VERIUS EST LICET DIFFICILIUS:
TIERNEY'S FOUNDATIONS OF THE CONCILIAR THEORY
AFTER FORTY YEARS*

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The trouble with the writers of classic historical works, or so Felix Gilbert once suggested, is that however much their critics feel obliged to come to terms with the authority of their names, those critics often fail to read them—or, at least, to read them with the close attention they deserve. When he suggested that, Gilbert was ruminating about the fate of von Ranke, almost a century after that great historian's death.1 But when, in the late 1960s, I encountered Quentin Skinner's withering critique of Lovejoy's approach to the history of ideas, I was forced to wonder if the process in question had accelerated and was now overtaking that author only thirty years after the publication of his classic Great Chain of Being.2 And, more recently, after digesting Hermann Josef Sieben's oblique criticism of Tierney's Foundations of the Conciliar Theory, I began to worry that the same fate might now be threatening that distinguished work, too.3 Sieben's rather wooden cataloguing of selected decretist and decretalist views on general councils and the relationship of pope to council did not even come close to engaging the intricacy, suppleness and restraint of the argument set forth in Foundations, nor did it take account (or, at least, take much accurate account) of

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2 Discussed in Francis Oakley, Omnipotence, Covenant and Order: An Excursion in the History of Ideas from Abelard to Leibniz (Ithaca and London, 1984), pp. 27-29.

3 Hermann Josef Sieben, Die Konzilsidee des lateinischen Mittelalters (847-1378) (Paderborn, 1984), pp. 232-276, esp. pp. 253-255. Constantin Fasolt, Council and Hierarchy: The Political Thought of William Durant the Younger (Cambridge, 1991), pp. 17-19, takes a somewhat more positive view of Sieben's critique. He views it as "an outright assault on the central element of Tierney's thesis" and says: ". . . Sieben has tried to cut the 'foundation' of the conciliar theory down to size by showing that the decretists and decretalists of the twelfth and thirteenth centuries overwhelmingly considered general councils to be subordinate to papal authority, so that their thought could hardly have been the immediate source of the conciliar theory."
the historiographic context in which that book had been written. It is with this last matter that I propose to begin.

It would be hard, I think, fully to sense the importance of the contribution Foundations made without having had some personal acquaintance with the state of the field prior to its publication. "In Conciliar studies," E.F. Jacob had grumbled in 1943, "we are frequently told that this or that view 'is to be found in Ockham,' and there the matter is unsatisfactorily left." On that score, nothing much had changed prior to the appearance of Foundations in 1955. By then nobody was any longer content, with the earliest writers on the history of conciliarism, to regard the positions staked out by Conrad of Gelnhausen and Henry of Langenstein at the start of the schism as simply the outcome of their attempts to come to terms with the grievous difficulties occasioned thereby.

Thus he exaggerates the degree to which Tierney's case had been preempted by earlier scholars. Similarly see Fasolt, Council and Hierarchy, p. 19, where, invoking the authority of Seidlmayer and Bäumer, he states that "Tierney's emphasis on the canonists had been anticipated by Bliemetzrieder." Franz Bliemetzrieder, Das Generalkonzil im Grossen Abendländischen Schisma (Paderborn, 1904), pp. 75-76, basing himself on Otto Gierke, had indeed suggested that in Gratian's Decretum and the canonistic glosses would be found die Hauptquelle of conciliar thinking, and that historians would be wise to pay attention to them. But it was no more than a suggestion that was involved; and, in his important review article on Foundations, Michael Seidlmayer does not suggest that it was anything other than that; see Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung, 43 (1957): 374-387, at p. 377. But Remigius Bäumer, who three years earlier had launched a distressingly personal attack on Tierney (in a review of the latter's Origins of Papal Infallibility; see his "Um die Anfänge der päpstlichen Unfehlbarkeitslehre," Theologische Revue 69 [1973]: 441-450), does make more of it. He gives the impression, indeed, of being determined to minimize the originality of Tierney's contribution in Foundations; see his "Die Erforschung des Konziliarismus," in Die Entwicklung des Konziliarismus: Werden und Nachwirken der konziliaren Idee, ed. Remigius Bäumer (Darmstadt, 1976), pp. 3-50, at pp. 29-34. It should be noted, too, that this report is marked also by some odd emphases and exclusions. Hans Küng's lengthy discussion of conciliarism in Strukturen der Kirche (Freiburg, 1962) gets no more, for example, than a glancing, critical reference. Francis Oakley, Council Over Pope?: Towards a Provisional Ecclesiology (New York and London, 1969), gets no mention at all, though other works of his are cited. And John T. McNeill's concluding discussion of that book in his "The Relevance of Conciliarism," The Jurist 31 (1971): 81-112, is without explanation deleted in the translation of the article which appears as "Die Bedeutung des Konziliarismus" in Bäumer's edited volume, Die Entwicklung des Konziliarismus, pp. 91-106.

For the pertinent scholarly literature, see the introductory survey of the field as it stood in the 1950s in Tierney, Foundations of the Conciliar Theory, pp. 1-14. See also Karl August Fink, "Zur Beurteilung des grossen abendländischen Schismas," Zeitschrift für Kirchengeschichte 73 (1962): 335-343 (despite its brevity, a very important article), updated and lengthier discussions, to 1976 and 1978, respectively, in Bäumer, "Die Erforschung des Konziliarismus," pp. 1-34, and Giuseppe Alberigo, "Il movimento conciliare (xiv-xv sec.) nella ricerca storica ricente," Studi medievali
Nor did much enthusiasm attach to John Neville Figgis's unargued assertion that what conciliar theory, in effect, reflected was the bold extension to the universal church of constitutionalist principles long since hammered out in the secular kingdoms of Europe. E.F. Jacobs's twinge of asperity notwithstanding, more sympathy was extended to the efforts of later historians to push back beyond the immediate context in which Gelnhausen and Langenstein had framed their views, and to claim an earlier source for conciliarist views in the great efflorescence of publicistic literature occasioned in the first half of the fourteenth century by the bitter clash between the Avignon papacy and Lewis of Bavaria—and especially in the tracts contributed by those two imperial publicists, William of Ockham and Marsiglio of Padua. For those made uneasy by the fact that it was Juan de Torquemada, in his role as leading papalist ideologist at the Council of Basel, who (as Thomas Izbicki has recently reminded us) had first attached this suspect radical genealogy to conciliar theory—for such historians recourse was not readily available. They might conceivably turn to the suggestions advanced periodically over the years by such scholars as Gierke, Blumentzrieder, Arquillière, Martin and Ullmann to the effect that, behind the works of publicists like Ockham and Marsiglio, beckoned an even deeper and more promising source in the Decretum Gratiani itself and in the ocean of glosses written by decretists and decretalists alike. But such suggestions, however intriguing, were no more than suggestions, and, for most historians, given the fact that the bulk of those glosses (many of them unprinted) still awaited investigation, forbiddingly unmanageable suggestions at that.

It was Tierney's great achievement, then, not only to have embarked hopefully on the vast glossatorial ocean (more than one historian had done that), but also, with the publication of Foundations, to have brought his ship safely into port, laden with a wealth of pertinent evidence and propelled forward by the power of a sustained argument. That argument was as economical as it was elegant (the book, after all, is less than three hundred pages long), as lucid as it was compelling, and no less bold for being so carefully delimited and so diffidently restrained. This last point deserves particular emphasis. Not all of the critics have chosen to acknowledge the quite explicit limitations Tierney set for himself when he eschewed any claim to be offering a "complete history" of


7 John Neville Figgis, Political Thought from Gerson to Grotius, 1414-1625: Seven Studies (New York, 1960), pp. 41-70. The book was first published in 1907.

8 Thomas M. Izbicki, "Papalist Reaction to the Council of Constance: Juan de Torquemada to the Present," Church History 55 (1986): 7-20—a very helpful account.

conciliar thinking prior to the outbreak of the schism, or a "complete account" of the thinking of the canonists on matters pertaining to ecclesiastical government. Instead, it was his explicit intention to focus only on "those elements in canonistic thought that contributed to the growth of Conciliar Theory" (ix).10

That tightness of focus paid off. Leaning strongly against "the tendency to treat the Conciliar Movement as something accidental or external thrust upon the Church from the outside," Tierney portrayed it instead as "the logical culmination of ideas that were embedded in the law and doctrine of the Church itself" (15). During the century and more preceding the onset of the Great Schism, the decretalists, in their attempts to rationalize the structure both of the individual churches of Christendom and of the universal church itself, had been led to develop not one but two separate doctrines concerning the church's unity. "The more conspicuous one, which has usually been regarded as the canonistic doctrine par excellence insisted that the unity of the Church would be secured only by a rigorous subordination of all the members to a single head" (240).

Hence the doctrine of absolute papal monarchy that admittedly dominated most of the canonistic glosses of the fourteenth century:

But side by side with this [familiar doctrine of papal sovereignty] there existed another theory, applied at first to single churches and then at the beginning of the fourteenth century, in a fragmentary fashion, to the Roman Church and the Church as a whole, a theory which stressed the corporate association of the members of the Church as the true principle of ecclesiastical unity and which envisaged the exercise of corporate authority by the members of a Church even in the absence of a collective head (240).

That theory, along with an older strand in canonistic thinking going back to the twelfth- and early thirteenth-century commentators on Gratian's *Decretum* (and especially to their discussions of the case of the heretical pope), laid the essential foundations for conciliar theory. The ambivalence of the canonistic heritage blocked the crystallization of a coherently constitutionalist understanding of the church's unity until the imperative necessities of a protracted schism called such an understanding into being in the formulations of the great conciliarists of Pisa, Constance and Basel, theologians no less than canonists—not least of all those characteristic of "the most mature and harmonious of the conciliar theories, that of Nicolaus Cusanus" himself (36). But it remains nonetheless true that what made those formulations possible was nothing other than "the impregnation of Decretist ecclesiology by Decretalist corporation concepts" (245).

The case Tierney made was at once both powerful and subtly nuanced and, despite the subsequent surfacing of some oblique (and not so oblique) scholarly


10 Here (and later) the numbers in parentheses refer to the pagination of Brian Tierney, *Foundations of the Conciliar Theory: The Contributions of the Medieval Canonists from Gratian to the Great Schism* (Cambridge, 1955).
I would judge that the great tide of literature on conciliar and related matters that has been flowing during the forty years since he propounded his thesis has really done little or nothing to shake it. As our knowledge of the thinking of individual conciliarists has grown, so, too, has the body of evidence for the deep impress made on the full range of conciliarist literature by arguments drawn (either directly or at one remove or another) from the glosses of decretists and decretalists alike. That this should be so in works written by those who were themselves lawyers is hardly surprising; more striking is the degree to which some of the theologians, too, reveal their acquaintance with, or indebtedness to, the canonistic literature. And, if we are willing to accord a measure of deference to the understanding of conciliar theory shown by commentators who lived closer in time to the conciliar epoch than do we and who had themselves not even a remotely conciliar axe to grind, we may wish to take note of the fact that English Protestant divines, John Ponet in the mid-sixteenth century and John Bramhall in the mid-seventeenth, unhesitatingly labeled the conciliar theory as a canonistic teaching. And so, too, did an seventeenth-century English parliamentarian, William Prynne.

If that is my assessment of the case made by a book which is concerned to make a contribution to the history of ecclesiology, how then would I appraise its significance beyond that for our understanding of the history of constitutional and political thought, or, for that matter, its significance for the development of

11 See above, n. 3, 4 and 9.

12 Though some of these works come close at times to being a veritable tissue of canonistic citation; see Philippus Decius, Consilium . . . de auctoritate papae et concilii (1511), printed in Monarchia S. Romani Imperii, ed. Melchior Goldast, 3 vols. (Frankfurt, 1614), 2:1662-1676, and Matthias Ugonius, Synodia Ugonia Episcopi Phamagustani de Conciliis (Venice, 1532).

13 That is true even of a Pierre d'Ailly, in whose writings the blunt expression of his contempt for lawyers and for the study of law is a recurrent motif, or of a Jean Gerson, whose commentators have more than once remarked on his indifference to canonistic argumentation. See Francis Oakley, The Political Thought of Pierre d'Ailly: The Voluntarist Tradition (New Haven and London, 1964), pp. 163-164, 209-210, for d'Ailly's not inconsiderable canonistic erudition. For commentary on Gerson, see John B. Morrall, Gerson and the Great Schism (Manchester, 1960), p. 120; G. Posthumus Meyjes, Jean Gerson: Zijn Kerkpolitiek en ecclesiologie (The Hague, 1963), pp. 277-284; and Oakley, "Gerson and d'Ailly: An Admonition," Speculum 40 (1965): 74-83, at p. 81, for an argument that Gerson was more familiar with canonistic modes of thought than his citations might suggest.

contemporary Catholic ecclesiology? Let me take up those two matters in turn, though reversing their order and beginning with ecclesiology and concluding with the history of political thought.

Almost two centuries ago now, when in his *View of the State of Europe during the Middle Ages* the English historian, Henry Hallam, came to write about the ending of the Great Schism at the Council of Constance by the deposition of the rival pontiffs, he spoke of "the Whig principles of the Catholic church" embodied in the superiority decree *Haec sancta*, and described that decree as one of "the great pillars of that moderate theory with respect to papal authority which . . . is embraced by almost all laymen and the major part of ecclesiastics on this side of the Alps."15 By the end of the century, however, in the wake of the ecclesiastical and theological developments that had culminated in 1870 in the First Vatican Council, what Hallam had seen as a live ecclesiological option for the Catholics of his day had become a matter of interest only to the archaeologists of defunct ideologies. Vatican I's definitions of papal primacy and infallibility seemed to leave Catholic historians with little choice but to treat the conciliar movement as nothing more than a revolutionary moment in the life of the church, and Catholic theologians with no alternative but regard the conciliar theory—the malign contribution, it was thought, of those dangerous radicals Marsiglio of Padua and William of Ockham—as a dead issue, an ecclesiological fossil, something lodged deep in the lower Carboniferous of the dogmatic geology.16

Upon this whole matter—very much one of the "neuralgic points" in Catholic ecclesiology, as Karl August Fink has since labeled it17—there descended an ecclesiastical version of the "politics of oblivion." It was only the fortuitous intersection of advances in historical knowledge and John XXIII's unexpected convocation in 1959 of the Second Vatican Council that shattered the silence. Six years before *Foundations* was published, in the long, opening section of his great *History of the Council of Trent*, Jedin gave a powerful impetus to the surge of historical work on the persistence of conciliarism into the Age of Reformation which has continued down to the present, which has long since established the fact that the demise of conciliar theory after the dissolution of Basel was neither as sudden nor as final as we once were led to suppose, and which has powerfully suggested that it is only our familiarity with

15 Henry Hallam, *View of the State of Europe During the Middle Ages*, 3 vols. (London, 1901), 3:243, 245. The work was first published in 1818.

16 So much so, indeed, that in 1908 the editors of *The Catholic Encyclopedia* did not even judge it worthwhile to include in that work an article on conciliarism. For the extraordinary degree of contradiction, confusion, disingenuousness and disarray evident well into the 1960s in the treatment by Catholic encyclopedias of such topics as conciliarism, the Councils of Pisa, Constance and Basel, and the status of the popes of the Avignon and Pisan lines, see Oakley, *Council Over Pope*, pp. 27-29, 123-124. See also Izbicki, "Papalist Reaction to the Council of Constance," pp. 17-20.

the papalist outcome that has contrived to suggest the apparent necessity of the process.\textsuperscript{18} Six years later it was likewise (if more dramatically) the contribution of Tierney to have made it abundantly clear that the conciliar theory was neither as recent nor as revolutionary in its origins as it had long been customary to believe.

With the excitement surrounding the convocation of Vatican II, then, and the concomitant renewal of interest in matters conciliar, it is not surprising that during the 1960s Catholic theologians (and those Catholic historians prone to scratching a theological itch) should quickly be forced to come to terms with the implications of all these new historical interpretations for contemporary Catholic ecclesiology. To this development Tierney himself was no stranger, pointing up the pertinence of medieval canonistic teaching to the much-discussed doctrine of episcopal collegiality, and, beyond that, emphasizing at large the constitutionalist implications for the church of the conciliar tradition.\textsuperscript{19}

By the time he did so, however, things had taken a somewhat more radical turn and attention had come to focus rather tightly upon the ecclesiological significance of the Council of Constance itself and of its decrees \textit{Haec sancta} and \textit{Frequens}. As a result, within less than a decade of the publication of \textit{Foundations}, Joseph Gill of the Pontifical Oriental Institute at Rome, reiterating the long-since traditional rejection of Constance's legitimacy at the time it enacted \textit{Haec sancta}, and warning that "the principle of the superiority of council over pope, forgotten and denied in the intervening centuries [since Constance and Basel], is being revived," ruminated gloomily about what he called "the conciliarists of today" and nominated the Belgian Benedictine Paul de Vooght for that forbidding title.\textsuperscript{20} In that de Vooght, already in 1960 (and referring to the work of Ullmann and Tierney), had been the first to have reopened the


question of the dogmatic status of the Constance superiority decree _Haec sancta_, the nomination was not entirely inappropriate. But it should be noted that in his initial statement de Vooght had restricted himself almost entirely to the role of historian and had hesitated to draw any precise theological conclusions. Only in the final restatement of his position in 1965, and after the appearance of Hans Küng's _Structures of the Church_, did he draw the obvious theological conclusions from his own historical arguments and conclude that _Haec sancta_ fulfilled all the conditions necessary to make it a binding dogmatic decree. So that, he concluded, "there is no longer today any motive for maintaining the [traditional] ostracism of a dogmatic decree which clarifies a point of doctrine always admitted in the Church and always taught in the schools."\(^{21}\)

That conclusion had, in effect, been anticipated by Küng in 1962. Pointing out that "the (traditionally understood) legitimacy of Martin V and all other subsequent popes up to the present day depends on the legitimacy of the Council of Constance and its procedure in the question of popes," he had argued that the question of papal approbation of the decree is not to be "posed anachronistically" and had stated flatly that "the binding character of the decrees of Constance is not to be evaded." But "what was defined," he hastened to add, was not a "radical conciliarism" (his words) reducing the pope to "a subordinate executive organ of a conciliar parliament," but rather "a distinct kind of superiority of the council... according to which an ecumenical council has the function of 'control authority,' not only in connection with the emergency situation of that time, but also for the future on the premise that a possible future pope might lapse into heresy, schism, or the like."\(^{22}\)

In light, however, of Küng's subsequent and masterly ecclesiological treatise, with its almost agnostic appraisal of the whole question of a scripturally-validated papal primacy, and his rejection (even before he wrote his book on infallibility), as "something that is not directly demonstrable from the New Testament," of "the _a priori_, unquestionable and verifiable infallibility of particular 'doctrinal statements'"—in light of these subsequent, more radical, positions, what is striking is the extreme caution with which, in _Structures of the Church_, he interpreted the implications of his own affirmation of the dogmatic validity of _Haec sancta_. In that book, indeed, he came close, in effect,

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22 Küng, _Structures of the Church_, pp. 270-271, 284-285. See also ibid., pp. 288-302, where he makes heavy use of _Foundations_ and pays generous tribute to the importance of its contribution.
to understanding *Haec sancta* in terms of the teaching of Vatican I, or, more precisely, to understanding it in terms of the room left by that teaching and by the 1917 Code of Canon Law for the existence of limitations upon the exercise of papal authority.\(^{23}\) As a result, in the years prior to the appearance in 1970 of his book on infallibility, it was left to others to push into more novel territory the implications of the "new conciliarism." And, along that route, the outer limits were reached with the insistence that Constance's *Haec sancta* and Vatican I's *Pastor aeternus*—both of them meeting the tests for valid conciliar, doctrinal pronouncements—were in almost direct conflict one with another, that not even the most agile of hermeneutical gymnastics made it possible to effect a credible reconciliation between them, that, as a result, the absolutist claims traditionally made (and currently being made) by the official church for the *magisterium* had simply to be dropped, and that it was necessary to admit, with full candor, the essential historicity and reformability of all doctrinal pronouncements, conciliar no less than papal, as well as, concomitantly, the reformability of all ecclesiologies, conciliar no less than ultramontane.\(^{24}\)

In the history of interpreting the ecclesiological significance of *Haec sancta*, however, that position stood out as something of an isolated extreme.\(^{25}\) The 1960s and 1970s saw an extensive body of scholarly literature produced concerning the status and interpretation of *Haec sancta*, but no viable historical or theological consensus was generated thereby.\(^{26}\) The mainstream of

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\(^{25}\) That is the judgment of Schneider, ibid., pp. 270-271.

\(^{26}\) Much of the pertinent literature up to the mid-1970s is summarized, criticized, or commented on in Oakley, *Council Over Pope*, pp. 105-171; Paul de Vooght, "Les controverses sur les pouvoirs du concile et l'autorité du pape au Concile du Constance," *Revue théologique de Louvain* 1 (1970): 45-75; and Schneider, *Der
interpretation flowed, instead, through less broken countryside than that occupied by the extreme position; it pursued, on the one hand, a course more cautious than that adopted by Küng, even in *Structures of the Church*, while, on the other, still departing in varying degrees from the rejectionist high ground defended by Gill and others of similarly traditionalist sympathies. But here the story becomes even more tangled and, feeling a sharp tug on the tether confining me to the topic at hand, I must restrict myself to focusing on the revealingly selective way in which some of the scholars involved made use of the thesis propounded in *Foundations*.

In an address which he himself identified, not as a work of history, but as a contribution to ecclesiological discourse,27 Jedin himself signaled the general direction that was to be followed by this stream of interpretation. While at one with Küng in his desire to avoid posing anachronistically the question of subsequent papal approbation of *Haec sancta*, he insisted (invoking the definitions of Vatican I) that the fact that John XXIII was not an indisputably legitimate pope was "decisive" for the doctrinal status of the decree. Despite the later efforts of the Council of Basel to accord it such a status, therefore, it was not to be viewed as a "universal, as it were, free-floating definition of belief," but rather as "an emergency measure to meet a quite definite exceptional case" of the type that the decretists had envisaged and in which, they had insisted, the interest of the church had to come before that of the pope. Only (and for the first time) in 1439, when it was attempting to depose an unquestionably legitimate pope, and when it had become a rump council bent on turning itself into a "church parliament" in a manner wholly alien to the conciliar tradition, did Basel accord to *Haec sancta* an absolute dogmatic value and declare the superiority of council to pope a truth of the faith.

Shortly thereafter, in a *Concilium* article that enjoyed a very wide circulation, claiming oddly to be in broad agreement with both Küng and Jedin and insisting that *Haec sancta* was "not the kind of dogmatic definition which Vatican I described," August Franzen argued that Constance "did not intend the

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decree...to be a norm of faith. Only because the fathers assembled at Basel moved in 1439 to reinterpret the decree "in a radical conciliarist sense" was it taken to be a dogmatic statement. What it really was, instead, was a measure for emergencies, a piece of legislation designed to give formal, legal force to the traditional decretist teaching that a general council was superior in authority to a pope who, by lapsing into heresy or by fostering schism had ceased ipso facto to be anything more than a pseudo-pope.

With this approach Remigius Bäumer, in his subsequent study of the reverberations of conciliar thinking in the theology and canonistics of the early sixteenth century, was clearly sympathetic. But his treatment of these matters, in common with Franzen’s, was marked by one striking characteristic. Though they both invoked the argument of Foundations (Franzen referred to it as Tierney’s "brilliant study"), they appear to have assimilated that argument only in a reduced or truncated form. Thus, they misleadingly insisted on distinguishing between, on the one hand, a “conciliarism” or “radical conciliarism” which they viewed as stemming from Marsiglio and Ockham and as having been adopted by Basel, and, on the other, a “conciliar theory” or “moderate conciliarism” which they viewed as having been affirmed at Constance in the decree Haec sancta and as being nothing other than an expression of the decretist teaching on the extraordinary case of the heretical pope. Tierney’s stress on the contribution of decretalist corporation theory to conciliar thinking was passed over in silence. So, too, by and large, the decretist school of thought

28 August Franzen, “The Council of Constance: Present State of the Problem,” Concilium 7: 29-68, esp. pp. 45-68. This lengthy article is largely dependent upon two earlier articles of his: “Zur Vorgeschichte des Konstanzer Konzils vom Ausbruch des Schismas bis zum Pisanum,” and “Das Konzil der Einheit: Einigung bemühungen und Konziliaren Gedanken auf dem Konstanzer Konzil. Die Dekrete ‘Haec sancta’ und ‘Frequens’,” in Das Konzil von Konstanz, pp. 3-35, 69-112. It should be noted that, while Jedin’s argument is marked by its own confusions (in the second edition he ruefully conceded the manifest difficulties attendant upon it—see Bischöfliches Konzil oder Kirchenparlament, pp. 38-39), they are overshadowed by the incoherence of the case Franzen makes here. For a discussion and critique of both, see Oakley, Council over Pope, pp. 113-120.


30 Bäumer, Nachwirkungen des Konziliaren Gedankens.

which insisted that a heretical pope had to be subjected as pope to conciliar trial, judgment and deposition. Instead, they focused on the alternative teaching that a heretical pope ceased *ipso facto* to be pope and, as a result, could be subjected as a private person to a merely declaratory process of judgment. But that latter view, of course, was close to being a commonplace, even among such staunch papalists as Torquemada in the fifteenth century and Bellarmine over a century later. And, as even Robert Persons, the Elizabethan Jesuit controversialist, readily acknowledged, it was still, at the end of the sixteenth century, a matter taught publicly in the schools, even at Rome itself.

So diminished (or domesticated) the ecclesiological importance of the Council of Constance on which Küng had insisted, and for the recognition of which by the theological community Tierney's historical work in *Foundations* had blazed the trail, became understandably less obvious. Perhaps accordingly, as the 1970s and 1980s wore on, the attention of Catholic ecclesiologists appears to have drifted away somewhat from such matters—mainly, I would judge, and after a brief period of intense focus on the question of papal infallibility, back in the direction of the more fundamental (or, at least, more abstract and theoretical) dimensions of their field. Doubtless, there were many

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32 For these two approaches to the case of the heretical pope, see Tierney, *Foundations of the Conciliar Theory*, pp. 8-9, 56-65, 212-218.

33 And Thomas de Vio, Cardinal Cajetan, went further than that, attributing an actual power of deposition to the general council; see Vincent-Marie Pollet, "La doctrine de Cajetan sur l'Eglise," *Angelicum* 12 (1935): 223-244, at pp. 224-229.

34 Thus "Philopater" (Robert Persons), *Elizabethae Angliae Reginae Haeresim Calvinianam propagantis saevissimum in Catholicos sui regni Edictum* (Lyons, 1592), §221, p. 152; similarly, his *A Treatise tending to Mitigation towards Catholicke Subjectes in England* (St. Omer, 1607), §§52-53, pp. 180-181. See also William Allen, *A true, sincere and modest defence of English Catholiques that suffer for their Faith* (Ingolstadt [?], 1586), p. 73, where he argues that "... no more [would] the Popes Holines ... count anie of his own subiectes Traitors for houlding, that in case of Heresie or Apostasie, he might be deposed or loose the right of his place and dignitie."

35 Reflecting perhaps the sense, too, even among historians, that the claim of Küng and de Vooght to the effect that *Haec sancta* constituted a dogmatic definition had been forcefully and successfully contradicted and had come, as a result, to represent by the late 1970s no more than a "marginal" position—thus Erich Meuthen, "Das Basler Konzil in römisch-katholischer Sicht," *Theologische Zeitschrift* 38 (1982): 274-308, at pp. 277-278, n. 8. Note, on the other hand, that Yves Congar had judged Tierney's *Foundations* to be "le livre décisif"; see his "La collegialité de l'épiscopat et la primauté de l'évêque de Rome dans l'histoire," in idem, *Ministères et communion ecclésiale* (Paris, 1971), p. 116, n. 32. See also Küng, *Structures of the Church*, pp. 268-288.

36 For a useful review of the state of Catholic ecclesiological discussion in the immediate aftermath of Vatican II, see Richard P. McBrien, *Church: The Continuing Quest* (New York, 1970). The flurry of interest in the infallibility question was stimulated almost immediately thereafter by the publication of Hans Küng's *Unfehbar?: Eine Anfrage* (see n. 23 above) and Brian Tierney's *Origins of Papal*
factors involved in that shift. In 1970 Gregory Baum had berated Catholics at large for their "institutional hang-up," their instinctive tendency to ecclesiastize religion, their obsessive concern with questions relating to "defined doctrine, sacramental legislation or ecclesiastical jurisdiction." His sentiments may well


This general issue is the focus of a forthright discussion (under the rubric of "infallibility or indefectibility" and with reference to the contributions of Yves Congar, Küng and Rahner) in a recent, comprehensive survey of modern Catholic ecclesiological thinking by Miguel M. Garijo-Guembe, Communion of the Saints: Foundation, Nature, and Structure of the Church (Collegeville, Minnesota, 1994), pp. 182-186. (The book is a translation by Patrick Madigan of Gemeinschaft der Heiligen: Grund, Wesen und Struktur der Kirche, first published in 1988). But in the same work the conciliar issue gets only the most glancing of references and then (p. 223) via the final report of the Anglican-Roman Catholic International Commission. There are similarly glancing references to the medieval teaching on the case of the heretical pope (pp. 190, 227). But this is incorrectly interpreted (as was the case with Franzen, see n. 29 above) as a “unanimous teaching;” asserting that a pope who lapsed into heresy ceased ipso facto, as a result, to be pope and that teaching is incorrectly ascribed to Cajetan (p. 190, n. 27). For that interpretation the authority of both Congar and Küng is invoked, though Küng, in fact, proffers a more accurately nuanced view; see Küng, Structures of the Church, pp. 261-263, 296, 308-310. Garijo-Guembe’s bibliographical listings are quite rich; but he slights, in general, the contributions of historians on this topic and, in particular, makes no reference to any of Tierney’s writings. In this respect, Patrick Granfield, The Papacy in Transition (New York, 1980), pp. 78-85, 166-174, is somewhat more helpful and reliable—though he does follow the Annuario Pontificio in appearing to recognize the exclusive legitimacy of the Roman line of claimants during the Great Schism (see p. 198).

37 Gregory Baum, "The Institutional Hang-Up," Commonweal (May 15, 1970): 212-213. While the particular set of hermeneutical principles Baum himself was bringing to the interpretation of papal and conciliar magisterial pronouncements might be expected to liberate him from the necessity of harboring any such distracting "hang-ups" (on which, see Oakley, "The ‘New Conciliarism’ and Its Implications," pp. 834-840), he had, in fact, indicated in the previous year his own worry that collegiality was destined to be "a dead word unless the Pope . . . [changed] . . . the understanding of his own office," and, referring to Constance and Haec sancta, had argued that "it should . . . be possible to have papal primacy and episcopal collegiality guaranteed by some sort of constitutional law;" see his "Suenens Crying in the Wilderness," The Catholic World 210 (Dec., 1969): 103-107.
have been shared by many a theologian at the time, though it is tempting to speculate that the shift at Rome over the past two decades into an unambiguously Thermidorian phase may have rendered somewhat less than appealing as a subspecialty the more institutional or constitutional aspects of ecclesiological work. Certainly, on the latter (perhaps ungenerous) note, there come irresistibly to mind from the late fourteenth century the words of the Parisian theologian, Jean Courtecuisse (Johannes Breviscoxe). After ruminating provocatively about the source of some aspects of the papal power of coercive jurisdiction, he wryly added, tongue firmly in scholastic cheek: "But this I do not assert. For it is perilous to speak of this matter—more perilous, perhaps, than to speak of the Trinity, or the Incarnation of Jesus Christ our Savior."38

When one turns, however, to the significance of the contribution of Foundations to our understanding of the history of political thought, one finds oneself on more welcoming terrain. The principal reason, therefore, is the subsequent (and congruent) development of Tierney's own thinking evident in a very impressive body of scholarly work published over the course of the past forty years. And the subsidiary reason: the unfolding of events during the same period in the world at large—the chastening experience of decolonization and its aftermath, the restoration over the past decade and more of constitutionalist regimes in so many parts of Latin America, and, most recently, the collapse of communism and the attempt to establish and consolidate liberal democratic regimes in eastern Europe and in the successor states to the Soviet Union. I will return to this latter development by way of conclusion to this paper. What I should like to do now is to focus briefly on the direction taken by Tierney's work in the aftermath of Foundations.

Right at the start of that book, he noted that late-medieval political thinking was dominated by "two major problems concerning the nature and limits of ecclesiastical authority" (1), problems often, in their development across time, closely associated one with another but logically quite distinct. The first was the long drawn-out conflict between regnum and sacerdotium. The second concerned matters internal to the structure of the church itself and the distribution of authority among head and members. Among historians, the first had always attracted a great deal of interest and attention. The second, much less so. It was, of course, with the second that Foundations was concerned. And, commenting in that book on Figgis's thesis about the origins of conciliar theory, Tierney had emphasized the further point that the interactions of the rival governmental structures of state and church may have been even more significant than the state of conflict that so often enveloped them.39 Indeed, "one might... argue," he said, "that the resemblance between the conciliar theories and the


constitutional experiments of secular states was due partly to canonistic influence in the secular sphere” (11-12, n. 2).

Much of his subsequent work—most notably his Wiles lectures on religion, law, and the growth of constitutional thought from the mid-twelfth to the mid-seventeenth centuries (along with the earlier work it drew upon), and, more recently, the continuing series of articles he has devoted to an investigation of the origins and development of theories of individual natural rights in European legal and political thought—much of that work has focused on these "more complex and more important" problems of interaction. It has been directed, in effect, to a probing exploration of the proposition that the juridical culture of the twelfth century—the works of the Roman and canon lawyers, especially those of the canonists where religious and secular ideas most obviously intersected—formed a kind of seedbed from which "[eventually] grew," not only "the whole tangled forest of early modern constitutional thought,"

40 but also the notion of natural rights which played so central a role in early modern political theory. 41 The project, of course, is mightily ambitious, and the topic hugely complex. Here I must content myself with making no more than a handful of observations about what it has involved, observations focused, in particular, on its investigation of the development of constitutional thinking.

The basic assumptions underlying the whole project are two-fold. First, that "it is impossible really to understand the growth of Western constitutional thought unless we consider constantly, side by side, ecclesiology and political theory, ideas about the church and ideas about the state." And, again, that "it is hardly possible to understand" that tradition of constitutional thinking "unless

40 The words cited are those of Brian Tierney, Religion, Law, and the Growth of Constitutional Thought: 1150-1650 (Cambridge, 1982), p. 1. Among the earlier articles of his that this book builds upon, attention should be drawn especially to "Medieval Canon Law and Western Constitutionalism," "The Roots of Western Constitutionalism in the Church's Own Tradition," and "Divided Sovereignty' at Constance: A Problem of Medieval and Early Modern Political Theory."

we consider the whole period from 1150 to 1650 as a single era of essentially continuous development."

In relation to the former assumption, it should be noted that the claims Tierney makes, developing further a tradition of scholarship represented notably in the United States by such scholars as Gaines Post and Ernst Kantorowicz link closely with the thesis argued in Foundations, especially as it relates to the specific contribution of canonistic corporation theory to the development of a form of ecclesiastical constitutionalism. For that corporation theory, preoccupied as it was with the distribution of authority among head and members of a complex collegiate body, and insisting as it did on the ability of the members to exercise the corporate authority even absent the presence of an effective head—that specifically canonistic variant of corporation theory was assimilated, he argues, not only into ecclesiastical but also into secular thinking. And assimilated also during the later medieval centuries, along with such notions, was, in addition, a whole battery of affiliated constitutionalist ideas pertaining to representation, consent, rights of resistance, collegiate and "divided" sovereignty, ideas which coalesced into "an unusual structure of constitutional thought that was common to medieval law, to fifteenth century conciliarism, and to seventeenth century constitutional theory." In relation to Tierney's affiliated assumption that in matters constitutional the period from the late-twelfth to the late-seventeenth centuries must be understood as a single epoch, more than one approach is pertinent. The older one was pioneered by Figgis and pursued more recently by those who, while rejecting his thesis about the origins of conciliar theory, have endorsed his claim about the influence of conciliar theory upon the thinking of the secular resistance theorists and constitutionalists of the sixteenth and seventeenth centuries, and have busied themselves with the task of mapping out that process more precisely. While not unduly dismissive of that approach, Tierney himself, however, has persistently nudged us to probe somewhat deeper, to recognize that "resemblances which cannot be explained as a result of the influence of one writer on another may be at least as important for the historian as those that can be so explained." For they reflect "a continued preoccupation of many thinkers with essentially similar problems of constitutional theory through more than five centuries of Western history."  


43 See, especially, Gaines Post, Studies in Medieval Legal Thought (Princeton, 1964), and Ernst Kantorowicz, The King's Two Bodies (Princeton, 1957).

44 The aspect of his argument, in effect, that Franzen and Bäumer, in downplaying the significance of that constitutionalist thrust, contrived somehow to push to one side.

45 Tierney, Religion, Law, and the Growth of Constitutional Thought, p. 103. See also his "Divided Sovereignty at Constance," pp. 238-256, a fine article with a broader significance than its title might suggest.

46 Tierney, "Divided Sovereignty at Constance," pp. 254-255, where he adds: "It follows . . . that the task of a historian is not simply to pursue threads of influence
Of course, in a project of such scale and complexity it is only to be expected that disagreement should arise on this or that particular point. On the interpretation, for example, of Aegidius Romanus, writing in the fourteenth century.47 Or on the use made of Julian Franklin's interpretation of George Lawson, writing in the seventeenth.48 Or on whether one can really, without anachronism, speak of thirteenth-century lawyers as having "asked Rousseau's questions" and addressed explicitly the problem of political obligation.49 Or, for that matter, whether one should not, after all, persist in ascribing a somewhat greater importance than does Tierney to the really quite extensive use made of the conciliar precedent by the Protestant resistance theorists and constitutionalists of the sixteenth and seventeenth centuries—if only because of what that usage reveals about the ideological demands of the religious and political context in which they found themselves.50

from one author to another down the course of the centuries. The further, more difficult task for future research will be to understand what elements of continuity existed in social, political and religious life (during a period of such incessant change) which might explain the continued preoccupation of so many thinkers with the same constitutional problems over such a long period of time. See also Religion, Law, and the Growth of Constitutional Thought, pp. 103-108. Given this emphasis, I find it odd that Cary J. Nederman, in a recent critique of the Figgis thesis and its latter-day defenders appears to regard Tierney as one of those defenders and reserves one or two of his sharpest barbs for him; see Nederman, "Conciliarism and Constitutionalism: Jean Gerson and Medieval Political Thought," History of European Ideas 12 (1990): 189-209. I have always thought that the powerful case Tierney has made for an essentially continuous unfolding of constitutionalist ideas from the canonistic literature of the twelfth century to the political thinkers of the seventeenth tended rather to diminish than enhance the significance that Figgis (and later sympathizers like myself) attached specifically to the conciliar legacy.


50 I addressed these issues some years ago in "Figgis, Constance, and the Divines of Paris," and "Natural Law, the Corpus Mysticum, and Consent in Conciliar Thought," and have since returned to them in two forthcoming papers: "Constance, Basel, and the Two Pisas," in which I conclude that, in the early-seventeenth century, "the access of English people to the conciliarist literature was easier . . . (and their
So far as the general approach is concerned, however, I would predict that in the stakes of historiographic reputation it will prosper, and increasingly so as the new picture being generated by current investigations of the natural rights tradition comes progressively into focus. In one of a notable series of articles emphasizing important discontinuities between late-medieval political thinking and distinctively modern preoccupations, Cary J. Nederman, it is true, has recently launched a sweeping attack on the claims being made for the impact of medieval ecclesiology in general and conciliar theory in particular upon the shaping of early-modern constitutionalism. That attack, however, depends for its force on something of a misrepresentation of what those claims actually involved, as well as upon the deployment of an over-rigid and essentially anachronistic definition of "modern constitutionalism," one as ill-matched to the realities of the seventeenth century as it is to those of the fifteenth. Indeed, Nederman's greatest contribution in this article, or so I conclude, may well have been other than he intended. Namely, that of lending unwitting support to those—A.J. Black, J.H. Burns and others—who, like Tierney, have argued that we would do well to go about our task of historical interpretation on the assumption that "the truly epochal shifts in European political thought occurred in the eleventh and eighteenth centuries," so that the whole period in between should properly be understood, therefore, as "essentially a single epoch."

These being the centuries which witnessed, as Tierney has argued, the crystallization in Europe of a body of constitutional thinking that we now

knowledge of that literature concomitantly greater) than at any time preceding, the fifteenth century not excluded," and "Anxieties of Influence: Skinner, Figgis, Conciliarism and Early-modern Constitutionalism."


53 The words are those of Antony Black, Political Thought in Europe: 1250-1450 (Cambridge, 1992), p. 191. See also the comments of J.H. Burns in his introduction to The Cambridge History of Political Thought: 1650-1700, ed. J.H. Burns and Mark Goldie (Cambridge, 1991), pp. 1-3. There he notes that "as the differentiation between 'early modern' and 'later modern' has sharpened, that between 'early modern' and 'medieval' has softened." Right at the end of the period covered by the volume we find, after all "the stubborn persistence of theological issues that had preoccupied late medieval scholastics." Certainly, the amount of emphasis placed on such issues by the historians contributing to the volume itself signals a significant shift in the way in which, over the past quarter century, we have come to understand the ideological underpinnings of early-modern political thinking.
recognize as distinctively Western, let me return, by way of conclusion, to my earlier suggestion that the unfolding of events world-wide over the past half-century has served to underline the significance of the particular course of historical investigation which Tierney, building upon the argument in *Foundations*, has been pursuing during the forty years since that book appeared. If it was easy enough for Figgis and historians of his generation to suppose that "constitutional government was a kind of normal, natural end toward which human history inevitably progressed," that degree of optimism is hardly available to us today. The flowering in the very heartland of Europe of totalitarian despotisms of the most squalid kind, the failure in so many parts of the decolonized world of the Western-style constitutional forms so confidently bequeathed to them, and, more recently, the mounting challenges currently being confronted by the countries of eastern Europe and Latin America in their struggle to consolidate liberal democratic regimes and to rebuild the institutions and practices of a viable civil society—such developments hardly encourage us to take at all for granted the emergence of constitutionalism in medieval and early-modern Europe. What they do encourage, instead, is a forthright acceptance of the historical singularity of that development, as well as an energetic investigative effort to identify and understand its roots and presuppositions. And that must take us back, of course, as Tierney has again and again insisted, to the medieval centuries, to the aspects of medieval civilization which are "extremely abnormal by the standards of other societies," and, above all, therefore, to the religious aspect and "the exceptional role" played by "the Christian church in the organization of medieval society." The technical nature of so much of the scholarly work demanded by this effort, and the intricacy and subtlety of argumentative tactic necessarily pursued, have been such as to retard the absorption of the interpretative shift involved into the habitual thinking of the generalists or of modernists whose minds still revolve within the Ptolemaic cycles and epicycles of the traditional periodization of European history. But time, I would judge, is on its side; it explains more, and explains it more profoundly. At the end of his long review of *Foundations*,

54 The importance of that recognition was underlined by the papers produced by scholars from all over the world for the international conferences sponsored between 1987 and 1989 as part of the American Council of Learned Societies' Comparative Constitutionalism project; see *Constitutionalism and Democracy: Transitions in the Contemporary World*, ed. Douglas Greenberg et al. (New York and Oxford, 1993).


56 For an attempt to evoke the dimensions of that political singularity and to set them in a broader and comparative cultural context, see Francis Oakley, *The Medieval Experience: Foundations of Western Cultural Singularity* (New York, 1974), esp. pp. 1-8, 103-135, 209-212.


58 For a brief (but telling) comment on one illustrative case, see Brian Tierney, "Hierarchy, Consent and the 'Western Tradition'," *Political Theory* 15 (1987): 646-652.
and by way of concluding judgment on the power of its thesis compared with the historiography preceding it, Michael Seidlmayer borrowed four words from the great decretalist, Hostiensis. They were words which Hostiensis had used when he insisted, against the view of Innocent IV, that it is in its membership taken as a whole, and not in its head alone, that the authority of a corporation resides. Those words apply with equal felicity to the argument Tierney has since developed concerning the shaping, not simply of medieval ecclesiastical constitutionalism, but of European constitutional thought in general. *Verius est*, Hostiensis had said, *licet difficilior*.59

59 See the review by Seidlmayer (n. 4 above) at p. 387. See also Tierney, *Foundations of the Conciliar Theory*, p. 107.