

BOOK REVIEW

THE MEDIEVAL ORIGINS OF THE WESTERN NATURAL RIGHTS TRADITION: THE ACHIEVEMENT OF BRIAN TIERNEY

Charles J. Reid, Jr.†

THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625. *By Brian Tierney.*‡ Atlanta: Scholars Press. 1997. Pp. 380. \$24.95.

INTRODUCTION

Brian Tierney has established himself over the course of forty-five years of writing and teaching as one of the world's leading authorities on the history of medieval canon law and political thought. In a series of foundational works, he has offered important new interpretations of the origins of Western constitutionalism, tracing many concepts believed to be modern or early modern innovations to the work of twelfth-century canon lawyers.¹ He has spent the past fifteen years ex-

† Charles J. Reid, Jr., B.A. University of Wisconsin-Milwaukee, 1978; J.D. the Catholic University of America, 1982, J.C.L., 1985; M.A. Cornell University, Ph.D., 1995, is Research Associate in Law and History, Emory University School of Law. I would like to thank David Bederman and John Witte, Jr., who read an earlier version of this Review and made helpful comments. I would also like to thank William and Sabine Hyland for their helpful conversations on themes pertaining to this Review. Any errors, of course, are the author's sole responsibility.

‡ Bryce and Edith Bowmar Professor *emeritus* of Humanistic Studies, Cornell University.

¹ BRIAN TIERNEY, *FOUNDATIONS OF THE CONCILIAR THEORY: THE CONTRIBUTION OF THE MEDIEVAL CANONISTS FROM GRATIAN TO THE GREAT SCHISM* (1955) [hereinafter TIERNEY, *FOUNDATIONS*] (tracing the "constitutionalist" elements of fifteenth-century conciliar writings to the twelfth-century canonists); BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* (1959) (examining the medieval origins of modern efforts to aid the poor through legal reform); BRIAN TIERNEY, *ORIGINS OF PAPAL INFALLIBILITY, 1150-1350: A STUDY ON THE CONCEPTS OF INFALLIBILITY, SOVEREIGNTY AND TRADITION IN THE MIDDLE AGES* (2d ed. 1988) (examining the development of medieval notions of sovereignty and infallibility). An important work of synthesis is BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT: 1150-1650* (1982). Other important works include BRIAN TIERNEY, *OCKHAM, THE CONCILIAR THEORY, AND THE CANONISTS* (1971) (assessing Ockham's influence on conciliarism) and BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE, 1050-1300* (1964) [hereinafter TIERNEY, *THE CRISIS OF CHURCH AND STATE*] (describing church-state relations from 1050 to 1300). BRIAN TIERNEY, *CHURCH LAW AND CONSTITUTIONAL THOUGHT IN THE MIDDLE AGES* (1979) contains Tierney's most important articles written prior to 1979 on the history of medieval legal and

ploring the origins of the Western notion of natural rights.² In his new work, *The Idea of Natural Rights*,³ Tierney draws on a decade-and-a-half of research as well as a deep knowledge of Western constitutional history to present a radical reconceptualization of the history of natural rights thought in Western civilization.

Natural rights historians and scholars have expressed numerous opinions concerning the origins of the Western rights tradition. In the Anglo-American world, scholars have commonly viewed the seventeenth century as a radical departure from an older tradition that had emphasized the existence of an objectively just order in which individual rights were impossible.⁴ On the Continent, by contrast, scholars

political thought. One should also consult Brian Tierney, *Canon Law and Church Institutions in the Late Middle Ages*, in PROCEEDINGS OF THE SEVENTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 49 (Peter Linehan ed., 1988) (discussing important recent developments in the historiography of canon law) and Brian Tierney, *Freedom and the Medieval Church*, in THE ORIGINS OF MODERN FREEDOM IN THE WEST 64 (R.W. Davis ed., 1995) (discussing "[t]he political contributions of the medieval church to the development of western freedom").

² Tierney's leading articles on rights include: Brian Tierney, *Aristotle and the American Indians—Again: Two Critical Discussions*, 12 CRISTIANESIMO NELLA STORIA 295 (1991); Brian Tierney, *Conciliarism, Corporatism, and Individualism: The Doctrine of Individual Rights in Gerson*, 9 CRISTIANESIMO NELLA STORIA 81 (1988); Brian Tierney, *Ius and Metonymy in Rufinus*, in STUDIA IN HONOREM EMINENTISSIMI CARDINALIS ALPHONSI M. STICKLER 549 (Rosario Castillo Lara ed., 1992) [hereinafter Tierney, *Ius and Metonymy*]; Brian Tierney, *Ius Dictum Est a Iure Possidendo: Law and Rights in Decretales, 5.40.12*, in THE CHURCH AND SOVEREIGNTY c.590-1918: ESSAYS IN HONOUR OF MICHAEL WILKS 457 (Diana Wood ed., 1991); Brian Tierney, *Marsilius on Rights*, 52 J. HIST. IDEAS 3 (1991); Brian Tierney, *Natural Rights in the Thirteenth Century: A Quaestio of Henry of Ghent*, 67 SPECULUM 58 (1992); Brian Tierney, *Origins of Natural Rights Language: Texts and Contexts, 1150-1250*, 10 HIST. POL. THOUGHT 615 (1989); Brian Tierney, *Political and Religious Freedom in Marsilius of Padua*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT 59 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996) [hereinafter RELIGIOUS LIBERTY]; Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 J.L. & RELIGION 163 (1987); Brian Tierney, *Religious Rights: A Historical Perspective*, in RELIGIOUS LIBERTY, *supra*, at 29; Brian Tierney, *Tuck on Rights: Some Medieval Problems*, 4 HIST. POL. THOUGHT 429 (1983) [hereinafter Tierney, *Tuck on Rights*]; and Brian Tierney, *Villey, Ockham, and the Origin of Individual Rights*, in THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION, A TRIBUTE TO HAROLD J. BERMAN 1 (John Witte, Jr. & Frank S. Alexander eds., 1988).

³ BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625* (1997).

⁴ Writing from a traditional Marxist perspective, C.B. MacPherson asserted boldly that the seventeenth century witnessed the emergence of "a new belief in the value and the rights of the individual." C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 1 (1962). MacPherson traced this new belief to the economic changes occurring in England in the seventeenth century, and maintained that Hobbes, Locke, and other English natural rights philosophers simply "project[ed] [these developments] onto a hypothetical state of nature and . . . deriv[ed] political philosophies congruent with their class interests." Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37, 47-48 (1991) (criticizing MacPherson). Ian Shapiro has recently criticized MacPherson's historiography as "simplistic" and "historically inaccurate." IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 69 (1986). Shapiro nevertheless feels comfortable in asserting that the work of Thomas Hobbes represents the "earliest recognizably modern form" of rights-thought. *Id.* at 23.

have tended to view the fourteenth century as decisive for the formation of individual rights: it was then that William of Ockham, the brilliant English logician, succeeded in dissolving the thirteenth-century synthesis of Thomas Aquinas in an acid bath of nominalistic analysis, reducing Thomas's conception of ordered justice to the competing interests and claims of individuals.⁵ Both schools of thought tend to view the creation of natural-rights theories as an aberrant development, either harmful to society, or, at best, of dubious benefit.⁶

Working from a very different perspective, Leo Strauss and his followers have also maintained that the seventeenth century was decisive for the shift from systems of thought that emphasized transcendent and immutable principles to a way of viewing the world that placed primacy on the competition of all against all and the individual rights that flow from such an asocial struggle. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 120-64 (1953); see also Ernest L. Fortin, "Sacred and Inviolable": *Rerum Novarum and Natural Rights*, 53 *THEOLOGICAL STUD.* 203 (1992) [hereinafter Fortin, *Rerum Novarum*]; Ernest L. Fortin, *Recovery Movement*, *B.C. MAG.*, Summer 1994, at 18 [hereinafter Fortin, *Recovery Movement*]. Fortin's argument is a circular one: He takes the Hobbesian understanding of natural rights as paradigmatic, and rejects anything that does not conform to his preconception of what a natural right ought to be. Fortin, *Rerum Novarum*, *supra*, at 221-23; Fortin, *Recovery Movement*, *supra*, at 21.

This way of viewing the history of rights has found its way into American law reviews, and has come to shape contemporary thinking about the nature and function of rights. Thus Morton Horwitz has written:

[R]ights conceptions emerged in a 17th- and 18th-century intellectual environment in which the religious basis for natural law was rapidly crumbling. . . .

. . . .

. . . [N]atural-rights conceptions were conceived in radical individualism and continue to express an individualistic perspective on social relations. Natural rights philosophy is rooted historically in an adversarial vision of human interactions and a negative idea of human freedom as the absence of external restraint.

Morton J. Horwitz, *Rights*, 23 *HARV. C.R.-C.L. L. REV.* 393, 399-400 (1988) (footnote omitted).

Tierney's work effectively refutes this entire approach to viewing the development of rights. Two recent exceptions to this school of thought are RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1979) (acknowledging that the twelfth through fifteenth centuries were important to the development of rights, but understating their significance) and ANNABEL S. BRETT, *LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT* (1997) (examining philosophical treatments of the concept of individual right from the thirteenth century to Thomas Hobbes's in the seventeenth century). For Tierney's analysis of Tuck's work, see TIERNEY, *supra* note 3, at 56-57, 217-20, and Tierney, *Tuck on Rights*, *supra* note 2.

⁵ Michel Villey has made this case most emphatically. Villey's major work of synthesis on the subject is MICHEL VILLEY, *LE DROIT ET LES DROITS DE L'HOMME* (1983). Villey's scholarship has also come to influence American jurisprudence. See James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey*, 39 *AM. J. JURIS.* 185 (1994); see also TIERNEY, *supra* note 3, at 13-42 (describing and criticizing Villey's account of the origin of Western rights theories and suggesting alternative approaches).

For another example of this line of thought, see LOUIS LACHANCE, *LE CONCEPT DE DROIT SELON ARISTOTE ET S. THOMAS* (2d ed. 1948).

⁶ See *supra* note 4 (suggesting that the Marxists and the Straussians both considered the development of rights theories distressing); *supra* text accompanying note 5.

Tierney challenges this scholarly consensus in several fundamental ways. His central contention is that theories of natural rights did not emerge as an aberrational feature of Western political and legal thought at some late date, but rather comprised an integral part of Western intellectual life from the birth of universities and the revival of legal studies in the twelfth century.⁷ He is concerned as well with tracing the lines of transmission and development by which twelfth-century legal texts came to shape the philosophical reasoning of the seventeenth century.⁸

The book is divided into three large parts: "Origins," "Ockham and the Franciscans," and "From Gerson to Grotius."⁹ In the first part of his book, Tierney begins by examining the important role canon law played in the shaping of rights discourse, and by demonstrating that thirteenth-century scholastic philosophers—near contemporaries of Thomas Aquinas—were quite capable of posing rights-based questions that would stimulate and challenge their successors for generations.¹⁰ In the second part of his book, Tierney then considers the impact the Franciscan poverty controversy had on the development of rights thought.¹¹ This controversy, Tierney demonstrates, was one of the most important early sources of rights-based discourse.¹² The third part addresses the problems of the fifteenth, sixteenth, and seventeenth centuries: the Great Schism and the conciliar theories to which it gave rise, the great debates that erupted in the sixteenth century over the rights of the native peoples of the Americas, and the rights-based synthesis forged by Hugo Grotius in the early seventeenth century.¹³

This Review will consider some of Tierney's main arguments about the development of rights, assessing the deep originality of his contributions to each of these periods. It must be stressed that Tierney's book is a vast treasure house of information about rights, and one cannot hope to do justice to the complexity of his thesis in the course of this Review.¹⁴ It will, however, be evident that Tierney's book will become the starting point for all future efforts to address the origins of the Western natural rights tradition.

⁷ TIERNEY, *supra* note 3, at 13-42 *passim*.

⁸ *Id.* at 8-9 *passim*.

⁹ *See id.* at v-vii.

¹⁰ *Id.* at 13-92.

¹¹ *Id.* at 93-206.

¹² *Id.* at 93.

¹³ *See id.* at 207-342.

¹⁴ For example, in the course of a few pages, as a subtext to one of his larger arguments, Tierney traces a debate on the rights of animals and inanimate things in the late middle ages to its decisive refutation by Francisco de Vitoria. *Id.* at 227-28, 263, 267-68. Other examples abound.

TIERNEY'S RECONCEPTUALIZATION

A. The Canonistic-Scholastic Synthesis

Tierney begins his study with the canon law of the twelfth century. The twelfth century was a time of "renaissance"—a revolutionary new age that decisively broke away from past practices.¹⁵ It was also a distinctively "legal" century.¹⁶ In the late eleventh century, Pope Gregory VII declared the independence of the Church from Henry IV's empire.¹⁷ Although several decades of struggle and polemicizing followed, the contestants reached a series of compromises in the first decades of the twelfth century that allowed Church and State to coexist uneasily for the next three hundred years.¹⁸

The polemicizing that occurred in the late eleventh century, furthermore, was of a uniquely legal nature.¹⁹ By the early twelfth century, after peace was achieved between Church and State, the new universities proved to be the ideal forum for the continued sustenance of the sort of sophisticated legal analysis that had grown out of the struggle between papacy and empire.²⁰ Education in both the Roman-law texts of Justinian and the new canon law of the Church became very popular undertakings.²¹ Indeed, at the close of the twelfth century, a developing process of "professionalization" emerged that would establish canonists as "professionals" in a sense easily recognizable by today's legal practitioners.²²

¹⁵ On the twelfth-century "renaissance," see generally CHARLES HOMER HASKINS, *THE RENAISSANCE OF THE TWELFTH CENTURY* (1927); on the twelfth century's revolutionary character, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 99-107 (1983). Cf. Stephan Kuttner, *The Revival of Jurisprudence, in RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY* 299 (Robert L. Benson & Giles Constable eds., 1982) (analyzing the impact of the rediscovery of Justinian's *Digest* and the emergence of new forms of law, such as papal decretal letters).

¹⁶ Berman has noted: "Maitland called the twelfth century 'a legal century.' It was more than that: it was *the* legal century, the century in which the Western legal tradition was formed." BERMAN, *supra* note 15, at 120.

¹⁷ See *id.* at 94-99.

¹⁸ See *id.* at 111, 205-15, 221-24. Nevertheless, there were sometimes sharp conflicts between Church and State, yet neither side was able to prevail completely. Brian Tierney explores these tensions and struggles in TIERNEY, *THE CRISIS OF CHURCH AND STATE*, *supra* note 1.

¹⁹ See BERMAN, *supra* note 15, at 202-04, 276-78; see also COLIN MORRIS, *THE PAPAL MONARCHY: THE WESTERN CHURCH FROM 1050 TO 1250*, at 126-33 (1989) (describing the eleventh century "War of Ideas"); I.S. ROBINSON, *THE PAPACY 1073-1198: CONTINUITY AND INNOVATION* 295-321 (1990) (discussing the political ideas of the papacy).

²⁰ See BERMAN, *supra* note 15, at 123-31 (describing the importance of the universities to legal development).

²¹ On the spread of organized legal learning in the twelfth century, see JAMES A. BRUNDAGE, *MEDIAEVAL CANON LAW* 44-47 (1995).

²² See James A. Brundage, *The Rise of Professional Canonists and the Development of the Ius Commune*, 112 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE* (Kan. Abt.) 26, 30 (1995). Professor Brundage explains that

In the middle of the twelfth century, at the hands of a mysterious figure named Gratian, the canon law received a systematic structure which it would retain until the twentieth century.²³ We can safely say more about Gratian's methods than about his background and training.²⁴ Adapting his approach from the dialectical reasoning common in the schools of philosophy, and building on the work of predecessors such as Ivo of Chartres, Gratian produced a massive work of synthesis around 1140.²⁵ Divided into three parts, the *Concordia discordantium canonum* ("A harmony of conflicting canons")—a name quickly changed to "*Decretum*"—was intended to reconcile the many inconsistencies that had arisen from a millennium of ecclesiastical legislating and teaching.²⁶

Gratian's textbook soon became the foundation for training in the canon law.²⁷ It quickly attracted its share of commentators, who came to be known as the "decretists" because of their work on the *Decretum*.²⁸ As is the case with any truly great book, the *Decretum* generated as many questions as answers, and the decretists set about imbibing the wisdom of Gratian's work as well as addressing its shortcomings.²⁹

In this context, lawyers and others began to talk about rights in entirely new ways.³⁰ Tierney elicits a number of examples.³¹ "Gratian himself wrote of the *iura libertatis*, the rights of liberty," which one

[t]he term "profession" . . . conventionally means a highly skilled terminal occupation that can be entered only through formal admission, whose practitioners undertake to abide by a set of ethical standards, and who enjoy in return a publicly-sanctioned monopoly on the practice of their trade and a measure of authority resulting from their peculiar skills, coupled with high social status and esteem. . . .

Canon lawyers became professionals in this sense through a gradual process that began late in the twelfth century.

Id.

²³ See BRUNDAGE, *supra* note 21, at 47 ("About Gratian himself we know little."); cf. John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 TRADITIO 145 (1979) (reviewing all of the available biographical data on Gratian).

²⁴ For an important study relating Gratian's selection of subject matter to twelfth-century Church-State politics, see STANLEY CHODOROW, *CHRISTIAN POLITICAL THEORY AND CHURCH POLITICS IN THE MID-TWELFTH CENTURY: THE ECCLESIOLOGY OF GRATIAN'S DECRETUM* 17-64 (1972).

²⁵ See BERMAN, *supra* note 15, at 143-51 (describing Gratian's treatise and his method of analysis and synthesis).

²⁶ See BRUNDAGE, *supra* note 21, at 47-48.

²⁷ See JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 256 (1987).

²⁸ See BRUNDAGE, *supra* note 21, at 49-53.

²⁹ See *id.* at 49-53.

³⁰ See TIERNEY, *supra* note 3, at 55-56.

³¹ *Id.* at 56-58.

cannot lose even when "held in bondage."³² But these usages, Tierney cautions, still do not amount to a theory of specifically *natural* rights.³³

To be sure that one has discovered a theory of natural rights, Tierney continues, one must traverse a "semantic minefield."³⁴ His own concern is with the Latin term *ius naturale*.³⁵ While twelfth-century canonists found that this expression had a variety of meanings, Tierney is "concerned mainly with *ius* as meaning either objective law or subjective right, and with 'natural' as meaning either a primeval state of affairs or an intrinsic permanent characteristic of any being, as when we speak of 'the nature of man.'"³⁶

The term *ius naturale* in the writings of such classical and post-classical authors as Cicero or Ulpian meant "natural law" or "natural order," not "natural right."³⁷ By the seventeenth century, however, the term clearly embraced subjective rights as well.³⁸ When and under what circumstances, then, did the natural law of Cicero and Ulpian also acquire the meaning of natural rights?

Tierney answers these questions by identifying texts that carried a subjective meaning of *ius naturale* as early as the first decretist commentaries on Gratian.³⁹ Gratian himself gave *ius naturale* an objective definition in the opening words of the *Decretum*, stating: "Natural law (*ius*) is what is contained in the Law and the Gospel by which each is commanded to do to another what he wants done to himself and forbidden to do to another what he does not want done to himself."⁴⁰ Gratian subsequently offered other, competing objective definitions for the term *ius naturale*, but never attempted to reconcile these with each other or with the meaning he obviously preferred.⁴¹

Commentators on the *Decretum*, however, were forced to deal with these inconsistencies, and sought to resolve them by proposing that *ius naturale* had multiple meanings.⁴² In elaborating on these meanings, the canonists introduced a notion of subjective rights into the analysis of *ius naturale*. Tierney explains:

³² *Id.* at 57.

³³ *Id.* at 58.

³⁴ *Id.* at 48.

³⁵ *Id.* at 46.

³⁶ *Id.* at 48.

³⁷ MICHAEL BERTRAM CROWE, *THE CHANGING PROFILE OF THE NATURAL LAW* 36-46 (1977).

³⁸ See TIERNEY, *supra* note 3, at 46-47, 52.

³⁹ *Id.* at 60-69.

⁴⁰ *Dist.* 1, d.a.c. 1: "*Ius naturale est, quod in lege et Evangelio continetur: quo quisque iubetur alii facere quod sibi vult fieri et prohibetur alii inferre quod sibi noli fieret.*" See TIERNEY, *supra* note 3, at 58 (translating the text).

⁴¹ See *id.* at 59-60.

⁴² See *id.* at 60.

Gratian himself used the word *ius* consistently to designate systems of objective law in the opening chapters of the *Decretum*—e.g. he considered in turn natural law, customary law, civil law, military law, public law as different species of *ius*; but the canonists who commented on his texts lived in a world where, in everyday discourse, the word *ius* commonly meant a subjective right. Hence, in their commentaries, they would shift from one meaning to the other, unreflectively it seems, and without seeing any need for explanation, evidently confident that their meaning would be plain to contemporary readers.⁴³

Between the 1150s and the 1190s, the decretists worked out a series of definitions of *ius naturale* as subjective right. Around 1160,⁴⁴ the decretist Rufinus proposed a two-part definition for the term that would shape future canonistic thought on the subject, and continues to condition our thought today. *Ius naturale* was, Rufinus began, “a certain force instilled in every human creature by nature to do good and avoid the opposite.”⁴⁵ This force, he continued, “consists in three things, commands, prohibitions, and demonstrations. . . . It cannot be detracted from at all as regards the commands and prohibitions . . . but it can be as regards the demonstrations, which nature does not command or forbid but shows to be good.”⁴⁶

Tierney notes that both parts of this definition of *ius naturale*—“the initial subjective definition of *ius* and the following tripartite division” into commands, prohibitions, and demonstrations—were subjected to further analysis and refinement.⁴⁷ On the one hand, decretists quickly developed the idea of *ius naturale* as a natural force of the “human personality.”⁴⁸ Indeed, “the greatest of them all, Huguccio, . . . insist[ed] that this was the one primary and proper meaning of the term.”⁴⁹

On the other hand, the decretists did not fail to analyze the second part of Rufinus’s definition—the idea of *ius naturale* as an area

⁴³ *Id.* at 61.

⁴⁴ *See id.* at 62. *Cf.* Tierney, *Ius and Metonymy*, *supra* note 2 (providing a more detailed treatment of the work of Rufinus).

⁴⁵ TIERNEY, *supra* note 3, at 62 (quoting and translating DIE SUMMA DECRETORUM DES MAGISTER RUFINUS 6-7 (Heinrich Singer ed., 1902)) (“*Est itaque naturale ius vis quedam humane creature a nature insita ad faciendum bonum cavendumque contrarium.*”).

⁴⁶ *Id.* at 62-63 (quoting and translating DIE SUMMA DECRETORUM DES MAGISTER RUFINUS 6-7 (Heinrich Singer ed., 1902)) (“*Consistit autem ius naturale in tribus, scilicet: mandatis, prohibitionibus, demonstrationibus. . . . Detractum autem ei non est utique in mandatis vel prohibitionibus . . . sed in demonstrationibus—que scilicet natura non vetat non prohibet, sed bona esse ostendit.*”).

⁴⁷ *Id.* at 63.

⁴⁸ *See id.* at 64.

⁴⁹ *Id.* *See generally* WOLFGANG P. MÜLLER, HUGUCCIO: THE LIFE, WORKS, AND THOUGHT OF A TWELFTH-CENTURY JURIST (1994) (providing important biographical details).

where nature does not command or forbid.⁵⁰ Tierney finds that a group of English decretists active in the 1180s were especially creative in emphasizing the notion of *ius naturale* as “‘a zone of human autonomy,’” or “‘a neutral sphere of personal choice.’”⁵¹ The author of the *Summa, In nomine*, for instance, proposed as a meaning of *ius naturale*:

“licit and approved, neither commanded nor forbidden by the Lord or by any statute, which is also called *fas*, as for instance to reclaim one’s own or not to reclaim it, to eat something or not to eat it, to put away an unfaithful wife or not to put her away.”⁵²

Tierney emphasizes that these passages can only refer to a concept of natural rights:

In the texts we have just quoted *ius naturale* plainly does not mean restrictive law; the term is used to mean what we should call a natural right—to eat what one chooses for instance. The right of nature in these texts is what is permitted by the law of nature.⁵³

Thus the canonists fashioned definitions of natural rights congruent with our own understanding. This conclusion is not anachronistic. Tierney has no intention of superimposing a modern conceptual apparatus onto medieval sources. Rather, he argues that twelfth-century lawyers were the first to articulate and acknowledge this basic feature of the Western juristic and philosophic landscape.⁵⁴ The remainder of Tierney’s book explores the ways in which this idea grew and was adapted in the centuries that separate Gratian and Hugo Grotius.⁵⁵

Lawyers, furthermore, were not the only ones talking about natural rights in the Middle Ages. Tierney shows that by the thirteenth century, arguments grounded on natural rights had become an important feature of scholastic reasoning as well.⁵⁶ In doing so, Tierney challenges long-cherished views about the scholastic philosophers. John Finnis, for instance, has maintained that because a concept of natural rights was absent in Thomas Aquinas but was clearly in place in the seventeenth century, the concept must have been created some-

⁵⁰ See TIERNEY, *supra* note 3, at 45-48.

⁵¹ *Id.* at 67.

⁵² *Id.* at 67 (quoting and translating the *Summa, In nomine*).

⁵³ *Id.* at 68.

⁵⁴ *Id.* at 48-54.

⁵⁵ *Id.* at 78-315.

⁵⁶ *Id.* at 83-89. By the thirteenth century, new philosophical definitions of the human person began to take shape. Those definitions continue to influence thinking today. See, e.g., ODON LOTTIN, *PSYCHOLOGIE ET MORALE AUX XII^E ET XIII^E SIÈCLES: PROBLÈMES DE PSYCHOLOGIE* 225-389 (2d ed. 1957) (analyzing the scholastic contribution to Western conceptions of human liberty); EDOUARD-HENRI WÉBER, *LA PERSONNE HUMAINE AU XIII^E SIÈCLE: L’AVÈNEMENT CHEZ LES MAÎTRES PARISIENS DE L’ACCEPTION MODERNE DE L’HOMME* 199-493 (1991) (analyzing the scholastic contribution to Western conceptions of rationality and volition).

time in the intervening four centuries.⁵⁷ Tierney responds by stating that the absence from Aquinas of a theory of natural rights matters little to his account: Aquinas was not the only thinker of originality and depth in the middle ages, and there were, as well, many other avenues of transmission by which the natural rights language of the canonists might have been passed down to subsequent generations.⁵⁸

Tierney illustrates this point with a close examination of a *quaestio* of Henry of Ghent. Henry was one of the masters of the University of Paris, where he taught from 1276 to 1292.⁵⁹ Henry chose the case of a criminal sentenced to death to explore the limits of the right of self-preservation, asking: May someone so sentenced use the right he has to preserve his own life to escape execution?⁶⁰ By what right does the judge carry out the sentence?⁶¹ Henry mooted these questions by considering who "owned" the body of the condemned, and concluded, after weighing the strengths of the competing claims, that the prisoner had the superior right, and was even under an obligation to escape if allowed to do so.⁶²

The question of the state's right to execute a condemned convict and the right of the convict to resist greatly exercised seventeenth-century minds. Both Thomas Hobbes⁶³ and Samuel Pufendorf made this question and its answer an important part of their political philosophies.⁶⁴ Although John Locke avoided answering this particular question, much of his political philosophy rested on the principle of ownership—"rights" in one's person that the prisoner's dilemma sought to elucidate.⁶⁵ The framing of this argument in terms of conflicting rights and self-ownership seems "distinctively modern."⁶⁶ But, Tierney observes, one would be wrong in so concluding.⁶⁷ Indeed, Henry of Ghent made sophisticated use of the same set of problems in the latter part of the thirteenth century. In making this argument,

⁵⁷ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 206-07 (1980).

⁵⁸ TIERNEY, *supra* note 3, at 45; see also Brian Tierney, *Hierarchy, Consent, and the "Western Tradition,"* 15 *POL. THEORY* 646, 647 (1987) (stating that "Aquinas was a great thinker, but the idea that he was the one great thinker of the Middle Ages is an invention of modern neo-Thomism.").

⁵⁹ For Henry of Ghent's biography, see Jerome V. Brown, *Henry of Ghent*, in 6 *DICTIONARY OF THE MIDDLE AGES* 165-66 (Joseph R. Strayer ed., 1985); see also the references collected in TIERNEY, *supra* note 3, at 83 nn.34-35.

⁶⁰ See TIERNEY, *supra* note 3, at 83-87.

⁶¹ See *id.* at 85-86.

⁶² See *id.*

⁶³ *Id.* at 81.

⁶⁴ See *id.* at 81-82.

⁶⁵ See *id.* at 80-81; see generally A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* (1992) (discussing Lockean moral and political philosophy).

⁶⁶ TIERNEY, *supra* note 3, at 82-83.

⁶⁷ *Id.* at 82. Indeed, Tierney asserts that Henry engaged in "an elaborate inquiry, more explicit and detailed than those of the seventeenth-century authors themselves, into the correlative rights of judge and criminal." *Id.* at 87.

Tierney is not interested simply in identifying ways in which seventeenth-century political philosophy linguistically resembled the work of earlier writers. Rather, he stresses the need for scholars to think in new ways about the origins of natural rights. Thus Tierney writes:

The language of subjective natural rights has become a central, characteristic theme of Western political discourse. It is important to know when and how the cluster of ideas it conveys grew into existence, what historical contexts made their articulation possible and their survival likely. A glance at Henry of Ghent's *Quaestio* suggests that seventeenth-century rights language cannot be adequately understood simply as a response to the contingencies of the early modern era. Rather, it was an adaptation to new circumstances of a much older tradition of discourse. . . .

A continuous chain of texts connects the idea of dominion of self with the seventeenth-century doctrines. . . . It is a story that has never been adequately written.⁶⁸

By the close of the first part of *The Idea of Natural Rights*, Tierney has convinced the reader that the structure of the whole Western tradition of natural rights and human rights is built upon a foundation of canonistic texts. The idea of subjective right as a zone of personal freedom or the ownership of one's person has a far deeper history than hitherto believed. But how was this idea developed and transmitted? This is the next part of Tierney's story, and it is an account told with breathtaking ambition, originality, and subtlety.

B. The Franciscan Poverty Dispute and the Shaping of the Western Rights Tradition

In the year 1206, a twenty-four year old merchant's son named Francesco Bernardone, who had previously led a life of revelling and soldiering, renounced it all in favor of a new vision of what Christ demanded of him: radical itinerant poverty, as depicted in the Gospels of the New Testament.⁶⁹ Francesco—known to modern English speakers as St. Francis of Assisi—eventually moved from his hometown of Assisi to the surrounding countryside, where he began

⁶⁸ *Id.* at 88-89.

⁶⁹ See JOHN R.H. MOORMAN, *SAINT FRANCIS OF ASSISI* 6-9 (1963). St. Francis has attracted numerous biographers through the ages. The earliest biographies date to the thirteenth century. See ST. FRANCIS OF ASSISI, *WRITINGS AND EARLY BIOGRAPHIES: ENGLISH OMNIBUS OF THE SOURCES FOR THE LIFE OF ST. FRANCIS* (Marion A. Habig ed. & Raphael Brown et al. trans., 3d rev. ed. 1973) [hereinafter *OMNIBUS OF SOURCES*]; see also MORRIS BISHOP, *SAINT FRANCIS OF ASSISI* (1974); G.K. CHESTERTON, *ST. FRANCIS OF ASSISI* (Image Books ed. 1957) (1924); OMER ENGLEBERT, *SAINT FRANCIS OF ASSISI: A BIOGRAPHY* (Ignatius Brady & Raphael Brown eds. & Eve Marie Cooper trans., 2d Eng. ed. 1965); PAUL SABATIER, *LIFE OF ST. FRANCIS OF ASSISI* (photo. reprint 1975) (Louise Seymour Houghton trans., 1894); JOHN HOLLAND SMITH, *FRANCIS OF ASSISI* (1972).

to attract followers who shared his rejection of material well-being.⁷⁰ By the time of his death in 1226,⁷¹ he had become known throughout Western Europe and had drawn followers from all of the Catholic countries of the West.⁷² These followers organized themselves, even during Francis's lifetime, as a religious order known as the Friars Minor—the "little friars"⁷³—although this movement would become known colloquially as the "Franciscans."

Francis never varied from his radical opposition to material comforts.⁷⁴ He subjected himself to the severest deprivations, and expected the same from his followers. Thus, his Rules of 1221⁷⁵ and 1223,⁷⁶ composed for the benefit of the Friars Minor, decreed that his followers shall accept no money and live entirely from the free-will offerings of those inclined to support the friars' existence as they travelled throughout Europe preaching and living the Gospel.⁷⁷ Francis

⁷⁰ See MOORMAN, *supra* note 69, at 16-18, 44. Francis renounced his attachment to the old ways of high living in the most dramatic way possible—by stripping naked in the palace of the bishop of Assisi before his father and the bishop. See *id.* at 16. His radicalism has continued to inspire contemporary authors, such as the liberation theologian Leonardo Boff. LEONARDO BOFF, SAINT FRANCIS: A MODEL FOR HUMAN LIBERATION 18 (John W. Diercksmeier trans., 1988) ("[Francis] is the purest figure (gestalt) of Western history, of the dreams, the utopias, and of the way of relating panfraternally that we are all searching for today.").

⁷¹ See JOHN MOORMAN, A HISTORY OF THE FRANCISCAN ORDER: FROM ITS ORIGINS TO THE YEAR 1517, at 83 (1968).

⁷² See SMITH, *supra* note 69, at 195-203 (discussing the spread of veneration of St. Francis following his death and the circumstances that surrounded his canonization).

⁷³ See MOORMAN, *supra* note 71, at 10-19 (discussing the first official recognition of the Friars Minor, or Franciscans).

⁷⁴ See Thomas of Celano, *The First Life of St. Francis* (Placid Hermann trans.), in OMNIBUS OF SOURCES, *supra* note 69, at 225, 272-73. For instance, out of devotion to "Lady Poverty," Francis rarely ate cooked foods, and when he allowed himself this luxury, he destroyed the taste of the food by mingling it with ash. See *id.* at 272. Furthermore, he generally slept on the bare ground, using, at most, a piece of wood or a stone for a pillow. See *id.* Francis engaged in other behavior considered extreme for the time—such as regularly bathing lepers—as a way of both showing mercy toward them and practicing humility himself. See *id.* at 242-43.

⁷⁵ See *The Rule of 1221* (Benen Fahy trans.), in OMNIBUS OF SOURCES, *supra* note 69, at 31.

⁷⁶ See *The Rule of 1223* (Benen Fahy trans.), in OMNIBUS OF SOURCES, *supra* note 69, at 57.

⁷⁷ Thus Chapter 8 of the Rule of 1221 declares:

We should have no more use or regard for money in any of its forms than for dust. Those who think it is worth more or who are greedy for it, expose themselves to the danger of being deceived by the devil. . . .

If any of the friars collects or keeps money, except for the needs of the sick, the others must regard him as a fraud and a thief and a robber and a traitor, who keeps a purse, unless he is sincerely sorry.

The Rule of 1221, *supra* note 75, at 38-39 (footnote omitted). Similarly, Chapter 4 of the Rule of 1223 declares: "I strictly forbid all the friars to accept money in any form, either personally or through an intermediary." *The Rule of 1223*, *supra* note 76, at 60. Chapter 6 declares:

was emphatic: "[p]overty . . . was to be absolute; the friar was to call nothing his own, not even the shabby clothes in which he stood."⁷⁸

The problem his successors encountered was how to translate this absolute theological mandate into workable legal categories. Francis's demand that poverty be absolute required reconciliation with the practical necessities of daily living. Thus, his successors wondered what legal right, if any, entitled Franciscans to possess their clothes, their food, their chapels, and the incidentals of life.

A series of papal decrees from the 1230s to the 1270s used rights language to fashion a solution generally favorable to Franciscan interests.⁷⁹ Probably the most important decree was *Exiit*, which Pope Nicholas III issued in 1279.⁸⁰ *Exiit* acknowledged that a life of absolute poverty conformed to the example of Christ and his apostles, who had renounced all rights of property and contented themselves with the "simple use" of goods consumable in use.⁸¹ Pope John XXII, however, ultimately destroyed this whole arrangement in the early years of the fourteenth century.⁸² Like Nicholas III, John made use of rights language, but asserted that it was impossible to separate the simple use of goods from the underlying right to use them. He therefore branded heretical the Franciscan position that Christ and his apostles enjoyed only simple use.⁸³

This set of actions touched off a debate that, Tierney demonstrates, has held lasting significance in the development of Western notions of rights.⁸⁴ The fact that different popes chose to define the status of Franciscan poverty in terms of rights permitted successive waves of commentators and polemicists to explore the nature and

The friars are to appropriate nothing for themselves, neither a house, nor a place, nor anything else. As *strangers and pilgrims* . . . in this world, who serve God in poverty and humility, they should beg alms trustingly. . . . This is the pinnacle of the most exalted poverty, and it is this, my dearest brothers, that has made you heirs and kings of the kingdom of heaven, poor in temporal things, but rich in virtue.

Id. at 61.

⁷⁸ MOORMAN, *supra* note 69, at 37.

⁷⁹ See TIERNEY, *supra* note 3, at 94-95.

⁸⁰ See *id.* The text of the decree is found at VI^o 5.12.3; see also M.D. LAMBERT, FRANCISCAN POVERTY: THE DOCTRINE OF THE ABSOLUTE POVERTY OF CHRIST AND THE APOSTLES IN THE FRANCISCAN ORDER 1210-1323, at 141-48 (1961) (analyzing extensively the decree and the broader Franciscan theory of absolute poverty).

⁸¹ See *id.* at 143-46.

⁸² On John XXII's attack on the Franciscan doctrine of absolute poverty, see MOORMAN, *supra* note 71, at 315-17. On the background to this attack, see Thomas Turley, *John XXII and the Franciscans: A Reappraisal*, in POPES, TEACHERS, AND CANON LAW IN THE MIDDLE AGES 74 (James Ross Sweeney & Stanley Chodorow eds., 1989).

⁸³ See MOORMAN, *supra* note 71, at 316-17; TIERNEY, *supra* note 3, at 95-96.

⁸⁴ TIERNEY, *supra* note 3, at 93, 104-203.

function of rights.⁸⁵ Tierney's exposition of the contours of these debates is at once lucid and comprehensive.

At the level of fundamental definitions, Tierney finds repeated instances of subjective definitions of the word *ius*.⁸⁶ This was so not only for Franciscan writers, but also for faithful Thomists like Hervaeus Natalis,⁸⁷ Master-General of the Dominican Order.⁸⁸ The humanist writer Marsilius of Padua⁸⁹ also laboriously distinguished between two meanings of *ius*. *Ius* in its first sense, Marsilius maintained, meant "law,"⁹⁰ but in its second sense it meant "any voluntary human act, power or habit . . . in conformity with *ius* taken in the first sense."⁹¹

By far the greatest part of this section of Tierney's book, however, is dedicated to the Franciscan response to John XXII, particularly as it took shape at the pen of William of Ockham.⁹² The leading Francis-

⁸⁵ See *id.* at 93.

⁸⁶ *Id.* at 106, 109, 117, 119-20, 125.

⁸⁷ See generally FREDERICK J. ROENSCH, *EARLY THOMISTIC SCHOOL* 106-17 (1964) (providing biographical information on Hervaeus Natalis, also known as Hervé Nédélec).

⁸⁸ See TIERNEY, *supra* note 3, at 104. Concerning Hervaeus, Tierney observes that "he persistently, almost obsessively, kept on defining a right as a power and specifically a licit power." *Id.* at 107.

In making this observation, Tierney effectively refutes Michel Villey's contention that it was Ockham who first equated *ius* ("right") with *potestas* ("power"). *Id.* at 97; see also Michel Villey, *L'idée du Droit Subjectif et les Systèmes Juridiques Romains*, 24 *REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER* 201, 214 n.1 (1946) (defining subjective right as a "*pouvoir appartenant . . . à un sujet actif contre sujets passifs*"—a power belonging to an active subject (exercisable) with respect to passive subjects).

⁸⁹ See generally ALAN GEWIRTH, *MARSILIUS OF PADUA: THE DEFENDER OF PEACE* (Jacques Barzun et al. eds. & Alan Gewirth trans., 1951 & 1956) (discussing the political philosophy of Marsilius of Padua and translating Marsilius's *Defensor Pacis*); GARY J. NEDERMAN, *COMMUNITY AND CONSENT: THE SECULAR POLITICAL THEORY OF MARSIGLIO OF PADUA'S DEFENSOR PACIS* (1995) (studying the secular political ideas of Marsilius of Padua); Conal Condren, *Democracy and the Defensor Pacis: On the English Language Tradition of Marsilian Interpretation*, 13 *IL PENSIERO POLITICO* 301 (1980) (reviewing and criticizing the main lines of Marsilian scholarship).

⁹⁰ TIERNEY, *supra* note 3, at 111 (quoting Marsilius of Padua).

⁹¹ *Id.* at 112 (quoting Marsilius of Padua). Tierney finds this development striking: Perhaps just because he was not a lawyer, Marsilius found it necessary to spell out for himself a distinction that was implied in the legal texts but so taken for granted that it had not seemed to call for any analysis. Yet it was essential for the distinction to be made if a coherent tradition of discourse concerning subjective rights was to grow up. And it was Marsilius who first insisted on the point.

Id. at 116.

⁹² On Ockham, see generally MARILYN MCCORD ADAMS, *WILLIAM OCKHAM* (1987) (reviewing comprehensively Ockham's philosophy); GORDON LEFF, *WILLIAM OF OCKHAM: THE METAMORPHOSIS OF SCHOLASTIC DISCOURSE* (1975) (situating Ockham in the development of scholastic philosophy); ARTHUR STEPHEN MCGRADE, *THE POLITICAL THOUGHT OF WILLIAM OF OCKHAM: PERSONAL AND INSTITUTIONAL PRINCIPLES* (1974) (examining Ockham's political writings); and William J. Courtenay, *William of Ockham*, 9 *DICTIONARY OF THE MIDDLE AGES* 209 (Joseph R. Strayer ed., 1987) (providing biographical data and bibliographical references).

can intellectual of his day and one of the great logicians of any time, Ockham was instructed by the Order's Master-General, Michael of Cesena, to prepare a response to the Pope's challenge.⁹³ Ockham's treatise *Opus nonaginta dierum*—"The Work of Ninety Days"—was the result.⁹⁴ Ockham subsequently developed an interest in political theorizing and produced several additional treatises dealing with such matters as the powers of the papacy and the proper response to tyrannical rule.⁹⁵

Tierney's analysis covers the entire corpus of Ockham's political writings. He finds that Ockham's contribution to the development of rights in the West was crucial. Indeed, Tierney proposes an entirely new synthesis concerning Ockham's role in the shaping of the Western rights tradition. Tierney demonstrates the falsity of the idea that Ockham replaced an ordered theory of rational justice with a doctrine of rights dependent on blind and inscrutable will.⁹⁶ Rather, Ockham creatively reworked the natural-law tradition he had inherited from his thirteenth-century predecessors, and thereby produced a theory of natural rights that had nature and reason as its twin foundations.⁹⁷

Tierney's discussion of Ockham's place in the history of property and political rights is especially detailed and central to the larger story. When he discussed the right of property in the *Opus nonaginta dierum*, Ockham found himself confronted with two extreme positions on its origin, both rooted in interpretations of the book of *Genesis*.⁹⁸ Bonagratia of Bergamo, a Franciscan apologist, contended that God, at the creation, gave Adam and Eve only simple use of fact, not the right of use (*ius utendi*). Bonagratia concluded that the Franciscans merely were returning to this state of primitive bliss.⁹⁹ John XXII, on the other hand, sought to demonstrate by scriptural argument that God had instituted private property at the time of creation.¹⁰⁰

⁹³ See 1 ADAMS, *supra* note 92, at xv.

⁹⁴ On the dating of the *Opus nonaginta dierum*, see McGRADE, *supra* note 92, at 14 n.51.

⁹⁵ For most of Ockham's political works, see GUILLELMI DE OCKHAM: OPERA POLITICA (H.S. Offler ed., 2d ed. 1974); see also WILLIAM OF OCKHAM, A SHORT DISCOURSE ON THE TYRANNICAL GOVERNMENT (Arthur Stephen McGrade ed. & John Kilcullen trans., 1992) for a translation of Ockham's *Breviloquium de principatu tyrannico*.

⁹⁶ TIERNEY, *supra* note 3, at 126-30, 174-75; cf. VILLEY, *supra* note 5, at 122 (tracing the breakdown of classical theories of justice and the emergence of modern rights thought to Ockham's writings on the divine will, *potestas absoluta*). After a close reading of Ockham's texts, Tierney refutes Villey: "There was no thought here of an inscrutable deity who might arbitrarily will anything." TIERNEY, *supra* note 3, at 175.

⁹⁷ See TIERNEY, *supra* note 3, at 129-30; see also Brian Tierney, *Natural Law and Canon Law in Ockham's Dialogus*, in ASPECTS OF LATE MEDIEVAL GOVERNMENT AND SOCIETY: ESSAYS PRESENTED TO J.R. LANDER 3 (J.G. Rowe ed., 1986) (developing this line of argument further).

⁹⁸ See TIERNEY, *supra* note 3, at 148-57.

⁹⁹ See *id.* at 151-53.

¹⁰⁰ See *id.* at 153-56.

Ockham, Tierney shows, moved this entire debate from scriptural to conventional premises by defending the proposition that God had ordained neither primitive communism nor private property.¹⁰¹ Ockham looked to the Roman-law doctrine of *res nullius*—the rule that anyone may take a good belonging to no one—and concluded that, after the Fall of Adam, the whole world was in this state.¹⁰² Adam and Eve and their progeny were able to parcel out the world's property by using a certain innate power to appropriate.¹⁰³ Private property, Ockham argued, “emerged . . . in a historical process that involved a long series of voluntary arrangements among humans—compacts, customs, the laws that peoples made for themselves, and finally the laws of kings and other rulers.”¹⁰⁴

Tierney finds this argument significant for at least two reasons. First, he notes that this is an argument about the *first acquisition* of property.¹⁰⁵ An earlier generation of scholars had contended that it was precisely this concern that distinguished the constitutional theorists of the seventeenth century from their medieval counterparts.¹⁰⁶ In fact, Tierney observes, “the problem of first acquisition had already surfaced in the twelfth century among canonists faced by the tangled texts of Gratian's *Decretum*, and it became an issue of central importance in the fourteenth-century Franciscan dispute.”¹⁰⁷

This observation leads to Tierney's second and larger point about the Franciscan poverty disputes: notions of the right of property thought to be distinctive to the seventeenth century actually have a deep medieval substructure. Tierney explains:

When we read Ockham after studying earlier canonistic texts on the origin of property there is sometimes a feeling of *déjà vu*. If we turn finally to the classical natural rights theories of the seventeenth century we can experience a sense of “*déjà vu* all over again.” Filmer turned back to the first chapters of Gratian's *Decretum* in criticizing Grotius's theory of natural law. Grotius himself, in his early work *De jure praedae*, cited the decretals of Nicholas III and John XXII on Franciscan poverty; then he observed that the common “use of fact” that existed at the beginning of the human race could not properly

101 *Id.* at 162 (“If either of the varieties of primitivism presented by Bonagratia and John XXII had prevailed, argument about the right to property would have been drawn into a sort of scriptural *cul-de-sac*. . . . Ockham chose to pursue a different and more promising course.”).

102 *See id.* at 163.

103 *See id.*

104 *See id.* at 166.

105 *Id.* at 168.

106 *See, e.g.,* Richard McKeon, *The Development of the Concept of Property in Political Philosophy: A Study of the Background of the Constitution*, 48 *ETHICS* 297, 343-44 (1938). *But see* TIERNEY, *supra* note 3, at 168 (refuting McKeon).

107 TIERNEY, *supra* note 3, at 168.

be called *dominium*. This was a crucial distinction for Ockham too. . . . Selden and then Filmer reintroduced the theory of Adam's sole dominion. Pufendorf and Locke undertook to refute it, and in doing so deployed some of the same arguments that Ockham had used earlier. Pufendorf expressed a hearty contempt for all medieval thought; yet he constructed a theory of property remarkably like that of the fourteenth-century Franciscan.¹⁰⁸

Tierney's treatment of Ockham on political rights is similarly original and provocative. He shows that Ockham argued that both the emperor and the pope were obliged to respect the rights of their subjects.¹⁰⁹ Ockham maintained that the emperor derived his power from the people, who "could not confer more power than it actually possessed."¹¹⁰ A provision of the canon law of corporations, Ockham continued, limited this power, holding that a governing majority—and, by extension, the emperor—could infringe on the rights of the other members only in the case of "necessary actions."¹¹¹ The pope, furthermore, was limited by the canonistic maxim that no one was to be deprived of rights "without fault" (*sine culpa*),¹¹² and the fundamental principle of evangelical liberty:

Ockham's favorite way of proving [the restraints on papal power] was to argue that the evangelical liberty proclaimed in scripture limited papal power by safeguarding the natural and civil rights of the pope's subjects. . . . Christian law was a law of liberty, indeed, "a law of perfect liberty" according to the Epistle of James. Paul too wrote of "the freedom that we have in Christ Jesus" and declared that "Where the spirit of the Lord is, there is liberty." But, if the pope could command anything not contrary to divine and natural law, then Christian law would be a law of most horrid servitude. All Christians would be made slaves of the supreme pontiff, for to command anything not forbidden by divine and natural law was precisely the kind of power that a master held over his slaves. . . . The proper limits to papal power were set by the liberties and temporal rights of emperors, kings, princes and other persons, rights that came to them from natural law or the law of nations or civil law.

108 *Id.* at 167-68 (footnotes omitted).

109 *Id.* at 182-93.

110 *Id.* at 184.

111 *Id.* "Necessary actions" was a term of art used to describe a restricted set of cases, such as elections and the alienation of property, in which the overriding of minority rights was permissible. Taking non-necessary actions, on the other hand, required the unanimous consent of all those affected. *See, e.g.,* BERNARD OF PARMA, *GLOSSA ORDINARIA* at X.1.2.6, s.v. *constitutum*.

112 *See, for example, Glossa ordinaria* X.1.2.2., s.v. *culpa caret*, where Bernard of Parma explores the origins and scope of this principle. This maxim was routinely invoked to prevent deprivations of rights. *See, e.g.,* X.4.13.11 and X.4.13.6 (indicating that both decretals relied on the maxim *nemo privatur iure suo sine culpa*—"no one is to be deprived of one's right without fault"—to decree the restoration of marital rights).

Without cause and without fault the pope ought not to disturb these rights of others.¹¹³

Tierney's work has profound implications not only for the study of the Franciscan poverty controversy and Ockham's role in it, but also for our understanding of the history of natural rights. As for Ockham and the poverty controversy, Tierney concludes that the received interpretation, which sees Ockham's nominalism and voluntarism as ultimately conditioning his championing of natural rights, is simply erroneous.¹¹⁴ Ockham's reliance on rights was neither the result of a nominalistic impulse to reduce all human relations to their smallest component parts, nor of a voluntarist desire to transpose an unfettered divine will onto human relations, but rather of a learned reworking of canonistic sources. Although Ockham was not himself a trained canonist, Tierney's research makes clear that Ockham was a "quick study," who acquired a surprisingly extensive knowledge of the subject when the exigencies of the Franciscan poverty controversy required it.¹¹⁵

Tierney's work also challenges the standard understanding of the origins and transmission of the Western natural rights tradition. Contrary to the received historiography, natural rights had become a pervasive part of legal and political thought by the dawn of the fourteenth century. Writers of different persuasions—the faithful Thomist Hervaeus Natalis, the Italian humanist Marsilius of Padua, the Franciscan logician William of Ockham—all made rights-talk an essential part of their vocabularies. The twelfth-century canonistic jurisprudence of rights was thus moving into broader currents. Tierney masterfully elucidates the main lines of this development and powerfully challenges historians, theorists, and lawyers alike to reconsider their beliefs about the origins of natural-rights thought.

C. Lines of Development, 1400-1635

In the final third of *The Idea of Natural Rights*, Tierney traces the lines of development by which a medieval idea—the concept of natural rights—was elaborated, revived, and transmitted to the modern world. This was not, Tierney makes clear, an inevitable develop-

¹¹³ TIERNEY, *supra* note 3, at 187-88 (footnotes omitted).

¹¹⁴ *Id.* at 196. Tierney specifically challenges the work of Georges de Lagarde and Michel Bastit. *Id.* at 196-97. See generally MICHEL BASTIT, *NAISSANCE DE LA LOI MODERNE: LA PENSÉE DE LA LOI DE SAINT THOMAS À SUAREZ* 243, 300-03 (1990) (attempting to trace connections between Ockham's voluntarism and his political philosophy); GEORGES DE LAGARDE, *5 LA NAISSANCE DE L'ESPRIT LAÏQUE AU DÉCLIN DU MOYEN ÂGE* 123-24 (1963) (asserting that Ockham's nominalism introduced an "individualist microbe" into medieval thought).

¹¹⁵ TIERNEY, *supra* note 3, at 100-03 (discussing the extent of Ockham's knowledge of canonistic sources).

ment.¹¹⁶ After all, many other medieval juristic concepts are now no more than museum pieces, and there is no reason that natural rights should have been immune from the normal processes of obsolescence.

Tierney begins by discussing the conciliar movement and its contribution to rights-thought. This movement was ignited by the Great Schism of 1378, the deepest and most enduring fragmentation of papal government to occur in the Middle Ages.¹¹⁷ The conciliarists maintained that the proper solution to the crisis was to convoke an ecumenical council that would serve as a sort of parliament for the Church in order to confer on a new Pope the sense of legitimacy the rival claimants to the papal throne had lost.¹¹⁸

¹¹⁶ Tierney observes:

In considering the survival of natural rights theories we need always to remember that it is perfectly possible to construct coherent systems of political thought without appealing to such ideas, and that, indeed, in any universal history of political doctrines, theories grounded on rights would appear as exceptions rather than as a norm.

Id. at 253.

¹¹⁷ The papacy spent most of the fourteenth century in residence in Avignon, in the south of France. In 1377, Pope Gregory XI returned the papacy to Rome, but died soon thereafter. The College of Cardinals, distrusting the political situation in Rome, resolved to return to Avignon, but the Romans set upon them before they had a chance to escape. At the insistence of the local authorities, they elected an Italian—Bartolomeo Prignano—as Pope, but soon thereafter left the City, repudiated their election as the result of force and fear at the hands of the Roman mob, and named Robert of Geneva as Pope. Bartolomeo, however, continued to rule in Italy, while Robert was forced to withdraw to Avignon. The various countries of Europe pledged allegiance to one or the other of the contestants—England and much of Germany and Italy backed Bartolomeo, while France, Scotland, and Castile sided with Robert—and Christendom itself split in two. The Council of Pisa, convoked in 1409, only worsened matters by electing a third claimant to the papacy. The Council of Constance, which assembled in December 1413, finally succeeded in repairing the breach, by deposing all of the rival claimants and electing Martin V as the new Pope. Leading histories of this period include: HOWARD KAMINSKY, *SIMON DE CRAMAUD AND THE GREAT SCHISM* (1983); G. MOLLAT, *THE POPES AT AVIGNON: 1305-1378* (Janet Love trans., 1963); WALTER ULLMANN, *THE ORIGINS OF THE GREAT SCHISM: A STUDY IN FOURTEENTH-CENTURY ECCLESIASTICAL HISTORY* (2d prtg., Archon Books 1967) (1948).

Scholars have long recognized the conciliar movement as a turning point in the history of Western constitutionalism. John Figgis, for instance, has declared the conciliar movement to be “the culmination of medieval constitutionalism” and the decree the Council issued, declaring conciliar supremacy “[P]robably the most revolutionary official document in the history of the world.” JOHN NEVILLE FIGGIS, *POLITICAL THOUGHT FROM GERSON TO GROTIUS: 1414-1625*, at 41 (Harper & Brothers 1960) (1907).

¹¹⁸ See FRANCIS OAKLEY, *THE WESTERN CHURCH IN THE LATER MIDDLE AGES* 61-64 (1979) (discussing the forming of the consensns that a Church council was the best means of resolving the Great Schism). Some important works on the conciliar movement include: ANTONY BLACK, *COUNCIL AND COMMUNE: THE CONCILIAR MOVEMENT AND THE FIFTEENTH-CENTURY HERITAGE* (1979); ANTONY BLACK, *MONARCHY AND COMMUNITY: POLITICAL IDEAS IN THE LATER CONCILIAR CONTROVERSY, 1430-1450* (1970); FRANCIS OAKLEY, *COUNCIL OVER POPE?: TOWARDS A PROVISIONAL ECCLESIOLOGY* (1969); FRANCIS OAKLEY, *THE POLITICAL THOUGHT OF PIERRE D'AILLY: THE VOLUNTARIST TRADITION* (1964); and TIERNEY, *FOUNDATIONS*, *supra* note 1.

In the course of his treatment of this movement, Tierney resolves an important paradox. Many contemporary scholars have come to view the conciliar movement as espousing an organic conception of society. Rights, these scholars believe, cannot survive in such an environment.¹¹⁹ On the other hand, historians of rights have come to recognize that Jean Gerson, Chancellor of the University of Paris and the leading exponent of conciliar thought in the early fifteenth century, played an important role in the development of rights-thought.¹²⁰

The truth, Tierney establishes, is that conciliar thought is a more complex phenomenon than scholars have understood, and that a rights-based conception of Church polity made Gerson's writings on the power of a Church council coherent.¹²¹ Gerson argued that all subordinate prelates in the Church enjoyed rights, and the infringement of these rights would amount to a violation of basic constitutional order.¹²² Furthermore, he contended, the existence of these rights conferred authority on a Church council.¹²³

Thus the paradox is resolved. Tierney's accomplishment here is to see through the dichotomy modern scholars created between organic conceptions of society and individual rights. This sort of con-

¹¹⁹ Tierney gives the example of Joseph Wohlmuth, who "maintained that, because of its corporatist foundation, the conciliar movement never developed 'an ecclesial individual-right that could yield a catalogue of basic rights in the modern sense.'" TIERNEY, *supra* note 3, at 209 (citing and translating J. Wohlmuth, *Konziliarismus und Verfassung der Kirche*, 19 CONCILIVM 522, 524 (1983)).

¹²⁰ See, e.g., BREIT, *supra* note 4, at 76-87; TUCK, *supra* note 4, at 25-31; Reinhold Schwarz, *Circa Naturam Iuris Subiectivi*, 69 PERIODICA DE RE MORALI CANONICA LITURGICA 191, 191-92 (1980).

Tierney strongly criticizes Tuck's approach to Gerson. TIERNEY, *supra* note 3, at 217-20. Tuck argues that prior to Gerson, rights were seen as passive claims, and that Gerson was responsible for the invention of the active right. TUCK, *supra* note 4, at 5-7, 25-27. Tierney goes on to assert that Tuck is simply wrong to see late medieval discussions of rights as involving "'Gersonians,' who insisted that all rights were active, and others who defended a theory of passive rights. . . . Everyone who discussed these matters . . . acknowledged the existence of both active and passive rights, rights of action and rights of recipience." TIERNEY, *supra* note 3, at 219; see also Tierney, *Tuck on Rights*, *supra* note 2 (criticizing Tuck's view on medieval natural rights thought as based on mistranslations of Latin texts or interpretations of passages taken out of context, leading to confusion over the use of the terms *ius* and *dominium* for passive and active rights).

For a discussion of the relationship between active and passive rights, see David Lyons, *The Correlativity of Rights and Duties*, 4 NOÛS 45 (1970). On the creation of the distinction between active and passive rights, see Charles J. Reid Jr., *Thirteenth-Century Canon Law and Rights: The Word ius and its Range of Subjective Meanings*, 30 STUDIA CANONICA 295, 307-11 (1996).

On Gerson's role in the conciliar movement, see JOHN B. MORRALL, *Gerson and the Great Schism* (1960); LOUIS B. PASCOE, *Jean Gerson: Principles of Church Reform* (1973).

¹²¹ TIERNEY, *supra* note 3, at 221-25.

¹²² See *id.* at 224-25.

¹²³ See *id.*

ceptual construct simply does not fit the thought-world of the conciliarists.¹²⁴ The conciliar theory in some respects presented an organic conception of society, but it became a coherent theory of governance precisely because of the rights the representatives of Christendom brought with them when they assembled in council.

But Tierney also finds in Gerson's work a more general conception of natural rights.¹²⁵ Gerson adapted the doctrine of evangelical liberty to argue that "the first natural right was a right of the soul to strive for its own perfection by acting in accordance with God's law—which, in its central moral precepts, was known to human reason as the law of nature."¹²⁶

Gerson's conception of rights, however, emphasized more than the moral perfection of the individual Christian.¹²⁷ A few years earlier, John Wyclif had argued that it was possible for those not in a state of grace to lose their right to govern and that, in fact, this applied to the Church's prelates.¹²⁸ Gerson argued, in contrast, that no one could be such a sinner as to lose all natural rights.¹²⁹ Thus, Gerson continued, even infidels enjoyed natural rights.¹³⁰ Similarly, even an unjust ruler might exercise the power of governance until properly condemned, although individuals had the right to resist illegal acts.¹³¹

Tierney moves on to consider developments in the years just before and after the year 1500. Around 1500, Tierney notes, the concept of subjective rights was in danger of becoming "a tired survival from an age that was passing away."¹³² Admittedly, writers like Conrad Summenhart offered important new insights into the distinction between objective and subjective rights.¹³³ However, other writers, like John Mair, used a rights vocabulary to engage in virtuosic displays of

¹²⁴ Tierney observes: "The contrast between holism and individualism . . . may . . . distort rather than enhance our understanding of the history of Western rights theories." *Id.* at 235.

¹²⁵ *Id.* at 225-35.

¹²⁶ *Id.* at 228.

¹²⁷ *See id.* at 228-29.

¹²⁸ *See id.* at 229-30; cf. Stephen E. Lahey, *Wyclif on Rights*, 58 *J. HIST. IDEAS* 1, 1-16 (1997) (explaining the distinction between objective and subjective theories of rights and recounting Wyclif's view of the objective right).

¹²⁹ *See TIERNEY, supra* note 3, at 231-32.

¹³⁰ *See id.* at 231.

¹³¹ *See id.* at 232 ("A pope who committed arson or rape was still a pope. But nothing prohibited the injured individuals from exercising a natural right of self-defense against such depredations. No human law could take away this natural right, wrote Gerson.")

¹³² *Id.* at 236.

¹³³ *Id.* at 242-52. *See, e.g.,* CONRAD SUMMENHART, *DE CONTRACTIBUS LICITIS ATQUE ILICITIS* (1580) (discussing morally licit and illicit types of contracts).

logic and analysis that had little to do with the practical necessities of the time.¹³⁴

In 1492, however, a chain of events began that would have a dramatic impact on the history of the world. Christopher Columbus, an Italian navigator sailing under the flag of the united kingdoms of Castile and Aragon, encountered islands hitherto unknown to Europeans.¹³⁵ Over the next several decades, explorers from Spain and other countries came to appreciate the full extent of Columbus's discoveries. In the 1510s, Spanish explorers came into contact with the part of Mesoamerica now known as Mexico, and in the years 1519 to 1521, Hernán Cortés inflicted on the Aztec rulers of central Mexico a crushing military defeat that resulted in Spanish ascendancy.¹³⁶ In the early 1530s, Francisco Pizarro repeated this process in Peru, where he subjugated the Incan empire to Spanish authority through a process of deceit, cunning, and military adventurism.¹³⁷ In both Mexico and Peru, European diseases decimated the native populations, while the survivors were put to work as part of an *encomienda* system that substituted Indian labor for tribute.¹³⁸

The stories of brutality that accompanied these conquests and the consequent imposition of a system of forced labor shocked morally-sensitive Spaniards, and sparked a fierce debate over the proper handling of the native populations.¹³⁹ Tierney considers especially closely

¹³⁴ Tierney gives the example of Mair's treatment of the rights of the poor. The dislocations caused by economic changes had become severe around 1500, and were the focus of much concern. Mair, however, posed questions about the rights of the poor that were "ingenious," but "[did] not address any of the urgent problems that faced European society at the beginning of the sixteenth century." TIERNEY, *supra* note 3, at 240. Although Mair's writings on the poor were largely divorced from reality, he was one of the great logicians of his time.

¹³⁵ Columbus's own account of the journey, *THE VOYAGE OF CHRISTOPHER COLUMBUS: COLUMBUS' OWN JOURNAL OF DISCOVERY* (John Cummins trans., St. Martin's Press 1992), still makes compelling reading.

¹³⁶ See ROSS HASSIG, *MEXICO AND THE SPANISH CONQUEST* (1994); HUGH THOMAS, *CONQUEST: MONTEZUMA, CORTÉS, AND THE FALL OF OLD MEXICO* (1993).

¹³⁷ See RAFAEL VARÓN GABAI, *FRANCISCO PIZARRO AND HIS BROTHERS: THE ILLUSION OF POWER IN SIXTEENTH-CENTURY PERU* 70-89 (Javier Flores Espinoza trans., 1997) and the older literature cited therein.

¹³⁸ See Silvio Zavala, *The Evolving Labor System, in INDIAN LABOR IN THE SPANISH INDIES: WAS THERE ANOTHER SOLUTION?* 76 (John Francis Bannon ed., 1966).

¹³⁹ The following works explore the history of this moral debate: LEWIS HANKE, *ALL MANKIND IS ONE: A STUDY OF THE DISPUTATION BETWEEN BARTOLOMÉ DE LAS CASAS AND JUAN GINÉS DE SEPÚLVEDA IN 1550 ON THE INTELLECTUAL AND RELIGIOUS CAPACITY OF THE AMERICAN INDIANS* (1974); LEWIS HANKE, *ARISTOTLE AND THE AMERICAN INDIANS: A STUDY IN RACE PREJUDICE IN THE MODERN WORLD* (1959); and LEWIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* (1949). For further important background see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 59-118 (1990).

the arguments that Francisco de Vitoria¹⁴⁰ and Bartolomé de Las Casas¹⁴¹ made on behalf of the Indians.¹⁴²

Tierney finds that Vitoria made what might be characterized as an equivocal contribution to the cause of Indian rights. Vitoria maintained that rights were an essential feature of the human person, and he eviscerated the arguments that the discovery of the Indians proved the validity of Aristotle's theory of natural slavery.¹⁴³ On the other hand, Vitoria undercut the strength of his arguments by attempting to reconcile Indian rights with Spanish rule.¹⁴⁴ The Spanish, Vitoria contended, also had basic rights—such as a right to trade or to travel freely—on which the Indians might have infringed.¹⁴⁵ But what is important for Tierney's purposes is that "[t]he outcome of Vitoria's argument was that all human beings—sinners, infidels, children, even natural slaves . . .—could be bearers of rights and did possess certain natural rights. . . . For Vitoria, natural rights were rooted in human nature."¹⁴⁶

Las Casas, on the other hand, was far more passionate in his defense of Indian rights. As Tierney indicates, Las Casas developed his doctrine of natural rights not "in the calm of the study," but while "engaged in constant battle" with adversaries who sought to justify the Spanish exploitation of Indian labor.¹⁴⁷ A missionary, Las Casas grounded his commitment to the Indians on a desire to save their

¹⁴⁰ TIERNEY, *supra* note 3, at 265-72.

¹⁴¹ *Id.* at 272-87.

¹⁴² Vitoria's most important work on Indian affairs is FRANCISCO DE VITORIA, RELECTIO DE INDIS: O LIBERTAD DE LOS INDIOS (L. Pereña & J.M. Perez Prendes eds., 1967). Translations of this book and other leading works by Vitoria include: JAMES BROWN SCOTT, FRANCISCO DE VITORIA AND HIS LAW OF NATIONS (1934), which provides extensive commentary in addition to a translation; and FRANCISCO DE VITORIA, POLITICAL WRITINGS (Anthony Pagden & Jeremy Lawrance eds. & Jeremy Lawrance trans., 1991). The reader should also consult J.A. FERNÁNDEZ-SANTAMARÍA, THE STATE, WAR AND PEACE: SPANISH POLITICAL THOUGHT IN THE RENAISSANCE 1516-1559, at 58-119 (1977) for an analysis of Vitoria's contribution to the law of nations and the rights of Indians; and BERNICE HAMILTON, POLITICAL THOUGHT IN SIXTEENTH-CENTURY SPAIN: A STUDY OF THE POLITICAL IDEAS OF VITORIA, DE SOTO, SUÁREZ, AND MOLINA (1963) (reviewing Vitoria's political thought).

Las Casas's major works are found throughout his OBRAS COMPLETAS (1988-1994). Translations of his works include: A SHORT ACCOUNT OF THE DESTRUCTION OF THE INDIES (Nigel Griffin ed. & trans., 1992); INDIAN FREEDOM: THE CAUSE OF BARTOLOMÉ DE LAS CASAS, 1484-1566, A READER (Francis Patrick Sullivan trans., 1995); BARTOLOMÉ DE LAS CASAS: THE ONLY WAY (Helen Rand Parish ed. & Francis Patrick Sullivan trans., 1992); and WITNESS: WRITINGS OF BARTOLOMÉ DE LAS CASAS (George Sanderlin ed. & trans., 1992). Like St. Francis of Assisi, Las Casas has become the focus of liberation theologians interested in offering a radical critique of Western society. See, e.g., GUSTAVO GUTIÉRREZ, LAS CASAS: IN SEARCH OF THE POOR OF JESUS CHRIST (Robert R. Barr trans., 1993).

¹⁴³ See TIERNEY, *supra* note 3, at 266-67, 269-70.

¹⁴⁴ See *id.* at 271-72.

¹⁴⁵ See *id.* at 271.

¹⁴⁶ *Id.* at 271 (footnote omitted).

¹⁴⁷ *Id.* at 276.

souls. He argued: "They are our brothers, and Christ gave his life for them."¹⁴⁸

Out of this impulse, and a fundamental belief in "the natural right to liberty,"¹⁴⁹ Las Casas, especially in his later writings, challenged the legitimacy of Spanish rule as nothing other than "a conquest by violence followed by a plundering of the land and its inhabitants."¹⁵⁰ Las Casas, furthermore, bolstered his arguments by drawing on the same canonistic sources that Ockham had earlier employed: "[T]he whole fabric of the argument in [Las Casas's last major treatise, *De thesauris in Peru*]¹⁵¹—an argument about the natural . . . right to liberty—was sustained by juridical reasoning."¹⁵¹

Tierney closes his book by analyzing the role a revitalized natural-rights vocabulary played in the work of Hugo Grotius. A child prodigy, known as the "miracle of Holland," Grotius was one of the greatest jurists of all time.¹⁵² He wrote, as Tierney notes, "in a new style, speaking to a new audience made up mainly of Protestants and humanists."¹⁵³ But Tierney demonstrates that four centuries of canonistic and scholastic discourse shaped the questions Grotius asked himself and the concepts he employed.¹⁵⁴

Grotius, for instance, borrowed his understanding of natural rights from the canonists. It was, he asserted, a "faculty," or an "aptitude," or a "power" which enabled a person to claim that which was his or her own (*suum*).¹⁵⁵ Grotius justified this definition with citations to classical writers—"Aristotle, Philo, Cicero, Seneca, Florentinus, Augustine, and a scholiast on Horace"¹⁵⁶—but his thought was not conditioned by these sources, but by his canonistic and scholastic

¹⁴⁸ *Id.* at 273 (quoting Las Casas).

¹⁴⁹ *Id.* at 272.

¹⁵⁰ *Id.* at 281.

¹⁵¹ *Id.* at 280. On Las Casas's legal training, see generally Kenneth J. Pennington, Jr., *Bartolome de Las Casas and the Tradition of Medieval Law*, 39 *CHURCH HIST.* 149 (1970).

In addition to analyzing the treatment of Indian rights, Tierney also provides an important discussion of Spanish writings on the state and individual rights, focusing on Vitoria and Francisco Suarez. TIERNEY, *supra* note 3, at 288-315.

¹⁵² See CHARLES S. EDWARDS, *HUGO GROTIUS, THE MIRACLE OF HOLLAND: A STUDY IN POLITICAL AND LEGAL THOUGHT* (1981); EDWARD DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS* (1969); R. W. Lee, *Annual Lecture on a Master Mind: Hugo Grotius*, 16 *PROC. BRIT. ACAD.* 219 (1930). On the milieu in which Grotius wrote, see R. W. LEE, *AN INTRODUCTION TO ROMAN-DUTCH LAW* (4th ed. 1946).

¹⁵³ TIERNEY, *supra* note 3, at 324.

¹⁵⁴ *Id.* at 323-24.

¹⁵⁵ *Id.* at 325. Grotius himself distinguished subtly between "faculties" and "aptitudes." Tierney describes the difference: "A faculty, what the jurists called the *suum* (one's own), meant a right strictly so-called; an aptitude designated a claim by reason of merit that could not be legally enforced." *Id.*

¹⁵⁶ *Id.* at 326. Grotius's use of classical sources is the subject of an important study: David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli ac Pacis*, 10 *EMORY INT'L L. REV.* 1 (1996).

predecessors. "He did not mention any of the medieval . . . sources in which similar accounts of the meanings of *ius* had been given; but in fact his conceptual apparatus of law and rights, the ideas that would undergird the whole subsequent work, was of medieval origin."¹⁵⁷

Tierney reinforces this point by considering Grotius's theory of property rights and the relationship of the individual to state sovereignty. Grotius presented two different accounts of the first acquisition of property, each of which had roots in different aspects of the Franciscan poverty controversy.¹⁵⁸ In his treatment of sovereignty and individual rights, Grotius drew heavily from the Spanish scholastics of the sixteenth century, but he employed a vocabulary that originated with Ockham and the twelfth-century canonists.¹⁵⁹ Generally speaking, Grotius, like his medieval sources, "emphasized both individual rights and the common good as complementary rather than conflicting aspects of the human condition."¹⁶⁰ Not surprisingly, Tierney concludes that "Grotius was in fact using the medieval tradition of thought about natural law and natural rights to sustain a new vision of the world and the church."¹⁶¹

The final section of Tierney's book is a *tour de force* of gathering strength and majesty. It ranges over any number of important scholarly subdisciplines—conciliar thought, late medieval logic, Spanish and Latin American writings on the conquest of the Americas, and European and American studies of Hugo Grotius—and integrates these discrete bodies of knowledge into a compelling final movement that demonstrates the ways in which a medieval mode of thought became a central organizing principle of early-modern and modern juristic and political theory. This work is an achievement of enduring significance to the scholarly world.

CLOSING REFLECTIONS

Rights, it is commonly supposed, exist in opposition to notions of community. Critical legal scholars, relying on a Marxist historiography of rights, have made this argument most systematically, seeing rights as a form of individual property that alienates the individual from society.¹⁶² However, as noted at the outset, scholars from widely

¹⁵⁷ TIERNEY, *supra* note 3, at 326 (analyzing Grotius's *De jure belli*).

¹⁵⁸ *See id.* at 329-33. Summarizing, Tierney states: "Here again Grotius stood between the old and the new. His theory of property appealed to Enlightenment writers like Burlamaqui and even Hume, but it would also have been intelligible to Ockham . . . or Huguccio." *Id.* at 333 (footnote omitted).

¹⁵⁹ *See id.* at 333-42.

¹⁶⁰ *Id.* at 334.

¹⁶¹ *Id.* at 339.

¹⁶² *See, e.g.,* Horwitz, *supra* note 4; Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 27 (1993) (noting that "[r]ights-claims are individualistic . . . not because of something

varying schools of thought have advanced similar contentions about the origins of natural rights, even if they assign to them a vastly different significance.¹⁶³

In recent years, however, legal academics and philosophers have begun to stress that rights are not enjoyed in isolation from community, but instead serve to integrate persons within a larger social framework. Mary Ann Glendon, for example, has argued that rights language must be "refin[ed]" in order to take account of the needs of the community.¹⁶⁴ Alan Gewirth similarly has produced a powerfully argued and "detailed reply to the adversarial conception of the relation between rights and community."¹⁶⁵ Gewirth contends that the dichotomy that has emerged between rights and community is false and in desperate need of "conciat[i]on."¹⁶⁶

Tierney's work provides indispensable historical sustenance to the effort to reconcile rights with the common good. Since their origin, natural rights did not separate persons from the community, but helped to lead them to a deeper understanding of the common good. Rights provided, as the canonists stressed, "'a neutral sphere of personal choice,"¹⁶⁷ but this was a choice exercised in the context of a requirement that individuals exert themselves to achieve moral improvement. Thus, as Gerson argued, the "first natural right was a right of the soul to strive for its own perfection."¹⁶⁸

In our public discourse we have largely abandoned talk about the rights of souls. But the larger message embodied in this history is that rights, historically understood, have not necessarily exalted individual self-seeking over the demands of community life. At least in their early development, natural rights and community life were seen as compatible phenomena.

Tierney's work is invaluable for the connections he draws between the medieval and early modern worlds. Nearly seventy years ago, in his provocative Storrs Lectures at Yale Law School, Carl Becker proposed that the eighteenth-century *Philosophes*—those disciples of

inherent in the concept of rights, but rather because of the historical development of the language of rights"); cf. Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (arguing that rights necessarily result in the alienation of the individual from the larger society "as a matter of law").

¹⁶³ See, e.g., STRAUSS, *supra* note 4; Fortin, *supra* note 4; Walter Kasper, *The Theological Foundations of Human Rights*, 50 JURIST 148, 151 (1990) ("Historically considered, modern human rights are phenomena of crises, arisen from the collapse of the medieval order.") (footnote omitted).

¹⁶⁴ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 171-83 (1991).

¹⁶⁵ ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 3 (1996).

¹⁶⁶ *Id.* at 4.

¹⁶⁷ TIERNEY, *supra* note 3, at 49.

¹⁶⁸ *Id.* at 228.

natural reason such as Voltaire and Diderot—did not break completely with the medieval past.¹⁶⁹ Indeed, Becker maintained that “the *Philosophes* were nearer the Middle Ages, less emancipated from the preconceptions of medieval Christian thought, than they quite realized or we have commonly supposed.”¹⁷⁰

Tierney’s work goes far beyond Becker’s in the detailed connections he finds between medieval and early modern worlds of thought. Tierney makes clear that an essential organic unity connects the canonists of the twelfth century with the Franciscans, the conciliarists, the Spanish scholastics, and Hugo Grotius. As a consequence, our own thought about natural rights and human rights is not traceable, historically, to some supposed seventeenth- or eighteenth-century rupture between “medieval” and “early modern” forms of thought. Rights-thought did not take shape as the result of possessive individualism, as MacPherson charges, or the exaltation of personal will at the expense of ordered justice, as Villey alleges. Rather, natural rights, as a mode of juristic and philosophical analysis, was a well-established discourse with a half-millennium of historical development behind it when John Locke and Thomas Hobbes made the concept a cornerstone of their philosophies. Lawyers, historians, and philosophers must now build on Tierney’s discoveries in developing new concepts of natural and human rights that are faithful to the history of this central organizing principle of Western thought.

¹⁶⁹ See generally CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* (1932) (containing four lectures delivered in 1931 at Yale Law School, on the Stoits Foundation).

¹⁷⁰ *Id.* at 29.