

Rights, Law and Political Community:

A theological and historical perspective

Joan O'Donovan

Joan Lockwood O'Donovan is an Oxford theologian who has written extensively on political theology and philosophy

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Most citizens of this country and of other advanced western and westernizing nations approve of human rights, some more guardedly than others; and most perceive rights to belong to the moral, political and legal fabric of modern liberal democracy. By rights, I mean rights attributable to subjects, to persons, whether individual or collective 'persons'. To suggest that rights, freedom, and democracy go together (as does the United Nations Universal Declaration of Human Rights of 1948, which has been the template for subsequent generations of declarations) is a modern truism, which, like most truisms, is largely true.

Less clearly perceived, I think, is the extent to which human rights and democracy are bound up with liberal economics and free-market capitalism. Approval for free-market capitalism, even with a kinder face, is more equivocal in most advanced western societies, particularly, it would seem to me, among serious-minded Christians. Indeed, in today's thinking circles, anxieties are rife about the threats posed by unrestrained market forces to social, economic and democratic rights in the developed and developing world, quite apart from environmental considerations. It is widely perceived that excessive corporate profit and inflated managerial salaries flout the democratic ethos of social equality, that the coercive features of market exchange diminish individual economic freedom, and that the influence on governmental policy of powerful financial and commercial interests threatens the commanding role of the democratic majority. Indeed, there is a mounting sense among democratic populations that the global flow of investment capital seeking

larger profit margins, favourable tax benefits and speculative gains is robbing the majority of the world's citizens of effective political controls over their economic and social futures.

While this raft of anxieties are well-placed at the practical level, they somewhat cloud the deeper issue of how rights, democracy and liberal economic principles are related. To grasp this relationship, it is necessary to become acquainted with the liberal contractarian political tradition: the tradition of Hobbes, Locke, Rousseau, Kant, the apologists of the American and French Revolutions, and still vigorous, with utilitarian accretions, in the work of such contemporary contractarians as John Rawls and Robert Nozick. This, I would suggest, is the majoritarian tradition of *liberal natural rights* in the modern world.

In this tradition, which has supplied much of the ideological glue of contemporary liberal democracy, the equality of individuals is economic before it is political: behind the multitude of naturally self-governing individuals, whose sovereign collective will government serves, is a multitude of naturally self-owning individuals, each with a proprietary right over his/her spiritual and corporeal capabilities and acts, to dispose of them in whatever way he/she chooses. Although individuals are (obviously) not equal in their physical and spiritual resources, they are equal (so it is asserted) in their ownership of them: they are equal as proprietors. Self-proprietors are interested in maximizing their powers of self-disposal or self-determination, their freedom of choice; and they participate in political society as a contractual creation to achieve maximum freedom through the protection of and provision for their rights. Believing in the equality of self-proprietors, individuals are not adverse to honouring the

rights of others, but only as far as their prudential calculations allow, or the political contract which authorizes governmental action requires.

Churchmen and theologians are, at best, naive in their facile appropriation of 'rights' talk

Given the strength of the liberal 'rights' tradition in advanced technological societies, churchmen and theologians are, at best, naive in their facile appropriation of 'rights' talk. Across denominational boundaries there is quite a predictable argument from the creation of human-kind in God's image to the unique dignity of persons in community to their universal possession of rights. Albeit different denominations bring different theological nuances to the argument; nevertheless, there appears to be a consensus about the unproblematic nature of the move from human dignity to human rights, once the theological 'foundation' or 'analogy' is prepared. 'Rights' is accepted by all as expressing moral attributes of a theologically conceived humanity.

Having said this, the Roman Catholic tradition of social teaching over the last century stands out as more theologically and philosophically astute in regard to rights. The concept of 'natural rights' came into contemporary Catholic teaching with the pontificate of Leo XIII at the end of the nineteenth century, and his famous encyclical *Rerum Novarum* put its stamp on the subsequent integration of 'rights' into Catholic social and political thought. As many of you will know, Leo XIII was responding simultaneously to two aspects of the contemporary malaise: on the one hand, to the industrial degradation of the labouring class in a *laissez-faire* environment, and on the other, to the seductive appeal for the downtrodden of atheistic socialism. His alternative Catholic social vision and campaign of action placed in the foreground the right of the labourer, as well as the entrepreneur, to property, and the right of the family to fulfil its natural purpose of mutual love and provision.

In plotting his Catholic alternative, Leo turned principally, as in other matters, to the thought of Thomas Aquinas. But his sources were varied (possibly more than he realized), and included later neo-scholastic theologians and even a dash

of John Locke. In fact, Leo's encyclical tapped into two (let us say) *early-modern* sources of 'rights': firstly, a late medieval theological tradition of 'natural rights', and secondly, a tradition of civic corporatism, powerful in northern Italian, Flemish and German cities from the thirteenth century onward. Forty years later, Pope Pius XI would develop more extensively this corporatist 'rights' tradition. Subsequent Catholic social teaching, it should be said, has increasingly (but by no means wholly) aligned itself with the majoritarian liberal tradition, under the influence of such 'modern' Thomists as Etienne Gilson and Jacques Maritain.

Today I wish to look with a critical theological gaze at these three streams of 'rights' development, the two early-modern and the modern streams, in the hope of clarifying our understanding of how we, in advanced liberal democracies, have come to be where we are, and also of how we should proceed. At the outset, I wish to situate these streams in the larger historical landscape of Christian political thought with a few very general (and possibly reckless) remarks.

Political authority or government was primarily a matter of divine institution

Up until the fourteenth century, Christian political thought functioned virtually without any concept of subjective natural rights - I say virtually, because the concept made a few scattered appearances before the fourteenth century, but was not theoretically developed. In earlier patristic and medieval political theology, God's right established a matrix of divine, natural and human rights or objective obligations that determined the ordering justice of political community. Justice (*iustitia*) was synonymous with objective right (*ius*) - i.e. the objectively right action in any situation - and objective right was what accorded to law, to legal right (*lex, ius*). Political authority or government was primarily a matter of divine institution, appointment and authorization; and the central moral-political act on the part of ruler and ruled alike was to consent to the obligations inhering in communal life according to divine intention and rationally articulated as laws. The ruler commanded, gave laws, issued binding judgments, but he was to command obediently; his

judgments were to conform to the binding revelation of God's will in Scripture. The subject was obligated to obey the ruler's commands, not only because of his rightful authority, but because of their intrinsic conformity to the requirements of justice. And there were, of course, unjust commands that the subject was obligated by God's law never to obey.

In the fourteenth century there was a turn to the moral subject and his capacity for right action, and, from the start, this subjective capacity (i.e. subjective right) was associated with man's created freedom and lordship over the rest of creation. In this newer orientation to natural right, the active individual will occupied a central position, the emphasis being on the subject's control and ownership of his own acts, and increasingly, on his control over his moral and physical environment. Nevertheless, the late medieval development of subjective rights took place on the basis of 'objective right', of natural and divine law; only in the 'rights' theories of the seventeenth and eighteenth centuries was this basis superseded. Moreover, throughout the early-modern period, the older, 'rights'-free political theology continued to be represented in both Augustinian and Thomistic circles, and was revived in the sixteenth century by continental and English reformers.

The theological tradition of natural rights

In the late 1320s - early 1330s, Marsiglio of Padua and William of Ockham produced early, influential, formulations of the concept of subjective right. They produced these formulations in the course of defending the Franciscan order (to which Ockham belonged) from papal attacks on its practice of poverty. This context is significant for the theological issues surrounding subjective right. Briefly, the Franciscan practice of extreme poverty came out of a 'theology of the Cross' that dwelt on Christ's earthly sufferings and destitution; for the brothers, the most perfect discipleship meant participation in Christ's earthly poverty. The brothers' renunciation of wealth came in time to include renunciation of all legal ownership of goods, individual and collective. This allowed them to sustain themselves and their ministries with a range of goods that were owned by others and donated for their use.

While the practice of absolute legal poverty was not, I think, without theological (as well as practical) problems, its theological justification contained a profound truth: namely, that the most perfect love of God and neighbour leaves no room for claiming earthly goods *for oneself and against one's neighbour*. Because property-right creates the possibility of *defending one's claim to something in court*, it is disruptive of the human response to divine love. The great Franciscan theologian, Bonaventure, understood that the legal proprietor of something, in seeking to impose obligation on others regarding it, is involved in a degree of self-possession, separation from other wills, and self-referential attachment to the thing that approaches selfishness and covetousness. Thus, the status of legal poverty was to remove the brothers from the temptation inhering in *property as such*.

Franciscan poverty threatened a church endowed with vast property

Now, it is easy to see how Franciscan poverty threatened a church endowed with vast property. And not only that, it threatened the late-medieval claim of the Roman pope, as Christ's earthly vicar, to have universal *ownership* of temporal goods - a claim that reflected, among other things, the inseparability of 'ownership' and 'jurisdiction' in medieval feudal organization, which forms the backdrop to the appearance of 'natural rights'. In attacking Franciscan poverty, Pope John XXII argued that universal ownership (*dominium*) of temporal goods belonged to Christ's human perfection and lordship (*dominium*), and as well, to Adam's earthly lordship (*dominium*); and that no one could use material things without having, minimally, a legal right of use (*ius utendi*) and in the case of consumable goods (such as food or drink), full ownership of them. Here, in the Pope's protracted vindication of property-right, we already have the theological model that the seventeenth century 'natural right' thinkers would inherit - which, no doubt, explains why the Catholic Church had to wait over 600 years for Pope John XXIII! (Actually, John XXII was condemned for - what one can only describe as - his Barthian eschatology.)

Replying to the Pope's arguments, Marsiglio

and Ockham attributed to Christ and his disciples a 'natural right' to use goods necessary for their sustenance, in the absence of any positive legal right. Moreover, Ockham proposed that Adam and Eve's lordship (*dominium*) over the non-human creation was not ownership in any sense, but a power (*potestas*) of rationally ruling (*regendi*) and managing (*gubernandi*) the non-human creation, which included the power of using the earth's resources for human sustenance and comfort. Apart from his relatively novel concept of a subjective moral power or 'right', Ockham was merely endorsing the mainstream patristic and medieval view of Adamic society before the Fall as a community of sharing in the earth's abundance according to individual need, with no claims of 'mine' and 'thine'. In addition, Marsiglio precisely distinguished the 'objective' and 'subjective' meanings of 'right'. In the primary or objective sense, he explained in *Defensor pacis* 2.12, 'right' meant a dictate of law, whether divine or human; in the subjective sense, 'right' denoted 'a human act, power, or acquired habit' conforming to law (i.e. to objective 'right'). For both thinkers, then, subjective right was the power of a person to perform a lawful action: in other words, it was a 'lawful' or 'licit' power. In a more voluntarist move, Marsiglio described human freedom – that is, the relation of the person's will to his acts – as a form of ownership. Both thinkers also attributed natural rights to collective as well as individual subjects, but we shall reserve collective rights for later discussion.

The next important figure for the theory of subjective right was the late fourteenth/ early fifteenth century Paris theologian, Jean Gerson, a follower of Ockhamist nominalism, but also steeped in Aristotelian and Thomistic thought. While his theological interest was more with corporate than individual rights, he and his mentor, Pierre D'Ailly, inspired a Sorbonnist tradition of theorizing about individual right which continued into the sixteenth century, with far-reaching influence on humanist, Catholic neo-scholastic, and Protestant legal and political thought, well into the seventeenth century. Gerson's legacy included, firstly, his definition of individual right as a 'proximate faculty (*facultas*) or power' conforming to the dictate of 'right reason' or 'primary justice'; secondly, his assimilation of the *facultas* of individual freedom to Adam's natural *dominium*; and thirdly, his proposal that a theory of 'primary

justice would assign to everything its proper 'right', in the sense of 'title' or 'possession' (*De potestate ecclesiastica* 13).

Some of Gerson's followers carried the 'faculty' concept of right further in a voluntaristic, subjectivist, and proprietary direction. As property-right or ownership (*dominium* in the civil-legal sense) increasingly eclipsed non-proprietary use (Adamic *dominium*) as fundamental natural right, it shaped subjective right in a twofold way. In the first place, rights were conceived as immanent spiritual capabilities possessed or owned by individuals, so that their relation to divine command and authorization was not as immediate or transparent. One consequence was that individual freedom was considered by certain late scholastic thinkers to be a property alienable by agreement or contract (as when someone sells himself into slavery). In the second place, the relation of individuals to the external objects of their rights (even objects which they did not own) took on a proprietary character, so that the individual's claim-right to something was construed as a form of *dominium*. Thus, the individual was a moral proprietor (*dominus*) not only of what he actually possessed but also of what he demanded as an entitlement.

All the major late scholastic thinkers affirmed the natural sociability of individuals

It is hardly surprising, then, that social and economic relationships took on an increasingly covenantal and contractual character, and that, from the mid-fifteenth century onward, political society itself was quite regularly viewed as formed by a compact among rights-bearing individuals. Nevertheless, it must be observed that neither the objects of individual rights nor the terms of compacts entered into by individuals were severed from objective right as determined by divine and natural law (even if the moral content of the latter was attenuated at times). Limited contracts of social or economic exchange and even the compact establishing political society itself recognized divinely established social-moral bonds transcending them. All the major late scholastic thinkers affirmed the natural sociability of individuals and natural patterns of human fellowship. Moreover, the majority did not proceed from the

civil compact to endorse principles of popular sovereignty and republican self-government, for this reason: that they were concerned to harmonize their more voluntarist and individualist perspective with the older biblical theological tradition. At their best, they conceived theories of constitutional Christian monarchy – as, for example, did Richard Hooker in his *Laws of Ecclesiastical Polity*; at their worst, they constructed more statist and absolutist monarchical polities on the basis of a total transference of political right from the civil community to its ruler.

Finally, we cannot fully understand this late scholastic tradition of natural rights and political contract apart from the polemical pressures of the times to repudiate the associated ‘heresies’ of John Wyclif and Martin Luther. Both Wyclif and Luther gave moral centrality to gospel freedom and divine right – indeed, they viewed all right as God’s in Christ and refused to develop an independent concept of natural law and subjective rights. Of course, it was Wyclif and Luther’s use of this evangelical perspective to attack the proprietary and jurisdictional powers (spiritual and temporal) of the papal church that called forth such polemical resistance from Parisian and other late scholastic thinkers.

Our next task is to see what the late medieval theologians accepted, as well as what they rejected, in the other early-modern tradition of ‘rights’: that of civic corporatism.

The civic corporatist tradition of rights

The twelfth and thirteenth centuries saw the proliferation over western Europe of cities enjoying a large measure of political independence and sharing many communal, corporate and republican features: legal structures defined by charters; guaranteed equal freedoms and equal civic obligations for their citizens; participation of citizens in municipal administration, either directly or through representative bodies (chiefly guilds); and local churches under some degree of municipal control. The single most important *institutional* source of urban republican developments, whether incipient or full-blown, was the corporation as a juridical, social and economic reality. Loosely definable as a ‘sworn fellowship in pursuit of common aims’, the medieval corporation comprised a collective ‘legal’ (sometimes called

‘fictive’) subject to which legal rights and obligations were attached, both collectively and distributively, i.e., to its individual members. The self-governing and property-owning corporation typically had a head (*syndic, rector, tutor*) elected by the whole body (*universitas*) and a representative at law (proctor) authorized to act for it in various transactions, frequently to carry out its express will. Certain prerogatives such as corporate rule-making remained with the assembled members.

Church fellowship merged with guild solidarity

Urban communities and corporations interpenetrated in various ways. Not infrequently, towns and cities developed out of mercantile guilds which already exercised wide-ranging legislative and judicial control over local trade and commerce. Towns and cities were themselves established as comprehensive corporations with jurisdiction over lesser guilds. In the course of the fourteenth century, municipal corporations absorbed leading guilds into their political structure, resulting in popular representation or in power-sharing between the patrician and artisan classes. Thus medieval urban society was politically homogenized along corporative principles; and, moreover, integrated through a more embracing civic ethos in which natural loyalties and social virtues blended with popular Christian devotion and cultic piety. In mercantile, professional and craft guilds, concerns of economic justice and self-interest, social reciprocity and mutuality, and works of love and piety were deeply intertwined. Correspondingly, the urban churches took on not just congregational but civic features, as church fellowship merged with guild solidarity and the culture of corporate rights and obligations.

While most theologians and philosophers of the period viewed the republican and populist features of urban corporatism with suspicion, many were, nevertheless, drawn to corporative principles and ideas. Construing political society as a natural corporation, they attached to it the rights belonging to other corporate subjects in positive law: rights to make corporate rules and to elect, advise, correct and even to remove corporate administrators. While a theologian like Ockham was clear that all communal political

rights were *divinely imparted, post-lapsarian rights*, a theologian like Marsiglio of Padua neither made the distinction of pre-and post-lapsarian nor mentioned God's authorship of them.

In his *Defensor pacis*, Marsiglio carried through most consistently the theoretical project of republicanism, combining urban corporatism and Aristotelianism in the starkest defiance of the older theological tradition. He laid down the power (right) to make laws as the principal political power, and then set up the political community (*universitas, populus*) as the primary, permanent *legislator* that either acts immediately, or mediately, through the (secondary) agency of a chosen ruler. He granted to the communal *legislator* an ongoing right of political judgment, to be exercised in the periodic election, correction, and (if need be) deposition of rulers, either immediately or through representatives.

Ockham, by comparison, avoided the full-blown republican project of Marsiglio in the following respects. He did not make law-making the pre-eminent political act, nor invest the people as *legislator* with the ongoing, inalienable right of political judgment. Rather he proposed that, in electing a ruler (or a dynasty), the people conferred on him jurisdiction over itself, so that the ruler ruled under God and under law (divine, natural, and communal), but not under the people. In other words, political authority was acquired from the people, but held from God. Moreover, he admitted forms of communal consent other than election in the establishment of political rule; and he justified the forcible removal of rulers by the natural law of necessity, i.e., the necessity of preserving the common good under dire threat, rather than by an inalienable right of corporate self-government.

Of vital importance to the cautious undertaking of Ockham and later theologians to integrate corporative ideas into the theological tradition, was the centrality of the ruler's judicial function: his function of judging and punishing wrongdoing, of vindicating and rewarding right-doing. In the light of the biblical testimony, this function seemed to require the immediate dependence of human on divine political authority, whatever the community's original and continuing powers. But even with this limitation on communal powers, the project of harmonizing communal rights and God's right was fraught with tensions, the thorniest problem being how to relate the divinely

bestowed form of political authority to the constitutional form dependent on communal choice. The coolness of many protestant reformers (both continental and English) to the Aristotelian legacy, to juristic corporatism and to urban republicanism cannot be put down entirely to the political needs and pressures of church reform. Not only the problem of judicial authority but also that of political wisdom – how political judgments may be grounded in a secure knowledge of divine and human law – made them wary of egalitarian rights of political participation.

The Roman church, by comparison, was concerned less with the threat posed by urban corporatism to civil government than with its threat to ecclesiastical government. While the church was by far the most corporatively developed of late medieval polities, having integrated many popular devotional, charitable, and monastic corporations, still, the central core of its corporative structure was the clerical hierarchy; and the corporative rights – administrative and jurisdictional – of the clerical hierarchy were attached to their sacerdotal powers. As the fundamental corporate constitution of the Roman church was, therefore, episcopal and monarchical, collisions with the congregational and corporative ethos of civic churches were plentiful.

Hobbes's individuals have an unlimited right to use everything

The modern libertarian rights tradition

With the political writings of Hobbes and Locke, and the Leveller manifestos of the seventeenth century, arrived the full flowering of the proprietary paradigm of subjective right. Hobbes's chief contribution to this paradigm in *Leviathan* was his redefinition of natural right, over against the scholastic mainstream, as each individual's *unrestrained liberty* 'to use his own power' and to act for his self-preservation, so asserting both the radical priority of natural right to natural law and the radical separation of natural right from social obligation. In their natural condition, Hobbes's individuals have an unlimited right to use everything, including one another's bodies, unbound by obligations of natural justice. Only the

intolerable insecurity of right in this condition necessitates the prudential stratagems for peace known as ‘laws of nature’; which include the ‘mutual transferring of right’ by individuals to a recognized civil power (excepting the right in life and its defence), with the object of securing a sphere of limited (civil) rights.

If Hobbes’s emphasis on the appetitive and unlimited content of natural right projected a model of social relationships as essentially acquisitive, atomistic, and competitive, the Levellers’ and Locke’s concentration on property right projected a market model. The following passage from a tract of Richard Overton indicates how complete was the Levellers’ assimilation of subjective right to property.

To every Individuall in nature is given an individual property by nature, not to be invaded or usurped by any: for every one as he is himselfe, so he hath a selfe propriety, else could he not be himself, and on this no second may presume to deprive any of, without manifest violation and affront to the very principles of nature, and of the Rules of equity and justice between man and man; mine and thine cannot be, except this be; No man hath power over my rights and liberties, and I over no mans, . . . and as we are delivered of God by the hand of nature into this world, every one with a naturall, innate freedome and propriety . . . even so are we to live, every one equally and alike to enjoy his Birthright priviledge; . . . (cited by C.B. Macpherson, *Possessive Individualism*).

Not only does Overton conceive the individual’s property in himself and in his energies and capacities as full ownership – an exclusive power of disposal effective against the whole world, but, as C.B. Macpherson astutely observed, he identifies his total self-possession, his ‘freedom from other men’, with his essential humanity. This identification underpinned all the Levellers’ claims for specific civil, religious, economic, and political rights and freedoms.

The principle advance of Locke beyond the Levellers was his elaboration of the relationship between the individual’s ownership of his capacity to labour and his ownership of the produce of his labour. On analogy with God’s exclusive proprietary right over his creation, the individual has exclusive proprietary right over the objects created by his work, within the broad rational constraints of natural law, that place virtually no

obstacles in the way of wealth accumulation through enterprise in a money economy. The individual’s control of his labour is merely one aspect of his autonomous freedom – his right of unrestrained disposal of his actions *apart from* the obligations belonging to the natural law. Locke’s labour theory of private property also focused attention on the consequences of alienating one’s labour in a wage contract, and so, on the quality of labour as an exchangeable commodity in the economic market.

A century later, the project of reconstructing the political contract along the lines of a market exchange of rights would occupy the forefront of American Revolutionary thought, revealing the outer limit of libertarian individualism. Addressing the question of which natural rights are alienable in the civil contract and which inalienable, Thomas Paine in *The Rights of Man* proposed that each individual retains those natural rights ‘in which the power to execute is as perfect in the individual as the right itself’ (e.g., ‘right of mind’) and ‘deposits . . . in the common stock of society’ those in which ‘though the right is perfect in the individual, the power to execute them is defective’ (e.g., the individual’s ‘right to judge in his own cause’). Paine’s analogy of the joint stock company in which ‘Every man is a proprietor in society, and draws on the capital as a matter of right’, has the effect of accentuating the superior bargaining position and adjudicating power of the contracting individuals and the dominant role of calculative rationality in setting the terms of the civil contract.

The continuing predominance of property right within the negative libertarian tradition is hardly surprising; for it sustains the individual’s primary right of freedom as a power of acting that he possesses, and which entails an obligation of non-interference on the part of all other subjects, and especially, of government. The influence of property right on the more recent tradition of positive or welfare rights is less obvious. For welfare rights are ‘entitlements’ of subjects to goods or opportunities that others alone or in part can provide – e.g. medical care, housing, employment, voting opportunity etc. If the language of entitlement signifies no more than the moral obligations that certain others are under to provide these benefits, as far as is possible, then it does not express property right. In this case, I would suggest, the language is superfluous. If,

however, these entitlements constitute obligation-imposing demands on others made by potential recipients on the basis of their active powers, then they remain within the ambit of property rights. The strongest evidence for the latter is the historical sequence of rights theory in which negative freedoms have preceded positive welfare claims and supplied the framework for their conceptualization. The logic of the transition is this: that individuals are impeded in using fully their personal property (their freedom, and their powers or capacities), owing to the unavailability of the necessary means: their property in these capacities implies their claim-right to these means. In advanced liberal democracies, these claims are regularly held against the government, which, consequently, has the duty to provide the relevant means. That this is so reflects the assumed terms of the political contract in which definite civil/social rights are universally acquired by contracting individuals in exchange for their natural rights.

In a political climate in which communal obligations are derived from contractual exchange, it is hardly surprising that political authority and action should succumb to the logic and principles of market economics. Not merely have contemporary political theorists, enamoured of neo-classical economics, conceived the state as a 'business run by entrepreneurs', political parties as 'firms trying to maximize votes', and voting preferences as 'utility functions', but politicians themselves, as Ian Shapiro observes (in *The Evolution of Rights in Liberal Theory*), 'sell a commodity as entrepreneurs, employ agencies to 'package' their products for advertising, and gear those products to what they believe the market demands'.

Citizens, in their dealings with politicians and government, are increasingly consumer-conscious

Correspondingly, citizens, in their dealings with politicians and government, are increasingly consumer-conscious, seeking the most advantageous political exchange, the best possible protection and provision for their indefinitely expanding range of personal rights in return for their surrender of some freedom and material

property. On the basis of their ever more explicit contractual relations with the state, as formalized in bills and charters of rights, citizens have growing incentives and opportunities to demand legal redress of the failures of governmental and public agencies to furnish the expected goods and services. Such political contractualism spells the reduction of public law and the common good it enforces to private law and private good.

In a wholly secularized liberal democratic polity, where the only coherent public moral language is that of subjective rights, the only universally respected right will be that of freedom, understood as the sovereignty of the subject over his/her physical and moral world, that is, the subject's emancipation from all externally imposed material and spiritual constraints on his/her freedom of choice. In such a polity, rights-claims are only limited by two horizons: the expanding horizon of technological ingenuity and the shrinking horizon of the public purse. Both have already become causes of popular unease, as the gathering clouds of ecological disaster reveal the Faustian character of technological hubris to ever-more people; and ever-more taxpayers are coming to realize that their political investment is subject to the law of diminishing returns, given the inflationary logic of rights.

In addition, liberal democratic polity is inexorably blighted by the tension between the freedom and the equality of rights-bearers, particularly in the economic sphere, where the maximizing of proprietary freedom in market exchange continues to generate extreme economic inequality. But even more corrosive of political community is the denial of a *common moral universe* in which shared spiritual as well as shared material goods mediate and determine the self-transcending of individual wills in their mutual relationships.

Conclusion: The way forward?

Does my historical and theological perspective on rights project a way forward for secular liberal-democratic-rights polity? The answer must be 'no' for this reason: that the principles peculiar to modern liberal democracy are two: the maximization of individual and collective freedom, and the equality of individuals in respect of freedom, and these principles, my analysis suggests, necessarily entail the modern liberal conceptualization of rights. There are, as I trust I have shown, other

rights traditions, but neither of the early-modern traditions manifests the united aspiration to freedom and equality that marks liberal democratic rights culture.

The theological tradition of *natural rights at its liberal best* underpinned Christian constitutional government: it underpinned the rule of law – the principle that government is not its own law but governs according to laws publicly enacted by recognized authorities and consented to by the governed; it underpinned the principle of participation of the governed in legislative and judicial processes, either directly or representatively; it underpinned protection of the lives and property of the governed from unjustified governmental interference. At its worst, it underpinned political absolutism, all rights ending up on the side of government through the mechanism of the civil contract. At any rate, the understanding of the divinely revealed purpose and the requirements of government and commonwealth in this tradition precluded the idea of a self-governing, egalitarian rights polity.

***Radical participatory
democracy requires a high
degree of intellectual,
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The urban corporatist tradition of rights, while more egalitarian, was, if anything, *less liberal* than the theological constitutional tradition. In the first place, its egalitarianism was limited by the commercial foundations of the corporatist culture, which meant that civic rights were, for the most part, tied into economic status, citizenship being a function of guild membership. More significantly, the corporatist culture of *common property and common freedom* was a highly regulative one at the level of guild and of city council – oppressively so, we might decide. Most significant of all, its merging of commercial, civic and ecclesial identity tended toward an immanentist, local cult-piety, insufficiently attuned to the universal church and the distance between the city of God and the city of man. In brief, urban corporatism demonstrated what astute political thinkers have from time to time observed, and what has been proved over and over in history: that radical par-

ticipatory democracy requires a high degree of intellectual, spiritual, and ethical integration – inward and outward conformity, if it is not to dissolve into anarchy and licence.

The secular liberal-democratic rights culture of today, in seeking to combine radical spiritual and moral individualism with political and social egalitarianism, is in danger of collapsing into legal and political incoherence. It is largely the remnants of Christian political thought and practice in advanced western polities, in their legal and public traditions, and in the social and moral sentiments of at least some of the population and politicians, that keeps collapse at bay. People vaguely sense such a collapse lurking in the tyranny of an increasingly bizarre ‘political correctness’; but the very term, typical of journalistic triteness, invites disapproval without serious analysis. If liberal democratic polities are to retain any semblance of legal coherence, they will have to ensure that the concept of rights is a secondary language of justice, subordinate to and continuous with that of law, in the sense of objective right and duty, as expressing a community of political judgment. But even this achievement, I suspect, will require a more self-conscious recovery of the theological foundations of western legal and political institutions; and such a recovery is bound, sooner or later, to transform the fabric of contemporary political societies. For the theological tradition has understood that the work of civil justice, made necessary by the moral failings of sinful human community, exists for the sake of, and in dependence on, the communion of self-giving love that is the body of Christ; and that the true relationship between christological love and civil justice is spoken in the language of goodness, and right and law, of obligation and obedience, rather than in the language of subjective rights.