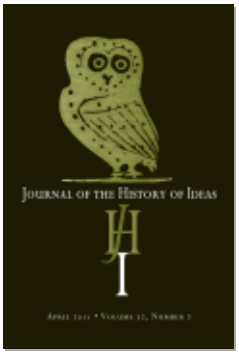
How Old Are Modern Rights?: On the Lockean Roots of Contemporary Human Rights Discourse



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How Old Are Modern Rights? On the Lockean Roots of Contemporary Human Rights Discourse

S. Adam Seagrave

Arguing for the proper placement of John Locke's natural rights theory within intellectual history is a particularly high-stakes enterprise for historians of political thought and political theorists alike. This is due in large part to the fact that, as Brian Tierney notes in his recent study, it is "widely agreed that Locke's work was an important influence in the formation of modern liberal ideas, including ideas concerning rights."[1] Our understanding of Locke thus contributes to our reflective self-understanding as "modern liberals" (of one stripe or another) to an extent perhaps unequaled by any other thinker so far removed from our own time.

As a result of the rare promise of studying Locke's natural rights theory, there has been no shortage of scholarly attempts to determine its place in intellectual history on the basis of Locke's own writings and their relation both to preceding and subsequent traditions and modes of thought. Although John Dunn had argued in his influential study that Locke's political thought was too thoroughly steeped in theology to remain relevant in the contemporary context, this thesis has since been persuasively challenged (albeit in very different ways) by Simmons, Zuckert and Waldron, among others.[2] Each of these scholars has contributed to an emerging agreement

[1] Brian Tierney, "Historical Roots of Modern Rights: Before Locke and After," *Ave Maria Law Review* 3 (2005): 23–43, 25.

[2] John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969); A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992); Simmons, *On the Edge of Anarchy: Locke, Consent, and the*

that the thread of Locke's natural rights theory may indeed be carried all the way up to current political and moral debates in some form or another. The precise length of this thread as it extends in the other historical direction has, however, remained a point of heated controversy. The scholarly literature on this issue may be broadly described in terms of a spectrum determined by two opposing emphases in understanding the relation of Locke's natural rights theory to its medieval predecessors: a continuity emphasis and a discontinuity emphasis.

On the discontinuity end of the spectrum stand those such as Michel Villey, Leo Strauss, C. B. Macpherson and, more recently, Michael Zuckert who argue for the existence of some sort of "Copernican moment" separating medieval natural rights theories from their modern counterparts.[3] Whether this moment is identified with William of Ockham in the fourteenth century or Hobbes in the seventeenth century, these scholars tend to emphasize the distinctively "modern" character of Lockean natural rights theory and its significant departures from medieval modes of thought. According to many of the advocates of discontinuity, Lockean natural rights are not only "modern" in their political applications but also in their more profound meaning as foundations for morality, and particularly in their newly conceived relation to the concept of natural law.[4]

The continuity end of the spectrum is, perhaps, more variegated, including scholars such as Tuck, Tierney, Tully, Oakley, Nederman, Coleman, and Swanson, among others.[5] Despite their many important differ-

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Limits of Society (Princeton: Princeton University Press, 1993); Michael Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994); Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence: University Press of Kansas, 2002); Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (Cambridge: Cambridge University Press, 2002).

[3] Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: Continuum, 2005), 87–109; Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953); C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Clarendon Press, 1962); Zuckert, *Natural Rights*; Zuckert, *Launching Liberalism*.

[4] See Strauss, *Natural Right*, 202–51; Zuckert, *Launching Liberalism*, 169–97.

[5] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Atlanta: Scholars Press, 1997); "Natural Law and Natural Rights: Old Problems and Recent Approaches," *The Review of Politics* 64 (2002): 389–406; Tierney, "Historical Roots"; Tierney, "Dominion of Self and Natural Rights Before Locke and After," in *Transformations in Medieval and Early-Modern Rights Discourse*, ed. V. Makinen and P. Korkman (Dordrecht: Springer, 2006); James Tully, *A Discourse on Property: John Locke and his adversaries* (Cambridge: Cambridge University Press, 1980); Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993); Oakley, *Natural*

ences, these scholars each focus upon the similarities between various elements or strains of medieval thought and modern natural rights theories rather than the differences between them. Insofar as the scholars on this end of the spectrum explicitly consider Locke's natural rights theory, they tend to emphasize Locke's intellectual debt to various preceding traditions and thinkers rather than his innovations upon them. Building explicitly upon the work of Tuck, Tierney and Tully, Janet Coleman finds "some extraordinarily Lockean moments" in the medieval thinkers John of Paris and Godefroid of Fontaines, and argues that Locke ought to be understood as contributing to this medieval tradition of thought rather than departing from it.[6] Scott Swanson, in turn, builds upon Coleman's scholarship in carefully connecting medieval understandings of the rights of subsistence and the principle of extreme necessity to Locke's natural rights theory. Swanson initially goes even further than Coleman in asserting that "all of Locke's celebrated doctrine is here [in John of Paris's writings] offered in a nutshell" before concluding on the more moderate note, echoed by Cary Nederman, that Locke's "application of natural rights of subsistence to politics" may indeed have been something "new under the sun."[7]

Brian Tierney, who has long been a prominent advocate for continuity with respect to the idea of natural rights, has recently attempted to bolster the case for strong continuity in a twofold manner: first, by articulating a conceptual framework defined by the interplay of the ideas of self-dominion and a permissive natural law that remains constant from the early medieval canonists to the present; and secondly, by employing a careful interpretation of John Locke's natural rights theory as the primary vehicle for transporting this framework from its medieval roots to modern times.[8] Tierney's recent work along these lines represents an innovative and intriguing contribution to the continuity emphasis literature, and calls for a thoughtful

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Law; Cary Nederman, "Review of Brian Tierney, *The Idea of Natural Rights* and *Rights, Law and Infallibility in Medieval Thought*," *The American Journal of Legal History* 42 (1998): 217–19; "Empire and the Historiography of European Political Thought: Marsiglio of Padua, Nicholas of Cusa, and the Medieval/Modern Divide," *Journal of the History of Ideas* 66 (2005): 1–15; Janet Coleman, "*Dominium* in Thirteenth and Fourteenth-Century Heirs: John of Paris and Locke," *Political Studies* 33 (1985): 73–100; Scott Swanson, "The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity," *History of Political Thought* 18 (1997): 399–458.

[6] Coleman, "John of Paris and Locke," 82, 99–100.

[7] Swanson, "Medieval Foundations," 418, 443; see Nederman, "Review of Brian Tierney," 218.

[8] Tierney, "Natural Law and Natural Rights"; Tierney, "Historical Roots"; Tierney, "Dominion of Self."

response both from discontinuity advocates and from more moderate proponents of continuity. Although the importance of the first prong of Tierney's recent thesis (the self-dominion/permissive natural law framework) has indeed received scholarly attention, the second prong of his thesis (relating this framework to Locke's natural rights theory) has yet to elicit the focused and thorough response it merits.[9]

This article aims to provide such a response to both interrelated aspects of Tierney's recent work, and in so doing to lend support to the position of Tierney's primary targets on the discontinuity end of the spectrum. Tierney falls short of persuasively extending his historical continuity thesis for two related reasons, corresponding with the two parts of his overall argument: first, the self-dominion/permissive natural law framework neither explains the implicit basis of modern rights-claims nor offers a sound basis for such claims in itself; and second, the application of this framework to Locke's natural rights doctrine largely misses the significance of Locke's contribution to the historical development of rights theories. Although the historical roots of modern rights discourse may indeed extend beyond Locke, it is only with Locke's distinctive and transformative contribution that the idea of natural rights becomes clearly recognizable to the modern eye.

TIERNEY'S CONTINUITY ARGUMENT

Tierney's discussion of the permissive natural law and its ability to serve as "a ground of natural rights"[10] is a promising line of thought that has substantial support in the historical record Tierney presents. The notion of permissive natural law, as Tierney conceives it, provides an intriguing means of mitigating the perceived incompatibility between natural law and natural (human) rights orientations. This apparent incompatibility, which Tierney associates in his recent work primarily with the "followers of Leo Strauss,"[11] is established by a pair of observations: natural law defines the morality of human actions on the basis of duties and obligations that are imposed on the individual from without, while natural rights define the morality of human actions on the basis of freedoms or liberties that spring

[9] John M. Finnis, "Aquinas on ius and Hart on Rights: A Response to Tierney," *The Review of Politics* 64 (2002): 407–10; Douglas Kries, "In Defense of Fortin," *The Review of Politics* 64 (2002): 411–13; Michael Zuckert, "Response to Brian Tierney," *The Review of Politics* 64 (2002): 414–15.

[10] Tierney, "Natural Law and Natural Rights," 400.

[11] Tierney, "Historical Roots," 24.

from within the individual himself. The traditional natural law perspective views individual morality as derivative from an ordered whole governed by a provident God; the natural rights perspective derives morality from the individual considered in relative isolation. These two perspectives, therefore, appear to reflect the obvious tension between heteronomy and autonomy; the former notion describes a moral framework common to the whole, while the latter asserts the "moral property of individuals . . . as individuals."[12]

The great advantage and promise of the permissive natural law is that it seems able to accommodate both perspectives within a single coherent framework. Early medieval jurists and philosophers, according to Tierney, "used the idea of permissive law to carve out . . . a sphere of human freedom and autonomy within the realm of natural law itself."[13] From the observation that certain areas of human activity, such as the acquisition of private property,[14] fall beyond any discernable command or prohibition of the natural law, these jurists and philosophers posited that the natural law generates *permissions* in addition to commands and prohibitions. With the addition of this function, the natural law comes to include a mechanism of self-limitation. Where the commands and prohibitions of the natural law end, a realm of human autonomy, licit self-dominion, and free choice begins.[15]

Tierney's most important historical authorities for this doctrine are Vitoria and Suarez. In attempting to extract a teaching of individual subjective rights from Aquinas, Vitoria explained Aquinas's statement that "law is the ground of right" by noting: "And so we use the word when we speak for we say . . . 'I have a right,' that is, it is permitted."[16] Suarez further defined the concept of permissive natural law to include an obligation on others to forbear from intruding on one's permitted sphere. He also posited the crucial connection between permissive law and subjective rights by stating that the very permission of the law conferred a "positive faculty or license or right" on the individual.[17]

After tracing the parallel historical development of the ideas of permis-

[12] H. L. A. Hart, "Are There Any Natural Rights?" *The Philosophical Review* 64 (1955): 175–91, 182.
[13] Tierney, "Historical Roots," 38.
[14] See Tierney, "Natural Law and Natural Rights," 400 and "Historical Roots," 38.
[15] Tierney uses the terms "self-dominion," "self-ownership," "self-mastery," "free choice," "freedom," and "autonomy" almost interchangeably throughout.
[16] Tierney, "Historical Roots," 39.
[17] Ibid.

sive natural law and licit self-dominion, Tierney argues that these ideas remain the twin pillars of subjective rights in contemporary discourse. While this is relatively easy to establish in the case of self-dominion, the modern relevance of the permissive natural law is more difficult to discern since "the language of natural law is not fashionable nowadays."[18] Nevertheless, Tierney maintains that the idea of permissive natural law manifests itself in the modern opinion that "all rights are limited by law, either by civil law or by moral considerations inherent in the concept of the right itself."[19] From these reflections Tierney concludes that "the very existence of our modern culture of rights is not intelligible unless we pay some attention to the early history of the idea,"[20] and that "something still survives from an older tradition in the modern welter of rights and rights theories."[21]

Upon careful examination of these conclusions in juxtaposition with Tierney's stated purpose at the outset of his arguments, however, one detects an air of caution in the former which is conspicuously absent in the latter. Tierney initially characterizes his purpose in "Dominion of Self and Natural Rights Before Locke and After" as an attempt to "see modern doctrines of rights, not as *innovations* . . . but as the *final product* of a developing tradition of thought. . . ."[22] Similarly, in "Historical Roots of Modern Rights," Tierney introduces his argument by conceding that "the work of Hobbes represents an *aberration* from earlier ideas about natural rights and natural law," but that "his ideas have little to do with modern ways of thinking about human rights."[23] From these introductory statements Tierney's purpose is clear: he will argue that modern rights discourse is not the result either of "innovation" upon or "aberration" from medieval rights discourse, i.e., that modern rights are neither *new* nor *different* from their medieval predecessors. Rather, modern rights are something like mature or adult medieval rights; they are the "final product" of a process involving a core idea and a "series of unforeseen contingent circumstances."[24]

Turning again to Tierney's concluding remarks, the ambition of his purpose appears in both cases to have dissipated during the course of his arguments. If Tierney's arguments are persuasive, and modern rights are

[18] Ibid., 42.
[19] Ibid.
[20] Tierney, "Dominion of Self," 198.
[21] Tierney, "Historical Roots," 42.
[22] Tierney, "Dominion of Self," 173–74 (emphasis added).
[23] Tierney, "Historical Roots," 25 (emphasis added).
[24] Tierney, "Dominion of Self," 199.

nothing more than the "final product" of the historical process he describes, surely *much* attention to the early history of the idea of rights is warranted. Indeed, one might argue that Tierney's opponents arrive at the medieval/modern disjunction as a result of merely paying "some" attention to the early history Tierney meticulously unearths. Similarly in the case of the second conclusion, the assertion that "something still survives" from the medieval tradition belies the force of Tierney's stated purpose. If Tierney were fully persuaded by his own argument that the self-dominion/permissive natural law core of rights thinking provides a continuous historical thread extending from the twelfth century to the present, surely it would have been more accurate to conclude that the essential aspects of medieval rights are "alive and well" in contemporary rights theories. Tierney does not argue that modern rights contain well-concealed traces of their ancestry, but rather that (at the least) their similarities to medieval rights outweigh the differences between them. Indeed, the novelty of Tierney's historical project lies precisely in the strength of his claim that the idea of natural rights has remained essentially the same (a combination of the ideas of self-dominion and permissive natural law) from the time of its initial development in the early medieval period to the present.

Why does Tierney hesitate in each of these versions of his thesis to conclude on the same controversial note with which he began? The answer to this question is suggested by a consideration of that which immediately precedes Tierney's conclusions in each of the two essays. In "Dominion of Self and Natural Rights," this consists in a discussion of the emergence of "purely secular doctrines of natural rights" in the age of Enlightenment.[25] Tierney's brief treatment of this historical fact is both puzzling and inadequate: ". . . if one were writing a history of moral philosophy this would seem a most significant change; but, if one is interested primarily in the origin and development of the idea of natural rights, it is equally significant that the old rights persisted in a new secular garb . . . the old idea of natural rights seemed too valuable to discard. . . ."[26] The primary inadequacy of Tierney's explanation lies in his understating characterization of religious doctrine as a superficial "garb" for the idea of natural rights (and by implication, according to Tierney's analysis, also for the natural law). Although Tierney clearly requires such a characterization in order to assert the identity of the "old" and "new" rights, its accuracy remains questionable even on the basis of his own analysis. If the "old" rights were originally derived

[25] Ibid., 195–96.
[26] Ibid.

from (and therefore depended upon) the permissions of the natural law, while the medieval understanding of natural law in turn depended upon the existence of the Divine Lawgiver, it is clear that the religious element constituted an integral component of the "old idea of natural rights." Belief in (or knowledge of) God was therefore not merely compatible with the old idea of rights but rather *essential to* it. Having to some extent set aside the idea of a legislating God (since this appeared to fall beyond the scope of unaided human reason), the Enlightenment philosophers could not avoid altering (or discarding) the idea of the natural law.[27] Having altered the idea of the natural law, they could not avoid altering the idea of natural rights. Thus while the word "rights" indeed persisted in a new secular garb, the idea answering to it necessarily underwent a significant transformation.

In "Historical Roots of Modern Rights," Tierney's conclusion is immediately preceded by his attempt to discover the idea of permissive natural law in contemporary rights discourse. In this connection Tierney asserts that "it is still generally agreed that all rights are limited by law, either by civil law or by moral considerations inherent in the concept of the right itself."[28] Tierney cites Nozick as an example of the persistence of permissive natural law since "he treated rights as constraints on behavior because they limit the ways we can act toward other right-bearers."[29] These considerations, far from establishing the continued survival of the idea of permissive natural law, clearly indicate its irrelevance to modern ideas of rights.

Of the two candidates Tierney offers for evidence of a permissive natural law, the "civil law" is clearly not natural (since it is made by human beings) and "moral considerations inherent in the concept of the right itself" do not have the character of law. In order for a "law" to exist in any sense beyond the merely metaphorical, it must have its source in a legitimate superior.[30] Among human rights-bearers simply *as* rights-bearers, a state of equality subsists which excludes the possibility that genuine law could arise between them. The constraints on behavior included within the idea of human rights itself result from the coexistence of a number of rights-bearing individuals each of whom must logically recognize the existence of similar rights in the others. The moral considerations employed by such

[27] See Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis, Ind.: Hackett, 1994), 1: xiv, 1: xv.36–41; John Locke, *Questions Concerning the Law of Nature*, ed. and trans. Robert Horwitz, Jenny Strauss Clay, and Diskin Clay (Ithaca, N.Y.: Cornell University Press, 1990).
[28] Tierney, "Historical Roots," 42.
[29] Ibid.
[30] See Locke's definition of and conditions for law in the *Questions*.

individuals thus result simply from the demands of logical consistency, and do not in themselves imply the subordination to a superior included in the notion of law. The "concept of the right itself," therefore, while it may impose moral constraints on behavior, is incapable of giving rise to a genuine law. Tierney here reveals, apparently unwittingly, the characteristically modern orientation towards law and rights in contemporary discourse. This orientation consists in a clear disjunction between the two corresponding to the distinction between the "civil" and the "natural"; modern rights seem to have followed the path of the Hobbesian "aberration" rather than the well-trodden thoroughfare of rights thinking traced by Tierney.[31]

SELF-DOMINION, PERMISSIVE NATURAL LAW, AND MODERN RIGHTS

The difficulties Tierney encounters in finally connecting modern rights to their medieval predecessors are not merely accidental; rather, they indicate the ultimate failure of his self-dominion/permissive natural law framework to either reveal the basis of modern rights-claims or provide a viable basis for rights-oriented theories in itself. The reason for this failure is, in short, that human rights are no longer premised on the existence of a natural law or its source in a divine legislator. The idea of self-dominion or self-ownership, and the ground of human autonomy which underlies it, is thus conceived to stand on its own rather than depend on a self-limiting natural law.

The medieval jurists and philosophers who constructed an idea of subjective rights by joining a permissive natural law with a concept of self-dominion all appear to share two important characteristics: a preexisting commitment to the natural law, and a basic attachment to the Christian faith. The Christian God provided a stable foundation for the natural law, and the limits of the natural law provided a foundation for the notion of subjective rights. On this account, the moral force of the realm of autonomy and subjective rights is entirely borrowed or derivative from the obligations of forbearance implied by a permissive natural law. Because some action is permitted to Y by law, X is prohibited from hindering this action; because X is prohibited from hindering this action, Y "has a right" to engage in it. Since the natural law is prior to subjective rights, the direction of moral

[31] See Tierney's detailed discussion of the Hobbesian line in "Natural Law and Natural Rights," 395–99.

reasoning properly proceeds from X's natural law duty to Y's claim to immunity from interference, and not the other way around. Y's action is, considered in itself and apart from the possibility of interference, devoid of the moral content implied by the exercise of a subjective right. In hindering Y's ability to act, X has not infringed on Y's moral power but rather departed from his own as defined by law.

The framework of permissive natural law and licit self-dominion that Tierney finds in his medieval sources thus enables a subjective consideration of objective right without expressing subjective rights in the full sense. In the former case, to "have a right" is taken in a loose rather than a strict or literal sense; one does not actually *possess* within himself the moral force of his actions (his "rights") but rather possesses the approval of a standard that measures both himself and others. In this sense to "have a right" means nothing more than to be the beneficiary of a just or lawful distribution or transaction, just as to "wake up and smell the roses" means to become aware of something obvious. Subjective rights in the full sense, on the other hand, include a strict understanding of rights-possessing individuals. The individual is in fact a source and measure of morality by virtue of her own existence and actions; the moral claims which such rights engender may be made without reference to any standard outside the individual. These rights are subjective "in the full sense" because their existence is coextensive with the existence of the individual, the former proceeding from the latter independently of external (objective) moral standards.

It is only by neglecting to make this distinction, or arguing that it is not meaningful, that a permissive natural law may truly be said to ground the notion of subjective rights. The reason for this is simply that the natural law, at least in its traditional form and as it is represented within Tierney's historical narrative, is conceived to have an objective existence beyond that of any particular individual. Although the natural law may attain a concrete and particular existence by virtue of its application to an individual circumstance and its perception by an individual subject, it does not thereby relinquish its objective character. The objective moral standard that the natural law provides thus admits of a certain mode of subjectivity, but is incapable of engendering subjective rights in the full sense. If subjective rights are to partake of a strict or more literal meaning, as they undoubtedly do in many modern contexts, a permissive natural law does not in itself suffice for their explanation.

In order for Tierney's permissive natural law to give rise to fully subjective rights, one must argue either that the individual subject is the ultimate

source of the natural law or that the natural law itself has been transferred from its original source to the individual subject. Neither of these arguments, however, is present in Tierney's historical account. Without the aid of such arguments, a permissive natural law may indeed delimit an intriguing "ground" for subjective rights (i.e., leave room for their emergence) without itself "grounding" them (i.e., explaining their existence).[32] Although Tierney's medieval sources were indeed aware of the individual subject, they still considered this subject primarily in terms of the thick objective context provided by the natural law. While the individual could have her own perspective on this objective context, and thereby have subjective rights in a loose sense, she could not yet consider herself sufficiently apart from objective morality to recognize the possession of subjective rights in the full or strict sense.

The medieval rights Tierney describes, therefore, are in fact little more than reflexes of the natural law duties of others. Suarez's assertion that the permissive natural law confers "a positive faculty or license or right" does not go beyond Vitoria's definition of "a right" as a kind of shorthand for expressing the more accurate statement, "it is permitted."[33] This particular view of rights discourse is not, moreover, confined to medieval philosophers. In the modern literature a similar phenomenon persists; to the extent that the natural law is conceived as the basis for subjective rights, these rights are generally relegated to the status of linguistic "instrument[s] for sorting out and expressing the demands of justice."[34] If rights are derivative from, or "carved out" of, the natural law, they relinquish the character of "independent moral insights"[35] and become simple correlatives of natural law duties. The general force of Bentham's argument for the irrelevance of subjective rights, with which Tuck introduces his pioneering historical work, is not answered by Tierney's permissive natural law.[36]

Tierney himself indicates in the concluding remarks of "Natural Law and Natural Rights" that he is aware of the potential force of these arguments. Tierney admits that "Permissive natural law does not exactly confer rights on human persons; rather it defines an area within which their inherent power of free choice can licitly be exercised."[37] The actual conferral of

[32] Tierney, "Natural Law and Natural Rights," 405.
[33] Tierney, "Historical Roots," 39.
[34] John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 210.
[35] Tuck, *Natural Rights Theories*, 1.
[36] Ibid.
[37] Tierney, "Natural Law and Natural Rights," 405.

rights must somehow be conceived to occur *within* the area of free choice itself, independently of the natural law, in order for subjective rights to emerge out of the shadow of natural law duties.[38] Tierney helpfully hypothesizes that while permissive natural law "allows" for subjective rights, "self-ownership justifies" them.[39]

This last point, that a meaningful concept of subjective rights may be justified independently of law, coheres with much of modern discourse. The recent analysis of another eminent historian asserts that ". . . already in the seventeenth century the process, it seems, had begun . . . whereby this notion of individual rights eventually escaped its lingering subordination to the objective moral constraints of natural law to become itself morally foundational. . . ."[40] The "foundational" character of modern subjective rights is clearly reflected in the extremely influential work of both Rawls and Nozick, whom Tierney unsuccessfully attempts to recruit into the permissive natural law fold.

In the case of Rawls, the priority of rights or "liberties" is established by the "lexical order" among his famous two principles of justice. The first principle asserts that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[41] The formulation of this principle and its priority to the second principle reflects the "absolute weight of liberty"[42] in the moral regulation of human society. The foundation of Rawls's theory consists in the assumption of an indefinitely extensive "right to liberty" of the individual; this indefinite right is subsequently limited not by natural law but by its coexistence with the indefinite rights of other individuals. Rawls's purpose in *A Theory of Justice* was, moreover, simply to "show that the theory proposed matches the fixed points of our considered convictions better than other familiar doctrines."[43] One of these "fixed points" consists in "feelings about the primacy of justice" with respect to "comprehensive doctrines" of the good.[44] Since natural law doctrines are teleological and perfectionist in character, explicitly directive towards the good, Rawls clearly indicates that "our con-

[38] This point is emphasized by Michael Zuckert in his "Response to Brian Tierney."
[39] Tierney, "Natural Law and Natural Rights," 418.
[40] Oakley, *Natural Law*, 109.
[41] John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 60.
[42] Ibid., 63.
[43] Ibid., 579–80.
[44] Ibid., 586.

sidered convictions'' place individual liberty (or subjective rights) rather than the natural law at the basis of moral considerations.

Nozick's *Anarchy, State, and Utopia*, despite its harsh criticism of Rawls, similarly posits that ''the rights of others determine the constraints upon [one's] actions.''[45] Nozick is clear that these constraints are ''side constraints'' issuing from the Kantian principle that ''individuals are inviolable,'' and not constraints following from the goals of an externally imposed law.[46] Natural law, even of the self-limiting variety, directs individuals towards some ''*social* good'' which justly limits their autonomy and freedom of choice.[47] The ''root idea'' of modern morality, however, is that ''there are different individuals with separate lives and so no one may be sacrificed for others;''[48] the moral power, or subjective right, of the individual is clearly prior to and independent of any notion of natural law.

In the more recent work of Michael Zuckert, one encounters a similar insistence on deciding the ''foundational problem'' in favor of natural rights rather than natural law.[49] The ''claim of exclusivity'' implied by a conception of rights as the moral property of the individual ''does not derive from some preexisting duty, natural or otherwise, but it does imply a subsequent duty . . . of forbearance.''[50] This formulation turns Tierney's account on its head by asserting that the ''duty of forbearance'' follows from the possession of rights rather than the permission of the natural law. Those who view rights as ''fictions,'' among whom are not only its dedicated enemies but also those who would relegate subjective rights to the status of mere idioms, are ''much at odds with settled moral convictions of contemporary Westerners.''[51]

Although it would be possible to belabor this general point with legal analysis or an examination of popular political discourse, the foregoing examples, coupled with Tierney's own misgivings, suffice for the purposes of this article. Two points seem clear: first, medieval rights of the sort Tierney describes are not *rights* in the full or strict sense of individual moral powers with their own justificatory bases; and secondly, modern rights are treated as meaningful in this way precisely because they are viewed apart from a natural law framework or a legislating God.

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[45] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 29.
[46] Ibid., 30–31.
[47] Ibid., 33.
[48] Ibid.
[49] Zuckert, *Launching Liberalism*, 175.
[50] Ibid., 196.
[51] Ibid., 333.

This indicates that a significant transformation in rights thinking does in fact mark the transition from the medieval to the modern periods.[52] It is a testament to Tierney's historical acumen that he locates the two crucial features of this transformation: the emancipation of moral foundations from religious doctrines, and the emergence of the idea of self-dominion or self-ownership as an independent justificatory basis for subjective rights. Tierney's focus on Locke is also appropriate, but mishandled; for it is in Locke's political philosophy that this transformation finds its definitive articulation. In correcting the "aberration" of Hobbes, Locke does not simply facilitate the safe passage of medieval rights into modern discourse. Locke accepts the most general outlines of Hobbes's critique of traditional political philosophy but attempts to provide what Hobbes could not: a new moral foundation to replace the old.

LOCKEAN RIGHTS: DIVINE VS. HUMAN WORKMANSHIP

The difficulties involved in interpreting the notoriously "cautious" writings of Locke have been well-documented and are abundantly evidenced by the variety of often-contradictory positions which have been persuasively attributed to him.[53] It may be helpful, then, to begin this discussion on a relatively uncontroversial note by asserting that the idea of "property" is of great importance to Locke's political teaching in the *Second Treatise*. The controversy ensues when one attempts to discern precisely how Locke understands property, what relationship this concept possesses to natural rights and the law of nature, and especially how divine ownership and self-ownership coexist in his thought.

Tierney's interpretation of the Lockean rights theory is motivated by his attempt "to contest the view that Locke's doctrine of natural rights should be seen as an aberration from an older and sounder teaching on natural law."[54] Tierney associates this view with Michael Zuckert, who claims that Locke's doctrine of self-ownership "points toward his break

[52] This conclusion echoes, but in significantly different tones, the understanding of the "medieval/modern divide" advanced by a handful of historians such as Cary Nederman in critiquing Tierney's thesis.

[53] See Paul E. Sigmund, "Jeremy Waldron and the Religious Turn in Locke Scholarship," *The Review of Politics* 67 (2005): 407–18; as well as Zuckert, *Launching Liberalism*, 25–56.

[54] Tierney, "Historical Roots," 23.

with the entire premodern tradition."[55] On Zuckert's controversial interpretation, Locke's account of the divine ownership of human beings in his "workmanship argument"[56] is subsequently undermined and eventually overshadowed by a novel doctrine of human self-ownership which grounds subjective rights.[57] This interpretation emphasizes an apparent disjunction between the two forms of ownership in Locke's thought which highlights his break with the preceding tradition.

The crux of Tierney's attempted refutation of Zuckert's reading is, accordingly, an argument for the compatibility of divine ownership and self-ownership in Locke's thought. Following Simmons's interpretation, Tierney argues that "Locke conceived of ownership of self . . . as a sort of trust from God."[58] Locke simply adopts the "standard medieval doctrine," the very same one expressed by Aquinas, by asserting that "In respect of God, the Maker of Heaven and Earth, who is sole Lord and Proprietor of the whole World Man's Propriety in the Creatures is nothing but that *Liberty to use them*, which God has permitted. . . ."[59] According to Tierney, Locke follows the centuries-old distinction of the jurists between *dominium directum*, ultimate ownership, and *dominium utile*, ownership of use.[60] Although human beings are ultimately God's property, they are also their own property in a derivative or secondary sense. This distinction closely parallels the interplay between self-dominion and the permissive natural law. In their capacity as self-owners, human beings possess a measure of autonomy and licit freedom of choice; insofar as they are God's property, human beings are under "God's law" (i.e. a permissive natural law) and the duties which it imposes on them.[61] Just as self-dominion and subjective rights derive from the limits of a permissive natural law, so self-ownership derives from God's generous grant of "self-use" to human beings.

As promising as this account may seem, Tierney's argument conspicu-

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[55] Zuckert, *Natural Rights and the New Republicanism*, 276 (quoted in Tierney, "Historical Roots," 32).
[56] John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1988), 2: 6.
[57] Zuckert, *Natural Rights*, 247–88; Zuckert, *Launching Liberalism*, 187–97. Zuckert's interpretation is in stark disagreement both with that provided by John Dunn in *The Political Thought of John Locke* as well as the recent work of Jeremy Waldron in *God, Locke, and Equality*.
[58] Tierney, "Historical Roots," 32. See Simmons, *The Lockean Theory of Rights*.
[59] Locke, *Two Treatises*, 1: 39 (quoted in Tierney, "Dominion of Self," 177).
[60] This distinction possesses interesting similarities with James Tully's distinction between "exclusive" and "inclusive" property rights in *A Discourse on Property*, 60–61.
[61] Tierney, "Dominion of Self," 178.

ously lacks a thorough discussion of Locke's concept of property in the *Second Treatise*. Such a discussion reveals that Locke's doctrine of property may be fruitfully conceived as an exposition and comparison of two forms of "workmanship": divine and human. By viewing Locke's doctrine through the "workmanship" lens, a relationship between divine and self-ownership emerges which reveals the distinctively modern orientation of Lockean rights theory.[62]

Locke begins his explicit discussion of property by stating that it is clear from both reason and revelation that "God . . . *has given the earth to the children of men*; given it to mankind in common."[63] This "common" earth, given to men by God, is evidently the product of God's workmanship or labor. The central question of the chapter then arises, namely, ". . . how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."[64] Locke's answer to this question begins with the statement that although the earth is "given to men for the support and comfort of their being . . . there must of necessity be *a means to appropriate* them some way or other, before they can be of any use, or at all beneficial to any particular man."[65] Before the end of the second section of Locke's discussion of property, the reader already encounters a subtle yet surprising suggestion: the product of God's workmanship is not in itself "of any use" or "at all beneficial" to individual human beings. If individual property consists in nothing other than a "*Liberty to use*" the things of the earth or a "trust from God," and if the things of the earth are in themselves useless, a contradiction or incongruity emerges: God has generously granted to human beings a liberty to use (a *dominium utile* in) that which is useless. Locke begins his discussion of property with a kind of *reductio ad absurdum*, concluding with a God-given liberty to use the useless, in order to more clearly indicate the precise object of his search: the natural transition from the given commons to individual property.

It is at this early juncture that Locke introduces the first explicit version of his self-ownership doctrine: "Though all the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own

[62] This focus on the concept of "workmanship" recalls Waldron's analysis of Locke's *Second Treatise*, but the interpretation to follow diverges widely from that offered by Waldron.
[63] Locke, *Two Treatises*, 2: 25.
[64] Ibid.
[65] Ibid., 2: 26.

person: this no body has any right to but himself."[66] This assertion begins an extended discussion of the way in which human labor engenders a "private right" of the individual in the things of the earth. The precise manner in which Locke repeatedly describes the process of individual appropriation merits close attention. By human labor a given object is "removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men. . . ."[67] Again, "His *labour* hath taken it out of the hands of nature, where it was common . . . and *hath* thereby *appropriated* it to himself."[68] Yet again, "whoever has employed so much *labour* about any of that kind . . . has thereby removed her from the state of nature wherein she was common, and hath *begun a property.*"[69] Finally, "Now of those good things which nature hath provided in common . . . every one had a right to . . . all that his *industry* could extend to, to alter from the state nature had put it in."[70]

These similar formulations are all intended to answer Locke's initial question by explaining how human "labour," rather than "compact," grants a title to exclusive property. In order to serve as a meaningful answer, human labor must obviously result in more than the mere fact of possession. In Locke's terms, by labor an object given by nature has "something annexed to it" which makes it one's own. The process of appropriation not only "removes" an object from its given state but "alters" it; the appropriated object becomes *something other than* what it is in the natural state. The simplest act of appropriation transforms a given external object into a "part"[71] of the individual person by being assigned a definite and conscious personal purpose.[72] Contrary to a common understanding of Locke's mechanism of labor, it is not merely the physical act of labor but rather this extension of self-consciousness to an external object that begins a title to private property. Thus "my apple" differs from "the apple" insofar as it now has a purpose annexed to it that relates to my happiness broadly understood. My self-consciousness is concerned for "my apple" in a way that it is not concerned for other apples; this particular object is now a component of my self-consciousness by virtue of the purposeful action of

[66] Locke, *Two Treatises*, 2: 27.
[67] Ibid., 2: 27.
[68] Ibid., 2: 29.
[69] Ibid., 2: 30.
[70] Ibid., 2: 46.
[71] Ibid., 2: 26.
[72] Cf. Simmons, *The Lockean Theory of Rights*, 273–74.

appropriation.[73] The "bird in the hand" is the immediate product of self-conscious human labor, the "bird in the bush" is the product of God's labor, and the two birds are vastly different from each other.

Locke thus establishes human beings as "workmen" themselves[74]; human beings do not simply *use* what is provided by nature or the divine workman, but rather *produce* "things that were never in the world"[75] by their own labor. The explanatory power of the divine "trust" or derivative *dominium utile* extends only to the "given," "common" state of the earth and establishes only a "common right" of mankind; Locke, however, is primarily interested in explaining the origin of "private rights" of individual human beings. After rejecting the "compact" explanation, Locke can only answer his initial question and provide a persuasive account of private property by invoking the right of the workman in his product. In order for individual human labor to generate a right to private property which differs from the mere fact of possession, this labor must, like God's original labor, have the creative character of "workmanship."

Locke's discussion of property is, therefore, essentially concerned with the relationship between two kinds of workmanship: human and divine. The most striking characteristic of this relationship consists in the obvious asymmetry of value between the objects produced by each. Elaborating upon the suggestion that the "given" earth is "not of any use," Locke repeatedly contrasts the original "penury" of the state of nature with the valuable effects of human labor. The "given," "common" products of divine workmanship are described as "waste," "little more than nothing," and "almost worthless materials."[76] Human workmanship, on the other hand, "makes the far greatest part of the value of things we enjoy in this world."[77] Locke emphasizes this point by frequently attempting to express the ratio of value between the products of divine and human workmanship in mathematical terms. Twice Locke sets this ratio at ten-to-one in favor of human workmanship before immediately increasing it to one-hundred-to-one.[78] By the end of Locke's discussion, this ratio balloons to one-thousand-to-one.[79]

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[73] See John Locke, *An Essay Concerning Human Understanding* (New York: Penguin Books, 1995), 2: xxvii.10–11.
[74] Locke, *Two Treatises*, 2: 43. Cf. Tully, *A Discourse*, 104–24.
[75] Zuckert, *Natural Rights*, 164.
[76] Locke, *Two Treatises*, 2: 37, 42, 43.
[77] Ibid., 2: 42.
[78] Ibid., 2: 37, 40.
[79] Ibid., 2: 43.

Having begun his discussion of property by describing the products of God's workmanship, or the original divine "trust" of the common earth, Locke progressively denigrates the worth and importance of this original grant in relation to the products of human workmanship. This relation, in mathematical terms invited by Locke's discussion, is not linear but exponential; the value of the products of divine workmanship approaches zero as that of the products of human workmanship approaches infinity. The cautious element of Locke's account of private property lies in his reluctance to emphasize the fact that the "given," "common" earth is the product of God's workmanship throughout his account, although this connection is firmly established at the outset.

The early transition from the useless products of divine workmanship to the valuable products of human workmanship is effected, moreover, by Locke's assertion that "every man has a *property* in his own *person*." In summarizing his discussion of property, Locke underscores the importance of this point: "From all which it is evident, that though the things of nature are given in common, yet man, by being master of himself, and *proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property. . . .*"[80] The property which rests on the "foundation" of one's self-ownership, according to Locke, is "perfectly his own."[81] Locke's entire account of property, moreover, hinges on the mechanism of workmanship or "transformative labor."[82] The products of divine workmanship are God's property and are "common" with respect to individual human beings. In order for human beings to acquire a title to property, they must themselves become "workmen" on God's "materials."[83] With respect to human beings, God's grant of *dominium utile* establishes merely what is *common* among them; only human workmanship is capable of establishing what is *proper* to each.[84] Given this clear distinction, and the absence of any other available resources for understanding Locke's assertion of self-ownership, one must conclude that the individual's property in his or her own person is the product of the same mechanism which establishes individual property in external objects, i.e., human workmanship.

This portrait of the human person or self as the product of human

[80] Ibid., 2: 44.
[81] Ibid.
[82] Zuckert, *Natural Rights*, 164.
[83] Locke, *Two Treatises*, 2: 43.
[84] This accounts for Locke's statement in *Two Treatises*, 1: 39 upon which Tierney builds his argument.

workmanship does not directly contradict Locke's earlier account in the divine workmanship argument. It does, however, in a manner that starkly contrasts with Waldron's influential interpretation, relegate this argument to relative insignificance in Locke's thought. In discussing God's ownership of mankind, Locke is careful to speak of human beings in the plural and in terms of what is common: ". . . for *men* being *all* the workmanship of one omnipotent, and infinitely wise maker; *all* the servants of one sovereign master, sent into the world by his order, and about his business; *they* are his property, whose workmanship *they* are . . ." (emphasis added).[85] This passage is reminiscent of Locke's arguments for the existence of God in both the *Essay* and the much earlier *Questions Concerning the Law of Nature*. In the *Questions*, Locke argues that since mankind cannot initially produce itself, it follows that "there exists some creator other than *ourselves*, more powerful and wiser, who at his pleasure can bring *us* into being, preserve, and destroy *us*" (emphasis added).[86] These subtle differences in language, easily overlooked when considered in isolation, neatly cohere with the distinction between divine and human workmanship that emerges in Locke's discussion of property. Divine workmanship generates property with respect to God and a "common" stock with respect to individual human beings; human workmanship begins with what is "common" and engenders a title to individual human property.

The foregoing analysis clearly supports Zuckert's interpretation of Locke's innovative account of human rights. The framework of divine and human workmanship has clear parallels in both the *Essay* and the *Questions*. In the *Essay*, Locke combats the "received doctrine" that "men have native ideas . . . stamped upon their minds in their very first being."[87] Rather, Locke supposes the human mind to be "white paper, void of all characters, without any ideas." It is through the human operations of "sensation" and "reflection" that ideas are engendered in the mind.[88] Since the "very first being" of men is nothing other than the product of divine workmanship, Locke is concerned to establish the primacy of human workmanship and the relative insignificance of divine workmanship in the formation of ideas. Most importantly, one's "personal identity" is not "given" innately by divine workmanship; it is only the workmanship of human "consciousness" that produces the "person" and one's "self."[89] Like the

[85] Locke, *Two Treatises*, 2: 6.
[86] Locke, *Questions*, fol. 54–56.
[87] Locke, *Essay*, 2: i.1.
[88] Ibid., 2: i.2
[89] Ibid., 2: xxvii.9–10.

"given" things of the earth, the human mind in its given state is "almost worthless" and utterly empty; the identity of the human "person," like individually appropriated external objects, does not even exist until "consciousness makes" it.[90]

In the *Questions*, Locke challenges the "givenness" of the law of nature. Locke repeatedly insists that "We do not say that this law of nature stands inscribed on tablets in our breasts,"[91] and dedicates an entire question to showing that "there exists no such law of nature inscribed in our hearts."[92] In a similar vein, Locke firmly rejects Aquinas's attempt to derive the natural law from the "natural inclinations."[93] Locke's primary argument for this point is that in those "barbarian nations" that have "no guide other than nature," there is "such fickle faith, so much perfidy, such monstrous cruelty" that they obviously have not been "given" any natural law.[94] Discovering the law of nature involves "concentrated meditation of the mind, thought, and care," i.e., human workmanship. In an analogy for the law of nature that reminds the reader of his later discussion of property in the *Second Treatise*, Locke states that "Good, rich veins of gold and silver lie hidden in the bowels of the earth, and moreover arms and hands and reason, the inventor of machines, are given to men, with which they can dig them out . . . that wealth which has been hidden in the darkness must be excavated with great labor."[95] The law of nature, like the "person" and individual property in external objects, owes the fact of its actual existence to human workmanship much more than to divine workmanship. This law is similarly given in an intrinsically useless state; God's workmanship leaves it "hidden in the bowels of the earth."

By vastly extending and forcefully emphasizing human workmanship at the expense of divine workmanship, Locke clearly departs from his medieval predecessors. Prior to Locke, the related notions of dominion, self-ownership, and natural rights remained wholly derivative from God's ultimate property in His creation and His lawful rule over it. To "have a right" in this context could mean little more than "it is permitted" by the natural law, and to possess private property was really to possess a "trust" from God, a *dominium utile*. To the extent that God's workmanship remains paramount in producing the individual, the things of the earth,

[90] Ibid. 2: xxvii.10.
[91] Locke, *Questions*, fol. 23.
[92] Ibid., fol. 37.
[93] Ibid., fol. 61.
[94] Ibid., fol. 41.
[95] Ibid., fol. 34.

and the law that governs them, true human workmanship becomes either impossible or relatively insignificant. To the extent, however, that God's workmanship falls short of explaining these products (as it clearly does for Locke), human workmanship becomes possible, necessary, and morally foundational. In this way, Locke's alteration of the relative emphasis of these two forms of workmanship in his theory of property corresponds with his innovative emphasis on the foundational importance of subjective natural rights in comparison with the objective natural law, whether permissive or otherwise. This shift in emphasis, first expressed in an enduring form in Locke's writings, continues to inform and underpin human rights discourse in contemporary contexts.

CONCLUSION

In refuting Tierney's recent arguments for placing Locke's natural rights theory within a strong continuity position, the foregoing analysis both vindicates the position of Tierney's primary interlocutors on the discontinuity end of the spectrum and suggests a sympathetic revision of more moderate arguments for continuity. Locke's natural rights theory departs from those of his predecessors, and in certain respects continues what Tierney terms the Hobbesian "aberration,"[96] not by inventing new words or ideas but rather by altering the order of priority and relative importance among preexisting ideas. It is with respect to the priority issue, or the "foundational problem," concerning natural rights and the natural law, as well as the related concepts of human workmanship and Divine workmanship, that Locke's natural rights theory is innovative and distinctively "modern." Locke's careful reformulation of this priority issue explains and justifies his innovative placement of natural rights at the core of his political philosophy.

Explaining the significance of Locke's natural rights theory in terms of the priority issue draws together a wide variety of positions on the continuity-discontinuity spectrum. Scholars such as Coleman and Swanson are correct to point out the similarities between Locke and John of Paris (among others) insofar as many concepts and modes of thought frequently attributed exclusively to Locke are in fact already present in a few of his predecessors. Zuckert, on the other hand, is correct to indicate the crucial importance of Locke's reshuffling and reinterpretation of these preexisting

[96] Tierney, "Historical Roots," 25.

concepts. Although Locke and some of his predecessors draw from the same conceptual cupboard, by altering the relative proportions of the ingredients Locke ultimately concocts a significantly different bill of fare. It is the priority issue among the concepts of natural rights and the natural law, parallel to that between human workmanship and divine workmanship, which then leads to the implications in the political dimension noted by Swanson and Nederman. The newfound "political overtones"[97] of natural rights which, according to Nederman, play a crucial role in determining the medieval/modern divide are in fact only the primary symptom of Locke's underlying innovation with respect to the priority issue outlined herein.

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A response from Brian Tierney will follow in the July 2011 issue of *JHI*.

[97] Nederman, "Review of Brian Tierney," 218.