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Juridic Origins of Representation II

Cover Page Footnote
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IN THE first instalment\(^1\) of this study we inquired into the representative practices of pre-Christian times to ascertain in what measure they contributed to the long evolving historic process that culminated in the Christian era in the Anglo-American tradition of representative government as the institutional surety for constitutionalism. The Greek pure democracy was characteristically direct governance. The Roman Imperium rested on a balance of powers which like the Roman arch was justified in the equilibrium it maintained and supported. The representative idea was obviously interior to every vicarious action and best illustrated by the Roman *lex regia*. But the Graeco-Roman *politeia* was absolute as well as plenary and constitutionalism was the political description of actual governance, viz., the *constitutio rei*. The circumscription of power was at most an institutional distribution and balance of forces. Disruption of the existing equilibrium was by revolutionary upheavals and with the turbulent civil wars of Greek and Roman history in mind we may well appreciate the Aristotelian dread of *stasis*. Representative government as the institutional safeguard of a defined public law and its empowerments were non-existent; nor for that matter was constitutionalism understood as a self-imposed legal limitation. Roman private law, however, did provide certain ingredients of stable trusteeship which the rulers of the Christian era, lay and ecclesiastical, were to expand into a broad foundation for representative government. These were, as we saw, the Roman *procuratorium* with its authorization, *plena potestas agendi*, and *mandatum*, and the Justinian dictum, *quod omnes tangit ab omnibus approbetur*. From private and proprietary they were transferred and made applicable by a succession of experiments and fruitful precedents to the public, corporate, and political domain. Since we discounted the Teutonic polity theory which came into vogue at Oxford during the later half of the nineteenth century as being simply historically unfounded, we maintained as the purpose of our *argumentum* that the Anglo-American system of representative governance was originally native to the English, and in its evolution of Catholic origins and of Catholic promotion.

We observed that Innocent III set an extraordinary authoritative precedent when he joined together the principle of consent and the principle of representation in a limited matter of proprietary interests

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and, by the sixth and twelfth canons of the Fourth Lateran Council, enjoined the universal practice of representative assemblies amongst the metropolitans and the religious orders. The influence of papal pressure on the institutional evolution of the representative idea was exerted at the two oecumenical Councils of Lyons (1245 and 1274), the legatine Council at Bourges of 1225, and in direct imitation of the latter, the English provincial synod convened by Archbishop Langton in 1226. Both the French and English assemblies were the first instances of the use of proctors in either country in clerical assemblies since the Fourth Lateran Council of 1215. The transference of these principles and practices from the restricted area of private corporate communities and the limited financial objective to the public domain—the political, the national jurisdiction with its plenary legislative and fiscal powers—must undergo the slow historical process that gives life and stability to the growth of an institution. This process whereby the representative idea gradually matured into the civil representative system and finally culminated in representative governance in England must yet be fermented by intermediary ecclesiastical influences, the Dominican Order and the English Synodal Convocations. In a confluence of events, the designation of primary and motor influence may not be more than conjectural. But neither should the circumambient environment of ideas and practices be minimized. Causal relations may not be as easily assigned in group actions as in individual activity but conditions and contingencies may be identified where similarity of motives and precedents obtain.

By the thirteenth century the provincial synods cease to be composed of bishops and abbots only; they include representatives of the cathedral clergy—those living in communal association. As yet, the diocesan or lower clergy—those not living in communities—have not been included. It is in this century that a confluence of events occur most similar to one another and their chronological sequence strongly intimates an immediate influence and concrete imitation. The development

2. In actuality events come about not through the application of theories but through experiments; the theories serve either as guiding lines or as explanations; they are never applicable in their entirety nor with inexorable logic. For example, the principle of the equality of men and the correlative, the consent of the governed, do not necessarily conduce to the historical development of representative democracy. They may just as likely lead to an enlightened and just monarchical rule. But in both instances these principles are the ethical ultimates.

of representation in the English State synchronizes with the thirteenth century; a representative parliament begins to be seen in the middle of the century, and is fully grown by its end. Concurrently (with some priority in time) ecclesiastical representation descends from the cathedral chapter to the inclusion of the diocesan clergy, a development that occurs first and only in England. This latter eventuality is consequent in time to the arrival of the Dominican Friars in England. It is then with more than provocative interest that we inquire briefly into the Dominican ratio gubernandi, in order to ascertain the extent of the influence of the Dominican Institute on other contemporary developments of similar sort.

THE DOMINICANS AND REPRESENTATIVE DEMOCRACY

The Dominican Order is characteristically a model type of representative democracy.

"The government is entrusted to a hierarchy of chapters; the conventual chapter ruled the house, the provincial chapter ruled the province and the general chapter ruled the whole order. The general chapter laid down certain rules; the provincial chapter amplified them according to the particular needs of the province; the conventual chapter applied them to individual cases, . . . both the general and provincial chapters, especially the latter, both made and executed ordinances."4

Power was not, as the hierarchy at first suggests, delegated from above, rather it ultimately derived from the convents or communities. This was secured by the use of representatives.

"The general chapter was composed of representatives of the provinces elected in the provincial chapter. . . . The provincial chapter in its turn included in its ranks representatives of the convent. . . ."5

The conventual chapter elected a representative who was invested with full power to deliberate and to vote for his electors. He was entrusted with the business of his convent and when he spoke he was bound to distinguish between his own opinion and that of his electors. The conventual chapter also chose two electors for the election of the provincial prior and it had the right of forwarding petitions through the socius. The provincial chapter, in addition to official members, thus consisted of the prior and one socius from each house in the province. It was usually a large body. The provincial chapter appointed four officers known as definitores by whom all business was transacted except elections. A special electoral chapter was held to choose the prior of the province. The general chapter was a small body, consisting of one elect-

5. Id. at 37-38.
ed representative from each province. To it belonged the function of altering the constitution (with the consent of three successive assemblies) and the power to elect, to punish and to depose the master-general of the order. The Dominican Order is constitutionally, de iure, democratic, i.e., of popular determination, and institutionally, as its elective system shows, of truly representative governance. Supreme sovereign power is vested in the General Chapter which is composed of representatives freely elected by local communities and who are entrusted with plenary proctorial powers to act for the general good of the entire order in the name of their conventual constituents and to bind the same by the commitments of the General Assembly.

"It is the most perfect example that the Middle Ages have produced of the faculty of monastic corporations for constitutions for constitution-building." 6

When St. Dominic founded his illustrious order in 1216, he was constrained by the decree of the Fourth Lateran Council that no more new orders should be founded and to adapt for his followers the rule of an order already established. His ratio guberandi then is not a novel contrivance but, providentially, the most advanced summation of the tried precedents and fruitful practices of an ever-widening tradition of older religious communities. The Austin canons, who in 1063 were instituted without sovereign general councils, were the first to have evolved the idea of the chapter of full members of a particular religious house as an organized constituency with judicial and executive authority. In the tenth century, the Cluniac order gave the first marked impetus to the conciliar plan of legislation by instituting closer association of the various convents. Councils comprised of priors of daughter houses and the abbot of Cluny convened annually and their decrees were binding upon the whole order. Let the Cluniacs be credited for being the first to evolve the idea of general chapters for purposes of legislation and discipline, albeit under the control of the Abbots. To this dual development of particular and general chapters for purposes of legislation and administration, the Cistercians in the beginning of the twelfth century wrought a significant change by conferring upon the abbot of Citeaux less powers (than those of the Abbot of Cluny) and enlarging the responsibilities and powers of the general chapter. The Premonstratensian Canons of 1129 imitated this Cistercian arrangement rather closely and provided the basis for the Dominican constitution and organization. The importance of the general chapter was vastly enhanced when the Carthusians in 1142 conferred larger powers upon it. Thus by a dual

process, which began with the local community and at the same time descended from above, the concentric circles of a community of communities with a supreme general government composed of representatives of local chapters evolved in the history of religious orders concurrently with the history of ecclesiastical synods and general councils. Is it then surprising that the Universal Church, by its ideas, its procedures, and practices should contribute to the history of institutional development of the west the basic essential elements of representative government?

Though the Dominicans are part of that development of representation in the General Councils of the Church and in its provincial synods, and of the tradition of representative government in the religious orders, they do constitute an innovation—not in theory—but in the detailed precision of their organization, in the concrete circumscription of the powers of the abbot which in other orders did in practice interpose itself too effectively in the relations between the convent and the rest of the order. St. Dominic, in statesman-like manner, institutionalized, i.e., embodied efficaciously, the constitutional ideas of monasticism in inviolable procedures which would distinguish discretion from presumption, legitimacy from usurpation, counsel from authority. Thus the general chapter of religious orders expressed and put into action all over western Europe the idea of an assembly with legislative and executive powers, composed of members drawn from communities which together made up the whole order. Both within the local and general groups the size, coherence, and powers essential for political representation (legislation, judicial, administrative) were provided by the religious orders for civil empowerments to study and imitate. The conjunction of the principle of consent and of representation on fiscal business was the papal contribution. The unique contribution of St. Dominic's Order is the forceful use of representatives elected by local communities for the conduct of affairs of the entire order. Representation of office has definitely ceased to be virtual and vicarious; representation is now of the community, it is actual as well as vicarious. In order to understand better how the two distinct developments, of representative consent for clerical taxation (introduced by the papacy) and representative democracy (best exemplified by the Dominican Friars), promoted political representation and civil representative government, we must look summarily into the intermediary influence of the representa-

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7. Clarke, op. cit. supra note 3 at 301, 303. The Order of Grandmont first developed the idea of representing the community by elected proctors rather than by officials, and they also entrusted those elected with a definite mandate. Since these religious lived in complete retirement from the world they could hardly have influenced civilian events.
tive convocation of the English secular clergy. For, let us note, it is not till after the arrival of Dominicans in England in 1221, that representation of the lower diocesan clergy are included in the provincial synods and this we are persuaded to be a consequence of the practice and influence of the Black Friars.

THE ENGLISH SYNOD

Consequent to the arrival of the Dominican Friars in England in 1221, a gradual expansion of representation in the English provincial synod develops until it ultimately comprises the proctors of diocesan clergy. In 1213 when Stephen Langton, Archbishop of Canterbury produced the Charter of Henry I to the assembly convened at St. Paul's in a memorable prelude to the Magna Charta, bishops, abbots, priors and deans attended. In 1225 Archbishop Langton slightly extended his summons when he requested the presence of Bishops, abbots, priors, deans, and archdeacons. In 1226, five years after the settlement of the Dominican Friars in England, proctors are added for the first time from each chapter of cathedral and prebendal churches, and by its inclusion of representatives from monasteries, and from other religious and collegiate houses, this convocation went beyond the capitular representation of the legatine Council at Bourges. Scarcely half a century later in the reign of Edward I, Kilwardy, onetime provincial prior of the Dominicans and now successor to Stephen Langton at Canterbury, summons to his convocation of 1273 not only capitular clergy but also diocesan clergy. The last and most advanced step of all is taken by the Franciscan Peckham who in 1283 called what has been properly designated as the Model Convocation of the province of Canterbury. Bishops, abbots, priors and other heads of religious houses, deans of cathedral and collegiate churches, and archdeacons were summoned to appear in person or by proctors; and, the significant innovation, bishops are enjoined to assemble and instruct the diocesan clergy to the intent that they elect two proctors from each diocese, and the cathedral and collegiate churches designate one proctor with plenary powers and instructions of “treating and consenting” in the name of their constituents. From 1226 and 1283 the advance is slow but steadfast and we may conjecture with the force of inferential argument of the influence of Dominican and Franciscan Orders upon the expanding experience of the provincial synod to the inclusion of the secular clergy. Stephen Langton was an intimate associate of the Dominicans. Kilwardy, his

successor, had been provincial prior of that order, and Peckham, who took the last all-embracing step, was a Franciscan whose order had improved its organization by refashioning its own provincial chapters on the model of the Dominican ratio. The progress of 1226 and 1283 is significant but hardly sufficient. Stephen Langton added for the first time representation of monasteries and other religious houses—possibly of the Dominican convents, too—to capitular representation (as at Bourges) but the principle of representation is still restricted to those clerics associated in a community life. Not till 1283 does representation descend to the inclusion of the ordinary diocesan clergy. The improvement of 1283 on 1273 is the election of the proctors by the constituents themselves and accordingly actual representation is affirmed as superior to virtual representation. In all these successive steps of expansion the motive force may be found in the need of meeting the financial demands which both the Papacy and the English Crown made on the Church during the reign of Henry III, and which the Crown still continued to urge in the reign of Edward I, the operative principle—quod omnes tangit—according to the injunction and precedent of the fourth Lateran Council, the exemplary procedure, the Dominican representative system. The pressure of taxation and its conditio sine qua non, consent, combined to fructify the best expedient as yet devised for individual cooperation through corporate responsibility, namely, representation with proctorial powers. As the need for money, papal and royal, increased, the appeal extended to the lower non-communal clergy, and what had served as the ideas and procedures for the upper clergy were applied to the lower unquestioningly because these had been more than mere prescriptive rights, they were principles touching upon the inviolability of person and possessions.

THE POLITICAL LEAVEN OF THE CHURCH

The more closely modern scholarship scrutinizes our medieval heritage the more frequent are the admissions of the vast indebtedness of modern political and civil liberties to the ecclesiastical influence and direction of medieval social and political history.

To begin with, the religious clergy were from earliest times experimenting with communal life. Emphasizing in every rule that charity is the supreme law and prudence the guide of life, they developed government through discussion and counsel even in such instances where the ultimate decision was monarchial. The value of information from every quarter, the preference for corporate responsibility, the wise attachment to the lessons of tradition, the respectful appreciation of the counsel of elders no doubt flowered from the christian virtues of hu-
mility, simplicity, and submission as a guard against pride of the intellect and arbitrary action. Frequent and orderly assemblies developed parliamentary procedures and usages. From these ecclesiastical practices two results vastly significant for the political domain ensued: the binding of the minority by majority decision, a principle of prudential expediency later formulated by canon law, and, secondly, the office of the procuratorium. For participation in larger assemblies or for the more facile contraction of inter-group agreements proxies were duly elected to determine the course of action in the name of their constituents and to bind them thereby. In the civil domain, we find instances of similar vicarious activities, particularly the jury practices in the reign of Henry II and the extensive use of knights by Henry III. Their practices do signify a representative function but they scarcely exceed the elementary duties of information, the assessment and collection of taxes, reports on the conduct of sheriffs, the registry of a local community’s opinion or decision in an ad hoc. Their offices are expanded with the objectives of inventory or, at most, with the restricted mandate of a trustee. Ad loquendum, ad ostendendum, ad recognoscendum essentially meant “bearing the record”. The closest instances fall far short of the procuratorium. Even as late as 1254 (late in relation to the ecclesiastical practices) the knights merely report decisions previously made by their respective counties. When Henry III’s writ of September 1261 summoned the knights to a central body at Windsor to discuss public affairs the purpose remained entirely consultative.

The vanguard, then, of institutional development was clerical. In designating taxation as the motor force for the extension of representation amongst the secular clergy we must not fail to stress, even if need be repeatedly, the Christian principles on which such an expediency was evolved. Representative system and representative government may not be the only and inevitable consequences of the logic inherent in the equality of men, in the consequent immunity from the arbitrary and in the inviolability of rights to possessions, but they have proved to be the best workable arrangement for the security of these rights as well as the best expression of corporate responsibility. The historical fact is that representative government in the civil domain did rise out of the

9. “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, History of English Law 431 (1922).
medieval atmosphere of thought and ideas and those ideas were of clerical origin and of ecclesiastical promotion. We have observed that it was two friar-archbishops, Kilwardy, the Dominican, and Peckham, the Franciscan, who brought the Dominican system of government by representative chapter into the English Church to make representation a permanent and regular part of the Church so that their religious organizations and the provincial church synods offered models of experience to their nation. We must conceive of these influences as part of a more enlarged comprehensive mentality—that of the medieval theology of politics—and this meant a divine conception of human personality which was unknown in the ancient world. And around this central truth medieval political theory and governmental practices, lay and ecclesiastic, built up an expanding tradition of securities, guaranties, and procedures that made for the free man, the *homo liber et legalis*. The friars, particularly in England (on the Continent the *onus* was borne more by the bishops who were in closer proximity with a multitude of overweening princes) represented the doctrines of civil independence in the universities and country at large. Bracton's *De Legibus*, Simon de Montfort's indebtedness to the Franciscans' *Song of Lewes*, the theory of kingship taught by Grosseteste, Bishop of Lincoln, and by Adam Marsh at Oxford, Stephen Langton and the Magna Carta, the Dominicans as confessors and counsellors of kings, to designate but several instances out of a whole contexture of Christian society, could not but work as a leaven upon the national history of England. Already in 1240 we find Matthew Paris representing the bishops as quoting the principle that what touches all must be approved by all. What the clerics secured for themselves in the struggle over "Spiritualities" passed to the laymen. Feudal consent which had been based on the equality of men had lacked representation. The ecclesiastics preserved the principle of equality through a consent indirectly applied in the majority decision of the corporate community. As feudalism faded for the civilians, they learned to apply to their newly formed communal groups the lessons of the clerics. We have stressed the importance and influence of the ecclesiastical religious examples of representation, as instanced in the three oecumenical Church councils of the thirteenth century, the Dominican and Franciscan *Institutes* and the development ensuing in England of the English Provincial Convocation to the inclusion of the diocesan clergy.

We may ask if there were any sociological conditions in England which rendered the ecclesiastical influence upon the civil development in England more likely and efficacious than on the continent. Even as late as the fourteenth century the French provincial synod does not go beyond the representation of chapters and similarly in Spain where the Spanish Cortes develops and advances beyond the ecclesiastical practices. In Germany, clerical representation does not descend below the chapters and the provincial synods convene irregularly. In France where the development came closest to the English probably because of the two oecumenical Councils at Lyons and of the legatine Council at Bourges the advance is arrested short of the English achievement. The États Généraux summon to attendance proctors of convents and chapters but only because they are part of the feudal hierarchy. A reasonable explanation may be drawn from the fixed localism of the English counties which paralleled the local life of the diocesan clergy. The geographical isolation of England and its remoteness from Rome might have strengthened the expression of communal as well as personal feudal claims with the evolution of an organic national self-consciousness particularly through the work of the justices which began with the reign of Henry II. This dual process of nationalization, drawing its vigor from a stable local life, developed in England (more so than on the continent) a political community of communities. Consequently wherever there was an identity of interest or problem, the laymen were to learn from the clergy. But English legal development abetted this interpenetrating influence. English custom law became common law without ceasing to be custom law. On the continent, under the influence of Roman revival, custom law surrender to common civil law imposed from above by the sovereign with only remnants of concessionary favors toward native custom law at most. Consequently, in England, through the influence of canon law upon the common law the Innocentian interpolation of *quod omnes tangit* may have operated more efficaciously with Edward I than with a continental monarch. And the motive was the same with parliamentary growth as it was with the English synod convocation, the papal demand for money and the royal need of revenue. The Model Convocation of the province of Canterbury convened by Peckham in 1283, notable for its extension of the summons to include proctors of the diocesan clergy, pointedly illustrates the interpenetration of the clerical and lay world, for it assembled under the royal summons. The stamp of royal confirmation served to make that form of 1283 authoritative and very likely served as the precedent for the *premunientes* clause of Edward I when he summoned the clergy to the Parliament of 1294. Each bishop must attend, premonishing (*praemuni*
entes) the dean and chapter of his cathedral church and the archdeacons and all the clergy of his diocese—causing the dean and archdeacons to attend in their proper persons and the chapter through one, the clergy through two fit proctors with full and sufficient power. The form the Church had adopted for its own provincial synod is used by the king for the inclusion of the Church as one of the estates of the realm in parliament.

Thus we have seen that the Church and her religious orders have provided the idea, composition, and procedure of representation to the distinctive native development in England. The identical principle—quod omnes tangit—permeates both clergy and laity, the same application to the same motive—the demand for money, either papal or royal, and a concomitant and correlative extension of the proctorial powers to the local unit of the shire and the diocese. It is representation of the communities with full proctorial power to bind the constituents. The reinforcement of the baronage by shire and borough representatives, toward the comprehension of the national parliament, finds its precedent in the reinforcement of the episcopate by the proctor of chapters. And the non-communal diocesan clergy, considered as a quasi community for the purpose of the Model Convocation of 1283 and the Model Parliament of 1294, points strongly to the still lower laical unit, the representative of the vill. Such interweaving of influence, such a common deposit of ideas and precedents was but the obvious and natural result of the organic structure of medieval society. But the originality of representative governance is Catholic, papal in promo-

13. The summoning of a representative of the chapter is considered as “the first germ of our (English) praemunientes 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. Barker, op. cit. supra note 3 at 32-33.

14. Barker, op. cit. supra note 3 at 27: “When one sees St. Dominic and de Montfort 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 for their allegiance to the principle, and to find that common ground in Southern France. But that would be pure conjecture; and it would be safer to say that the common ground between the two was a common adhesion to the same idea, an 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, even if it delegated its sovereignty to a magister. It is an idea with a long history. It is expressed by Ulpian (Quod principi placuit legis habet vigorem, utpote cum populus . . . ei et in eum omne sumum imperium et potestatem conferat): It is expressed in Peter Damiani (Potestas est in populo a summo data Domine): it is expressed in the Song of Lewes by de Montfort’s partisan. It underlies the organization of the Hospitallers: it underlies that of the Dominicans. Whenever men conceive of a group clearly
tion, religious in precedent and experience, ecclesiastical in the synodal convocations. Its growth and extension in English ecclesiastical and civil practices was mutually compenetrant; but the notable exemplar is the Dominican Order and the extent of its influence upon both provincial synods and the civil parliament is a conjecture of compelling moral persuasion. Theirs is the highest expression of the development of the representative principle in the thirteenth century Church and in England its first consummate example.

. Political Representation

We have already noted that the idea of representation is as ancient as vicarious action. A group of individuals are, for certain purposes, religious or civil, deemed to be one and may therefore be summed up as it were, figuratively, in the person of a king or priest. And in non-communal associations one individual would stand for another either as steward or trustee with or without powers of attorney. The mandate or responsibility would be either explicitly defined or implicitly assumed or gradually fixed by conventional practices. In the Catholic ecclesiastical synods the vicarious function was representative in virtue of the office of the bishop and on lower levels in virtue of power delegated from above. In religious assemblies with only consultative functions, the power of the superior or abbot derives from the religious institute to which its members were bound by their vow of obedience. They enjoy the prerogative of expressing themselves without the powers of governing. They represent, and though systems of representation may vary from the loosest to the strongest manifestation and contingency, it still is not representative government. In religious orders where representative government rules, the following conditions obtain: first, the local community freely elects its own delegates at the instance, of course, of superior authority. These delegates are not mere agents of administration either of their own constituents or of a superior power. They are invested with a mandate that has a double purpose: the general benefit of the universal society as well as the immediate interest of their own conventicle constituency. Above all their proctorial power transcends that of a trustee. It owes judgment, not blind obedience, to their electors. They must account for their actions to them but they may claim independence of action and commitment in the light of the general common good and in virtue of their presumed superior com-

and strongly as a community or brotherhood, they must conceive of it as sovereign of itself; whenever they seek to realize that self-sovereignty in deed as well as in word, they are driven beyond the conception of power as in its nature representative to the actual use of representative institutions."
petence. Their commitments bind their constituents and they may contribute to or modify the institutional law. They are not constrained by any superior personal dictation save by public law, substantive and procedural. The representatives legislate, adjudicate, execute: in a word, they govern. Representative system may exist without representative government but not vice versa. Free election, a temporal and revocable delegation of powers, accountability for the mandate entrusted, and the power to bind their constituents constitute the powers of representative governance. Such a government may obtain in private corporations or in public. In the latter public law and a national jurisdiction coincide with geographical frontiers and a coherent society. Representative government in public law and national sovereignty is political, i.e., it operates directly to the public good (res publica as distinguished from private interest), to the survival of the common (national benefit) as differentiated from the individual welfare. Toward the maturation of representative government thus described social and economic factors touching upon person and possessions operate in the control of power and in the legal investiture of rights and liberties.

We have seen that the conversion of individual counsel and consent to corporate responsibility through the plenary proctorial mandate transformed representative systems into representative governance. Consent as a practical source of power was recognized as far back as Solon and the oldest institutionalization of popular consent was custom law. Radical differences separate the inner meaning and content of counsel and consent, in governance or custom law of the pre-Christian and Christian eras. The Christian innovation was the ethico-theological exigencies of consent and its rational presuppositions. Not consent alone but consent in obedience to the prerogatives of human personality. Pagan custom law was rigidly fixed in religious immobility and the future was arrested in the archaic past. Relief existed only in the discretionary benevolence of the ruler or, as the most democratic achievement of Roman history, in the tribunal veto. Graeco-Roman civilization with all its vaunted cultural achievements did not provide the philosophical ratio for progress nor for that matter reach into the significance of time and its correlative, change. The Parmidean-Heraclitean antimony was only inadequately resolved by Aristotle and awaited for the Christian revelation of the transcendence of man for the true measure and direction of human progress. St. Isidore, enlarging upon St. Augustine's dynamic conception of temporal law was the first of the Christian Fathers to define (with a sound juridical perception) the material constituents.
of positive law as the reasonable presuppositions of choice and thereby conferred upon customary law those prerogative attributes which English legal history ascribe to prescriptive rights, franchises, immunities, privileges, and liberties. Gratian, who incorporated St. Isidore's divisions and definitions of law into his Decretum, was so impressed with the doctrine of sound utility in accord with reason and faith which St. Isidore's analysis of popular consent presupposed in customary law, that he concluded that all valid law was really custom law, that part which is written down being called constitutio sive jus while that part which is not written is known as consuetudo. St. Isidore's teaching of the material (intrinsic) content of law as constitutive of its ethical-juridical justice, viz., of its reasonableness as distinct from its legitimacy which derives from authoritative will differentiated validity from legitimacy which was hopelessly confused in Roman formalism and Greek Polity. The embodiment of consent in custom law according to Christian doctrine is best attested to in the twelfth century by Henry of Bracton, Archdeacon of Barnstaple, and, at his death in 1268, Chancellor of Exeter Cathedral.

"Though almost all countries use statutes and written laws (legibus et iure scripto), England alone uses unwritten law and custom (iure non scripto et consuetudine). Unwritten law is established or defined by precedent. It will not be ridiculous to accept the unwritten law of England as law, since that has the force of law which has been defined and approved by royal authority and by the advice and assent of magnates and the common consent of the realm."17

From the earliest times of English history—clearly with the Anglo-Saxon Witan—the idea of counsel and consent was bound up with law and the administration of justice according to the law of the land. Anglo-Saxon kingship ministered a power which was held to be 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 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 clear, also so as not to contain anything which by its obscurity might lead to wariness; it should be devised for the common good of all the citizens, and not for the private interests only of some individual." Similarly 2 id. 10, 1, 2, 3. It is repeated in Ivo of Chartes, Panormia, the handbook of canon law.

16. Pollock, Essays in Law 57 (1922): "... there is a real link between the medieaval doctrine of the law of nature and the principles of 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'."

17. 2 Bracton, De Legibus et Consuetudinibus Angliae 19 (Woodbine ed. 1915).
legislation and the imposition of extraordinary taxation, the right of the Witan to give counsel and consent was at all times recognized. The notion is at bottom an ethical one; it is limitation as well as direction of power. As Bracton wrote in the thirteenth century: "The king has his councillors who are his associates; he who has associates has a master."  

The Norman conquest transformed England from a loosely related kingdom to a closely knit feudal structure. To the king as supreme feudal lord as to the lesser lordships, his vassals, the tenants-in-chief, must give "aid" and "counsel" according to the rights and jurisdictions incident to feudal tenure. "Aid" was generally expressed at first by the feudal levy of military service; "counsel" meant periodic suit at court, to give advice and help settle difficult cases. Attendance was, under the Normans, compulsory. This forced participation in government administration fixed the exercise of counsel into the institutions of the Great and Small Councils and as such operated as a check upon autocratic depositions and as a defense of feudal rights. The Magna Charta of 1215 bears eloquent testimony to the constitutional consequences of counsel and consent. No scutage or aid, other than the three regular feudal aids, is to be imposed except per commune concili-um regii and the exact procedure for obtaining the consent is defined. Consent was implied in customary law, prefeudal and feudal, and in the aids incident to feudal tenure. It is in regard to the extra-feudal aids that the exercise of explicit, ad hoc consent, operated to constitutional intents. The right to determine the necessity and amount of these gracious aids lay not with the lord but with the suitors of his court. Feudal theory then made concretely activating the doctrine of consent by relating it to taxation. According to the feudal system, that my vassal’s vassal is not my vassal nor my lord’s lord my lord, the king’s contractual relations terminated with the tenants-in-chief. When these consented to a gracious aid they represented in a sort of vague way the rear-vassals and committed them to the grant. It is precisely at this point that England happily escaped the national disaster that befell the continental countries, particularly France, namely the danger of a system of private bargains whereby the magnates would secure for themselves permanent exemption from taxation and sever themselves from the common national causes. Only by removing the personal veto

18. The authenticity of this statement is not certain but it makes its appearance shortly after Bracton’s death and may be taken to indicate current views as to the nature of the king’s council. See I Bracton, op. cit. supra note 17 at 252, 332-333.

19. Which may be the reason why England did not dissolve as did contemporary France into great dynastic feudatories.
of the dissenting or absentee magnate would such a danger be averted. Feudal consent was drawn out of its personal, individualistic involvement by the slowly expanding concept of the corporate character of the king’s council just as collected counsel gradually enlarged into collective counsel.

Consent came to mean consensus and concord or simply consensual participation. This development was in no small measure due to the process of taxing the clergy. Ecclesiastics in their baronial capacity were subject to the terms of the feudal tenure as laymen were; they served in the king’s council and assented or rejected the royal demands for gracious aids. As prelates, however, who had received the ring and staff from ecclesiastical authorities, their income drawn from tithes and alms—known as spiritualities—were deemed exempt from taxation since they were avowedly reserved for a sacred purpose. The lesson of the Saladin Tithe (which fell on all clerics as well as on the laity, on spiritualities as on temporalities) was not lost upon the English Exchequer and the same plan was thereafter several times imposed in the name of national emergencies. When these exactions culminated in the excesses of King John, it is no wonder to find Stephen Langton, the Archbishop of Canterbury, leading the barons at St. Albans. It is the menace to ecclesiastical immunity, the attack upon the spiritualities, that provoked the resistance from below. These touched the lower clergy with greater inconvenience than the upper clergy who benefited from temporalities as well. At the fourth Lateran Council in 1215 the decree entitled de tallis a clericis non exigendis was issued for the protection of this privilege. But the crown succeeded to force exactions by threat of the legal lockout whereby the clergy were denied the defense of the courts. It was at this crucial time that the doctrine of consent was saved by the clerical interpolation of the maxim embedded in the private law of Rome; quod omnes tangit ab omnibus approbetur. Private proprietary interests are protected by the notion of corporate responsibility of the class “touched,” and in this instance the ecclesiastical class set exemplary precedents to the corresponding growing self-consciousness of the communitas regni. Just as the law of great men became in time the law of all free Englishmen, so too from above the corporate self-consciousness of the baronagium (so markedly evident in King John’s reign and manifest in the 61st clause of the Great Charter) expanded as to embrace first the minor barons, then the knights, and so on broadening toward a sense of a national solidarity of the English realm. In its exuberant youth what was the House of Commons if not a community of communities. As private jurisdictions are eliminated by the quo warranto and seignorial responsibilities are absorbed by the
justices in eyre, feudal personalism shades into communal assertion curiously instanced in the *firma burgi*. As early as 1159 the *Policraticus* of John of Salisbury gave eloquent testimony to this sense of *salus publica* and the *cohaerentia* of a commonwealth whose analogue is the human body. In 1258 the English barons wrote to Pope Alexander IV that Henry III submitted to the counsel of the magnates, *without whom he is unable to govern his kingdom*, and they add with a sense of virtual representation that England is a body politic and is ruled by the community of the realm.

The doctrine of consent, as it lost strength on an individualist basis, was reinvigorated by the concept of corporate responsibility. This ensued from ecclesiastic experience and in England more vividly from the Provincial Synodal development as it reached down into the lower non-communal clergy. The magnates had established the right of consent for gracious aids and the lower clergy had done as much for the taxation of the spiritualities. The action of the canons of Salisbury in 1225 induced Stephen Langton to the first breach in this direction. The explanation thus far is partial. To have saved the doctrine and effective exercise of consent by corporate capacity action another device was actually necessary, the representative principle. Counsel had transformed consent into a corporate collectivity. Representation with procuratorial powers would make it viable and practical. Unanimity grew increasingly a practical impossibility and still retained its disintegrating individualism. Absentee or dissenting barons could paralyze effective and necessary action. It is to the credit of the clerics that they too contributed the representative principle (as well as the representative system) to give practical meaning and effectiveness to their other contribution, corporate responsibility. We must now review the secular representative practices and observe in select instances how the clerical examples and precedents contributed to their fruition into representative governance.

**CIVIL REPRESENTATIVE PRACTICES**

The idea of law as custom underlay the medieval doctrine of consent. The same concept played an even more direct part in the use of representation, at least for legal and administrative purposes. Customary law could not be administered without local knowledge. This was due not merely to the complete lack of jurisprudence, a systematic science of law, administered by a professional body of learned jurists, but also to the disruptions of the barbarian invasions and the frequent shifts of population uprooted from their native territory. Consequently the inevitable conflict of law was awkwardly but necessarily resolved by the personalism of Frankish and Germanic laws alongside with the
territorialism of jurisdictional laws—hence the necessity for the close connection between law and knowledge of it by the parties concerned. This was subsequently accentuated by the localism of the feudal structure with the benefit at this time of the court of peers or co-vassals. Local knowledge is now appended to trial by equals to ensure the accuracy of the law as well as to protect against the prejudices of superior intrusions.

When the king's justices went on circuit of the realm and central courts and common law were slowly and laboriously being formulated, it followed as a matter of course that local knowledge should be expressed by sworn local representatives or juries. The Norman sworn inquest accentuated this practice. The Doomsday Book stresses how natural and reasonable a method "knowledge on the spot" was obtained through carefully selected witnesses under oath. The representative idea is expressed through representative men who spoke "for all" about the locality, the hundred or wapentake. The second instance of representation are the juries of Henry II. Their office was a virtual representation, their functions mainly declarative, and accordingly required cognizance of local affairs in the representative men. These juries are aptly designated the juries of recognition, ad recognoscendum, to distinguish them from the juries of Grand Assizes who testified to the existence or non-existence of criminal actions in the community.

In 1213 a distinct intimation of a novel development occurred when King John summoned four discreet knights from each shire to speak (ad loquendum) with him at Oxford concerning business of the realm. While most probably these knights came to report local information, a general purpose of the realm is ascribed to their service. While we are yet not beyond collected consultation, a forward suggestion is made toward collective counsel. In 1215 we find the strongest instance to date of corporate capacity and representative responsibility expressed in the 61st clause of the Magna Carta, the communa totius terrae. It manifests a groping for the representative principle when perfect unanimity among the twenty-five barons is wanting. In 1226 the sheriffs were ordered to cause the election of four law-worthy and discreet knights for the purpose of meeting with the king at Lincoln and explaining to him (ad ostendendum) their complaints about the execution of certain clauses of Magna Carta. Gradually, the predominantly administrative and judicial functions of feudal representation enlarges toward national consultations of a political character. But the process is still in its infancy. These representatives are not invested with a mandate by their constituents; they do not decide the future; they simply "bear the record" on past or present conditions. But their influence increased
in the alliance with those nobles whose independent baronial franchises and jurisdictions were being eliminated.

So we see that from the advent of William the Conqueror to 1226, the year of Stephen Langton's representative assembly in London the laity had expressed the representative idea by means of inquest and the jury to such a point that the knights of the shire were brought to the frontiers of political responsibility. In local affairs they had already crossed the line between information and action, since they were being used with increasing frequency as assessors and as collectors of taxes. These fiscal duties show that the knights were extending their functions beyond the juror's obligation to "find the facts," but before 1226, at least, the extension was strictly limited to local tasks undertaken at the king's command, and these functions had no direct political significance. They were without any mandate from the communities, who had merely chosen the persons best suited to perform the royal assignments. The authority upon which the knights acted came, not from below, but from above. The magnates, on the other hand, had full powers of counsel and consent, but each was present only for himself; until the same powers were exercised by communities, through their delegates, the essence of political representation was still absent.

We must take notice, in addition to the inquest and the juries, of another English experiment of the representative idea in the boroughs. For the legal construction of these boroughs emphasizes communal existence with greater force than did geographical units, the hundred and the shire. Their internal organization and government contributes a new and necessary step toward political formation, namely, the election of the governors by the citizens. The prospering towns of the twelfth century were favored with royal charters, and accordingly an internal organization of the community develops with the grant of self-government in return for a lump corporate tax, the firma burgi. This new unity led naturally to the idea that one or more members might act for the rest. Signs of political evolution appear in the election of the mayor and common council to govern the borough on their behalf. However, this internal political representative government did not extend beyond its own walls; there is still no direct share in the central government, except in so far as representatives might be summoned to the courts as witnesses or jurors, ad loquendum or ad ostendendum. To achieve a national representative assembly, endowed with political power, the knights and burgesses of the local units must yet join in common association transcending their own limited origins with mandates from their constituents as to limit, control, and direct the sovereign
power of the realm. This political transcendence whereby the community of communities is realized in a national universitas could find at hand the precedents of the hierarchical union of Dominican and Franciscan chapters. Not until an identity of interests between the communities exists and an intercommunal governance strives to achieve a national good, as well as the particular local good, will a political representative government exist. To date on a national level, only representation for legal, fiscal, and administrative purposes existed, and, in most instances, occurred, with the exception of the internal government of the boroughs, at the royal behest. Even in such cases where an elective form was employed, the fact of election carried with it no general power or responsibility. We maintain that political representative government must fulfill these conditions: first, the representatives must be elected by the constituents in order that they be truly representatives of the constituents; secondly, the election must accord with authoritative prescription to mark it with legal right, for a political act must somehow be invested with sovereignty, i.e., public power; thirdly, these representatives must be entrusted with a dual mandate for the general and particular benefit; this mandate is temporal, revocable, and responsible, i.e., held to accountability; fourthly, these representatives by virtue presumably of their superior competency owe judgment not obedience to their electors; fifthly, their commitment binds their electors in justice. In a word, these representatives govern. All these conditions were fulfilled in the thirteenth century England, most perfectly in the Dominican Order. In the secular domain, the representative idea, vicarious action, and representative systems for the limited purposes of information and action existed in the English juries in all its forms, viz., the lawful men who bore the record, and the knights who were summoned to give voice to local conditions. Only within the boroughs do we find political representation and even here only inchoately. When the knights of the shire convened under royal summons at central assemblies, they still retained their individual rapport with the royal court, i.e., they acted neither in cooperation nor, for that matter, did they exercise their judgment in determination of royal authority.

**TOWARD REPRESENTATIVE GOVERNMENT**

The use of the proctorial mandate within the representative system of the Friars and of the English convocations contributed operative ideas toward the fruition of the secular practices. In the Catholic Church itself representation never was more than the representation of office and of dignitaries. The ecclesiastical influence comes predominantly from the Friars and from the gradual expanding descent of proc-
torial representation from the upper clergy to the lower clergy, from the collegiate, capitular, communal clerics to the non-communal clerics. The inviolable principle—*quod omnes tangit*—and the motive—financial exaction—were underscored by papal and oecumenical councils. We will accordingly choose select instances when the two domains, civil and ecclesiastical crossed on these lines and an identity of interests promoted an identical resolution.

The first significant instance when the clerical position could not but leave its mark on the thoughts and reflections of secular contemporaries occurred in 1254. Henry III had requested the bishops to agree to the deflection of the triennial tenth, which had been granted for a crusade, to the war in Gascony. When the bishops remonstrated that this could not be done without the consent of their clergy, the crown issued writs whereby the bishops were to induce their clergy to this purpose, and requested that each diocese send representatives to report their answer to the council. Simultaneously, similar writs were addressed to the sheriffs which directed that the shire courts assemble and knights be elected for the identical objective. Let us observe these facts; this is the first instance to our knowledge of the presence of clerical proctors at a central assembly; secondly, the clerical consent was dependent on five conditions; thirdly, these proctors were invested with general powers of attorney, as it cannot be supposed that the five conditions were drafted independently in each local assembly. From this clerical precedent certain factors toward political evolution issue: temporary and general mandates are entrusted by the constituents to their proctors and the right to exercise personal, independent, responsible judgment in cooperation with others. Since these assemblies were sectional and not public they are obviously not political. But the parallelism is unmistakable. The lower clergy as well as the prelates, the *nunci* of the chapters and of the colleges, are summoned by writ concurrently, and in a similar manner, and for an identical purpose as are the knights of the shire. The significant addition is the dependence of the clerical consent on certain conditions, a practice that will not be lost on the Parliaments of later years who appended list of grievances as a condition to a financial grant. The effectiveness of actual consent and the strength of its principle is evident in the declaration of the archdeaconry of Lincoln in 1255: “When it is proposed to lay a burden on anyone, it is necessary to have his express consent.” Almost invariably every insistence on actual consent and every instance of refusal to a grant is explicitly referred to the canon of 1215—*quod*

20. Lunt, Consent of the Lower Clergy 140 et seq.
omnes tangit. This maxim, as Vinogradoff has shown, was widely known in the thirteenth century, but it is significant that in England it almost invariably occurs in an ecclesiastical text. The vogue may be traced to its use by Innocent III when he regulated at the fourth Lateran Council the discipline of the lower clergy.

In 1254, the two knights who were summoned from each shire to come before the council at Westminster are invested with extended commissions; they do not come simply to report on local information or local opinion. To bear the record now means to answer exactly (respondere precise) for their shires. It is a mandate from below, with specified commission, it is true. But the intimate association of consent with representation is overlapping from clerical experience to lay expedients. Was the provoking cause the action of the lower clergy at the same time? The conjecture is more than suspicion. In 1268 twenty-seven boroughs and cities are enjoined to send six representatives to Westminster who were empowered to act in the name of their communities. As representation descends from the prelates to the lower clergy, as it extends from collegiate, capitular, communal clergy to the non-communal diocesan clergy, the practice and principle of consent functioning through representation becomes a formidable limitation and in time direction to the royal power through the proctorial mandate. Our last consummate illustration is the Model Convocation of 1283 and its undoubted relation to Edward’s Parliament of 1294. In 1283 Edward I motivated by the great financial strain of the war in Wales enjoined the knights and burgheses of North and South to convene at Northampton and York respectively on January 20th. To the same purpose, he sent writs to the archbishop of Canterbury and York and urgently requested them to secure the presence of lesser dignitaries and clerical proctors at the same assemblies. The clergy of the Canterbury province rejected the summons on the ground that they had not been properly called. Whereupon Archbishop Peckham sent out his own summons to the bishops with orders that they assemble their clergy and declare to them the royal request, and then to require the attendance of the archdeacons, two proctors from each diocese and one proctor from each chapter at the convocation in London. These representatives were to be entrusted with full and express powers (plenum et expressam potestatem) to treat (ad tractandum) with the bishops and to consent to those things which the community of the clergy shall determine. Let us note that this convocation, known as Peckham’s Model Convocation, was due to the action of the clergy assembled at Northampton under

21. 2 Collected Papers 245 (1928).
the royal summons; that the extension of representation to the diocesan clergy is provoked by taxation with direct reference to *quod omnes tangit*.

All that is now wanting for the conditions requisite to political representation is the extension of the proctorial mandate from taxation to public legislation. The importance of the Model Convocation of 1283 is that the form the Church adopted for its own provincial synod is used by Edward I for the inclusion of the Church as one of the estates of the realm in the Parliament of 1294. Edward's *praemunientes* clause for clerical proctors with plenary powers widened the road for the lay commons. This Parliament of estates was the public assembly of a national society summoned by the sovereign power, elected by constituents to treat of fiscal matters and indirectly touching upon public law. The point is that consent through representation upon matters touching property had overlapped from the common cleric to the common layman. Like a ferment, papal and oecumenical injunctions, the Order of Friars, particularly of the Dominicans in England, the development of the English Provincial synod to the inclusion of the diocesan clergy, had worked to the transfer and extension of the same principles activated with the same motive in the civil domain. Clerical representation was ever leading the way. They held forth experience, precedents, and influence as well. From the Norman inquest, Henry II's juries, the corporate unity of the boroughs, the knight's "bearing the record", there is a forward advance from information to action, from consultation to consent, from virtual to actual representation, from individual to corporate capacity, from collected to collective counsel and consent, from assent to conditioned consent. The private character of religious Orders, the exempt status of ecclesiastics were no bar, no insurmountable frontier to the influence of their internal governance and relations to the Crown upon the *public* assimilation of the virtues and lessons of their representative practices.

**CONCLUDING ANIMADVERSIONS**

In pursing together the primary and fundamental factors that operated to the evolution of a complex system of representative government we have discerned that it was governed by a dynamic logic inherent in the historic process; not indeed the logic of Hegelian idealism or of abstract, *a priori* conceptualism, but the logic of human motives in the light of avowed first principles, "... we dare not say," wrote Professor Powicke, "that it was inevitable or impersonal, and divorce it from

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the convictions of ordinary men and women, for these convictions gave it life. There is a danger of superficial empirical pragmatism that would see in the representative system no more than its operational function and attribute its raison d'être solely to the stress of inventing devices of government or suiting purely administrative convenience or to the transient necessities of pressing utility, such as the need for money. But there are other factors and amongst these the enduring underlying spiritual forces that inspire human actions and fix them into habits that are expressive of beliefs and convictions about human relations. We have studied the spiritual principles, their origin and application, which operated toward the development and growth of representative government in the civil domain. But we have stopped short of the actual formation and maturity of this political-juridical institution. Before the English parliamentary system has grown to the maturity of representative government, it must secure three empowerments: complete control of all national revenue and expenditure, the exclusive exercise of the legislative right by Parliament, including the House of Commons as an equal partner in every act, and the power to determine the general policy, foreign and domestic, which at any moment of time should give character and purpose to the government. In a word, the representatives are invested with sovereign power and its exercise. The struggle to win full control of national revenues and


24. Present day scholars have differed on the interpretation and extent of power in the thirteenth century consent of representatives. Professor Wilkinson of the University of Toronto maintains that consent in the thirteenth century Parliament was, or became, predominantly political. Wilkinson, The English Provincial Revolution of the 13th and 14th Centuries in England, 24 Speculum 10 (1949); Professor Gaines Post in a closely evolved study has argued that consent even to taxation was consultative and judicial, not political, and that plena potestas stood, not for political, sovereign consent but judicial-consiliar consent. Post, Plena Potestas and Consent in Medieval Assemblies, I Traditio 355-408 (1943); J. G. Edwards argues that plena potestas in England implied an almost political or sovereign consent which limited the royal authority. And he concludes that the historical genesis of the legal sovereignty of Parliament arose partly from the plena potestas of the representatives of the Commons and partly from the character of Parliament as a high court. Edwards, The Plena Potestas of English Parliamentary Representatives, Oxford Essays in Medieval History Presented to H.E. Salter 141-154 (Powicke ed. 1934); C.H. McIlwain seems to conclude that the consent expressed by plena potestas was more than a formality in that the representatives had some discretionary power (ad tractandum), which would naturally act as a brake on the king's demands. McIlwain, Medieval Estates, 7 Cambridge Medieval History 679; similarly, but emphasizing more strongly the right of judgment and consent, Clarke, Medieval Representation and Consent (1936). The extent of the juridical con-
expenditures was to be long and severe. In legislation hardly even a starting point for the new institution had yet been found, and in the determination of the general policy, Parliament scarcely visioned such a trust. But the historic continuity is unmistakable. Ethico-juridic origins of political representation expand into the more assured constitutional and institutional developments of the fourteenth, fifteenth, and sixteenth centuries. The Christian constitutionalism, which Bracton so aptly expressed, was repeated in the fifteenth century by John Fortescue who, with explicit acknowledgments to St. Thomas Aquinas, distinguishes the *dominium regale* from the *dominium politicum et regale* on the basis of the people's consent to legislation. The course of development was in general outline as follows: The Christian doctrine of the equality of all men (by nature) would not tolerate any willful human superiority save the supremacy of law and by the consent of co-equals. The Carolingian *capitularia* bear literal witness to the fermentation of these ideas upon political activity. The feudal doctrine of consent on which rested the medieval coronation oath and all the contractual relations of the fief were concretized by specific reference to taxation. It lacked, however, the element of representation. As the feudal structure gave way to an organic communal society, the doctrine of consent survived through the mediacy of the representative system. Its individualism was modified through the *maior et sanior pars* pro-

sequences which Miss Clarke deduces from the Modus Tenendi Parlamentum is considerably mitigated by the doubt cast about the date and authenticity of the description of Parliament contained therein. Nonetheless, its significance rests on the betrayal of such conceptions though they may be prematurely ascribed to historical actuality. Plunknett, to the contrary, has held that plena potestas was an expression of involuntary consent to the acts and decisions of the royal government. Plunknett, Parliament, I Willard and Morris, The English Government at Work 1327-1336, 101 et seq. (1940).

25. "The king is subject to God and the law because the law made him king. Let the king attribute to law what the law attributes to him, namely, dominion and power. There is no king where will and not the law dominates."

26. The first chapter of the De Monarchia: "There bith ij kyndes off kyngedomes, of the wich that one is a lordship callid in laten *dominium regale*, and that other is callid *dominium politicum et regale*. And thai diversen in that the first kyngge mey rule his peple bi suche lawes as he makyth hym self. And therfore he mey sett uppon thalm tayles and other imposicions, such as be wol hym self, withowt thair assent. The secounde kyngge mey not rule his peple by other lawes than such as thai assenten unto. And therfore he mey sett uppon thaim non imposicions withowt thair owne assent. This diversity is wel taught bi Seynt Thomas in his boke which he wrote *ad regem Cipri de regimine principum*." Fortescue, The Governance of England 109 (Plummer ed. 1885). In this was Sir John Fortesque sought in the writings of St. Thomas Aquinas a philosophical basis for the constitutional regime in England and for the rule that the King as a constitutional monarch needed the consent of Parliament to the imposing of taxes and the making of laws.
The procedural application of *quod omnes tangit ab omnibus approbetur*. In this wise absenteeism and the dissident vote did not impede the development of corporate capacity and responsibility. The conjunction of consent with representation must be attributed to ecclesiastical origins, to the fourth Lateran Council as the most universalizing force, to the precedents of the Black Friars, to the expansion of the English Church Councils from 1226 onwards, and to the principle applied first in connection with taxes on "Spiritualities," that taxation demands both representation and consent. These antecedents laid the foundation of the power of the Commons. From consent for taxation to consent for legislation the illation was a matter of historical actuality and logically follows upon action touching *rem et personam*. In general outline, the course of the process was: from no taxation without consent to no taxation without representation to no legislation without consent and representation. The principles, precedents, and motives arise out of ecclesiastical history and flow into the civil domain. The *maior et sanior pars* is in accord with the Christian virtue of prudence. The *sanior pars* finds the *formal* unit for numbers outside itself\(^2\) —in *reason*—and while men, even in the majority, are still fallible this procedure allows for peaceful change and progress. The *sanior pars* accordingly distinguishes the salutary majority decision from the absolutism of majority *rule*. The *maior pars* is simply a human expediency to express corporate capacity and responsibility.\(^3\)

And so we conclude our companion study to the *Politia* trilogy. Therein we maintained that sound constitutionalism is of medieval provenance. In this study we have reviewed the indebtedness of sound representative governance to Catholic medieval history.

"Looking back over the space of a thousand years, which we call the Middle Ages, to get an estimate of the work they had done, if not towards perfection in their institutions, at least, towards attaining the knowledge of political truth, this is what we find: Representative government, which was unknown to the ancients, was almost universal. The methods of election were crude; but the principle that no tax was lawful that was not granted by the class that paid it,—that is, that taxation was inseparable from representation,—was recognized not as a privilege of certain countries, but as the right of all. Not a prince in the world, said Philip de Commines, can levy a penny without the consent of the people. Slavery was almost everywhere extinct; and absolute power was deemed more intolerable than slavery. The right of insurrection


was not only admitted but defined as a duty sanctioned by religion. Even the principles of the *Habeas Corpus Act*, and the method of the Income Tax were already known. The issue of ancient politics was an absolute State planted on slavery. The political produce of the Middle Ages was a system of States in which authority was restricted by the representation of powerful classes, by privileged associations, and by the acknowledgment of duties superior to those which are imposed by man.  

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