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By Brian Tierney. England: Cambridge University  
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RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL  
THOUGHT 1150-1650. By Brian Tierney. England: Cambridge  
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*Reviewed by Harold J. Berman\**

In a series of major scholarly works written during the past three decades, Brian Tierney has brilliantly illuminated the history of constitutional theory and practice in the formative era of the Western legal tradition, from the twelfth through the fifteenth centuries. In his latest book, comprising the Wiles Lectures, he not only brings into a common focus many of the insights of his previous writings but, even more important, he also shows the survival and adaptation of late medieval constitutional thought in the secular political theory of the sixteenth and seventeenth centuries and, by implication, of the eighteenth, nineteenth, and twentieth centuries as well. "[T]he juridical culture of the twelfth century," he writes, "the works of the Roman and canon lawyers . . . formed a kind of seedbed from which grew the whole tangled forest of early modern constitutional thought."<sup>1</sup>

The principal source of the "seedbed" is identified by Professor Tierney as the "unusual duality of structure" that characterized Europe from the time of the Investiture Contest of 1075 to 1122 — that is, from the time when a new papal party threw off imperial, royal, and feudal control of the church and established a separate ecclesiastical polity, with its own jurisdiction and its own legal system. "From then onward . . . [t]here was never just one structure of government, presided over by an unchallenged theocratic head, but always two structures, ecclesiastical and secular . . . . Each hierarchy limited the authority of the other . . . ."<sup>2</sup> The "tension and interchange"<sup>3</sup> between the eccle-

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1. B. Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150-1650*, at 1 (1982) [hereinafter cited by page reference only].

2. P. 10. This is a major theme of the reviewer's recent book, H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), which is also being reviewed in these pages. See Sandoz, *Book Review*, 45 *La. L. Rev.* 1111 (1985). Unfortunately, when the book went to press Professor Tierney's book was not available; otherwise, I could have saved a large amount of time simply by quoting from it at length.

3. P. 12.

siastical and the secular spheres — as well as within each — led to the development, in the twelfth and thirteenth centuries, of a sophisticated body of doctrine concerning sovereignty, legitimacy, jurisdiction, representation, consent, majority rule, right of resistance, and similar matters of corporation law, as it was then called, or constitutional law, as we call it today.

Tierney also traces to the actual circumstances of political life in twelfth-century Europe the extraordinary concern of modern western political theory with the question of the origin of the state. “[I]n classical works,” he notes, “accounts of the origin of the state are not of central importance in the whole structure of political thought . . . . But from John of Paris [in the early fourteenth century] to John Locke, and beyond to Rousseau, political theorists frequently began their works with hypotheses (sometimes very odd ones) about the origins of government, which determined the whole content of the argument that followed.”<sup>4</sup> The emphasis on origins, Tierney points out, is closely related to the fact that, from the twelfth century on, corporate structures did actually derive their authority from the ways in which they were founded. “We are dealing with a time,” he writes, “when, all over Europe, separate individuals were in real life coming together, swearing oaths to one another, covenanting together to form new societies, sometimes political societies — all those *universitates* [corporations], guilds, colleges, communes that we noticed earlier — and were deliberately shaping constitutional structures for their new societies. For civil and canon lawyers one distinction between a *universitas* and a mere crowd of individuals consisted precisely in the fact that the *universitas*, but not the individuals, could create a ruling official, having ordinary jurisdiction over the community.”<sup>5</sup>

Similarly, the elaboration of a formal theory of government by consent was closely related to the fact that “[m]edieval society was indeed saturated with consensual practices. Feudal contracts were based on mutual consent. Innumerable corporate groups chose their leaders by consent. Kings summoned assemblies to consent to taxation. Church government was a structure of elective offices. . . .”<sup>6</sup> Tierney cites a passage in which the philosopher Duns Scotus (1265-1308) envisages a multitude of unrelated strangers coming together to build a city. In order to institute a government, Duns Scotus wrote, they could all assemble together and submit themselves either to one person or to the whole community. Thus Scotus “[gives] us so to speak a choice between Hobbes and Locke at the start of the tradition.”<sup>7</sup>

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4. Pp. 35-36.

5. P. 36.

6. P. 40.

7. P. 42.

The modernity of the theories expounded by lawyers and theologians in the period after the Investiture Contest has been generally ignored by conventional historiography, with its division between "Middle Ages" and "Modern Times," or, as the social-economic historians would have it, "Feudalism" and "Capitalism." Even the doctrine of separation of powers is foreshadowed in the "Middle Ages." Tierney cites a theologian writing in about 1315, Hervaeus Natalis, who analyzes "jurisdiction" (*i.e.*, government) as consisting of three powers: the power to legislate, the power to judge, and the power to execute the laws.<sup>8</sup> Hervaeus says that such jurisdiction can be acquired "only by consent of the people." "The theory of government by consent (based on liberty and equality) was fully formulated by the early fourteenth century," Tierney writes; and to the argument that, regardless of theory, the medieval social order was characterized in practice by hierarchy and status, he replies that in practice hierarchy and status continued to flourish in the early modern era as well.<sup>9</sup>

In turning to seventeenth century writers, Professor Tierney starts with Althusius, pointing out that he was steeped in the entire tradition of civil and ecclesiastical legal literature from the twelfth-century on. Focusing on Althusius's theories of popular sovereignty and of federalism, Tierney emphasizes their derivation from theories expounded by the Romanist Azo (1150-1230). Althusius's work, he concludes, is "unintelligible unless it is seen as the end product of a tradition — a particular way of interweaving Christian religious and classical legal thought — that can be traced back as far as the twelfth-century Roman and canon lawyers."<sup>10</sup>

The last major thinker to be considered by Tierney in this short but pioneering work is George Lawson, seventeenth-century Calvinist clergyman from whom John Locke derived many of his ideas. Lawson's writings have been studied in the context of the political struggles of the Cromwellian period of English history. Tierney places them also in the context of an older intellectual tradition, including the twelfth-century canonist theory of a complex corporate structure in which the bishop was head of the corporate body but nevertheless was required to rule with the advice and consent of the members in grave matters. Tierney also addresses the ecclesiastical theory of a mixed constitution, especially as it developed in the conciliar period. Indeed, Lawson expressly founded the principle of social contract upon theological premises. "Politiks both civil and Ecclesiastical belong unto Theology," Lawson wrote, "and are but a brand of the same."<sup>11</sup> "Consent," he wrote, "grounded upon

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8. P. 45.

9. P. 52.

10. Pp. 77-78.

11. Quoted p. 99.

Love and Good Affection," is God's way of working through man.<sup>12</sup> Lawson developed his theories in part to explain and justify the English constitutional revolution of the 1640's just as Locke later developed parallel theories, in part to explain and justify the Glorious Revolution of 1688-89; but the intellectual background of the theories is far broader, and goes back to earlier theological controversies.

In a revealing conclusion, Tierney confronts some of the larger questions that are raised by his uncovering of the ecclesiastical origins, in the twelfth to fifteenth centuries, of the debate which dominated political and constitutional thought in the sixteenth and seventeenth centuries and which has continued to exert enormous influence up until our own time. It is not enough, he acknowledges, to show the resemblances between modern and medieval theories, although those resemblances "are too striking to be mere coincidences." "Merely to call attention to resemblances is not to explain the whole phenomenon. The recurrence of similar patterns of thought in different historical environments is itself the problem that needs elucidating."<sup>13</sup> "[T]he task of a scholar is not merely to pursue threads of influence from author to author down through the centuries. The further, more complex task for historians will be to understand what elements of continuity existed in political and religious life (during a period of such incessant change) which might explain the survival of medieval ways of thought into the modern era."<sup>14</sup>

"Here I can offer only the briefest suggestions," Professor Tierney continues<sup>15</sup> — and in three compressed pages at the end of his book he projects a further study of massive proportions. First, "[t]he tensions between central and local government never ceased to exist . . . ."<sup>16</sup> Second, "the medieval habit of basing constitutional doctrines on theories of corporation structure . . . remained pertinent to the social and religious life of the early modern world."<sup>17</sup> Third, "[t]he old tensions and interactions between church and state never died away."<sup>18</sup> "The old medieval conflict of church and state had tended to desacralize kingship; but it did not desanctify the community."<sup>19</sup> At the same time, "the mutual persecutions of the age led both Catholic and Protestant writers — depending on who was being persecuted at a particular time and place — to reformulate medieval doctrines of resistance to unjust rulers and of limited constitutional government."<sup>20</sup>

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12. *Id.*

13. P. 103.

14. P. 105.

15. *Id.*

16. *Id.*

17. P. 106.

18. *Id.*

19. P. 107.

20. *Id.*

Rejecting a simple idealistic interpretation of these developments, as well as "any notion of an 'inevitable principle of progress' at work in history," Professor Tierney nevertheless asserts that "it was not only the circumstances in which our protagonists were placed that determined the outcome of their thought, but in part too the very nature of the religious tradition to which they appealed."<sup>21</sup>

These concluding insights justify the hope that the lectures presented here will prove to be a basis for a larger work that will explore the reasons both for the continuities and for the changes in constitutional thought and practice during the entire history of the West from the late eleventh to the twentieth century. Such a work would have to deal not only with the relationship of the Christian tradition of constitutional theory to changing political-economic-social circumstances but also with the relationship of that tradition to deist, agnostic, and atheist theories that have gradually become dominant in Western thought in the nineteenth and twentieth centuries.

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21. P. 108.