AQUINAS AND THE SUPREME COURT
Challenges in Contemporary Theology

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Thomas Aquinas, Summa theologiae, II-II.2.9 ad 1
Mosaics flanking dedication inscription above the west portal of Santa Sabina in Rome, ca. 432. For commentary see Conclusion. © Holly Hayes / Art History Images
For my father, who wanted me to be a lawyer
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The chapters of this book accumulated over many years in many venues, while other books came in between. For that reason these chapters also incurred many debts of gratitude both to readers and institutions, as well as to editors and anonymous referees at this and other publishers. Among the former I wish to thank the University of Virginia for summer grants in several years and an appointment to the Shannon Research Center in 1996–1997, enabling me to publish the earlier articles. The National Humanities Center supported a delightful year in 1998–1999 that saw the publication of Chapters 5 and 6 in Sexuality and the Christian Body. The University of North Carolina at Greensboro awarded me a Research Assignment in 2007–2008 and a Summer Excellence Grant in 2012 to work on the project, as well as Regular Faculty Grant and a Kohler Grant in 2008 to visit images of Ecclesia and Synagoga, such as the one on the cover. Most pleasantly the Tantur Institute for Ecumenical Studies in Jerusalem, a division of Notre Dame University, hosted me for seven months in 2009–2010. The National Endowment for the Humanities also awarded me a Summer Stipend in 2012. Finally, I completed the book and saw it through the press while at the Center of Theological Inquiry in Princeton on a generous grant from the Templeton Foundation, at the same time writing my next book, The Analogy of Blood.

Readers who offered comment and administrators who offered support on at least one chapter or piece of argument, some in the distant past, include Lewis Ayres, Jim Buckley, John Bowlin, David Burrell, Jim Childress, Brevard Childs, Bob Connor, Joe-Gus DiNoia
(who gave me my first Summa), Reginald Foster (who taught me to look up the Latin words you already know), Paula Fredriksen, John Gager, Stanley Hauerwas, Russ Hittinger, Robert Jenson, Greg Jones, Serene Jones, Mark Jordan, John Kelsay, David Kelsey, Fergus Kerr, George Lindbeck, Gerard Loughlin, Michael McGarry, Kent Mullikin, Ernan McMullin, Rob MacSwain, Joe Mangina, Bruce Marshall, Dale Martin, David Novak, Otto Hermann Pesch, Victor Preller, Max Seckler, Kendall Soulen, Janet Soskice, Will Storrar, Jeffrey Stout, Kathryn Tanner, Bill Werpehowski, Dan Westberg, Diane Yeager, and David Yeago. I also wish to thank the groups who invited me to give papers on parts of this material: the Narrative Theology Group of the American Academy of Religion, the Religion Department of Princeton University, the Papal Observatory in Castel Gandolfo, and the American Theological Society. For errors of fact, tact, interpretation, and judgment I have only myself to thank.

I have almost more gratitude to anonymous reviewers for journals, presses, and granting agencies who could be more frank, whether in puzzlement or praise. I have special thanks for Dean Timothy Johnston for his generous support of the Religious Studies Department in fat years and lean, and for Pat Bowden, its beloved administrator. Above all I thank my student and research assistant Joseph Naron, without whom I could hardly have finished the book, and who made the marvelous indices. At Wiley-Blackwell I wish to thank Rebecca Harkin, my editor for several books now; Isobel Bainton, her able assistant; Leah Morin, the project manager, and Jacqueline Harvey, my patient copy-editor. Finally I wish to thank my partner, Derek Krueger, who takes wonderful care of me when I am beset by the demon of finishing and who married me when the church was ready, in 2006.

With the exception of Chapters 1 to 3, the essays in this volume first came out in other settings and appear here with light to moderate revisions. Where the copyright lies with the earlier publisher, Wiley-Blackwell and I gratefully acknowledge permission to reproduce the material in this book. Details of original publication are as follows:


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Bibliographic Note

Bare references appear in parentheses in the text. For that reason I give the shortest possible version of the smallest textual unit. For modern authors, this is the author’s name and page number, differentiated by date (before a colon) only if necessary. Full information appears in the list of references at the end of each chapter. For medieval authors like Aquinas, however, the author (date) page system yields ludicrous results.

For readers unused to the *Summa theologiae*, let me explain that it is divided into four parts – I, I-II (the First Part of the Second Part), II-II (the Second Part of the Second Part), and III – which in turn are divided into numerous “questions,” or inquiries, and the questions into “articles,” the main units of argument. It is the article, rather than the “question,” that takes a yes–no form, beginning with “whether.” Thus, “Whether God exists” is an article. A “question” is a *quaestio*, or search, collecting several articles. An article’s structure builds in a real or constructed dispute, opening with at least three “objections,” which briefly state positions that Aquinas does not hold. They begin “it would seem,” but you know, from the form, that the objection is not really Aquinas’s considered view. The objections are followed by a very short citation of authority, a warrant or pivot, called the *sed contra*, or “on the other hand.” The *sed contra* usually does indicate Aquinas’s own view. The *sed contra* is followed by a response, also called the body or corpus of the article, in which Aquinas explains his own position. Frequently Aquinas’s view qualifies the “yes” or “no” implied by the *sed contra* to concede correct points and make distinctions.
Replies to the objections follow the response. In rare cases, the response goes down the middle between the objections and the *sed contra*, and we find a reply also to the *sed contra* (then called the objection on the other side).

Readers unused to this system may prefer to read the response first, taking in the *sed contra*, and then the replies to the objections, and finally, to check the context, the objections that occasion the replies and frame the response. After some practice, it will come to seem more natural to start, as Aquinas does, with the objections, so that the response has some drama to it. One learns to read the objections thinking “it would seem” means he’s going to disagree, but how is he going to get out of this bind?

Two sorts of remarks lie outside the article structure. Paragraphs introducing whole parts are called prologues (= prol.). Organizing material that comes before an article, baring the structure, is called a proemium (= proem.) to it.

Most of my references come from the *Summa theologiae* or from the biblical commentaries. I refer to the *Summa theologiae* as the *Summa* and cite it by part, question, article, and part of article (*sed contra* = sc; body = corpus = response = respondeo = c; reply to an objection = ad 1, ad 2, etc.; and an objection itself = obj.). Thus I-II.90.1 ad 2 refers to the First Part of the Second Part, question 90, article 1, reply to the second objection. Since the response is the longest part of an article, references can specify where in a response to look: in init. = at the beginning; ca. med. = around the middle; post med. = after the middle; and in fin. = at the end. A citation consisting only of roman numerals and numbers in that format always refers to the *Summa theologiae*. If I refer to the *Summa contra Gentiles* or the *Commentary on the Sentences* of Peter Lombard, then I will specify *Contra Gentiles* or *SCG* or *In Sent*.

The Latin preposition *in* means, in citations, a commentary “on” another work. Thus *In Sent.* is the *Commentary on the Sentences*. *In Rom.* is the *Commentary on Paul’s Epistle to the Romans*. *In Jo.* is the *Commentary on the Gospel of John*, and so on. Aquinas’s biblical commentaries are traditionally cited by book and lecture, or *lectio* (= lect.). But the paragraphs receive numbers in the best edition, published by Marietti in Turin, whereas the *lectio* looks like a verse number, of which it gives no indication, so that the reader cannot tell from the citation itself which verse Aquinas is treating. So I
have modified that system to be more precise. I cite according the
Marietti paragraph numbers, and if relevant I also note the verse
on which Aquinas is commenting. Thus In Rom. 1:20, §97 means
Marietti paragraph 97, where Aquinas comments on Romans 1:20.

Translations from the *Summa theologiae* are my own or depend
upon the older, Benziger Brothers edition because it is often so
literal that the practiced reader can back-translate into the Latin
(except for Chapter 5, which uses the Blackfriars edition). I have,
however, modified it without comment to bring out nuances of
the Latin, avoid gendered pronouns, or make corrections. I reserve
comment for the very rare cases in which the Benziger edition
makes it impossible to recover the sense of the Latin. Translations
of other works, including the *Commentary on Romans*, are my own
unless noted.

In the phrase “Thomas Aquinas,” “Thomas” is his name and
“Aquinas” is a Latin adjective of place, meaning “from Aquino.”
Theologians, medievalists, and Latinists prefer to call him simply
“Thomas,” and I would too, except that nonspecialists tend to call
him Aquinas. I do so here out of hospitality to them.
List of Abbreviations

I have used the Marietti editions of the *Summa theologiae* and the commentaries on the Pauline epistles. The other texts can be found in *S. Thomae Aquinatis opera omnia ut sunt in indice thomistico*, ed. Roberto Busa, 7 vols. (Stuttgart–Bad Cannstatt: Friedrich Frommann–Holzboog). The texts are sometimes catalogued as an appendix to the index, *Index thomisticus*. References are cited by abbreviated title from the largest to the smallest text division, separated by periods. The texts can also be accessed online at www.corpusthomisticum.org.


In De anima  Sentencia in libri de anima (1267). In Opera omnia iussu Leonis XIII P.M. edita (Rome: Commissio Leonina, 1984), vol. 45/1.


List of Abbreviations


In praecl.  Opusculum in duo præcepta caritatis et in decem præcepta legis (1273). In Thomas Aquinas, Opera omnia, ed. Busa, vol. 6, pp. 26–33.


Aquinas on the Supreme Court – and on the Bible, or How to Read This Book

Aquinas on the Bible and the Court

Contemporary accounts of what’s “natural” for human society still cite the thirteenth-century system of Thomas Aquinas – even on the Supreme Court. But those accounts ignore his biblical commentaries, which reveal something much stranger. Against the reigning impression, the commentaries embed all law, even the law of nature, in a sexually charged story of decline by specific ethnic groups – Jews and Gentiles – gendered in changing ways and redeemed by the reinsemination of divine grace. This book uses accounts of ethnicity and gender, nature and grace in Aquinas’s biblical commentaries to reframe the systematic works (especially his *Summa theologiae*) still quoted in court.

The whole advantage of natural law is supposed to lie in its independence from any particular group, history, or religion. That is why rival views of gender and sexuality both appeal to “nature” and cite Aquinas. But Aquinas’s *Summa* ties natural law to specific biblical passages, where his commentary describes a nature that differs by ethnicity, varies over time, and changes sexuality by God’s decree. This destabilizes turn-of-the-twenty-first-century uses, liberal or conservative.
Consider a story of decline and rise from Aquinas’s commentary on the biblical book of Romans: In the beginning, God impressed or (in a parallel passage) “inseminated” human minds with a moral “law of nature” – God presses or fathers them in God’s image. According to the law of nature, human beings would multiply and do justice. But after the fall of Adam, they came to love injustice. To hide that injustice, they “bound” (detinent) or “tied up” (ligatur) the law of nature until they “held it captive” (captivatur) and “put an end to it” (terminatur) (In Rom. §§112, 127). The verbs reveal this as a tale of bondage. By the time of Abraham, particular ethnic groups (“Gentiles”), having “put an end to” nature, began to worship dead idols (tempore Abrahae, quando creditur idolatria incoepisse). The living God punished them by giving them up to “the vice against nature” (same-sex sexuality) – so that they would die out (ex quo generatio sequi non potest). The author finds the punishment strictly appropriate (satis rationabiliter), since according to the story nonprocreative sex befits the binding of nature and the worship of dead idols (§151; see Chapters 5, 6, and 9). After the coming of Jesus, the Holy Spirit reinseminates them with natural law as “the semen proceeding from the Father.” “How they become again children of God is clear,” says the author,

from comparison to physical children, who are begotten by physical semen proceeding from the father. For the spiritual semen proceeding from the Father, is the Holy Spirit. And therefore by this semen some human beings are (re)generated as children of God. – 1 John 3:9: “Everyone who is born of God does no sin, since the seed of God remains in him [semen Dei manet in eo].” (In Rom., §636; see Chapter 12)

The United States Supreme Court cites the same author – Thomas Aquinas – in cases crucial to gender issues, including Roe v. Wade (abortion) and Bowers v. Hardwick (sodomy laws). Eight centuries after he lectured on the Bible, advocates and critics agree, Aquinas remains the most influential natural law philosopher. Even liberals cite Aquinas – Blackmun, for the majority in Roe and in dissent in Bowers. Citations of philosophers show “a slow rise in majority decisions” and “a dramatic and recent rise” in dissents, trending toward 30 cases a year. Behind the scenes, the influence
of philosophical sources exceeds the citation rate (Brooks, 27 \textit{Rutgers L. Rec.} 1; Rao, 65 \textit{U. Chi. L. Rev.} 1371).

This book links four claims: (1) Aquinas’s recently or never translated commentaries complicate all understandings of Aquinas’s natural law, conservative and liberal alike. (2) The commentaries differ from the systematic works in the type of reasoning Aquinas employs – narrative in the commentaries, logical in the \textit{Summa}. (3) Aquinas’s writing belongs in a historical context including medieval practices of teaching and his commitments to the Dominican Order of Preachers. (4) Aquinas’s commentaries submit the law of nature to particularities of ethnicity, gender, history, and religion that would embarrass secular courts.

My method sounds simple, but has hardly been tried: When Aquinas’s systematic works quote the Bible, I read his biblical commentaries on the passages he cites. Widely available in complete if unopened Latin sets, the commentaries remain unread even by those who call themselves Thomists. Why not hear Aquinas on the texts he cites?

This book critiques turn-of-the-twenty-first-century natural-law theory by its founding text. I do not try to deconstruct natural law by appeal to natural science, since that would hardly work with thinkers who treat nature as normative goal rather than scientific evidence. Natural lawyers don’t go by science. They go by texts. That favors my approach, since Aquinas also goes by texts – not just Aristotle’s, but those of Augustine, Pseudo-Dionysius, and the Bible. Those texts leave Aquinas more interested in natural law’s failures than moderns give him credit for.

If you read the \textit{Summa theologiae} on natural law, you find that Aquinas cites the New Testament book of Romans for his claims about nature. If you open Aquinas’s commentary to the places where he interprets those citations, you find that, contrary to the \textit{Summa}’s impression, Aquinas embeds all law, even natural law, not in a particular \textit{logic}, but in a particular \textit{story}. There, Aquinas places natural law in a narrative of God’s dealings with two religio-ethnic groups, Jews and Gentiles. There, having or lacking natural law depends not on humanity but on ethnicity. The narrative tries to explain, not how natural law would work, but why it fails. Aquinas the commentator veers away from all his modern readers, pro or con.
Among those Aquinas readers are those who prepare Supreme Court opinions, write *amicus* or interested-party briefs, and examine Supreme Court nominees on the Senate Judiciary Committee. *Roe v. Wade* legalized abortion in the United States (1973, 410 US 113). *Webster v. Reproductive Health Services* (1989, 492 US 490) confirmed *Roe*; both decisions cited Aquinas on the issue of “ensoulement” (cf. Haldane and Lee). And *Bowers v. Hardwick* (1986, 478 US 186), overruled by *Lawrence v. Texas* (1993, 539 US 558), was the last Supreme Court decision upholding sodomy laws. In another sexual orientation case that reached the Supreme Court, *Romer v. Evans* (1996, 116 S. Ct. 1620), the State District Court took testimony about the law of nature from “prominent Roman Catholic and Jewish theological scholars . . . about interpretations of the teachings of their own traditions that are not uncontroversial within those traditions” (Olyan and Nussbaum, xiv) and prompted an article of 136 pages in the *Virginia Law Review* about nature in Plato and Aristotle (Nussbaum; I thank Joseph Naron). *Romer* addressed the access of gay and lesbian citizens to the courts.

In 1991, when Clarence Thomas was up for confirmation to the Supreme Court, Senator Joseph Biden (later US vice-president), suggested that the Judiciary Committee explore whether Thomas had a “good” or “bad” theory of natural law. A bad theory, according to Biden, would impose a “code of behavior . . . suggesting that natural law dictates morality to us,” while a good one would support individual rights, as in the Declaration of Independence (Hittinger 36, quoting Biden; I thank Joseph Naron). Biden also voted against failed Supreme Court nominee Robert Bork because Bork rejected the “good” kind of natural law (Hittinger 83). As I correct this manuscript, vice-presidential nominee Paul Ryan claims (without evidence) to have been influenced less by Ayn Rand than by Thomas Aquinas. On the Supreme Court and on the Senate Judiciary Committee, liberals and conservatives argue over Aquinas. This book uses narratives of ethnicity and gender in Thomas Aquinas’s biblical commentaries to reframe his account of a natural moral law (especially in his *Summa theologiae*) still cited on the Court, in the Senate, and on the political trail.

*LexisNexis*, the online legal database, finds 2,824 articles in law reviews and journals mentioning Thomas Aquinas (as of July 29, 2012; two days later, five more). In the 10 years between 1982 and
1992, *LexisNexis* shows 225 law review articles citing Aquinas. In the five years between 1992 and 1997 – half the time – the number doubles to 402. Between 1997 and 2002, the number rises by half again to 632. Between 2002 and 2007, the number again increases by a third to 838. In the five years between 2007 and the time of writing, the increase holds steady at 708, but the delay in recording keeps that figure down. So the attempts to influence the courts by citing Thomas Aquinas have risen dramatically, the greatest acceleration occurring between 1992 and 1997 and leveling off at the time of writing to something over a hundred law review articles a year. That seems a high rate for an author who died almost as many years before North America was discovered, as since the United States first set up the Supreme Court.

**Aquinas and the Court in New Natural Law Theory**

Prominent among those who cite Aquinas are the ones grouped as “new natural law” theorists. A conservative movement animated by such authors as Robert George, John Finnis, Joseph Boyle, and Germain Grisez, the natural lawyers have recently tried to influence secular courts with their interpretation of Aquinas. They have enjoyed great success with institutes, websites, and articles in journals, including law reviews. The Witherspoon Institute in Princeton, associated with George, and the Natural Law Institute at Notre Dame, associated with Finnis, seek to influence the courts with a conservative approach to natural law, especially on gender and sexuality. For *Lawrence v. Texas* (1993, 539 US 558), for example, George wrote an *amicus* brief, sponsored by the Witherspoon Institute and the American Family Association for Law and Policy, in favor of sodomy laws.

The philosopher of religion Nicholas Wolterstorff offers an uncontroversial description of the Finnis–Grisez–Boyle platform:

> From its beginnings among the Stoics of antiquity, the natural law tradition of ethical theory has undergone many transformations. The most prominent contemporary spokesmen of the tradition, John Finnis and Joseph Boyle, who see themselves as representing the Aristotelian–Thomistic version of the tradition, offer natural law
theory as a mode of ethical inquiry which is independent both of all comprehensive religions and philosophical perspectives, and of all concrete moral communities. In particular, they present it as independent of theology. It is from human nature as such that they propose to derive ethical principles; and it is their claim that these principles are not only knowable, but in good measure actually known, by every rational adult human being whatsoever. (Wolterstorff 11)

In fact (as Wolterstorff implies), Aquinas stands against that description in every particular. The qualification that natural law operates only among “adults,” for example, recalls Aquinas’s own qualification that natural law is possessed – but does not operate – among infants. In the same breath, Aquinas notes that it also fails to operate among the damned (I-II.94.1sc). Whether you estimate the number of the damned as large, small, zero, or of no interest, Aquinas’s qualification implies that, for him, natural law operates in the presence of grace and not by itself. The trouble with the new natural law theory is its semi-Pelagian attempt to operate natural law in the absence of grace. When you note that Aquinas also thinks natural law is defective among Germans (I-II.94.4), you begin to suspect that he is as interested in its failure as in its success.

Finnis, George, and other authors of law review articles assume that they can appeal to Thomas Aquinas for a putatively secular project because, they think, he contributes his views as a philosopher rather than as a theologian, or at least because they can easily disentangle a secular philosophy from his theological commitments. As a theologian, I aim to show how Aquinas is a theologian all the way through, so that his authority can hardly be claimed for a secular project, and that nothing in the Summa theologiae counts as “natural” in the sense that the new natural lawyers need or that secular courts should countenance. It is widely accepted among theologians in the United States, Britain, Germany, and France that the reading of Aquinas is wrong according to which nature and grace form a two-story system with nature at the bottom and grace, extrinsic to nature, at the top (even if that is still debated among ethicists and unheard of among natural lawyers). In the last stage of Aquinas’s authorship, which includes both the Summa theologiae most quoted in natural-law reasoning, and his Commentary on
Aquinas on the Supreme Court and on the Bible

Romans, which is his most useful guide to reading it, the purely natural does not exist. Rather, nature without qualification is always already shot through with grace, so that “nature” remains a religious, Christian, theological concept all the way down. The courts ought to take the position on Aquinas’s concept of nature in general, that Justice Stevens (concurring in part and dissenting in part) took in Webster:

If the views of St. Thomas were held as widely today as they were in the Middle Ages, and if a state legislature were to enact a statute prefaced with a “finding” that female life begins 80 days after conception and male life begins 40 days after conception, I have no doubt that this Court would promptly conclude that such an endorsement of a particular religious tenet is violative of the Establishment Clause. (Webster v. Reproductive Health Services, 492 US 490 (1989))

But all of Aquinas’s talk about nature belongs to a particular religious tenet – one that his natural law advocates (“with friends like these . . .”) deny: God holds nature in being by grace. So far from a concept independent of religion or free from dispute among rational adults, “nature” as the natural lawyers use it remains a disputed question even among theologians and Thomists: so that any courts appealing to it appeal not only to a religious understanding, but willy-nilly take sides in an intra-religious dispute. Secular natural lawyers, so far from following in Aquinas’s footsteps, have, in his terms, demoted themselves to the status of the philosopi in mundo, the pagan philosophers (In Rom. 1:20, §122).

If we return to those nearly 3,000 law review articles, we find that the highest total number, 92, comes from the American Journal of Jurisprudence, the house organ of Notre Dame’s Natural Law Institute, and closely associated with John Finnis, who serves as editor. That number would be higher, except that the database has indexed it only since 1996. The second-highest number (60) comes, similarly, from the Notre Dame Law Review. One starts to see a pattern when the third-highest number (56) comes from the Journal of Catholic Legal Studies, and the fourth-highest number comes from the Ave Maria Law Review. To complete the top five, see the University of St. Thomas Law Journal: Fides et Iustitia (44). Tied for sixth
is (again) the *Notre Dame Journal of Law, Ethics, and Public Policy* (42). Its rival for sixth place is the first non-Catholic journal, the *Michigan Law Review*, followed by the *Yale Law Review, Fordham Law Review* and *Catholic University Law Review* round out the top ten. So half of the top six spots belong to Notre Dame; eight of the top ten belong to Catholic institutions. Of articles citing Aquinas, 609, or 22 percent, also cite John Finnis. The evidently sectarian success of something supposed to enjoy universal appeal might make more sense if its defenders developed a more Thomistic–Augustinian theory of its failure: there is such a thing as natural law, but people disagree about what it is.

Like a higher and more textually sophisticated Intelligent Design for gender roles, new natural law theory dresses deeply religious views in secular clothing. But the point of this book is not that natural law reasoning is sectarian (whether it is or not). The point of this book is that Thomas Aquinas himself does not in fact defend the optimistic, timeless, universal, secular, and court-worthy argument for traditional gender roles that a raft of books and the almost 3,000 law review articles would lead you to believe.

In the Supreme Court and on the Senate Judiciary Committee, in *amicus* briefs and law review articles, on websites and in think-tanks, natural law thinkers are trying to influence sex and gender law by invoking the author of the now bizarre religious narrative that opened this chapter. If you find that prospect alarming, this book is for you. If you find the prospect alarming for theological reasons, or because, as a student of law, religion, or the humanities you respect the integrity of religious reasoning, even better. If the very sophistication of Finnis’s *Aquinas: Moral, Political, and Legal Theory* (1998), together with the social program of the *American Journal of Jurisprudence*, leaves you wondering how to pry apart their self-insulation, this book offers strategies.

It hardly undermines the need for a book like this to note that the reach of new natural law theory exceeds its grasp. Not when standard sourcebooks in Aquinas’s so-called treatise on law or political theory leave the uniform impression that undergraduates, law students, and political theorists can responsibly read bits from the *Summa* of theology with little or no attention to theology at all. (I can think of half a dozen: Bigongiari, Dyson, Feddoso, Henle, Regan, Sigmund, the last a little less narrow than the others.) New