

## Natural Law and Natural Rights Before Liberalism

Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York and London: Continuum, 2005)

Francis Oakley, *Omnipotence, Covenant, & Order: An Excursion in the History of Ideas from Abelard to Leibniz* (Cornell University Press, 1984)

Oakley's book on natural law is an exploration of Western intellectual history in search of the origins of the seventeenth century's ideas of natural law, of the laws of nature and of natural rights that were so central and impactful in that century and in the eighteenth. He focuses on the "ultimate grounding rather than the specific content of natural law theories." (p. 23) Simultaneously, he tests ideas advanced by historians about the modifications that these ideas are said to have undergone in their journey through time. There are chapters consisting of essays on each of these ideas, but also a foundational and important first chapter on "Metaphysical Schemata and Intellectual Traditions" which explores the context for the appearance of these natural law ideas. As this is the story of voluntarism, its origin and trajectory, which has begun to play an important role since the 1980s in historians' explanation of major cultural shifts, it is valuable to have the medievalist Oakley's careful account of how voluntarism arose.

He begins by explaining that he wants to challenge an entrenched presumption by historians of political theory that there was a major discontinuity between modern and medieval natural law theory, a view especially represented by Leo Strauss, who becomes his foil at important junctures in the book, and also to take on the interpretive schools for whom "rupture, caesura, discontinuity, break have come to command a degree of attention bordering sometimes on the obsessive." (p. 13) This leads him on a protracted programmatic discussion of how these tendencies have assumed dominance. In doing so he notes the extreme claim by the discontinuity school "that the late medieval subscribers to one or other form of epistemological nominalism (was well as seventeenth-century voluntarist successors like Hobbes and Locke) *could not* possibly have been natural law thinkers at all." (p. 22) Oakley's challenge to these ideas is significant, not only for the intellectual history narrowly focused on these natural law ideas themselves, but also for the general cultural histories, that make the rise of voluntarist thinking a central motif, and then by emphasizing the *potentia absoluta* side of Ockham's thinking vs the *potentia ordinata* side (ideas which Oakley explores in these books) attempt to portray the emergence of a *secular* culture in the West as the inevitable outcome of the rise of nominalism in late medieval times. One can think of Michael Allen Gillespie's *The Theological Origins of Modernity*, for example.

But the result of a careful examination of the history, such as Oakley will perform, is that the stages of this narrative will get complicated and messy:

Contrary to widespread belief, a variety of natural law theories flourished in the Middle Ages. And even if we prescind now from much of that variety, embrace a measure of expository concision, and indulge in ... simplification..., we must still concede (and, again, widespread belief to the contrary) that the scholastic thinkers of the later Middle Ages passed down to their early modern successors not one but two principal and conflicting traditions of natural law thinking. (p. 23)

As an interpretive matter, he rejects “the traditional periodization of European history into ancient, medieval and modern” with instead the “epochal shifts” having happened in the twelfth and eighteenth centuries and the period in between being one era. With the exception of the foundations laid in the first chapter, the discussion is of intellectual developments in that single era. He proposes “three principal arguments, the first is that much of the variety in natural law thinking across the past two millennia and more ... reflects the ambiguity of the word *nature* itself.” The second is “that, at least, as far as the last thousand years are concerned, the most important break, shift, or discontinuity in the understanding of natural law, though not, interestingly enough, natural rights, was that which occurred in the fourteenth and fifteenth centuries.” Third, “what precipitated this particular shift or discontinuity within the orbit of scholastic philosophy and theology was the renewed pressure on modes of thought, Neoplatonic or Aristotelian in origin, of extra-philosophical commitments of biblical provenance, not least among them the alien insistence on the untrammelled freedom, transcendence, and omnipotence of God.” (pp. 25-26)

This is the theme that keeps recurring in the cultural histories of Europe written after 1980, such as Gillespie’s, Willis B. Glover’s *Biblical Origins of Modern Secular Culture*, and Larry Siedentop’s *Inventing the Individual: The Origins of Western Liberalism*. As it is summarized by Oakley:

The achievement of the church fathers and their medieval scholastic successors in appropriating for their own purposes the philosophic legacy of Hellenic and Hellenistic antiquity and in harmonizing it with religious commitments of biblical inspiration was a truly remarkable achievement historic in its enduring significance. But we should not miss the fact that it was also an achievement, fraught with instability and tension and predicated at times .... on overambitious attempts to render compatible the contradictory and harmonious the dissonant. (p. 26)

The result of this attempted synthesis of the Greek and Christian worldviews is what he compares to “a profound geologic fault ... right across and beneath the often conflicted landscape of our Western intellectual tradition. Along that subterranean and long-forgotten fault, periodic bursts of seismic activity are inevitably to be expected: the bumping, the grinding, the subduction, if you will, of those great tectonic plates of disparate Greek and biblical origin which long ago collided to form the unstable continent of our *mentalité*.” (p. 26) The late middle ages is one such period of upheaval resulting in “a reconceptualization of the metaphysical grounding of the law of nature in both moral/juridical order and the order of physical nature.” (p. 27)

Throughout the book Oakley will seek to contrast a view of the laws of nature “conceived in organic terms, fraught with purpose and finality and open to investigation by analytic or deductive modes of reasoning capable of delivering knowledge that is certain or absolute” with “a notion of the laws of nature as imposed by an external will” and which “presupposes or entails a system which harbors a notion of God as extrawordly or transcendent stressing above all his freedom and omnipotence, ... and a natural philosophy ... emphasizing the conditional nature of all knowledge based on observation of a created and radically contingent world which could well have been other than it is.” (p. 30) He indicates Hellenistic Stoicism as an exemplary example of the immanent type of doctrine. “For the Stoics conceived of the physical world as an organic unity impregnated with a reason they regarded as divine. Natural law, therefore, they conceived as universally valid and inherent in the very structure of things....” (p. 31) Early attempts to incorporate Greek philosophy into Christian theology, such as that

by Origen, were not successful. It was the fusion of such philosophical sources during the late empire that provided material more useful to Christian theologians.

There can be few developments in the history of philosophy more tangled and more complex than the movement of ideas in late antiquity that culminated in the fourth century of the Christian era in the Neoplatonic patterns of thought which St. Augustine encountered in what he was wont to call “the books of the Platonists”. Among other things, this movement had involved a persistent tendency to understand the mysterious Demiurgos of Plato’s *Timaeus* not as a mythic symbol but as a real, creative efficient cause of the world, to conflate him, nonetheless, with the transcendent and uncaring Unmoved Mover of Aristotle’s *Metaphysics*, the Final and highest Good which he himself calls “god,” — and, in a crucially influential move, to treat Plato’s eternally subsistent forms, archetypes, or ideas, not as independently and eternally subsistent entities, but as thoughts or ideas in the mind of the supreme God resulting from that cosmic conflation. Thus emerged the notion of a transcendent God, at once the highest good or final cause to which all things lovingly aspire ..., the first efficient cause to which all things owe their existence, the supreme reason (or formal cause) from which all things derive their order and intelligibility, and increasingly ... the object of a lively devotional sentiment. (pp. 45-46)

The parallels between this Neoplatonism and Christian theology made this seem like the ideal model to adapt for the purpose of putting a philosophical ground under Christianity. Augustine appropriated this Neoplatonist synthesis for “a further and quite stunning conflation.”

It was nothing other, in effect, than the conflation of the Neoplatonic God — the God of the philosophers, as it were, in its final, most complex, and most developed form — with the biblical God ... the personal God of power and might who not only transcends the universe but also created it, not out of Platonic or Aristotelian pre-existent matter but out of nothing, the providential God, moreover, from whose omniscient purview not even the fall of a sparrow escapes.... At the same time, by agreeing with Philo, the Neoplatonists, and many of his Christian predecessors that the creative act was indeed an intelligent one guided by forms, archetypes, or ideas of the Platonic mold, but ideas now situated in the divine mind itself as a sort of creative blueprint, he responded to the Greek concern to vindicate philosophically the order and intelligibility of the universe. By virtue of his authority, then, he secured for the doctrine of the divine ideas an enduring place in later Christian philosophy. Clearly, an extraordinary accommodation. (pp. 46-47)

This does not mean that the Augustinian synthesis was a stable one. There was always “the sheer difficulty of reconciling the personal and transcendent biblical God of power and might, upon whose will the very existence of the universe was radically contingent, with the characteristic Greek intuition of the divine as limited and innerworldly and of the universe as necessary and eternal ... with the persistence tendency of Greek philosophers to identify the divine with the immanent and necessary order of an eternal cosmos.” “If the universe was truly rational and ultimately intelligible, could God ever be willful? And if God could really be willful, could the universe be fully rational and intelligible?” (p. 47) Add to this a new factor. With the high Middle Ages Aristotelian ideas arrived, encased in Mohammadan interpretations, and then the Aristotelian texts themselves became available. Aristotle’s “world ... was not a *created* world presupposing the free decision of a divine will, but a world that eternally and necessarily flowed from the divine principle on the analogy of a stream

flowing from its source or of a logical conclusion proceeding necessarily from its premise. As such, it was a determined world in which everything had to be what it was and in which there was room neither for the providence of God nor the free will of man.” (p. 48) This set in motion an attempt to remake the synthesis between Christian theology and Greek philosophy, or to reject a synthesis. “What had ensued in the late thirteenth, fourteenth, and fifteenth centuries was, as a result, a set of philosophical and theological developments of formidable complexity.”

There was the attempted synthesis of Thomas Aquinas:

Assuming the primacy of reason over will, not only in man but also in God, he regarded what in later parlance would be called the physical laws of nature, and also the moral and juridical natural law, in comparatively “Greek” fashion as, both of them, the external manifestation of an indwelling and immanent reason. ... That “eternal law”, then, orders to their appropriate ends all created being, irrational as well as rational, and it is understood as “nothing other than the idea of divine wisdom insofar as it directs all acts and movements” and governs “the whole community of the universe.”

It was the advantage of this way of looking at things that it enabled one to regard the whole of being, the realm of nature not less than that of man, as in some fashion subject to the norms of the same eternal law. The correlative disadvantage, however, was that this subjection to law could equally be taken to extend to God himself, thus threatening at worst to turn him into a merely demiurgic figure limited in his creative activity by the co-eternal forms, archetypes, or ideas, or at best casting a dangerously qualifying shadow athwart his freedom and omnipotence. For the eternal law is nothing other than one aspect of the divine reason itself, and in God reason is prior to will. (p. 50)

What Oakley here calls a disadvantage, is, for many varieties of Christianity, exactly what is desired — a God tamed by his inner necessity to be the sort of God than man needs. This is the *via antiqua* tradition which has been the mainstream for Christian dogmatics, including not only Trent, but the major reformers other than Luther, down to such contemporary writers as Nicholas Wolterstorff (*On Universals: An Essay in Ontology*) and Jean-Marc Berthoud. Oakley is not sanguine about the results of the *via antiqua* synthesis, noting that “the old discord ... far from being resolved in the ingenious accommodations sponsored by the theology of the schools, was simply transposed into another key, sounding now, as it were, in the celestial harmonics of the divine psychology itself and threatening, at least in the view of the more cautious of contemporary theological diagnosticians, the onset even of a species of divine schizophrenia.” (p. 51) The immediate response was the condemnation in Paris in 1277 of “a host of philosophical propositions (including some attributable to Aquinas).” Over the next century opposition materialized in “the somewhat varied group of thinkers who pursued what came to known as “the modern way,” who came to be labeled as nominalists, and who were seen to have drawn their inspiration, at one or other remove, from the philosophical and theological writings of the great fourteenth-century English philosopher and theologian William of Ockham.” (p. 51)

For this group, “taking the omnipotence of God as their fundamental principle” went with “a concomitant understanding of the order of the created world (both the natural order governing the behavior of nonrational beings and, as we shall see, the moral order governing human behavior) no longer as a participation in a divine reason that is in some measure transparent to the human intellect, but rather as the deliverance of a free and inscrutable divine will. And this divine will is bound by no

external standard and is utterly resistant to the curious probings of any merely human intellect. ... Also called into question was the affiliated understanding of the universe as in intelligible organism penetrable *a priori* by reason because it was itself ordered and sustained by a luminous, indwelling, and immanent reason.” (pp. 52-53)

The results of this for natural science was not to immediately adopt an empirical, experimental approach, as might seem appropriate, but to take a more contingent view of Aristotelian science. The solution was “to encapsulate Aristotle’s vision of the world within a larger (and ultimately incompatible) religious framework which stripped from that world its eternity and necessity.” (p. 54) This was because they were “conscious of the possibility that God would have fashioned vastly different world.” Aristotle’s science could still be supposed to be true of the actual world that God did create, even though it could not rationally be known to be true for being the nature of all possible worlds. The conceptual distinction that the natural philosophers invoked was that “between God’s power taken as absolute or as ordained (*potentia dei absoluta et ordinata*), using the term ‘absolute power’ to denote God’s power taken in itself, that is, his capacity taken *in abstracto* and without reference to the orders of grace, morality, and nature which, of his ordained power, he has actually willed to establish.” (p. 55)

While an all-powerful God cannot be bound by the canons of any merely human reason or justice, he is certainly capable by his own free decision of binding himself to follow a certain pattern in dealing with his creation, a pattern dictated by “the ordinary law,” which, you will recall, Suarez, had spoken of as God having imposed “upon himself.” So the biblical God who knows, of course, no absolute necessity, has freely chosen to bind himself by what was called a conditional or hypothetical necessity, a “necessity appropriate to God,” as Robert Holcot put it, “because of his promise, that is, his covenant or established law” ... (p. 56)

This last point of Oakley’s about God’s self-binding, which Oakley sometimes calls the covenantal idea, is very important to take notice of, because it is ignored or denied by all interpreters and historians of a secular mentality, leading in the end to a misrepresentation of the logic of Western history. It’s dismissal leads to an interpretation of Western history as necessarily secularizing, rather than that the secular direction being a freely chosen path due to a rejection of certain alternatives. As well, the failure to see this (besides the failure to grasp Ockham’s use of the *potentia ordinata* in his political theory) has been at the root of such types of dead-end conservatism as that of Richard M. Weaver (*Ideas Have Consequences*). (But to give him his due, Weaver probably had no clear idea of Ockham’s real views, only scholarly caricatures of the earlier twentieth century.)

Oakley also notes an important bifurcation in the meaning of the *potentia absoluta* and *potentia ordinata* distinction.

At its inception, and certainly in the classical usage favored by Aquinas and many others in the Middle Ages, the absolute power was not understood as a presently active one by means of which God intervenes in the world to act apart from (or set aside) the order he has established by what was called his ordained power. Instead, it was taken to refer to God’s *hypothetical* ability to do many things he does not in fact choose to do. ... Well before the end of the thirteenth century, however ... a different understanding of the absolute power had established itself, one that side by side with the classical usage was in subsequent centuries to endure. It envisaged the possibility that God’s absolute power, by virtue of which he can do anything that

does not involve a formal contradiction, is a potentially active or operational power whereby he can contravene ... the laws — natural, salvational, moral — which, by his ordained power, he has actually willed to establish. In accordance with this view miracles can be understood as instances of God’s actual exercise of his absolute power.” (pp. 56-57)

Here I wish to enter an objection. This latter view of the *potentia absoluta* and *potentia ordinata* distinction sees God intervening in time to make an exception to what he had established at a previous time. But if God is outside of time, if eternity is timeless, then this later distinction cannot exist, except as an artifact of the human perspective, and what is actually taking place is a complication in the pattern of the *potentia ordinata*. God determines, timelessly, that the world always rotates, except on Joshua’s long day, when it stops for a bit. Nevertheless, Oakley is describing an historical view, one that soon came to exist in medieval philosophy and which persisted.

Here is also a good place to consider Oakley’s earlier book, *Omnipotence, Covenant, & Order*, which is concerned with the *potentia absoluta* and *potentia ordinata* distinction. The book exhibits the same preoccupation with methodology as the *Natural Law* book, as it also elevates the history of the scholarship on the subject ideas to a prominence near to that of the historical ideas themselves. Oakley introduces a discussion in 1067 between Desiderius and Damiani. The view advocated by Damiani is that:

God, who has no need of any creature and is nudged by no necessity to create, out of that nothing into existence draws this natural world of ours, establishing its order, imposing upon it its customary laws. Incapable in his omnipotence and in his eternal present of suffering any diminution or alteration of his creative power, that natural order he could well replace, those laws at any moment change. .... And how ... can we deny that God can undo the past—that is, so act that an actual historical event should not have occurred?” (*Omnipotence*, p. 43)

The theoretical context for this Oakley finds, citing Lovejoy, in a theological fusion, that had created three Gods in one. First there was “God as goodness itself, overflowing into creation like a mountain lake giving birth to a stream, moved by the inherent generosity and very necessity of his nature to bring into being everything even remotely conceivable”, the “principle of plenitude”. Second, “God as the good, of whose very essence it is to be self-sufficient perfection, lacking, therefore, in his nature, any reason or desire ‘to bring a universe of imperfect beings into existence.’” But, during “the early Christian era, there was in the third place added to those two previous Gods yet another—the God of Abraham, Isaac, and Jacob, the biblical God of might and power.” That “fusion of three Gods into one being was in his [Lovejoy’s] view ‘perhaps the most extraordinary triumph of self-contradiction, among many such triumphs in the history of human thought.’” (pp. 44-45)

A succession of medieval thinkers was forced to struggle with the issues arising from the unstable fusion, including Abelard, Peter Lombard, and Thomas Aquinas. “The matter in dispute was whether God’s attribute of omnipotence requires us to believe that he has the power to do otherwise or better than he has in fact willed to do.” (p. 47) “The ultimate outcome of such labors was ... the emergence of a scholastic distinction concerning the divine power” that in “its late-medieval and early-modern form ... constituted nothing less than the pivot on which turned a vision of the nature of the universe rivaling in its logical force and imaginative appeal the vision associated with the great chain of being.” (p. 48) That distinct is that between the *potentia absoluta* and the *potentia ordinata*. For a statement of this distinction he quotes Aquinas. For him and those of his school:

The stress ... lies on the real or the ordained power, which evokes the stable, concrete arrangements that the good God, who never acts in a disorderly or arbitrary fashion, has preordained in his creation, has actually chosen to effect, and that we humans can, therefore, safely rely upon. At the same time, the absolute power remains, as it were, on dialectical standby, a matter of abstract possibility periodically evoked to underline the contingency of creation ... the fact that it does not have either to be what it is or even to be at all. (pp. 50-51)

From here the distinction entered its long career:

Certainly, though there are hesitations in some of his formulations, the distinction was given a warm welcome by William of Ockham, who is now thought to have understood it in much the same way as did Aquinas. It enjoyed a continuing vogue among the theologians and philosophers throughout the fourteenth and fifteenth centuries, survived during the sixteenth the ambivalent strictures of Luther and the general ideological turbulence of the Reformation era, and was still being evoked in the early seventeenth century by such Catholic thinkers as Francisco Suárez and by such Protestants as the great Puritan divine William Ames. This last piece of information is particularly important because Ames's classic textbook, the *Medulla theologica*, first published in 1623 in Amsterdam, was widely read in Holland, England, and New England, the Latin edition going through twelve printings, a Dutch translation appearing in 1656, and three printings of an English translation—*The Morrow of Sacred Divinity*—appearing between 1638 and 1643, one of them “by order from the Honorable the House of Commons.” (p. 51)

Ockham's “hesitations” were his occasional introduction of relativity where the ordained powers are said to be what God can do according to his laws, or of an historical dimension such as the introduction of the new Christian dispensation in place of that of the Law. “It seems safe to speculate that the only problem that Peter Damiani, two and a half centuries earlier, would have had with Ockham's uneasy formulations would have been to find them insufficiently forthright and explicit. Damiani's God, after all, knows no yesterday, today, or tomorrow, but only a perpetual now. The mighty power he exercised in creating the world remains unchanged and unchained.” (p. 53) In between, though, had intervened the development of scholasticism. “The great intellectual event of the years separating Ockham from Damiani was the recovery of the entire corpus of Aristotle's writings.” This led to both the Thomistic synthesis and its condemnation at Paris, energizing the search for an alternative to this synthesis, under conditions where its perils had come to be understood.

Among those developing the alternatives was Duns Scotus, who “distinguished .... between the ordained power whereby God acts *de jure*, in accordance with the rightful law he has himself established, and the absolute power whereby *de facto* he can act apart from or against the law, ... for the very rectitude of the law derives from God's will, and it is within his power to decree another law in accordance with which his *de facto* action would become, in effect, *de jure*.” Some philosophers and theologians (Pierre d'Ailly, Suárez, Luther) welcomed this as an improvement to the old understanding of *potentia ordinata*, which Suárez began to call the *potentia ordinaria*. William Ames brought both distinctions into his theology. “The ‘absolute power,’ he says, ‘is that by which God is able to do all things possible though they may never be done.’ ‘The ordained power,’ on the other hand, ‘is that by which he not only can do what he wills but actually do what he wills.’ “At the same time, however, Ames does not forget the newer meaning” and “he renders it by referring to ‘the ordinary and usual’ or ‘the extraordinary and unusual’ providence of God.” (pp. 58-59)

Oakley at this point launches into a discussion of Ockham's use of the distinction, and its subsequent history of usage. A review of Ockham's understanding is best left for the later *Natural Law* book. Oakley's next chapter takes up the scientific revolution of the seventeenth century. Robert Boyle is the major figure here, and he tried to construct an account of "God's relationship to the universe and the nature of his activity with it" that was friendly to both Christianity and science. Oakley takes on the received view that Boyle's attempts to harmonize the two amounted to desperate intellectual gyrations that could not really bring to two worlds together. The problem was his belief in the world as a mechanical system, and his simultaneous commitment to miracles. "The story of the relationship between science and religion in the seventeenth century was, in its most fundamental aspect, the story of the progressive exile of the sovereign God of Abraham, Isaac, and Jacob to the remote and inaccessible post of First Cause." (p. 74) But Boyle's arguments were an appeal to the established idea of the *potentia ordinaria*.

This is was not beginning of this controversy about science, however. Earlier Samuel Clark in defense of Newton had argued with Leibniz. Importantly, Leibniz was the new champion of the principle of plenitude, and held that this must be the best of all possible worlds. That is, he held the view, to get away from which, the distinction between the *potentia absoluta* and the *potentia ordinata* had been invented in the first place. He would not be accepting of a view of science that depended on the distinction. Oakley steps back in history to give us another solution to the problem. There had been an extreme view with denied causality in the world altogether, to deny that there was a *potentia ordinata*, which was advocated by Nicholas of Autrecourt. This view was rejected by the Ockhamists, but "the degree to which they emphasized the absolute power ... did involve a very significant shift in their understanding of the *nature* of that natural order. Aquinas had been able to preserve the Greek idea of "nature viewed as in intelligent organism on the analogy of the individual human being" for which natural uniformities were "the external manifestations of an indwelling and immanent reason." All things participate in eternal law because it is built into their nature, which in turn was grounded in the being of God.

It is the advantage of this way of looking at things that it enabled Aquinas to regard the whole of being—including the realm of natural causation as well as that of man's moral endeavors—as in its own fashion subject to the dictates of the same law. The disadvantage, however, is that that subjection to law could well be seen to extend to God himself, thus threatening his freedom and omnipotence, since the eternal law is nothing other than one aspect of the divine reason, and in God reason is prior to will. (p. 80)

But when that view was replaced by one in which the world was the product of the divine will, without shared archetypes or essences, the world became "an aggregate of particular entities linked solely by external relations...." (p. 81)

And if the natural world ... was no longer conceived as a luminous world fraught with purpose by virtue of its own indwelling rationality, they did see it, nonetheless, as possessing an order that God by virtue of his ordained power had freely imposed upon it. And to *that* contingent order, as Buridan insisted against Autrecourt, the empirical investigations of the scientists, though certainly not proof against the incursions of omnipotence, could be taken to be a safe guide. God does not play games. Just as in the order of redemption, the realm of theological causality, God has bound himself by his covenant with his church to a salvific process that,

though utterly depended on his will, he will not choose to change, so, too, by analogy and in the realm of natural causality, he has bound himself by covenant with the whole of mankind to sustain the particular order that out of the unfathomable freedom of his will he has chosen to impose upon the natural world. The biblical God is not only a God of power and might; he is also a God who, of his incomprehensible mercy, has condescended to bind himself with promises. (p. 84)

It is in this covenantal tradition that Oakley locates Boyle. In fact, Oakley thinks that it is the covenant idea that is behind the rise to prominence of the idea of the imposed laws of nature. Boyle's ideas were normal for his time; they seem strange and forced to those viewing them through the assumptions of a later era. But even in his day they were not universally shared as the case of Leibniz illustrates.

Oakley's final chapter applies the distinction between the absolute and ordained powers to political theories about the divine right of kings, and to papal power. In the course of this he gets drawn into theology, and yet another distinction, this time between the revealed and the secret wills of God, which he says is "somewhat narrower in scope than that between the absolute and ordinary powers." (p. 118)

This returns us to the *Natural Law* book, in which Oakley is about to briefly mention the many figures in his earlier book who made use of the distinction between the absolute and ordained powers, and as many new ones as well.

Turning from his discussion of the "Laws of Nature" to "Natural Law" Oakley once more uses Aquinas to illustrate the contrast between the immanentist and voluntarist views. As rational creatures human beings participate "in Providence itself, in that they control their own actions and the actions of others." (*Natural Law*, p. 71) They even have, Aquinas says, "a certain share in the divine reason itself, from which they derive a natural inclination to such [moral] actions and ends as are fitting." The human "participation in the Eternal Law" Aquinas calls *natural law*. (Quoted in *Natural Law*, p. 72)

Aquinas's position, then, amounts basically to this: that there is an eternal law, an immanent order guiding all created things to their appointed ends emanating from the divine ideas, forms, archetypes, or patterns in accordance with which God created those things. Insofar as it concerns man as such — created in his very essence as a rational, moral being, participant by his god-like reason in the divine idea of the good, co-member with God (to use Leibniz's language) in a "common community of justice", caught up alike in a common web of morality — thus far, the *eternal law* is called the *natural law*. (p. 72)

But what of Ockham's view? Does he take the contrasting view the all law is external and imposed on contingent entities? About this there has been an interpretive problem. Ockham's legal writings come from the later phase of his career when he was no longer a university philosopher, but was acting as the lawyer of the Franciscan order or the emperor, constructing cases for them in their disputes with the pope. Here he makes ample use of natural law.

Texts which link natural law with evident natural reason are broadcast throughout the *Dialogus*, and that law, in its most fundamental mode and as "the natural dictate of reason," is said to be absolute, immutable, and admitting of no dispensation. (p. 75)

How does that harmonize with Ockham's view of the transcendent God who could have commanded, and in that way made good, the opposite of what he did command? "A great gulf would appear to yawn, then, between the voluntarist moral teaching affirmed in these theological and philosophical writings of Ockham's academic years and the seemingly rationalist ethic assumed by the natural law talk of his later political writings." (p. 76)

Oakley finds the solution in that Ockham believed that the good to be what is willed according to right reason, because God had willed it to be so. "In effect, and the point is decisive, it is 'by the very fact that the divine will wills [or commands] it, that right reason dictates what is to be willed' by man." (p. 78) Oakley points out that "in the *Dialogos* itself no less than in the *Sentences* Ockham made clear his commitment to the view that the principles of right reason, and therefore, of the natural law are themselves in the power of God. He does so by extending the concept of divine law, or direct divine command to cover the whole of natural law; 'every natural law', he says, is 'contained explicitly or implied in the divine Scriptures.'" (p. 79) Conversely natural laws are tacit divine commands, and natural reason itself was created by God in accordance with the world he also had created. (Here there seems to be a hint of an anticipation of Thomas Reid.) Here Oakley brings in the distinction between the absolute and ordained powers of God.

That distinction ... was deployed in the later Middle Ages in an effort to vindicate the freedom and omnipotence of God and the concomitant dependence of the order of physical nature on his will, while at the same time, on the grounds of his faithfulness to his promise or covenant, affirming the *de facto* stability of the particular order he has actually chosen to institute. ... By that ordained power, however, he has actually established a moral order to which right reason is our unfailing guide. When Ockham speaks, then, of a natural law which is absolute, immutable, and admitting of no dispensation, it should be recognized that he is thinking within the framework established by God's ordained power. (p. 80)

Underling the persistence of this idea Oakley identifies a similar type of thinking in John Locke:

... since man has been made such as he is, equipped with reason and his other faculties and destined for this mode of life, there necessarily results from his inborn constitution some definite duties for him, which cannot be other than they are.

For since, according to His infinite and eternal wisdom, He has made man such that these duties of his necessarily follow from his very nature, He surely will not alter what has been made and create a new race of men, who would have another law and moral rule, seeing that natural law stands and falls together with the nature of man *as it is at present*. (p. 85, quoted from John Locke, Essay VII in Von Leyden, ed., *Essays on the Law of Nature*, pp. 192-93, 198-99.)

Oakley's third topic is natural rights. He points out the controversy over the origin of this concept. This origin is identified as "in the theology of Jean Gerson (thus Richard Tuck), in the nominalism of William of Ockham (thus Georges de Lagarde, Michel Villey, Michel Bastit), in the natural law theory of Thomas Aquinas (thus John Finnis), or even earlier, in the juristic formulations of the twelfth- and thirteenth-century canon lawyers (thus Brian Tierney, Charles Reid)." (p. 89) To get to the "classic" seventeenth century natural rights theories, however he also seeks to trace two other concepts: subjective right and consent.

Oakley especially reviews the arguments of those who see Ockham as the founder of the idea of subjective rights, for linking *jus* and *potestas* “to speak of a right as a licit power”. But the problem with this type of scholarship, besides the previous historical practice of misinterpreting Ockham, has been that much important material is unpublished, and must be located in old manuscripts. To make it more difficult the earliest material is in the forms of comments on legal texts, not organized expositions. But now that much of that work has been done Oakley can simply appeal to the “scholarly research on the natural rights tradition” to show that “however important Ockham’s role may have been as a shaper and transmitter to future ages of the notion of subjective rights, there was nothing particularly novel about his own deployment of that notion.” “It appears also to have begun during the great flowering of legal studies that occurred in the twelfth century.” (p. 100)

First, the use of *jus* or right to mean a subjective right was a commonplace in the twelfth-century canonistic discourse from Gratian himself onward. Further than that, the association of “right” and “power” ... was equally commonplace at that time. By the end of the same century, moreover, the “modern” distinction between “active” or “liberty-rights” and “passive” or “claim-rights” was firmly in place in decretist commentaries. (p. 102)

“But what, in the second place, of the more rarified notion of *natural* rights? Did it, too, rise to the surface during the Middle Ages, or must we await its advent in the seventeenth century?” (p. 103) He says that the “line of argument becomes somewhat more intricate. But here, too, it points to the conclusion that the roots of the concept of natural rights are also engaged in decretist soil.” This seems to come about later than Gratian, though. While he finds a trend to more subjective uses of the idea of natural rights, it is with Ockham that he finds a clear case.

While the concept of subjective right, the moral power of the individual to do something, would arise to address real issues in marriage and contract law, natural right is something out of the ordinary, for the simple reason that legal issues arise out of disputes in a social context, and lawyers look to that context to determine the type of legal concept that applies. Why would they look to nature? The historical cause was the claim of the Franciscans to not own property in imitation of Christ, a claim which was disputed pope John XXII. Instead of ownership they said they only had a use-right to the things that that needed. To argue for the existence of such a right Ockham had to reach past the state of man in society and argue that “far from conferring any proprietary right on Adam and Eve in the state of innocence, God had endowed them only with a ‘power of using’ the consumables they needed for food and drink.” (pp. 104-105) Here is something like the use-right with which Locke began to equip his man in the state of nature with rights. “Something like” because Adam and Eve got their right from God, while for Locke it was given by the natural state.

Ockham did not limit himself to this, but also went on to “appeal to the natural right of a people to choose its ruler, and, further, to the limitation of the power of that ruler.” But here again, it was not like Locke’s consent in a state of nature, as this was done by a people, that it occurred in a constituted social state, and it was not an individual action, but that of a collective.

Taking up the consent idea as such, Oakley finds that the continuity to the seventeenth century concept is weaker. He finds the idea of consent from the late twelfth century onward, but in the form of consent by communities, to choose rulers, or maybe even the form of government, but “that governmental authority as such was not ultimately the product of any free act of human willing” but a natural condition.

So in the end, Oakley has to concede that the seventeenth century did produce something new when the idea of individual rights became the moral foundation, out of which new political theories were built. In conceding this Oakley qualifies and hedges his language so much that it seems that he hopes for more and stronger continuities with the medieval past to yet be demonstrated. But this means as well that these older ideas of subjective right, natural right and consent are separable from the seventeenth century systems that underlie liberal political theories. In their original context they have a function that answered to different needs than the goals of the seventeenth century theories. These liberal theories can be dispensed with without losing the ideas of natural rights or of government by consent.