Aquinas, *ius gentium* , and the Decretists

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Thomas Aquinas wondered in his *Summa Theologica* whether the *ius gentium* was grounded in natural law or positive human law. He proposed an ambiguous answer, linking the *ius gentium* to both natural law and human law, but ultimately grounding it in natural law. In the sixteenth century, Aquinas's commentary became the touchstone for discussions by neo-scholastics on the exact nature of the *ius gentium*, a debate that would finally lead to the association of the idea of *ius gentium* with international law or, in the words of Francisco Suárez, the *ius inter gentes*.[1] However, Aquinas himself was not primarily envisioning the *ius gentium* as a body of legal rules governing the conduct and relationship between states. Rather, he conceived it as a collection of legal institutions that were common to many peoples, such as the practice of buying and selling or the institution of slavery. In developing his ideas on the *ius gentium*, Aquinas did not rely on thinkers from the theological tradition. He could not: theologians of the twelfth and thirteenth centuries, such as Petrus Lombardus, seem not to have discussed the concept.[2] Instead, Aquinas took as his starting point the canon

[1] Brian Tierney, "Vitoria and Suarez on *ius gentium*, Natural Law, and Custom," in *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James Bernard Murphy (Cambridge: Cambridge University Press, 2007), 101–24.

[2] Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Geneva: Graduate Institute Publications, 1983), 1.9.42, DOI: 10.4000/books.iheid.605; Riccardo Saccenti, "The *Ministerium Naturae*: Natural Law in the Exegesis and Theological Discourse at Paris between 1160 and 1215," *Journal of the History of Ideas* 79 (2018): 527–45.

law doctrines of Gratian, who himself was inspired by Isidore of Seville. Aquinas's conception of the *ius gentium* differed from that of Gratian and Isidore. He did not just disagree with Gratian; he also misunderstood him. This misunderstanding was forgivable: first, because the Isidorian texts adopted by Gratian were fundamentally question-begging; and second, because the decretists (the canon lawyers who produced learned comments on Gratian's text) arrived at conceptions of the *ius gentium* that were anchored more in Roman law than in Gratian's or Isidore's more theological conceptions.

In this article, I will explain how the decretists arrived at a conception of the *ius gentium* different from that of Isidore or Gratian. In the literature, there is no other systematic overview of the evolution of the idea of the *ius gentium* in the writings of the decretists, although Weigand included many useful elements in his wonderful book on the natural law theories of decretists and jurists of the twelfth century.[3]

Since classical times, the *ius gentium* had been a multi-layered concept. Its oldest layer was the Roman law tradition, which itself was an uneasy mix of legal and Greek-philosophical elements. Another layer was the text of Isidore of Seville, which was tremendously influential following its inclusion in the *Decretum Gratiani*. Before turning to the writings of the decretists, I will discuss the Roman layers of the concepts and how they were understood by twelfth-century jurists at medieval law schools. Then I will focus on the Isidorian text as adopted by Gratian, followed by a discussion of the evolution of decretist thought on these two traditions. Finally, I will return to Aquinas and his conception of the *ius gentium*.

I have one more preliminary remark concerning terminology. In this article, I will not translate the Latin terms *ius naturale* and *ius gentium*. Any translation of these terms (such as "natural law," "natural right," "law of peoples," or "law of nations") fails to account for how the meanings of the terms fluctuated in the original Latin. I make one exception. Aquinas generally preferred the term *lex naturalis* over *ius naturale*. While it might be true that Aquinas used these terms synonymously,[4] it is by no means cer-

[3] Rudolph Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (München: Max Hueber, 1967). See also the short note of Theo Mayer-Maly, "Isidor–Gratian–Thomas: Stationen einer allgemeinen Rechtslehre," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteiling* 80 (1994): 490–500.

[4] John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 135.

tain that a contemporary jurist would do so.[5] Therefore, when discussing Aquinas, I will use "natural law" as a translation of *lex naturalis*.

IUS GENTIUM IN ROMAN LAW AND THE TWELFTH-CENTURY JURISTS

The concept of *ius gentium* has its origins as a legal category in the law of the Roman republic, where it referred to the technical rules governing the relationship between Roman citizens and foreigners.[6] This technical conception was later enriched with deep philosophical connotations, as the *ius gentium* was increasingly associated with the *lex* or *ius naturale*. The Greek concept of law grounded in nature was Romanized by Cicero. Cicero borrowed from the Stoics the idea that man was a rational creature, and he defined natural law as some "eternal principle, that rules the world with wisdom, ordaining what ought to be done and forbidding the contrary."[7] This wisdom (*sapientia*), properly called "right reason" (*recta ratio*), was common to the gods and man.[8] Reason, extracted from the nature of things itself, ordered man "to do good and avoid evil."[9] Thus, man's capacity to reason was what gave validity to the *ius naturale*. *Ius gentium* was closely associated with nature.[10]

Cicero's rhetoric shows how a closer association was gradually forged between the *ius gentium* and nature. This closer link eventually trickled down into Roman law. In Justinian's codification, Gaius explained that natural reason (*naturalis ratio*) was the origin of the *ius gentium*,[11] and it explained what rules and institutions all men had in common. In his *Res*

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[5] Kenneth Pennington, "*Lex naturalis* and *ius naturale*," *The Jurist* 68 (2008): 569–91; Ennio Cortese, *La norma giuridica. Spunti teorici nel diritto comune classico* (Milan: Giuffrè, 1962–64), 2:34–35.

[6] Max Kaser, *Ius Gentium*, trans. Francisco Javier Andrés Santos (Granada: Comares, 2004), 33–36.

[7] Marcus Tullius Cicero, *De legibus*, ed. Jonathan G.F. Powell (Oxford: Oxford University Press, 2006), 2.8: "legem . . . esse . . . aeternum quiddam, quod universum mundum regeret, imperandi prohibendique sapientia."

[8] Cicero, *De legibus*, 1.22–23.

[9] Cicero, *De legibus*, 2.10. More on the relationship between *ius gentium* and nature in Kaser, *Ius Gentium*, 19–26.

[10] Marcus Tullius Cicero, *De officiis*, ed. Michael Winterbottom (Oxford: Oxford University Press, 1994), 3.23: "natura, id est iure gentium."

[11] *Institutiones*, ed. Paulus Krueger, in *Corpus iuris civilis*, 21st ed. (Dublin-Zürich: Weidmann, 1970), 1.2.1.

cottidianae, Gaius went further by defining the *ius gentium* as that part of natural law that referred to humans only.[12] With this statement, he nearly made the identification between natural law and *ius gentium* complete.

In spite of Justinian's endorsement of Gaius's philosophical association between the *ius gentium* and the *ius naturae* via the *ratio naturalis*, there are indications that not every Roman jurist agreed with this association, let alone identification. Ulpian defined natural law as "that which nature has taught to all animals." Man shares with animals certain behavior, such as procreation and rearing of offspring. The *ius gentium*, on the contrary, "is not co-extensive with the natural law" as it refers "only to human beings among themselves."[13] While Ulpian still saw some connection between the *ius gentium* and the *ius naturale* through the *ratio naturalis*, there were other Roman jurists who seemed to have rejected the connection altogether. Hermogenian, for instance, called *ius gentium* every legal institution that different peoples happen to have organized similarly, such as the foundation of political communities, warfare, slavery, the introduction of private property, and the establishment of contracts.[14] Warfare and slavery were not self-evidently in accordance with the *ratio naturalis*, and Hermogenian must have considered the *ius gentium* as a loose set of institutions that had nothing more in common than the fact that many peoples had established them. Even so, Hermogenian's opinion was not the dominant doctrine in the codification of Justinian. Moreover, Roman jurists were more focused on practical results than on abstract reasoning; they were quite tolerant of a few theoretical inconsistencies.[15]

Such was the panorama that twelfth-century jurists encountered when they started to gloss the *Digest*, Justinian's anthology of extracts from the writings of classical jurists. Even if much of Roman law material had been available during the early Middle Ages in Western Europe, the *Digest* had been out of sight until the end of the eleventh century, when, legend has it, Irnerius was able to reconstruct the central book of Justinian's codification

[12] *Institutiones* 2.1.11. For the authorship of Gaius, see Kaser, *Ius Gentium*, 117.
[13] *Digesta*, ed. Theodor Mommsen, in *Corpus iuris civilis*, 21st ed. (Dublin-Zürich: Weidmann, 1970), 1.1.1.3–4; *The Digest of Justinian*, trans. Alan Watson, rev. ed. (Philadelphia: University of Pennsylvania Press, 1998). The authenticity of Ulpian's text has been questioned, but this can't occupy us here because medieval jurists did not doubt it. On Ulpian's question-begging conception of the relationship between natural law and *ius gentium*, see Haggenmacher, *Grotius*, 1.9.11–19; Cortese, *La norma giuridica*, 1:79–86.
[14] *Digest* 1.1.5; see also *Institutiones* 1.2.2.
[15] David Johnston, "The Jurists," in *The Cambridge History of Greek and Roman Political Thought*, ed. Christopher Rowe and Malcolm Schofield (Cambridge: Cambridge University Press, 2000), 621.

project. From that moment onward, the law school of Bologna attracted many students and scholars to study the newly found texts. Their first goal was to unveil the meaning of the Roman terms and understand the text properly.[16]

Most glossators endorsed Gaius's idea as they found it in the codification of Justinian, emphasizing the connection between the *ius naturale* and the *ius gentium* via the *ratio naturalis*. Furthermore, the reception of Gaius's ideas was facilitated by the influence of the Ciceronian legacy, which was pervasive among medieval law students and political thinkers.[17] A good example is offered by one of the earliest glossators, Martinus. Martinus defined the *ius gentium* as an "arrangement of reason inserted by nature in the soul and therefore . . . an art of goodness and equitableness," drawing on Ulpian's famous definition of *ius* and its explicit association with justice and natural law.[18] The association between justice, equity, and *ius gentium* was inspired by the *Digest* itself. For instance, it considered that the *traditio*, a formless way to convey ownership of goods, was in accordance with both *ius gentium* and natural equity.[19] Even if Martinus was not prepared to completely identify the *ius gentium* with justice or the *ius naturale*, he came very close. On the one hand, Martinus pointed out that there were elements of the *ius gentium*, such as slavery, that were not at all just and therefore could not form part of natural law. On the other hand, in his gloss to *Institutiones* 1.2.11, he made the obvious link between the idea of *iura naturalia* as laws observed by all nations alike with the concept of the *ius gentium* as that law which natural reason has established among all human beings and is observed by all nations.[20] This highlighted the substantial identity between *ius gentium* and *ius naturale*. To overcome this challenge, glossators devised a complex theory to explain why the *ius gen-*

[16] Bart Wauters and Marco de Benito, *The History of Law in Europe: An Introduction* (Cheltenham: Edward Elgar, 2017), 51–54.

[17] Cary J. Nederman, *The Bonds of Humanity: Cicero's Legacies in European Social and Political Thought, ca. 1100–ca. 1550* (University Park: Pennsylvania State University Press, 2020).

[18] Martinus, gloss to *Institutiones* 1.1, quoted in Weigand, *Naturrechtslehre*, 32: "Ius gentium cum sit constitutio rationis a natura in anima insite ars dicitur boni et equi, set cum quadam distinctione." Martinus added that the *ius gentium* in some cases was good and just, as in the case of self-defense, and sometimes it was not, as in the case of slavery. For Ulpian's definition, see *Digest* 1.1.1.pr. and *Digest* 1.1.11.

[19] As opposed to the very formal and ritualistic *mancipatio*, which had to be used to convey certain types of goods between Roman citizens and thus belonged to the ancient *ius civile*. *Digest* 41.1.9.3 and *Digest* 41.1.3.pr.

[20] *Digest* 1.1.9.

tium was different from the *ius naturale* even though it could still be called *ius naturale*:

> The *ius gentium* can thus be called *ius naturale*, because it is introduced by natural reason. It can be defined as follows: the *ius gentium* is human industry (*industria*) introduced by natural reason, and therefore it is not a one-folded right, because it is introduced by both industry and nature. Natural law on the other hand can be defined as follows: natural law is the condition imposed by divine disposition itself to the created things. As such it is a one-folded right, because it is introduced only by divine decision without human assistance.[21]

There were two grounds for the *ius gentium*: human industry and natural reason that introduced and guided it. Chronologically speaking, human industry and natural reason were present since the creation of man, and thus they introduced some institutions of the *ius gentium* like the worship of the gods.[22] Other institutions of the *ius gentium* were introduced long after the creation, and some of these institutions, such as contract law, were in accordance with natural law, while others, such as slavery, were apparently against it.[23] Even so, according to the standard gloss of Accursius, once introduced, these institutions acquired a permanent character, precisely because they were induced by natural reason.[24] With this "chronological" solution, hinted at also by Gaius,[25] the glossators managed to build a more or less coherent reading of their Roman law texts. Emphasizing the close link between the *ius gentium* and the *ius naturale*, their reading was basically in line with the dominant doctrine of Gaius they had found in their sources.

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[21] Anonymous gloss to *Institutiones* 2.1.11, quoted by Weigand, *Naturrechtslehre*, 29: "Ius gentium ideo dicit appellari ius naturale, quia ex naturali ratione inductum est et potest sic diffiniri: Ius gentium est industria humana naturali ratione inducta et ideo dicitur ius non simplex, quia inductum est et industria et natura. Naturale vero ius sic potest diffiniri: naturale ius est conditio rebus creatis ab ipsa dispositione divina imposita et ideo dicitur simplex ius, quia non ex industria hominum, set sola divina dispositione inductum est."
[22] *Digest* 1.1.2; Cortese, *La norma giuridica*, 2:56, 79–86.
[23] *Summa Institutionum Vindobonensis*, quoted in Weigand, *Naturrechtslehre*, 27.
[24] *Glossa ordinaria* to *Institutiones* 1.2.1, v° *naturalis ratio*: "Nota quod ius gentium naturali ratione est inductum, ut hic [*Institutiones* 2.1.11], unde est ius immutabile, ut [*Institutiones* 1.2.11]."
[25] *Institutiones* 2.1.11 and *Digest* 41.1.1.

ISIDORE AND GRATIAN

Isidore, bishop of Seville, compiled his *Etymologies* in the early seventh century. Most likely drafted in several stages, the work is an encyclopedia on the classical world arranged by subject matter. Book 5 discusses law. We are uncertain of the sources Isidore used, but he probably based his ideas on some compilatory material or textbooks from Gaius, Ulpian, or Paulus. It is unlikely that he used the codification of Justinian.[26]

Isidore defined the *ius gentium* as follows: "*Ius gentium* is occupation of land, construction, fortification, wars, captivities, enslavement, the right of regaining citizenship after captivity, treaties of peace, truces, the inviolability of ambassadors, the prohibition of mixed marriages. And it is called *ius gentium* because nearly all nations [*gentes*] use it."[27] Isidore drew inspiration from Gaius here.[28] However, what Isidore did not explicitly take from his source was the idea that the *ius gentium* is based on natural reason. As observed by Haggenmacher, this omission might well have been deliberate.[29] While Isidore grants that reason generally underlies every form of *ius* and no jurist could conceive that a law can be irrational,[30] the omission of an explicit reference to the *ratio naturalis* even when his probable source did include such reference, indicates that he did not conceive of the *ius gentium* as closely associated with the *ius naturale* as Gaius or Cicero. For Isidore, the *ius naturale* had a moral dimension that the *ius gentium* did not have. In his definition of the *ius naturale*, Isidore referred explicitly to metaphysical values of justice and equity:

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[26] Haggenmacher, *Grotius*, 1.9.29; Juan de Churruca, *Las instituciones de Gayo en San Isidoro de Sevilla* (Bilbao: Publicaciones de la Universidad de Deusto, 1975), 27.

[27] *Etymologiae* 5.6. I made use of the following edition of the Latin original and checked it with the modern edition in the ALMA collection: *Isidori Hispalensis Episcopi, Etymologiarum sive originum libri XX*, ed. Wallace Martin Lindsay (Oxford: Clarendon, 1911), Isidoro de Sevilla, *Etymologías. Libro V. De legibus—De temporibus*, ed. Valeriano Yarza Urquiola and Francisco Javier Andrés Santos (Paris: Les Belles Lettres, 2013). There is a modern translation in English: *The Etymologies of Isidore of Seville*, trans. Stephen A. Barney et al. (Cambridge: Cambridge University Press, 2006).

[28] Alfonso García Gallo, "San Isidoro jurista," in *Isidoriana: Colección de estudios sobre Isidoro de Sevilla con ocasión del XIV Centenario de su nacimiento*, ed. Manuel C. Díaz y Díaz (León: Centro de estudios San Isidoro, 1961), 139; Churruca, *Las instituciones*, 27.

[29] Peter Haggenmacher, "Sources in the Scholastic Legacy: *Ius Naturae* and *Ius Gentium* Revisited by Theologians," in *The Oxford Handbook of the Sources of International Law*, ed. Samantha Besson and Jean d'Aspremont (Oxford: Oxford University Press, 2017), 57.

[30] *Etymologiae* 5.3; Paolo Grossi, *L'ordine giuridico medievale* (Bari: Laterza, 1995), 137; Cortese, *La norma giuridica*, 2:261.

> 1. *Ius naturale* is common to all nations [*commune omnium nationum*] and, because it exists everywhere at the instigation of nature, it is not grounded on some human positive law. Such is the union of a man and woman, the succession by one's children and their education, the common possession of everything, the same liberty for all, and the right to take for oneself whatever is seized from the sky, the earth, and the sea. 2. Also the return of things which were entrusted and of money which was deposited, and the repulsion of violence by force. Because this, or whatever is similar to it, is never unjust, but is held to be natural and fair.[31]

The conclusion that Isidore managed a conception of *ius gentium* removed from Gaius's sense of *ius naturale* is further supported by the scope of Isidore's *ius naturale*. Isidore did not employ Ulpian's obvious term of *animalia* as the scope for the *ius naturale* but instead preferred *nationes*, hinting at the etymological link between *natura* and *natio*.[32] He seemed to have conceived the *ius naturale* as primarily applicable to humans and not to animals. The examples he listed can all be interpreted as applicable to humans, while some of the examples necessarily excluded animals, such as succession, or the return of goods and money deposited.

If Isidore's *ius naturale* applied only to humans, the obvious question is how did he conceive the *ius gentium*? Isidore defined the *ius gentium* as the law common to all *gentes* and defined the *ius naturale* as the law common to all *nationes*. What was the difference between *gentes* and *nationes*? *Natio*, *gens*, *nasci*, and *natura* were etymologically all related to each other.[33] Etymology, then, cannot explain the difference between *nationes* and *gentes*. Rather, what can be observed is that Isidore's examples of natural law defined relations between individuals. When Isidore stated that *ius naturale* is "common to all nations," his point was that even in the absence of political communities, individuals would form sentimental unions, use what they take from the common, enjoy freedom, transmit their values and identity to their children, return what's entrusted to them, and defend themselves. No group identity, no abstract political entity is necessary to understand these relationships; they exist truly "at the instigation of nature." By con-

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[31] *Etymologiae* 5.4.

[32] For *animalia*, see *Digest* 1.1.1.3 and *Institutiones* 1.2.pr. On the link between *natura* and *natio*, see Haggenmacher, *Grotius*, 1.9.2.31, n. 1538.

[33] *Etymologiae* 9.2.1; Kaser, *Ius Gentium*, 13; Robert Bartlett, "Medieval and Modern Concepts of Race and Ethnicity," *Journal of Medieval and Early Modern Studies* 31 (2001): 39–56; Haggenmacher, *Grotius*, 1.9.2.31.

trast, his institutions of the *ius gentium* all presuppose the existence of some kind of organized community: elsewhere in his *Etymologies*, Isidore explained that political communities came to be formed by the "occupation of land, construction and fortification."[34]

The deliberate omission of the *ratio naturalis* as a source of the *ius gentium* and its presupposition of the existence of political communities are clear indications that Isidore conceived of the relationship between the *ius gentium* and the *ius naturale* in a different way than the dominant conception in the codification of Justinian. But why?

To fully understand the reason why Isidore took a different path, it is necessary to look beyond the strictly Roman law tradition and take into account late-classical theological traditions.[35] After all, Isidore was a man of the Church. He was thoroughly influenced by the teachings of St. Augustine, in particular as seen through the lens of St. Gregory the Great, who was a close friend to Isidore's brother Leander.[36]

Augustine had no use for the term *ius gentium*, not in the *City of God*, nor in any of his other writings.[37] Given Augustine's familiarity and ongoing dialogue with the work of Cicero, this omission cannot have been a coincidence and thus must be seen as a rejection of the Ciceronian conception of *ius gentium* as based on reason and close to nature.[38] Augustine focuses instead on the divide between the eternal law (*lex aeterna*) and natural law (*lex naturalis*) on the one hand, and human law (*lex temporalis*) on the other hand. The *lex aeterna* is the divinely ordained and universal order. The whole creation takes it as its standard, and it is eternal and immutable. It is God's understanding as to how his creation must be ordered, and as such it manifests divine reason (*ratio divina*) and divine will.[39] Man can know of and

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[34] *Etymologiae* 15.2.5–6.

[35] Karl-Heinz Ziegler, "*Ius gentium* als Völkerrecht in der Spätantike," in *Collatio iuris romani: Études dédiées à Hans Ankum à l'occasion de son 65e anniversaire*, ed. Robert Feenstra (Amsterdam: Gieben, 1995), 665–75.

[36] Jacques Fontaine, *Isidore de Séville: Genèse et originalité de la culture hispanique au temps des Wisigoths* (Turnhout: Brepols, 2000), 247–50.

[37] Ernest L. Fortin, "Augustine and the Problem of Modernity," in *Classical Christianity and the Political Order: Reflections on the Theologico-Political Problem*, ed. J. Brian Benestad (Lanham: Rowman and Littlefield, 1996), 144; Mary M. Keys, "Religion, Empire, and Law among Nations in *The City of God*: From the Salamanca School to Augustine, and Back Again," in *International Law and Religion: Historical and Contemporary Perspectives*, ed. Martti Koskenniemi, Monica García-Salmones Rovira, and Paulo Amorosa (Oxford: Oxford University Press, 2017), 80–81.

[38] Fortin, "Augustine and the Problem of Modernity," 148.

[39] Anton-Hermann Chroust, "The Fundamental Ideas in St. Augustine's Philosophy of Law," *American Journal of Jurisprudence* 18 (1973): 57–79.

participates in the *lex aeterna* through the *lex naturalis*. The *lex naturalis* is implanted into the heart and soul of the individual, a "sense belonging to the inner man,"[40] which is the manifestation of the *lex aeterna*. Therefore, every man, even the wicked, has the capacity to know the basic moral principles of the *lex naturalis*, thanks to his capacity of reason. Due to the Fall, however, man's capacity of reason is impaired, which renders the natural law less effective. Divine grace restores the effectiveness of natural law.[41] But, as divine grace can't be taken for granted, human law, though tainted by human sinfulness, somehow also assists the effectiveness of the natural order. The assistance provided by human law primarily takes the form of deterring people from the worst type of abuses against the divinely willed order. As human law inspires fear of punishment, it contributes to suppressing evil.[42] In this way, human law is an essential tool in the preservation of the natural order.[43]

Isidore endorses this Augustinian view.[44] Political power inspires fear and terror to coerce people to abstain from evil, and human law has the capacity to hold people in place.[45] Isidore categorically divides law into divine law (*fas*) and human law (*ius*).[46] Divine law is equiparated with nature, while human law appears under two forms (*species*): statute law (*lex*) and custom (*mos*).[47] As we've seen, for Isidore natural law dealt primarily with the individual, as it did for Augustine. But Isidore reintroduced the concept of the *ius gentium*.[48] *Ius gentium* was clearly part of human law, not derived from, or close to natural law. For Augustine, political communities and human law had a role to play in the effectiveness of the natural order. But he hadn't really explained how they came into existence. Isidore filled that gap, by identifying the *ius gentium* as the driving force behind the origin, development, and change of commonwealths. In his definition of the *ius gentium*,

[40] Augustinus, *De Civitate Dei*, ed. Bernhard Dombart and Alfons Kalb (Turnhout: Brepols, 2014 [=1955]), 11.27.
[41] Richard J. Dougherty, "St. Augustine on Natural Law," in *Research Handbook on Natural Law Theory*, ed. Jonathan Crowe and Constance Youngwon Lee (Cheltenham: Edward Elgar, 2019), 70.
[42] Robert A. Markus, "The Latin Fathers," in *The Cambridge History of Medieval Political Thought, c. 350–c. 1450*, ed. James H. Burns (Cambridge: Cambridge University Press, 1988), 111; Herbert A. Deane, *The Political and Social Ideas of St. Augustine* (New York: Columbia University Press, 1963).
[43] Chroust, "The Fundamental Ideas," 76–78.
[44] Andrea Padovani, *Perché chiedi il mio nome? Dio natura e diritto nel secolo XII* (Torino: Giappichelli, 1997), 103–4.
[45] Isidorus Hispalensis, *Sententiae*, ed. Pierre Cazier (Turnhout: Brepols, 1998), 3.47.1.
[46] *Etymologiae* 5.2.
[47] *Etymologiae* 5.3.
[48] Fortin, "Augustine and the Problem of Modernity," 196n51.

Isidore posits the list of *sedium occupatio*, *aedificatio*, and *munitio*. Elsewhere in the *Etymologiae*, he explains his use of those terms. He envisions how individuals settle together on unoccupied land, develop the settlement, and build protection.[49] Ultimately, they organize themselves in political communities.[50] War explains why and how these political communities come and go,[51] a very Augustinian thought.[52] The institutions of the *ius gentium* not only determine these changes into the subdivisions of the earthly city, but, as all other human law, they also provide most important remedies, like private property and slavery. Because when commonwealths were subject to change, and the law produced by a commonwealth could no longer be presumed to be enforceable, the institutions of the *ius gentium* somehow kicked in to prevent utter anarchy and destruction, but only if so willed by God.

The inclusion of Isidore's text in the *Decretum Gratiani* gave it the same authoritative voice as the Roman law texts in the *Digest* and *Institutiones*. In the first few *distinctiones* of his great work on canon law, the so-called *Treatise on Laws*, Gratian relied heavily on Isidore, and copied him nearly word for word.[53] Like Isidore, Gratian divided the law into *fas* and *ius*. Gratian also stressed that divine and natural law stood in opposition to human law, in Augustinian fashion highlighting the dignity and age of natural law, and explaining the need for human-made custom to give way to truth and natural law in cases of contradiction.[54] However, Gratian added some

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[49] *Etymologiae* 15.2.5–6; 15.9.1–3.
[50] *Etymologiae* 9.2.1 and 9.1.1.
[51] *Etymologiae* 9.3.2.
[52] Deane, *The Political and Social Ideas*, 31.
[53] Jean Gaudemet, "La doctrine des sources du droit dans le Décret de Gratien," *Revue de droit canonique* 1 (1951): 5–31. Knowledge on the history of the drafting of the *Decretum Gratiani* has increased dramatically thanks to the work of Anders Winroth, *The Making of Gratian's* Decretum (Cambridge: Cambridge University Press, 2000) and the lively discussions following its publication. See Melodie H. Eichbauer, "Gratian's *Decretum* and the Changing Historiographical Landscape," *History Compass*, 11/12 (2013): 1111–25. For the purpose of this article, I will not make a distinction between the first and subsequent recensions of the *Decretum*, and I will call its author "Gratian." I used the edition of Emil Friedberg and checked it against the edition of the first recension currently being prepared by Winroth, October 5, 2019, accessed March 4, 2020, www.gratian.org. There is also a translation of the relevant distinctions: Gratian, *The Treatise on Laws (Decretum DD. 1–20) with Ordinary Gloss*, trans. Augustine Thompson and James Gordley (Washington: The Catholic University of America Press, 1993).
[54] *Decretum Gratiani*, D. 5 dict. ante c. 1; D. 6 dict. post c. 3; and D. 8 dict. ante c. 2; Dominique Bauer, "The Importance of Medieval Canon Law and the Scholastic Tradition for the Emergence of the Early Modern International Legal Order," in *Peace Treaties and International Law in European Legal History from the Late Middle Ages to World War One*, ed. Randall Lesaffer (Cambridge: Cambridge University Press, 2004), 210.

important elements of his own. For instance, he linked the idea of the *ius naturale* with the Golden Rule. He said that natural law is what is contained in the Law (*lex*) and in the Gospel.[55] The Golden Rule was Jesus's summary of the teachings of the laws of Moses (*lex*) and the Prophets (Mt. 7:12; Lk. 6:31)—the principle that one should treat others as one would want to be treated (and to not do to others what one would not want done to oneself, Tob. 4:12). When Gratian linked the Golden Rule to natural law, he made use of a long theological tradition spanning from Augustine and Prosperus of Aquitaine (d. ca. 455) to Hugh of St. Victor (d. 1141).[56] Unlike those Roman jurists who in Ciceronian fashion stressed reason as the grounds for the validity of natural law, most theologians after Augustine tended to emphasize revelation as the source of natural law, given man's corrupt nature after the Fall.[57] Gratian also identified natural law with revealed divine law, de-emphasizing the role of reason.[58] However, he made an important and crucial innovation. Earlier theologians had linked the Golden Rule to the *lex naturalis*. Gratian linked it to the *ius naturale*.[59] *Lex* referred to written law and had a voluntaristic connotation because it required promulgation by an authority. *Ius*, by contrast, was a much richer term, with connotations of justice and equity. *Ius* referred to the transcendental significance of the legal system[60]; *lex* was a tool.

Gratian's immediate purpose in making the terminological shift from *lex* to *ius* was so he could frame the Isidorian conception of *ius naturale* within the theological tradition of the Golden Rule. This conceptual link between the *ius naturale* and the Golden Rule, in turn, had two effects. First, it increased further the Isidorian separation between the *ius naturale* and the *ius gentium*. Adding the metaphysical layer of the Golden Rule to the concept of the *ius naturale* necessarily limited the scope of the *ius naturale* to human beings, as Isidore also had conceived it. Second, it opened the door again for doctrines originating in Roman law that grounded the *ius naturale* in man's capacity for reason; all human beings have sufficient capacity for reason to know how they want to be treated by others. I will explain

[55] *Decretum Gratiani*, D. 1 dict. ante c. 1.
[56] Pennington, "*Lex naturalis* and *ius naturale*," 575–77. For Augustine, see Chroust, "The Fundamental Ideas," 72.
[57] Haggenmacher, "Sources in the Scholastic Legacy," 53.
[58] *Decretum Gratiani*, D. 1 dict. ante c. 1 and D. 9 dict. post c. 11; Rudolph Weigand, "Die Rechtslehre der Scholastik, bei den Dekretisten und Dekretaliste," *Ius Canonicum* 16 (1976): 62–63; Padovani, *Perché chiedi il mio nome*, 104.
[59] Pennington, "*Lex naturalis* and *ius naturale*," 576.
[60] Pennington, "*Lex naturalis* and *ius naturale*," 573.

that this grounding in reason was exactly what happened when the decretists started to comment on the *Decretum*.

THE DECRETISTS

The decretists encountered two traditions: they had the text of the *Decretum Gratiani*, which was their immediate source and object of commentary; and they had the Roman law texts. These two traditions had certain elements in common, along with some important differences. Both Justinian and Gratian favored a moral understanding of the *ius naturale*. They both linked it to equity and justice. But while Justinian's texts still left marginal room for more down-to-earth conceptions of *ius naturale*, Gratian added a theologically inspired conception of superiority of natural law, and he linked the *ius naturale* to the Golden Rule. For Gratian, the scope of *ius naturale* was therefore restricted to human beings, while Justinian extended its scope to all *animalia*. Another difference between Justinian and Gratian was the relationship between the *ius gentium* and the *ius naturale*. To a large extent, Roman jurists thought there was a close relationship between the *ius gentium* and the *ius naturale* through the *ratio naturalis*. Gratian, following Isidore, rejected this. For him, the *ius gentium* was not "natural law for human beings only" but rather he opted for a great divide between the *ius gentium* as man-made law and *ius naturale* as God-made law.

For the first generation of scholars that commented on the *Decretum*, there was never any doubt on the human origin of the *ius gentium*.[61] Paucapalea identified it as the law that some peoples had established.[62] Stephen of Tournai, while commenting on Ulpian's division of law into *ius naturale*, *ius gentium*, and *ius civile*,[63] linked this tripartition to Gratian's initial dichotomy of the law into *ius naturale* and *mores*. He said that *mos* could be split up into *ius gentium* and *ius civile*.[64] The author of the *Summa Reverentia sacrorum canonum* agreed and identified the *mos*, consisting of *ius*

[61] For context on the decretists covered in this section, see several articles in *The History of Medieval Canon Law in the Classical Period, 1140–1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington (Washington, DC: The Catholic University of America Press, 2008).

[62] Paucapalea, *Die Summa über das Decretum Gratiani*, ed. Johann F. von Schulte (Giessen: Emil Roth, 1890), 6, ad D. 1 c. 9: "Ius gentium est illud quod gentes sibi quaedam constituerunt."

[63] *Decretum Gratiani*, D. 1 c. 6.

[64] Stephan of Tournai, *Die Summa über das Decretum Gratiani*, ed. Johann F. von Schulte (Giessen: Emil Roth, 1891), 7, ad D. 1 dict. ante c. 1.

gentium and *ius civile*, as what Plato had called "positive law."[65] The author of *Animal est substantia* said that *ius gentium* was *ius humanum*.[66]

While the decretists stressed the human origin of the *ius gentium*, they gradually diminished the divide between the *ius gentium* and the *ius naturale*. The first step thereto was taken by Rufinus. For Rufinus, *ius naturale* was a force (*vis*) instilled by nature in man that allowed him to do good and avoid evil. In truly Augustinian fashion, Rufinus accepted that the original sin had corrupted this force to distinguish between good and evil. After the Fall, man thought that everything was allowed. This corrupted version of *ius naturale* was first reformed with the Mosaic law and later fully restored with the Gospel.[67] Even so, the period in between the Fall and the Mosaic law was not one of complete lawlessness. The same natural force (*vis naturalis*) was not dead but continued to slumber in man. This force was what distinguished man from animals; it was the privilege of knowledge (*prerogativa sciendi*) and the privilege to live in accordance with the law (*prerogativa lege vivendi*). Such privilege induced man to consult and agree with his fellow man on some institutions of mutual benefit and to leave behind some of the practices and habits of beasts and animals. The institutions that were so agreed upon, such as contracts of sale and hire, were *ius gentium*.[68]

For Rufinus, the sparks of justice were not entirely extinguished with the Fall. The *vis naturalis*, which was present in man but not in animals, was focused on knowledge and *scientia*. Rufinus explicitly distanced him-

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[65] *Summa "Reverentia sacrorum canonum*," ed. John C. Wei (Città del Vaticano: Biblioteca Apostolica Vaticana, 2018), 3–4, ad D. 1 dict. ante c. 1.

[66] *Animal est substantia*, ed. Emile C. Coppens, accessed March 25, 2019, www.medcanonlaw.nl (site discontinued), ad D. 8 c. 1, "v° *iure humano*, Id est iure gentium."

[67] Rufinus, *Summa decretorum*, ed. Heinrich Singer (Paderborn: Schöningh, 1902), 6, ad D. 1 dict. ante c. 1: "Est itaque naturale ius vis quedam humane creature a natura insita ad faciendum bonum cavendumque contrarium. . . . Hoc igitur ius naturale peccante primo homine eo usque confusum est, ut deinceps homines nichil putarent fore illicitum . . . Postmodum vero per decem precepta in duabus tabulis designata ius naturale reformatum est, sed non in omnem suam plenitudinem restitutum, quia ibi quidem omnino opera illicita, sed non omnimodo operantis voluntas condemnabatur. Et propterea evangelium substitutum est, ubi ius naturale in omnem suam generalitatem reparatur et reparando perficitur." See also Nederman, *Bonds of Humanity*, 44–46.

[68] Rufinus, *Summa*, 4, praefatio: "Cum itaque naturalis vis in homine penitus exstincta non esset, nimirum satagere cepit, qualiter a brutis animalibus, sicut prerogativa sciendi, ita et vivendi lege distaret. Dumque deliberavit homo cum proximis convenire et mutuis utilitatibus consulere, continuo quasi deinter emortuos cineres scintille iustitie, modesta scilicet et verecundiora precepta, prodierunt, que agrestes ac feros hominum mores ad decora atque honesta revocare et concordie subire federa docuerunt et certas pactiones inire: que quidem ius gentium appellantur, eo quod illis omnes pene gentes utantur, sicut sunt venditiones, locationes, permutationes et his similes."

self from the jurists, who in the wake of Ulpian, managed a conception of *ius naturale* that referred to what all animals had in common and that could not be much more than natural instinct.[69] By contrast, the natural force envisioned by Rufinus fit Gratian's and Isidore's conception much better.

The natural force that was peculiar to man had been created at the same time as man himself. After the Fall, it was a corrupted version, but basically still the same natural force that led human beings to create the *ius gentium*. The *ius gentium* thus came into existence before the Mosaic law and the Gospel. This is crucial for understanding why for Rufinus the *ius gentium*, even if it was propelled by the same *vis naturalis*, could never be identical to the *ius naturale*. The *ius naturale* had a moral dimension that the *ius gentium* did not have. The main objective of the *ius gentium* was mutual benefit. The Mosaic law created awareness of what was good and bad; the Gospel made it wrong for people to want to do something evil. The possibility of moral blame or praise, based on will, was what for Rufinus distinguished the *ius naturale* from the *ius gentium*.

Rufinus stayed very close to Gratian's conception of natural law, which had a moral dimension that the *ius gentium* lacked. However, at the same time, the *ius naturale* and the *ius gentium* had something in common: the *vis naturalis*. Isidore and Gratian had not stressed reason in particular as a ground for the *ius gentium*, and Rufinus himself did not explicitly endorse it as a ground either. But Rufinus did say that the *vis naturalis* was linked to clarity of knowledge (*scientiae claritas*) and the privilege to know (*prerogativa sciendi*). In so doing, he opened the door for others to identify reason as the common element in the *ius gentium* and the *ius naturale*.

After Rufinus, it would take a long time before this *vis naturalis* was explicitly identified as *ratio*. Stephen of Tournai agreed with Rufinus that the *ius gentium* was created before the Mosaic law and the Gospel. He declared that the *ius gentium* was derived from human nature only and that it could also be called natural law.[70] Stephen did not explain what he meant when he said that the *ius gentium* had its origin in human nature *only*, but this can only refer to the lack of a moral dimension following the Fall, as he made a clear distinction between *ius naturale* in a moral sense and the *mores*, consisting of the *ius civile* and the *ius gentium*. Stephen also did not explain what made human nature so special that it could produce the *ius*

[69] Rufinus, *Summa*, 6, ad D. 1 dict. ante c. 1, v° *humanum genus*; and 9–10, ad D.1 c. 7 v° *terra marique capiuntur*. The early decretists widely accepted the idea that the legists managed a different conception of *ius naturale* than themselves.

[70] Stephen of Tournai, *Summa*, 7, ad D. 1 dict. ante c. 1: "Dicitur et ius naturale ius gentium, quod ab humana solum natura quasi cum ea incipiens traxit exordium."

gentium. He did not call it a *vis naturalis*, nor did he call it reason or mutual benefit.

Stephen linked the *ius gentium* to the *ius naturale* in another way. Following Rufinus, he distinguished between the *ius naturale* precepts, prohibitions, and demonstrations. The demonstrations were those institutions of natural law that did not command or prohibit but were of a permissive, non-obligatory kind, meaning that human law was actually allowed to devise alternative institutions. For instance, man by nature was free, yet evidently slavery and servitude still existed. Likewise, common property was a demonstration of natural law, but man had introduced private property all the same.[71] Stephen identified those institutions that changed the demonstrations as *ius gentium*.[72] This identification of the *ius gentium* with institutions that changed the demonstrations of natural law became a familiar idea.[73]

Why could the *ius gentium* introduce changes to the demonstrations of the *ius naturale*? Simon of Bisignano, who otherwise did not discuss the concept of *ius gentium*, initiated a very influential idea. He said that even Cain possessed a capacity for reason, a superior part of the soul that Simon called *ius naturale*.[74] Following Gratian, for the decretists, Cain had been the prototype of man in between the Fall and the Mosaic Law, the period in which customary law and *ius gentium* presumably had their origins.[75] Even in his fallen condition, man had kept the capacity for reason that allowed him to devise customary law and institutions of *ius gentium*. While for Rufinus, this

[71] Brian Tierney, *Liberty and Law: The Idea of Permissive Natural Law, 1100–1800* (Washington, DC: The Catholic University of America Press, 2014), 15–47.

[72] Stephen of Tournai, *Summa*, 8, ad D. 1 dict. ante c. 1: "Detractum in demonstrationibus, tamen non in praeceptis vel prohibitionibus, sicut in libertate, quae per ius gentium immutata est, et servitus inducta."

[73] *Summa "Elegantius in iure divino" seu Coloniensis*, ed. Gerard Fransen and Stephen Kuttner (New York: Fordham University Press, 1969), 9, cap. 33; *Summa "Omnis qui iuste iudicat" sive Lipsiensis*, ed. Rudolph Weigand, Peter Landau, and Waltraud Kozur (Città del Vaticano: Biblioteca Apostolica Vaticana, 2007), 13, ad D. 1 c. 7; *The Summa Parisiensis on the Decretum Gratiani*, ed. Terence P. McLaughlin (Toronto: Pontifical Institute of Medieval Studies, 1952), 7, ad D. 8 dict. post c. 1; Huguccio, *Summa decretorum. Tom. I. Distinctiones I–XX*, ed. Oldrich Prerovský (Città del Vaticano: Biblioteca Apostolica Vaticana, 2006), 131, ad D. 8 dict. post c. 1.

[74] Simon of Bisignano, *Summa in Decretum*, ed. Petrus V. Aimone Breda (Città del Vaticano: Biblioteca Apostolica Vaticana, 2014), 2, praefatio: "Nobis itaque videtur quod ius naturale est superior pars anime, ipsa videlicet ratio que sinderesis appellatur, que nec in Cain, teste scriptura, potuit extingui."

[75] Stephen of Tournai, *Summa*, 16, ad D. 6 dict. post c. 3; Magister Honorius, *Summa "De iure canonico tractaturus*," ed. Rudolph Weigand, Peter Landau, and Waltraud Kozur (Città del Vaticano: Biblioteca Apostolica Vaticana, 2004), 24, ad D. 6 dict. post c. 3.

capacity had been a *vis naturalis* corrupted by the original sin, for Simon of Bisignano, it was *ratio* equiparated with *ius naturale*.

The association of the *ius gentium* with the *ius naturale* via the *ratio* thus became a real possibility for the decretists. The evolution toward this association was primarily driven by canonist and theological thought. But once the canonists had made the association, the parallel Roman law tradition was a very powerful ally to reinforce it. Unlike Rufinus and Stephen, who stressed the differences with the Roman law conceptions of *ius gentium* and *ius naturale*, the later generations of decretists had no problem seeing the synthesis between Roman law and canon law. The author of the *glossa ordinaria* to the *Decretum* did not hesitate to use Gaius's definition of the *ius gentium*.[76] Decretists thus recognized that there were several meanings of *ius naturale* and that Ulpian and Gratian used *ius naturale* in different ways. It was therefore important to distinguish between the different meanings of *ius naturale*. This was exactly what the decretists did by making lists of definitions of *ius naturale*.

Huguccio, for instance, distinguished between four different meanings of *ius naturale*. First, he identified it as reason (*ratio*) and the natural force of the soul (*naturalis vis animi*) with which man distinguishes between good and evil. Second, *ius naturale* refers to the *iudicium rationis*, the act triggered by the *ratio*: doing good, giving alms, worshipping God. Third, Huguccio referred to the instinct of nature, that which all animals have in common. This is Ulpian's conception of *ius naturale*. And finally, Huguccio referred to *ius naturale* as the written law of the Mosaic law and in the Gospel. This is also called divine law (*ius divinum*).[77] In a slightly different form, this list was incorporated into the *glossa ordinaria*.[78]

Almost every decretist made his own list of definitions of the *ius naturale*. Following Stephen of Tournai, these lists regularly came to include the *ius gentium*. While some decretists were careful to point out that *ius gentium* was natural law only in an improper way,[79] and others resisted the trend to consider *ius gentium* as one of the meanings of the *ius naturale*,[80] by the end of the twelfth century, the idea of *ius gentium* as a form of natural

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[76] *Glossa ordinaria* ad D. 1. c. 9, in *Decretum Gratiani emendatum et notationibus illustratum una cum glossis* (Editio Romana, cum glossis, 1582), 5.
[77] Huguccio, *Summa*, 7–12, praefatio.
[78] *Glossa ordinaria* ad D. 1 c. 6, v° *ius naturale*, 5.
[79] Honorius, *Summa*, 11, ad D. 1 c. 9; *Summa "Elegantius in iure divino,"* 11, cap. 38; *Animal est substantia*, praefatio, r. 21.
[80] Huguccio, *Summa*, 7–12, praefatio; *Summa "Reverentia sacrorum canonum,"* 2–4, ad D. 1 dict. ante c. 1; *Glossa ordinaria* ad D. 1 c. 6, v° *ius naturale*, 5.

law was firmly consolidated. Invariably, the later generation of decretists pointed to the *ratio naturalis* as the identifying link between the *ius gentium* and the *ius naturale*.[81]

AQUINAS

There was not much love lost between Aquinas and the jurists. At one point in his *Summa Theologica*, Aquinas called them ignorant, and the rivalry between the schools of theology and canon law at Paris was relentless.[82] However, while writing his treatises on law and justice, Aquinas had no other choice but to confront the very influential works composed by Justinian and Gratian. In his *Summa Theologica*, Aquinas twice discussed the relationship of the *ius gentium* with natural law: in his so-called *Treatise on Law* and in his chapter on justice. In both places, Roman jurists and Isidore were his guides—in the case of Isidore, through the text of the *Decretum Gratiani*.[83] A detailed discussion of Aquinas's legal theory exceeds the scope of this article, but it is clear that he disagreed with Isidore and Gratian on a number of points. For Gratian, the *ius gentium* was not at all *ius naturale*, nor had it been for the first generation of decretists. Aquinas, by contrast, endorsed Justinian's conception of *ius gentium* as natural law.

While for Isidore and Gratian, natural law was divine law because of the revelation in the Mosaic law and the Gospel, Aquinas saw greater detachment between divine law and natural law. Natural law was not primarily implanted in individuals to help them discern the *lex aeterna*, but was rather associated with the order inherent in nature. As a rational creature, man is capable of detecting the natural order and acting accordingly.[84]

Furthermore, unlike Isidore and Gratian, Aquinas thought that there was a strong association between natural law and the *ius gentium*, with the

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[81] *Summa "Tractaturus Magister*," quoted in Weigand, *Naturrechtslehre*, 186; *Summa Duacensis*, quoted in Weigand, *Naturrechtslehre*, 239, 279; Raimund of Peñafort, *Summa de iure canonico*, ed. Xaverio Ochoa and Aloisio Diez (Roma: Commentarium pro religiosis, 1975), 5–6, ad P. 1, tit. 2.

[82] Tierney, *Liberty and Law*, 87; Thomas Aquinas, *Summa Theologiae* (Romae: Editio Leonina, 1897), II^{a}-II^{ae}, q. 88, art. 11.

[83] Pennington, "*Lex naturalis* and *ius naturale*," 580.

[84] Haggenmacher, "Sources in the Scholastic Legacy," 53; Pia Valenzuela, "Between Scylla and Charybdis: Aquinas's Political Thought and His Notion of Natural Law and *Ius Gentium*," in Martti Koskenniemi, Monica García-Salmones Rovira, and Paulo Amorosa, eds., *International Law and Religion*, 51; Jean-Marie Aubert, *Le droit romain dans l'oeuvre de Saint Thomas* (Paris: Librairie Philosophique J. Vrin, 1955), 89–105.

ratio naturalis as its primary link. The *ratio naturalis* enabled man to detect both the natural order as well as its opportunities and effects. While animals could only detect the absolute order of natural law, man could also distinguish what the order was for. This capacity to consider and weigh opportunities was how natural law and *ius gentium* related to each other. Aquinas wrote, "To consider something by comparing it with what results from it, is proper to reason. And therefore it is natural to man according to natural reason, which dictates it. And that is why the jurist Gaius tells that 'law which natural reason has established among all human beings is among all observed and is called *ius gentium*.'"[85]

For Aquinas, principles of natural reason guided man to derive his laws from natural law.[86] Human law could be derived from natural law in two ways: either by way of conclusion (*per modum conclusionum*) or by *determinatio*. As a conclusion, human law was a deduction from the natural law premises, as when the prohibition to kill was the conclusion from the premise that it is wrong to inflict harm on others. The *determinatio* was a process of derivation from natural law that left much more discretion to man, as when the law lays down the punishments for different types of offences.[87] Aquinas identified the *ius gentium* as a deduction, under the guidance of reason, from natural law principles by way of conclusion. Therefore, it was normal that almost universally man had developed the same kind of institutions of *ius gentium*.[88]

We can now return to Aquinas's question of whether the *ius gentium* was more natural law than human law. In a way, for Aquinas, all human law was derived from natural law. Even the laws arrived at by *determinatio* kept some connection with natural law. But the validity for the law derived by *determinatio* was grounded on human authority only, while the validity of the conclusions, of which the *ius gentium* was an example, was both human and natural.[89]

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[85] Aquinas, *Summa*, II^{a}-II^{ae}, q. 57, art. 3: "Considerare autem aliquid comparando ad id quod ex ipso sequitur, est proprium rationis. Et ideo hoc quidem est naturale homini secundum rationem naturalem, quae hoc dictat. Et ideo dicit Gaius iurisconsultus: Quod naturalis ratio inter omnes homines constituit, id apud omnes gentes custoditur, vocaturque ius gentium."

[86] Aquinas, *Summa*, I^{a}-II^{ae}, q. 95, art. 2.

[87] Finnis, *Aquinas*, 266–74.

[88] Aquinas, *Summa*, I^{a}-II^{ae}, q. 95, art. 4: "Ius gentium est quidem aliquo modo naturale homini, secundum quod est rationalis, inquantum derivatur a lege naturali per modum conclusionis quae non est multum remota a principiis. Unde de facili in huiusmodi homines consenserunt."

[89] Aquinas, *Summa*, I^{a}-II^{ae}, q. 95, art. 2.

So far, Aquinas arrived at a grounding of the *ius gentium* that was reminiscent of the one produced by the jurist Martinus, with its reference to both *industria humana* and *ratio naturalis*. But Aquinas added something of his own. He stressed that the *ius gentium* did not have to be instituted specifically (*institutio specialis*) by human authority; it was only that human authority had come to adopt it anyway. The reason why it did not need an *institutio specialis* was the approximate equality (*aequitas*) between human beings: "Because natural reason dictates that those are institutions of *ius gentium*, that is, as requiring an approximate equality. That is why they do not need to be instituted specifically, but why it is natural reason itself to institute them."[90]

For Aquinas, *ius gentium* did not primarily refer to the origin, growth, and relationship between commonwealths in the earthly city, as it did to Isidore. Aquinas's conception focused rather on institutions that allowed people to live in a community, such as buying, selling, or slavery.[91] While Isidore also had seen the need for some default human institutions to remedy sin and make the natural order effective in the absence of commonwealths, he, unlike Aquinas, did not base them primarily on the *ratio naturalis*, but rather on the need to preserve God's creation. Aquinas, on the other hand, took the *ratio naturalis*, implying the equality of human beings, as the ultimate ground for this type of institution,[92] even of slavery, insofar as it was mutually beneficial to slave and master.[93]

For Aquinas, the *ius gentium* was thus not some kind of second-best law, fit for the sinful man after the Fall. To him, it was not the default regime before the advent of the Mosaic law or the Gospel. For Aquinas, following Gaius, *ius gentium* was the collection of legal institutions that happened to be organized similarly by a large number of people. That empirical observation gave the *ius gentium* a presumption of legitimacy over and beyond its potential in rendering the natural order effective in a sinful world. He found its legitimacy in the *ratio naturalis*, which in turn explained the strong link that Aquinas saw between the natural law and the *ius gentium*.

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[90] Aquinas, *Summa*, II^{a}-II^{ae}, q. 57, art. 3 ad 3: "quia ea quae sunt iuris gentium naturalis ratio dictat, puta ex propinquo habentia aequitatem; inde est quod non indigent aliqua speciali institutione, sed ipsa naturalis ratio ea instituit."

[91] Aquinas, *Summa*, I^{a}-II^{ae}, q. 95, art. 4. Compare with Alexander of Hales, *Universae theologiae summa* (Venetiis, Franciscus Franciscium, 1576), P. 3, q. 27, art. 3, § 4.

[92] James Gordley, "Equality in Exchange," *California Law Review*, 69 (1981): 1587–656; Finnis, *Aquinas*, 136.

[93] Aquinas, *Summa*, II^{a}-II^{ae}, q. 57, art. 3.

Aquinas thereby came to endorse the civilian conception of the *ius gentium*, a conception that was absent in Gratian. For Aquinas the *ratio naturalis* was a strong link between the natural law and the *ius gentium*, while Isidore and Gratian had de-emphasized it. Aquinas, however, did not just disagree with Gratian and side with the civilians. To a certain extent, he misunderstood him. This misunderstanding was entirely forgivable. After all, later decretists already assimilated Roman law doctrines into their theory of the *ius gentium*.

CONCLUSION

In spite of the fact that his main sources, Gratian and Justinian, managed different conceptions of the *ius gentium*, Aquinas came to a remarkably coherent theory. But consistency came at the cost of reading Justinian's conception into the *Decretum Gratiani*. For Gratian, the *ius gentium* was not at all *ius naturale*, nor had it been for the first generation of decretists. Aquinas, by contrast, endorsed Gaius's and Justinian's conception of *ius gentium* as natural law. The reason was that it fit his natural law theory, a theory that itself was based on a theological or Aristotelian, but not juridical, tradition. Moreover, the decretists had prepared the way to read Justinian's conception into the *ius gentium*. Rufinus and Huguccio maintained a strict separation between the *ius naturale* and the *ius gentium*, but gradually the *vis naturalis* that man had maintained after the Fall came to be recognized as the *ratio naturalis* that could be found in the Roman law sources. This identification allowed the Roman law ideas to be incorporated into the canonical tradition, and thus overcome the Augustinian ideas that the decretists had started with.

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