“Io, che son la più trista, / son suora a la tua madre, e son Drittura, / povera, vedi, a fama e a cintura” (For I, in sorrow first, / Am Justice, and my sister gave you birth— / Though as you see, my clothes are of small worth).\textsuperscript{1} In these verses, Dante Alighieri offers an allegorical presentation of Justice and uses the image of three women to characterize three kinds of justice, namely, what medieval authors called natural law, or “drittura” (\textit{ius naturale}), law of nations (\textit{ius gentium}), and civil law (\textit{ius civile}). According to Dante, these kinds of \textit{ius} are deeply connected as \textit{ius naturale} is the mother of \textit{ius gentium} and the grandmother of \textit{ius civile}.\textsuperscript{2}

An ancient interpretation of Dante’s thought juxtaposes \textit{Tre donne} to Chaco’s words in \textit{Inferno} 6.73: “Giusti son due, e non vi sono intesi” (Two are just, and no one heeds them).\textsuperscript{3} According to interpreters of the Divine Comedy such as Jacopo della Lana, the Anonymous Selmiano, and Pietro Alighieri, the two “giusti” no longer respected in Florence are those of law and custom, \textit{ius} and \textit{mores}, or those of divine and human law, \textit{fas (ius divinum et naturale)} and \textit{ius gentium sive humanum}.\textsuperscript{4} The reference here is to the opening pages of Gratian’s \textit{Decretum}, where the author, quoting Isidore of Seville, explains that human nature is ruled by customs and laws and that “natural law” (\textit{ius naturale}) is contained in the laws of Moses and in the Gospel. In fact, this law of nature corresponds to the Golden Rule of Matthew 7:12: “All things therefore whatsoever you would that men should do to you, do you also to them. For this is the law and the prophets.”\textsuperscript{5}

The Florentine poet and his ancient commentators seem to have in mind a conceptual framework composed of \textit{ius naturale} or “drittura,” \textit{ius gentium, ius civile}, the Golden Rule, and divine will. Using this “conceptual map,” Dante places himself within a long and complex intellectual tradition to which several legists
and decretists, theologians, and philosophers belong. Starting with Gratian, several authors have dealt with the way in which ius naturale could be considered the basis of both the legal and moral orders. These authors developed an understanding of this peculiar kind of ius that encompassed its very plurality: it is a rule, a moral principle, a power proper to human nature, an instinct. Ius naturale became a crucial topic in medieval culture, and its history reflects the developments and turns in political, economic, and religious life. Harold Berman, Paolo Prodi, and other historians have offered detailed analyses pointing out the place that medieval discussions of ius naturale occupied in the historical process. Following the last decades of the eleventh century, radical changes occurred in the cultural, political, and ecclesiastical structures and institutions of Latin Europe.6

Many scholars have devoted themselves to the study of the medieval history of the ideas of natural law and natural rights. This literature grew rapidly in the twentieth century, especially after World War II, when “human rights” became a focus of moral and legal cultures. The aim of this literature was and continues to be to define the features of the evolution of these ideas looking back to the medieval roots of modern “rights” doctrine. In its presentation and debate of the various interpretations of the medieval development of ius naturale and lex naturalis, this literature has deepened our understanding of the intellectual background against which Dante’s allegorical representation of natural law stands.

Evaluating the main results of this lengthy research requires clarifying concepts and ideas, stressing continuities and discontinuities, and delineating the limits of medieval ideas of natural law and natural rights and their contemporary heir, human rights. This book offers a critical review of the way in which we look at the crucial conclusions that scholars reached in their inquiries. My goal is to establish the status quaestionis of the historical debate and demonstrate key differences among scholars. At the same time I show how several apparently opposing opinions and interpretations are in fact complementary. I examine the works of the most important
contemporary scholars, presenting a portrait of medieval *ius naturale* and *lex naturalis* that attempts to uncover both highlights and areas of contemporary research still in shadow, the unsolved problems, the aspects hitherto ignored of this portrait of the woman who shows up to Dante with the name “Drittura.”
One of the main questions in the study of natural rights and natural law is when these concepts first came into use in the modern period. Originally *ius naturale* was synonymous with *lex naturalis*, an objective rule or prescription. At a particular point in time, *ius naturale* began to refer also, or more strictly, to a specific right belonging to each human being. The distinction between *lex* as objective rule and *ius* as subjective right marks the beginning of a new language and is a basic feature of modern rights theories. The history of these concepts involves not only the discovery of a crucial turning point in the history of ideas. To establish the “birth” of the modern idea of natural rights means also to determine the way in which it happened. Is there a specific discontinuity in the history of ideas, a moment after which the legal, moral, and political lexicon radically changed? Or is there a longer and more complex process, during which natural rights language shifted from its ancient meaning to our modern understanding?

Some authors stress that the origin of the modern notion of natural rights has to be linked to the specific features of the modern age; for others, it is to be found in medieval legal and political thought.¹ Twentieth-century historians and philosophers, as well as jurists and theologians who have focused on natural law and natural rights, adopt different points of view according to the cultural and intellectual contingencies in which they live and work. In this light,
an evaluation of their interpretations of the medieval doctrines of natural law and natural rights requires general remarks on the different cultural “seasons” and circumstances in which these authors studied and worked.

The rise of totalitarianism and the dramatic experience of World War II created a crisis for the positivist legal tradition and the political order it had produced since the middle of the nineteenth century. In this context, several intellectuals and philosophers elaborated the idea of “human rights,” that is, natural individual rights proper to every human being, which the state through its laws must protect and support. Many thinkers debated the philosophical status of human rights, particularly after approval of the 1948 United Nations Universal Declaration of Human Rights. The idea that there could be rights that limit political power because they are “natural,” that is, not established by any authority but simply recognized by human reason as proper to human nature, questioned the basic assumptions of legal positivism. The consequence was that thinkers who came from a positivist culture started to moderate their radical denial of the existence of any kind of natural legal principle. Herbert Lionel Adolphus Hart, for example, in his famous article, “Are There Any Natural Rights?,” suggests that the existence of at least one basic natural right can be admitted: the equal right of all men to be free.2

Within this cultural framework, historians focused on the origins and roots of contemporary natural rights and looked back to the medieval notions of natural law and natural rights. In addition, one must remember that the discourse on *ius naturae* and *lex naturae* was quite commonly classified as part of the history of ideas. Ever since the publication of Arthur O. Lovejoy’s *The Great Chain of Being* (1936), this kind of historical study has been much questioned and debated, as also in relation to the development of discourse on natural law and natural rights.3 Several scholars, particularly those belonging to the Anglo-Saxon intellectual milieu, have devoted increasing attention to defining the epistemological criteria for evaluating the features and development of a concept in different moments of its history.4 These two elements are crucial
also for studies concerning the place of natural law and natural rights from the eleventh to the fifteenth century. These studies have to be placed alongside another cultural development in the first half of the twentieth century, namely, the new interest of Catholic intellectuals in the Middle Ages and the debate about the foundations of modern political discourse.

**The “Master” of Natural Law**

The increasing interest in medieval civilization, which Pope Leo XIII stimulated and supported, led to a series of historical and philological studies that aimed to present the great texts of Christian medieval thought. Among the subjects of interest was natural law, which in the decades around the turn of the twentieth century was a topic of debate and confrontation between Catholic and secular cultures. The Catholic interest in natural law and natural rights of the Middle Ages had a significant turning point in the 1920s and 1930s. It is in these decades, when the Catholic Church faced a complex situation with respect to totalitarian regimes, that fresh attention was given to the issues of *lex naturalis* and *ius naturale* and to the question of their mutual relationship. Several authors, such as the philosopher Jacques Maritain and the Dominican medievalist Marie-Dominique Chenu, moved from the idea of a return to a medieval Christian civilization to that of the construction of a “new Christianity.” This philosophical and theological orientation was supported by a new historical approach to the evaluation of medieval philosophy and theology.

In 1922 Martin Grabmann published an essay offering a general overview of the development of the doctrines of natural law and natural rights between the ages of Gratian and Thomas Aquinas. Through a detailed series of quotations from the writings of twelfth- and thirteenth-century canonists and theologians, the German scholar showed how complex and clearly articulated were the roots of Aquinas’s doctrine of *ius naturale*. Since Gratian the medieval discourse on “Naturrecht” engaged both canonists and...
theologians, who melded the Roman legal and philosophical culture and the heritage of the Church Fathers. According to Grabmann, various authors, including Peter Lombard, Magister Gandulphus, Stephen of Tournai, Praepositinus, Stephen Langton, and Philip the Chancellor, contributed to the debate that prepared the way for the season of great scholasticism.9

After 1924 Odon Lottin went further in his research on the texts of and witnesses to the medieval doctrines of natural law and natural rights. He published a series of articles in the Ephemerides theologicae Lovanienses that were later collected in the volume, Le droit naturel chez saint Thomas d’Aquin et ses prédécesseurs.10 He then returned to this topic in his collection, Psychologie et morale aux XIIe et XIIIe siècles. According to Lottin, the twelfth- and thirteenth-century debate on lex naturalis and ius naturale was characterized mainly by two types of matters: first, the nature and content of lex and ius; and second, its features (i.e., innate, universal, and immutable). The detailed examination of the juridical and theological milieu that Lottin offered was thus the essential premise to a closer historical interpretation of Aquinas’s Summa theologiae, Ia–IIae, q. 94, where the Dominican master gave his account of natural law.11

Through close textual analysis, both Grabmann and Lottin studied the development of concepts and language connected with natural law and natural rights during the age of scholasticism. In their perspective, the medieval debate over natural law and natural rights achieved its most complete doctrinal synthesis with Thomas Aquinas. The doctrine of the Dominican master was the final stage in a long process. Mainly in his Summa theologiae, Aquinas offered an account of lex naturae and ius naturae within the largest framework of the Christian understanding of the notions of lex, natura, and ius. In this sense, Aquinas perfected the definition of one of the cornerstones of what Étienne Gilson called la philosophie chrétienne.12 According to this perspective, the Christian authors, in the twelfth and thirteenth centuries, elaborated an idea of lex/ius naturae that resolved the contrast between the ancient philosophical emphasis on the natural foundation of moral discourse and
the Christian idea of the crucial role of divine grace. As Aquinas explained in his *Summa*, natural law, that is, the participation of human beings in the eternal law established by God, is nothing else but the natural knowledge of the first principles of practical reason. These principles are submitted to the divine illumination of moral consciousness. Medieval discourse on natural law thus bequeathed to Christian culture a systematic presentation of natural law as part of that hierarchy of laws which from the eternal divine law descended to human positive law.¹³ Such a hierarchy, perfectly rational, is also perfectly coherent within the ontological order of creation, because, as Gilson explains, according to medieval authors, natural law is to eternal law as being is to Being (i.e., God).¹⁴

The Ground of Political Discourse

Interest in medieval natural law doctrines, and particularly the role of Christianity in the definition of *lex naturae* and *ius naturae*, was not unique to Catholic neo-scholasticism and medievalism. From the last decades of the nineteenth century on, German and British scholars devoted increasing attention to this issue. They debated the content of legal positivism and Bismarck’s *Kulturkampf*, looking to the Middle Ages for the origins of the basic elements of modern political and constitutional thought. The debate on the implications of legal positivism was developed particularly in Germany, where it directly involved the interpretation of medieval legal culture. Since Savigny stressed the continuity between Roman law and medieval law and opposed natural law to customary and common law, several scholars have focused on the status of natural law in medieval legal culture. In addition, the effects of legal positivism became interwoven with the political and cultural mood of German *Kulturkampf*, which involved several scholars in a series of studies on medieval canon law.¹⁵

The German historian Otto von Gierke, from 1868 to 1913, published *Das deutsche Genossenschaftsrecht*, a reaction against the idea that modern political thought is basically characterized
by positive law, without any essential foundation in natural law. Part of the third volume of this series (1881), devoted to a study of medieval doctrines on the state and collectivism in Germany, was translated into English by Frederic William Maitland under the title *Political Theories of the Middle Ages* (1900). This English edition was a point of reference for subsequent studies on medieval political doctrines and offered a basic argument for a new evaluation of the role of the church in the construction of the political and legal lexicon later assumed by modernity. Among these ideas were those of *lex naturae* and *ius naturae*, which would be so crucial for the building of modern state theories. Gierke, whose interest was mainly the reconstruction of the origins and historical roots of the German legal system, stressed that the idea of natural law was the answer to the question of the relation between state and law. “How then,” wrote Gierke, “was it thinkable that, on the one hand, law ought to exist by, for and under the State, and that, on the other hand, the State ought to exist by, for and under the Law?” Natural law, that is, law that exists before the state and limits and regulates the power of the state, was the answer to such questions, the German scholar noted, given by decretists and legists, along with philosophers and theologians, who made use of the classical and patristic heritage. Gierke’s research provided a strong historical argument against the positivist doctrine of sovereignty, insofar as it stressed the existence of a legal and political tradition that grounded the state in a natural law that fixed the limits of its power. Generally speaking, Gierke noted that, according to a medieval intellectual perspective, all human authorities and powers, secular and ecclesiastical, were under the *lex naturae*. He stressed the importance of the formulation of the idea of natural law in the theological system of medieval Christianity; it is here that such a concept assumed its proper features. The modern theorists of natural law doctrines (Grotius, Hobbes, Pufendorf, Althusius) inherited and secularized this Christian idea of natural law.

Robert Warraud Carlyle and Alexander James Carlyle developed Gierke’s basic idea that medieval Christianity was the framework within which the concept of natural law was defined.
Especially in the fifth volume of their *History of Mediaeval Political Theory* (1903), the two scholars presented the basic ideas of medieval political thought. Following Gierke, they stressed that natural law was not just part of the ancient Greco-Roman inheritance, but moreover was a proper result of medieval thought. Their position was elaborated on the basis of the debate about the foundation of sovereignty and continued what Maitland started with his English translation of Gierke’s book. The *History of Mediaeval Political Theory* stressed that the cornerstone of medieval political debate was the principle of the supremacy of law, since medieval authors had no theory of sovereignty. “Natural law,” as it was defined mainly by Gratian and Thomas Aquinas, was the set of moral rules that limits political authority. According to the two English scholars, Aquinas did offer a complete account of the nature of law, showing how “natural law” is connected with that “light of natural reason” by which human beings can distinguish good and evil. This preeminence of law over authority is the foundation of that “Rule of Law” which was crucial in modern political and constitutional tradition, mainly in England.

In his 1907 volume devoted to political theories from Gerson to Grotius, John Neville Figgis developed this line and presented political history between the late Middle Ages and the early modern era as a great and constant struggle between civil and religious powers that led to the definition of the basic elements of modern constitutionalism. Figgis described Aquinas’s political theory as “the beginning of the later medieval rationalising political thought.” The Dominican master was seen as a conscious user of the heritage of ancient Roman legal tradition, combined with the arguments that came from the Church Fathers and founded on the philosophical content of Aristotle’s *Politics*. For Figgis, Aquinas’s natural law doctrine represented the means through which modern political thought inherited the medieval idea of limits on authorities and powers. For the English scholar, medieval *ius naturale* entails both individual human beings and the existence of a higher legal order.

Figgis developed Gierke’s question about the nature of authority and power and their limits and boundaries. He explained
that the lex naturae and ius naturae of medieval authors were limits
to the exercise of absolute political power. They represented the
very basis on which in the modern era the constitutional tradition
built its idea of the state and was radically put in question by those
“men like Machiavelli and Hobbes, whose aim is to remove all re-
straints to the action of rulers except those of expediency.”

**Laws, Natures, and Rights**

The writings of Gierke and Figgis, as well as the historical account
of Carlyle, represented a reaction against the basic assumption
of legal positivism, which denies any value to natural law as the
basis of any legal system. The crisis of political and legal systems
between the two world wars incited the arguments in favor of a
reconsideration of the historical value of natural law. Legal posi-
tivism had criticized the value of the idea of natural law, mainly
stressing the concept of positive law as obligatory command and
dismissing matters concerning the essence of law and of the ideal
legal standards as irrelevant to jurisprudence. According to authors
such as Kelsen, natural law was a suspect concept, inasmuch as it
entails that it is not the state that grounds the legitimacy of the legal
order. Furthermore, in his view, the phrase “natural law” itself im-
plies a misuse of the word nature, here indicating not the physical
order of reality but a universal set of moral principles that rational
beings can understand and to which they have to conform. Kelsen
stressed that the notion of natural law necessarily involves a reli-
gious character and an unclear passage from what “is” in nature to
what “ought to be” in legal and moral fields.

Totalitarianism and World War II showed the limits of this kind
of criticism of natural law. Legal positivism appeared incapable of
any form of resistance to authoritarian exercise of political power.
On one side, there was the need for strong limits to regulate politi-
cal authorities; on the other side, there was the will to order the legal
system to respect human rights, now perceived not as established
by the state but as natural features of individual human beings.
The two tendencies gave rise to new approaches to the topics of natural law and natural rights.

In 1950 Alessandro Passerin d’Entrèves published his *Natural Law: An Introduction to Legal Philosophy*. The Italian scholar showed the importance of natural law in the construction of the European legal culture, analyzing the plurality of traditions and inheritances that characterized its contemporary understanding. Taking into account the historical and philosophical inquiries of the previous decades on this issue, Passerin d’Entrèves argued for the need to combine consciousness of the evolution that the meaning of *lex naturae* (or *lex naturalis*) had undergone over two millennia with a careful philosophical analysis of the debated aspects of this notion. In this way, he distinguished his approach from both the purely historical and purely philosophical perspectives.

In relation to the history of the idea of natural law, Passerin d’Entrèves identified three main stages. In antiquity Romans understood it as something external and formal, which united all humankind under a single legislative standard, while medieval authors, mainly canonists and theologians, considered natural law the basic and immutable criterion for good moral conduct, that is, an internal and rational point of reference for moral life whose value rests on its grounding in the will of God. Thus medieval authors presented natural law as the supreme parameter for evaluating human laws. The passage to modernity, Passerin d’Entrèves noted, entailed a new and significant shift in the understanding of natural law, since the modern age proposed a completely different idea of “nature” from that of the Middle Ages. After the sixteenth century “nature” was no longer synonymous with “creation” but indicated a force independent from God. Philosophers started to ground the validity of natural law not on divine will but on human reason. According to the Italian scholar, this new idea of natural law was rationalistic and individualistic and was the basis on which modern natural law theorists opposed the “self-evident” rights to absolute governments and political powers.

Alongside this historical account, Passerin d’Entrèves developed a philosophical inquiry that he articulated in three ways. First,
he noted, the proper essence of law is defined by its function, which is to qualify rather than to command. Second, he explained that the relation between law and morality appears problematic in the context of legal positivism. On the contrary, natural law doctrine is clearer in defining the complex relations between the two fields. Therefore, the notion of natural law combines a clear distinction between law and morals with the clear consciousness of their mutual relations. Third, thanks to these features, natural law is a useful measure for the evaluation of the validity of human laws.

Passerin d’Entrèves’s account of natural law summarizes the intellectual situation at the middle of the twentieth century. Natural law became one of the great issues of scientific research in several fields. Jurists and philosophers, as well as theologians and historians, started to rethink the idea of natural law as the possible ground of legal and moral order. Passerin d’Entrèves, in his study of natural law, tried to overcome the limits of legal positivism, which had dominated European legal culture since the last decades of the nineteenth century. In the age of the Universal Declaration of Human Rights, he explained how the modern concern for human rights as limits to the absolute power of government and as the basic criteria to validate human positive laws is nothing but the evolution of the doctrine of natural law in modern times. According to his perspective, the medieval developments of natural law doctrines were the results of the intellectual work of canonists and theologians. Medieval Christian authors are thus considered responsible for one of the crucial transitions in the history of natural law doctrines and in the definition of some basic questions concerning the grounds of the legal and political order.

Questions and Doubts

Several scholars have remarked that the first use of *ius naturale* as the right of individual human beings can be found before the usually accepted beginning of the modern age. Studying the texts of medieval authors, they have shown that a subjective understanding