

CARDINAL ZABARELLA AND NICHOLAS OF CUSA
From community authority to consent of the community*

Von Thomas E. Morrissey, New York

INTRODUCTION

Franciscus Zabarella (1360-1417) and Nicholas Cusa (1401-1464) were both men who had been trained in law and who became cardinals¹. Both men served in a time of crisis in the church, Zabarella down to and at the Council of Constance and Cusa at Basel and later. Both wrote works that explicated their theory on the basis and function of authority in the Church and in society in general. Zabarella had been a famed teacher of law at the University of Padua; Cusa came to Padua to study law in the year that Zabarella died². Thus they represent two different generations in the late medieval world with many similarities. Zabarella was a close associate of humanists and poets; Cusa was himself a part of the new Humanist movement³. Both men wrote major works, the *De scismate* of Zabarella and Cusa's *De concordantia catholica* (whose 550th anniver-

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¹ The standard biographical details on Cusa are in: E. VANSTEENBERGHE, *Le cardinal Nicolas de Cues* (Paris 1920); P. E. SIGMUND, *Nicholas of Cusa and Medieval Political Thought* (Cambridge, Mass. 1963), esp. c. 2; M. WATANABE, *The Political Ideas of Nicholas of Cusa with Special Reference to the De Concordantia Catholica* (Travaux d'humanisme et renaissance 58) (Genève 1963). (These works are henceforth cited as Sigmund, Watanabe, etc.) For Zabarella, see: A. KNEER, *Kardinal Zabarella (Franciscus de Zabarella, Cardinalis Florentinus) 1360-1417. Ein Beitrag zur Geschichte des grossen abendländischen Schismas* (Münster 1891); G. VEDOVA, *Memorie intorno alla vita ed alle opere del cardinale Francesco Zabarella Padovano* (Padua 1829); G. ZONTA, *Francesco Zabarella (1360-1417)* (Padua, 1915); A. ZARDO, *Francesco Zabarella a Firenze (il Cardinale Fiorentino)*: Archivio Storico Italiano, Series 5, Vol. 22 (1898) 1-22; W. ULLMANN, *The Origins of the Great Schism* (London 1948) „Appendix“: Cardinal Zabarella and His Position in the Conciliar Movement, p. 191-231; also, T. E. MORRISSEY, *Franciscus de Zabarellis (1360-1417) and the Conciliarist Traditions* (Dissertation, Cornell University, Ithaca, New York; January 1973), and DERS., *The Decree 'Haec Sancta' and Cardinal Zabarella. His Role in its Formulation and Interpretation*: AHC 10 (1978) 145-176; *Emperor-Elect Sigismund Cardinal Zabarella and the Council of Constance*: CHR 69 (1983) 353-370.

² Cusanus studied law at Padua from 1417 to 1423 and one of his teachers was Prosdocimus de Comitibus; see Sigmund, p. 23, N. 5; A. KRCHNÁK: MFCG 2 (1962) 67-84. Also on the faculty of law at this time in Padua was Cardinal Zabarella's nephew, Bartolomeo Zabarella, see Sigmund, p. 110 and also *Vita di Francesco Zabarella Cardinale et genealogia della Famiglia Zabarella*, München, Bayerische Staatsbibliothek, Cod. Ital. Mon. 258, Fol. 1-55r.

³ Zabarella's friends, associates and correspondents included the Greek scholar Emmanuel Chrysolaras who came to Constance with Zabarella, Coluccio Salutati, Pier Paolo Vergerio, Johannes Ciconia (the composer), several poets, Poggio, Bruni and others. He himself was part of the Petrarch circle at Padua and Venice and during his career as a lawyer handled the Petrarch inheritance in a legal dispute; see his *Consilia* (Milan 1515) § 63, 70, 79. Zabarella himself wrote several works in the new humanist mode and so was well aware of the changing world in which he lived. Cusa's work and role in the development of humanistic studies is well enough known not to need detailed analysis.

sary was celebrated in 1983), in response to crises of their ages⁴. But there is a closer link between the two men, their ideas and writings, and it is this continuity and development that this study explores.

Zabarella's *De scismate* was completed in 1408,⁵ a quarter of a century before Cusa's work. It was Zabarella's last major writing and represented the fruit of some thirty years of learning, teaching, study and reflection, since he had begun his legal studies in Bologna in 1378, the year that the Great Western Schism began. Cusa's tract by contrast came at the beginning of his professional career and he would have thirty years ahead of him in active and fruitful work to develop his ideas. The two men in these two works reflected different stages in their own personal lives but also in the evolution of western political thought and constitutionalism. The link between them is not necessarily causal, but it is not merely a temporal succession. While Zabarella's ideas on the authority of the community did not compel Cusa to evolve his own ideas on consensus, still in one sense Zabarella's rooting of authority in the community can be seen as a stage and pre-condition for the development of the later idea by Cusa⁶. How are the two ideas linked: community authority and consent of the community? The best answer to this question is to indicate what each meant.

I Zabarella

First of all it is clear that unlike his predecessor and fellow-citizen, Marsilius of Padua, who postulated only one locus of authority in western Christian society, i.e., the com-

⁴ Zabarella wrote during the crisis of the Great Western Schism and his tract had three sections composed successively between 1403 and 1408 with the final draft completed in 1408 and written to justify the break the cardinals of the two obediences (Avignon and Rome) had made with their respective papal claimants (Benedict XIII. and Gregory XII.) and the summoning by the cardinals for all to attend the Council of Pisa in 1409. Cusa wrote at the Council of Basel at a time when relations between this council and Pope Eugenius IV. in Rome were becoming very strained. It should be noted that the nomination of Eugenius with three others as cardinals in 1408 by his uncle Gregory XII., had been the final straw which precipitated the open break of the cardinals with Pope Gregory who had solemnly sworn to create no new cardinals but rather to work for unity and reform in the Church. This break led the cardinals to join with the Avignon cardinals in revolt and the results were the Councils of Pisa (1409), Constance (1414-1418), and ultimately the end of the Great Western Schism. Now a quarter of a century later Eugenius IV. seemed to be following in his uncle's footsteps and might well precipitate another crisis in the Church. See also, T. MORRISSEY, *After Six Hundred Years: The Great Western Schism, Conciliarism and Constance*: TSt 40 (1979) 495-509.

⁵ The full text of the final redaction was printed in S. Schardius, ed., *De iurisdictione, autoritate et praeminentia imperiali ac potestate ecclesiastica* (Basel 1566) 688-711; henceforth cited as Schardius. It was also printed as an appendix in Zabarella's commentary on the Gregorian decretals in the edition from Venice, 1502. This latter work will be henceforth cited as *Comm. ad X*; the *De scismate* is appended to Zabarella's exposition on I.6.6., Fol 117^{ra}-120^{vb}.

⁶ SIGMUND, p. 110, has stated that Cusa almost certainly studied Zabarella's commentary on the Decretals while at Padua and so the continuity of tradition linking the two is even stronger than at first glance. G. CHRISTIANSON suggests also the role of Cardinal Cesarini as an important bond between the two men in his *Cesarini: The Conciliar Cardinal. The Basel Years, 1431-1438*. (Kirchengeschichtliche Quellen und Studien, 10) (St. Ottilien 1979) 13. J. E. BIECHLER also stresses the importance of Padua and their studies there for both Cesarini and Cusa and that Cesarini was the key link between Zabarella and Cusa; see his *The Religious Language of Nicholas of Cusa* (Missoula, Montana, 1975) 8, 10 and also *Nicholas of Cusa and the End of the Conciliar Movement*: Church History 44 (1975) 9-10.

munity⁷, for Zabarella there were several *loci*, and it was the tension between two of these, the papacy and the community that led Zabarella to his most extensive, creative and influential formulations. A second person whose name has also been associated with the conciliarist tradition of Zabarella was William of Ockham⁸. It is my contention as I have argued elsewhere, however, that neither of these two (Ockham or Marsilius) was really a direct major influence on Zabarella. This is not to deny, of course, the enormous influence Ockham had on the language and thought patterns of all academic and publicist discourse of the later Middle Ages and the fact in particular that by his formulation of the questions he had structured the way later conciliarism would confront the problem of the relationship between pope and church, pope and council. Certainly Zabarella and Ockham both asserted that ultimate and definitive authority resided in the whole church as such, but Ockham went on to conclude that therefore it could only be there while Zabarella allowed certain representatives of that whole church to share in and exercise that authority, a practice and doctrine which Ockham denied⁹. Furthermore in the exercise of authority by the whole church, for Ockham this could occur only when there was total unanimity, down to the last person, and only in that case would there be certainty, while Zabarella's doctrine was far less restrictive since he allowed for decision by the greater part¹⁰. He was after all a major proponent of medieval corporation theory.

In his development of corporation theory Zabarella naturally enough devoted considerable time to the relationship of head and body, especially in that particular medieval corporation, the church¹¹. He specifically rejected the doctrine of the famed jurist and

⁷ Marsilius wrote: „The aforesaid whole body of citizens or the weightier part thereof is the legislator regardless of whether it makes the law directly by itself or entrusts the making of it to some person or persons, ...“ p. 475 in *Medieval Political Philosophy* ed. R. Lerner and H. Mahdi (Ithaca, N.Y. 1963). Some scholars have seen Zabarella as merely transferring Marsilius of Padua's ideas to the ecclesiastical sphere; see: C. ANDRESEN, *History of the Medieval Councils in the West: The Councils of the Church. History and Analysis* ed. Hans J. Margull (Philadelphia, 1966) 82-240 at 184-85, 193.

⁸ J. LECLER, *Les théories démocratiques au moyen âge: Etudes* 225 (1935) 5-25, 168-189, at p. 181 where Lecler viewed Zabarella as influenced by or reviving Ockham's ideas.

⁹ For Ockham's ideas on this, see: J. B. MORRALL, *Ockham and Ecclesiology: Medieval Studies Presented to Aubrey Gwynn S. J.* ed. J. A. Watt and F. X. Martin (Dublin 1961) 481-491 at p. 481, 483; also, B. TIERNEY, *Ockham, the Conciliar Theory and the Canonists: Journal of the History of Ideas* 15 (1954) 40-70, and SILBERNAGL, *Ockhams Ansichten über Kirche und Staat: HJ* 7 (1886) 423-433; also the two studies by A. S. MCGRADE, *Ockham and the Birth of Individual Rights: p. 149-165 Authority and Power: Studies in Medieval Law and Government. Presented to Walter Ullmann on His Seventieth Birthday.* Edited by Brian Tierney and Peter Linehan (Cambridge 1980), esp. p. 152, 158-160, and his *The Political Thought of William of Ockham* (Cambridge 1974), and G. DELAGARDE, *L' idée de représentation dans les oeuvres de Guillaume d'Ockham: Bulletin of the International Committee of Historical Sciences t. IX, fasc. IV, no. 37 (1937), No. 3, p. 425-451; and Ockham et le Concile general: Studies Presented to the International Commission for the History of Representative and Parliamentary Institutions XXIII, Album Helen Maud Cam (Paris-Louvain 1960) 93-94.*

¹⁰ One example of Zabarella's use of this term *maior pars* is at *De scismate*, Fol. 119^{a-b}: „Nam ex quo maior pars universitatis catholicorum sic sentit, ceteri debent sic sentire et opinari quod spiritu sancto ducantur cum ut predixi ecclesia tota non possit errare et maior pars accipiat pro tota.“

¹¹ One of the best studies on these medieval corporate ideas and theories is: P. MICHAUD-QUANTIN, *Universitas. Expressions du mouvement communautaire dans le moyen-âge latin* (Paris 1970); some examples of Zabarella's analysis of body-head relations would be: *Comm. ad. X, III.10.4.*, Fol. 73^{rb}: „Episcopus et capitulum sunt

pope, Innocent IV, who centralized all authority in the head and left little power to the body¹². Zabarella started from the same corporation model and came out of the same canonistic tradition which had proclaimed so often and so elegantly on the fullness of power held by the papacy¹³. But Zabarella added that this fullness of power did not belong to the pope by himself but as head of the corporation, so that the power was in the corporation in principle (*tanquam in fundamento*) and in the pope as its agent or minister, the one through whom usually this power was exercised (*tanquam in ministro*)¹⁴. Zabarella went on to discuss what he meant by this statement.

He explained then that Jesus entrusted the salvation of the whole body to all the apostles, but in a special way committed this task to Peter as the leader or head (*principaliter*)¹⁵. He repeated and explicated what this latter statement meant: the authority was not totally (*totaliter*) in Peter (nor in the pope his successor consequently) to the exclusion of all others, but was in Peter chiefly or principally (*principaliter*). Thus the fullness of authority was in the corporation formed by all and was exercised by individuals in the name of and for the sake of the whole. To be sure it was exercised chiefly by Peter, since he was the head, but not in such a way that if Peter should err, he would have to be supported and agreed with¹⁶.

Zabarella referred to the tradition with the famous scene of Saint Paul correcting Saint Peter and drew the inevitable conclusion once again that the fullness of power was in the pope so long as he did not err, but if he did err, it would be the duty of a general

unum corpus mysticum.“; *In Clem.*, I.6.2., Fol. 41^{rb}: „Capitulum et ipse episcopus tanquam due partes faciunt unum totum cuius prelatus est caput.“; *In Clem.*, I.5.1., Fol. 35^{va}: „Non est tanta communio inter alias ecclesias et prelatos quanta inter episcopum et capitulum suum.“ B. TIERNEY, *Foundations of the Conciliar Theory* (Cambridge 1955) and especially p. 221 where Tierney says of Zabarella that he thought: „the whole of Christendom was one great corporation.“ The major studies on these medieval ideas are by: O. GIERKE, *The Political Theories of the Middle Age* translated with an introduction by F. W. Maitland (Cambridge 1900; 1951); E. KANTOROWICZ, *Selected Studies* (Locust Valley, N.Y. 1965); IDEM, *The King's Two Bodies. A Study of Medieval Political Theology* (Princeton 1957); H. DE LUBAC, *Corpus Mysticum. L'eucharistie et l'église au moyen âge. étude historique* 2nd ed. (Paris 1949); also P. GILLET, *La Personnalité juridique en droit ecclésiastique, spécialement chez les Décretistes et les Décretalistes et dans le Code de droit canonique* (Universitas Catholica Lovaniensis, Dissertations, Series II, Tomus 18) (Malines 1927) esp. p. 111, 119, 122, 150ff.

¹² B. TIERNEY, *Foundations of the Conciliar Theory*, p. 138-139; ZABARELLA, *Comm. ad X*, I.4.11., Fol. 94^{va}: „Quando universitas habet rectorem omnis iurisdictio est apud rectorem et non apud universitatem, nota Innocentius.“

¹³ For the canonistic tradition on the fullness of power (*plenitudo potestatis*) held by the pope, see: B. TIERNEY, *Pope and Council: Some New Decretist Texts*; *Medieval Studies* 19 (1957) 197-218. The actual words *plenitudo potestatis* occur so often in Zabarella's writings that it would be futile to attempt to give a complete list. A couple of examples would be: *Comm. ad X*, I.1.2., Fol. 12^{vb}; I.4.11., Fol. 88^{vb}; I.5.4., Fol. 108^{rb}; etc.; also, *In Clem.*, I.3.2., Fol. 16^{ra}, which is his Commentary on the Decretals known as the *Clementinae*, the edition of Venice, 1602.

¹⁴ *De scismate*, Fol. 119^{va}: „Et ex hoc apparet ad id quod dicitur quod papa habet plenitudinem potestatis debet intelligi non solus sed tanquam caput universitatis ita quod ipsa potestas est in ipsa universitate tanquam in fundamento sed in ipso tanquam ministro per quem hec potestas explicatur.“

¹⁵ *IBID.*, „Dicitur quod Iesus comisit salutem universitatis omnibus apostolis ita tamen quod in Petro principaliter collocavit.“

¹⁶ *IBID.*, Fol. 119^{va-b}: „Nota quod non dicit totaliter ut alii excludantur sed dicit principaliter ut sic plenitudo potestatis sit in universitate ipsorum et per singulos exercetur, sed principaliter per Petrum. Non tamen ita per Petrum ut ei errante standum sit.“

council to correct him and the pope could not resist this correction since this would be to subvert the church and the pope could not change the state of the church (*status ecclesiae*)¹⁷.

It is clear that Zabarella placed the ultimate possession of authority in the church itself, the community of the faithful, from which all other manifestations of authority drew their right and power to act. Such an assertion is in open contradiction to the descending thesis so ably portrayed by the late Walter Ullmann in so many of his studies¹⁸, according to which all authority came from the head and emanated out to the other members of the body, the view asserted by Pope Innocent IV a century and a half before Zabarella wrote. In a real sense Zabarella's view, curialist, cardinal and canonist though he may have been, was the ascending thesis. All authority held and used by any officer or administrator in the church was delegated authority¹⁹, and whatever the community of believers had granted or attributed to any office or person, they could with equal right and if necessary or desirable, take away. They, the believing community, the body politic, were sovereign and could reverse any earlier grant (*Par in parem non habet imperium*)²⁰. The continued existence and well being of the whole community was the norm which governed the actions of any officer to whom it delegated authority; this well being was best expressed by the *status ecclesiae*²¹, which occurs so often in the canonists in general and in Zabarella in particular²².

¹⁷ *IBID.*, „Ex his infert quod potestatis plenitudo est in papa ita tantum quod non erret. Sed cum errat hec habet corrigere concilium apud quod ut predixi est plenitudo potestatis tanquam in fundamento nec in hoc potest papa per suas constitutiones vel alio modo resistere quia hoc esset subvertere ecclesiam ... papa non potest immutare universalem statum ecclesie.“ A good discussion of this last phrase is in Y. CONGAR, *Status Ecclesiae*: Studia Gratiana XV, Post Scripta. Essays on Medieval Law and the Emergence of the European State in Honor of Gaines Post, ed. by J. R. Strayer and D. E. Queller (Rome 1972) 3-31 and J. HACKETT, *State of the Church: A Concept of the Medieval Canonists*: The Jurist 23 (1963) 259-290.

¹⁸ A good overview of the late Walter Ullmann's thesis and influence has been provided by F. OAKLEY, *Celestial Hierarchies Revisited: Walter Ullmann's Vision of Medieval Politics*: Past and Present 60 (August 1973) 3-48. The one place where Zabarella does display a form of descending thesis is his devolution of the responsibility and right to summon a general council of the Church to deal with a crisis affecting the whole Church, in particular the crisis of the Great Western Schism. In default of papal action Zabarella sees first the cardinals, the emperor or other authorities as capable and obliged to intervene; see R. N. SWANSON, *Universities, Academics and the Great Schism* (Cambridge Studies in Medieval Life and Thought, 3rd Series, vol. 12) (Cambridge 1979) 152.

¹⁹ The actual words of Zabarella (see note 14 above) were that the fullness of power was in the corporation of believers as in a foundation (*tanquam in fundamento*) and in the pope as a minister (*tanquam ministro*) through whom the power was exercised (*per quem hec potestas explicatur*).

²⁰ *De scismate*, Fol. 120^{va}, „non ligaret hodiernum concilium quia par in parem ...“ Here Zabarella links the two ideas of the council representing the whole community and also exercising in its name the sovereign authority of that whole community.

²¹ G. POST has studied and illustrated the textual confusion and uncertainty over correct readings in many canonistic writings of this phrase; see his: „Copists' Errors and the Problem of Papal Dispensations“ *Contra Statutum Generale Ecclesiae* or „Contra Statum Generalem Ecclesiae“ according to the Decretists and Decretalists: Studia Gratiana 9 (1966) 357-407. See also the CONGAR and HACKETT articles in n. 17 above.

²² For other and earlier examples, see the article by B. TIERNEY, *Pope and Council* in n. 13 above. For Zabarella, see *Comm. ad X*, I.4.4., Fol. 88^{vb}; I.6.4., Fol. 114^{ra}; III.30.24., Fol. 168^{ra}; v.39.23., Fol. 130^{ra}; *De scismate*, Fol. 119^{va}.

There were several main officers or bodies which exercised the authority of the community of believers since it was quite clear that in most cases the body did not act directly in itself, although this possibility was never precluded but rather explicitly cited by Zabarella for special circumstances²³. What is notable is that each of these chief figures: the papacy, the college of cardinals, the episcopate, the general council, had the right, power and duty to act precisely because in varying degrees and in different ways they acted as and in reality were representatives of the whole community²⁴. To give just a few examples, the college of cardinals was seen as acting on behalf of and in the name of the whole church in its special function of electing a pope²⁵. When they acted in this matter, the authority of the whole community was involved in their decision²⁶, and so it could be said that the authority which came to the newly elected pope came from God, but that this person or that one received this authority was a human decision, the

²³ When he wrote *De scismate*, Zabarella was specifically arguing for the right and power of the Church as a whole to act for its own existence and security but in so doing he was continuing what he had written earlier in his commentary on the Decretals where he rejected the position of the great canonist pope, Innocent IV, and sided with the famed thirteenth century canonist, Hostiensis, in asserting that a corporation could act on its own and not merely through its head. See: *Comm. ad X*, I.6.6., Fol. 110^{rb}: „Innocentius ... dicit quod si universitas habet rectorem iurisdiclio est penes rectorem, non penes universitatem ... sed negari potest hoc, nam Hostiensis ibi tenet hoc quod universitas exerceat licet sit incommodosum ...“

²⁴ Zabarella saw the cardinals as representing the authority of the whole community of believers in two different functions, (a) in the election of a pope as noted below and (b) as advisors to the pope, advisors whom the pope should consult on all serious matters. There was some ambiguity in this latter function in that two terms appear, advice and consent (*consilium* and *consensus*), which shade over into each other. Zabarella did not always carefully distinguish between the two. J. A. WATT has argued that by contrast Hostiensis made a definite distinction in this area, *The Constitutional Law of the College of Cardinals: Hostiensis to Joannes Andreae: Mediaeval Studies* 33 (1971) 127-157 and Hostiensis on „*Per venerabilem*:“ *The Role of the College of Cardinals: Authority and Power. Studies on Medieval Law and Government Presented to Walter Ullmann on His Seventieth Birthday*, edited by Brian Tierney and Peter Linehan (Cambridge 1980) 99-113. I do not find his argument totally convincing for in the medieval world as in the modern, advise and consent tended to become mixed. E. ISELOH expressed the function of the cardinals as bringing to the papacy the consensus of the whole Church and as advisors to the pope: *Reform der Kirche bei Nikolaus von Kues* (Institut für Europäische Geschichte, Mainz; Vorträge Nr. 38, Wiesbaden 1965) 17-19. For Zabarella's ideas on this, see (among many other texts): *Comm. ad X*, I.6.54., Fol. 195^{rb}; I.41.5., Fol. 393^{rb}; III.4.2., Fol. 18^{va}; *De scismate*, Fol. 118^{rb-va}. For his views on the relation of the episcopate to the papacy and similar concerns, see my: *Cardinal Zabarella on Papal and Episcopal Authority: Proceedings of the Patristic, Medieval and Renaissance Conference* (Villanova University) vol. I (1976) 39-52 and *Franciscus Zabarella (1360-1417): Papacy, Community and Limitations Upon Authority: Reform and Authority in the Medieval and Reformation Church*, edited by Guy F. Lytle (Washington, D.C. 1981) 37-54. On the competency of a general council to act for the whole Church and even to judge a pope if necessary, see: *De scismate*, Fol. 117^{rb} and *Comm. ad X*, III.37.3., Fol. 219^{va}.

²⁵ *De scismate*, Fol. 118^{vb}: „Ubi considerandum quod in hiis que concernunt electionem pape collegium cardinalium representat universalem ecclesiam et eius vice fungitur.“ See also, R. N. SWANSON, *Universities, Academics and the Great Schism*, p. 153.

²⁶ *De scismate*, Fol. 117^{va}: „In his que concernunt electionem pape collegium cardinalium reputatur universalem ecclesiam et eius vice fungitur.“ Zabarella also expressed the view that since the college of cardinals was acting for the community, then if they failed in their duty the community through one of its other officers could compel them to act; e.g., it could compel a cardinal to take part in the conclave or require him to return if he had left it. On this see his commentary on the Clementine Decretals, *Comm. in Clem.*, I.3.2. (Venice 1602), Fol. 17^{va}.

decision of the community²⁷. When it was a question of the body politic, the church, defending its own existence against the threat posed by a heretical or notoriously criminal pope, then the authority of the community took shape in a different body, the general council²⁸. At Constance Zabarella was involved in the formulation of the decree *Haec Sancta* which specified the tight and causal connection between the authority of a general council and the duty and function it fulfilled, i.e., to represent the whole community²⁹, to act for the whole community as a general council with authority derived directly from Christ³⁰, guided and called by the Holy Spirit³¹, and to work for

²⁷ *De scismate*, Fol. 120^{va}: „Item licet potestas pape sit a Deo, tamen quod iste sit papa vel ille est immediate ab homine, scilicet per electionem cardinalium, unde potest ab homine tolli ...“ In addition Zabarella stressed the fact that the one who received papal authority attained this office by the judgement and consensus of the whole body; *De scismate*, Fol. 117^{rb}: „Et videtur bene probari ibi in littera cum dicit quod ille erit papa quem iudicium et universitatis consensus elegerit.“

Later Zabarella went on to argue for the other side of this relationship, i.e., that if the community or its representative, the council, were to remove a pope from office, then this action was not to be seen as an action merely of men but also as a divine action; see: *De Scismate*, Fol. 120^{va}: „Respondeo quod quando concilium privat papam potestas non dicitur sibi auferri ab homine sed a Deo cum dispositio concilii sit divina.“

²⁸ *De scismate*, Fol. 117^{rb}: „Queritur autem primo si contingat esse contentiōnem inter duos de papatu ..., quis erit iudex. Respondeo quod concilium.“; also, „cum papa accusatur de heresi competens iudex est concilium.“ Fr. MERZBACHER discusses Zabarella's position on this question in his *Die ekklesiologische Konzeption des Kardinals Francesco Zabarella (1360-1417)*, p. 279-287 in *Festschrift Karl Pivec zum 60. Geburtstag*, hrsg. von Anton Haidacher und Hans Eberhard Mayer (Innsbrucker Beiträge zur Kulturwissenschaft Band 12, Innsbruck 1966), esp. p. 281.

²⁹ For Zabarella's involvement with *Haec Sancta* see my: „The Decree ‚Haec Sancta‘ and Cardinal Zabarella. His Role in its Formulation and Interpretation: AHC 10 (1978) 145-176. One problem of interpretation is that H. JEDIN has suggested that in the medieval view a council „made present“ (*gegenwärtigsetzen*) the whole Church rather than „represented“ (*vertreten*); see his *Bischöfliches Konzil oder Kirchenparlament?* 2nd ed. (Basel 1963) 8. For Zabarella both terms would apply equally well to a council which made the whole Church present in its existence and hence embodied the authority of that whole Church and thus could truly represent and employ the full authority of that Church in its decisions. In the article just mentioned I indicated some reasons for the evolution of the decree *Haec Sancta* in its various forms as (a) the originally proposed text of March 26, 1415; (b) the proposals of the Nations from March 28-29; (c) the proposals of the cardinals from March 29; (d) the first draft voted for on March 30; (e) the final draft approved on April 6, 1415.

The texts of these different versions are found respectively in: (a) Johannes D. Mansi, ed., *Sacrorum conciliorum nova et amplissima collectio* (Florence and Venice 1757-1798; new edition, Paris and Leipzig 1898-1927) vol. 27:580 (henceforth cited as Mansi); (b) H. VONDER HARDT, *Magnum oecumenicum Constantiense concilium* 7 vols. (Frankfurt and Leipzig 1696-1742) IV:III:81 (henceforth cited as von der Hardt); (c) J. Hardouin, ed., *Conciliorum collectio regia maxima*, 12 vols. in 11 (Paris 1715), vol. VIII, col. 251; (d) Mansi, 27:585-586; (e) Mansi, 27:590-591.

The key first phrase that the council represented the whole community (*Ecclesiam militantem repraesentans*) occurs in (b) and in (d), „ecclesiam catholicam militantem repraesentans“ and in (e) as „ecclesiam catholicam repraesentans“.

³⁰ von der Hardt, IV:III:81: „potestatem a Christo immediate habet“; also in Mansi, 27:585-586, 590-591.

³¹ Mansi, 27:580: „In Spiritu Sancto legitime congregata,“; also in von der Hardt, IV:III:81, and Mansi, 27:585-586, 590-591. Earlier Zabarella had written in his *De scismate*, Fol. 119^{vb} that the community could impose a law on their head (the prince) because although the prince was above the law (*legibus solutus*), this axiom only applied to his own laws, i.e., laws issued by him but not to laws of God such as the laws of councils which were promulgated under the inspiration of the Holy Spirit: „Et si dicatur quod hoc est imponere legem principi qui est solutus legibus, dic quod est solutus legibus suis, non dei quales sunt leges concilii que spiritu sancto suggerente promulgantur.“ Later at Basel Johannes de Segovia repeated this argument in saying that the Holy Spirit presided at the council and that decisions of councils were inspired by the Holy Spirit; see A. J. BLACK, *Monarchy and Community. The Political Ideas in the Later Conciliar Controversy 1430-1450* (Cambridge 1970) 37 and n. 3.

the Church against the threat of schism and on behalf of union and reform³². In such a circumstance the authority of the community of believers, and hence the authority of God³³, was involved and so everyone, of every status whatsoever³⁴, was called to and held to obedience in all those matters which pertained to faith, the ending of the schism and general reform of the church on all levels³⁵.

More examples could be included but this is sufficient evidence of Zabarella's stance on the authority of the community of believers, how it is grounded in law, existed by divine institution and how it could be exercised in different ways. Thus he saw in the normal course of events no trouble whatsoever and in fact fully expected it to be exercised by the papacy as head of the community, with the reservations that have already been mentioned about special and controlling circumstances and conditions. Where could Nicholas of Cusa's theory fit in with this tradition?

II Cusa and Consensus

The key word in Cusa's tract *De concordantia catholica* was of course *consensus*. He used it so many times and in so many contexts that just to enumerate them would be an interminable task³⁶. The other major image that went with this term was that of the body

³² Mansi, 27:580: „pro reformatione et unione dictae ecclesiae in capite et in membris fienda.“ This text later went on to argue that the council can not be and is not to be dissolved until the complete elimination of the existing schism and until the Church is reformed in faith and morals, in head and members; „Item quod istud sacrum Concilium non debet dissolvi, neque dissolvatur usque ad perfectam extirpationem praesentis schismatis, et quousque ecclesia sit reformata in fide et moribus, in capite et membris.“ Mansi, 27:580. The text in von der Hardt, IV:III:81, spoke in addition of the obligation of obedience from everyone in all that the council decided in the matters of faith, extirpation of the schism and reform of the church in head and members.

On March 30 the council outlined its reason for existence (Mansi, 27:585-586): „pro extirpatione praesentis schismatis, et unione et reformatione Ecclesiae Dei in capite et in membris fienda.“ The text went on to affirm then the duty of all towards conciliar decisions in these matters. There exists a dispute over what Zabarella read and omitted from this text in the general session on that day. Mansi, 27:590-591, repeats these phrases with some slight changes which may have some significance. For a discussion of these differences see my article *The Decree 'Haec Sancta' and Cardinal Zabarella* in note 29 above.

³³ The council in its declaration of authority made the clear link that in order to attain the peace on earth for men of good will that had been divinely promised in the Church of God, it was now acting as it did. Therefore the council was representing the Church of God and so embodied its authority in its decisions („decernit, declarat, diffinit, ordinat“); it continued with the observation that the flight of John XXIII had in no way impaired its authority and integrity („remanet in sua integritate et auctoritate“), Mansi, 27:580.

³⁴ The text of *Haec Sancta* went directly from the phrase „having authority immediately from Christ“ to its invocation of the duty of all to offer obedience to its decisions, no matter what dignity or status one might possess, since one was then offering obedience to the power coming from Christ; „potestatem a Christo immediate habet, cui quilibet cuiuscumque status vel dignitatis, etiam si papalis existat, obedire tenetur.“ Later it again listed those obligated to heed the council's voice as: „quod quicumque cuiuscumque conditionis, status, dignitatis, etiam si papalis, ...“ Mansi, 27:590-591.

³⁵ The expressions „general reform“ and „reform of head and members“ were hotly disputed points at Constance and ones over which Zabarella drew considerable fire upon himself for his actions in their regard. His judgement that in this key section of the text there existed a problem inherent in the ambiguity of its language has been vindicated by history; see *The Decree 'Haec Sancta' and Cardinal Zabarella*, p. 171-172, 175.

³⁶ The very title of Cusa's major tract on this subject gives the emphasis which he placed on agreement (*consensus*) in his discussion of a council. In developing the essentials of a general council he required that decisions be made „concordanti sententia“. If this quality were present then the council was acting under the gui-

and in this Cusa was the heir to the whole medieval tradition that went back through the Age of the Fathers to the writings of St. Paul³⁷. Cusa made explicit the link between these two images in his term *concordantia*, i.e., that it is the agreement of the parts, agreement in each member and as a whole, that made the body one³⁸. He added moreover that it was precisely this agreement that elevated the individual, for „each of the faithful who does God's will is made one spirit with Him through *consensus*“³⁹. Another model to which Cusa alluded was selected from St. Jerome who earlier had drawn the picture of an army which had a commander who exercised in himself the *consensus* of all⁴⁰. This last image fitted well with Cusa's thought pattern since a major influence on him was the writing of Pseudo-Dionysius on the celestial hierarchy⁴¹. For Cusa therefore *consensus* did not of itself involve or imply that existing orders or differences were abolished or unimportant⁴²; rather his idea demanded the interchange and cooperation between groups and individuals of different status within the existing body⁴³. One has to see Cusa working more from the Eastern tradition in this regard rather than the wes-

dance of the Holy Spirit; see Nicolai de Cusa, *Opera omnia*. XIV: *De Concordantia Catholica* edited by Gerhard Kallen in 3 vols. (1959-1965), henceforth cited as Cusa, DDC, with the respective volume, section and page references, as in this case, II: 77, p. 103, and 78, p. 105. Cusa cited another form of this expression from the Eighth Council at Constantinople, „omnes concinentes et consentientes,“ II: 80, p. 106. He concluded that of all the prerequisites for a council by far the most important was: „communis omnium sententia,“ *ibid.*, p. 106. The actual term *consensus* appears so many times and in various forms and expressions that only a few examples could be given: „ex unico concordanti consensu,“ (p. 135); „de consensu,“ (p. 136); „per acceptationem et usum seu consensum,“ (p. 137); „cum hoc requirit consensum per usum et acceptationem,“ (p. 138); „consensione nostra,“ (p. 138); „a communi consensu,“ (p. 144); „a tacito permissivo consensu ... nullo praecedente consensu,“ (p. 145); „de omnium concordia,“ (p. 147); „ex divina ordinatione et electione sive consensu subiectorum,“ (p. 153); „concordia et consensus,“ (p. 159); „universali consensu,“ (p. 159). To be sure Nicholas' ideas on *consensus* have to be seen in their medieval context and not simply identified with modern ideas on this topic, as Watanabe has pointed out, p. 38.

³⁷ Scholars who have developed this theme from varied perspectives are Otto Gierke, Ernst Kantorowicz, Henri deLubac and Brian Tierney in the studies cited in note 11 above. From different perspectives see also: E. LEWIS, *Organic Tendencies in Medieval Political Thought*: American Political Science Review 32 (1938) 849-876; G. B. LADNER, *Aspects of Medieval Thought on Church and State*: Review of Politics 9 (1947) 403-422.

³⁸ DCC, I:20, p. 44, „ad unitatem concordantiae;“ „necesse est ergo concordiam illam esse in uno et pluribus.“ J. WOHLMUTH, *Verständigung in der Kirche*. Untersucht an der Sprache des Konzils von Basel (Tübinger Theologische Studien 19) (Mainz 1983) presents a detailed study of the process by which such agreement was achieved at Basel. He treats the relation of the principle of majority rule to the right of minority, agreement seen more as process rather than the final achievement, agreement as gift of the spirit. In particular he considers the views of Johannes de Segovia in comparison with those of Nicholas of Cusa and a most useful section is its extensive treatment of the vocabulary of agreement and its forms.

³⁹ DCC, I:22, p. 44: „quisque fidelis faciens voluntatem Dei unus spiritus cum eo efficitur per consensum.“

⁴⁰ DCC, I:36, p. 56: „sicut exercitus sibi capitaneum constituit et ille tunc omnium consensum in se gestans.“

⁴¹ DCC, I:34, p. 54, where Cusa refers to Dionysius. SIGMUND, p. 45ff., discusses Pseudo-Dionysius and notes that Cusa questioned the traditional belief that this writer was the same Dionysius mentioned in the New Testament. Sigmund also points out that in Cusa's library there were a number of translations of and commentaries on Dionysius, p. 46; see also WATANABE, p. 31-32. BLACK, *Monarchy and Community*, p. 103, argues that Cusa's later papalist position was grounded in this Neo-Platonic strain of thinking.

⁴² SIGMUND, p. 132; WATANABE, p. 39 and n. 11, 13.

⁴³ SIGMUND, p. 55-56, sees Cusa as influenced by Hugh of St. Victor in this section.

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tern⁴⁴; in a real sense Cusa's *consensus* is not strictly speaking construed from the juridical and canonistic mode but rather is to be seen as part of the Eastern pneumatological traditions⁴⁵.

• The influence of the Eastern tradition on Cusa is well enough known not to require much elaboration, especially in his later career⁴⁶. But even in this early stage of his life Cusa appears more eastern than canonistic. Thus, for example, he defined a general council in the same way as the Eighth Ecumenical Council had defined one, i.e., made up of the five patriarchates⁴⁷, the pentarchy as it was called⁴⁸. This definition was a further nuancing or elaboration of his earlier definition of a general council, a definition which had been more Western and canonistic, i.e., a council is a meeting of the pope with all the bishops⁴⁹. Not all canonists agreed with Cusa's definition⁵⁰, but more to the point Cusa would have agreed with the canonists who stressed that for a council to

⁴⁴ SIGMUND, p. 127-128. One indication of the more Eastern and Neo-Platonic strain in Cusa's thinking would be that by Cusa's day and for some time before this, writers had most commonly spoken about a dualistic scheme or dichotomy, body-soul, *imperium-sacerdotium*, whereas Cusa could still write of spirit, soul and body, a tripartite perspective, *DCC*, I:34, p. 54. He then went on in this section of the tract to cite Gregory of Nazianzen, p. 55.

⁴⁵ This Eastern aspect of Cusa's thought has been exemplified in many ways; see P. B. T. BILANIUK, *Nicholas of Cusa and the Council of Constance*: Proceedings of the Patristic, Medieval and Renaissance Conference vol. 2 (1977) (Villanova University) 59-76, at p. 65. Bilaniuk later incorporated this article in a collection, *Studies in Eastern Christianity* vol. 2 (München-Toronto 1982) in which he contrasts and compares the Eastern and Western traditions, e.g., „The Monk as Pneumatophor in the Writings of St. Basel the Great.“

⁴⁶ On this see: J. E. BIECHLER, *The Religious Language of Nicholas of Cusa* (Missoula, Montana 1975).

⁴⁷ *DCC*, II:75, p. 100. See also II:85, p. 112-113 where Cusa gave three historical elements of the general councils of the past: (1) „de consensu Romani pontificis,“ (2) „ac aliarum patriarcharum,“ (3) „per imperatores.“

⁴⁸ BILANIUK, *Nicholas of Cusa*, p. 61, and WATANABE, p. 76 and n. 107 where reference is given to the Eighth General Council at Constantinople.

⁴⁹ *DCC*, II:69, p. 93. Cusa would have shared this view with medieval figures such as Gerson, see: J. B. MORRALL, *Gerson and the Great Schism* (Manchester 1960) 82, 103, and with more recent scholars such as Joseph Gill and Hubert Jedin. GILL has presented his view in *The Representation of the Universitas Fidelium in the Councils of the Conciliar Period* in G. J. Cumming and C. G. D. Baker, eds., *Councils and Assemblies*, *Studies in Church History* 7 (Cambridge 1971) 177-195 and „The Canonists and the Council of Constance“ *Orientalia Christiana Periodica* 32 (1966) 528-535 and JEDIN in *Bischöfliches Konzil oder Kirchenparlament?* 2nd Ed. (Basel 1965) esp. p. 9-10. Watanabe cited two predecessors of Cusa who are generally viewed as part of the conciliar tradition and yet who did not agree on what constituted a general council. For Guilielmus Durantis (Durandus) in the early fourteenth century a council was an assembly of the bishops (p. 24-25), while for Conrad of Gelnhausen in the opening years of the Great Western Schism it was not just a meeting of the bishops, p. 81 and n. 9,11. Johannes de Segovia, a contemporary of Cusa at the Council of Basel, argued that the council was an assembly of bishops and in his view it was this episcopal character of the council that gave it authority; see BLACK, *Monarchy and Community*, p. 136.

⁵⁰ Zabarella presumed that bishops would come to a council and stressed their obligation to attend a council when called, *Comm. ad X*, II.24.4. Fol. 61^{ra}. In a similar manner he took it for granted that popes usually convoked a general council; see *In Clem. „Prohemium“* (Rome, 1477), Fol. 3^{va}. But Zabarella never stopped at this level nor did he see a council as simply a meeting of the pope with the bishops. Rather for him a council was the body which represented the whole Church and so exercised its authority, *De scismate*, Fol. 117^{ab}. See also the two articles, *Cardinal Zabarella on Papal and Episcopal Authority*, and *Franciscus Zabarella (1360-1417): Papacy, Community and Limitations Upon Authority*, cited in note 24 above.

To be sure Cusa also mentions the definition of a council as constituted by the pope or his legate meeting with all the bishops, *DCC*, II:69, p. 93, but Cusa like Zabarella went beyond this and explicitly cited it as insufficient, *DCC*, II:70, p. 94, „Tamen haec diffinitio forte non est sufficiens.“

be truly general it must be representative of the whole church⁵¹, and therefore the other patriarchates (besides Rome) had to be present or else it would not be truly representative. In this definition Cusa rejected the narrower and papalist view that what determined a general council was its convocation by the pope⁵². Cusa said that to be sure there really could not be a general council without being called by the legitimate authority⁵³, but this in itself was not sufficient; there had also to be the representative character. Cusa admitted that one would not necessarily have to wait for everyone to come⁵⁴; it was sufficient that all had been summoned and that many were present⁵⁵. This idea led Cusa to his next major element as he sketched his description of a general

⁵¹ DCC, II:75, p. 100.

⁵² BIECHLER has pointed out that Cusa was proud of his identity as a canonist, *The Religious Language of Nicholas of Cusa*, p. 8, and as a trained canonist Cusa naturally stated that councils were normally celebrated by the pope; he used the word „regulariter“ in this context, DCC, II:72, p. 96. But later Cusa simply stated that he did not think that the authority of a council should be placed on its convocation, II:75, p. 100, „Unde in convocatione vim concilii non puto ponendam.“ Here Cusa and Zabarella would have been in close agreement and in fact another member of the Council of Basel, Johannes de Ragusa, presented the same point of view and on almost the same words as Cusa, „non puto magnam vim in convocatione concilii ponendam, dummodo patres ecclesiae convenient, qui universalem ecclesiam repraesentant,“ in W. KRÄMER, *Die ökumenologische Auseinandersetzung um die wahre Repräsentation auf dem Basler Konzil: Der Begriff der Repraesentatio im Mittelalter. Stellvertretung, Symbol, Zeichen, Bild*, hrsg. von Albert Zimmermann (Miscellanea Mediaevalia 8) (Veröffentlichungen des Thomas Instituts der Universität zu Köln) Berlin 1971) p. 202-237 at p. 227 and n. 79.

⁵³ Cusa admitted that the early councils had been summoned by the emperors, DCC, II:73, p. 98, but in these he still saw the presence of papal authority as presiding at the council and argued that without this there would have been no general council and nothing would be done, p. 99.

⁵⁴ In his argument Cusa stated that a reasonable time should be granted to allow those summoned to come to the council, although he adds realistically that the council fathers did not have to and could not wait for all to show up; DCC, II:75, p. 100, „expectandi sunt patres, licet non omnes necessario expectentur.“ Zabarella had also written that it would be sufficient if the major part of those summoned had appeared. Segovia at Basel followed Zabarella in this stress on the major part as sufficient, BLACK, *Monarchy and Community*, p. 36. On this point both Cusa and Zabarella would seem to distance themselves from the view of William of Ockham who appears to have required unanimity for any decision that would be truly binding and representative of the faith of the whole Church. In this sense then Ockham would not stand as a true conciliarist for he would reject the claim of the general council to represent the whole Church and so its claim to exercise the powers of the whole Church; see B. TIERNEY, *Ockham, The Conciliar Theory, and the Canonists in his Church Law and Constitutional Thought in the Middle Ages* (London 1979) Part XI, p. 40-70, at p. 67. On another point dear to the conciliarists, whether general councils were unfailing, TRYGVE R. SKARSTEN has pointed out that Pierre d'Ailly was closer to Ockham on this question since he saw only the whole Church as unfailing, *The Origin of Conciliarism as Reflected in Modern Historiography: Lutheran Quarterly* 19 (1967) 296-311, at p. 299. See also L. SALEMBIER, *The Great Schism of the West* (London 1907) 287. Skarsten then went on to summarize the observation made by Tierney in the article just mentioned that there was no simple line of continuity of canonists, Ockham and conciliarists, for „when Ockham parted company with the canonists, the conciliarists in their turn parted company with Ockham,“ p. 307 and n. 51. In another study, *From Thomas of York to William of Ockham. The Franciscans and the Papal Sollicitudo omnium ecclesiarum 1250-1350*, p. 607-658 in *Comunione interecclesiale. Collegialita Primato - Ecumenismo*. (Acta Conventus Internationalis de Historia Sollicitudinis Omnium Ecclesiarum. Romae 1967) (Communio 12-13), edited by Iosepho d'Ercole and Alphonso M. Stickler (Rome 1972), at p. 655, Tierney denies that Ockham can be considered in any way a conciliarist. J. J. RYAN, *The Nature, Structure and Function of the Church in William of Ockham* (A.A.R. Studies in Religion 16) (Missoula, Montana 1979) 12-13, 30-31, 34, would agree with this assessment since Ockham would not allow any body adequately to represent the whole community of the faithful.

⁵⁵ DCC, II:75, p. 101, „quoniam sufficit plures esse et omnes vocatos.“

council. He stated that in general one should stand by the position held by the many rather than by the few, but still numbers were not the decisive element⁵⁶. The critical elements were rather that there be openness, freedom, and finally unanimity⁵⁷. These essential ingredients were repeated and drummed home on numerous occasions throughout the tract by Cusa⁵⁸. He showed that councils which lacked these qualities should be and had been rejected in the past. He cited as an example the Second Council of Ephesus which admittedly had the proper convocation and the presence of the delegates of the pope but which failed because liberty and agreement were lacking in it⁵⁹. Although Cusa was influenced by the Eastern tradition, still he was writing as a Westerner and for the Latin world and so Cusa put great stress on the position of the papacy in a council⁶⁰. There could not be a general council without the participation of the

⁵⁶ DCC, II:76, p. 101-102, „Potius enim si statueretur, quod a pluribus quam quod a paucioribus dictatur, ... et non esset numerus adeo necessarius sicut libertas et unanimitas.“

⁵⁷ DCC, II:76, p. 102, „libertas et unanimitas.“ Cusa had earlier, p. 101 spoken of the need for open and frank discussion, and for freedom of speech at the council, „quisque liberalem loquendi habeat facultatem cum liberalitate loquendi.“

⁵⁸ Cusa mentioned these on numerous occasions in his tract; e.g., *openness*: DCC, II:77, p. 103, „non secreta sed publice“; *freedom*: DCC, II:73, p. 102, „liberrima detur audientia“; II:78, p. 105, „in summa libertate loquendi“; II:81, p. 107, „libera omnium audientia“; *unanimity*: II:77, p. 103, „concordanti sententia“, II:78, p. 105, „ex una concordantia“, „unanimitate et concordia.“

⁵⁹ DCC, II. 82, p. 110, „defecit libertas et absque concordantia ... fuit erronea decisio.“

⁶⁰ DCC, II.85, p. 112-113. Here Cusa repeated his earlier assertion that the three elements traditionally in the composition-convocation of a universal council were: (1) „de consensu Romani pontificis“ (2) „ac aliarum patriarcharum“ (3) „per imperatores“. Now he added that the object of the council was a fourth element: „super articulis fidei.“ In their respective experiences both Cusa and Zabarella found themselves confronted by the extreme case of a council meeting without or actually in opposition to a pope. For somewhat obvious reasons this possibility had never drawn much attention in the earlier canonistic tradition. Constance had issued *Haec Sancta* (April 6, 1415) soon after John XXIII had fled the city in order to proclaim to the world that his departure had in no way impaired the authority of the council. The future Eugenius IV with whom Basel would have difficulties was not at Constance at this time but rather with Gregory XII; see A. VAGEDES, *Das Konzil über den Papst? Die Stellungnahmen des Nikolaus von Kues und des Panormitanus zum Streit zwischen dem Konzil von Basel und Eugen IV.* 2 vols. (Paderborner theologische Studien 11, Paderborn 1981) I:70.. Basel was facing the situation of an absent and increasingly hostile Eugenius IV who was bent on undermining and destroying the council and its effectiveness. These two moments in history and what transpired have been described in (a) for Constance, the studies mentioned in note 1 above; see also *After Six Hundred Years: The Great Western Schism, Conciliarism and Constance*: Theological Studies 40 (1979) 495-509; G. ALBERIGO, *Chiesa Conciliare. Identità e significato del conciliarismo* (Istituto per le Scienze religiose di Bologna, Testi e ricerche di Scienze religiose, 19) (Brescia 1981) provides a detailed discussion of both Constance and Basel and copious bibliographical references. (b) for Basel, the most recent and very useful studies by G. CHRISTIANSON, *Cesarini. The Conciliar Cardinal*; W. KRÄMER, *Konsens und Rezeption. Verfassungsprinzipien der Kirche im Basler Konziliarismus* (Beiträge zur Geschichte der Philosophie und Theologie des Mittelalters, 19) (Münster 1980); J. WOHLMUTH, *Verständigung in der Kirche*; A. VAGEDES, *Das Konzil über den Papst?*; J. W. STIEBER, *Pope Eugenius IV, The Council of Basel and the Secular and Ecclesiastical Authorities in the Empire: The Conflict over Authority in the Church* (Studies in the History of Christian Thought 13) (Leiden 1978).

One problem in any discussion of these medieval councils is that many of the canonistic writings on councils and even decrees by councils contain an inherent ambiguity since the documents (whether deliberately or not is not always clear) do not in every case clarify what they meant by the word council, i.e., with the pope, apart from the pope, etc. in the contexts in which the word appears. On this see: B. TIERNEY, *Hermeneutics and History. The Problem of Haec Sancta*, in *Essays Presented to Bertie Wilkinson*, ed. by T. A. Sandquist and M. R. Powicke (Toronto 1968) 354-370, and his, *Divided Sovereignty at Constance. A Problem of Medieval and Early Modern Political Theory*: AHC 7 (1975) 238-256; see also the excellent works in this direction by H. RIED-

papacy in some way⁶¹. Nevertheless Cusa added that not all papal councils, i.e., those in which the pope or his legates presided, were universal or general councils of the whole church⁶². Here Cusa touched upon a question that has remained unsettled, for there is no agreed upon listing of the councils accepted as general precisely because there was and remains such a difference of opinion on what constitutes a general council⁶³. Again unlike the later arguments which put a definitive character to the subscription of conciliar decrees by the pope, Cusa stated that the pope signed decrees just like other members of the council⁶⁴, for the force or validity of the decree came not from the pope but

LINGER, *Hermeneutische Überlegungen zu den Konstanzer Dekreten*: Das Konzil von Konstanz, ed. by A. FRANZEN and W. MÜLLER (Freiburg 1964) 214-238 and K. A. FINK, *Zur Beurteilung des großen abendländischen Schismas*: ZfKG 73 (1962) 335-343, and finally the collections edited by R. BÄUMER, *Das Konstanzer Konzil* (Wege der Forschung 415, Darmstadt 1977) and *Die Entwicklung des Konziliarismus* (Wege der Forschung, 279) (Darmstadt 1976) and C. N. D. CROWDER, *Unity, Heresy and Reform 1378-1460: The Conciliar Response to the Great Schism* (Documents of Medieval History 3) (New York 1977).

⁶¹ DCC, II:87, p. 115, „absque auctoritate sedis apostolicae concilium universale esse non potest.“ One must remember that even Constance in spite of its bitter feelings toward John XXIII (and the other papal claimants as well) continued to deal with him (and the others) and so obtained John's agreement to accept in advance their decision in his regard and thus they obtained his abdication and resignation when they demanded that he be deposed. A similar pattern was equally successful with Gregory XII and only Benedict XIII remained recalcitrant which earned him the title of a modern book on him by A. GLASFORD, *The Antipope* (Pedro de Luna 1342-1423). A Study in Obstinacy (New York 1965).

⁶² DCC, II:87, p. 115, „tamen non sequitur: ubi praesidet papa in concilio vel eius legatus, ibi est universale concilium universalis ecclesiae.“ Here Cusa would disagree with the view of his more papalist contemporary, Heinrich Kalteisen, who placed the authority of a conciliar decree in the assent of the pope, see W. KRÄMER, *Die ekklesiologische Auseinandersetzung* 212.

⁶³ The best discussion of this question remains the study by K. A. FINK, *Konzilien-Geschichtsschreibung im Wandel*: Theologie im Wandel. Festschrift zum 150. jährigen Bestehen der kath. Fakultät an der Universität Tübingen 1817-1967 (Tübinger theologische Reihe 1) (München 1967) 179-189; see also the comments by J. A. F. THOMSON, *Popes and Princes 1417-1517*. Politics and Policy in the Late Medieval Church (London 1980) 4.

⁶⁴ Cusa discussed the system of signing the decrees of a council which had varied at different councils, DCC, II:86, p. 113-114 and II:94-95, p. 125. Controversy at one stage had developed at Constance on how decrees were to be issued: in the name of the pope, in the name of the council, of the pope with the council agreeing, etc., see A. LENNE, *Der erste literarische Kampf auf dem Konstanzer Konzil im November und Dezember 1414*: RQ 28 (1914) 2-40, 61-86, at p. 84-86. This seemingly minute point was of some importance in establishing authority. In a similar manner in the centuries prior to Constance popes had issued decrees to which the cardinals had added their signatures, thus giving the decision a greater importance and prominence; see B. KATTERBACH and W. M. PEITZ, *Die Unterschriften der Päpste und der Kardinäle in den „Bullae Majores“ von 11. bis 14. Jahrhundert*: Studi e Testi 40 (Miscellanea Fr. Ehrle IV) (Rome 1924) 177-274. Canonists such as Zabarella had drawn from this tradition and other canonistic sources such ideas as that the pope must consult with the cardinals; popes were not to act on serious matters apart from the cardinals; if a pope acted without consultation of the cardinals it was to be presumed that he did so out of malice and his action was to be invalidated; for Zabarella's teachings on the special bond between the pope and the college of cardinals, see *Comm. ad X*, V.33.23, Fol. 113^{ra}. J. LECLER has studied the expression that they were part of the body of the pope, *Pars Corporis Papae ... Le sacre college dans l'ecclésiologie medievale*: L'Homme Devant Dieu. Melanges offerts au Pere Henri DeLubac 3 vols. (Lyons 1964) II:183-198; the cardinals consequently were called the brothers of the pope, *Comm. ad X*, V.6.17., Fol. 61^{va}, In Clem., II.9.1., Fol. 82^{ra} and their existence imposed the restrictions listed above on papal actions, *Comm. ad X*, III.4.2., Fol. 18^{va}. For other examples of this tradition see J. LULVES, *Die Machtbestrebungen des Kardinals-kollegium gegenüber dem Papsttum*: Mitteilungen des Instituts für österreichische Geschichtsforschung 36 (1914) 455-483 and G. MOLLAT, *Contribution a l'histoire du sacre college de Clement V a Eugene IV*: RHE 46 (1951) 22-112, 566-594.

from the fact that it (the decree) embodied the *consensus*⁶⁵. Cusa drew the logical conclusion from this principle that since a council was constituted by *consensus*, wherever or whenever there was not *consensus* but dissension, there was no council⁶⁶. He even went as far as saying that where *consensus* was, God was⁶⁷. Thus conciliar decisions had binding authority because they shared in divine authority.

That conciliar decrees shared in this authority and therefore were binding on all subjects of this authority came from the fact that they, the decrees, had been accepted and put into practice by the community⁶⁸. The community had shared in and demonstrated the *consensus* by its actions. Contrary to the more monarchist and papalist maxim that the will of the prince gave force to the law⁶⁹, Cusa submitted that even papal decrees had not only to be made known publicly but also accepted and approved by use and practice⁷⁰. He admitted that he did not intend at that point in his argument to go into the question on the tradition that had developed that the pope by himself could and did issue statutes which had binding force. Rather he was arguing about the author-

⁶⁵ DCC, II:100, p. 135, „Ex qua re sequitur iuxta subscriptiones praetactas vigorem statutorum canonum in concilio non ex papa nec capite concilii, sed ex unico concordanti consensu vigorem habere,“; see also WATANABE, p. 54 and n. 37.

⁶⁶ DCC, II:101, p. 137, „Ex quo patet quod, quia concilium ex consensu constituitur, quoniam, ubi dissensio, ibi non est concilium.“ R. HAUBST sees this principle as the justification for Cusa's transfer of allegiance from Basel to Eugenius IV in that the dissension at Basel had undermined this council's claim to speak for the whole Church as its representative and with its authority, *Wort und Leitidee der „Repraesentatio“ bei Nikolaus von Kues: Der Begriff der Repraesentation im Mittelalter. Stellvertretung, Symbol, Zeichen, Bild*, hrsg. von A. ZIMMERMANN (Miscellanea Mediaevalia 8; Veröffentlichungen des Thomas Instituts der Universität zu Köln) (Berlin 1971) 139-162, esp. 152-153.

⁶⁷ DCC, II:104, p. 140, „Ibi enim est deus, ubi simplex sine pravitare consensus,“; fittingly in this context Cusa was citing Pope Hormisdas and this text is almost an echoing of the hymn from the old Holy Thursday liturgy, „Ubi caritas et amor, ibi Deus est.“

⁶⁸ DCC, II:103, p. 139, „Quare vigor particularium statutorum quoad hoc, quod subditi per ea legentur, requirit usum et acceptationem. Unde usus leges firmantur et utentium moribus approbantur.“ See also WATANABE, p. 53 and the study by Y. CONGAR, *La réception comme réalité ecclésiologique: Concilium* (French Edition) 77 (1972) 51-72. Early in this century A. HAUCK published a study which applied these ideas to the constitutive elements of a general council in the middle ages, *Die Rezeption und Umbildung der allgemeinen Synode im Mittelalter: Historische Vierteljahrsschrift* 10 (1907) 465-482. Hauck showed that the definition of a general council as given by Gelnhausen and Langenstein early in the Great Western Schism was the same as had been received from the make up of the Fourth Lateran Council called by Innocent III in 1215; see p. 465, 470. See also B. TIERNEY, „Only Truth Has Authority: The Problem of „Receptio“ in the Decretists and in Johannes de Turrecramata: in Law, Church and Society. Essays in Honor of Stephan Kuttner, edited by K. Pennington and R. Sommerville (Philadelphia 1977) 69-96 and W. KRÄMER, *Die ekklesiologische Auseinandersetzung* p. 225. I was unable to consult the study by L. DE LUCA, *L'Accettazione popolare della Legge canonica nel Pensiero di Graziano e dei suoi Interpreti: Studia Gratiana* III (1955) 193-276.

⁶⁹ Cusa cited this principle: „Quod enim placet principi, habet legis vigorem,“ DCC II:113, p. 148, in a context where he was explicitly following Zabarella to the view that while the ruler (*rector*) might have the exercise of jurisdiction, nevertheless the jurisdiction remained in a real sense with the corporation, „remanente etiam ipsa iurisdictione in habitu apud universitatem,“ p. 148-149; Zabarella's position is found in note 23 above.

⁷⁰ DCC, II:105, p. 141, „tamen ad hoc, quod statutum suum liget, non sufficit quod sit publice promulgatum, sed oportet quod acceptetur et per usum approbetur secundum superiora et ea, quae notantur De constitutionibus super rubrica, ubi dicitur per doctores quod ad validitatem statuti tria sunt necessaria: potestas in statuante, approbatio statuti per usum et eiusdem publicatio.“ To corroborate his statement Cusa here simply referred to the long standing canonistic tradition on this subject.

ity of establishing canons, i.e., church law affecting the whole church, a form of fundamental law and for such law to be valid more was required: not just a papal action but the common consent of the church⁷¹. That Cusa here was talking about something more and beyond mere positive law or enactment is clear for he argued that against his conclusion no prescription or custom had validity just as there could not be anything to take precedence over divine law and natural law, the sources of his conclusion on the need for *consensus*⁷².

In this section of his tract there stands one of Cusa's major contributions in the western intellectual tradition. For Cusa took the next step and said that anyone could see that the binding force of law came from the agreement to be subject to it on the part of all who would be bound to it⁷³. Cusa, like Zabarella before him⁷⁴, was highly critical of those whom he called flatterers or sycophants as they exalted the papal authority too far and made it alone the source of law's binding power⁷⁵. In fact in this section Cusa explicitly cited Zabarella's *Commentary on the Decretals* for a discussion of the extent of papal authority⁷⁶. He referred to Zabarella who himself quoted the earlier medieval disagreement between two great canonists of the thirteenth century, Innocent IV and Hostiensis, in regard to a corporation and the exercise of authority by it⁷⁷. Innocent IV had held that if the corporation had a head or rector, then he alone could exercise jurisdiction. Hostiensis disagreed and added that no matter how inconvenient it might be or difficult for the whole body to exercise jurisdiction, still it could do this⁷⁸. This opinion was at the heart of Zabarella's conciliar theory for he had drawn from this principle the teaching that in the emergency of the Great Western Schism, the church, the believing community as a whole, had the authority to act to settle the crisis⁷⁹. His principle was that the authority or jurisdiction possessed by the head was a ministerial one,

⁷¹ Cusa employed here a number of distinctions between simple orders, directives, responses to questions which the popes had traditionally issued for centuries as part of their office, and statutory laws or decrees. He identified the latter as: „statutis, quae vim canonum habent, et decretis, quae ligant universaliter in ecclesia.“ The authority for the latter came not from the fact that they were issued by the pope but from *consensus*, „quod canonum statuendorum auctoritas non solum dependet a papa, sed a communi consensu,“ DCC, II:109, p. 144.

⁷² DCC, II:109, p. 144.

⁷³ DCC, II:110, p. 145, „scilicet quod vigor legis ex concordantia subiectionali eorum, qui per eam ligantur, subsistat, facile quisque apprehendit, qui vires consuetudinis ex usu tantum introductae advertit.“

⁷⁴ Zabarella, *De scismate*, Fol. 119^{vb}: „per multos assentatores qui volentes placere pontificibus per multa retro tempora usque ad hodierna suaserunt eis ut omnia potarent et sic quod facerent, quasi omnia possunt etiam illicita et sic plus quam Deus.“

⁷⁵ Cusa used the words, „quidam adulatorum“ to describe these courtiers, DCC, II:111, p. 146, who stressed a positivist interpretation of papal legislative authority: „scilicet quod ipse tantum statuere habeat aliis consulentibus.“

⁷⁶ DCC, II:112, p. 147.

⁷⁷ For a detailed and lucid discussion of the corporative ideas of Innocent IV and Hostiensis, see B. TIERNEY, *Foundations of the Conciliar Theory*, c. 2 *The Structure of a Medieval Ecclesiastical Corporation*. Zabarella took up the problem in his *Comm. ad X*, I.4.11., Fol. 94^{va} and I.6.6., Fol. 110^{rb} (see note 23 above).

⁷⁸ TIERNEY, *Foundations of the Conciliar Theory*, p. 106-107.

⁷⁹ Zabarella at one point argued that a failure to act against the papal claimants would be to sin against the article of the Creed, „unam, sanctam, catholicam,“ *De scismate*, (ed Schardius), p. 692.

that therefore it generally would be exercised by the head⁸⁰, but that fundamentally all authority resided with the whole, the community as such⁸¹. Cusa agreed with this principle from Zabarella and rejected the view that would have centralized and located all authority in the head of the community⁸². This other tradition which both Cusa and Zabarella opposed ultimately derived all inferior authority from the papacy. Since therefore any authority in the church in this theory would be derivative, i.e., come from the pope, then all authority would reside in the papacy as was argued by many papalists⁸³. The opposing view saw, read and used the same Scriptural texts as the papalists but interpreted them differently. For example, in their interpretation of the granting of authority to Peter in Matthew 16:18 they saw Peter as a figure of the church and not of the papacy⁸⁴. In this sense then Peter (and all the subsequent popes) got his authority from the church and not vice versa.

What then is Cusa's view in summary of authority in the church? And what are the implications of this theory for a wider discussion of the role of authority in any community? It is clear that Cusa like Zabarella saw authority residing in the community. It was the consent or agreement (*consensus*) of this community that gave binding force to all laws governing this community, regardless of the variety of ways and forms this *consensus* had taken over the different generations. Cusa cited the example of the election of the pope as one means by which the cardinals acting in the name of the whole church chose the one to whom they and the body they represented, the church, would be subject⁸⁵. Unlike later Divine Rights theorists of the seventeenth century, Cusa, in a few short words was able to see election or the *consensus* of the subjects and by divine ordinance all joined together in one and the same act⁸⁶. In this way Cusa avoided being

⁸⁰ Zabarella had expressed his views on this in language which denied total possession and exercise of authority to the head, „Nota quod non dicit totaliter ... sed dicit principaliter,“ *De scismate*, Fol. 119^{va-b}, and „quod papa habet plenitudinem potestatis debet intelligi non solus sed tanquam caput universitatis,“ and „in ipso tanquam ministro per quem hec potestas explicatur,“ Fol. 119^{va}.

⁸¹ *De scismate*, Fol. 119^{va}, „in ipsa universitate tanquam in fundamento.“

⁸² DCC, II:114, p. 149.

⁸³ DCC, II:115, p. 149-150. Cusa saw the problem from two perspectives. The derivation of jurisdiction for lower prelates might well come to them from the pope as a matter of mere positive law, but in principle this would imply that Peter had received a special prerogative more than the other Apostles and this Cusa does not accept. Here again Cusa cited Zabarella's Commentary on the Gregorian Decretals. Zabarella himself had pointed out the evil outcome of such abuses by papal authority: „Ex hoc enim infiniti secuti sunt inferiores prelati sunt pro nihilo et nisi Deus succurrat status ecclesie universalis periclitaretur,“ *De scismate*, Fol. 119^{vb}. He had attacked this extreme assertion of papal powers in his *De scismate* as having led to the great crisis of his age, several decades of schism with no relief or solution in sight if one followed this extreme papalist line of thought, i.e., if only a pope could summon a general council; see *After Six Hundred Years: The Great Western Schism, Conciliarism, and Constance*: Theological Studies 40 (1979) 495-509, esp. p. 503-505.

⁸⁴ DCC, II:115, p. 150. To be more precise they saw Peter („The Rock“) first as the figure of Christ, then of the Church or of the faith of the Church; „tamen per petram Christum quem confessus est intelligimus. Etsi Petrus per petram tanquam lapis fundamenti ecclesiae intelligi deberet,“ also Cusa later cited St. Augustine, II:167, p. 204, „quod superius per sanctum Augustinum dictum est, scilicet quod de petro, id est ecclesiae fidelium, Petrus oritur.“

⁸⁵ DCC, II:117, p. 153, „cardinales nomine universalis ecclesiae papam eligere.“

⁸⁶ DCC, II:117, p. 153, „Ex quibus patet iurisdictionem in Romano pontifice ita constitui ex divino privilegio et electione, sicut in aliis administrationem ecclesiasticam habentibus. Et sicut gradualis maioritas principatus etiam eodem modo constituitur ex divina ordinatione et electione sive consensu subiectorum.“

pushed into any descending thesis on the origin of authority based on the notion that because it was from God it must come from the top down⁸⁷, an idea which was very common among certain medieval and even more recent writers⁸⁸.

From this model in the ecclesiastical order Cusa drew a general principle: the root of all canons (law) insofar as their binding power was concerned consisted in the *consensus*⁸⁹. Thus habitual practices that have achieved the consent of those so acting copied law and so if all other authority failed such a custom of the people and of one's ancestors were to be observed as law⁹⁰. So too every principate or ruling authority, whether it was founded upon written law or in the living law (tradition) embodied in the prince, was ultimately derived from only one source, the concordance and subjective consent of those bound to this ruler⁹¹. Or as he put it in another way: by a general agreement human society agrees to obey its kings⁹². Hence any law whether in the civil or ecclesiastical order that was not accepted was not really law⁹³. This acceptance could be express or implicit⁹⁴. Cusa did bring in one distinction between the two orders, civil and ecclesiastical, that must be observed. While in general Cusa would argue that one must presuppose that the rule of the majority was valid and therefore one should be subject to their decision⁹⁵, nevertheless no decision, especially in matters of faith would really be secure unless the voters could ultimately be brought to unanimity as we read was

⁸⁷ DCC, II:119, p. 155, „Dicunt quidam moderni Petrum Apostolos misisse ad particulares provincias volentes ex hoc trahere, quod exercitium potestatis ligandi et solvendi fuit a Christo Petro datum et per Petrum aliis.“

⁸⁸ M. WILKS has studied some of this line of thinking as it appeared in medieval times in his *The Problem of Sovereignty in the Late Middle Ages* (Cambridge 1964); see also U. HORST, *Papst, Bischöfe und Konzil nach Antonin von Florenz: Recherches de théologie ancienne et médiévale* 32 (1965) 76-116, esp. p. 90 and *Papst und Konzil nach Raphael de Pornaxio, O.P.: FZPbTh* 15 (1968) 367-402. For the danger that this idea might represent among modern theologians, see the warning by K. RAHNER, *Studies in Modern Theology* (London 1964) p. 308-309.

⁸⁹ DCC, II:124, p. 158, „ex prae habitis patet radicem canonem quoad ligandi vigorem in consensu existere.“

⁹⁰ DCC, II:124, p. 159, „vide diuturni mores consensu utentium approbati legem imitantur, ... et ubi auctoritas deficit, mos populi et maiorum instituta pro lege sunt servanda.“

⁹¹ DCC, II:127, p. 162, „Unde cum natura omnes sint liberi, tunc omnis principatus, sive consistat in lege scripta sive viva apud principem, per quem principatum coercentur a malis subditi et eorum regulatur libertas ad bonum metu poenarum, est a sola concordantia et consensu subiectivo,“ and further: „vera et ordinata potestas ... non nisi electione et consensu aliorum constitui potest, sicut etiam lex ex consensu constituitur.“

⁹² DCC, II:127, p. 163, „quia pacto generali convenit humana societas velle regibus obedire,“ at the end of this section Cusa added that of course all of this was what Hostiensis and the other doctors had taught as he had noted elsewhere. The power of Roman rulers had been grounded in such a *lex regia*.

⁹³ DCC, II:130, p. 165, „non possumus legem dicere non acceptam usu utentium etiam in quocumque foro civili vel canonico;“ also II:131, p. 165, „si canon ex concordantia, usu et acceptance approbatur, tunc firmatus cuiusque constitutionis ex acceptance est.“ Modern research on *usus* and *receptio* in relation to law is voluminous.

⁹⁴ DCC, II:132, p. 166, „Iam ex prae habitis constat omnium constitutionum ligandi vigorem consistere in concordia et consensu tacito vel expreso.“

⁹⁵ DCC, II:137, p. 171, „Et quia quisque ad synodum pergens iudicio maioris partis se submittere tenetur, quia hanc praesupponit quod maior pars regulariter vincit, tunc synodus finaliter ex concordia omnium diffinit, licet varia sint etiam particularium vota, quoniam iuxta maiorem partem concludit.“

done in all the councils⁹⁶. Here Cusa expressed a view of good practical politics as well as of theology; unless there were agreement, things would not get done. Later Cusa drew another conclusion which he exemplified once again from the ecclesiastical order but which clearly had implications for the civil order as well. He applied the structure of Aristotelian causality to an analysis of the office of the one who presided over the whole body, i.e., the president (the pope). He stated that no one ought to be ordained to this office unless he had been elected by those whose president he would be so that he would acknowledge (recognize) that the origin of his presidency was in these subjects and therefore he would rule in love without pride⁹⁷. From this Cusa moved on to a discussion of the relationship of that president and his authority, i.e., papal authority, to the authority of the church as a whole and of the general council which represented the whole church⁹⁸.

Nicholas combined here a number of themes from different traditions: authority as coming to the presiding officer from on high (*a deo*) and from below (*per voluntariam subiectionem*). He explained this by images and language from traditional scholastic philosophy joined together with theological speculation and Trinitarian imagery based on Joachim of Fiore. He asked whether the pope could change, overrule, amend, abrogate, abolish, etc., something that a general council had decided.⁹⁹ Cusa argued that on the contrary popes were bound by the decisions of councils¹⁰⁰. Therefore the body politic

⁹⁶ DCC, II:137, p. 171-172, „Nulla tamen conclusio, maxime in materia fidei, esset secuta, nisi ad unitatem vota reducerentur, sicut in omnibus conciliis legimus actum.“

⁹⁷ DCC, II:167, p. 204, „Si iura ac dicta sanctorum patrum, quae loquuntur nullum ad praesidentialem curam ordinari debere nisi electum ab hiis, quibus praesidere debet servarentur, ut suae praesidentiae originem ab hiis se habere cognoscat, quibus praest, et sic absque superbia in amore pascat.“

⁹⁸ DCC, II:167, p. 204-205.

Ultimately he argued that the theory was a beautiful one, „pulchra est haec speculatio,“ which saw all powers as latent in the community and only activated by divine action, „quomodo in populo omnes potestates tam spirituales in potentia latent quam etiam temporales et corporales, licet ad hoc, quod ipsa praesidentialis potestas in actu constituatur, necessario desuper concurrere habeat radius formativus, qui hanc constituat in esse, quoniam omnis potestas desursum est – et loquor de ordinata potestate ...“ DCC, II:168, p. 205. The last comment by Cusa shows that he was aware in this discussion of the speculations and disputes in the late medieval period on *potestas ordinata* vs. *potestas absoluta*; see *After Six Hundred Years: The Great Western Schism, Conciliarism, and Constance* p. 503 and n. 15. BLACK, *Monarchy and Community*, p. 22, seems to express the view that Basel went beyond Zabarella in claiming total power for the council whereas Zabarella always worked within the framework of *potestas ordinata*, see esp. p. 22 n. 1.

⁹⁹ DCC, II:169, p. 206, „Quod autem canones universalium conciliorum tollere non possit vel mutare vel aliquid in contrarium condere, textus est notabilis.“ Cusa then cited the Decretum.

¹⁰⁰ DCC, II:170-171, p. 208. In support of his position Cusa cited a number of authorities which included the famous canonist known as the Archdeacon (Guido de Baysio, d. 1313), the Decretum and finally the Council of Constance itself, „Talia statuta universalem statum ecclesiae respicientia papam retractare non posse notat Archidiaconus 19 di. Ita Dominus in fine, facit c. Sunt quidam et alia capitula ibi posita 25 q. 1.“ and „Sed regulae et canones universalium conciliorum sunt editi pro correctione morum, 31 di. Nicaena igitur, et illis papa oboedire tenetur et illis in pascendo uti debet, quoniam divino consultu saluberrimos canones ediderunt, ut ait Leo Quartus papa, 25 q. 1 Ideo. Unde superaddidit concilium universale Constantiense quod, nisi oboediret, puniri possit, quia nullam sedem magis exsequi oportet uniuscuiusque synodi constitutum quam romanam, ut ait Gelasius papa, 25 q. 1 Confidimus.“ Given the policies and character of Eugenius IV this was a

could restrict and bind its head¹⁰¹. Even more the head should set the example in obedience to the rules set by the whole community¹⁰². The ruler moreover even in the legitimate exercise of that authority which he had ought to act only after proper consultation¹⁰³. Whatever was done without consent was invalid¹⁰⁴. Whatever power existed to rule, this power only had the form of ministerial care¹⁰⁵; i.e., the ruler had to act to serve the best interests of the community and only in this sense could coercion be

very real problem in the period after Constance and it led to the crisis at Basel and so ultimately in a sense to the failure of the reform attempts of that generation and thus at least indirectly to the Reformation in the next century; a strong proponent of this view is A. FINK, *Papsttum und Kirchenreform nach dem großen Schisma*: Tübinger theologische Quartalschrift 126 (1946) 110-122. For Eugenius IV's policies, see also STIEBER, *Pope Eugenius IV, The Council of Basel and the Secular and Ecclesiastical Authorities in the Empire*.

¹⁰¹DCC, II:172, p. 209, „Canon itaque universalis concilii est dux et regula regiminis et aedificationis ecclesiae, qua maxime primum architectum uti oportet, si recte sua potestate uti voluerit.“ In this section Cusa clearly links two images: (a) a conciliar decree as leader (*dux*), therefore one who was to be followed and (b) a conciliar decree as a rule (*regula*) or directive for both the administration of and for the building up of the Church. This latter point appealed to the medieval tradition that the only purpose of authority was for the building up of the community (*aedificatio*) and not for its destruction.

¹⁰² DCC, II:180, p. 220-221, „Ex quibus satis lucide patet opinionem antiquorum non fuisse papam per universalia concilia ligari non posse, sed potius, quod ipse inter omnes tamquam caput regulis traditis per universale concilium usus semper fuit ac etiam uti oportere confessi sunt.“

¹⁰³ DCC, II:191-192, p. 234, Cusa here went through some of the limits on the authority of a lower prelate in the matter of disposing of rights, property, and other matters that belonged to the local church. He cited the long standing canonistic tradition that the prelate could not alienate, donate or change anything in this area without the consent and agreement of his clergy; „alienationem sive donationem sive permutationem absque consensu et subscriptione suorum clericorum non habet.“ Cusa on this page recapitulated the history of the development of the development of medieval corporation theory by the canonists and specifically mentioned the two key steps by which the model of the local corporation was transferred to the *Ecclesia Romana* and to discussion of the papacy; „Nomine enim cleri Romanae ecclesiae, in quantum monarchiam significat Romana ecclesia, cardinales veniunt, ut superius quodam loco dicitur.“ Later he added: „Patet igitur: sic et papa facere tenetur a simili in factis universalis ecclesiae.“ J. A. WATT has examined in a number of studies the position that the popes should seek the advice of the cardinals and discussed this as a common canonistic teaching; e.g., Hostiensis, Vincentius Hispanus both taught this doctrine along with many others; see *Hostiensis on Per Venerabilem: The Role of the College of Cardinals* p. 99-113 in *Authority and Power. Studies on Medieval Law and Government Presented to Walter Ullmann on His Seventieth Birthday*, edited by Brian Tierney and Peter Linehan (Cambridge 1980) p. 105 (Hostiensis), p. 107 (Laurentius) but in this study, p. 111-113, Watt argues that for Hostiensis this meant that the pope need merely seek the advice of the cardinals (*consilium*) but that he was in no way bound to follow this nor to seek their consent (*consensus*). See also his: *The Constitutional Law of the College of Cardinals: Hostiensis to Joannes Andreas*: *Mediaeval Studies* 33 (1971) 127-157 and *The Early Medieval Canonists and the Formation of Conciliar Theory*: *Irish Theological Quarterly* 24 (1957) 13-31, esp. p. 22-23.

¹⁰⁴ DCC, II:240, p. 284-285, „Unde videtur irritam esse, nisi consensus interveniat, per c. *Obeuntibus* 63 di., ubi dicit textus (quod) illud, quod absque eorum consensu et conniventia factum fuerit, irritum esse, et ad idem 66 di. *Archiepiscopus* hoc bene probatur.“ Zabarella like many canonists before him had similarly argued that the pope needed the cardinals to establish a general law affecting the whole Church; see WATANABE, p. 52 and TIERNEY, *Foundations of the Conciliar Theory*, p. 234.

¹⁰⁵ DCC, II:260, p. 302, „Etiam ad ea quae superius tacta sunt, quomodo scilicet potestas principandi in ecclesia non sit quoad radicem illam, qua ipsa a deo est, proprie in coactione constituta, sed ministeriali cura.“

used¹⁰⁶. This assertion by Cusa in regard to governing the church he also applied to all civil rule; and here he based his ideas on Aristotle's *Politics*¹⁰⁷.

Cusa began with the problem similar to that of Zabarella, the grounding of authority. Zabarella wrote in a period of extreme crisis when the highest authority with which he was familiar, the papacy, was in its gravest hour to that day, the Great Western Schism. Zabarella proposed a way of solving the schism, of saving the position and authority of the papacy by grounding it in the general authority of the church which could then act in its own best interest to save itself and in so doing preserve the papacy. Cusa wrote only fifteen years after the Council of Constance when once again another crisis was brewing but had not yet reached the critical stages it would see in the following decade; he was able to be more theoretical and generalizing. Zabarella wished to base his solution on general church law and so his theory was proposed in a more canonistic fashion and only incidentally brought in the Aristotelian theories on society and historical examples. Cusa who had been trained in law was able as a member of the next generation to take the second step and place the legal theory in the context of general political theory and historical precedent, and so while Cusa too cited church law extensively and Zabarella himself, Aristotle as Cusa interpreted him still played a far greater and more central role in his tract. From the foundation that Zabarella had laid, i.e., that ultimately authority resides in the community as a whole, Cusa drew a conclusion that Zabarella might never have himself drawn or at least did not put such emphasis on, i.e., that therefore only the consent of that community made any authority legitimate and binding. This conclusion with its theoretical justification and historical inferences is Cusa's great contribution to political theory as it later developed in the western European tradition.

¹⁰⁶ DCC, II:261, p. 303, „Quare illa coertio nonerit, sicut principes dominantur eorum, quia hic dominandi modus est per vim super corporibus et rebus, sed erit coertio per liberam subiectionem omnium vel partis maioris initiata et punitio non nisi ad salutem tendens.“; and also, II:264, p. 305-306, „Resideo itaque in hac conclusione quod principatus ecclesiasticus ob unitatem ecclesiae et ad eius servitium et ministerium a deo ordinatus in realitate sua a Christo per ecclesiam constituitur.“

¹⁰⁷ DCC, III:270, p. 314-315, „Videmus enim hominem animal esse politicum et civile et naturaliter ad civilitatem inclinari.“ As WATANABE, p. 35, has pointed out, only now in this third section does Cusa cite Aristotle and not in the earlier two sections.