

RETRIEVING A CATHOLIC TRADITION OF
SUBJECTIVE NATURAL RIGHTS FROM THE LATE
SCHOLASTIC FRANCISCO SUÁREZ, S.J.

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INTRODUCTION

There is good reason to inquire into the Catholic contributions to the foundation of human rights.¹ There is a global proliferation of natural rights in nation-states, international treaties, charters and conventions, as well as in political rhetoric, court decisions, law, and even in personal conversation. Furthermore, the Catholic Church herself has emerged as one of the leading advocates of natural rights in its moral and social teachings as well as in its charitable practices. As a result of these omnipresent rights claims, debates have arisen with respect to the origin and nature of, and justification for, natural rights. These debates are not only between Catholics and those outside the Church (e.g., with contemporary secular liberals), but also between Catholics themselves.

At the heart of these debates are a number of questions: Do natural rights even exist? If so, what is a right? Are natural rights compatible with or contradictory to natural law understood as an objective order of justice? Are natural rights derived from natural law or is natural law derived from natural rights? Which is given a priority? Do natural rights entail a rejection or diminution of virtue and the common good?

For some Catholics, a very important aspect of this overall debate is the supposed break between pre-modern views on natural right/law and modern views on natural rights. They offer a narrative which includes the claim that rights are more of an invention of the modern political philosophers such as Hobbes and Locke, and/or have their

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1. Throughout this Article, I use the term “natural” for “human” rights. Human rights are those rights which are inherent to human nature, that is, natural to human nature.

origin in the purported nominalist and individualist thought of William of Ockham.² They tend to be conflicted when attempting to explain why and how the Church can now be such an advocate of rights.³ Instead of this narrative, I would like to offer another instructive one, which I believe to be a more historically accurate and a more correct understanding of natural rights within the Catholic tradition itself. My Article focuses on one person in this narrative, the prominent, pre-modern, late scholastic, Jesuit theologian/philosopher, Francisco Suárez, S.J. (1548–1617),⁴ who inherited the entire tradition

2. See J. BRIAN BENESTAD, CHURCH, STATE, AND SOCIETY: AN INTRODUCTION TO CATHOLIC SOCIAL DOCTRINE 25, 53–54 (2011); ROBERT P. KRAYNAK, CHRISTIAN FAITH AND MODERN DEMOCRACY: GOD AND POLITICS IN THE FALLEN WORLD 171–72 (2001) [hereinafter KRAYNAK, CHRISTIAN FAITH] (arguing against the compatibility of modern natural rights with a traditional pre-modern natural law order); Robert P. Kraynak, *Citizenship in Two Worlds: On the Tensions Between Christian Faith and American Democracy*, 16 JOSEPHINUM J. THEOLOGY 288, 290–94 (2009) [hereinafter Kraynak, *Citizenship in Two Worlds*]; see also ANNABEL S. BRETT, LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT 4–6 (1997) (discussing subjective rights and the Spanish neo-Thomists); ERNEST L. FORTIN, *On the Presumed Medieval Origin of Individual Rights*, in CLASSICAL CHRISTIANITY AND THE POLITICAL ORDER: REFLECTIONS ON THE THEOLOGICO-POLITICAL PROBLEM 243, 243–64 (J. Brian Benestad ed., 1996) (arguing for the differences between natural law and natural rights theories); ERNEST L. FORTIN, *Sacred and Inviolable: Rerum Novarum and Natural Rights*, in HUMAN RIGHTS, VIRTUE, AND THE COMMON GOOD: UNTIMELY MEDITATIONS ON RELIGION AND POLITICS 191, 192 (J. Brian Benestad ed., 1996) [hereinafter HUMAN RIGHTS, VIRTUE, AND THE COMMON GOOD] (suggesting that *Rerum Novarum* attempted to fuse modern and pre-modern thought, with mixed results); ERNEST L. FORTIN, *The Trouble with Catholic Social Thought*, in HUMAN RIGHTS, VIRTUE, AND THE COMMON GOOD, *supra*, at 303, 305 [hereinafter FORTIN, *The Trouble with Catholic Social Thought*] (positing that the true originator of rights doctrine was Hobbes); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 69 (2d ed. 1984) (making his famous claim that rights do not exist); TRACEY ROWLAND, CULTURE AND THE THOMIST TRADITION: AFTER VATICAN II 152–54 (2003) (echoing MacIntyre); BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW 1150–1625, at 29–30 (1997) (briefly summarizing Michel Villey’s view that subjective rights originated with Ockham’s nominalism); Douglas Kries, *In Defense of Fortin*, 64 REV. POL. 411, 412–13 (2002); John R. T. Lamont, *Conscience, Freedom, Rights: Idols of the Enlightenment Religion*, 73 THE THOMIST 169, 179–80 (2009) (arguing that Suárez followed Ockham by proposing natural law to be founded upon a morality of obligation, rather than a Thomistic morality of virtue). To understand the influence exerted upon most present day Catholics who follow this view of modern natural rights, see generally LEO STRAUSS, NATURAL RIGHT AND HISTORY (1950), and, in a nutshell, James V. Schall, S.J., *The Modern Regime of Rights*, THE CATHOLIC THING (May 3, 2011), <http://www.thecatholicthing.org/columns/2011/the-modern-regime-of-rights.html>. There are other Catholic authors who address rights, but I have limited my references to those who address more of the specifics of the aspects of the debate, which I cover in this Article. I also do not include the good number of non-Catholic authors who have much to say about rights.

3. See, e.g., Kraynak, *Citizenship in Two Worlds*, *supra* note 2 (stating that rights as claims against external authority, or entitlements to social welfare, are not easily squared with Church doctrine); Lamont, *supra* note 2, at 233–35 (discussing his own and Villey’s concerns with the Church’s teachings on rights).

4. See Antonio Pérez Goyena, *Francisco Suárez*, NEW ADVENT, <http://www.newadvent.org/>

before him. His thought can be summoned to resolve some of the above disputed questions concerning the origin and nature of natural rights, and their relation to natural law, civil law, virtue, and the common good.⁵ Suárez's understanding of rights, I hope to show, is evidence of a Catholic tradition of human rights, which Catholics should not fear, and which is (generally) consistent with how the Church understands rights today. In addition, this tradition can help provide the proper grounding for any rights claims as Catholics engage the contemporary debate about rights in all venues.

The narrative I present here builds on the one advanced by Brian Tierney, who claims that natural rights discourse has its origin in early medieval canonists, jurists, theologians, and philosophers, and that the successors of the medieval developed natural rights discourse up to the modern political thinkers and into contemporary times.⁶

cathen/14319a.htm (last visited Apr. 4, 2012). The works of Francisco Suárez are comprised of twenty-eight volumes of *Opera Omnia*, a number of which will be cited throughout this paper.

5. See, e.g., TIERNEY, *supra* note 2, at 301–15; see also Annabel Brett, *Individual and Community in the 'Second Scholastic': Subjective Rights in Domingo de Soto and Francisco Suárez*, in *PHILOSOPHY IN THE SIXTEENTH AND SEVENTEENTH CENTURIES: CONVERSATIONS WITH ARISTOTLE* 146, 146–68 (Constance Blackwell & Sachiko Kusukawa eds., 1999); John P. Doyle, *Suárez on Human Rights*, in *COLLECTED STUDIES ON FRANCISCO SUÁREZ, S.J. (1548–1617)*, at 333, 333–56 (2010) (giving a very good broad overview of Suárez's views on rights); Brian Tierney, *Dominion of Self and Natural Rights Before Locke and After*, in *TRANSFORMATIONS IN MEDIEVAL AND EARLY-MODERN RIGHTS DISCOURSE* 173, 189–93 (Virpi Mäkinen & Petter Korkman eds., 2006) [hereinafter Tierney, *Dominion of Self and Natural Rights*] (unearthing Suárez's emphasis on the *subjective* aspects of rights—*subjective* meaning a right inhering in the individual subject—and arguing that this leaves ample room for a fuller exploration of the ultimate ground of these subjective natural rights, as well as their relation to the natural law, virtue, and political community); cf. MODESTO LEWIS PÉREZ, *THE COMMON GOOD AS A FUNDAMENTAL PRINCIPLE OF THE LAW ACCORDING TO SUÁREZ* (1994); REIJO WILENIUS, *THE SOCIAL AND POLITICAL THEORY OF FRANCISCO SUÁREZ* 61–62 (1963) (mentioning the distinction between natural law and natural rights); Antonio García y García, *The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights*, 10 *RATIO JURIS* 25, 25–35 (1997) (focusing on the *ius gentium* and not directly discussing the subjective natural rights of Suárez).

6. See Brian Tierney, *Natural Law and Natural Rights Old Problems and Recent Approaches*, 64 *REV. POL.* 389, 406 (2002) [hereinafter Tierney, *Natural Law and Natural Rights*] (considering permissive natural law as the key link between natural law and natural rights); Brian Tierney, *Permissive Natural Law and Property: Gratian to Kant*, 62 *J. HIST. IDEAS* 381, 381–99 (2001) [hereinafter Tierney, *Permissive Natural Law*]; accord R.H. Helms, *Natural Human Rights: The Perspective of the Ius Commune*, 52 *CATH. U. L. REV.* 301, 302 (2003) (following Tierney's idea that the origins of natural rights "are found within the medieval traditions of the *ius commune*"); Kenneth Pennington, *The History of Rights in Western Thought*, 47 *EMORY L.J.* 237, 238 (1998) (reviewing TIERNEY, *supra* note 2, and approving of his thesis); cf. THOMAS D. WILLIAMS, *WHO IS MY NEIGHBOR?: PERSONALISM AND THE FOUNDATIONS OF HUMAN RIGHTS* 165–81 (2005) (endeavoring to show, from a Catholic perspective, how rights are related to the tradition of natural law, natural justice, and the Gospel of love); Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 *B.C. L. REV.* 37, 41 (1991) (arguing that, contrary to the views of many rights historians, "canon law possessed

Important to this is the claim that rights include a “sphere of free choice” which stems from a right of self-ownership. One of the key objections which some Catholics have with this narrative is that the modern and contemporary idea of rights predominately is understood as rooted in individual autonomous choice.⁷ They argue that these putative free choice rights are the problem, in that they are rights not merely to choose among various goods, but to make choices in violation of the natural law and therefore undermine virtue and the common good. I will show that Suárez provides an understanding of and justification for a natural right as a moral power or faculty pertaining to the individual subject rooted in self-governance. Yet this understanding itself is rooted in his overall view of human nature; hence, rights do not have to be separated from or opposed to natural law/right, God’s objective order, political power, virtue, and the common good.⁸ Although Suárez fits most closely within Tierney’s narrative, I must note that Tierney perhaps emphasizes too much the continuity of the pre-modern rights with the modern natural rights thinkers and contemporary rights.⁹ I argue that there is a specifically Catholic understanding of natural rights which cannot be classified strictly as “modern” or “contemporary.” This will become more evident when I briefly explore how Suárez’s

a sophisticated system of rights” at least as early as the thirteenth century); *but see* John M. Finnis, *Aquinas on ius and Hart on Rights: A Response to Tierney*, 64 REV. POL. 407, 407–10 (2002) (accusing Tierney of omitting the crucial concept of “the other” in his assessment of Aquinas’s *ius*, and thus failing to identify *ius* as a subjective right).

7. *See, e.g.*, Kraynak, *Citizenship in Two Worlds*, *supra* note 2, at 294; Kries, *supra* note 2, at 412.

8. *Contra* Lamont, *supra* note 3, at 179–81. Contrary to Lamont’s rejection of (purportedly) Suárez’s understanding of a right as a subjective moral power, I show that it is understood in relation to the natural moral law, an objective order of justice, which is precisely what Lamont advocates for when he tries to make sense of the way one can accept the Church’s understanding of rights. There is perhaps confusion over the notion of “subjective,” which Lamont seems to think is a monadic property of an individual, and as a result rights are expressed “in human law just as they are, without needing significant interpretation.” *Id.* at 213. He goes on to equate this understanding of a subjective natural right with Hobbes and Locke. This notion of a subjective natural right is not Suárez’s, and it is this connection from Suárez to these modern thinkers—and now, our contemporary state of affairs—that I am contesting. However, it needs to be noted that I am not addressing Lamont’s arguments about the specific understanding of natural law and conscience which Suárez had; rather, I am taking a more general approach to show the compatibility of natural rights and natural law, regardless of how Suárez may have understood natural law in relation to practical reason and the Divine will and conscience. Suárez still considered the natural law to obtain with respect to right moral action. In short, subjective natural rights do *not* have to be grounded in a Hobbesian or Lockean anthropology. *Contra, e.g.*, Kries, *supra* note 2, at 412.

9. *See* TIERNEY, *supra* note 2, at 343–44. At the very least, Tierney does not clearly and elaborately explain some important differences between pre-modern and contemporary rights.

understanding of rights compares with current Catholic teachings on rights. As a result, I believe, Suárez's thought can help contribute to the Church's correction of the contemporary understanding of rights.

I. *IUS* AS A SUBJECTIVE MORAL POWER

In his impressive ten book work on law, *De Legibus et Deo Legislatore*, Suárez specifically describes the meaning of right (*ius*) as

properly being called a certain moral faculty which anyone has either over a thing or to a thing due him. For in this way, an owner of a thing is said to have right in a thing (*ius in re*), and the worker is said to have a right to a wage (*ius ad stipendium*), by reason of which he is called worthy of hire.¹⁰

Here, "*ius*" is used in what can be considered a "subjective" sense: it inheres in the human subject and, as a moral faculty, is distinguished from a mere physical power to control something. Rather, it signifies a rightful moral claim in or to something. However, it is important to explore how Suárez ultimately grounds a subjective right. To do so, I turn to Suárez's argument for the origin of political power. He begins by putting forth the objection that subjection to a prince is against human liberty,¹¹ and this objection has its foundation "in the natural dignity of man. For man was made in the image of God, and *sui iuris*, subject to God alone."¹² Therefore, the objection goes, it does not seem to be just that a man could be brought into subjection or enslaved to any man, and so the political *principate* usurps man's mastership.¹³ In this objection, Suárez accepts the premise, but not the

10. FRANCISCO SUÁREZ, *TRACTATUS DE LEGIBUS ET LEGISLATORE DEO*, Bk. I, Ch. 2, ¶ 5, in *5 OPERA OMNIA* 5 (Carolo Berton ed., Paris, Ludovicum Vivès 1856) [hereinafter *DE LEGIBUS*] ("[S]olet proprie jus vocari facultas quaedam moralis, quam unusquisque habet, vel circa rem suam, vel ad rem sibi debitam; sic enim dominus rei dicitur habere jus in re, et operarius dicitur habere jus ad stipendium, ratione cuius dicitur dignus mercede sua.") (author's translation); see also TIERNEY, *supra* note 2, 302–04 (comparing Suárez's definition of *ius* with Aquinas's definition).

11. FRANCISCO SUÁREZ, *DEFENSIO FIDEI CATHOLICAE ET APOSTOLICAE*, Bk. III, Ch. 1, ¶ 1 (Naples, 1872) [hereinafter *DEFENSIO*].

12. *Id.* ("Quod si Iudas ille absolute de omnibus hominibus et principibus humanis locutus est, fundari forte potuit in naturali hominis dignitate. Nam homo factus ad imaginem Dei, sui iuris, solique Deo subditus creatus est . . .") (author's translation).

13. *Id.* ("[E]t ideo non videtur posse iuste in alicuius hominis servitutem vel subiectionem redigi; ergo non potest unus homo iuste compelli, ut alium tanquam principem et dominum temporalem recognoscat; ac subinde principatus politicus, qui hunc dominatum usurpat, nec legitimus nec a Deo est."). I use the term "mastership," but I could use the term "lordship," and, as we shall see, "self-governance."

consequence—that man is subject to God alone, and therefore political power is unjust *per se* and political subjection would be a usurpation of man’s mastership. In accepting the premise, Suárez implies that being made in the image of God and being created *sui iuris* includes a proper mastership over oneself.¹⁴ The question arises: what is it about the person which allows him to be designated as *sui iuris*?

Elsewhere, Suárez defines *ius* as a man’s “power in himself and in the use of his faculties and members of his body.”¹⁵ This explanation of *ius* as a moral power over oneself is in accord with, and appears to be, the essence of the grounding for man’s dignity and being in the image of God, and hence the grounding for one being *sui iuris*. Thus, one can conclude that man is *sui iuris*—of his own *right*—because he possesses a subjective moral power or faculty to be master of himself or, to express it another way, that he is a person with the capacity for self-governance.

This is confirmed in *De Opere Sex Dierum*, where Suárez does an exegesis of the Old Testament book of *Genesis* in order to surmise man’s nature in the state of innocence:

[T]he capacity of dominion is fitting to man naturally because he was made in the image of God. This is manifest in itself, for man, on account of reason and freedom is in the image of God and on account of the same properties is capable of dominion and therefore the rest of the animals are not capable of dominion because they do not have the use of reason or freedom.¹⁶

14. See HARRO HOPFL, *JESUIT POLITICAL THOUGHT: THE SOCIETY OF JESUS AND THE STATE*, c. 1540–1640, at 202 (2004) (analyzing the term *sui iuris*, which is from Roman law and refers either to an emancipated individual who is independent of any familial power or other power whereby he is a slave, or to a self-governing commune); accord 43 ADOLF BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 723 (3d ed. 2003) (“*Sui iuris* (esse). To be legally independent, not under the paternal power (*patria potestas*) of another. Syn. *suae potestatis esse*.”).

15. DE LEGIBUS, *supra* note 10, Bk. III, Ch. 3, ¶ 6, at 183 (“Quocirca sicut homo, eo ipso quod creatur et habet usum rationis, habet potestatem in seipsum et in suas facultates et membra ad eorum usum . . .”).

16. FRANCISCO SUÁREZ, *TRACTATUS PRIMUS: DE OPERE SEX DIERUM*, Bk. III, Ch. 16, ¶ 6, in 3 OPERA OMNIA 279 (D. M. André ed., Paris, Ludovicum Vivès 1856) (author’s translation).

Primo igitur dicimus, capacitatem dominii convenire homini naturaliter ex eo quod ad imaginem Dei factus est. Hoc per se manifestum est, nam homo propter rationem, et libertatem est ad imaginem Dei, et propter easdem proprietates est capax dominii, et ideo reliqua animantia capacia dominii non sunt, quia rationis usum non habent, neque libertatem.

Here dominion, grounded in man's faculties of reason and freedom, is understood in the sense of mastership or self-governance. Furthermore, he claims that it is a *natural* right because it is part of man's nature flowing "from the force of his creation" and is a consequence of his nature.¹⁷ It should come as no surprise to discover that Karol Wojtyła (the future Pope John Paul II), in one of his philosophical articles, "The Personal Structure of Self-Determination," references St. Thomas's use of the term—*persona est sui iuriset alteri incommunicabilis*—and proceeds to philosophically expound on the meaning of that term in light of what he calls self-determination and self-governance.¹⁸ This understanding of the person is an essential aspect of Cardinal Wojtyła's personalist philosophy, and it informed his papal encyclicals and other writings, including those concerned with rights. In effect, Cardinal Wojtyła developed what had already existed within the Catholic tradition (here, in specific reference to Aquinas and Suárez).¹⁹

Although this self-governance can fall under both "*dominium*" and "*ius*," it can also pertain to "liberty." For Suárez, man has an "intrinsic right of liberty,"²⁰ which means that man is not owned or enslaved by another and under another's control, but rather that he has control over his own faculties, actions, and bodily members.²¹ It is

Id.

17. *Id.* Bk. III, Ch. 16, ¶ 9, at 280 ("Hoc ergo jus habuit etiam homo ex vi suae creationis . . . Respondemus, verum quidem esse hoc dominium ex dono Dei homini competere: nihilominus tamen naturale dici, quia naturam ipsam consequitur . . .").

18. KAROL WOJTYŁA, *The Personal Structure of Self-Determination, in PERSON AND COMMUNITY: SELECTED ESSAYS 187, 192–93* (Theresa Sandok, O.S.M. trans., 1993).

19. See WILLIAMS, *supra* note 6, at 182–203 (exploring Wojtyła's personalism in relation to rights).

20. DE LEGIBUS, *supra* note 10, Bk. II, Ch. 14, ¶ 16, at 141 ("Nam hac ratione libertas est de jure naturae, potius quam servitus, quia natura fecit homines positive (ut sic dicam) liberos cum intrinseco jure libertatis, non tamen ita fecit positive servos, proprie loquendo."); see also TIERNEY, *supra* note 2, at 306–07 (pointing out that permissive natural law, which was within the longstanding tradition of canonists and jurists, allowed Suárez to underpin his notion of a natural right to liberty); Tierney, *Permissive Natural Law*, *supra* note 6, at 392 (providing a long history regarding the notion of permissive natural law and property). I generally follow along Tierney's lines.

21. See DE LEGIBUS, *supra* note 10, Bk. III, Ch. 3, ¶ 6, at 183. Suárez claims elsewhere that one has true dominion of his liberty. *Id.* Bk. II, Ch. 14, ¶ 16, at 141 ("[Q]uia ipsa natura verum dominium contulit homini suae libertatis."); *id.* Bk. II, Ch. 14, ¶ 18, at 141 ("Nam imprimis eo ipso quod homo est dominus suae libertatis, potest eam vendere seu alienare."). See also FRANCISCO SUÁREZ, DE STATU PERFECTIONIS, VARISQUE ILLIUS MODIS, SEU SPECIEBUS, in 15 OPERA OMNIA, Bk. I, Ch. 1, ¶ 12, at 5–6 (Carolo Berton ed., Paris, Ludovicum Vivès 1859) [hereinafter DE STATU], where he also speaks of freedom in terms of being opposed to slavery and a self-governance, but also in terms of a true more perfect freedom when one is free from sin by the grace of God and, "ironically," becoming the slave of God. However, it must be noted

not a liberty of self-governance grounded solely in an autonomous individual will separated from human nature and the objective moral and social order as created by God. Rather, it is intrinsically related to the latter.

II. RIGHTS IN CONTEXT

However, if one were to emphasize the subjective aspect of the person—the natural right of liberty to act, of self-governance, the right in something and to something, the right to use things, even the right of self-defense, which Suárez calls the greatest right²²—one might promote both an undue emphasis on the individual, and the idea that these are rights to do what one pleases. As mentioned above, this concern is expressed by those Catholics who argue against the compatibility of natural rights with objective natural right/law, virtue, and the common good.²³ For Suárez, however, subjective rights exist only within a framework of communities, laws, and the respective powers which make those civil, canonical, natural, and divine laws, and this framework helps define the very concrete nature of the rights.²⁴ Suárez intimates this when he states that natural liberty is the faculty to do whatever one pleases that is *not prohibited by law*.²⁵ As we shall see, this does not only mean civil law.

that Suárez allows for the fact that one can sell or alienate one's ownership of his liberty, putting oneself under the control of another. Obviously, this is not what the Church teaches today, as it opposes slavery.

22. DEFENSIO, *supra* note 11, Bk. VI, Ch. 4, ¶ 5 (“[Q]uia ius tuendae vitae est maximum . . .”). And it is to be noted that there are other rights which could be listed, and other aspects of Suárez's thought in relation to rights, which we cannot cover in this Article.

23. See FORTIN, *The Trouble with Catholic Social Thought*, *supra* note 2, at 311 (arguing for the incompatibility of rights on the one hand and the common good on the other); KRAYNAK, CHRISTIAN FAITH, *supra* note 2, at 172–73 (emphasizing that the subversive power of rights is premised upon “impatience with God's providence”); Kraynak, *Citizenship in Two Worlds*, *supra* note 2, at 292 (“[Catholicism] elevates the common good above the rights of individuals and even above the rights of groups.”).

24. Perhaps one can say that these subjective rights are understood in the relationships of persons with each other and the communities. See Lamont, *supra* note 2, at 199–200, 212 (contrasting his understanding of the bad idea of subjective *rights* rooted in a monadic individual with an order of objective *right* that is rooted in relations).

25. FRANCISCO SUÁREZ, TRACTATUS SECUNDUS: DE VOLUNTARIO ET INVOLUNTARIO IN GENERE, DEQUE ACTIBUS VOLUNTARIIS IN SPECIALI, Bk. I, Ch. 3, ¶ 13, in 4 OPERA OMNIA 171 (D. M. André ed., Paris, Ludovicum Vivès 1856) (“[N]otandum est *liberum* ex primaeva impositione significare id quod est sui juris, et alteri non est subjectum: unde videtur directe excludere relationem servitutis: unde in l. Libertas, ff. de Statu hominum, dicitur, *libertas est facultas ejus quod cuique facere libet, nisi quod ei, et lege prohibetur est.*”); cf. Tierney, *Dominion of Self and Natural Rights*, *supra* note 5, at 189–90 (showing that this is in line with the tradition expressed through canonists, jurists, and Roman Law).

Furthermore, all rights must be understood within the whole order as created by God which includes the possibility that rights can be changed or taken away. When he discusses the difference between (and complementarity of) natural law and natural rights, he states that the preceptive natural law gives direction to man's actions with regard to what is right and wrong, and natural rights are the subject matter about which the preceptive law is concerned. He affirms that the precepts of natural law are unchangeable,²⁶ while natural rights can be "changed" or removed.²⁷

The importance Suárez places on human agency to "modify" rights is seen in a passage where he explains the reason why different types of religious and clerics had, in fact, different degrees of the divine right of privilege of immunity from political power:

Although it [the right of clerical immunity] be divine, that is, given by God, it can be changeable or losable for just causes. Just as life itself and parts of the body and the right of natural liberty were given by God and are said to be from the right of nature, nevertheless they can be diminished or removed for a just cause

26. It is beyond our scope to present Suárez's complete understanding of natural law; however, Suárez does argue for the immutability of natural law principles. See *DE LEGIBUS*, *supra* note 10, Bk. II, Ch. 13–14, at 132–44.

27. *DE LEGIBUS*, *supra* note 10, Bk. II, Ch. 14, ¶ 19, at 141 (referencing only the first of the two sections numbered nineteen). Suárez states:

The general reason of difference between preceptive law and natural right, is, that the first contains rules and principles for acting well, which rules contain necessary truth, and therefore are immutable; for they are founded in the intrinsic rectitude or wrongness of the objects. *But natural right* [ius dominativum] *is only the material of another preceptive law and consists, so to speak, in a certain fact or in such a condition or habitude of things*, and it is evident that all created things, especially corruptible things, have many conditions by nature which are changeable and can be removed through other causes. So it is in this way that we speak concerning liberty and whatever other civil right, even if given positively by nature, that it can be changed by men, because in individual persons it is dependent either upon the person's will or upon the commonwealth to the extent it has legitimate power in all private persons and their goods, insofar as is necessary for due governance.

Id. (emphasis added) (author's translation). I agree with Tierney's judgment that Suárez means "natural right" when he uses "*ius dominativum*" because it accords best with his use of liberty as an example of *ius dominativum*. It is translated as "law" in the Carnegie translation. See FRANCISCO SUÁREZ, *A TREATISE ON LAWS AND GOD THE LAWGIVER*, Bk. II, Ch. 14, ¶ 19, *in SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ*, S.J. 280–81 (Gladys L. Williams et al. trans., 1944) ("[W]hereas the law concerning dominion is merely the subject-matter of the other preceptive law, and consists (so to speak) of a certain fact, that is, a certain condition or habitual relation of things.").

through human power which we understand to be conceded by God because it is so required for the common good of the commonwealth.²⁸

In this very intriguing and telling passage, one should note first that rights are ultimately grounded in God, whether they be given by Him directly, as a divine right, or given by Him through nature. Indeed, for Suárez, “God is the supreme and universal lord of all and there is no dominion, good, or right that is found in any creature that is not necessarily under the dominion of God in a higher and more perfect way.”²⁹ Second, God is also the author of the political (and spiritual) power and therefore man’s concrete political and ecclesial condition helps define and contextualize the natural and divine rights. For Suárez, these rights are always understood in relation to the divine and natural law and justice. These laws command that the rights not be changed or removed without legitimate power and without a just cause in relation to the common good. In fact, he specifically claims that the rights of life and liberty are granted by the author of nature (God) under these very conditions.³⁰

28. DEFENSIO, *supra* note 11, Bk. IV, Ch. 9, ¶ 11 (author’s translation).

[H]oc, inquam, licet divinum sit, id est a Deo datum, amissibile seu mutabile esse potest ex iustis causis; sicut vita ipsa et corporis membra et ius libertatis naturalis a Deo donata sunt, et de iure naturae esse dicuntur; et nihilominus ex iusta causa auferri, vel minui possunt per potestatem humanam, quam intelligimus a Deo esse concessam, quia communi bono reipublicae humanae ita expediebat.

Id. See also *id.* Bk. III, Ch. 30, ¶ 8 (“[S]ome goods given by nature immediately, such as life and liberty, sometimes can be removed justly by superior human powers. God gave these gifts, and also gave to men the public power for removing these goods for a just cause.”) (author’s translation); 21 FRANCISCO SUÁREZ, DE BAPTISMO, *in* OPERA OMNIA, Bk. XXV, Ch. 4, ¶ 9; DE STATU, *supra* note 21, Bk. I, Ch. 1, ¶ 10, at 5.

29. FRANCISCO SUÁREZ, DE JUSTITIA QUA DEUS REDDIT PRAEMIA MERITIS, ET PEUNAS PRO PECCATIS, *in* 11 OPERA OMNIA, Work VI, § 2, ¶ 29, at 539 (Carolo Berton ed., Ludovisum Vivès 1858) (“At vero Deus ita est supremus et universalis dominus omnium, ut nullum bonum, dominium, aut jus possit in creatura inveniri, quod non necessario sit sub dominio Dei, altiori et perfectiori modo . . .”) (author’s translation).

30. DEFENSIO, *supra* note 11, Bk. IV, Ch. 9, ¶ 11; see also *id.* Bk. IV, Ch. 27, ¶ 15.

Et ob eandem causam, ut in superioribus attigi, etiam si hoc privilegium datum esset clericis immediate ab ipso Christo, possent in poenam illo privari, sicut privantur homines libertate, aut vita in poenam, etiamsi dono auctoris naturae illam habuerint, quia intelligitur data quasi sub hac conditione, seu subordinatione ad commune bonum reipublicae et potestatis, quae illius curam gerit . . .

Id. See also DE LEGIBUS, *supra* note 10, Bk. II, Ch. 14, ¶ 19, at 141.

At times, then, the right of political power can be a higher right than the individual's rights.³¹ The foundation for this comes from the relation of the common good to the private good. Suárez does claim that the private good of individuals could be and is included in the common good.³² But, "the common good is to be preferred to the private good when they cannot exist at the same time."³³ Elsewhere, however, he claims that the law is to guard temporal rights, and that the law can pertain to a right and establish a right.³⁴ He also mentions that the common rights and things which are common to all citizens either by *civil* or natural right are owed to clerics as well because they are also citizens who should enjoy the same rights.³⁵ Thus, rights are to be secured, but they also can be removed or changed. The reason for this seeming discrepancy is that the right claim needs more clarification in order to determine whether it is a true or false right claim. This is most applicable with reference to absolute rights claims. When Suárez writes of removing or changing rights, it might seem as if divine and natural rights are not absolute and can be violated for the sake of a greater good understood in some utilitarian

31. See DE LEGIBUS, *supra* note 10, Bk. III, Ch. 30, ¶ 5, at 294 ("[E]t, licet homo jus etiam habeat in vitam suam, tamen in eadem majus jus habet respublica, quia (ut in 5 Politic. dixit philosophus) civis magis est reipublicae quam sui ipsius."). This does not contradict the fact that the commonwealth does not have *dominium* or is the *dominus* of the individual's life, but it only has a right to its fitting use in accordance with the requirements of the common good. This also concurs with the fact that man is not proper lord of his life; only God is proper lord of it, though man still has a right in it. See also *id.* Bk. I, Ch. 17, ¶ 11, at 68; *id.* Bk. V, Ch. 18, ¶ 18, at 501; *id.* Bk. V, Ch. 18, ¶ 20, at 501.

32. *Id.* Bk. I, Ch. 7, ¶ 3, at 30 ("[U]t ita ex bonis singulorum consurgat commune bonum . . .").

33. *Id.* Bk. I, Ch. 7, ¶ 14, at 33 ("Quia vero commune bonum praefertur privato quando simul esse non possunt . . .") (author's translation).

34. *Id.* Bk. I, Ch. 3, ¶ 21, at 13 ("Est enim illa quae ad civitatis politicam gubernationem, et ad temporalia jura tuenda, et in pace, ac justitia rempublicam conservandam ordinatur . . ."); see also DEFENSIO, *supra* note 11, Bk. IV, Ch. 30, ¶ 16 ("*Secundo dicitur, quando lex semel posita contulit ius, et mutationem in ipsis rebus fecit, non posse sine causa boni communis ita abrogari, ut subditi priventur rebus vel iuribus iam acquisitis . . .*") (emphasis added). This is translated: "When the law, once posited, confers a right and makes a change in the things themselves, it cannot be abrogated without cause of the common good, in order that the subjects be deprived of their things and rights already acquired." *Id.* (author's translation). Here is an example of the law establishing a right, then the law protecting the right from being taken away without cause—a right being protected.

35. DEFENSIO, *supra* note 11, Bk. IV, Ch. 22, ¶ 12 ("Vel etiam dici possunt timidiore fieri, quia non sinuntur libere uti, et frui iuribus, seu rebus communibus ceteris civibus, etiam si statui clericali non repugnent."); *id.* Bk. IV, Ch. 22, ¶ 14 ("[Q]uia licet talia iura communia civibus non debeantur clericis, quia clerici sunt, debentur tamen ipsis ut civibus, etiam si statum diversum a laicis habeant . . . quia propter statum clericalem non amittunt iura communia civium . . ."); see also *id.* Bk. IV, Ch. 22, ¶ 11.

or consequentialist manner. But this would be mistaken because there are some rights that can never be violated by another.

However, which rights are inviolable are determined in relation to the whole of man's nature and God's created order, especially as it is expressed through the divine and natural law. Thus, in the case of the right to life—understood as one person making a claim on another not to take away his life—it would admit of “exceptions” with respect to self-defense, killing in just war, and the state's imposition of the death penalty.³⁶ This is not to say, however, that certain rights can be violated, or that certain natural law principles do not always apply. Rather, the absoluteness of the natural right is related to the absoluteness of the natural law. In other words, absolute prohibitions against the violation of rights are fully intelligible in reference to the immutable precepts of the natural law.³⁷ In this example, the absolute natural law precept would be formulated precisely as: “One ought not deliberately kill innocent human life.” Or in terms of rights: “The innocent person has an absolute right to life.”

III. RIGHTS, LAW, VIRTUE, AND THE COMMON GOOD

What also helps to contextualize and clarify the understanding of subjective natural rights is the substance of the common good of the political community, which consists in peace, justice, and good morals. Thus, the charge that the common good and living a life of virtue in the political community is diminished or even incompatible with natural rights cannot be leveled against Suárez.³⁸ In *De Legibus*,

36. See *id.* Bk. IV, Ch. 27, ¶ 15 (arguing that a right may be removed by the political power as a penalty for a crime); see also FRANCISCO SUÁREZ, TRACTATUS TERTIUS: DE CHARITATE, Dispute VIII, § 7, ¶ 15, in 12 OPERA OMNIA, Bk. XIII, at 755–56 (Carolo Berton ed., Paris, Ludovicum Vivès 1858) (“[Q]uia occidere innocentem est intrinsece malum. . . . At vita non cadit sub humanum dominium, unde nullus potest illa privari, nisi propter culpam propriam. . . .”) (stating that killing the innocent is intrinsically evil because no one has ownership or mastership over life, but that someone can be deprived of life when the person is properly blameworthy).

37. DE LEGIBUS, *supra* note 10, Bk. II, Ch. 13, ¶¶ 4, 7–8, at 133, 134–35. This is a point where Lamont would agree: the natural rights claims are understood in relation to natural law principles. The good of life and its protection is expressed in different ways, depending on the perspective, but both are complementary—as Lamont rightly points out by citing Blessed Pope John Paul II's encyclical *Evangelium Vitae*. See Lamont, *supra* note 2, at 233–34. But this does not mean that John Paul II repudiated the right to life as a subjective right, rooted in the human person and inhering in the human subject due to his human nature. See generally WILLIAMS, *supra* note 6 (describing how the personalism of John Paul II serves as a ground for rights).

38. See *contra* FORTIN, *The Trouble with Catholic Social Thought*, *supra* note 2, at 304–05 (positing that natural rights and natural law approaches are not easily reconciled); KRAYNAK, CHRISTIAN FAITH, *supra* note 2, at 169 (arguing that human rights undermine the notion of an

Suárez takes up the traditional question of whether the civil law commands acts of all virtues or prohibits the contrary vices.³⁹ He answers by claiming that civil laws can command some acts of virtue and prohibit some acts of vice because the civil laws must make good men, otherwise they will not be good citizens.⁴⁰ Therefore, in addition to the peace, justice, and sufficient goods necessary for the natural happiness of the political community, he claims that moral virtues with respect to oneself, to other men, and to God can be the subject matter of civil laws.⁴¹ However (following Aquinas), civil law should be moderate and prohibit and prescribe what is possible for the whole community, or at least the greater part.⁴² It is left to the prudence of the legislator to apply the rule in particular times, places, and circumstances of the people for the common good.⁴³

objective, common “Good”); Kraynak, *Citizenship in Two Worlds*, *supra* note 2, at 293 (“The Catholic conception of the common good is best captured by the concept of corporate hierarchy rather than by conditions for the exercise of individual rights.”); Kries, *supra* note 2, at 413 (asserting the necessity of “sharpen[ing] the theoretical distinction between natural law and natural rights”).

39. DE LEGIBUS, *supra* note 10, Bk. III, Ch. 12, at 215–22; *cf.* ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-II, Q. 96, Art. 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (“[H]uman laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained . . .”).

40. DE LEGIBUS, *supra* note 10, Bk. III, Ch. 12, ¶ 8, at 218 (“[U]bi ostendimus leges civiles intendere cives facere bonos viros, quia non possunt aliter facere bonos cives.”); *see also id.* Bk. I, Ch. 15, ¶ 14, at 63 (“[E]ffectus legis est facere homines bonos . . .”).

41. *Id.* Bk. III, Ch. 12, ¶ 9, at 218 (“Alio item modo potest haec inductio fieri, quia omnes virtutes morales aut sunt ad alterum hominem, aut sunt ad se, aut ad Deum; leges autem civiles secundum omnes hos respectus praecipere possunt.”).

42. *Id.* Bk. III, Ch. 12, ¶ 11, at 219 (“[R]atio autem est, tum quia lex humana debet esse moderata, et de re moraliter possibili universae communitati pro majori parte . . .”). Here the “greater part” (*majori parte*) seems to mean a numerical majority.

43. *Id.* Bk. III, Ch. 12, ¶ 16, at 220.

Dicendum igitur censeo nullam aliam regulam in hoc assignari posse, praeter eam quae ex conditionibus legis supra in commune positae colligi valeat: nimirum, illum actum virtutis posse esse materiam legis humanae, qui ad bonum finem talis legis moraliter necessarius, et ad commune bonum valde utilis, et communitati hominum, eorumque ordinariae facultati accommodatus sit Idemque cum proportione dicendum est de prohibitione vitiorum: illa enim vetanda sunt per civilem legem quae communitati humanae noxia sunt, et cum morali utilitate reipublicae prohiberi possint et puniri. Quando autem vitia non sunt noxia communitati, vel ex rigorosa punitione illorum majora mala timentur, permittenda potius sunt quam cohibenda per leges civiles. Quapropter in particulari ad applicandam hanc regulam necessaria est prudentia legislatoris

IV. PERMISSIVE LAW AND RIGHTS

In this relationship between law and virtue, the civil law would permit many morally bad actions to go unpunished. As Tierney demonstrates, permissive law is a part of the tradition of canonists, jurists, and theologians,⁴⁴ and I think it is important in relation to rights. Suárez takes up this tradition, especially in respect to Aquinas's distinction between good, evil, and indifferent acts.⁴⁵ In reference to some acts that are otherwise good, permitting those does not only mean not prohibiting them, but also to give "a positive faculty or license or some right to that good act."⁴⁶ In reference to acts that are evil, the law permits them in a manner comparable to the way in which God permits (allows) *de facto* the commission of evil, but does not permit any evil in *de iure* (in law). The permission in fact does not negate the prohibition in God's divine and natural law.⁴⁷ Analogously, civil law can *permit* (allow) that an evil act be done without civil penalty, "[b]ut when the law permits an evil in which it cannot or does not dispense, although the law does not give a right (so to speak), it gives at least impunity [freedom from penalty] before men, which contains a moral right of no small importance."⁴⁸ What can be made of this passage where Suárez both denies a right and

Id. See also *id.* Bk. I, Ch. 7, ¶ 9, at 32 ("[A]d valorem et substantiam legis solum esse necessarium ut res illa, de qua fertur lex, hoc tempore, hoc loco, in hac gente et communitate sit utilis, et conveniens ad bonum commune illius . . ."); PÉREZ, *supra* note 5, at 172–73.

44. Tierney, *Natural Law and Natural Rights*, *supra* note 6, at 399–406.

45. DE LEGIBUS, *supra* note 10, Bk. I, Ch. 15, ¶ 5, at 60 ("Additque materiam permissionis esse actus, vel indifferentes, vel parum bonos et parum malos."); *id.* Bk. I, Ch. 15, ¶ 6, at 60 ("Si vero sit sermo de lege positiva, etiam graviter mali interdum permittuntur, ut sunt fornicatio, homicidium, adultera aliqua pacta injusta et similia."); *id.* Bk. I, Ch. 15, ¶ 10, at 62 ("Saepius vero dicuntur leges permittere aliqua mala, sicut leges civiles permittunt meretrices, et maritum occidere uxorem inventam in actuali adulterio, et contrahentes se decipere infra dimidiam, etc.").

46. *Id.* Bk. I, Ch. 15, ¶ 11, at 62 ("Nam quando permissio dicitur de actu alias bono, non solum non prohibet illum: sed etiam cum sit bonus, dat positivam facultatem, seu licentiam, vel jus aliquod ad illum.") (author's translation).

47. *Id.* Bk. I, Ch. 15, ¶ 7, at 60–61.

Utrumque in Deo explicatur optime: nam si factum attendamus, Deus multa peccata permittit, quia cum posset impedire ne fiant, de facto non impedit nec vult impedire, sed potius directe vult illa permittere, id est, sinere ut fiant. Attendendo autem ad jus, Deus nullum peccatum permittit, quia nullum non prohibet, neque ullum impunitum relinquit, quomodo dixit Augustinus, supra, legem aeternam nullum peccatum permittere. *Igitur permissio facti non includit negationem prohibitionis . . .*

Id. (emphasis added).

48. *Id.* Bk. I, Ch. 15, ¶ 11, at 62 ("Quando vero lex permittit malum, in quo vel dispensare non potest, vel non dispensat, licet non tribuat jus (ut sic dicam), tribuit saltem impunitatem apud homines, quae continet morale jus non parvi momenti.") (author's translation).

substantiates a right? He seems to be claiming that the civil law does not grant a right to do evil (a positive faculty or license as in the case of the good act) because no one has a right, that is, a moral power or faculty, to commit evil, and that the civil law can never give someone the right to commit evil in this positive sense.⁴⁹ In other words, there is no natural right to do something morally wrong.⁵⁰ However, the person can have a right of not being punished by men (by means of the civil law), when he *de facto* commits certain evil acts. In this, there could be an obligation for the political power not to punish him.⁵¹ One might describe this as a legal right of permission.⁵²

V. NATURAL RIGHTS AND THE HIERARCHY OF LAW

This is an important distinction which bears on natural rights and the political community. Suárez is realistic about man's fallen nature, realizing that there are those who will exercise their rights improperly, and therefore the civil law should take this into account. As a result, man is given wide "civil latitude" to exercise his natural rights. It is here where there exists a "zone of free choice" whereby one can *de facto*, and legally, choose evil. With regard to this (legal) right to immunity from civil punishment (and non-interference), it is essential to understand that an individual's actions are never separable from a law superior to civil law.⁵³ This means that, first,

49. Of course, the civil law cannot command someone to commit an evil act—an act against the natural law. *Id.* Bk. III, Ch. 12, ¶ 4, at 216 ("[L]ex autem civilis non potest legem naturalem auferre . . .").

50. Thus, one should not be confused by Suárez's use of "*morale ius*" in this reference to this right of immunity from punishment—it does not mean a moral claim to commit evil. Rather, a natural (moral) right is a positive faculty to choose the good.

51. DE LEGIBUS, *supra* note 10, Bk. I, Ch. 15, ¶ 12, at 62 ("Quando vero permissio est alicujus mali, obligat judicem ne propter illud puniat, quia hoc prohibet talis lex, et sic de aliis."); *see also* Tierney, *Permissive Natural Law*, *supra* note 6, at 391 ("Where the law permitted evil acts it obliged the judge not to punish them.").

52. *See* WILLIAMS, *supra* note 6, at 294 (distinguishing legal and moral rights).

53. DE LEGIBUS, *supra* note 10, Bk. III, Ch. 12, ¶ 19, at 221 ("[Q]uod actus si per se et intrinsece malus sit nunquam potest per legem humanam praecipi, licet possit permitti, quia nunquam est ab illo separabilis malitia vel prohibitio superioris legis . . ."); *see also id.* Bk. I, Ch. 16, ¶ 7, at 65.

Sic ergo aliqua lex, scilicet humana et civilis, permittit illa parva mala, licet non omnis lex, quia lex naturalis illa non permittit. Et in hoc sensu parva mala dici poterunt, non tantum venialia peccata, sed etiam quaedam mortalia, quae in ordine ad finem legis civilis parva reputantur, licet in ordine ad Deum sint magna.

Id. Accord Heinrich Rommen, *Francis Suarez*, 10 REV. POL. 437, 445 (1948) (speaking on the way Suárez links natural rights to natural law).

one cannot have a legal or natural right or faculty to do injury to another,⁵⁴ and second, the divine and natural law are still binding on everyone—they do not permit evil actions and no evil actions are left unpunished.⁵⁵ Understood from this perspective, a legal right not to be interfered with in many of one's actions does not necessarily promote a loss in virtue or selfishness, or lack of commitment to the temporal (and eternal) happiness of the person and the common good.⁵⁶

Suárez still expects a life of virtue to be pursued even though one is not *fully* directed to this good life by means of *civil* law, and therefore there is no natural right to choose against the natural law. However, the problem today is that where the civil law does not prescribe every virtue nor prohibit every vice, thus allowing one to *de facto* perform evil acts without a civil punishment, there has arisen a natural law “licentiousness”: a general disposition that the only commands and prohibitions (especially as codified into civil law) one has to follow are those concerning physical harm to others and their property, but other natural moral laws become a matter of option. This seems to be the heart of the problem—that legal rights of permission and non-interference which allow a “zone of free choice” are now understood as natural rights to commit evil, under the rubric

54. DE LEGIBUS, *supra* note 10, Bk. VIII, Ch. 28, ¶ 6, in 6 OPERA OMNIA 245 (Carolo Berton ed., Paris, Ludovicum Vivès 1856) (“[N]emo enim potest dare uni jus seu facultatem ad injuriam alteri faciendam . . .”).

55. DE LEGIBUS, *supra* note 10, Bk. I, Ch. 16, ¶ 7, at 65 (“[N]am lex naturalis prohibet omne malum, et quantum est ex se nullum relinquit impunitum: nam omnis transgressor legis ex vi naturalis juris dignus est poena.”); *see also id.* Bk. II, Ch. 14, ¶ 7, at 138.

But there are other natural laws which oblige immediately in their matters independently from every prior consent of human will, as are the affirmative laws of religion towards God, of piety towards parents, of mercy, or of tithes for a neighbor: and negative laws of not killing, of not defaming and similar ones.

Id. (author's translation). *Cf.* Tierney, *Natural Law and Natural Rights*, *supra* note 6, at 403 (explaining Suárez's contention that permissive natural law cannot allow evil conduct).

56. DE LEGIBUS, *supra* note 10, Bk. II, Ch. 7, ¶ 7, at 114 (“Denique haec omnia praecepta necessitate quadam prodeunt a natura, et a Deo quatenus auctor est naturae, et tendunt ad eundem finem, nimirum ad debitam conservationem et naturalem perfectionem, seu felicitatem humanae naturae; ergo omnia pertinent ad naturale jus.”). This is the same complementarity, mentioned by Tierney, of natural law and natural rights, both of which are necessary for man to reach his end. *See* TIERNEY, *supra* note 2, at 305; *but see* Kries, *supra* note 2, at 413 (arguing that, because natural law circumscribes permissive natural law, there is “little ‘space’ within which the commanding function of natural law would be silent so that permissive law could grant rights”). Contrary to Kries, the natural law obligations still leave a variety of choices with respect to the goods in which one participates for the perfection of one's nature as a human person.

of the self-interested autonomous individual. Thus, the critics of rights are correct to be concerned about contemporary understandings and applications of rights. However, it should be evident that Suárez's vision demonstrates compatibility between subjective natural rights and the objective moral law, virtue, and the common good which does not necessarily have to lead to a comprehensive licentiousness. Suárez assumes the presence of the other types of law which direct an individual as a member of a family and other communities. This presence manifests itself not only in the political/juridical sense, but also in the whole culture—the “non-political/non-juridical” lives of individuals and their social institutions which amount to the mores, customs, and ways of life of persons.⁵⁷ It would seem that there must be a “political-juridical” zone of free choice to some degree, otherwise *all* vices would be criminalized, and I do not think this is a position the critics of rights are willing to advocate.

Thus, for Suárez, legal rights of permission presuppose an understanding of the moral good shared by all based on man's common spiritual and moral nature. Therefore, the less consensus on human nature and the good life, then the less consensus on the nature of a right and the greater the moral and political problem. It is obvious that this consensus has been eroded and needs to be restored to counteract the climate of a “right to licentiousness.” But the solution is not to stop making rights claims, but rather to provide the true understanding of those rights—with all of their “trappings.” As I have tried to demonstrate with Suárez, Catholics do not have to go outside of their own tradition—both in the distant past and the present, to retrieve this true understanding. That is why one does not need to lament the Church's teachings on rights.⁵⁸

57. Cf. Kraynak, *Citizenship in Two Worlds*, *supra* note 2, at 300.

[W]e can develop a prudent alliance between Christianity and liberal democracy by viewing democracy and human rights as conditional goods subservient to higher goods and continuously striving to dominate the surrounding culture, so that the pursuit of happiness is properly understood as the pursuit of rational and spiritual perfection rather than any lifestyle that people happen to find pleasing to themselves.

Id.

58. Some of those Catholics who critique the Church's stance on rights, ironically, seem to affirm that it is acceptable to understand natural rights linked to objective natural law/right, virtue, and the common good. See, e.g., *id.* at 294 (stating that “rights are not rights, strictly speaking, but rather conditional goods subservient to higher goods”).

VI. THE CHURCH AND RIGHTS

I suggest that Suárez's way of understanding rights is not unlike the Church's teachings in certain essential respects. For instance, regarding religious freedom, the Church teaches that due to the nature and dignity of the human person, there is a natural right not to be coerced in religious matters which is to be a civil right understood as immunity from coercion. This can be understood as part of the "zone of free choice" within the political community. However, the Church also teaches that the right is intrinsically related to its purpose, which is the duty to seek out the truth and live by it. Hence, the Church states that the right is "not a moral license to adhere to error, nor . . . [a] right to error,"⁵⁹ nor is the right based on religious indifferentism or religious relativism (that it does not matter which religion one believes in or that all religions are of equal value).⁶⁰ In other words, the legal permission (non-coercion) does not negate the moral duty to seek out, accept, and live by the truth. However, one can point to evidence that many people today do think both that the right to religious freedom means the natural right to believe anything one wants, and that all religions are generally equal in value. The answer to this unfortunate state of affairs does not appear to be a

59. COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 421 (2004); see also Second Vatican Council, *Dignitatis Humanae* [Declaration on Religious Freedom] ¶ 2 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 398, 399 (Nat'l Catholic Welfare Conference trans., 1967) [hereinafter *Dignitatis Humanae*] ("[Men] are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth."); but see Lamont, *supra* note 2, at 235 (discussing the debate over *Dignitatis Humanae*, and concluding that it was error to perceive the right to religious liberty as a *subjective*, rather than *objective*, right). Contrary to Lamont, the right to religious freedom is a subjective natural right, if subjective natural right means a right inhering in the human person as a personal subject. Because a personal subject has a specific human nature, he thus has a claim against another or the state not to be coerced in his religious beliefs, with the appropriate qualifiers. This is different from what Lamont means by explaining a subjective right as a "monadic propert[y] of [an] individual[]" to do whatever one wants. *Id.* at 212–13. It should be evident by now that this latter view is not Suárez's notion of a moral faculty or power in the individual, notwithstanding the purported falsity of Suárez's notions of conscience and natural law obligation which are not addressed in this Article. Rather, it is much more similar to the way in which Lamont wants to explain the ontological realities represented by the Church's use of the term "rights." The Church does teach that the just society includes the recognition and protection of natural rights. It must be noted that Suárez, unlike the teaching of the Church today, advocated the use of some coercion pertaining to religious belief for some heretics and apostates, but not all persons.

60. Congregation for the Doctrine of the Faith, *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life* ¶ 8 (2002), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html (reaffirming that the right to religious liberty is based upon the dignity of the human person, and not the notion that all religions are equal).

return to coercion—to take away a supposed non-existent right of religious freedom—but to emphasize and cultivate the end for which the right exists: the Truth. This would not primarily be the task of government, but of the Church, the family, educational institutions, etc.⁶¹

Another way in which the Church is like Suárez in its understanding of rights pertains to the conditions or qualifications related to rights claims. Looking again at religious freedom, the Church conditions this right by referencing the just limits to its exercise. She calls on the role of prudence to determine the just limits based on each social circumstance and the requirements of the common good. Specifically, the right to religious freedom is not to disrupt the public order which consists in the protection of the rights of others, public peace, and public morality.⁶² In the Church's teaching on religious freedom, then, we see all of the aspects present in Suárez's understanding of a natural right: the right is intrinsic to man's nature and dignity, is directed to the end for which the right exists, it is a civil (legal) right of not being punished, but it is also limited in accordance with the requirements of the common good.

We can see elsewhere that the Church does present rights in relation to duties and ends. For instance, John XXIII in his encyclical, *Pacem in Terris*, begins by listing numerous rights, but then goes on to write of duties of the person to himself and to others.⁶³ In the more recent encyclical of John Paul II, *Centesimus Annus*, we find a presentation of rights which moves beyond mere claims of rights, and instead, gives a brief "rationale" for them:

Among the most important of these rights, mention must be made of the right to life, an integral part of which is the right of the child to develop in the mother's womb from the moment of conception; the right to live in a united family and in a moral environment conducive to the growth of the child's personality; the right to develop one's intelligence and freedom in seeking and knowing the truth; the right to share in the work which makes wise use of the earth's material resources, and to derive from that work the means to support oneself and one's dependents; and the right freely to

61. The Church does leave open the possibility of the government recognizing the Catholic faith as the one true religion, so long as religious freedom for others is respected. See *Dignitatis Humanae*, *supra* note 59, ¶ 6.

62. *Id.* ¶ 8 (exhorting men to respect lawful authority and to fulfill their duties in community life).

63. Pope John XXIII, *Pacem in Terris* [*Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity, and Liberty*] ¶¶ 11–30 (1963).

establish a family, to have and to rear children through the responsible exercise of one's sexuality.⁶⁴

These examples demonstrate the relationship between rights, duties, and the good ends for which they exist, and the interlocking relationships of the family, political community, political power, and the common good—all of which Suárez explicitly and implicitly pre-supposes.

CONCLUSION

A much broader and precise comparison could, and should, be completed, but I hope that this brief exploration is enough to support my point of the existence of a Catholic tradition of rights which is not a bad or false one, but rather is one which accords with the nature of the human person as a social, moral, and spiritual being.⁶⁵ We can see that Suárez does advance a subjective notion of natural rights in the sense that a right is a moral faculty inhering in the nature of the person. His ultimate ground is the dignity of the person, made in the image of God, with reason and freedom, making him a self-governing person—of his own right (*sui iuris*). Any natural, divine, civil, or canonical rights of the person are also conditioned by civil (and canon) laws prohibiting vices and prescribing virtues, as well as by natural and divine law, for the sake of man's natural (and supernatural) happiness. Although Suárez recognizes rights as something that citizens possess, civil power and law are not only to protect or promote them, but rather are to promote the common good which gives shape to any individual right.

Whether one wants to use the term "rights" or not, the ontological realities which the word signifies do exist. Thus, if one wants to say that one has, as a matter of justice, something that is due a person as he is a person, and therefore a claim against others not to prevent him from acting on or receiving that claim in justice, then so be it. But that is what a subjective right consists in. Analogously, the same could be said of the word "freedom." Catholics should in no way reject the use of the word freedom, as it would entail explaining in some other way what Christ did with respect to setting us free from our sins, providing us with the "same glorious freedom as the

64. Pope John Paul II, *Centesimus Annus* [Encyclical Letter on the Hundredth Anniversary of Rerum Novarum] ¶ 47 (1991).

65. Hence, natural rights do not have to be understood in the ateleological, apolitical, and individualistic way. *Contra* FORTIN, *The Trouble with Catholic Social Thought*, *supra* note 2, at 311.

children of God.”⁶⁶ Just as the modern and contemporary notions of freedom (which are not unrelated to rights) are distorted, and therefore need to be reclaimed, so too, the notion of rights.⁶⁷ And, of course, in reclaiming the idea of rights, other truths signified by the words virtue, self-sacrifice, gift, good, end, community, common good, etc., would be used to affect such a reclamation.⁶⁸ It is this Catholic tradition, of which Suárez is a part, which can help Catholics engage contemporary rights claims to help discern the true from the false ones.

66. *Romans* 8:21 (Revised Standard, Catholic Edition).

67. Kraynak underscores this Christian notion of freedom, yet he still wants to refine and use the term in the modern sense in the case of rights. See Kraynak, *Citizenship in Two Worlds*, *supra* note 2, at 292.

68. There is much to be done in reclaiming these other areas, especially virtue. Benestad’s latest book does an excellent job of relating rights and the social teachings to the virtues: “Rights will be respected when people both realize that it is beneath their dignity to violate them and acquire the virtues that will enable them to live a dignified life.” BENESTAD, *supra* note 2, at 51.