Journal of Markets & Morality
Volume 22, Number 2 (Fall 2019): 439–455
Copyright © 2019

St. Thomas Aquinas and the Idea of Limited Government

Martin Rhonheimer
Professor of Ethics and Political Philosophy
Pontifical University of the Holy Cross
Rome
Cofounder and President
Austrian Institute of Economics and Social Philosophy, Vienna

What Is "Limited Government"?

To understand Thomas Aquinas's contribution to the idea of limited government we must first ask what exactly limited government is and which are its historical and philosophical presuppositions.

The idea of limited government is a specifically modern idea. It includes the conviction that, to prevent the abuse of state power and to protect the rights of citizens (especially their fundamental liberty rights), government must be limited and checked by legal restraints enforced by state power which in turn is checked by an independent judiciary, according to the law. The scope of limited government is to substitute, as far as possible, the rule of law for the arbitrary rule of human persons, with the aim of protecting the fundamental human and civil rights of citizens. Rather than conceding sovereign power to determinate persons, limited government understands law as sovereign and liberty rights as legally enforceable claims against governmental or state power.

The practical realization of such a conception presupposes a "multilayered" legal system, normally consisting of two planes. In the wake of the French Revolution, this was classically formulated in 1789 by Abbé Emmanuel Joseph Sieyès in his pamphlet *Qu'est-ce que le tiers état?* as consisting of the duality of (1) "constituent power"—a body, representing the "nation," establishing a fundamental law called the "constitution"—and (2) the "constituted powers" that are the governmental bodies, institutions, and procedural rules based on constitutional law, being both ordered and limited by the legal provisions of the constitution.

Limited government, therefore, is equivalent to constitutionalism in its modern and liberal meaning. As previously stated, these restraints being enforced by an independent judiciary that is respected and whose decisions are enforceable by state power, the idea of limited government includes the separation of powers—executive, legislative and judicial—in the sense of mutual "checks and balances," as William Blackstone expressed it.[1]

Absolutism: The Historical Precondition for the Idea of Limited Government

It seems clear that Thomas Aquinas did not hold such a doctrine. He was not a constitutionalist in the modern sense. To hold the opposite would be anachronistic for a simple reason. Modern, liberal constitutionalism and its idea of limited government was a reaction to something that did not exist in Aquinas's time and of which he lacked experience: the modern sovereign territorial state and absolutism as its first modern kind of appearance. Absolutism invested a monarchic ruler with full powers at all times, situating him, at least in theory, above the law. Despite the existence of traditional rights of estates (mainly the aristocracy) and regional administration bodies, in practice its position allowed him to rule according to his own will. Absolutist state theory in the seventeenth century also held that the monarch's will embodied—by divine mandate—the interest or "higher reason" of the state and the whole community and, as such, could not err.

Under the rule of an absolute monarch, there were no citizens: only "subjects" without rights and legal means to defend themselves against the arbitrariness of state power. The medieval understanding of a monarch, with which Aquinas was very familiar, was something quite different. A king was understood as judge and executor of the law that, contained in tradition and custom, was considered something given, neither made nor alterable by him.[2]

Absolutism, thus, was a form of government unknown in the Middle Ages as the modern sovereign state had not yet developed. The only form of abuse of power was tyranny, typical perhaps for smaller city states. But tyranny was not absolutism, because it lacked a legal justification; that is, it was not a system of government, but simply a form of abuse of personal power.

From a legal point of view, the justificatory basis of absolute power was the Roman *lex regia*, stemming from the imperial period and which held that law was "what pleased the ruler" (*lex est quod principi placuit*). The *lex regia* justified unfettered and uncontrolled exercise of governmental power or the principle that the lawgiver was not himself subject to the law but exempt from it (*princeps*

legibus solutus). We will come back to this. For an absolutist monarch, as long as he was strong, in practice there were no limits, for example, to taxing his subjects or otherwise disposing of them. In France, resistance to absolutist rule and in favor of religious freedom was systematically, and not seldom bloodily, repressed until the wake of the French Revolution when the king had to submit to the demand of summoning the general estates. In England, attempts by James I and Charles I to introduce absolutism led to a parliamentary reaction in the form of the "Petition of Right" of 1628, then to civil war, and eventually to the Glorious Revolution of 1688, which helped to reestablish a parliament-controlled monarchy and a system that gradually produced parliamentary sovereignty, the most famous defender and theoretician of which was John Locke. Along with Montesquieu and William Blackstone, Locke's ideas became one of the most influential sources of the modern idea of limited government in the American colonies.

It is thus crucial to understand that liberal constitutionalism, insofar as it emphasizes individual freedom, basic civil rights, and limited government, was not opposed to the medieval understanding of government. It did, however, contradict modern absolutism. In the Middle Ages, government not bound to any law was known as tyranny and clearly rejected as both immoral and politically pernicious. But it was the abuse of power for the sake of personal interest and, thus, a perverted form of government. Absolutism, by contrast, was understood and defended by its promoters as a principled and superior form of government, based on an idea—or ideology—of public reason embodied by the monarch.

The preceding clarifications help us correctly ask the question about St. Thomas Aquinas's contribution to the idea of limited government. I will therefore proceed in the following way: First, I will elucidate the premodern Aristotelian and medieval sources of modern, antiabsolutist, liberal constitutionalism. Second, I shall briefly expose how these elements are present in modern antiabsolutist political theory, namely in one of its most prominent and influential representatives, John Locke. Third, I shall specify the contribution of Aquinas to these premodern sources of the liberal, antiabsolutist idea of limited government and thus, indirectly, his contribution to the modern idea of limited government.

Premodern Components of the Modern Idea of "Limited Government"

Much historical research during the last decades has shown us that modern constitutionalism and the idea of limited government did not simply come from nowhere or fall from heaven like manna in the desert. Classical liberal constitutionalism, and thus the idea of limited government, has revived an older tradition

stemming from the medieval scholastics, a tradition nourished by Roman law—interpreted by Christians—political Aristotelianism, and the idea, originating in feudalism, that rulers represent the interests of their vassals and that the mutual bond could be dissolved and legitimate resistance mounted against rulers who had ceased to represent their subjects.

By itself, this doctrine could easily lead to anarchy rather than a sustainable political order. It merged, however, with the classical doctrine about tyranny, something that Aristotle had previously reflected upon. A tyrant was understood as a ruler who governed not for the common good, but pursued his own personal good at its expense, making resistance against him and his removal from power morally legitimate exercises.

Yet, from the end of the fourteenth century onward, there was another powerful idea at work. This was called "conciliarism," an idea already presented by Marsilius of Padua and William of Ockham.[3] This theory—in contradiction with Catholic dogma, but promoted at that time to end the great schism—included the idea that the pope was elected by the College of Bishops united in a council, that he was responsible to them and, therefore, a sovereign who, if he did not fulfill his duties or acted against the will of the body that elected him, could be legitimately deposed.

During the sixteenth and seventeenth centuries, mainly through theologians of the University of Paris and its chancellor Jean Gerson, this idea made its way into political theory. It merged with the older idea of popular sovereignty and medieval contractualism—the doctrine that those who govern are united with those they govern by a contractual bond of protection and obedience and therefore are responsible to them. Thus, whenever the ruler broke the bond, mutual allegiance was dissolved, and disobedience became lawful.

This tradition eventually shaped Calvinists' attempts to formulate a doctrine of legitimate resistance, which they first had rejected on Augustinian grounds because, they believed, tyrants had to be endured as divine punishment for the sins of those ruled by them. But now Calvinists started to consider government by an unfaithful—that is, a Catholic—king as illegitimate violence against the people, which in turn made violent resistance against the king lawful. For this, Calvinists, and also Lutherans, evoked the Roman legal principle *vim vi repellere*, which had been popular among jurists since the thirteenth century. Ironically, they effectively adopted Catholic doctrines of legitimate resistance against tyranny, thereby creating a decisive bridge between medieval and modern political thinking.[4] Thomas Aquinas's political philosophy was perhaps the most influential ingredient of this medieval tradition.

There was also another important if not decisive source for modern theories of limited government: the Anglo-Saxon tradition of common law and its gradually evolving idea of "rule of law." It was not created by theologians or philosophers but by jurists and politicians. Moreover, they did so in a way that was eminently practical and political. Consider, for instance, Henry Bracton's *De Legibus et Consuetudinibus Angliae* ("On the Laws and Customs of England") in the thirteenth century,[5] or, in the seventeenth century, British Chief Justice Edward Coke's *Petition of Right* (1628), which limited the king's right to tax and, most importantly, established the fundamental civil right of habeas corpus.[6]

This leads us to the one philosopher who, in certain ways, embodies all these traditions or, at least, whose political philosophy depends and draws upon them: John Locke. He is *the* anti-absolute political thinker, who at the same time is mostly dependent on the medieval heritage. Focusing on Locke we will better understand the presence of the medieval heritage and of Aquinas in the modern idea of limited government.

John Locke: Modern Intermediary of the Earlier Tradition

Locke's *First Treatise of Government* was both a critique and a rejection of Robert Filmer's patriarchal theory of monarchic government, which was nothing other than a defense of absolutism. Only in his *Second Treatise of Government* did Locke expose his own conception. And it is here that we find the above-mentioned elements of tradition fully present—and something more.

That "something more," which has not been mentioned thus far, but which is of crucial importance for Locke's political theory, is natural law. Locke's political theory is essentially a natural law theory of legitimate government: However, it is a post-absolutist and, in this sense, modern version of such a natural law theory. For Locke, it is precisely natural law that defines the purpose of every legitimate government and therefore also circumscribes its limits. It is in his conception of natural law that all the threads of medieval tradition meet, eventually forming a new kind of political thought.

Where did Locke derive his ideas about natural law? As has already been pointed out by A. Passerin d'Entrèves[7] and, more recently, shown by Alexander S. Rosenthal,[8] they were deeply shaped by Richard Hooker, the Anglican theologian of the Elizabethan age, who lived a century before Locke. Hooker's masterpiece was his widely read *Of the Laws of Ecclesiastical Polity*. In his *Second Treatise*, Locke refers several times to the "judicious Hooker," and quotes from Hooker's

Laws of Ecclesiastical Polity. Though Anglican, Hooker was an adherent of the Anglican Thomistic renaissance that emerged during the reign of Elizabeth I.

Hooker thus transmitted important elements of Aquinas's thinking on natural law to Locke. There is consequently much more continuity than opposition between modern constitutionalism and the medieval natural law thinking of which Aquinas was the most important source. According to Rosenthal, this illustrates how wrong Leo Strauss and his school were in opposing Locke's natural law theory, as a theory of "rights," to medieval "natural law."

This influence explains the famous quotation of Hooker in Locke's *Second Treatise of Government*, chapter 11, § 136. Locke appears not to have known that Hooker's formulation was a nearly exact citation of Aquinas. In Locke's *Second Treatise* it reads as follows:

> Human laws are measures in respect of men whose actions they must direct, howbeit such measures they are as have also their higher rules to be measured by, which rules are two, the law of God, and the law of nature; so that laws human must be made according to the general laws of nature, and without contradiction to any positive law of scripture, otherwise they are ill made.[9]

Locke quotes Hooker—and thus Aquinas—in a note to a chapter titled "Of the Extent of the Legislative Power." The reference to Hooker aims at substantiating what he says in the body of the text, which is the following:

> The legislative, or supreme authority, cannot assume to its self a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges: for the law of nature being unwritten, and so no where to be found but in the minds of men, they who through passion or interest shall miscite, or misapply it, cannot so easily be convinced of their mistake where there is no established judge.[10]

That means that the legitimate exercise of human legislative power is both defined and limited by natural law, which, being unwritten, has to be interpreted and applied to be effective. These positive laws that embody principles of natural law are eventually enforced by a judicial power. This also means that what is legislated against the precepts of natural law is not legitimate law because it falls short of the very purpose of positive law. This echoes Aquinas who famously wrote that a law which contradicts natural law is not law but rather violence.[11] Under the influence of Hooker, Locke echoes this doctrine, albeit in a different context, namely his rejection of, and opposition to, absolutism.

In some way, hence, Locke's natural law-based theory of limited government revived the medieval idea of the right of resistance against tyrannical government, which had been acknowledged by Aquinas. In Locke's *Second Treatise* there is an entire chapter (18) entitled "Of Tyranny," in which Locke recalls the medieval understanding of tyranny as an illegitimate form of government. It states that "tyranny is the exercise of power beyond right, which no body can have a right to. And this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private separate advantage."[12] Locke thus develops the idea of individual rights and their protection against the possibility of tyrannical government opposed to the common good, which is in turn formulated primarily in terms of fundamental rights of citizens. This absence of orientation toward the common good on the part of government was precisely the rationale for the medieval justification of the right of resistance.

Therefore, modern constitutionalism can be best understood as the institutionalization of the right of resistance. It is important to keep this nexus between the idea of limited government and the right of resistance in mind because it links the idea of limited government to natural law and the conception contained in it, which is of Aristotelian origin, that the aim of legitimate government and legislation is the common good.

Having elucidated the sources of modern—anti-absolutist and liberal—constitutionalism and its idea of limited government, we now possess all the requisites for specifying the contribution of Thomas Aquinas. We will find the seeds of essential features of Locke's theory of limited government and generally of modern constitutionalism—but *only* the seeds because, as we will see, the mature doctrine of limited government is something more.

Aquinas: Natural Law, Government by Law, and the Mixed Constitution

When talking about Aquinas's theory of government, scholars usually focus on his adaption of Aristotle's distinction between regal and political rule and his theory of polity as a *regimen commixtum*: a form of political organization that mixes monarchic, aristocratic, and democratic elements. From this they conclude that Aquinas fully advocated the idea of limited government.[13] This thesis needs important qualifications in order not to miss the point of modern constitutionalism and to avoid an anachronistic reading of medieval political theories.

Let us first look at Aquinas's well-known résumé of what he calls a mixed government as formulated in his description of the system of government given by God to Ancient Israel:

> the best form of government is in a state or kingdom, where one is given the power to preside over all; while under him are others having governing powers: and yet a government of this kind is shared by all, both because all are eligible to govern, and because the rules are chosen by all. For this is 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.[14]

The idea of mixed government—*regimen commixtum*—is inherited from Aristotle. However, both the role and the content of that doctrine in Aquinas's political theory is considerably different.[15] While Aristotle was preoccupied by the establishment of political stability by balancing the different classes, Aquinas laid emphasis on government being in accordance with, and ordered by, law. Even if Aquinas argued in *De Regno* that monarchy, the rule of one, was theoretically the best form of government, he also held that, when we look at the reality of man, monarchic or regal rule could not guarantee the lawfulness of government. It would, he thought, most probably degenerate into tyranny.

Aquinas considers it to be crucial that government be not "personal" but regulated by law, which in turn is an "ordinance of reason" (*ordinatio rationis*) aiming at the common good.[16] This is precisely why Aquinas rather than Aristotle is the real precursor of the idea of limited government in the sense of rule of law.

Aristotle famously distinguished between regal, political, and despotic rule, from which he deduced the different types of polities, both sound and degenerated ones. As William Blythe has argued, it is important to understand that Aquinas's reading of Aristotle was in fact a misunderstanding due to a somewhat flawed Latin translation of the original text. By "political rule," which was the regime that he favored, Aristotle understood a kind of government in which the rulers and the ruled were interchangeable in the sense of a rotation of offices. In Aquinas, however, "political rule" meant "ruling in part only": in other words, checked and limited by laws. So the entire preoccupation of Aquinas went in the direction of finding that kind of government that best guaranteed a rule, not so much *of* law, but *by* law, thereby guaranteeing the orientation of government toward the common good.

Aquinas's distinction between regal and political power, adapted from Aristotle, therefore acquires a new argumentative role: It distinguishes between government via absolute rule, that is, rule of men not based on law, and government by law. However, this calls to mind the Aristotelian affirmation that the rule of the "best laws" is to be preferred to the rule of the "best man," because the law is

without emotion while every human soul is affected by the passions.[17] On this basis Aristotle rejects monarchy, and in this way Aquinas's "mistaken" reading of Aristotle turns out to have met with his real intentions: the emphasis on the idea that government should obey good laws rather than good men.

In fact, this is a kind of critique of absolutism *avant la lettre*. Aquinas holds that if kingship, understood as legally uncontrolled power, is combined with aristocratic and democratic elements of government—including the election to all offices, especially the monarch, by all citizens—then law would prevail, the danger of tyranny would be averted, and government would be orientated to the common good. The reason for this, according to Aquinas, is that the mix of monarchical, aristocratic, and popular governmental elements guarantees that the interests of all social groups, rather than only one of them—the monarch—are represented. Under such conditions, law prevails over arbitrary power.

As William Blythe puts it, Aquinas's rejection of "absolute," that is, exclusively monarchic rule, "has to do with the inherent nature of man and not just the situation in this or that place." This applies not only to monarchy but also to aristocracy and democracy. In their pure forms, they too are to be rejected "in favor of the political rule of law." Therefore, "all of Thomas' effort was directed to deprive the king of his regal prerogatives and to render him a political ruler bound to the laws."[18]

Now the question arises: Is this a theory of limited government in the modern sense of rule of law? I would hesitate to answer this question simply in the affirmative. The reason for my hesitation is that, according to Aquinas, there is no provision built into a mixed constitution of this kind for checking or limiting any exercise of governmental power. Again, strictly speaking, what Aquinas advocates is not rule *of* law, but rule *by* law. These are different. For Aquinas, the degree to which the law is effectively respected depends not so much on the institutional arrangement or controlling devices, but rather on the virtues of those who participate in government.

Of course, by combining the powers of various groups, some checks and balances *are* inbuilt in such a mixed constitutional order. It certainly confers much power upon the law. The same is true for Aquinas's emphasis on the role of judges being constrained to their adherence to written law.[19] What is most interesting in the present context, however, is Aquinas's concern for government being based on *law* and not on tyranny. The opposition between law and tyranny is his real concern. And this is Aquinas's real legacy—and exactly what we find in Locke's *Second Treatise of Government*.

The Moral Constraints of Natural Law and the Limited Scope of Human Law

What then is this law that Aquinas wants to be the fundamental guide and limit of any government? It is the threefold law to which Locke refers in his "Thomistic" quotation of Hooker. As noted, in his *Second Treatise* Locke affirms that human laws "have also their higher rules to be measured by, which rules are two, the law of God, and the law of nature; so that laws human must be made according to the general laws of nature, and without contradiction to any positive law of scripture, otherwise they are ill made." For Locke, the law of nature was already there, and morally binding, before political society existed.

Yet, Locke emphasizes, natural law had no force in the state of nature and was sometimes unclear and disputed. There was no impartial judge to decide between litigating parties, and even if there were one, he had no power to impose his verdict. Locke's solution to this problem of the primacy of law is an *institutional arrangement* rather than the virtues of those who govern. This institutional arrangement of limited government—including the constitutional and legal order—aims at making the law prevail independently from whether those who govern are virtuous or not. This is the very point of modern political philosophy, its distinctive mark, and a decisive achievement still not understood by many. That includes, for example, communitarians and antiliberal conservatives who criticize modern, specifically liberal political thinking as morally deficient because—among other reasons—it seeks to render the institutions and procedures assuring the political common good as far as possible independent from the moral virtues of those who are in charge of the government.

Nevertheless, one point seems clear, and it is a leading idea of Locke's political philosophy: There is a standard of right and wrong for human legislation that pre-exists it and, in fact, is both the *reason* why the state's power to legislate must be limited as well as the *standard* for limiting it. This standard is the fundamental rights of the individual living in society with his equals and cooperating with them—mainly the rights of life, liberty, and property and, consequently, the rights of families and other social realities based on liberty and property. The task of constitutional design is primarily to guarantee the legal enforcement of these standards of natural law in the form of civil liberty rights.

In a similar way, Aquinas's theory of mixed government, which is a theory of political government characterized by government by law, leads us to the question: What ought to be the basic standard of human law? This standard, Aquinas asserts, is natural law, which as all law, especially as far as it is the law

of a political community, aims at the common good and not the good of only one group, constituency, social class, or what would be the worst, of the ruler himself (or a clique of rulers), which is the distinctive mark of tyrannical government.

However, there are more reasons why government by law is limited. It is limited not only because positive law should not contradict natural law but also because positive law, determined by legislative bodies of the political authority, is strictly limited to the end of politics which is *political*, namely peace and justice. The constituents of the common good, politically considered, are peace and justice—and not moral perfection or human fulfillment in the sense of the perfection of the virtues.

Even if the perfection of men and their ultimate flourishing consists in acting virtuously, Aquinas is clear that the positive law of the polis does not aim at making men moral *simpliciter*; rather, it legally requires them to abide by those minimal moral standards strictly required for citizens to live together in peace and justice. Aquinas does not deny Aristotle's idea that "the purpose of human law is to lead men to virtue,"[20] but he does dramatically restrict this task to the aim of civil government, which is "the common good of justice and peace."[21] Moreover, he asserts that "the end of human law is the temporal tranquility of the state, which end law effects by directing external actions, as regards those evils which might disturb the peaceful condition of the state."[22] This is why Aquinas holds to something like an (astonishingly liberal) do-no-harm-principle when he says that "human 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: thus human law prohibits murder, theft and such like."[23]

Of course, this still demands from citizens some acts that belong to the virtues—in fact, every act that is not vicious belongs to at least one of the virtues—but it does not require virtue as an inner attitude or moral perfection. Nor does it require the acts of all the virtues. Aquinas emphasizes that attaining moral perfection is the aim of divine law; human law instead "falls short of the eternal law" and "does not prohibit everything that is forbidden by the natural law."[24] For human law, it suffices not to contradict divine or natural law or not to demand the performance of acts that contradict them.

This leads us to mention another limitation of human law that is immediately connected to the previous one: Human law is limited to external acts; it does not refer to intentions: "Now man, the framer of human law, is competent to judge only of outward acts … while God alone, the framer of the Divine law,

is competent to judge of the inward movements of wills."[25] The only way that human law takes into consideration a person's interiority is possible ignorance of the law. But this is considered an exempting factor.

Limited Government as the Best Form of Government in the Present Human Condition

Natural law contains the idea of human beings having a moral code and rights independent from a constituted power or government. In some way, this presupposes the conceivability of a state of nature, not as a historical fact but as a normative idea. In opposition to the Augustinian tradition, Aquinas believes that our need for government is in full accordance with the nature of man: It is *not* a consequence of original sin or proper to fallen nature. Even if in the state of fallen nature, government acquires new, more repressive and coercive properties, it is still natural to man as an ordering power to the common good and would have existed in a state of persisting innocence. This idea implies a "state of nature" in the sense of the existence of a norm, valid already before any government is established, and that it is good to establish it politically. This clearly Aristotelian "political naturalism"[26] is again an important seed of the modern idea of limited government insofar as it is based on natural law.

Hence, from Aquinas's theory that monarchy would be the best form of government provided human beings were not as they actually are—that is, corruptible by power and prone to abusing it for their own advantage—we can infer that his idea of government by law is the one that applies to the real world, because it takes into account the present, fallen condition of man. For Aquinas, the condition of human nature after the fall does not imply its corruption but only a state of being "abandoned to itself" (*natura sibi relicta*). This is a condition in which human nature lacks the assistance of supernatural grace and the divine gifts, which both exceed nature and elevate it, thereby leading human nature to fulfill its utmost intrinsic potential. The frailties and disorders of human nature in the real world, which need to be overcome by moral virtue, are thus really *natural* and by no means infra-natural or signs of the corruption of human nature. They simply did not exist—they were healed or "compensated" by grace—in the state of initial supernatural perfection before the fall and in precisely *that* sense they are "wounds" inflicted upon human nature as a consequence of original sin.[27]

Therefore, Aquinas holds that *if* a king was perfectly virtuous, virtue guaranteed, and thus government not to be corrupted, then monarchic rule would be the best of all. "But since the power granted to a king is so great, it easily degenerates into tyranny, unless he to whom this power is given be a very virtuous man: for

it is only the virtuous man that conducts himself well in the midst of prosperity, as the Philosopher observes (Ethic. iv, 3). Now perfect virtue is to be found in few."[28] From this derives the general rule that a mixed constitution, unable to degenerate into tyranny, is the best form of government in this world because it assures government not by arbitrary power but by law.

Locke analyzed the impotency of natural law in a state of nature and its inability to restrain a state of war and concluded that if the natural law was to be effective, the creation of civil society and government was indispensable. It follows that in Locke and the modern constitutionalist project more generally, there is something more than we find in Aquinas. For law to really rule, in the sense of judicial control, a kind of institutionalization of this limitation of human legislation is required.

In Locke this theory is developed in a rather imperfect way: It is the judge, backed by state power, who must guarantee this "rule of law." It is the law that must rule; the merely guiding force of law does not suffice. In politics, it follows that we should not simply rely on the existence of human virtue but rather build institutions in a way that guarantees the rule of law even in a world in which virtue often is lacking and bad behavior is rather common.

Rule *by* Law or Rule *of* Law?

Here we arrive at the real point of difference between Locke and modern constitutionalism, on the one hand, and his medieval predecessors, on the other, especially to the point where we see Aquinas as clearly premodern. As previously noted, despite his Aristotelian background according to which the rule of the "best laws" is preferable to the rule of the "best man," Aquinas does not articulate a theory of "rule *of* law," warranted by the institutional arrangement we call limited government, but rather of "rule *by* law," whose efficacy ultimately depends on the virtues of those who govern. Admittedly, by opting for a mixed form of government Aquinas plainly intended to make government independent from the threat of being perverted by vicious behavior. Mixed government in fact is an institutional arrangement meant to overcome human weakness and make government by law possible.[29] However, Aquinas's view lacks the one—in my view, decisive—element of "rule of law" and, thus, of limited government. This consists in putting law in some way *above* those who are in charge of applying it.

That this is not the case in Aquinas's theory is best illustrated by his interpretation of the Roman public-law principle *princeps legibus solutus* ("the ruler is exempt from the law"), contained in the Codex of the Emperor Justinian and broadly discussed both in late Antiquity and in the Middle Ages.[30] Though he still

upheld it, Aquinas was inclined to a mitigated version of this principle. In this regard, Aquinas's theory falls short of the modern idea of limited government, mainly in its constitutionalist form. Aquinas states,

> The sovereign is said to be "exempt from the law," as to its coercive power; since, properly speaking, no man is coerced by himself, and law has no coercive power save from the authority of the sovereign. Thus, then is the sovereign said to be exempt from the law, because *none is competent to pass sentence on him, if he acts against the law*.[31]

We can see that this runs counter to the most essential intentions of modern constitutionalism. In his mitigated interpretation of the principle, Aquinas reduces it to a moral obligation to follow the *vis directiva* of the law, about which, however, men are not the judges, but God alone. He continues,

> Hence, in the judgment of God, the sovereign is not exempt from the law, as to its directive force; but he should fulfil it to his own free-will and not of constraint. Again, the sovereign is above the law, in so far as, when it is expedient, he can change the law, and dispense in it according to time and place.[32]

From a modern point of view and having historical knowledge of all aberrations committed by rulers in the name of rulers being only responsible to God, this is somewhat disappointing. It shows us that the modern idea of limited government really is something more and original and not simply a revival of older ideas. *It is a legal theory of political institutions*, which for the most part has its roots in the Anglo-Saxon Common Law tradition and English Parliamentarianism. Even the French Declaration of the Rights of Man and of the Citizen heavily draws upon this tradition. In fact Thomas Jefferson, who was then American ambassador in Paris, helped the French to draft it in 1789. What Aquinas lacked—as did everybody in his time—was the experience of absolutism! This also explains why in the early modern period (that is, in the time of real absolutism), Aquinas was used by Catholic theologians such as Francisco Suárez and Cardinal Bellarmine to defend absolutism on the basis of the principle of princes being *legibus solutus*. This was not rejected, at least provided that the monarch was a Catholic.[33]

Still, this does not alter the fact that the modern idea of limited government is rooted in, and deeply shaped by, the older tradition of which Aquinas is much more an original and mostly creative interpreter than a simple witness or transmitter. According to Walter Ullmann, Aquinas is the real founder of a medieval theory of *regimen politicum* as founded in the aspirations of human nature and in natural law. In his words, "Thomas opened up new vistas to his contemporaries.…

He demonstrated the theme of nature as an integral part of the divine order: nature was to claim its own right; within its own terms of reference nature was autonomous and independent, working on its own laws, premises and aims."[34]

In conclusion, we can say that Aquinas provided some crucial building blocks for modern constitutionalism. This especially includes his idea that government must be limited by law in the sense of thereby becoming government *by* law so that its orientation toward the common good is guaranteed, and that this presupposed a determined constitutional arrangement in the form of a mixed constitution of monarchic, aristocratic, and democratic elements. Another foundation was his theory of natural law as the standard of any human legislation, including a right to resistance. This, together with many other premodern traditions already mentioned, was the decisive ground on which modern constitutionalism, rule *of* law, and limited government would eventually be built when the time had come: the time of the struggle against modern absolutism in all its forms.

Notes

1. Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, [1753], Vol. I, Book I, chapter II, 154–55:

   > It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. (…) And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments.

   Quoted according to: Sir William Blackstone, *Commentaries on the Laws of England in Four Books*. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes. (Philadelphia: J. B. Lippincott Co., 1893). Vol. 1, Books I and II, https://oll.libertyfund.org/titles/2140.

2. Cf. Fritz Kern, *Gottesgnadentum und Widerstandsrecht im früheren Mittelalter. Zur Entwicklungsgeschichte der Monarchie*, 2nd ed. (1954; repr., Darmstadt: Wissenschaftliche Buchgesellschaft, 1980); idem, *Recht und Verfassung im Mittelalter* (1952; repr., Darmstadt: Wissenschaftliche Buchgesellschaft, 1981). Both studies are available in English in one volume: *Kingship and Law in the Middle Ages*, Studies in Mediaeval History, vol. 4 (1956; repr., Clark, NJ: The Lawbook Exchange, 2006); Walter Ullmann, *Principles of Government in the Middle Ages* (London: Methuen & Co., 1961).

3. Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150–1625* (Grand Rapids: Eerdmans, 1997); Quentin Skinner, *The Foundations of Modern Political Thought*, vol. 2: *The Age of Reformation* (Cambridge: Cambridge University Press, 1978).

4. See Skinner, *The Foundations of Modern Political Thought*, vol. 2.

5. Bracton, *De Legibus et Consuetudinibus Angliae*, trans. Samuel E. Thorne, Latin text of George Woodbine (*Bracton online*: http://amesfoundation.law.harvard.edu/Bracton/). Cf. vol. 2, 110: "The king has a superior, namely, God. Also the law by which he is made king. Also his curia, namely, the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him."

6. For Coke, see Jean Beauté, *Un grand Juriste Anglais: Sir Edward Coke 1552–1634. Ses idées politiques et constitutionnelles ou aux origines de la démocratie occidentale moderne*, préface de Jean-Jacques Chevalier (Paris: Presses Universitaires de France, 1975).

7. A. Passerin d'Entrèves, *The Medieval Contribution to Political Thought: Thomas Aquinas, Marsilius of Padua, Richard Hooker* (Oxford: Oxford University Press, 1939; repr. New York: Humanities Press, 1959).

8. See Alexander S. Rosenthal, *Crown Under Law: Richard Hooker, John Locke, and the Ascent of Modern Constitutionalism* (Lanham: Rowman & Littlefield, 2008).

9. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), 358n. The reference is to Hooker, *Eccl. Pol.*, 1.3.9.

10. Locke, *Two Treatises*, 358n.

11. *Summa Theologica* (hereafter *ST*), I-II, 96, 4; see also *ST* I-II, 93, 3, ad 2.

12. John Locke, *Two Treatises of Government*, 398–99 (§ 199).

13. See Thomas Gilby, *Principality and Polity: Aquinas and the Rise of State Theory in the West* (London; New York: Longmans, Green and Co., 1958); James M. Blythe, "The Mixed Constitution and the Distinction between Regal and Political Power in the Work of Thomas Aquinas," *Journal of the History of Ideas* 47 (1986): 547–65, repr. in John Dunn and Ian Harris, ed., *Aquinas*, vol. 2 (Cheltenham; Lyme: Elgar, 1997), 375–93; John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 258–66.

14. *ST* I-II, 105.1.

15. Blythe, "The Mixed Constitution," 547–65.

16. See *ST* I-II, 90, 4.

17. See Aristotle, *Politics*, 3.10.126a9–20.

18. Blythe, "The Mixed Constitution," 563.
19. See Finnis, *Aquinas*, 250–51.
20. *ST* I-II, 96, 2 ad 2.
21. *ST* I-II, 96, 2 a. 3.
22. *ST*, I-II, 98, 1.
23. *ST*, I-II, 96, 2.
24. *ST*, I-II, 96, 2, ad 3.
25. *ST*, I-II, 100, 9.
26. Cf. Georges De Lagarde, *La naissance de l'esprit laïque au déclin du moyen âge*, vol. 2: *Secteur social de la scolastique* (Louvain; Paris: Éditions E. Nauwelaerts; Béatrice Nauwelaerts, 1958), 51–85.
27. This clearly is Aquinas's doctrine of original sin and fallen nature, expressed in many of his writings, but—under the influence of Augustinian and Protestant theology, much dependent on St. Augustine—often not correctly understood even by Thomists.
28. *ST*, I-II,105, 1.
29. See Finnis, *Aquinas*, 250–51.
30. See Kenneth Pennington, *The Prince and the Law*, *1200–1600. Sovereignty and Rights in the Western Legal Tradition* (Berkeley; Los Angeles; Oxford: University of California Press, 1993), 77–106.
31. *ST*, I-II, 96, 5 ad 3.
32. *ST*, I-II, 96, 5 ad 3.
33. See Skinner, *The Foundations of Modern Political Thought*, vol. 2, 178–84.
34. Ullmann, *Principles of Government in the Middle Ages*, 254–56.