

Law from Below: How the Thought of Francisco Suárez, SJ, Can Renew Contemporary Legal Engagement

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Moral Traditions

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When remembered at all within the English-speaking world, Francisco Suárez is usually relegated to the history of international law. What a shame. This Jesuit scholastic theologian of the late Spanish Renaissance was a major thinker, hailed in his own time as “*Doctor Eximius*”—the preeminent scholar. As author Elisabeth Rain Kincaid shows, the good doctor’s legal philosophy has much to teach about how law, justice, government, and the people should interact with each other.

Kincaid is a trained lawyer and now teaches theological ethics. She notes that much contemporary political theology explores how policy should look and when public authorities should be confronted, or even defied. However, few modern theologians engage with law on its own terms. How should Christians avail themselves of it in order to seek justice? When should imperfectly just law still command their respect? What sort of justice can people reasonably hope for from law? These questions occupied Saint Augustine, Saint Thomas Aquinas, and the Protestant Reformers, but are nowadays often neglected.

Recovering Suárez is a way of turning to such issues anew. Kincaid’s book does this cleanly and concisely. It opens with discussions of Suárez’s historical context and his (limited and sometimes misconstrued) reception by English-language scholars. Kincaid identifies Suárez’s main concern as one familiar to readers of Thomas Hobbes and John Locke: Do the people retain any public authority after consenting to the creation of government? Suárez says yes.

Kincaid then shows how the notion of popular involvement in shaping law influenced Suárez’s approach to three key issues of jurisprudence: lawmaking, legal interpretation, and equity. Lawmaking is people-driven in that popular custom is a source of law parallel to government decision-making. Legal interpretation is people-driven in that the people’s own language, and their understanding of formal enactments, guide what government rules mean. Equity can be people-driven in that they even have the authority to equitably deviate from government laws when they prudently determine that necessity or justice demands doing so.

For all his emphasis on popular co-ownership of the law, Suárez also understood that formalized, government-enacted law can reduce social conflict and establish predictability. The people’s grant of authority to their rulers means governments can legitimately make decisions. Seeking justice and the common good means respecting both the people’s retained authority and the rules set down by public authority. Kincaid finds in Suárez a dialectic where the people and the government

(ideally, anyway) constantly interact with and react to each other in pursuing justice and the common good.

Kincaid finds that the sort of democratic give-and-take described by Suárez happens also in modern democratic society. She illustrates Suárez's theories using recent examples such as international environmental law and activists' challenges to ordinances banning them from feeding homeless people. Economics is a natural illustration, too: in Suárez's day, the *lex mercatoria*—the law of the merchants—decided economic rules more than did monarchs; Kincaid gives the Uniform Commercial Code as a modern example. With an interest in theological ethics, Kincaid draws from Suárez methods Christians can use to participate in shaping law. She presents Suárez as a resource for pastors and congregants as they think through conscientious citizenship.

Kincaid could have also engaged more with legal scholarship. Current conversations around lawmaking, interpretation, and equity raise many of the themes she discusses. "Popular constitutionalism" is a decades-old effort at reviving popular sovereignty as a challenge to judicial monopolies on legal meaning-making. Debates around textualism have long revolved around issues such as public accountability and language's social evolution. The legal role of background principles such as equity is a theme of recent work by William Baude, Jud Campbell, and Stephen Sachs. None of these ideas appear in Kincaid's book. Suárez does have many insights to offer religious social activists, but surely his work can also shed valuable light on important problems in American jurisprudence and other fields as well. Historians, take note. Written code books only tell the story so well: legal history is also made by everyday people wrestling with law as they understand it and want it to be.

Still, Kincaid writes well, and her limited scope keeps the book to a very reasonable length. Besides, Suárez's enduring point was that law belongs to everyone: to the government and the people, to the theologians and the activists, to church folks and the lawyers alike. Each should contribute to shaping law that is principled yet practical, well-suited to realities of what society is and aspirations for what it should be. Lawyers have a place in the project of law, but not hegemony over it.

If Kincaid does not quite give lawyers the prominence she could have—and that they tend to believe themselves entitled to—well, that may be just what Doctor Suárez would have ordered.

—Matthew P. Cavedon
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