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Cover Page Footnote

Rev. Joseph F. Costanzo, S.J. Professor of Political Philosophy at Georgetown University, Washington, D. C. This article is the last of a trilogy on Graeco-Roman Politeia, 20 Ford. L. Rev. 119 (1951) and Catholic Politeia I, 21 Ford. L. Rev. 91 (1952).

CATHOLIC POLITEIA II

JOSEPH F. COSTANZO, S.J.†

CONTINENTAL RETROGRESSION AND THE ENGLISH SURVIVAL

1. THE ROMAN RIVALRY AND RETROGRESSION

"Quis custodiet ipsos custodes? Mens, et animus, et consilium et sententia civitatis, posita est in legibus."

FROM St. Augustine through St. Isidore of Seville to Hincmar of Rheims, and then to John of Salisbury and finally to St. Thomas Aquinas, there was ever present the aim to settle political philosophy on the basis of a clear universal standard in reason rather than on the basis of mere choice. From St. Augustine on and in accordance with his basic principles, there was repeated effort to establish valid transcendent norms for man's political and social life. St. Isidore, the first to give doctrinal development to the teachings of St. Augustine, made the *Iustitia Augustiniana* the core of the *Pax Christiana* by prescribing the material content of civil law. The consent of the *lex regia* was referred not only to the eternal law but also to the civil law itself and this doctrine was concretized in the *Law of the Visigoths*. In defining the material content of law as constitutive of the justice of the law and referring the governance of the ruler to the administration of that law, he gave concrete constitutional significance to his memorable distinction between the true king and the tyrant. In the ninth century, Jonas of Orleans repeated the teaching of St. Augustine and St. Isidore on the supremacy of rule by law as directly based on the equality of men's nature; Hincmar, Archbishop of Rheims, repeatedly used the passage from St. Augustine's *De Vera Religione* as the premise for the popular promulgation of law and its supremacy. The first Christian Constitution which embodied the principles of this tradition was the *Forum Iudicum*, the work for the most part of the Spanish Bishops. Its laws anticipated by almost two centuries many of the provisions of the English Magna Charta on due process, equal protection before the law, the contractual nature of law which sets it above the will of either party, king or subjects, and the inviolability of human life and limb from punishment without legal trial.¹

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1. Though the state plays a dominant determinative role with respect to law, law has an existence independent of the state and the might of the political community is to be

St. Augustine's concepts of law and government inspired the constructive period of the Carolingian Empire. The Oath of Coronation was conditioned by the vow to abide by the law of the kingdom and the traditional rights and privileges of the people, and the fealty of the people was conditioned by the king's faithfulness to his oath. Of the *practical* means whereby the ruler can effectively be checked by the people for arbitrary acts there were many inadequate, indefinite suggestions of resistance. But in the *Assizes of Jerusalem* there is evidence of the growing discernment of how the supremacy of law can better be institutionally assured by the independence of the courts. In the thirteenth century, Bracton and Beaumanoir summed up for their contemporaries the Christian heritage of law and government. Bracton made a legal emendation of the Roman *lex regia* for the English. *Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem.* Beaumanoir stressed a notion of St. Isidore—that the king is elected for the *common good*, and while its meaning is still indefinite and general, the reference of a just law to the public weal added significantly to the meaning of consent. John of Salisbury, recalling that St. Isidore of Seville distinguished between a king and a tyrant, simply concluded that the king who claims to be above the law is an *outlaw*. But his emphasis was on the "higher law," which for St. Augustine, whom he quotes, as for John, was the source and dynamic principle of social order. John of Salisbury enlarged upon the bond of common life, "the common objects of love," and he cast light upon the need of hierarchical coordination in society. St. Thomas Aquinas' famous exposition of law as a "dictate of reason" for the good of the community, has aptly merited for him Lord Acton's description as that of the "First Whig." His political philosophy might have saved the Continent from the Reception and assured the normal development of medieval society from feudalism to nationalism. There was nothing incompatible between the development of national unity and the unity of Christendom, and the violent disruption of the latter was not necessarily demanded by

confined within legal boundaries. The dynamic, creative function of the state as regards the domain of law is traceable to classical antiquity, while as agent operating within an intellectual ethical structure it belongs as an efficacious idea to the medieval period. The medievalists solved the polar tension in these two conceptions by distinguishing between the natural law and the positive law, without destroying the unity of the juridical continuum. The *lex naturalis* is prior to the state, and does not admit being overridden by any act of government, resolution of the people, or custom. On the other hand, the political community freely specifies the civil law, which no longer enjoys the sacred quality of immutability as it did in the archaic German conception. "Medieval theory therefore was unanimous that the power of the state stood below the rules of natural and above the rules of positive law." GIERKE, *POLITICAL THEORY OF THE MIDDLE AGES* 78 (1913).

the needs of the former. The medieval unity was the grandest attempt in human history to base the structure of institutions upon righteousness, political, social and economic, no less than religious. When this unity broke up, a new world—as Luther said—came into being. A pagan *politeia* cannot rest easily upon a Christian society. The two camps of thought—the Roman *Imperium* and the *Pax Augustiniana*—met again as in the days of the Fall of the Roman Empire. While it is true that the State came into being with the disruption of Christendom, it is the *modern secular* State which has its source in this breakup. Whatever virtues of law and government it has retained is part of the medieval heritage. The Aristotelian-Augustinian-Thomistic political tradition could have vitalized the nascent State and made the transition from feudalism to nationalism a normal logical development of the constitutionalism inherent in the medieval political thought and governance.

There is an almost unbroken silence in the history of Teutonic law during the tenth and eleventh centuries.² Notwithstanding Lord Bryce, the Roman Empire, real and fictitious, is dead, and, with it, the Roman idea of the sovereign plenitude and source of legislative power in the ruler. When the idea revived again, in the nascent nationalism of the France of the thirteenth century, chauvinist legists asserted the royal power of legislation in maxims which were literal translations of the texts of Roman law. And this is the peculiar thing in the history of law, namely, that whereas it was the responsibility of the English lawyers who strengthened the common law of England against foreign influence by their Year Books and Inns of Court, it was the legists of France and the Italian lawyers in Germany who imposed the *Corpus Iuris Civilis* upon native common law which had not yet reached the doctrinal stage of growth in their countries. Thus established, English law was able to withstand the perilous tendencies when the modern state was emerging in the shape of the Tudor monarchy.

The center of the conflict of these two traditions was the University of Bologna. There the Church established the chair of canon law with avowed intention to offset the effects and influence of the school of Bolognese Civilians. Sundry reasons rendered this competition inevitable. The Empire was striving to assert its supremacy in terms of the Old Roman Empire, and in this struggle with the Church the Roman law was of course the Empire's support.

"The old idea of the Holy Roman Empire—the theory that the Roman empire, providentially constituted as a permanent institution for the protection of Christendom, continued to live in the imperial dignity of German kings, *the idea that the Empire of the German nation was simply a continuance of the Old Roman Empire—*

2. JENKS, LAW AND POLITICS IN THE MIDDLE AGES 21 (1905).

led directly to the conclusion that the persistent authority of a world law was immanent in the Justinian books. From the time that Otto III revived this idea, his successors, whenever political conditions were favorable and incitement offered, repeatedly insisted upon the authority of that law and appealed to its particular principles. The Hohenstaufen only followed the way already marked for them when they furthered the splendor of the Bologna law school, in order that it should serve their own political theory of the 'dominium mundi.' It was, indeed, notably these relations of the emperor to the great jurists which worked so efficiently for the dissemination and establishment of the belief and authority of the Roman law."³

With the renaissance of classical studies and culture, the advantages of the Graeco-Roman *politeia*⁴ could not but appeal to the presumptive ambitions of overweening kings and emperors. Its strongest commendation was the Roman law and its plenary and absolute *Imperium*. Slowly but surely the Reception worked toward the destruction of the *Pax Augustiniana*, founded on the *Iustitia Augustiniana*, by encompassing Christendom on four sides, the legal, philosophical, theological, and political. Toward the restoration of the autonomous, omnicompetent state, the rebels of Christendom labored and this they hoped to achieve by uprooting the four regenerative principles of the *Iustitia Augustiniana*. The French Legists exaggerated the comprehensiveness and function of temporal law; Marsiglio of Padua misunderstood the popular basis for government by restoring the pagan concept of popular sovereignty; Martin Luther vitiated sound human nature; Niccolo Macchiavelli rejected the eternal law.

a. French Legists—"Milites Regis"

In France the regalists and their lawyers turned to two sources of antiquity to substantiate their position—Roman law, which the Glossators and Commentators of Bologna were bringing to light, and the Aristotelianism of the Averroist brand.⁵ Philosophers and jurists gave the nascent State a "reason" of its own as the Greeks and Romans had done. Of the three elements which the modern jurist considers essential to the State, namely, a juridical unity within a determined territory with sovereign power, the Roman conception of the "public power" served the legists best. Of the first two elements the Roman jurists of antiquity

3. *General Survey* in 1 CONTINENTAL LEGAL HISTORY SERIES 346 (1912).

4. ". . . even when Medieval Political Doctrine was endeavoring contentedly to live within the world of medieval thought, it had from the first borne into that world the seeds of dissolution. To the cradle of Political Theory the Ancient World brought gifts: an antique concept of the State, an antique concept of Law. Of necessity these would work a work of destruction upon the medieval mode of thought." GIERKE, *op. cit. supra* note 1, at 4.

5. LAGARDE, 1 LA NAISSANCE DE L'ESPRIT LAIQUE AU DECLIN DU MOYEN AGE BILAN DU XIII SIECLE cc. IX-X (1934).

have not too much to say. Obviously, the imperial march of the Roman conquerors who imposed their law as proconsulars upon the vanquished left no room for consideration of the territorial laws of the defeated nations. For the same reason, the existence of a collective reality known as the Roman people was more an institutional rather than a juridical reality. The ancient *Imperium* rested on the old proconsular power of the governor of the province who exercised in the name of the metropolis all the sovereign powers for the good of the conquered people *but without much regard to their will*. When the Roman rulers in their conquests fell under the influence of the Oriental monarchies, the *Princeps* of Augustus and Tiberius became by the time of Septimus Severus invested with absolute proprietary rights over all habitants and possessions within the jurisdiction of the *Imperium*. Accordingly, the legists vindicated for the ruler two Roman powers: the plenitude of legislative power and the unrestricted right to raise taxes. He had the power to establish law, to interpret it, and to abrogate it. The notions of a *public* authority for the sake of the *people* expressed in terms of a representative function, referred ultimately to a delegation of this power from the people to the ruler, in themselves could have aptly united with the development of the same ideas in the Christian tradition and both might have rendered the transition from the feudal structure of society to that of a civil society a normal one. But because these Roman notions were never free of their Roman origin they did not lose the Roman character of a jurisprudence whose autonomy was absolute. *Omnia in corpore iuris inveniuntur*. The point of departure between St. Thomas' use of Aristotle and that of the Civilian lawyers is precisely on the natural basis and character of the State. St. Thomas had explicitly referred to the philosophical inadequacy of the Patristic teaching and, accepting what was sound in Aristotle, developed a political philosophy as a science independent of theology. Since grace does not destroy nature but perfects it, St. Thomas could see no contradiction between the state as a natural institution and the demands of the supernatural order through the divinely instituted Church. *In quantum opus naturae est opus Dei*. That St. Thomas was ignored in his day may be due to the fact that even his own students, Ptolemy of Lucca and Egidius of Romanus, did not appreciate the correctness of his position in the face of the revived Roman law and its Stoicism. The Civilians referred the *Imperium* to a collectivity but it was hardly the "community" of St. Thomas which should place a check (*temperet*) upon the actions of the ruler.

Just as the Roman jurists of antiquity turned to Graeco-Roman Stoicism for a rationalization of their jurisprudence, so too the thirteenth century legists turned to Averroist Aristotelianism for a similar rationali-

zation. What served the legists most in the revived study of Aristotle was the *naturalism* inherent in his politics. It prescinded entirely from any theological or supernatural concept of society, and consequently its transcendence is entirely self-contained. But Aristotle's teaching that civil society has its origins in the *moral* nature of man and its perfectibility gave a more rational basis for authority than the conventional Roman *lex regis*. And in referring the exercise of authority to the *final cause* of society, the common good, it gave material content to the Roman formalism of *ius*. In his *Politics*, the State is defined as the *only perfect society* because it alone is self-sufficient for the fullness of human life and its destiny. The Legists found in the pre-Christian Aristotle reason for distinguishing the two powers, spiritual and temporal, and because of Aristotle's doctrine of the hierarchy of being, they could easily accept the subordination of one to the other. This they did in converse. They tended to include what was within the domain of the supernatural, and therefore of the Church, within the moral objectives of the State, and to find in the divine origin of civil authority reason for responsibility *only* to God. Justinianism re-appeared in Philip the Fair to a greater extent than in Henry IV, Frederick Barbarossa, and even more than in Frederick II.⁶ Though we are yet far from *Cuius regio eius religio* the road has been open to it.

b. *Marsiglio of Padua—The Paramountcy of Positive Law*

In the thirteenth century the introduction of Aristotle to Medieval Christendom divided the universities and their doctors into three camps. At the head of a large contingent was Siger of Brabant who surrendered in blinding admiration to Aristotle and compromised Christianity. Many others, staunch champions of a conservative Augustinianism, endeavored with varying degrees of success to ignore the new problems raised by Aristotelianism. The third group acknowledged as their leader St. Thomas Aquinas who squarely met the Stagirite, reviewed his problems with philosophical courage and theological assurance, and succeeded to evolve a synthesis which has become the substantial core of the *philosophia perennis*. Within the first group we must list Marsiglio of Padua,⁷ the

6. RIVIERE, LE PROBLEME DE L'EGLISE ET DE L'ETAT AU TEMPS DU PHILIPPE LE BEL 377 (1926).

7. The "life" of Marsiglio (1270-1343) explains his doctrine more than any academic training he received. Contrary to the assertion of several authors, he was only a layman, never a religious—though he was a canon of his native city. For a time he served in the Imperial Army and then turned to medicine at the University of Padua. To complete his medical studies he proceeded to Paris, and before 25 December 1312, he emerged as rector of the University for the statutory period of three months. He must have been at Paris in the years of the trial of Pope Boniface. At that time the Nominalism of William of

author of the first complete doctrine of laicism in Christian times, the *Defensor Pacis*. Marsiglio's approach to the study of civil society began with the individual will rather than the nature of man and as a result he reduced public order to a mechanical equilibrium, substituting convention to "nature," the subject for the object, the form for the substance. Marsiglio ignored the intrinsic finality which the Stagirite had contributed to the understanding of human activity and progress and, instead, by keeping to the periphery of human experience, evolved on the basis of human needs a voluntaristic conception of law and a purely contractual origin of society. He defined the necessity for social life, not in the Aristotelian sense of what is seen to be essentially demanded by the nature of men, but as a primitive necessity in seeking the resolution of their fundamental physical and economic needs in collective action.

"Government is concerned, first of all, with the repression of the perverse will in man. Its primary business is to force men to act in their own interests. In this

Occam enjoyed a popularity in the minds of the Parisian scholars and it is natural to claim the English discontented Franciscan as one from whom Marsiglio derived more than the elements of his political, as well of his metaphysical, ideas. At Paris, Marsiglio met John of Jandum who seems to have been associated with the party in the university that had supported Siger of Brabant and which was tainted with Averroism. Together, they composed the *Defensor Pacis* within the space of two months in the generally accepted date, 1324. His work was immediately attacked and when the city had become, apparently, an unsafe place for him, he left together with his collaborator for the imperial court of Louis of Bavaria to sustain by their doctrine the German emperor's fight against John XXII. There they joined forces with William of Occam and the rebellious Franciscan General against the Papacy. The quality of his work is animated by a strongly anti-papal and anti-clerical hatred. Even his virulent abuse of the Pope and the clergy is rationalized in terms of Roman concepts of law and government and by a revival of the Aristotelian *polis*. His consuming desire was for the realization of the laical state supreme in itself and independent of any interference. There is no evidence of any scientific knowledge in his work of the Roman texts and the glosses which the jurists had accumulated for three centuries before him. But he had lived his early life in Italian communes, which were the nearest spiritual relatives of the Greek-City States that Aristotle studied, and he had studied at a University where the spirit of the revived studies of Roman law prevailed. Further, Marsiglio gives evidence of no knowledge of the Papalist position. He has a hazy notion of canon law and is completely silent about the papal literature on the controversial issue that arose for the three centuries before him. He discloses the same intellectual independence of the science of theology and evidently contrived to escape any influence from the traditional Church theologians and Schoolmen. But he did succumb, very likely only too eagerly, to a "climate" of thought which imposed upon the thirteenth century a positivist interpretation of Aristotle. What characterized Averroist-Aristotelianism is not so much a definite body of doctrine as an attitude which prided itself on its independence of judgment and its thoroughgoing naturalism and rationalism. Aristotle is *the* authority. Rational truths are in a domain all their own and in no way related to the truths of Revelation. In fact the two orders of "truths" can be contrary to one another, *simplici credulitate absque ratione tenemus*. The secularism implied in the Averroist dichotomy is formally avowed by Marsiglio.

conception there has been found an anticipation of Rousseau . . . the writer is thinking in terms of mere need and necessity. The recognition of need involves will; but he is thinking of will only as something produced by need; and he is not thinking in terms of 'right' at all."⁸

The Socratic eudaemonism is gone. As a consequence the principle of unification in society is the achievement of an exterior tranquillity which permits each member to fulfill his function in society.⁹ Marsiglio deprived society of the metaphysical and moral "substratum" and reduced it to an association of mutual assistance, a notion which Aristotle himself had stigmatized. Since Aristotle never adequately conceived of human personality, the monism underlying his "finality" must necessarily come to light again in Marsiglio's explanation of the will of man as a *natural* force driving him to his ends.¹⁰ And in spite of the Aristotelian truisms "to live a good life," "virtue," and "the common good" which appear throughout the pages of the *Defensor Pacis*, Marsiglio's concept of law, the right, and the just is completely emptied of any objectivity.

"Law is essentially a judgment as to what is just and advantageous to the community. It is an imperative expression of the common need, formulated by reason, promulgated by recognized authority, sanctioned by force. Just because it is this, the Legislator must needs be either the whole community or its *valentior pars*. . . . No theory of right is involved: there is no question of right here at all. They are simply stating what seems to them a fact."¹¹

This "judgment" is law if there is coactive force to compel obedience and compliance.¹²

An essentially Greek characteristic in Marsiglio's polity is his notion of unity as necessary to stability of government. This unity does not issue from a harmonious relation between many contributing agencies within the state but from the summation of all power in the hands of the *princeps*; and though the "first and proper efficient cause of law is the people . . . or a prevailing part of it, commanding and *deciding by its own choice or will* . . . that something among civil acts be done or omitted,"¹³ by the fiction of the *lex regia*, there remains in effect no independent legislative function outside of the office of the prince.¹⁴ All that remains of Marsiglio's popular government is the people's acquiescence to force because force without the resulting acquiescence is not effective

8. ALLEN, *Marsiglio of Padua and Medieval Secularism* in *THE SOCIAL AND POLITICAL IDEAS OF SOME GREAT MEDIEVAL THINKERS 177-8* (Hearnshaw ed. 1923).

9. DEFENSOR PACIS I, ii, 8.

10. DEFENSOR PACIS I, xiii, 2, 55.

11. ALLEN, *op. cit. supra* note 8, at 181-2.

12. DEFENSOR PACIS I, 10, 36.

13. *Id.* at I, iii, 10. Cf. ALLEN, *op. cit. supra* note 8, at 176.

14. DEFENSOR PACIS I, xv, 6, 70.

and therefore *in no way can consent be said to be implied!* Further, this unity of power in the *princeps* is a necessary means to ensure the stability of the State against any popular uprisings and particularly against those disturbances for which the papacy in its claim of spiritual autonomy has been responsible. Aristotle,¹⁵ Marsiglio points out, had listed all but one of the causes of disturbance of civil order—and that reason could not have been known to him—the Christian clergy. Therefore, he concludes, in terms of the pagan *politeia*, that churchmen must be subject to the territorial jurisdiction of the all-inclusive *Imperium* as it was in antiquity. Thus by enlarging upon the self-sufficiency of the state its *bene-vivere* to include, as Aristotle did, not only all the moral values of human endeavor, but every social factor of public influence, Marsiglio restores the omnicompetence of the secular state and its “civil theology,” as St. Augustine had called it.

c. *Martin Luther—Incoherent Extrinsicism*

Like Marsiglio of Padua, Luther gives every evidence of being utterly outside the medieval tradition of theology and philosophy.¹⁶ Unlike Marsiglio who used Aristotle to his own purposes, Luther despised both Aristotle and St. Thomas.¹⁷ Both had this in common in regard to the two philosophers: Marsiglio and Luther (in an environment of Occam's nominalism) in effect denied the order of nature¹⁸ and its intrinsic finalities.¹⁹ Their approaches differ and that of Luther is still less complimentary to human intelligence than that of Marsiglio. Luther turned the dichotomy of faith and reason, which Averroism bequeathed to him, into an opposition. Faith was essentially an abiding dogged confidence in the application of the Redeemer's merits for the salvation of a helpless vitiated nature, and, consequently, not only philosophy but reason itself is discredited. St. Augustine had written, “God has made you without your cooperation, but He cannot save you without it.” According to Luther, sin has vitiated the very essence of our nature, and this evil is radical. If that which is actual in man is not good, then its intelligibility is hardly concerned with *principia* of logic, truth, and morality, and a coherent system of thought about the being of man as related to the

15. *Id.* at 101.

16. 1 GRISAR, *MARTIN LUTHER* 131 (Lamond transl. 1914).

17. *Id.* at 163. Cf. MARITAIN, *THREE REFORMERS* 30 (1934).

18. “Having expelled from the mind of God the intelligible world of Plato, Occam was satisfied that no intelligibility could be found in any one of God's works. How could there be order in nature, when there is no nature.” GILSON, *THE UNITY OF PHILOSOPHICAL EXPERIENCE* 85 (1941). Cf. *AM. HIST. REV.* (July, 1897). Sullivan says that Luther kept a set of Occam on his shelves.

19. 1 GRISAR, *op. cit. supra* note 16, at 132.

being of God and the moral relations that arise from this relation is simply impossible. At most, reason has an exclusively pragmatic value in life and human business. This is not to deny free will but to assert its absolute independence of an objective due order which the mind discerns and to which the will ought to conform through the acknowledgment of a moral necessity.²⁰ Lutheran extrinsicism is opposed both to the creative politics of Aristotle who saw in the intrinsic finality of human nature a norm for social action, and opposed to the creative politics of St. Thomas who discerned in society the outward expression of the perfectibility of human personality. It combines in an *unreasonable primacy of the will*²¹ the despondent wickedness of Manichaeism without adhering to the dualism of Manes, and the will-tension of the Stoics without their rationalism and their control of the inferior passions.²² In the abasement of the natural order, Luther logically annuls the supernatural order. A vitiated human nature cannot contribute even as a quasi-material cause to a salutary act.

The application and influence of Lutheran notions on society is obviously disastrous.²³ Society does not take its rise from the exigencies of a sound human nature which freely determines the positive relations of social co-existence. His theological extrinsicism has its counterpart in his "philosophical" extrinsicism, and since his political teaching was governed by his ulterior motives of resistance to and for the Papacy as well as the opportune support or lack of it from Emperors or Princes, his "extrinsicism" is characteristically incoherent. Not the least of Luther's incoherency is that his initial efforts to destroy the visible character of the divinely instituted Church and its external jurisdiction, ends precisely with the civil institution of such an external Church. By substituting the invisible universal priesthood for the Orders of the Catholic Church, and by establishing the prince, as one holding by preeminence of his divine power and sacred right to rule, the highest powers of the episcopate, Luther restored to the state the sacred rights of the ancient pagan

20. "It is godless philosophy, and censured by theology, to assert that *'liberum arbitrium'* exists in man for the forming of a just judgment and a good intention, or that it is man's business to choose between good and evil, life and death, etc. He who speaks thus does not know what man really is, and does not understand in the least what he is talking about." 2 GRISAR, *op. cit. supra* note 16, at 287.

21. Of the essential complimentary correlation between mind and will, St. Thomas says, "Reason has its power of moving from the will: for it is due to the fact that one wills the end that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason." (*SUMMA THEOLOGICA*, I, II, 1 ad 3).

22. Melancthon characterizes Luther's doctrine as "*stoica*," "*manichaea deliria*" and "*stoici et manichaei furores*." Cf. 2 GRISAR, *op. cit. supra* note 16, at 287-8.

23. 5 GRISAR, *op. cit. supra* note 16, at 557-606.

cities.²⁴ Thus did the distinction of the two powers uprooted from their true basis in the nature of man and in the fact of Revelation work with inevitable logic to the restoration of the sacred rights of the ancient pagan cities.²⁵ By rejecting the independence of an institutional spiritual power, the Catholic Church, Luther removed one of the most effective checks upon arbitrary state rule.

Luther's "extrinsicism" was a favorable climate for the voluntarism of the *Corpus Iuris Civilis*. The Reformers could give no objective basis to the notion of justice, ethical or legal, and the Divine power of the prince was referred to the arbitrary will of the God of the Nominalists. The consequence was that law became exterior in character, or—as we had seen in ancient Roman law—formalism and subjectivism became its essential characteristics. It is law because its entire content and legitimacy proceeds from the will of the ruling authority, who is directly responsible to God and God alone. From Bologna, Roman law swept like a deluge over Germany. The learned doctors from the new universities whom the Princes called to their councils, could explain everything in a Roman or would-be Roman sense. Disruptive Protestantism found an unholy ally in Pagan-Roman law and the German Princes were quick to avail themselves of sweeping advantages.²⁶ The Bolognese doctors of law, the commentators and their followers helped the Princes to consolidate their power and to exploit the advantages of the systematic Roman law over the shapeless native "folk law"²⁷ which had hardly ever reached

24. LAGARDE, *op. cit. supra* note 5, at 321-43.

25. "Ainsi se trouvait remise en question une des conquêtes essentielles christianisme, qui depuis quinze siècles rappelait aux princes, qu'ils devaient déposer leur sceptre et leur grandeur en entrant dans l'église. Par une prodigieuse contradiction, c'était dans un essai de restauration de l'ancienne loi du christianisme, que l'état retrouvait les droits sacrés des anciennes cités païennes. C'était le principe de distinction des deux pouvoirs logiquement appliqué jusqu'à l'absurde, qui produisait cette confusion sans précédent." *Id.* at 343.

26. 2 JANSSEN, HISTORY OF THE GERMAN PEOPLE AFTER THE CLOSE OF THE MIDDLE AGES 159 (Mitchell transl. 1896).

27. "Modern Germany has attained such a pre-eminence in the study of Roman Law, that we in England may be pardoned for forgetting that of Roman Law medieval Germany was innocent and ignorant, decidedly more innocent and ignorant than was England of the thirteenth century. It is true that in Germany the theoretical continuity of the Empire was providing a base for the argument that the law of Justinian's books was, or ought to be, the law of the land; it is also true that the *Corpus Iuris* was furnishing weapons useful to Emperors who were at strife with Popes; but those weapons were fashioned and wielded chiefly by Italian hands, and the practical law of Germany was German as it well could be. Also—and here lay the possibility of a catastrophe—it was not learned law, it was not taught law; it was far from being *Juristenrecht*. Englishmen are wont to fancy that the law of Germany must needs savour of the school, the lecture room, the professor; but in truth it was just because German law savoured of nothing of the kind, but rather of the open air, oral

the doctrinal state of growth. But in their conspiracy they had to do violence to the medieval traditions of a Christian society.

"In its most important respects *the Roman Code was in direct opposition to the Christian standpoint of the German people*. While, according to them, all law ought to be the expression of the will of God, and all social order based on the dependence of man on God, according to the Roman pagan acceptance, these matters depended on the popular will. According to this latter view law ceases to be a higher authority over men and a development of the moral law, and becomes an entirely independent code, fashioned by men for their own personal advantage. . . . While, according to the Christian German jurisprudence, the ruler was merely the director or assistant of right, the Roman teaching clothed him with unlimited power and supreme sovereignty. It made him the highest source of law, and gave him the power of altering it by his own arbitrary decree in general as well as in individual cases. 'Legitimate right,' *which according to the German standpoint could not be violated by the ruler any more than by the subject, was not recognized by the Roman Code, which left out of account all those safeguards of traditional privileges which the German system had established.*"²⁸

At first the Emperors did not succeed in permanently supplanting the national law, or establishing an empire after the old Roman idea on German soil. Because of the deeply rooted Christian medieval tradition, the use of Roman law was restricted to the ecclesiastical-political contests with the Church and as a weapon against canon law.²⁹ Gradually jurists of the Roman school infiltrated into that bulwark of rule by law, the courts, and by the fifteenth century succeeded in undermining established liberties. First, when the jurists strove to discredit the customary law of the land and judgment according to it, the consequence was that its supremacy was reduced to the point of counsel.

"It was inherent in the nature of the popular courts that the source of the law, in the last resort, was the personal conviction of the *judgment-giver, who felt bound by no external authority. The conception of a binding statute, to which personal opinions must unconditionally submit, receives in such a system no recognition.* Records of the law of whatever kind, are not laws that bind the lay-judge, but

tradition and thoroughly unacademic doomsdaymen that the law of Germany ceased to be German and that German law has had to be disinterred by modern professors." Maitland's Introduction to Otto Von Gierke's *POLITICAL THEORIES OF THE MIDDLE AGES XII* (1913). Cf. JENKS, *op. cit. supra* note 2, at 51-2.

28. 2 JANSSEN, *op. cit. supra* note 26, at 162-3.

29. "The Church rejected the Justinian Code whenever it clashed with the divine law, and set itself against the spread of Roman law from the moment it began to be used to establish the heathen absolutism of the Hohenstaufen emperors, at the risks of undermining the Christian-German law. In 1180 Pope Alexander III forbade the monks from studying the Justinian Code. In 1219 Pope Honorius III extended this prohibition to all priests, and in the following year he forbade laymen, under pain of excommunication, to give or listen to lectures on the Justinian Code in the University of Paris. In 1254 Innocent IV extended this last prohibition to France, England, Scotland, Spain and Hungary." 2 JANSSEN, *op. cit. supra* note 26, at 167.

merely aids to knowledge, instruction which helps him to form his opinion. *Every tradition, custom, is to him no formally binding sanction*; it is only a motive, a ground of conviction: he judges in accordance with it *because he allows himself* to be persuaded by it; for he is *inclined* to hold that to be law which has always been so held, and because it has been so held. Given such an attitude of legal practice toward all law in the objective sense, it was natural that questions regarding the formal basis and extent of validity of traditional legal records were scarcely raised, still less were closely examined. It was enough that men believed in their essential value, in the wisdom and super-eminence of its authors."³⁰

The opposition of the people to the forced introduction of the foreign code was strongly and openly expressed. They had been accustomed for centuries to having justice administered briefly, orally, and openly. Each distinct class was judged according to its own legislation and the principle that every man must be judged by his peers had prevailed universally. All civil procedure was based on open discussion; all criminal procedure presupposed accusation. Kings and lords looked to the courts for justice and they were bound to respect its decisions. The consequences for the peasant class were disastrous.³¹ Because of the Roman law concept of the *Imperium* all property and its use was by sufferance of the Prince and there was no individual or communal right that could define and limit his action. With the limitless power of legislation went the Roman companion power to tax at will. The two combined to deprive the people of any distinctively personal right and title. The rights and privileges of centuries were looked upon as nominal and revocable. Thus did Rome conquer Germany a thousand years after the Roman Empire had ceased to be. The Augustine-Isidorian doctrine of justice by which the ruler was distinguished from the tyrant could find no meaning in this unholy alliance of Luther and Caesar.

"That servants, as Luther puts it, were 'personal property like any other cattle' which the overlords could buy and sell at their pleasure, was also maintained to be just and right by many representatives of the old pagan Roman law. The saying in vogue amongst nearly all lawyers of importance at that time, 'All is legitimate, and tyrannical, that can in any way be backed up by the statutes of the *Corpus Iuris*,' was fruitful of the greatest injury to the peasant class."³²

No single monarch of Western Europe, however he may contest his rights as a sovereign, could in Pre-Reformation days, claim with any show of plausibility to be over all persons and in all causes within his dominions supreme.³³

30. *A General Survey* in 1 CONTINENTAL LEGAL HISTORY SERIES 357 (1912).

31. 15 JANSSEN, HISTORY OF THE GERMAN PEOPLE AFTER THE CLOSE OF THE MIDDLE AGES c. iv (1910). Cf. 2 GRISAR, *op. cit. supra* note 16, c. xiv, § 2.

32. 15 JANSSEN, *op. cit. supra* note 26, at 144.

33. JENKS, *op. cit. supra* note 2, at 29 (1896). "Had there been no Luther there could never have been a Louis XIV." FIGGIS, STUDIES IN POLITICAL THOUGHT FROM GERSEN TO

"The public nature of law which the Carolingian *Missi dominici* established was destroyed by the usurping privileges of the German Princes. Territorial law—the law of the land—came to mean the law of the prince for his territory."³⁴

Though Luther's knowledge of Roman law was significantly negligible, *still* his doctrine of vitiated nature, the servile will, the debasement of the natural and the annulment of the supernatural, the Divine Right of the ruler to unqualified submission, restored the pure legality of the Roman law, and its absolute sovereignty.

"When Luther burnt the *Corpus Iuris Canonici*, he symbolized and intended to symbolize the entire abolition of all claims, not only to superiority, but even to any kind of coercive or inherent jurisdiction in the Church. He destroyed, in fact, the metaphor of the two swords; henceforth there should be but one, wielded by a rightly advised and godly prince. It is a curious fact that Luther, whose fundamental motive was a love of liberty (sic) and care for the rights of one's neighbors, should have been so *powerful* a supporter of absolutism."³⁵

He thought to have resuscitated St. Augustine's antimony between the *City of God* and the Earthly City. But St. Augustine had reconciled this antimony precisely through the fundamental unity of Christian ethics, as realized by the members of the *City of God* within the bosom of the Church, whence virtue might flow back into the organism of temporal society.

d. *Niccolo Machiavelli—Technician of the Political Order*

Within ten years of the day on which Martin Luther nailed his theses to the door of the Church in Wittenberg, Niccolo Machiavelli, the Florentine, had written the two books, *I Discorsi* and *Il Principe*. Intellectually, Luther and Machiavelli had one thing in common: both were independent of and completely ignored the traditional medieval philosophy and theology. In this sense they were not truly Christian. In the quality of their thought they differ. Luther was incoherent and at times intellectually dishonest. Machiavelli was honestly frank and his intellectual realism, although at times contradictory, was keenly analytical and logical. Luther dealt hardly at all with any problem of politics except as far as circumstances forced him to do so. Machiavelli is wholly concerned with the science of government.

Authors generally agree that Machiavelli was not a political philosopher, but rather a political scientist. More accurately, we should de-

GROTIUS 62 (1931). ". . . there grew up a conception of political authority which was fundamentally different from that of the Middle Ages, for absolute monarchy was a new thing, an innovation which had no real relation to the past." CARLYLE, *POLITICAL LIBERTY* 26 (1941).

34. 3 JANSSEN, *op. cit. supra* note 26, at 181.

35. FIGGIS, *op. cit. supra* note 33, at 65.

scribe him as a master technician of the mechanics of government who expresses his rules in maxims rather than in principles and whose approach is wholly positivistic. We are advised to look to his times, the general political scenery of Italy and the disgust inspired in him by the politics of papal Rome. It has been said that his method is historical and inductive. But underlying his observations and his newly formulated prescriptions are certain presuppositions and generalizations about the constancy and expectations of human behavior which cannot be restrained entirely within empirical individuated historical data. His almost literal transcription from the sixth book of Polybius' *Histories* of the pseudo-philosophic concept of the ineluctable cycle of history confirms our inference. For Machiavelli, all men and all ages were on the same level and he does not make the slightest distinction between the examples taken from ancient Greece and Rome and those taken from contemporary history. And he refers us to his ulterior and paramount motive of attaining to the "truth of reality" which he believes must underlay the "effectual" truthfulness of his techniques of government.

Andare dietro alla verita effettuale delle cose . . . e discorrendo quelle che son vere.

His unwitting transempirical illation is all for the worse since it founds empirical absolutes. In Machiavellian history we can see *only half* of human nature. The nature of man adequately studied is that which a man is meant to be, and the nature of political society is that rational and moral and which is a spiritual achievement, not a "natural." Only as we know what society should be, and may be, can we wisely criticize the present or future plan, and draw lessons of profit from the past. But Machiavelli's pessimism colors his mind—not the pessimism of Luther—but the pessimism that does not go beyond his own times when men were generally corrupt in political life. Renaissance Italy gave the ancient Stoics *Sequere naturam* a distinctive meaning of "return to nature" and preferred the least noble of the several meanings which the ancient philosophers had given it.³⁶ Underlying the apparent discrepancies of republicanism and tyranny in Machiavelli, is the doctrine based on his concept of the perverse nature of man that the governing power must be strong and morally uninhibited in order to achieve unity, security and stability. He is scientific in the sense that he is impersonal. Men are so many social factors to be calculated as a physicist or chemist would consider his elements for the composition. Man is what he does and consequently there is no question in such naturalism for a concept of evil.

36. BAUDRELLART, *The Catholic Church in THE RENAISSANCE AND PROTESTANTISM* 17 (Gibbs transl. 1907).

"In his history he sometimes praises great and fine actions, but we see that it is with him only an affair of imagination. The bottom of his thought is that all actions are indifferent in themselves, and must be judged by the skill and success that they exhibit. For him the world is a great arena from which God is absent, where conscience has nothing to do with it, and where everybody gets on with things as best he can."³⁷

Like Thrasymachus, Machiavelli saw in man one dominant selfish impulse and he considered the main problem of government the craft of converting such disruptive forces into the bands of a strong state.

"From knowledge of man as he is and always has been, from knowledge of the constitution of the States as they are and have been, of their modes of action and good or evil fortunes, one can draw conclusions, valid and positive, as to the causes of political success and failure, as to the most efficient form of government, as to what makes for stability and what for disorder and ruin. What we need is positive knowledge of these things as this can only be arrived at by looking at things as they are, without fear or preconceptions."³⁸

Government takes its origin from the imminence of anarchy and the realization that survival and security is possible under the strong constraints of a dominating ruler. The domination of the ruler is not arbitrary, but calculated and the secret of his success is all that is within his power to do, provided he gives the semblance of realizing the common advantage.³⁹ In fact, generalized notions of right and wrong develop from the effort to repress forms of activity, recognized as dangerous by every individual. There is no absolute good nor any transcendental reference. Goodness is that which subserves the interests of the mass of individuals. Such a view involves, of course, an absolute denial of the validity of the conception of the natural law. All law, in fact, divine as well as human, is positive law. The Reformation had assisted philosophers to detach the natural law theories from ideas of God and to find their source in an impersonal cosmic reason. It is not likely that Machiavelli was conscious of following any of the Reformers, but there is a connection between his secularism and the naturalistic Aristoteleanism that produced the *Defensor Pacis* two centuries before. For Machiavelli as for Marsiglio of Padua there was no *lex aeterna* and therefore no *lex naturalis*. He simply legalized the Lutheran Extrinsicism and took from social ethics their inward basis, which to St. Augustine and his followers was the dynamic force that inspired social *order* and *peace*. The consequences for the supremacy of law in constitutional government are completely subversive.

37. MORLEY, MACHIAVELLI 59 (1897).

38. ALLEN, A HISTORY OF POLITICAL THOUGHT IN THE SIXTEENTH CENTURY 452 (1928).

39. "Perche' degli uomini si puo' dire questo generalmente, che sieno ingrati, volubili, simulatori, fuggitori de' pericoli, cupidi di guadagno: e mentre fai loro bene, sono tutti tuoi, ti offeriscono il sangue, la roba, la vita ed i figliuoli, comme de sopra dicesi, quando il bisogno e' discosto." IL PRINCIPE 292 (Burd ed. 1891).

"What has vanished from Machiavelli is the conception of natural law. So long as this belief is held, however inadequate may be the conception as a view of the facts of life, it affords some criterion for submitting the acts of statesmen to the rule of justice, and some check on the rule of pure expediency in internal and of force in external politics. *The more law comes to be thought of as merely positive, the command of a lawgiver, the more difficult is it to put any restraints upon the action of the legislator, and in cases of monarchical government to avoid tyranny.* So long as ordinary law is regarded as to some extent merely the explication of law natural, so long there is some general conception remaining by which governments may be judged; so long, in fact, do they rest on a confessedly moral basis. This remains true, however little their ordinary actions may be justifiable, however much they may in practice overstep their limits. When, however, natural law and its outcome in custom, are discarded, it is clear that the ruler must be consciously sovereign in a way he has not been before, and that his relations to other rulers will also be much freer—especially owing to the confusion of *jus naturale* with *jus gentium* which is at the bottom of International Law. . . . *To Machiavelli the State, i.e. Italy, is an end in itself.* The restraints of natural law seem mere moonshine to a man of his *positif* habit. He substituted the practical conceptions of *reason of state* as a ground of all government action, and the balance of power as the goal of all international efforts."⁴⁰

Machiavelli's extrinsicism differs from that of Luther in that the latter maintained nature was vitiated by Original Sin, while the former so absorbed vice and evil into nature as to induce an appraisal of evil as not evil and vice as no vice. Luther was immoral and acknowledged immorality; Machiavelli was simply amoral. "Goodness" and "wickedness" was conformity to or contrariety to the general welfare of the community. The difference lay in man's proneness to be anti-social and anarchical because of his self-love; while force was a major factor in moving men to "goodness."⁴¹ Machiavelli's Prince must be possessed

40. FIGGIS, *op. cit. supra* note 33, at 76.

41. The purpose of politics according to Machiavelli is to preserve and increase political power itself by any means, and the sole, absolute standard by which he judges of the means is their successful effectiveness. With utter moral indifference, he approves of massacre and the use of religion that serves the purposes of the State. But clearly not every religion. For he expresses unfeigned Nietzschean contempt for the humillity of Christian life. What is needed is a religion after the fashion of old Rome: a religion that teaches that he who best serves the State best serves the gods. "Amo la patria mia plu' dell'anima," Machiavelli wrote to a friend just before his death, and in the *Prince*, "Praised be those who love their country rather than the safety of their souls." The closest analogue to Machiavelli's separation of political expediency from morality is probably to be found in some parts of Aristotle's *Politics*, where Aristotle betraying the Greek dread of *stasis*, considered the preservation of states without reference to their goodness and badness.

"The practice of cutting off prominent characters and putting out of the way the high spirits in the state; the prohibition of common meals, political clubs, high culture and everything else of the same kind; precautionary measures against all that tends to produce two results, viz., spirit and confidence; the opposition offered to literary reunions or any other meetings of a literary kind, and the endeavor by every possible means to produce the greatest mutual ignorance among the citizens, as it is acquaintance that tends to

with a singleness of purpose to attain his end without ever wavering. But the success of his effort depends not only on his *virtu'* but also on Fortune. By *virtu'* he does not mean pious virtue, but what can wilfully be accomplished by the potential of will. Fortune is not Divine providence but the pagan *fatum* which, however, can be handled roughly and curbed to personal intent. Taking nature, as he understood it, he not only denied that the State was a natural society but equally rejected its conventional aspect. Nowhere does he ever suggest that a free consent is requisite to a legitimate government. He considers law a channel for the effective rule by force and this force holds society together. With the denial of the transcendent destiny of man as the basis of his social life, and representing the Prince *solutus legibus* morally and legally, and in identifying the common advantage of selfish individuals with the will for dominion, Machiavelli has given objective grounds for leaving us wondering whether he made travesty of non-Christian *politica* or was sincere in what he wrote. At any rate he has drawn for us the logical implication of the absolute autonomy of the secularist State. The Prince, further, even negated whatever positive contributions the pagan philosophers made to the ideal of Justice. Plato and Aristotle sought to draw a political philosophy from universal principles and first truths and thence were practical not only in a logical but also in an ethical way. They sought to understand "causes" and first principles and recognized somehow the need of contriving a theory of the *legal* state. Machiavelli's "art of the State" was equally fit for the legal and the illegal, for the legitimate prince and usurpers or tyrants, for just and unjust rulers. He deprived the head of a State of a basis in moral and juridical legitimacy and gave him as the sole basis of power, success and personal advantage. Machiavelli was neither in the Christian tradition nor within the best pagan tradition. Paganism never suppressed the voice of morality and its aspirations for ideals.

2. SURVIVAL OF THE CHRISTIAN TRADITION IN ENGLAND

When St. Augustine wrote the *City of God* to answer the pagan charge that Christianity was responsible for the fall of Rome and for the gradual dissolution of the Empire, and he showed, on the contrary, that Chris-

produce mutual confidence." "Another expedient," he says, "is the endeavor to prevent any word of action of any subject from escaping detection by a system of spies. . . . For the citizens are then less free of speech for fear of the spies and, if they do speak freely, are more easily discovered. A tyrant is fond of making wars, as a means of keeping his subjects in employment and in continual need of a commander." The sum of all such measures, Aristotle concludes, is "to prevent mutual confidence among the citizens, to incapacitate them for action, and to degrade their spirit." ARISTOTLE, bk. V, c. 11, 1313 b, 1-30.

tianity possessed the truths basic to sound and lasting government—the pagans may have felt that his answer was entirely conjectural. But the Christian faith and philosophy could have given to the Graeco-Roman *politeia* those necessary correctives for a sound temporal order that they gave to the Teutonic societies in the Carolingian era. The normal development of Christian society, under influence of St. Augustine's political principles, was blocked and in fact reversed by the revolt against the Christian faith. By the sixteenth century the peoples of Western Europe had known the influence of the two traditions of law and government—the Christian and the Roman. The former found in the moral value of the individual and in his transcendental end the source and meaning of liberty and social life: the latter found in power, as a concrete fact both the efficiency and unlimited competence to construct a secular order.

Partly because the Protestant revolt occurred in England at a later date and partly because of other historical reasons which are discussed in this article, the sound Christian tradition of law and government common to all of Western Christendom, took deeper root and prevailed through the centuries against alien influences. From her earliest recorded history English law is Christian.⁴² On the Continent, Roman law once knitted together the Roman Empire and even survived its downfall for at least two centuries; but in England it failed to take root.

"Roman legal institutions do not appear to have survived the abandonment of Britain by the Romans; at least they do not appear to have contributed materially to the formation of the laws of the pre-Norman period of English history. 'We speak of law,' says Maitland, 'and within the sphere of law everything that is Roman or Romanized can be accounted for by later importation. . . .' And, in point of fact, *there is no trace of the laws and jurisprudence of imperial Rome, as distinct from the precepts and traditions of the Roman Church, in the earliest Anglo-Saxon documents. Whatever is Roman in them is ecclesiastical. . . . The inroad of the Roman ecclesiastical tradition, in other words, of the system which in course of time was organized as the Canon Law, was the first and by no means the least important of the Roman invasions, if we may so call them, of our Germanic policy."*⁴³

In England as upon the Continent, canon law became practically the "common law" of the King's courts.⁴⁴ A class of professional canonists,

42. "We do well to remember that the oldest laws that we have, however barbarous they may seem, are none the less Christian laws. . . . This is well to remember, for it should prevent any glib talk about primitive institutions. Teutonic law (for what is true of England is true also of the continent) when it is first set in writing has already ceased to be primitive; it is already Christian, and so close is the connection between law and religion, that we may well believe that it has already undergone a great change." MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 2 (1919).

43. HAZELTINE, *Roman and Canon Law in the Middle Ages* in 5 *CAMBRIDGE MEDIEVAL HISTORY* 756 (1926).

44. 5 *id.* at 760. Canon law "made a natural bridge to connect legal ideas with ethical

from the days of Lanfranc, the Pavese lawyer, who was William the Norman's counsellor, administered the justice of the *Curia Regis*. Though disciples from the Bolognese School set up chairs at both Oxford and Cambridge, the *civil* law was taught with direct reference to *canon* law rather than in opposition to it and for this reason the names of Azo and Bracton must always be linked together in English legal literature. The preservation of the Christian tradition of law in England was not without the test of a challenge. In the thirteenth century, the English jurists, Patteshull, Archdeacon of Norfolk and Dean of St. Paul's, William of Raleigh, Bishop of Norwich and of Winchester, and particularly Henry of Bracton, Archdeacon of Barnstaple and Justice of the king, "more Roman than the Romanists, made the grand experiment of a new formulary system."⁴⁵ They turned to the *Corpus Iuris* to borrow terms, maxims, and divisions to "construct upon native foundations"⁴⁶ a reasonable system of English law in order to protect it against Roman law itself. When, then, Churchmen and Canonists withdrew from the King's Courts⁴⁷ they bequeathed to the lay lawyers a body of rational legal principles for their education in the Inns of Court and for their transmission in the later day Year Books. The cooperative alliance of the English lawyers and Parliament secured the supremacy of English law against the overweening power of the Tudor and Stuart Monarchs. The serious threat to the preservation of the Christian tradition came in time from Christian *sects* in their misinterpretation and misunderstanding of the English heritage.

But before Henry VIII was to give a new meaning to the "Head of the State," England, as early as Anglo-Saxon times, gave evidences of the *Pax* of St. Augustine in the King's *Peace*. This *Peace* flowed from the

and theological discussion." FIGGIS, *op. cit. supra* note 33, at 4. See *A General Survey in 1 CONTINENTAL LEGAL HISTORY SERIES*, pt. IX (1912). *The Influence of Canon Law on Secular Law* in 1 *id.* at 721-4.

45. "The judges who presided in the royal courts were generally churchmen. . . . The royal judges, therefore, brought to the task of declaring the custom of the king's court some knowledge of a body of law the rules of which were logically coherent, the expression of which was precise and clear. This training in method and principle enabled them to construct a rational, a general, a definite system of law out of the vague and conflicting mass of custom, half tribal, half feudal, of which the English law consisted." 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 177 (1922).

46. 2 HOLDSWORTH, *op. cit. supra* note 45, at 284.

47. ". . . after the end of the thirteenth century the study of the civil and the canon law ceased to influence directly the development of English law. But up to that period their influence was direct. So great was their influence, so speedily did English lawyers, at the head of a strong royal court, impart to the customary law of England the essence of what they had learned, that they were able to construct a system which could stand without foreign aid." 2 HOLDSWORTH, *op. cit. supra* note 45, at 177.

King's sense of obligation to promote a justice according to the Christian faith and morality.

Ce que nos sociétés modernes appellent l'ordre, et qui est une chose purement matérielle et exclusivement politique, apparait à ces générations sous la forme de paix et concorde, c'est-à-dire comme chose morale, et d'ordre à la fois politique et religieuse. Ce gouvernement se donnait pour mission, non pas seulement d'accorder les intérêts humains et de mettre l'ordre matériel dans la société, mais encore d'améliorer les âmes et de faire prévaloir la vertu."⁴⁸

This religious sense was a dynamic moral and social force. The idea of the King's *Peace* gradually expanded from the limited jurisdiction of pleas of the crown (*placita coronae*) till it embraced all criminal proceedings under Henry II.⁴⁹ But the kingly power, however great its responsibilities and the extent of its exercise, was not allowed to become purely personal. Anglo-Saxon kingship ministered a power which was derived from the subjects and strictly limited by the Witan or National Council, which, though not a representative assembly in the modern acceptation of the word, stood in relation to the king as the representative of the people. This Council of leaders and wise men, *principes et sapientes*, who were the natural leaders in those days, could elect and depose the king for misgovernment. They had a direct share in every act of government, and, though at times strong kings restricted their participation in the government, in the two cardinal matters of legislation and the imposition of extraordinary taxation, the right of the Witan to give counsel and consent was at all times recognized. The Conquest brought England into closer touch with the main currents of the intellectual life of the Continent and introduced a genius for government in William the Norman, and his nobles.⁵⁰ The thing that had been lacking and which came in at the Conquest was the idea of a definite contract understood as existing between lord and man. The Normans in England developed the contractual basis of feudal society with greater logical consistency and understanding than it possessed on the Continent. Their conception of contract was not a speculation of a pseudo-historical kind, related to some original agreement upon which political society was

48. Cf. FUSTEL DE COULANGES, 6 HISTOIRE DES INSTITUTIONS POLITIQUES DE L'ANCIENNE FRANCE 533 (1888-92).

49. POLLOCK, *King's Peace* in OXFORD LECTURES (1890). Pollock traces the growth of the King's Peace from earliest Anglo-Saxon times till it became the established right of every peaceable subject and the general peace of the kingdom.

50. "The fact that William had as his prime minister (*Lanfranc*) a skilled lawyer, learned in canon and civil law, learned also in Lombard law, and on that account, perhaps, capable of mastering quickly and accurately the rules of Anglo-Saxon law, is, to say the least, a significant fact in the history of English law." 2 HOLDSWORTH, *op. cit. supra* note 45, at 147.

founded, but rather the rational consequence of the principle of the equality of men. Both ruler and the community by their mutual oaths of the ceremony of coronation entered into a partnership of reciprocal rights and obligations and this was the essential meaning of "supremacy of law." The earliest of the great constitutional documents which embodied in concrete terms the denial of government purely by the personal discretion of the ruler or by reason of the royal power alone is the memorable Magna Carta.

a. *Magna Carta—Legal Vindication*

The years in which Magna Carta was secured were a critical period in the history of English law. The process of curbing forces, which made for disintegration by the creation of central institutions, was bound in time to become an abuse in less competent and unscrupulous hands. As McKechnie says, "powers used moderately and on the whole for national ends by Henry were abused for selfish ends by both his sons." Excessive taxation and services were demanded, jurisdictional privileges curtailed, and the traditional rights and liberties of men of all ranks violated. The rights of all classes were therefore consulted, at least on general principle, when Stephen Langton produced the Charter of Henry I for the barons gathered at St. Albans.⁵¹ Professor McIlwain in his brilliant volume, *The High Court of Parliament and its Supremacy* concurs with Professor George B. Adams⁵² that the Charter is declaratory of the supremacy of the fundamental law of the land. What is properly due to each class of society by force of custom law and its implied consent may at first be considered privileges but these privileges become "liberties."

"For these liberties are *rights*, and *rights imply an immunity from arbitrary authority* of which the nation may avail itself when it has come into being. They carry with them the idea of *government under law instead of limitless discretion—'franchises,'* they are often called."

But neither McIlwain nor Adams indicate any adequate appreciation of the Christian moral principles⁵³ which invested these English "rights"

51. MAGNA CARTA COMMEMORATION ESSAYS 79 (Malden ed. 1917). Sir Paul Vinogradoff thinks that those historians who have questioned the great claims made for Magna Carta as a charter for constitutional government and have insisted that the barons who forced the king's signature were guided solely by class interests, cannot explain the great influence of the document on the national life of England. He believes that the feudal interpretation of the Charter fails to take into account sufficiently that certain provisions tended to impress upon all the necessity of the appreciation of the rule of law in ordinary legal relations and to carry over this idea from the justice of the feudal tenure to the common law of the growing commonwealth.

52. AM. HIST. REV. 237 (Jan., 1908).

53. "There is a real link between the medieval doctrine of the law of nature and the

with immunity from the arbitrary. Professor Powicke⁵⁴ has seen this clearly in the recognition of the universal sweep of the natural law. The Charter does not legislate explicitly for Englishmen generally because the presence of strongly marked class distinctions was a characteristic feature of medieval society. But it attempts to safeguard the rights of different classes according to their different needs. There are two extreme appreciations of the Charter. Holdsworth, McKechnie, and Edward Jenks have seen in the Charter a forced redress of violated class interests. The other extreme is the indiscriminating admiration of seventeenth century lawyers who, in the days of the Stuarts looked behind the Tudor absolutism, and read into the clauses of the Charter later day constitutional developments. We contend together with A. J. Carlyle and Professor Powicke that the Charter is an elaboration of the *coronation oath* and was so regarded by its prime mover, Stephen Langton. It summed up fundamental principles of the feudal and constitutional system of the Middle Ages: that whatever authority was possessed by the lord was limited and controlled by the law, and that this law had as its guardian a properly constituted court. The Charter expressed a sharp antithesis to the *patria potestas* of Romanism in regard both to persons and possessions. Whatever may be said of the various meanings of *judicium parium* it involved basically the equitable principle that a free man would not be placed at a disadvantage in a judgment by the peculiar motives of those either above him or below him.⁵⁵ "*The law of the land*" repeats the same

principles of the common law. It is given by the use—correct in both systems, though constant, indeed exclusive in the Common law, and rather sparing in the Canon law—of the words 'reason,' and 'reasonable.'" POLLOCK, *ESSAYS IN LAW* 57 (1922). For Adams' Teutonic origins of early English custom refer to his *CONSTITUTIONAL HISTORY OF ENGLAND* (1921).

54. "The Christian world is one; the moral law is binding upon princes and bishops alike, and nothing must stand in the way of it. The moral law is natural law; it expresses the nature as well as the will of God. It is to be found in the Scriptures, and, as Langton and others pointed out in their teaching, as pope and cardinals also asserted, there is no escape from it. It is beyond the pope himself; the *pope* may deal with problems, but he cannot dispense from it, as far as the fabric of any form of society is bound up with it. One of its cardinal injunctions is the duty of restitution—a duty emphasized in a decree of the Lateral Council (no. 39). All wrongly gotten gains must be restored. . . . *Any idea of a state right, any tampering with the issue on grounds of public convenience or policy, was incredible. King John had defied the law of nature and must make restitution.* The law was not imposed by the Church on the world—rather *the law was the condition of life.*" POWICKE, *STEPHEN LANGTON* 89 (1928).

55. "We are not here concerned with the detailed interpretation of all the phrases of the famous passage, or with the question how far it may be thought to embody some legal principles which are distinctly English. It is enough for us to observe here that it is not an isolated attempt to establish some new principle of the law and the constitution, but that it was in its most essential principle of the feudal and constitutional system of the

principle from a different viewpoint. It insists on an objective trial, that is to say, according to the due course of law.

"The struggle was waged to secure trial in properly constituted courts of justice and in accordance with established law. The latter requirement would apply equally to substantive rules as far as they existed, and to procedure; it was in fact a declaration in favour of legality all round. Here, again, as in the case of the *free man*, the formulation was elastic enough to stand carrying over from the class justice of feudal lords to the common law of the growing Commonwealth."⁵⁶

Clause 36 prescribed as a matter of *right* that which had been a bought privilege—the writ of *inquest of life and limb*. This writ (*de odio et atia*) analogous to that of Habeas Corpus⁵⁷ was henceforth to become one of the greatest securities of personal liberty.

Clauses 12 and 14 surrender the royal claim to arbitrary taxation, and lay down the principle that the subjects ought not to be *taxed* except *by consent* of the General Council. No scutage or aid, other than the three regular feudal aids, is to be imposed except *per commune concilium regni* and the exact procedure for obtaining the consent is defined. A vague though bold effort is made toward the latter principle of no taxation without representation by prescribing that "the consent of

Middle Ages." CARLYLE, *op. cit. supra* note 33, at 106. "When this personal acceptance of the term *liber homo* has obtained a firm footing, the transition from the feudal notion of liberty to the civic one becomes a matter of substitution." VINOGRADOFF, *MAGNA CHARTA COMMEMORATION ESSAYS* 92 (Malden ed. 1917).

56. "We see . . . the working of that principle which Mailland has emphasized in *English Legal History—the law of the great men tends to become the law for all.*" VINOGRADOFF, *op. cit. supra* note 55, at 85.

57. "It was said in the seventeenth century that these clauses (38, 39, 40) embodied the principles of the writ of *Habeas Corpus* (viz., Coke) and of trial by jury (Selden identified trial by jury with *judicium parium*); and for these interpretations early medieval authority could be cited. (Cf. note 3). It is not difficult to show that, taken literally, these interpretations are false. Trial by jury was as yet in its infancy. The writ of *Habeas Corpus* was not yet invented, and as we shall see, it was long after it was invented that it was applied to protect the liberty of the subject. *But there is a sense in which these interpretations are true.* These clauses do embody a protest against arbitrary punishment, and against arbitrary infringements of personal liberty and rights of property; they do assert a right to a free trial, to a pure and unbought measure of justice. They are an attempt, in the language of the thirteenth century, to realize these ideals—just as the demand for the laws of Edward the Confessor was an attempt, in the language of the twelfth century, to realize the same ideals. It is not until these ideals have been expressed in *Magna Charta* that we cease to hear the demand for the laws of Edward the Confessor. It is not until the parliamentary contests of the Middle Ages and the technical skill of the common lawyers have provided more perfect securities for freedom and justice that we cease to hear the demand for the confirmation of the Charter. This is the real sense in which trial by jury and the writ of *Habeas Corpus* may claim descent from these clauses of the Charter. The historian may prove that there is no strict cognatic relationship. He must admit that there is a natural-cognatic link." 2 HOLDSWORTH, *op. cit. supra* note 45, at 215.

those present on the appointed day shall bind those who, though summoned, shall not have attended."

Clause 61. The authority of the medieval prince was not only limited by the law, but that some at least of the political systems of the Middle Ages provided a constitutional form by which this limitation might be enforced even by deposition. However the methods were cumbersome and anarchic in their tendency. One of the better experiments for the restraint of the ruler is found in this clause. There is a united "*communa totius terrae*" which both desires some share in the government, and has the power and the will to correct abuses in the administration of the law. A significant detail of this clause is the groping for the representative principle in the instance where perfect unanimity among the twenty-five barons is wanting.

Such are the basic constitutional principles which the Christian medieval tradition contributed to the drawing up of the Great Charter. The remainder are mainly articles of special and transient character. There is nothing theoretical in the Charter nor is there to be found a declaration of abstract principles of government. But it rests directly upon certain fundamental principles of government which are part of Christian society. The Charter is in essence an admission by an anointed king that he is not an absolute ruler not only by reason of the moral law but also by reason of the terms of the coronation oath; that he has a master in the laws he has violated but now once more swears to obey; that his prerogative is defined and limited by principles more sacred than the will of kings; and that the community of the realm through their natural leaders, the barons, have the right to compel him to respect the essential equality of men by guaranteeing immunity from the arbitrary in a rule according to law. In the submission to the fundamental laws of the realm, of established rights and privileges, both in regard to the person's status and proprietary rights of his subjects, the English ruler's relation to law and taxation is diametrically opposed to the plenitude of the legislative power and the absolute dominion of Romanism.

b. *Song of Lewes—Doctrinal Summation of the
Christian Medieval Tradition*

One of the problems raised by the Magna Carta—that of combining an efficient executive with some sort of control over that executive—was bound to come to the fore again at a time when the national life of England was maturing and a middle class was slowly developing. In the *Song of Lewes*, we have a record of the growth of the conception that it was not enough to have good laws, but that some machinery should be created which would secure that the king should carry out these laws.

The significance of the *Song of Lewes* is in its summation of the Christian medieval tradition of law and government with striking paraphrases of St. Augustine, St. Isidore, the Carolingian *Capitula*, Innocent III, and Salisbury—at a time when Englishmen were divided into two armed camps on the fundamental relation between law and the king. *It is commonly said*, “As the king wills, the law goes; truth wills otherwise for the law stands, the king falls.”

There is more likely evidence that the author of the *Song* was cognizant of Bracton's *De Legibus* and that his theory of kingship is the one that was taught by Grosseteste and Adam Marsh at Oxford. He was a strong admirer of Earl Simon and an ardent sympathizer of the constitutional party.⁵⁸ Written very probably by a Franciscan at the time of the struggle over the enforcement of the terms of the Magna Carta, (and at about the time St. Thomas wrote *De Regimine Principum*), the author states clearly the philosophy of law and government which that historic enactment of the fundamental relations of king and subjects presupposed. As the author sees it, the real issue was whether the *king should be free to govern according to his will*, and with the advice of such counsellors as he might himself choose, or, whether he was to *rule according to law*, and with the counsel of those who represented the community, and were acquainted with its customs. The point at issue referred directly to the two basic antithetical traditions we have traced.

*Song of Lewes*⁵⁹

“(692) [St. Isadore] Whoever is truly king is truly free if he rule himself and his kingdom *rightly*; let him know that all things are *lawful* for him which are *fitted* for ruling the kingdom, but not for destroying it. It is one thing to rule, which is the duty of a king, another to destroy by resisting the law. Law is so called from binding (*lex a ligando*), which is so perfectly described as the *law of liberty*, as it is *freely* served. Let every king understand that he is the servant of God; let him love that only which is pleasing to Him, and let him seek His glory in ruling, *not his own pride despising his equals*. [St. Augustine] Let the king who wishes the kingdom which is put under him to obey, render his duty to God, otherwise let him truly know that *obedience is not due him who denies the service by which it is held of God*. Again, let him know that the *people is not his own but God's* and let him be profitable to it as a help.”

“(763) [Carolingian] If he alone choose (his advisers) he will be easily deceived

58. “With regard to the *author of the Song* we have no direct information; but there can be little doubt that he was a *Franciscan Friar*, probably one who had been educated at Oxford under the influence of Adam Marsh and Bishop Grosseteste, and *who, like the rest of his order, would thus have sympathised warmly with Earl Simon and the Constitutional cause*. Whoever the writer may have been, he was *thoroughly familiar with the principles and objects of the best section of the constitutional party*, and was a warm, not to say enthusiastic, *admirer of Earl Simon*.” SONG OF LEWES (Kingsford ed. 1890).

59. The numbers correspond with the paragraph numbers in the Kingsford edition.

who has no knowledge of who may be *useful*. Therefore let the *community* of the realm *take counsel* and let that be decreed which is the *opinion of the commonalty* to whom their own laws are most known; *nor are all the men* of the province *such fools as not to know better* than others *their own realm's customs*, which those who are before bequeath to those who come after. *Those who are ruled by the laws*, have *more knowledge of them*; those, in whose use they are, become more experienced and because it is their own affair which is at stake they will care more and will procure for themselves the means whereby peace is acquired. . . . [Innocent III] From this it can be gathered that the *kind of men*, who ought rightly to be *chosen* for the service of the kingdom, *touches the community*; namely those who have the *will and knowledge and power* to be of profit, let such men be made councillors and coadjutors of the king; men to whom various customs of their country are known; [Salisbury] who may feel that *they themselves are injured if the kingdom be injured*, and guard the kingdom, lest, if harm be done to the whole, the parts may grieve *suffering along with it*. (820) The affairs of the commonalty are best managed if the realm is directed by the *way of truth*: and moreover, if the subjects seek to waste their own, those set over them can refrain their folly and rashness. . . . *Let liberty be limited by the bounds of right*, and when these limits are despised let it be deemed *error*. (870) [Roman] It is commonly said, 'As the king wills, the law goes'; *truth wills otherwise for the law stands, the king falls*."

"(892) [St. Augustine] Whence *if anything useful has been long deferred, let it not be reprehended when it is later preferred*. And let the king *prefer nothing of his own to the commonweal* as though the safety of all gave way to him who is but one, for he is *not set over them* to live *for himself*, but so the *people* which is put under him *may be secure*."

The king as well as the subject is always in the presence of law.⁶⁰ In answer to the charge of "incongruity" (sic) made by the opposing party of the title to rule and the subjection of the king to the law, the author answered in terms characteristic of the medievalists' correlation of power with liberty. "All constraint does not deprive one of liberty, nor does all restriction take away power." The descent of authority from above gives it a divine character but it does not assure it against

60. "Bracton who, you will remember, was for twenty years a judge under Henry III, repeats this very positively. The king is below no man, but he is below God and the law; law makes the king; the king is bound to obey the law, though if he break it, his punishment must be left to God. Now to a fresh student from Austin's jurisprudence this may seem an absurd statement. You put the dilemma, either the king is sovereign or no; if he be sovereign then he is not legally below the law, his obligation to obey the law is at most a moral obligation. On the other hand, if he is below the law, then he is not sovereign; he is below some man or some body of men; he is bound for example to obey the commands of the king and parliament, the true sovereign of the realm. This may be a legitimate conclusion if in Austin's way we regard all law as command; but it is very necessary for us to remember that the men of the thirteenth century had no such notion of sovereignty, had not clearly marked off legal as distinct from moral and religious duties, had not therefore conceived that in every state there must be some man or some body of men above all law. And well for us is it that this was so, for had they looked for some such sovereign man or sovereign body as Austin's theory requires, there can be no doubt that our king would have become an absolute monarch . . ." MAITLAND, CONSTITUTIONAL HISTORY 100 (1908).

error. The root of the difficulty, says the author in the words of St. Augustine, is in the *pride* of one man who *despises* the judgment and consent of those who are his equals by nature. Since the precise issue is not whether the king should have counsellors at his side, *but whether they should be of his own choosing or of the community*, the author's reasoning is an excellent defense of the soundness of popular judgment as against absolute discretionary judgment of the ruler. Men who are ruled are not thereby fools that they do not know their law and their needs better. Since those who are ruled by the laws have more knowledge of them and "their own affair is at stake" the choice of the king's counsellors and coadjutors "touches the community." It is remarkable to note that the author expresses the correct notion of majority decision as a procedure for government. "Let the community of the realm take counsel and let that be decreed which is the opinion of the commonalty." It is not clear whether these lines suggest representative government because they may refer only to the "community of the prelates and barons." John of Salisbury's organic notion of society is repeated in the notion of the common sufferance and enjoyment of the benefits of society. The king is *part of a common life*, neither above the society he rules nor apart from it. If the *Song* is referred to the source of its inspiration, the teachers of the English Universities, Marsh and Grosseteste, and to the contemporary developments of the representative system, we may well accept it not only as a summation of traditional doctrine but also as indicative of the viability of that tradition in adapting itself to changing circumstances.

"If anything useful has long been deferred, let it not be reprehended when it is later preferred."

3. THE HISTORICAL AND LOGICAL CONSEQUENCES OF MEDIEVAL CONSTITUTIONALISM

a. *Equality—Consent—Representation: Ecclesiastical Origins and Influence*

"It is indeed, a somewhat curious and even humorous thing to find, as we occasionally do, persons who claim to be attached to the *traditional aspects of political institutions*, criticising the representative system as though it were a modern thing, a product of some crude political idealism of the nineteenth century, or discussing the merits and demerits of a representative system upon merely abstract grounds. While all the time the *truth is that the representative system was not only created when the civilization of the Middle Ages was at its highest point, but that it was also the natural and logical outcome of its political conditions and ideas.*"⁶¹

Everywhere throughout Christian Europe, as we have indicated sum-

61. CARLYLE, *op. cit. supra* note 33, at 129.

marily, the Church tended to moralize and systematize political and social institutions—the office of king, the supremacy of law, the feudal pact, due process, and equal protection before the law. Not the least of Her contributions was the impetus the Church gave to the development of the representative system. Some of Her religious orders, particularly, the Dominicans and the Franciscans, held forth concrete examples of representative government; and since several of their leading Friars were counsellors of the English kings and strong supporters of the constitutional party of Simon Montfort we are led to find some common ground for the development of the English representative system in ecclesiastical history.⁶²

Early in the history of the Church, the expansion of Her activities developed institutions which necessitated consultative arrangements. Metropolitans convoked and presided over provincial councils of bishops, and above these larger synods gathered from a number of provinces within a nation. The tendency to higher and more universal ecclesiastical assemblies naturally suggested the inferior and smaller group, the diocesan synod. It was inevitable in Christendom where spiritual and temporal concerns were intimately related that laymen were invited to attend the larger assemblies. Both in their structure and in their functions these synods were representative assemblies in a very rudimentary and imperfect sense. The summons were personal and not to a corporate group; the transactions of the synods were at most consultative and never infringed upon the authority of the bishop, much less of the Pope; lastly, "the restoration of discipline" was generally the object of their deliberations; or their purpose might be the defense of the rights of the Church, which was increasingly engaged in struggles with the secular empowerments.

These assemblies took on a new importance and great signification for the future in the summons of the Fourth Lateran Council in 1215 by Pope Innocent III. Not only archbishops and bishops, but abbots and priors and all the monarchs of Western Christendom were cited to appear. A new step was taken when Innocent III asked the bishops to enjoin the *chapters of the churches*, beside the cathedrals, to send their provost or dean or some other suitable men *to act on behalf of the whole body*. He gave as his reason for this new departure that business relating to chapters would be brought before the whole council. It is noteworthy that the beginning of the representative process should have as its motive that which was to guide its development to maturity, namely,

62. Cf. CLARKE, *MEDIAEVAL REPRESENTATION AND CONSENT* (1936) and BARKER, *A Study of the Growth of Representation in the Church During the Thirteenth Century in THE DOMINICAN ORDER AND CONVOCATION* (1913).

exaction of money. It was part of the Pope's design of reform to compel the chapters to allot one prebend for the support of a schoolmaster and, in commanding attendance of their representatives, he was acting on the principle already expressed in his canons—*quod omnes tangit, ab omnibus approbetur*. This was a maxim embedded in the private law of Rome and the Church had transferred its application to the public domain. It appeared early in the legislation of the ninth century—the “*Edictum Pistense*” and again in the legal work of Edward I of England in the thirteenth century. The principle gradually became the basis for majority decision,⁶³ as it was explained and developed by the canonists in the light of a fundamentally rational principle, *the sanior et maior pars*,⁶⁴ which was first used by Pope Alexander III in the twelfth century. The underlying reason justifying this procedure was given by Innocent IV in the thirteenth century, *quia per plures melius veritas inquiritur*. Thus, the Church developed a Roman maxim, which the ancients used only in the guardianship of private property, to apply to the public domain of legislation and taxation—a development utterly unrelated to the intentions of the rulers and citizens of the *Imperium*.

“Here is representation in the highest assembly of the Church—representation, indeed, not only of the community of the diocese, but at any rate of the community of the chapter.”⁶⁵

The two Councils at Lyons in 1245 and 1274 were summoned by Innocent IV and Gregory X respectively by the same procedure. Two canons of the Fourth Lateran Council served to generalize the idea and process of representation throughout the religious orders, and through them introduced it into civil society. The sixth canon enforced an old canonical custom which enjoined annual meeting of provincial and diocesan synods *for purposes of legislation*;⁶⁶ the twelfth canon ordered

63. “From the earliest period in its history the English Parliament has accepted the principle that the *wishes of the majority are decisive*. It is probable that the principle itself was derived from the *canon law*. In this, as in many other instances, ideas drawn from the canon law had a large influence upon the minds of those who were creating a common law in the thirteenth century. It is clear from the Year Books that in the fifteenth century it is accepted as an ordinary and obvious principle.” 2 HOLDSWORTH, *op. cit. supra* note 45, at 431.

64. POWICKE, *op. cit. supra* note 54, at 80-1.

65. BARKER, *op. cit. supra* note 62, at 32-3. *Cf. id.* at 32 n. 9. The summoning of a representative of the chapter is considered “the first germ of our (English) *præmunientes* clause” whereby under Edward I the whole inferior clergy were for the first time represented in the national Parliament. In this instance, too, consent for the grant of an aid was requested from the corporate unit.

66. Bracton in citing *quod omnes tangit* . . . merely refers it to legislation, while the common reference is to the acquisition of a money grant. It indicates again an irony of history that a Roman maxim is transferred from private law to the public law to

triennial chapters in each national province by those religious orders by whom the practice had not already been adopted.

In England, the development of representation in the State synchronized in the thirteenth century with the growing public significance of this institution in the convocations of the Dominicans.⁶⁷ Amongst the Preachers, the principle of democracy developed considerably. Representation according to its constitutional arrangements was *de iure* of a kind which we should call today democratic. It was a representative democracy.

"The characteristic feature of government is the elective system which prevails throughout the Order."⁶⁸

The freely elected representatives were not merely delegates but actually possessed "plenary power, so that whatever is done by them shall remain firm and stable." The Dominican representative system supplied a model that was imitated extensively by other orders and deeply affected the constitution of diocesan synods, which also assumed a distinctly representative character during the thirteenth century. It is certainly a reasonable inference that the analogous change which took place in the constitution of the English Parliament in the same period was similarly inspired. At a time when civil society was pervaded by clerical influence and a rising class of burgesses were summoned to send their representatives, surely the Dominican experiment in representative government would be studied and imitated. The Dominican Order was original and unique in its use of representatives elected by *local* communities for the conduct of the affairs of the Order. If we recall the significant fact that it was in England first that the *diocesan clergy* were represented in the thirteenth century in provincial synods, in likely imi-

redefine the powers of the ruler in matters of law and property. The consent of the clergy for grants to civil rulers was repeatedly defended by the Popes. In 1179 Alexander II had decreed that the exactions of secular rulers should be resisted, unless the clergy freely recognized urgent necessity. Professor Powick (*Stephen Langton* 91) has shown that Langton, when teaching at Paris at the end of the twelfth century, maintained this view. When the encroaching practices of Henry III set precedents for Edward I and Edward III, Pope Boniface VIII made a last effort (1296) to recover the immunity by the Bull *Clericis Laicos*. Submission was constrained by the crown by what may be called the legal lock-out, the outlawing of the clergy. But this struggle only served to popularize in reaction and protest the doctrine of consent and to contrive machinery to enforce it. Wherever there was an identity of interest or problem, the laymen were to learn from the experience of the clergy.

67. The idea of representation universalized by Innocent III is not an institution of the Church itself, while it is part of many of its religious orders. "*Quod omnes tangit*" was misused by Durandus, Nicolas of Cusa, Gerson, and such as have held for the conciliar structure and nature of the Church.

68. MANDONNET, *Preachers* in CATHOLIC ENCYCLOPEDIA.

tation of the Preachers, we may appreciate the environment in which the English Parliament took rise.

The influence which the Dominicans enjoyed in the thirteenth century, both with statesmen like Montfort and prelates like Langton, would obviously account for the spread of the representative government in civil society.

"When one sees *St. Dominic and de Montfort* (the elder) in conjunction in Southern France—when one remembers what St. Dominic did for the principle of representation in the Church, and *de Montfort's son for that principle in the State*—one is tempted to find some common ground . . . a common adhesion to the same idea always cherished by the Church, *of power as a trust given by the community*, and of the community as in some sense sovereign of itself. . . . It is an idea with a long history . . . it is expressed in Peter Damiani (*Potestas est in populo a summo data Domino*); it is expressed in the *Song of Lewes* by de Montfort's partisan."⁶⁹

This influence is particularly seen in Archbishop Langton and Simon Montfort. In 1226, five years after the settlement of the Dominicans in England, Stephen Langton summoned not only bishops, abbots, priors, deans, and archdeacons, but also *proctors from each chapter of cathedral and collegiate houses*, who were to attend with full instructions. It was not till 1273 that representatives of the *diocesan clergy* were summoned by Kilwardly, a Dominican, Archbishop of Canterbury. It would be inaccurate to attribute this evolution entirely to imitation of the Dominican model. But it is noteworthy that the first step was taken by Langton, a friend of the Dominicans, and the final step by another member of the Order. And both in the religious convocations as in the civil assemblies the motive force for representation was the demand, papal and royal, for money. One cannot but infer that the leaven of Stephen⁷⁰ had served to ferment similar ideas in similar problems. Simon Montfort was the first to achieve for the English State really popular representation when on the 14th of December, 1264, he summoned his famous Parliament to meet at London on the 29th of the following January. Writs were issued to all the sheriffs directing them to return not only two knights from each shire, but also two citizens from each city, and two burgesses from each borough.⁷¹

69. BARKER, *op. cit. supra* note 62, at 27.

70. Barker calls Langton, "father of English liberty," *id.* at 46; and "friend of English liberty," *id.* at 51.

71. "Simon's action . . . has been explained by different writers as modeled on the institutions of Aragon, of Sicily and of Gascony. . . . We may, however, raise one or two considerations. In the first place, de Montfort was *closely connected with the friars*. *St. Dominic* had been closely associated with his father; *Simon himself* was perhaps the *pupil of the Dominicans*. . . . He was also connected with the Franciscans through his friendship with Adam de Marsh and with the friend of the Franciscans, Robert Grosseteste. In the second place, the *Song of Lewes* generally attributed to a friar of the Franciscan Order,

These writs were modeled on the Dominican ratio for each priory, and this should not be surprising since his advisers were Dominicans. The significance of de Montfort's innovation does not rest entirely upon his instrumentality in this matter because during the same year of his achievement his power was completely overthrown and he himself was slain in battle. The full significance of de Montfort's action must be considered as a response to an influence that had gained momentum during his life-time and which still remained operative despite his death. The victor over de Montfort ascended the throne as Edward I, and he too had Dominican advisers. It was in his reign that perfect representation of the *Three Estates* of the realm becomes a fixed constitutional institution. With express reference to the citation from the *Institutes—quod omnes tangit ab omnibus comprobetur*—the final transition from the system of local to that of central assent to taxation by an assembly truly representative of every class and portion of society became a permanent reality in English government.⁷² Thus two maxims of Roman origin, *quod omnes tangit* and *quod principi placuit*, are rationally reconciled in England through the Christian principles of law and government. Edward I acted as much from the influence of the Christian heritage as he was from a practical appreciation of contemporary developments. This is evident from the experience he brought to the task.⁷³ .

b. Principles of Sound Representative Government

The survival and stability of representative government in England

throws light on Simon's ideas on 'the government of soul and body,' on which he had so often talked with Adam de Marsh and Grosseteste. . . . It illustrates the sentiments not only of the Franciscans but of the Universities, and not only of the Universities but of Simon himself, who had talked with these teachers of the Universities, Marsh and Grosseteste, from whom the doctrine of the *Song* was drawn. That the *Song* definitely suggests representation we can hardly say; the words

*igitur communitas regni consulatur
et quid universitas sentiat sciatur*

may refer only to the 'community of the prelates and barons' mentioned in the *Forma Regiminis* of 1264. Yet we may say with Stubbs that 'the friars represented the doctrines of civil independence in the Universities and country at large'. . . ." BARKER, *op. cit. supra* note 62, at 59-60. Cf. *id.* at 75 for a careful estimate of influence, direct and indirect, of the Friars on civil society in the development of representation.

72. Together with the knights and burgesses, the whole inferior clergy, by their representatives under the *praemunientes* clause, were for the first time united with the assembled baronage in the national Parliament of 1295.

73. 2 HOLDSWORTH, *op. cit. supra* note 45, at 292. His (Edward's) travels in Italy and the East, and his association with the French Crusades, gave him an opportunity of being acquainted with such monuments of the legislative activity of the Age of the *Assizes of Jerusalem*, the *Institutes of St. Louis*, and *Coutumes des Beauvais*, and with such jurists as Pierre de Fontaines, the younger Accursius, and Phillippe de Beaumanoir."

must be explained in terms of the principles which have actually guided its development just as the instability of representative *forms* in the countries of the continent can be traced to the misunderstanding of this principle. Since the reason alleged for the rule of strong men in our day has been justified by the apparent inefficiency of certain representative assemblies, it matters considerably to look further into the reasons that account for the vitality and efficiency of representative assemblies as an assurance against resorting again to the rule of the strong leader. To preserve sound representative government, it is necessary to preserve with conviction the true idea underlying it. Besides, the sound theory of representative government survives partly by being constantly restated in terms of the forces to which it is opposed. One of the chief errors in political science has been to judge of the nature of governments and to classify them according to their exterior forms. To see representative government in the forests of Germany, as Montesquieu did, is a dangerous simplification of history. In effect, this would explain civilization—the development and the establishment of institutions—in terms of customs. We are hardly inclined to think that primitive practices and barbarians account for civilization. Rather, in civilized people we look for the reasons that drew a nation out of barbarism. Appearances deceived Montesquieu; he merely took into consideration the exterior characteristics of representative government, not its true principles and purpose.

The intrinsic value of representative government is the relation it bears to *sound* government and to the perennial problems of governance of men. It strives to correlate responsibly the functions of authority—political power, with the liberty of the individual. This is of the utmost importance because the strength of the State must find its origin in the vitality of a citizen free to contribute to the good of the State by his intellect and will as by his hands. At all times men have endeavored to limit the exercise of legitimate power. When Lord Acton observed that power tends to corruption, we think he was expressing a scepticism as to the reliability of all men when in positions of power; and when he added absolute power corrupts absolutely, surely he expressed faith in the soundness of the judgments of ordinary men. If man is in need of society, does that mean that in order to benefit by the advantages of authority he must abdicate his nature in regard to the demands made by authority upon him? The specific nature of man in society must and does remain essentially the same as in his individual capacity, and the supreme eternal law according to which society must exist is the same as that which exercises a rightful control over the individuals themselves. Since there is nothing inherent in the nature of any individual, however extraordinarily gifted, that gives him a natural right to rule others, the

principles of sound representative government require that no group or collection of men, however eminently fitted, is endowed by nature with the *right* to govern others. All power which exists as a fact, must, in order to become a right, act according to reason, justice, and truth, the sole sources of rights. No man—not even Plato's philosopher-king, and no body of men—not even the middle of the road judgment of Aristotle's middle class, can know and perform fully and *exclusively* all that is required by the eternal law. To the extent that society tends to pass from the predominance of force, no matter under what title it is justified—to the moral and intellectual cooperation of its citizens, is true civic progress measured. This is the meaning of St. Thomas' doctrine that human nature is perfected through the medium of the State. For it means that the maturity of the State is commensurate with the civic maturity of its citizens, and historically speaking, there is much evidence to demonstrate these truths to be correlative and interdependent in their development.

The Christian tradition of law and government has provided us with the true basis for "popular government" so essentially different from the demagogic egalitarianism of the Greeks and the Roman *lex regia*. The essential distinction between the false and the sound popular government is in the recognition that power descends from above and at the same time obliges all who assume to be invested with it to substantiate the legitimacy of their pretensions before men who are capable of appreciating them. As the moral corporate person comes into existence—and this it does *in tempore*—then that power which comes from above is invested in the "people held together by objects of common love" even then the accountability of power as a trust must be given. The assurance against tyranny is not merely in the rule according to law or in the limitation of power—for a great crisis can require justly the use of extraordinary power—but in the accountability of the ruler, individual or collective, to the dictates of reason and justice. The problem of government, which the representative system attempts to solve, is how to give society a guarantee that the power to which all social relations must necessarily be referred—is identical with *rightful* power. The solution implied in the representative system joins the principle of the equality of men to the *cooperative* search for the reason, truth, and justice of society as the principle of unity. This it does by the procedure of *majority decision*. It does not admit that *vox populi* is *vox Dei* and refuses to ascribe charismatic qualities to the ruler.

The principle of equality which denies not only the right of anyone of himself to rule over another but also denies the right inherent in man to make a law for himself like a diminutive sovereign, finds its principle

of unity not only in the need men have for one another in the attainment of material resources but in the denial of any individual's possession of an infallible intuition of truth and justice for the common man. The doctrine of sound human nature is basic to the representative system. It asserts according to the maxim of the canon law of the Middle Ages that the majority is more likely to discern the truth than is the minority. This is merely an assumption that the decision of the majority is likely to be the more reasonable part as well as the more numerous. Yet this assumption distinguishes this sound meaning of the representative system from the force theory based upon the idea that the majority represented the greater might. Our sound doctrine finds the *formal* unit for numbers outside itself—in *reason* and while men, even in the majority are still fallible, this procedure allows for peaceful change and progress. The principle that we are bound to nothing except we consent to it is really anarchy and nothing else. Votes are not really all of equal value though they are to be counted as equal for the purpose of expediency. Choice must be preceded by discussion whose purpose is to achieve a *real* unity of purpose out of differences on the basis of reason. *Lex est ordinatio rationis*. The minority should serve as a posture of protest against the righteousness of majority rule and occasion renewed reflections and prudent reconsiderations. The process of rational discussion is essential to discovering the will of the society. For the equality of persons is still retained in the right of the minority to turn itself into a majority. It remains to be seen in what way these general principles are fulfilled in the point of contact between plurality and unity, namely, in the representative agent. There must first exist a coherent society whose complexities of interest and magnitude of numbers is beyond the competence of the simple one-man rule government even assisted with a court of advisers. Secondly, the evocation of representatives must be made by authority, as in the Fourth Lateran Council, the Dominican Convocations, and the Parliaments of Simon Montfort and Edward I. The representatives must be chosen freely by the groups they represent. *Quod omnes tangit . . . ab omnibus approbetur*. These representatives receive a mandate from their "constituents" both of a general and of a particular nature. Though they are chosen to represent the interests of a group and may be advised to make certain commitments in the general assembly, the general mandate is for the common good, above all. In other words, the electees owe judgment, not mere obedience, to the electors. They must strive to reconcile local and national differences and economic interests. For this reason, the electors should endeavor to choose men of competence. They may be assumed to be equal for the purpose of voting, but at least in talent, judgment and competence, they should be allowed

to modify the rigid use of the majority principle. *Maior et sanior pars*. This element is what distinguished Anglo-American assemblies from the French Chamber, the Italian Parliament of the Risorgimento, and the German Reichstag as a matter of conception and actuality. Lastly, there is no final transfer of responsibility, no *lex regia*, from the electors to the representatives. This is assured by various methods of accountability and a prudent limit of time. The time-extension of the trust must neither be too small as to render the representatives slavish to the wishes of their group in order to obtain re-election, nor should the time be too long, as to render them dangerously independent and unconcerned about the welfare either of the country or of their own constituents. The majority principle is simply a convenient rule of law and contains no inherent ethical validity. But it rests on ethical grounds and an intelligent citizenry.

It would be difficult to find a more remarkable example of the influence which St. Augustine's principle of equality, as applied to the juridical order, has had upon the development of constitutional government. Equality warned the early medieval rulers of the dreadful sin of *pride* in the exercise of power. In the later Middle Ages equality was the basis of the feudal contract and its mutual obligations. It gradually developed the notion that no one is judge in his own case in matters of law and property. A striking illustration of the supremacy law, be it custom law, and the principle of consent, is the fact that explicit consent was required for financial aids that were not customary, not yet consented to. These new aids were significantly called "*gracious aids*." The first mention of the majority principle in civil society is contained in the executive clause (c. 61) of Magna Carta. And though this article was omitted from all reissues and confirmations of the Charter, English constitutional history has brought out the significant fact that the principle prevailed with the development of taxation and legislation. Though England was never Romanized, by reason of the sound Christian tradition of law and government, her native institutions developed the direct answers to the Roman absolute *Imperium* in the dual plenary powers of legislation and proprietary *dominium*.

Conclusion

We have reviewed the Christian tradition of law and governance which began in the first instance with St. Augustine's critique of the Roman *Imperium*. From the general scenery of history, we have selected the major successive steps that progressively evolved with inherent logic and under historical provocation that constitutionalism which is of Christian medieval provenance. If for the pagans, ancient politics was a "manner

of life"—to use Aristotle's definition—it is for us in a deeper but more restricted sense the embodiment of a philosophy of values which derive from ultimates and touch upon private as well as public conduct. Modern jurists are tragically ignoring what St. Augustine and the pagans accepted as an incontrovertible premise—that law and governance rests upon theological and philosophical conceptions of man and society. But their avowed indifference or denial in effect established an affirmation—the assertion of part of reality for the whole. The perennial problem of politics has even been to reconcile the personal freedom of the citizen with the plenary power of government so as to include in the "pursuit of happiness" the eternal life promised by our Divine Lord. The Christian solution has been to hold responsible the persons in power to the community (from whom they derive the legitimacy of their office) for the prosecution of the general welfare, in as systematic a way as possible according to the law of the land as well as by conscientious accountability to God. The Christian tradition took its start from the *principles* of St. Augustine; it flowered into the *virtues* of constitutionalism in medieval Christendom; and gradually institutionalized—that is embodied the *ideas* of equality and consent in a procedural and substantive *due* process as the surest human guarantee against arbitrary rule. Consent was not unknown to antiquity; but since it was not rooted either in the natural law, (as St. Thomas was to teach it), or in the equality of men, (as St. Augustine taught it), there was no metaphysical barrier to the powers of authority. This ethical limitation is more than and above the limitation brought about by mere choice. Nor do we insinuate that the pagans were arbitrary. But since man achieved his highest good in the state, no *logical* limit could be set to the activities undertaken by the state. Greek democracy whereby each individual participated directly and actively in governance only served in effect to increase the *powers* of the state. The idea that citizens had rights by reason of their nature against the state was alien to Greek thought. The conception of public law, which defines the relations between state and individual had no place in Greek political theory. Greek democracy contributed the idea of political rights, but not that of civil rights. The basic difficulty was in the understanding of "nature," and what was wanting to the ancients St. Augustine could supply in terms of the truths Christianity revealed about man. The Christian revelation of each person's transcendental relation to God, not only as a principle of being and of thought, but also as the basis of an order of morality comprehending all human conduct, released the human spirit from fate and Nature. Christianity set man free from this pandemonism and revealed his full stature not only as superior to the forces of nature but in the sanctity of his person. An

immunity from the arbitrary followed as a consequence. The consent of rational beings was required for any sort of subjection. In matters of law, this consent was implied, particularly in custom law. The presumption of consent rested on the presumption of rationality in custom law according to the norms of St. Isidore. Explicit consent was required for *new* commitments as in the *capitula*, the coronation oaths, and the feudal fealty. The significance of consent appears in the mutuality of rights and obligations and the admission that arbitrary breach of the "pact" on the part of one released the other from any commitment of justice. This was but the assertion that the supremacy of law is a consequence on the juridical plane of the equality of men. This supremacy of law had a difficult history in the struggle between overweening rulers and their subjects. Two sorts of institutional checks developed upon the king: first, a growing effort to render the judiciary independent. Its humble beginnings arose from the incontrovertible principle that no man has a right to be judge in his own cause. The second institutional development was the representative *system*. Originally this was an appendage of royal authority formed upon a pattern supplied by the Dominican order. Its conversion into an organ of control over royal authority was the result of a long course of development inspired by the Christian version of *quod omnes tangit ab omnibus approbetur*. Gradually authority was being subject not only to law but its exercise and behavior submitted to conditions imposed by the growing need for taxation. Power over the purse was historically responsible for the development of the legislative powers of the representatives. It was not till the eighteenth century that the representative system, with its beginnings in the Spanish Cortes of Castile and Leon and in the religious Orders, matured into representative *government*. The representatives legislated, held the executive accountable, and the judges were either directly or indirectly chosen by the people. Parliamentary institutions (of popularly elected representatives) do not *eo ipso* ensure democratic government. The representatives must *actually* rule responsibly as well as represent, discuss, protest, and vote. Constitutional government understood as the antithesis to government not limited by law has found its best safeguards in self-government. The point is, however, that self-government is not an end in itself. It has proved to be the best means to safeguard against arbitrary rule. But nothing could be more disastrous to these results of long centuries of constitutional struggle than to uproot Constitutional government and its representative institutions from those Christian political principles which inspired and directed their growth, and were ever the first principles of defense for men who cherished the tradition of government as dearly as its present benefits. Misconceptions

about popular rule have succeeded to transfer the tyranny of the more easily confined individual to the less controllable multitude. If, as Burke and our Founders said, the people in the long run seek their own good and do not choose to err, we must remember that evil is referred to error of judgment as well as to choice, and the "computing principle" of politics compromising and adjusting for the final decision must never abandon incontrovertible first principles of law and government. These first principles are by no means to be identified with the social values of positive pragmatism; they are rooted in moral and religious truths. We do not deny that political science can accumulate a series of wise generalizations arrived at inductively from comparative studies of government. But they are no substitute for the truths that are rooted in the moral nature of man. We do not deny that a social order and stability can be achieved by a pagan creative politics; that Bills of Rights can offset in effect a theory of absolute sovereignty. But the time does come when the human mind observing institutions referred to a conventional ethics does honestly question the obligatory force of such values. This is the beginning of a process of degeneration. For institutions are in a *very* true sense embodied ideas, and when these ideas no longer draw their significance from ultimates, the institutions begin to lose their original meaning and their derived vitality. St. Augustine's *City of God* is an excellent testimony to the achievements of a society whose entire self-sufficiency denied any principle external to itself as a norm of righteousness. But, at the same time, the *City of God* is a sharp and penetrating critique of any society ancient or modern based on self-love. God has given man "sound" human nature; man must make it virtuous, and there is all the more need for a virtuous citizen since modern government depends so much upon his judgments and his choice. In this sense, the good State is the good man, and that includes being a good citizen, Aristotle notwithstanding, "writ large." It is not necessary for the common people to know the relation of the first principles to law and government. This should be the preoccupation of our responsible representatives. It suffices for the people to be attached to the *tradition* which we have inherited from medieval Christendom for, as Burke has said, one sure symptom of an ill-conducted state was the tendency of the people to revert to theories.

"When therefore in the political shipwreck of modern Europe, it is asked which political form of polity is favored by the Church, the only answer we can give, is that she is attached to none; but though indifferent to existing forms, she is attached to a spirit which is nearly extinct. . . . It is not in the results of the last three centuries that the Church can place her trust; neither in absolute monarchy, nor in revolutionary liberalism, nor in the infallible constitutional scheme. She must create anew or *revive* her *former creations* and instill a new life and spirit into those remains of *the medieval system*, which will bear the marks of ages, *when heresy*

and unbelief, Roman Law, and heathen philosophy, had not obscured the idea of the Christian State. These remains are to be found in various states of decay in every State—with the exception perhaps of France—that grew out of medieval civilization. Above all they will be found in a country which, in the midst of apostasy, and in spite of so much guilt towards religion, has preserved the Catholic forms in its Church establishment more than any other Protestant nation, and the Catholic spirit in its political institutions, more than any Catholic nation. To renew the memory of the times in which this spirit prevailed in Europe, and to preserve the remains of it, to promote the knowledge of what is lost, and the desire of what is most urgently needed—is an important service which it behooves us to perform."⁷⁴

Lord Acton lists the three subversives of the Catholic heritage and thereby discloses the three presuppositions of institutional development and the conditioning determinants which mark their genesis. They are theological ultimates, philosophical implicates, and juridical consequents. In a prior article we traced the evolution of the Catholic political tradition from St. Augustine to St. Thomas and its highlight in medieval constitutionalism. In this present study we have observed that "heresy and unbelief, Roman law, and heathen philosophy" are the Christian defections which in great measure threatened to negate the Catholic correctives of the pagan *politeia* and to undermine the Catholic theological and philosophical premises for the development of a polity in conformity with man's nature and destiny. The paradox of modern history is, as Lord Acton notes, the fact of the survival of the Catholic forms in Protestant England and their decay in Catholic continental countries. A study of the reasons, causes, and conditioning factors of this paradoxical resultant is too comprehensive and complex a labor for the modest confines of an article. But we may at least indicate some of the basic historical accidents from which a more extensive and authoritative study may later follow.

In the first place, the theological revolt occurred in England later than it did in Germany, and at a time when English Common Law enjoyed the secured advantage of a self-contained maturity, thanks to its ecclesiastical jurists and canonists. The English Common Law had been so effectively systematized and rationalized by the English jurists, Pateshull, Archdeacon of Norfolk and Dean of St. Paul's, William of Raleigh, Bishop of Norwich and of Winchester, and particularly Henry of Bracton, Archdeacon of Barnstaple and Justice of the king, that when the churchmen and canonists withdrew from the King's Courts they bequeathed to the lay lawyers a body of rational legal principles for their education in the Inns of Court and for their transmission in the later day Year Books. Anglican customary law was thus transformed into a distinct English national Common Law which by its native strength and

74. LALLY, AS LORD ACTON SAYS 55 (1942).

self-consciousness successfully withstood the Roman Reception. In Germany, customary law remained ever amorphous, unformed, shapeless, native, folk law and for want of an integrated strength proved an easy prey to the forced manipulations of the imperial jurists who had been trained in the Bolognese School and imbibed deeply of the Justinian Code. They chose to support the Hohenstaufen pretensions that the Germanic Empire was but a continuance with the Old Roman Empire. It was notably these relations of the emperors to the jurists which worked so efficiently for the dissemination and establishment of the authority of an alien law, the Roman law, and widened the contest between the imperial legists and the canonists and papalists. Secondly, in England, baronial opposition was the earliest effective check upon royal power. From 1215 on, the law of the great men tends to become the law for all. Their privileges become prescriptive rights and as such constitute franchises, liberties, and immunities from royal authority of which the nation may avail itself as it gradually evolves into being. In France and Spain, the representative assemblies of the thirteenth and fourteenth centuries—the Cortes of Castile and Aragon and the Estates General of France so like the English Parliaments of those centuries—failed to grasp the tremendous significance of the power over royal finance. Under the stress of the Hundred Years War they voted permanent taxes to keep on foot a paid army and they were never able to regain that power. As a consequence, the right of petition in France and Spain failed to materialize into the power to initiate legislation, as it did in the English Parliament, consequent to and dependent upon the power over the purse. Furthermore, the French and Spanish nobility were deceived by the privilege of exemption from taxation inasmuch as they were deprived of the constitutional implications of the consent for taxation. Conceded privileges increased royal power, enfeebled the opposition of the nobility, and widened their breach with the people. Besides, on the Continent, all the children of the nobility enjoyed the title and privileges of their family dignity whereas in England only the first born son succeeded to his father's rank. The junior sons swelled the numbers of the gentry, made common cause with them in the House of Commons, and bridged together the upper and lower social and economic classes into a general unanimity of national purpose *vis à vis* the royal power. Thirdly, in the struggle for political power, the English lawyers sided with Parliament and sustained the independence of the courts against absorption by the Crown. On the Continent, the Roman schooled legists debilitated the representative assemblies⁷⁵ and subjected the courts to the absolute

75. "The fact was that the States-General were unequally matched in their conflict with the Crown. Nurtured by lawyers in the traditions of Roman autocracy and hailed

sovereignty of the ruler. Fourthly, the theological and philosophical doctrines of the Reformers are not to be credited with the fruits of civil and political liberties whose genesis, we maintain, directly derive from Catholic medieval constitutionalism. Liberty for the Reformers meant simply the break with Rome and a confused notion of individual religious consciences. Neither the Established Church of England which hatched the Divine Right of Kings, nor the Puritan Revolution which was annulled by the Restoration and discredited by its own religious bigotry and intolerance, nor the political activities of Luther and the political experiments of Calvin⁷⁶ ensured a civil and political freedom to the individual. Whatever impetus they gave to free expression is to be credited rather negatively to the revolt from Rome and to the internal multiplication of sects. Doctrinally, the Reformation was incompatible with popular freedom. Luther repeatedly expressed unfeigned contempt for the peasants and preferred a prince who was wrong to a people in their right. Actually, as a matter of historical record, in proportion as Protestantism

by ecclesiastics as eldest sons of the Church, kings could not but distrust an institution in which a claim to national sovereignty seemed to be embodied; and its past history, so strangely compounded of high pretensions and docile submission, had aroused both their fear and their contempt. In truth, however, the institution, considered as a source of public liberties, was precluded by its origin, by its constitution, by its traditions, from effective opposition to the Royal power. To begin with, its members invariably considered that they were discharging a duty which they owed to the King rather than exercising powers which they had a right to enjoy; and this fatal conviction cramped their energies, damped their zeal, and sapped their strength. They had accepted without protest a theory which deprived them of the right to initiate deliberations by assuming that the questions which came within their competence were such only as the King might be pleased to submit. Their sessions, too, were dependent on Royal pleasure, the King summoning and dismissing them at will; and entirely devoid as they were of guarantees for regular meetings, they were too often employed merely as a political expedient in times of national disaster or financial distress, when the exigencies of the situation enforced submission to the demands of the Crown. Even when they had the good fortune to be convened in favorable circumstances, the States were seriously hampered by the theory of the *mandat impératif*, which limited their representative character. Unlike his contemporary in the English Parliament, the member of the States-General was not a representative, in the true sense of the word, but a delegate: upon the mandate of his constituents, by which his powers and duties were defined, his demands and concessions had to be based; he could make no bargain with the Crown outside the scope of his authority; and if a new question arose he was compelled to go back for fresh instructions." BRIDGE, HISTORY OF FRANCE 60 (1921).

76. "Calvin, whose motives were essentially those of iron authority and order, largely helped to produce those conditions which kept it (liberty) alive both in practice or theory. The reason for this is that Calvin happened to influence permanently either a minority within a hostile State as in France or England, or a nation struggling to be free like the Dutch. *That his principles were in themselves in no way based on any ideal of individual liberty may be illustrated from the history of Geneva, New England, Scotland, the Synod of Dort and the Puritan Revolution.*" FIGGIS, *op. cit. supra* note 33, at 66.

waned and its own distinctive effectiveness diminished to that measure did the Catholic heritage revive and fructify.⁷⁷ That political heritage had become so much a part of the national life of England that it could withstand complete subversion under the impact of heresy and apostasy. On the Continent, Roman law in an environment of Averroist Aristotelianism, and religious defection brought forth the autocratic Reformation Prince. In Catholic countries, legists⁷⁸ betrayed the political heritage of the nation and the nobles failed to make common cause with the people. Fifthly, both before and after her apostasy, it was to her Catholic tradition that English jurists and Parliamentarians turned for the vindication of the supremacy of law, the independence of the judicature, for due process and for all those legal guarantees that assure the *homo liber et legalis*. Ecclesiastical lawyers formulated a native law for England. Fortescue contrasted the constitutional polity of England in Thomistic language with the polity of the French legists. Hooker was the medium for St. Thomas across the schism.⁷⁹ Burke defended the traditional unwritten constitution of England against Lockean and French revolutionary interpolations. Acton reminded his countrymen

77. "Protestantism, which in the period of its power dragged down by its servility the liberties of the nation, did afterwards, in its decay and disorganization, by the surrender of its dogmatic as well as of its political principle, promote their recovery and development. It lost its oppressiveness in proportion as it lost its strength, and it ceased to be tyrannical when divines had been forced to give up its fundamental doctrine, and when its unity had been dissolved by sects. *The revival of those liberties which, in the Middle Ages had taken root under the influence of the Church, coincided with the progress of the Protestant sects, and with the decay of the penal laws. The contrast between the political character of those countries in which Protestantism integrally prevailed, and that of those in which it was divided against itself, and could neither establish its system nor work out its consequences, is as strongly marked as the contrast between the politics of Catholic times and those which were introduced by the Reformation. The evil which it wrought in its strength was turned to good by its decline.*" ACTON, *ESSAYS ON FREEDOM* 331 (1922). (Italics mine).

78. In the words of Martinez-Marina, ". . . as if they were foreigners in their attitude towards the national jurisprudence, ignorant of the law of their fatherland and of the excellent municipal laws, the good *fueros* and beautiful and praiseworthy customs of Castile and Leon, and forgetful of and ignoring the wishes of the sovereign who always desired to conserve in the new code, the ancient usages and laws in so far as they were compatible with the principles of justice and public felicity. *Not knowing any other source, nor any treasures of erudition and civil and ecclesiastical doctrine than the Decretals, Digest and Code, together with the opinions of the glossators, they introduced into the Partidas the Roman legislation and the opinions of its interpreters, altering and amending all our constitution, civil and ecclesiastical, in the most essential points with notable injury to society and the rights and regalia of our sovereign.*" MADDEN, *POLITICAL THEORY AND LAW IN MEDIEVAL SPAIN* 69 (1930).

79. Lord Acton writes of Burke's doctrines in the years from 1791-1797, ". . . when whatever was Protestant or partial or revolutionary, of 1688, in his political views disappeared, and what remained was a purely Catholic view of political principles and of history." LALLX, *op. cit. supra* note 78, at 48.

of the necessity to recognize and maintain inviolate the Catholic heritage underlying English institutional forms. Catholic protagonists were to guide England in her constitutional crisis of the sixteenth and seventeenth centuries. The most effective refutation of the Divine Right of Kings was provided by Cardinal Bellarmino in his controversy with James I and in the handbook of the Old Whigs in the bloodless Revolution of 1688 were the reprints of the Jesuit Father Persons' "*Conference on the Next Succession.*"

English Common Law is a Catholic heritage. Its notional and doctrinal promptings sprang from the original fundamental political principles formulated by St. Augustine against the background of the pagan world and first concretized by St. Isidore who stands as the earliest craftsman of a Christian State. Medieval Constitutionalism was the first vast political achievement of the Christian dispensation in the West. It absorbed the positive contributions of Roman and Teutonic societies, supplemented their inadequacies, and rejected their misconceptions of civil man. It laid the vast historical foundations from which modern constitutionalism derived its meaning and inner logic and upon which it could build its superstructure of democratic and representative governments.⁸⁰ The Christian revelation of the inviolability of man's transcendental destiny—its correlative, his inherent and inalienable rights, and the equality of man in divine adoption as well as in his specific nature provided St. Augustine the premises, unknown to the pagan world, for formulating a *new* doctrine of consent of the governed whose practical immediate significance was the application of law as limiting in its effects on the powers of government. It remained for time and human experience to teach what institutional means could best secure the ends of justice. The inalienable right to the immunity from the arbitrary as guaranteed

80. "The contributions of modern times to the Constitution have in the main taken the form of building on medieval foundations, and of modifying the relations between the various parts of those foundations, rather than of original creation. Naturally, these modern developments have altered the actual scheme of government almost out of recognition. It could be argued that the constitutional history of England is essentially a sequence of different Constitutions rather than one continuous history. There would be truth in such an argument, but the fact is that each of those historic Constitutions has merged perceptibly into the one following, and the difficulty would be to determine at what point to draw the line between the periods in the sequence. All historical periods flow into each other in a remorseless stream, defying and frustrating the neat classifications and generalizations of historians. Much of the past is ever-present; which is the same thing as saying that much of what seems to be modern is really medieval. In Western Europe, the Middle Ages were by far the most creative of all ages in the art of government; for they created the basis of modern government out of primeval anarchy. The modern ages have in fact created little; but they have adapted much." CHRIMES, *ENGLISH CONSTITUTIONAL HISTORY* 67 (1947).

by positive legal provisions, such as "due process" and "equal protection" may properly be considered as the logical and historical development of the medieval evolution of a Christian polity. We have endeavored to account for the fecundity and survival of the Christian tradition in England, its antithesis to the Roman *Imperium*, and its decay on the Continent.

Amongst the many blessings with which our country has been providentially favored has been the transmission of the English Common Law to our shores. Its influence and contribution to our own political and juridical way of life is not ever seriously contested. This historical phenomena illustrates forcibly and vividly that the surest guarantee of a tradition of law and government are the people themselves who bear in their very persons, their thoughts, and practices, the liberties and rights which constitute their native inheritance. For political and juridical institutions abide by a spiritual communion with the ideas and aspirations of men. To renew and preserve inviolate the sound political philosophy which is our Christian heritage and upon which depends the very life and survival of our political and juridical institutions "is an important service which it behooves us to perform."