subtopic

Late Medieval Transformations

NATURAL LAW, CONSENT, *and* EQUALITY:
WILLIAM *of* OCKHAM *to* RICHARD HOOKER
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The 14th through the 16th centuries were a period of transition from the Middle Ages to modernity. There were new developments in the history of natural law thinking, at least two of them of major importance for American constitutionalism. First, in this period writers on natural law gave greater emphasis to the rights of the individual, and in particular to the rights to property and freedom. Second, natural law doctrines of original freedom and equality were used to derive the legitimacy of law and government from the consent of the people, sometimes with the implicit or explicit threat of the withdrawal of that consent in cases of abuse of power.

Late medieval and early modern theories that derived legitimacy from popular consent were associated with the emergence of representative institutions that challenged the more extreme exponents of divine right absolutism. Part of the argument was historical, basing the king's authority on a supposed original transfer of authority from the people to the ruler. That transfer was itself justified by natural-law arguments supporting the original freedom and equality of all men, arguments that constituted an alternative to theories of hierarchical rule based on superior wisdom, virtue, or designation by God. God remained the ultimate source of authority, but the ruler received that authority through the consent of the people. At first popular consent was expressed by the nobles, bishops, or corporate groups in the Church and the state. In succeeding centuries, however, consent became more individualized until it became the decision of the numerical majority, and the collective rights of the people became the natural rights of the individual.

An early figure in the development of such theories was the fourteenth-century Franciscan theologian William of Ockham (1280–1349). Some scholars have argued that Ockham's epistemological nominalism (the denial that universals are any more than names) and his ethical voluntarism (which emphasized the centrality of God's will to moral obligation) undermined or were opposed to the rational foundation of natural law.[1] Other scholars, however, maintain that his nominalism was applicable to objects in the physical world and not to morality, with respect to which Ockham believed that God's sovereign will for human conduct had been revealed through the rational design of his creation. That design provided the basis for the natural law.[2]

Ockham's writings on natural law are significant for the ideas of both individual rights and consent to government. Defending his Franciscan order against papal criticisms of their teachings on spiritual poverty, he distinguished among the various meanings of the Latin word *jus* (law, right) and *dominium* (rule, property) to defend an individual right to property. While he was not a canon lawyer, he cited arguments from medieval Church lawyers who had already debated the status of property and attempted to explain and justify the transition from communal property before Adam's Fall to the contemporary institution of private property. Ockham was also one of the first to derive the legitimacy of government from consent. He drew on statements from Roman and canon law about man's original freedom and equality in order to explain the establishment of legitimate rule in both state and Church through the consent of the governed. He even used the term "the state of nature" (which became so important in the later theories of Hobbes, Locke, and Rousseau) to describe man's original condition. In the case of the Church, that consent was expressed through the universal council that could limit and

even depose the pope. In the temporal order, Ockham argued that the Holy Roman Emperor held his office because of the consent of the Roman people (i.e. those subject to the Holy Roman Empire) as expressed by the bishops and nobles who were the imperial electors.

Ockham's theories influenced the writers of the conciliar movement in the late medieval Church. Councils had existed in the Church since the earliest times, but a crisis created by the existence of two, and later three, claimants to the papal throne provided an opportunity for conciliar theorists to argue for the superiority of the council to the pope. The most detailed and nuanced version of conciliarism was The Catholic Concordance by Nicholas of Cusa, a German canon lawyer and humanist (1401–1464). Along with the other conciliar writers he argued that the pope could be deposed by the council and that consent, normally expressed through representative bodies, was necessary in order to elect Church officers and to adopt legislation at every level. He also called for increased power for the German Reichstag as well as judicial and tax reform in the Holy Roman Empire. His arguments were based partly on the Bible and on the history of the Church and the Empire. More fundamentally, he derived the necessity of consent from natural law doctrines of original freedom and equality and from the "equal natural rights" of all mankind.

In practice, however, these doctrines were largely mythical. The consent that Nicholas demanded was nearly always tacit, and when it *was* expressed, it was given by corporate groups rather than by individuals. However, as a trained canon lawyer, Nicholas proposed new voting procedures and decisions by "the greater part," which sometimes (although not always) meant a numerical majority. The natural law doctrines of original freedom and equality remained as a set of arguments available to opponents of royal absolutism, and the example of the deposition of the rival popes by the Council of Constance (1414–17) was cited as late as the 17th century in England.

While the Protestant Reformers believed that faith in the scriptures was the principal source of morality, they did not cease to believe in natural law. Nevertheless, because of their belief in human depravity as a result of original sin, they did not believe that most human beings would follow the natural law. The Bible itself, in St. Paul's Letter to the Romans, contains a passage that was understood as a reference to natural law: "When the Gentiles who have not the law [of Moses] do by nature the things contained in the law, these having not the law are a law unto themselves who show the work of the law written in their hearts, their consciences bearing witness thereof," (Romans 2:14–15). Both Luther and Calvin wrote commentaries on Romans and cited the passage to argue that basic moral precepts could be known by those who did not know the Bible. Martin Luther was suspicious of all man-made legal systems, but he occasionally referred to a higher law of nature that could be used to criticize the inadequacies of human law: "When you ignore love and the natural law you will never succeed in pleasing God, though you have devoured all the law-books and jurists."[3] Calvin, himself a lawyer, defined natural law as "the judgment of conscience sufficiently between just and unjust and by convicting men on their own testimony depriving them of all pretext for ignorance."[4] Yet for both writers the most important guide to living was the Gospel and only divine grace enabled sinful man to perform good actions.

Natural law became more important for the Calvinist opponents of the French king's attempts to impose Catholicism in sixteenth-century France. Calvin had interpreted Paul's statements in Romans 12 enjoining obedience to governmental authority ("The powers that be are ordained of God") to permit resistance by "lesser magistrates" for religious reasons to unjust rulers. The Huguenot writers of the mid-sixteenth century added to the religious justification of resistance an appeal to the popular origin of political authority and the consequent right of the community to revolt against a tyrannical ruler. The best known of their works, Vindiciae contra Tyrannos: The Defense of Liberty against Tyrants (1579) was translated into many European languages and was cited by the opponents of the Stuart monarchs in seventeenth-century England. The anonymous author (under the pseudonym "Stephanus Junius Brutus") argued that resistance to tyrants was permitted because given that "the people choose and establish the kings, it followeth that the whole body of the people is above the king." He also appealed to natural law: ". . . the law of nature teacheth and commandeth us to maintain and defend our lives and liberties without which life is scarce worth the enjoying against all injury and violence. Nature hath

imprinted this instinct in dogs against wolves, in bulls against lions, . . . and yet much more in man against man himself if man becomes a beast; and therefore who questions the truth of defending himself doth as much as in him lies question the law of nature." Resistance was justified, the *Vindiciae* maintained, not only in defense of the true religion, but also if the king violated the tacit or expressed contract with the people to protect their lives and property.

The derivation of political authority from the consent of the people was also defended by Catholic writers such as the Italian Jesuit Robert Bellarmine (1542–1621), who contrasted the divine origin of papal authority with the popular origin of that of the king, thus attempting to refute the claims of defenders of the divine right of kings. As in the case of the Calvinists, he held that the king's authority was limited by the conditions according to which he had received it from God through the people. John Locke, who based political authority on the consent of the people, knew Bellarmine's arguments seeing as he wrote his *Two Treatises on Civil Government* in order to refute the defense of divine right that Robert Filmer had made against Bellarmine's attack.

Locke was also familiar with The Laws of Ecclesiastical Polity by the Anglican divine Richard Hooker (1554–1600). He cited him in his early writings, purchased a copy of the *Laws* while he was writing the *Two Treatises*, and quoted from it frequently in the Second Treatise. The main purpose of Hooker's work was to defend the Church of England as a middle way between Catholicism and Puritanism. The work opens with a discussion of law that is strongly influenced by the *Summa Theologiae* of St. Thomas Aquinas. Beginning (as Aquinas does) with the eternal law, God's plan for the universe, Hooker derives from it the celestial law of the angels, the natural law governing all of nature, the law of reason governing rational creatures, the divine law revealed in the Bible, and human law by which men apply the precepts of the natural and divine law in contemporary legal systems.

Hooker argues that human reason can discover the existence of God and our moral obligations to others, who are "our equals in nature." "In those times wherein there were no civil societies," (when Locke quotes this passage, he adds "i.e, in the state of nature"), men were bound by the natural and divine law "even as they are men." In order to resolve the conflicts that result from self-interest and partiality, men agree to establish government, and because they are all equal this requires the consent of all. This consent, once given by the community, is binding on subsequent generations, a striking difference from the individual consent to majority rule given by the participants in the social contract in Locke's *Second Treatise*. Hooker also argues that, in the English case, consent was given to an established church, an institution that Locke rejects in his *Letter on Toleration* (1685). Therein he argues that true religion must be based on the individual conscience rather than governmental coercion.

The brief summaries above, and the primary sources presented below, should demonstrate that natural law theory in the period from the fourteenth to the sixteenth centuries contributed to the development of many of the central concepts of liberal constitutional theory: individual rights, freedom, equality, limited government, popular sovereignty, consent to law and government, and the right of the people to resist tyrannical rulers. In the seventeenth century Grotius, Pufendorf, and Locke drew on these sources, along with earlier writers such as Cicero and the Roman lawyers, to create the classic works of modern natural law that influenced the Founding Fathers.

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[1] e.g., Michael Gillespie, *The Theological Origiins of Modernity* (Chicago: University of Chicago Press, 2008).

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[2] e.g., Arthur McGrade, *The Political Thought of William of Ockham* (London and New York: Cambridge University Press, 1974) and Brian Tierney, *The Idea of Natural Rights,* (Atlanta, Ga.: Scholars Press, 1997).

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[3] *On Secular Authority*, II,3

[4] *Institutes of the Christian Religion*, II,2,22

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