "that bound morally and politically rather than through the

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[39] Pennington, 'Lex naturalis and Ius naturale', 573.

[40] See Lon L. Fuller, *The Morality of Law*, revised ed., (New Haven, CT: Yale University Press, 1969).

[41] Fuller, *The Morality of Law*, 96-97. One could say that the '*ius* of *lex*' in the way I have touched upon it here is of the sort outlined in Lon Fuller's 'eight excellences of law'.

[42] Martin Loughlin, *The Foundations of Public Law*, (Oxford: Oxford University Press, 2010).

[43] For as the philosopher V. Bradley Lewis appositely notes "The locus classicus of Aristotelian natural right, Nicomachean Ethics 5.7, for example, indicates that natural right is to be understood within the more general category "political right" (*politikon dikaion*) and as specifically correlative to legal right (*nomikon dikaion*). Natural right is the part of right that is the same everywhere, where legal right, originally indifferent, varies from time to time and place to place, but most of all with respect to the character of the regime (*politeia*); although, as Aristotle says, there is one regime that is "everywhere best by nature." See V. Bradley Lewis, 'Gerhart Niemeyer: Political Order, and the Problem of Natural Right' *The Political Science Reviewer*, 31 (2002), 117-61, at 144.

mechanisms of ordinary law".[44] Fundamental law thus referred to the constitution of the state - the *lex regia* or the later term *droit politique* - rather than the constitution of the office of government, which is regulated by positive law.[45] In Jacques Maritain's language this refers to the basic principles regulating the relationship between the body politic and the state.

In modern constitutions, the fundamental law was posited in the written and enshrined constitution. In the US over time this fundamental law was primarily interpreted by the courts via judicial review, even to the extent that legislative measures could be overruled. In England, Blackstone refers to the fundamental laws of England as the Magna Carta, and its reaffirmations through to the Petition of Right, the Habeas Corpus Act, the Bill of Rights, the Act of Settlement, and so on.

What conclusions do I draw from such distinctions? First, that they help clear up some of what was explored in Chapter 3. Following Finnis's interpretation of Aquinas I affirmed the relative positivity and autonomy of law while also affirming human law's irreducibly moral aspect. This moral aspect is exhibited most paradigmatically in public law, specifically the fundamental or constitutional law of the *civitas*/republic which sets the basis of the legitimacy or *ius* of positive *lex*. When the basis of the constitution of state is breached, or the procedural basis of *lex* (due process) is set aside by the governing powers, the Augustinian maxim *lex injusta non est lex* ('unjust law is no law') begins to seem eminently reasonable.

Scholars working in the Thomist tradition, especially those utilising Aquinas's transformation of Aristotle's ethics and politics, have set out a number of principles of *ius* that may be described as constituting aspects of the fundamental law of a constitutional regime. John Finnis argues that Aquinas was the first theorist to write explicitly of restricting or limiting the powers of the government in this way.[46] The restrictions he highlights include:

1. The conformity of rulers to positive law (the rule of 'laws and not men' derived from Aristotle's *Ethics* and *Politics)*, on the basis that law is intrinsically an order of reason while the actions of rulers may be unduly swayed by particular passions. In Aquinas's Commentary on Aristotle's *Politics* he implies a preference for 'political' rule (rule in accordance with laws of the polity) rather than to 'regal' rule, with its plenary powers for the King.

[44] Loughlin, *The Foundations of Public Law,* 289.
[45] Loughlin, *The Foundations of Public Law,* 228-289.
[46] Finnis, 'Is Natural Law Theory Compatible with Limited Government?' at 1.

2. The conformity of rulers to the moral law and to the principle of subsidiarity. Aquinas sees natural law precepts as being universal and does not allow for exceptions to the precepts for rulers – even in times of war or emergency – and, following Aristotle, sets out clear roles for societies within the polity that cannot be eliminated or unduly reduced by the state.[47]

3. The presupposition of "freedom and equality" between citizens (as opposed to the master-slave relationship in despotic rule) in 'political' rule and some degree of participation in ruling. This requires that the rulers and ruled, "because of their equality, exchange roles, and many persons are also constituted rulers in the same or different offices".[48] Finnis sees this principle as being "correlated with elections".[49] Aquinas's seemingly approving commentary on the definition of a citizen as one who is able to "participate in the regime" (commenting on the *Politics,* Book III, Chapter I) is also relevant here. In his more constructive work, the *Summa Theologiae,* Aquinas favours a mixed constitution of regal, aristocratic and democratic rule with offices open to election and a share in ruling held by all citizens, much in the vein of a modern constitutional monarchy.[50]

4. Political rule also requires, following Aristotle, that rulers do not govern for their private benefit, but rule for the common benefit or advantage (the common good or public interest) of the citizenry.

The right to political participation is in my view absolutely central, and is the cornerstone of a political or democratic constitution. Jeremy Waldron has called the right to participation in political decisions, especially legislative ones, the "right of rights"[51] reflecting its pivotal status within the democratic constitution. In the political form of constitution each citizen is granted a fundamentally equal share of political influence through the 'one person one vote' system and open elective access to the political offices of state. Though majoritarianism has

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[47] In this instance the principle of subsidiarity (as a correlate of constitutionalism) as a principle of political construction, would prescribe that citizens should refrain from deliberately attempting to smuggle into the classifications of core 'political goods' various aspects of the human good that are focally the proper functions of other human communities such as the domestic unit or a religious community. Insisting, for example, that the state should control absolutely every aspect of a child's education (leaving no role at all for parents) might be one example, or at another extreme insisting that the nation-state is the direct agent of a quasi-religious 'salvation' for people might be another (as some interpretations of Nazism/Fascism held for example).

[48] Thomas Aquinas, *Commentary on Aristotle's Politics,* translated by Richard J. Regan, (Indianapolis, IN: Hackett, 2007), comment on Book 1, chapter 5, at 40.

[49] Finnis, 'Is Natural Law Theory Compatible with Limited Government?', at 2.

[50] As Aquinas writes in *ST* I-II q. 105, a.1: "the best form of polity, being partly kingdom, since there is one at the head of all; partly aristocracy, in so far as a number of persons are set in authority; partly democracy, i.e., government by the people, in so far as the rulers can be chosen from the people, and the people have the right to choose their rulers. Such was the form of government established by the divine Law" [referring to ancient Israel].

[51] Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), at chapter 11, 232ff.

become a term somewhat tinged with derogatoriness we should not forget that it is a foundational principle of democratic politics - and the alternative of oligarchy or rule by a cabal hardly seems attractive.

The operation of the political constitution sets normative boundaries on the three powers of government. In a typical Western constitutional structure the 'power' most clearly accessible to participation by citizens is the legislature via elections. As courts are largely technical in their implementation and enforcement of law, appointment to judicial roles is usually based on different considerations and qualifications that make direct election or participation inappropriate and impractical. Thus the most appropriate responsibility for ensuring that human goods are advanced and moral norms are translated into positive law is focused on the legislature. Courts must interpret but should not normatively 'make' law or overrule statue without prior legislative consent to do so. In this basic reading the role of judicial review would appear limited to ensuring that the executive has acted lawfully.

Democratic deliberation takes place in many venues in the public sphere, from civil society and the media, to the crucible of the legislature itself. Following this deliberative process, Philip Pettit does not see it as utopian to believe that if the democratic process is successful and takes place according to the right principles of deliberation then the outcomes must, in principle, be seen as congruent with the political common good or public interest.[52] The converse of this is that without the use of such deliberative and constitutional principles in the process of determining the content of the political common good, citizens may have reason to doubt that what has been determined is in reality a political *bonum honestum*, and may only be an *apparent* political good.

As outlined in chapter 4 civil and political rights in this reading is an aspect of the political common good, which is principally the role for the legislature to enact. This does raise the question whether is necessary to enact explicit and justiciable human or civil rights into positive law (via the enactment of certain rights declarations - as in the UK's Human Rights Act 1998 and the European Convention on Human Rights). That some of these legal rights

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[52] Petitt writes "the public interest has to be defined on the basis of an active enterprise of democratic discussion and contest amongst the citizenry and so that it requires institutions that make room for such deliberative processes....The public interest is identified with those policies that are supported by criteria of selection—the commonly accepted reasons—that are implicitly ratified.... But though I have said nothing substantive on how to institutionalize the public interest, deliberatively understood, it does not seem outlandishly utopian to assume that things might be organized so that a polity does quite well in this regard..... Does the fact that a polity empowers the public interest in this way mean that the laws and other measures it imposes on the citizenry are controlled by them on an equally shared basis? Assuming that our abstract answer to the question about law is correct, does it mean that those laws and measures are non-arbitrary and non-dominating? I claim that it does." Pettit, 'Law and Liberty' at 58.

may be accorded a particularly preeminent status (as constitutional rights) on account of their relationship to *ius* or *droit politique*, or as being an intrinsic part of the *ius* of *lex* (such as due process rights presupposed by the Rule of Law), does not seem objectionable. This is because legislators may rationally wish to use a precommital device to ensure that any undue and unforeseen consequences of their legislation is mitigated, or may wish to hedge against shortcomings in the deliberative process which may lead to the enactment of future laws that fall short of the requirement of human rights. In such circumstances statute may be subject to 'weak judicial review', that is subject to review comparing it to constitutional rights. The UK's Human Rights Act 1998 is an example of this - a statute can be reviewed for its consistency with Convention Rights and, where possible, be read to conform to the Convention. When there is an inconsistency, however, the court can only issue a 'declaration of incompatibility' which does not overrule the existing statute.

'Strong judicial review' goes further than this. It would, as the US Supreme Court, Canadian Supreme Court or Israeli Supreme Court can (and regularly does), strike down legislation as being inconsistent with constitutional rights. This is a key tenet of modern legal constitutionalism. Normative political constitutionalists, such as Richard Bellamy and Adam Tomkins,[53] fear that such strong judicial review powers undermine the political basis of the constitution and its proper democratic orientation. Their practical fears include that strong judicial review short changes genuine political debate over controversial political issues in the public sphere serving to aggravate social tensions or at least delaying the political resolution of controversial social and political matters. Strong judicial review, by removing matter from the legislature's control thus shortcuts a wider deliberative process and gives the false impression that deeply controversial issues are resolvable by neutral legal-moral arbiters with specialist knowledge (i.e. judges). Instead political constitutionalists hold that legislative deliberations hold out the opportunity for partial agreement and political compromise in a dispute mechanism that involves a wider degree of participation than the judicial branch.

Where do modern natural lawyers stand on the question of the 'strong judicial review' of legislation? As advocates of the importance of human rights they may be expected to support judicial review on the basis of subjective human rights. Finnis seems to think the arguments are closely balanced, with clear advantages to judicial review in federal systems due to need to ensure vertical consistency between state and federal law. Yet at the same

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[53] Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005), and in Bellamy's *Political Constitutionalism*.

time he allocates to the legislature the retention of "high responsibility for human goods which 'modern manifesto rights' and principles pick out as basic goods to be shared by all" and worries about the supposed "moral neutrality" [54] of courts in deciding substantive matters of the common good of a society. Other natural law theorists take a similar view, seeing the legislature as the normal and proper place for positive law making, but also noting that Aquinas's writings on the judicial role and natural right do not answer directly the normative question of the desirability of the judicial review of legislation. [55]

This tallies with the view of natural law thinking explored in chapter 3, in which rights are seen fundamentally as a component of the political common good rather than as a Dworkinian side constraint on it. Weak judicial review of constitutional law by the courts can do this by naming potentially egregious examples of legislative decisions in relation to civil rights, without overriding the democratic pre-eminence of the legislature in making statute. Though without agreeing to a strong conception of essentially contested concepts or ideas, it is nonetheless difficult to see how, for instance, political questions that relate in clear ways to a philosophical anthropology (such as the legal permissibility of abortion, capital punishment, embryonic stem cell research, transhumanistic research and so on) can be prudently decided by the judicial branch in a definitive legal manner without undermining the integrity of the democratic or political constitution.

Political constitutionalists also challenge whether the proper role of the courts is that of a neutral arbiter, benignly presiding over disputes between citizens and their government, or clashes between the political right outlined in the in the constitution and majoritarian legislative decisions on the wider political good of the republic. Following J.A.G. Griffith[56] and Oliver O'Donovan[57] (in their different ways), I hold that the Courts have a properly 'political' role as they are themselves an 'arm' or 'power' of republican government. Using a Trinitarian analogy, the powers of the state are 'three in one' – that is, having three identities and roles but having but *one* fundamental level of being and purpose. The fundamental purposes of

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[54] John M. Finnis, 'A Bill of Rights for Britain?: The Moral of Contemporary Jurisprudence', *Proceedings of the British Academy*, 71 (1985), 303-331 at 329.

[55] See Russell Hittinger, 'Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?' *The Review of Politics* 55 (1993), 5–34. Also Robert George finds that "natural law does not dictate and answers to the question of its own enforcement, …authority to enforce the natural law may reasonably be vested primarily, or even exclusively, in the legislature; or …a significant measure of such authority may be granted to the judiciary as a check on legislative power. The question whether to vest courts with the power of constitutional judicial review… is in important ways underdetermined by reason". See Robert P. George, 'Natural Law, the Constitution, and the theory and practice of Judicial Review', *Fordham Law Review*, 69 (2001), 2269-2283.

[56] See especially chapter 9 'The Political Role', in J.A.G Griffith, *The Politics of the Judiciary* (Manchester, Manchester University Press, 1977).

[57] See Oliver O'Donovan, 'The Powers of Government' in Oliver O'Donovan, *The Ways of Judgement* (Grand Rapids, MI.: W. B. Eerdemans, 2005), 186-210.

government affect each branch equally even if they discharge these roles in a functionally different manner within the regime or constitution. In other words, each power of government is under the same general obligation to further the public interest or common good of the republic.

The role of each power of government in a regime must be complementary[58] and thus the notion of a full 'separation of powers', as Montesquieu outlined, may not be an apt maxim. A more helpful approach to the powers of government was symbolised clearly in the British Constitution with the notion of the 'Crown in Parliament' in which the Monarch summoned and prorogued Parliament within the law; which itself included all members of the executive, and the Law Lords who sat as the Judicial Committee of the Upper Chamber.[59]

e). The philosophical and theological complementarities of constitutionalism

Following the methodology I have outlined the potential consonances between philosophical approaches to ethics and politics and a theological orientation to politics is of some importance. One conventional story of the history of political philosophy grants the undoubted roots of the and modernity in Judeo-Christian thought, though speaks of a 'Great Separation' between the predominantly theological understandings of politics and the principally philosophical ones from Hobbes onwards.[60]

Part of this narrative focuses on the development of Augustine's dualistic two cities theology. In this understanding the *polis* is simply unable to deliver perfect eudaimonia to its citizens, the very function of politics is chastened. As James Schall puts it: "In political philosophy, this settling of the problem if that which human happiness exists, in an invitation to the divine life, allows politics to be – almost for the first time in human history – merely itself."[61] In this Christian "de-divinisation of politics",[62] the monistic polis-ethic set out by Aristotle was rejected, in favour of Augustine's Two Cities duality – where Christians make a spiritual and eschatological pilgrimage to the Heavenly City limiting the earthly City to the task of allowing true worship and the securing of temporal peace and justice.

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[58] "The differentiation of roles is dialectical and complementary" in Oliver O'Donovan, 'The Powers of Government', 191.

[59] This was altered by the Constitutional Reform Act of 2005 where the judicial role of the House of Lords was changed, and a distinct UK Supreme Court founded outside of the House of Lords.

[60] Mark Lilla, *The Stillborn God: Religion, Politics and the West* (New York: Vintage Books, 2008).

[61] James V. Schall, 'The Right Order of Polity and Economy: Reflections on St Thomas and the 'Old Law'', *Cultural Dynamics*, 7 (1995), 427-440 at 433-434.

[62] Eric Voegelin, *The New Science of Politics* (Chicago: University of Chicago Press, 1952), at 106.

The political thinker Eric Nelson has challenged this narrative by drawing on the wide range of political theology conducted throughout the seventeenth century that based its thinking about republicanism and the political constitution on the biblical Israelite constitution (such as Pufendorf, Grotius and influential republicans such as James Harrington). This contrasted with some earlier Renaissance humanist political thought (such as Petrach or Bruni) that was relatively light on scriptural reference by comparison.[63] This Hebraic revival was stimulated by the full emergence of Protestant thought against the social background of the persistence of absolutist monarchism in Europe. From this specifically theological context, notions such as the primacy of conscience, religious freedom and toleration emerge with great clarity. Nelson claims that "we owe several of our most central political commitments to an age that was anything but [secular]."[64] Moreover, political philosophers have, in recent times, also begun to take seriously the theological commitments of canonical liberal thinkers such as John Locke. Whereas some approaches neglect Locke's richly scriptural treatment of government in the *Second Treatise*, recent monographs such as Jeremy Waldron's give full weight to the theological seriousness of Locke's work.[65]

Characteristic of Aquinas's thought is his understanding of the relationship between natural human reason and revealed truths. Aquinas sees the moral precepts of the Old Law - though they are revealed - as also reflecting the natural moral law which can, in principle, be apprehended by humans as a rational beings. In Aquinas's treatment of the best regime he uses not only Aristotle, but also a theological understanding of scripture.[66] Similarly, Aquinas sees the Hebrew constitution, in which the Moses was accompanied by seventy two elders who were elected, as the revealed expression of the best regime. Carl Friedrich suggests that this positive allusion to constitutionalism may have resonated particularly with Aquinas as it formed part of the ecclesial structures of the Dominican order with its convocations and elections.[67] Though the lineage from the early medieval canonists' understanding of conciliarism to early modern constitutionalism to is subject to recurrent and trenchant historical disputes,[68] it is suffice to say perhaps (with Francis Oakley) that in "the Middle

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[63] Eric Nelson, *Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Cambridge, MA: Harvard University Press, 2010).

[64] Nelson, *Hebrew Republic,* at 5.

[65] See Jeremy Waldron, *God, Locke and Equality: Christian Foundations of Locke's Political Thought* (Cambridge: Cambridge University Press, 2002). Waldron is not the first interpreter to take such an approach - John Dunn has emphasised similar themes in his scholarship on Locke.

[66] At *ST* II-I, q. 105, a.1.

[67] Here Friedrich cites Ernest Barker's work. See Carl J. Friedrich, *Transcendent Justice: The religious dimension of constitutionalism* (Durham NC,: Duke University Press, 1964), at 38.

[68] For a taste of this dispute Cary J. Nederman, *Lineages of European Political Thought: Explorations along the Medieval/Modern divide from John of Salisbury to Hegel* (Washington D.C.: Catholic University of America Press, 2009), at 9-12, and chapter 3 'Pathologies of Continuity: the Neo-Figgisites', 30ff.

Ages secular and religious were intertwined, and ecclesiology and secular constitutional thinking, whether more absolutist or constitutionalist, constantly influenced one another".[69] This trend can been seen today in the theological work of thinkers such as Oliver O'Donovan, who despite distancing himself from liberalism and figures such as Maritain, still propound a form of 'political limitism'[70] that has clear parallels with certain key constitutionalist (and liberal) notions.[71]

5). Conclusion

In this chapter I have dealt with three compatible philosophical and theological ideas as they relate to political theory. First, the republican conception of freedom as non-domination; second, a normative conception of political constitutionalism; and third, the theological idea of 'political limitism' inferred by Augustine's Two Cities duality. I have argued that each of these ideas can be held to be a helpful complement to the species of political liberalism outlined in chapter 4. With Henry Richardson I believe that neorepublicanism can benefit from the incorporation of key principles incorporated in political liberalism. Inversely, I have argued that political liberalism can be strengthened by the inclusion of a neorepublican notion of freedom and the 'internal morality of law' provided by natural law principles.

The neorepublican conception of political freedom has significant advantages over the classical liberal notion of negative freedom as it helps frame how civic virtue or liberal education may be conceived in a way not always coherently addressed by classical or political liberals. In my brief overview of constitutionalism I have stressed how democratic or political constitutionalism has key advantages over strong forms of legal constitutionalism. In this view political liberalism and constitutionalism are compatible (and overlapping) normative approaches with different focal points, the former in political principles and the latter in legal principles. Rawls himself saw the clear connection between constitutionalism and political liberalism writing that the latter "understands itself as a defence of the possibility of a just constitutional regime".[72] This overlap is especially apparent with *political* liberalism in that this approach is not directly derived from a theory of final human ends but can be

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[69] Francis Oakley, *The Conciliarist Tradition: constitutionalism in the Catholic Church, 1300-1870* (Oxford: Oxford University Press, 2003), see chapter 6:' Democritus's Dream: Conciliarism and Political Thought', 217ff.

[70] See David Halliday McIlroy's treatment of O'Donovan and other theorists in: David Halliday McIlroy 'Idols and Grace: Re-envisioning Political Liberalism as Political Limitism', *Political Theology*, 11 (2010), 205-225.

[71] See Jonathan Chaplin, 'Political Eschatology and Responsible Government: Oliver O'Donovan's Christian Liberalism', Craig Bartholomew *et al* (Eds.), *A Royal Priesthood* (Carlisle: Paternoster Press, 2002), 265–308. See Oliver O'Donovan, *The Desire of Nations: rediscovering the roots of political theology* (Cambridge, Cambridge University Press, 1996).

[72] Rawls, *Political Liberalism*, 101.

affirmed as a political-legal doctrine. These overlaps and complementarities are helpful in addressing key questions in political theory – particularly those questions we have set out to answer in this work.

CHAPTER 6

CONCLUSION

This work has moved from an understanding of ethics, to a conception of justice and natural right, through to a species of permissive political liberalism in the form of a particular kind of republican constitutionalism.

The classical ethical approach broadly outlined in chapter 2 has been described as the "recognitional model" of practical reason, in contrast to constructivist and intuitionist models of practical reasoning. In this model the agent's practical reason has "the *capacity* to recognize and be motivated by what has objective value".[1] Though in the conception of ethics advanced here the acting person acts spontaneously towards their proximate goods and towards final ends, those ends - when considered from a metaphysical viewpoint - reflect the kind of rational animals humans are. In a particular way therefore, I do not deny what some might view as a certain ethical naturalism. The label "naturalist objectivism" therefore does not seem to be a misnomer here.[2]

This recognition of moral value is transferred into the political domain through the concept of natural right, as I explored in chapter 3. There I defined natural right as that part of the natural law that is related to the virtue of justice or that part of natural law pertaining to the social order. I have argued that human rights can be seen a philosophically consonant extension of the natural right tradition, the hermeneutical difficulties of claiming that Aristotle or Aquinas actually propounded a theory of human rights are worth conceding.

An outworking of the naturalist objectivism that I have advanced in the civil realm is the notion of the political common good. If there are goods or needs that *individual* humans have on the basis of their common humanity then, at least at some 'thin' level, there must be some *shared* goods or needs, even if there may be great variation in how those goods or needs are conceived in different cultures or linguistic traditions. I can therefore state that a proper end of political association is the optimisation of *political* common goods, that is, of the common goods of persons in their role as *citizens*.

How does a political community come to a decision as to what constitutes the political common good in contingent circumstances? In chapter 4 I argued that a form of public

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[1] Berys Gaut, 'The Structure of Practical Reason', in Garrett Cullity and Berys Gaut (Eds.), *Ethics and Practical Reason* (Oxford: Clarendon Press, 1997), 161-188, at 183, italics added.
[2] An apt label given by the Thomist John Haldane as noted in chapter 2, see: John Haldane: 'Natural Law and Ethical Pluralism', in Richard Madsen and Tracey B. Strong (Eds.), *The Many and the One: Religious and Secular Perspectives on Ethical Pluralism in the Modern World* (Oxford: Princetown University Press, 2003), 89-114, at 97.

reasoning is helpful here. As I maintained in the same chapter this is consistent with what Aquinas held about public disputations on matters that are not theologically revealed. The nature of pubic reasoning in the model outlined in chapter 4 is different to John Rawls's own formulation in *Political Liberalism* and his late writings. Like Rawls, the focus is on what practical reason can justify in building an overlapping consensus on a political conception of justice, based on some understanding of (primary) human goods.[3] I outlined in earlier chapters how practical reason can deliver - though not without difficulty - some understanding of human goods or needs that can be applied selectively to the legal-political domain as *political* goods (by using the principle of subsidiarity and other relevant principles). Despite my emphasis on the role of practical reasoning in public reason I would not restrict the latter *exclusively* to the deliverances of practical reason. The conclusions of speculative reasoning can also be admitted to public reasoning, though I are not optimistic that any significant degree of agreement on final ends is attainable in the diverse societies that characterise modern nation states. Overlapping agreement/consensus based on practical reasoning *can suffice* as the basis of political association.

Some traditionalist Thomist or Radical Orthodox thinkers may well claim that allowing any normative role for democratic deliberation or public reason into political matters is to risk reducing political agreement to a lowest common denominator, jettisoning all metaphysical or theological considerations in the process. This criticism is wrongheaded if directed against the species of political liberalism advanced in this thesis for two reasons. First, I allow for the admissibility of discussion of final human ends in public reason. Citizens, however, have safeguards against the imposition of authoritarian final ends in political life, as my approach insists that the full range of human rights (including freedom of thought and religion) have to be in place and implemented in any valid scheme of political liberalism. In eudaimonistic language, in matters related to civil association, priority is granted to the agreement of certain intermediate/infravalent ends *before* overlapping consensus on final ends can even be sought. This is not to say that intermediate/infravalent ends are more important than final ends in human life considered integrally, only that politics is not the site where final ends are truly attained.[4]

Secondly, I would note that some of the methodological devices used by contemporary liberal theorists have clear consonances with pre-modern philosophical ideas rather than Enlightenment ideas. This is clear in relation to constitutionalism (a strong theme in Aristotle), and I note (with Nussbaum) that the notion of reflective equilibrium is a

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[3] Though I differ with Rawls about the nature of primary (human) goods, as noted in chapter 4.
[4] Referring here to the Augustinian Two Cities duality and the de-divinisation of political life that may be said to flow from it.

development of the Socratic dialectical method and is therefore consistent with the underpinning dialectical method set out in chapter 1.[5] I hold that the method of reflective equilibrium, especially in relation to political justification, is a helpful tool in coming to a determination of the content of the political common good.

I hope to have provided, along the path of this work, both an internal and external critique of the species of political liberalism espoused by Rawls and of Nussbaum. For instance, the notion of structurally inclusive human ends (dealt with in chapter 2) addresses some of the problems created by the idea that a political conception of justice must be freestanding. In this understanding of classical eudaimonism,[6] infravalent social and political goods/ends are distinct from, but structurally incorporated into, the agent's overarching conception of 'a life well lived' (eudaimonia). This is a more philosophically satisfying way of thinking about political goods than the Rawlsian notion of a module, while the understanding of structurally inclusive ends importantly retains the ability of attaining an overlapping consensus on a political conception of justice without the necessity of agreement on final ends.

This work has sought in part to reclaim political liberalism for the Thomist tradition, the tradition from whence it arguably emerged in the wake of the Second World War.[7] In this I have clearly been inspired by Nussbaum's similar retrieval of an Aristotelian species of political liberalism and neorepublican efforts to resolve some of the *aporiae* of modern liberalism. My view differs from Nussbaum's political liberalism in that it permits a role for an integrative metaphysical perspective in philosophical anthropology, without undermining the primary role of practical reason in political association which is, after all, a branch of practical philosophy. Such an explicit link between Thomism and political liberalism might have been expected to have been made by New Natural Law theorists with their innovative and helpful understanding of natural law as a theory of practical reason. However, despite the potential for a productive exchange, John Finnis and his collaborators have seemingly been wary of saying anything genuinely appreciative about political liberalism for fear of endorsing what they view as Rawls's unjust positions on abortion and euthanasia. In their writings on

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[5] See Martha C. Nussbaum, *Creating Capabilities: the Human Development Approach* (Cambridge, MA.: Harvard University Press, 2011), 77-78. By way of a definition, the method of reflective equilibrium "consists in working back and forth among our considered judgments (some say our "intuitions") about particular instances or cases, the principles or rules that r believe govern them, and the theoretical considerations that we believe bear on accepting these considered judgments, principles, or rules, revising any of these elements wherever necessary in order to achieve an acceptable coherence among them." Norman Daniels, "Reflective Equilibrium", *The Stanford Encyclopedia of Philosophy (Spring 2011 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2011/entries/reflective-equilibrium/> . Accessed 1 September 2011.
[6] A form of eudaimonism viewed 'through the lens' of the work on this topic by Henry Richardson, Julia Annas and Martin Rhonheimer, as cited in chapter 2.
[7] As I have noted, Nussbaum identified that "the first example of political liberalism in the Western tradition is probably the neo-Aristotelian Thomism of Jacques Maritain." Martha C. Nussbaum, 'Political objectivity', *New Literary History*, 32 (2001), 883–906, at 892.

political liberalism New Natural lawyers appear to treat Rawls's stance on these matters as exposing a structural problem with the very concept of political liberalism (a position I have questioned in chapter 4).

More traditional Thomists or radical theologians such as John Milbank often attack political liberalism on the basis one has to subscribe to a deontological or constructivist view of ethics to make it work effectively. I have sought to demonstrate that this is not the case and that even a eudaimonist moral theory prioritising the good over the right can be fully consistent with a certain species of political liberalism. Constructivism may be found useful in the political sphere in helping to specifying the political common good and in justifying social duties and rights (which are themselves aspects of the political common good). Conceiving rights as an aspect of the political common good rather than a side-constraint on it addresses a central concern about reconciling the private autonomy of persons and the public autonomy of citizens. As Habermas frames the issue from a different philosophical perspective, democracy and rights must flow from the same fundamental source as "private and public autonomy mutually presuppose each other in such a way that neither human rights nor popular sovereignty can claim primacy over its counterpart."[8]

In this sense I have made some useful progress in answering the question posed in chapter 1: Is (a form of) political liberalism and human rights consistent with the philosophical-theological framework expounded by Thomas Aquinas? My affirmative answer has outlined how persons recognise or apprehend human goods without the necessity of procedures of moral constructivism and how those human goods may be considered relevant and specific as *political* goods through the application of political principles – some of which may also operate as legal principles – as outlined in Lon Fuller's notion of the 'internal morality of law'.[9]

In this vein it is helpful to address one remaining issue raised in chapter 1; what Gerald Gaus calls the 'problem of public reason': "how can we identify social demands that all have sufficient reason to acknowledge as moral demands?")[10] This might seem to be a problem in a work that has deliberately taken an 'ethics first' methodological approach. My response would be that this 'ethics first' method in political theory does not preclude an inverse influence, as the perception of *political or legal* duties can affect's one's own understanding of *ethical* imperatives. This should rightly be understood as an important aspect of reflective

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[8] Jurgen Habermas, 'Between Facts and Norms: an author's reflections', *Denver University Law Review*, 76 (1999), 937-942, at 940.

[9] Lon L. Fuller, *The Morality of Law*, revised edition, (New Haven CT: Yale University Press, 1969), chapter 2.

[10] Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge: Cambridge University Press, 2011), 262.

equilibrium (or the more traditional dialectical method). Legal claims may in some instances illuminate matters of moral import[11] and I see the development of subjective human rights as a case in point of the inverse influence from the legal to the ethical.[12]

That political principles significantly overlap with legal principles makes the consonances with constitutionalism clear. Constitutionalism delineates the appropriate role of the state, rendering political power subordinate to lawful authority. Citizens are protected from wilful governmental action as state power is forced to track the interests of its citizens who are considered to be both free and equal. Associated with the revival of contemporary constitutional thought is the emergence of neorepublicanism, which again has unmistakable premodern roots in Ancient Greek and Roman thought. There are undoubted affinities between the genus of political liberalism and republicanism or civic humanism - even if I hesitate in going as far as some in claiming the late Rawls for the republican tradition.[13] I may concur, however, that Rawls was perhaps overhasty in judging that civic humanism was necessarily a comprehensive doctrine and could not be seen as a political conception.[14]

That Aquinas was profoundly influenced by Ancient Greek and Roman thought makes the possible alignment of normative Thomist moral and political theory with aspects of neorepublican and constitutionalist thought fitting and less open to accusations of an undue eclecticism. The lack of work in normative political theory on how a contemporary natural law theory may contribute to, or benefit from, an interlocution with neorepublicanism and (neo)constitutionalism is surprising, but it has at least provided us with the basis for a wide ranging and original contribution to a series of important questions.

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[11] This was arguably seen in some prominent legal cases (such as the Somersett case) in eighteenth century England where the courts challenged the legality of holding of slaves on British soil (e.g. *R v Knowles, ex parte Somersett* (1772) 20 State Tr 1). It is generally considered that the Somersett case significantly advanced the cause of abolitionism in public opinion both in the UK and the America, though it was several decades before the passage of the Slave Trade Act of 1807 in the UK.

[12] As the philosopher V. Bradley Lewis writes, citing Finnis's and Brian Tierney's jurisprudential research: "The legal concept of [natural/human rights] comes first and reflects legal practice [i.e. canon law]; the moral notion of rights comes later and absorbs it. One reason for the increased importance of rights language is that, as political discourse separated itself from theological discourse, the language of the law became expressly less theological." V. Bradley Lewis, 'Theory and Practice of Human Rights: Ancient and Modern', *Journal of Law, Philosophy and Culture*, 3 (2009), 277-296, at 293.

[13] See Andrés de Francisco's wide ranging article: 'A Republican Interpretation of the Late Rawls', *The Journal of Political Philosophy,* 14 (2006), 270–288.

[14] "Historically, however, the doctrine called (by Hans Baron) "civic humanism" was, rather, a *political conception* in the Rawlsian sense: it sought to define the type of citizens needed by a republic which, in the face of a tangible and imminent threat of external tyranny, wanted to preserve its political freedom." De Francisco, 'A Republican Interpretation of the Late Rawls', at 280, 287-288.

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