Review

Reviewed Work(s): Natural Rights Theories: Their Origin and Development by Richard Tuck

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NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT by Richard Tuck. Cambridge: Cambridge University Press, 1979. Pp. 185.

Perhaps nothing is so striking about political philosophy in the last two decades or so as the revival of the concept of rights—natural, human, and moral. Theory here may only be following the election returns, for ever since the Universal Declaration of Human Rights (1948), the terminology of rights has played a significant role in the rhetoric of domestic and international politics. It is only rather recently, however, that English-speaking writers have given concentrated attention to the history of the concept of rights, a subject that for many years has occupied various continental scholars.

Richard Tuck's book is a noteworthy contribution to this area. His topic is natural rights theories, but statements to the effect that men *have* natural rights do not seem to occur prior to the late Renaissance. The classical notion of *ius naturale* is primarily an "objective" notion—what is naturally right or just—and the problem of the relationship between rights and the right becomes controversial in the early modern period. According to Tuck, the essence of a natural rights theory is that prima facie rights are ascribed to natural men. This means, presumably, that rights are ascribed to men in a presocial or precivil condition, or to men described independently of their social or political relations. For figures who deny or discount the existence of natural men, or who altogether ignore the question of their existence, one will be hard pressed to discover a natural rights doctrine, though a rights notion of some sort might be attributed to them. Central to this topic, as treated by Tuck, are views held regarding *dominium*—property—and discussions of property play an important role in Tuck's exposition of natural rights theories up to and including Locke.

This book covers a great deal of ground. Tuck begins with a brief account of Roman legal materials. The classical jurists distinguished between having *dominium* in something and having a *ius* in it, a distinction that caused difficulties for many later writers, since the possibility of assimilating the two concepts seems to have been crucial in the development of natural rights theories. Tuck then takes the reader from the first modern rights theory, which had its origins in the twelfth century and which flowered into a "full natural rights theory" in the thought of Jean Gerson in the fourteenth, through the humanist lawyers

of the Renaissance, the Spanish thinkers in the sixteenth century, Grotius (who set the terms of subsequent debate), John Selden and his followers, Hobbes, and the seventeenth-century English radicals. He concludes with Pufendorf's repudiation of central earlier doctrines and with advances in natural rights theory made by Locke.

The two great *floruits,* says Tuck, were comparatively short-lived, c. 1350-1450 and c. 1590-1670. For the first period, Tuck shows that theories as to the nature and scope of rights, to a large extent, grew out of theological disputes on Franciscan poverty and on whether private possession is founded on divine grace. Regarding the second period, Grotius's importance is well recognized, but Tuck rescues Selden from relative obscurity and demonstrates his influence on subsequent English writers, particularly the Tew Circle in the 1630s. More controversial perhaps, given Hobbe's many departures from the Tew thinkers, is Tuck's location of Hobbes in the Seldenian line. Also debatable, I think, is Tuck's attribution to Locke of more radical conclusions than the texts may warrant.

One theme of the book deals with the *type* of right recognized by the various figures. Tuck employs the current terminology of "passive" and "active" rights in his exposition, and he also speaks of "claim" rights. The achievement of a conception of rights—the first modern rights "theory"—is said to be the accomplishment of the twelfth-century glossators; their theory was built on the notion of passive rights and according to it all rights were claim rights. By the fourteenth century, with the introduction of the category of *dominium utile* as describing what it is that a usufructary possesses, theorists began to regard any right as a property right and took rights to be active. This conception was made the cornerstone of Gerson's theory, a conception that was revived toward the end of the sixteenth century by the Portuguese, Luis de Molina, and which dominated the second *floruit.*

Tuck, I believe, does not supply an adequate account of these crucial terms and distinctions. Ulpian (third century) stated that "Justice is the constant and perpetual will of giving to each his own *ius.*" As Tuck points out, in discussions of this statement, the twelfth-century glossators defined *ius* as *meritum,* which Tuck translates as "claim." At least some of these writers, however, developed this conception of rights out of a concern for the relationship between *ius* and justice. The prevailing view is expressed by Placentinus, that rights derive from justice *tanquam ex fonte rivuli,* just like rivulets from a spring. The terms *meritum* and *ius* thus have a moral connotation, which the translation as "claim"

suppresses. This connotation is shown by glossator references to Cicero's definition of "justice" (*De Inventione,* II, 53, 160): "Justice is the condition of the mind which, which the common utility being preserved, gives to each his own worth *(dignitas),*" a notion that derives from Aristole's idea of *axion,* desert. Placentinus cites Cicero with approval, and he explains that giving someone his *dignitas* means giving him a reward *si bene meruerit,* if he shall have merited well, and a punishment if he shall have sinned. Secondly, Tuck sums up the "claim rights" theory by saying that property rights were construed as claims to "total control against the whole world," and that the early glossators thus had evolved a consistent theory of passive rights. But if anything is an active right, it is a right to "total control." Moreover, the source cited by Tuck as evidence for the later recognition of active rights (after the introduction of *dominium utile*), because it refers to a *ius* to *demand* something *(ius ad petendam rem),* is hard to distinguish from a midtwelfth-century source that defines one's having a right in something if one can use it to claim the thing *(potest eam petere)* from all men. This discrepancy in treatment illustrates the need to sharpen the conceptual equipment employed by Tuck in analyzing his materials.

Tuck correctly makes a good deal of the later medieval change from *meritum* to *potestas* (power, capacity) in the definition of *ius*. The reference to a natural characteristic does seem to suggest something more "active." He disputes Michel Villey's view that William of Ockham's *Opus Nonaginta Dierum* was the first work to expound systematically a doctrine of "subjective" rights. The real advance, however was made by Gerson who, Tuck asserts, was the first to give an account of *ius* as a *facultas,* an ability. "In this way," says Gerson, "the sky has the *ius* to rain, the sun to shine, fire to burn, a swallow to build his nest." Aside from the ascription of *iura* to natural things, I am not sure that Gerson's definition—a *ius* is a *facultus* or dispositional *potestas (potestas propinqua)* appropriate to someone and in accordance with right reason—is importantly different from Ockham's conception. By claiming that *ius* was a *facultas,* Tuck says, Gerson was able to assimilate *ius* and *libertas.* But this assimilation, too, had long been in the air. *Magna Carta* (1215) constantly conjoins *iura* and *libertates.* Yet Gerson truly may have been the originator of a "full" natural rights theory, for he apparently conceived man's relation to the natural world as a replication of God's sovereignty over the universe.

Another theme of the book turns on a distinction between "strong" and "radical" rights theories. A strong theory holds that man is at liberty to renounce all of its rights, including the right of self-defense and resistance. This type of theory—propounded by Selden and his

followers—was the weapon of conservatives and tends toward absolutism. A "radical" theory allows that though men *can* renounce all their rights, they never do so. This position tends to permit revolution when the government violates basic retained rights; it also recognizes a right to use other people's property *in extremis.*

The seeds of both types of theory, as Tuck shows in a very useful survey, can be found in the writings of Hugo Grotius, whose final views tended toward absolutism. Grotius came to hold that the complete alienation of liberty and the renunciation of the right of self-defense are possible. He also stressed the notion of laws of nature, understood in terms of things being good or bad from their own nature. Much of political theory after Grotius turned on the absorption, modification, or rejection of these Grotian doctrines.

Especially notable is the position of John Selden. Selden rejected the high traditional notions of "right reason" and natural law as consisting of innate moral principles, thereby antedating Hobbes on this point. Contrary to Grotius, Selden postulated a condition of "boundless liberty" in which everyone has the same rights, and on which condition obligations are supervenient. He was thus faced with the problem of the binding force of obligations, which he resolved by taking punishment—ultimately divine punishment—as their ground, and the law of nature was viewed as the law of God revealed to man in specific historical periods. From earlier writers Selden borrowed the distinction between permissive and obligatory natural laws: The former allows the making of contracts and the latter mandates that contracts should be kept. Though he did not regard the English Constitution as resting upon a contract of total servitude and renunciation, binding on future generations, he held such a contract to be entirely possible under the *ius permissivum.*

Absent from Tuck's account (and from Selden, too?) is an explanation of why anyone should ever want to enter political society. This is supplied by Selden's Tew Circle followers (e.g., Dudley Digges), a group active in the 1630s. They stressed the distinction between the right *(ius)* of nature and the law *(lex)* of nature. Like Selden, they held the state of nature to be a condition of natural liberty limited only by contracts, which divine law obliges one to obey. Reason tells us that by renouncing our natural rights of resistance and self-defense we will obtain a more excellent good; there is a high probability of obtaining benefits and a low probability of wrongly suffering at the hands of the sovereign. Jeremy Taylor, a later Seldenian, advanced the point that the right of nature is a negative right, a right not to be interfered with, which does not pass any obligations on to someone else. This conception of natural

right was implicit in the Seldenian tradition, and it is a strange right indeed that passes no "moral effect" on others, as Pufendorf was to argue in his attack on Hobbes.

It is to the seventeenth-century English radicals that we owe the idea that natural rights survive entrance into political society, but Tuck sees the radicals (even the Levellers) united with the strong, conservative theorists in holding that it is "logically possible" for man to entirely renounce his freedom. But the radicals employed the "principle of interpretive charity" with respect to political agreements: In the absence of historical evidence to the contrary, it is to be presumed that men have not renounced all their freedom. So, says Tuck, for Henry Parker the existence of reserved rights derives from the duty of self-preservation and the principle of interpretive charity. All this, I think, is highly misleading, and I do not understand what "logically possible" can mean here. Parker makes it quite clear that it is "not just or possible for any nation to enslave itself," that this would be "unnatural." Overton says that "by nature no man can give that power to another," and Ascham speaks of the complete renunciation of liberty as one of the "moral impossibilities." The radicals were concerned with a question of justification, what a man *may* do, and their "liberal" doctrines involved the revival of natural law as a standard for judging the validity of civil laws.

Tuck's lengthy treatment of Hobbes is of special interest for its claim that Hobbes's thought emerged from the Tew Circle and particularly that seeing his thought in the perspective of its development resolves the problem debated by Warrender and his critics. Warrender's problem—if self-defence is a right of nature, not a duty under the laws of nature, how do we get the supreme duty to "seek peace"?—arises because Hobbes retained the Tew distinction between the right of nature and the law of nature, a distinction which, if I understand Tuck's reading of the later Hobbes, Hobbes might well have dropped. Still, says Tuck, had Hobbes done so, he would have been unable to describe the state of nature solely in terms of rights on which the laws of nature supervene. I myself do not see how all of this "solves" Warrender's problem. More generally, I think it incorrect to attribute to Hobbes the Seldenian view that the laws of nature supervene on man's natural condition and that they are based upon historically acquired experience. Hobbes is quite clear about the hypothetical character of the state of nature and that the laws of nature are principles that men acknowledge insofar as they are self-interestedly rational. It is the tenor of the *Leviathan,* I think, that we know the laws of nature as divine laws only because they are rational for us to adopt.

In conclusion, a remark about Tuck's general project. At the beginning of the book he explains that he thought that a study of the historical development of natural rights theories might shed light on problems in contemporary political philosophy. Unfortunately, he does not state what these problems are, nor does he ever return to the issue in the body of his book. This disappointed me because I feel Tuck would have interesting things to say here. However, it probably is churlish to mention this matter, since Tuck's book is so full of learning and interesting insights. It will prove extremely useful for researchers in the field, and Dr. Tuck deserves our compliments.

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