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Catholic Politeia I

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CATHOLIC POLITEIA I

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IN a previous article we studied the Graeco-Roman Politeia¹ and our analysis disclosed some of the positive and genuine contributions of Western antiquity to the art of governance and, in the same appraisal, revealed the radical deficiencies inherent in the total preoccupation with the founding of a self-sufficient secular order. We observed that for want of those reservations which guarantee the connatural freedom which individuals have antecedent and superior to civic prescriptions, the ever mounting cumulative demands exacted in the name of the numerous gods and of the *patria potestas* operated with inevitable logic to an ever more stringent paralyzing restraint upon individual initiative and gradually sapped the pristine vigor of the Roman citizenry. The *politeia* had been suffering for four centuries from chronic debility, and nothing which political activity could achieve seemed capable of restoring its original vigor. The constructive genius of Caesar and Augustus culminated in the *Pax Romana* and achieved in concrete expression Virgil's *City of Men*. But the Augustan era was but the prelude to the breakdown of the Imperium in the third century. The collapse of the *respublica* was indeed successfully forestalled by the vigorous administrative genius of various principates and their multiple genuine projects of reform. But the "inner life" had long gone out of the Colossus and the sack of Rome disclosed only too patently the futility of the hopes entertained by the renovationist emperors from Constantine to Theodosius.

The Fall of Rome was the fall of an idea, or rather of a system of life based upon a complex of ideas. The core of the Graeco-Roman Politeia was the supposition that mankind by reason of a capacity inherent in itself possesses the ability to discover a good independent of that which is intrinsic to a created being, and to generate the impulse needed for its realization. The *politeia* bound the Ultimate Good within *this* and the *only* (temporal) existence of man and devised its concrete embodiment through a creative politics in a wholly self-sufficient

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1. See Costanzo, *Graeco-Roman Politeia*, 20 *FORD. L. REV.* 119 (1951).

secular social order. The classical idea of a good life through knowledge (which Pelagius was to incorporate into his heresy) was wholly illusory. A process through education, either as intellectual discipline or moral habituation or both, cannot but lead to the deceptive and flattering ideal in utter disregard of the sobering fact of historical experience, that man cannot attain felicity in a mere world-immanent concept and endeavor. Born of Greek intellectualism and Roman voluntarism, and tempered by the turbulent experiments of the *polis* and the more enduring results of Roman statecraft, the *politeia* depended for its survival on a number of arbitrary identifications—religion, morals, politics, the immanent cosmic reason equated subjectively to “mind”, power with nature, and the Ultimate Good with the life of the City.

Not till the Advent of Christianity were philosophers and statesmen able to correlate the valid claims of authority and the inviolable prerogatives of the individual. Freedom was not less but better secured through subjection to authority, and authority stripped of its pretensions to absolutism was recognized by reason of its divine origin to be suffused with a nobler content and more august responsibility.

“The liberties of the ancient nations were crushed beneath a hopeless and inevitable despotism, and their vitality was spent, when the new power came forth from Gallilee, giving what was wanting to the efficacy of human knowledge to redeem societies as well as men. . . . When Christ said: ‘Render unto Caesar the things that are Caesar’s, and unto God the things that are God’s,’ those words spoken on His last visit to the Temple, three days before His death, gave to the Civil power, under the protection of conscience, a sacredness it had never enjoyed, and bounds it had never acknowledged; and they were the repudiation of absolutism and the inaugural of freedom. For Our Lord not only delivered the precept, but created the force to execute it. To maintain the necessary immunity in the one supreme sphere, to reduce all political authority within defined limits, ceased to be an aspiration of patient reasoners, and was made the perpetual charge of the most energetic institution and the most universal association in the world. The new law, the new spirit, the new authority, gave liberty a meaning and value it had not possessed in the philosophy or in the constitution of Greece or Rome before the knowledge of the truth that makes us free.”²

The Resurrection of Christ, Our Lord, the guarantee and warrantor of Eternal Life to those who receive Him and become sons of God, was the deathblow of secular aspirations and ideals. Man was to be liberated from his Promethean captivity by confessing to his complete dependence upon a loving and provident God—*adhaerere Deo*—of cleaving to the Supreme Good which is extrinsic to our merely human nature. This is the Creative Truth which would set all men free and provide fresh foundations for a new science of politics.

2. ACTON, HISTORY OF FREEDOM ESSAYS 27-9 (1922).

The establishment and expanding growth of the early Christian Church within the Roman Empire would for manifold historic reasons unavoidably confront the two in mutual conflicting claims. In the early centuries, the Fathers of the Church were content to affirm the exigencies of the Christian conscience and the prerogative rights of the Divinely instituted Church against the omnicompetent pretensions of the pagan state. But, with the exception of Lactantius, the first Christian philosophers had not yet evolved a philosophical ethics, and, not till St. Isidore, was some sort of a moral theology formulated with direct rapport toward the civil powers. We must, however, allow for the historical contingencies wherein the early Fathers and Christian apologists did not enjoy the leisure and the theological security of the Schoolmen to attend to the formidable problem of State and Church relations. The weight of their preoccupations engaged them otherwise. The trinitarian controversies, the Christological problems, the great heresies ever recurring sufficed to absorb the greater part of their activity.

The first direct assault on the idealistic pretensions of the pagan *politeia* was made by one who deeply revered the magnificence of the historic role of *Romanitas* and who could in the expanding vision of the Divine Faith apply the full power of his acute ingenium to a penetrating analysis of the pagan assumptions and claims. St. Augustine undertook to break through the confined frontiers of pagan naturalism and dissipate the nightmare involved in the concept of nature as a closed system of orderly relations determined by its own exclusive laws by fixing the principle of sufficiency and the source of all actuality, truth and value in an extra-temporal, transcendental Divine Reality and in the communion of divine charity.

"To be wise and live in the truth is to love God. Therefore 'thou shalt love the Lord Thy God with thy whole heart, and with thy whole soul, and with thy whole mind; and thou shalt love thy neighbor as thyself.' Natural philosophy is here, since all the causes of all natural things are in God the Creator, Ethics is here, since a good and honest life is not formed otherwise than by loving, as they should be loved, those things which we ought to love; namely, God and our neighbor. Logic is here, since God alone is the truth and the light of the rational soul. Here, too, is laudable security for the commonwealth; for a state is neither founded nor preserved save in the foundation and by the bond of faith and of firm concord when the highest common good is loved by all, and this highest and truest being is God; when, too, men love one another in Him with absolute simplicity; since they love one another for His sake, from whom they cannot hide the real character of love."³

St. Augustine was the first of the fathers who attempted to draw up a doctrine of the state in his monumental opus, the *City of God*. Both

3. EPISTOLA CXXXVII, c. V, 17.

St. Augustine and the pagans were at one in the comprehensiveness of viewpoint—*sub specie aeternitatis*. But they differ radically in establishing their vantage point and, as a consequence, they diverged essentially in their perspective. But even before St. Augustine began the composition of the *City of God* in 413, he had traced the flaws of Roman society to the acceptance of a defective *arché*. He implied that what was needed to rehabilitate the system was the radical revision of first principles; and this he proposed to his countrymen as the real fulfillment of the Roman aspiration for an everlasting city. What was needed was Christianity with its regenerative principles of God, men, and the universe, to reinvigorate the life of the State with her new doctrine of justice and order resting on a divinely revealed law of love. It is possible to envisage the world in either of two ways, with or without the eyes of a Christian, the results in each case being apparent. To the creative politics of an intellectual or voluntaristic rationalism, St. Augustine answered:

“The good that must be sought for the soul is not one above which it is to fly by judging, but to which it is to cleave by loving; and what can this be except God? *Not the good mind, or the good angel, or the good Heaven, but the good good.*”⁴

The sack of Rome by Alaric on the 24th of August, 410 shocked the known world. History has drawn a veil over the horrors of that unexampled catastrophe; we know of it chiefly from the sensation it caused in distant places—such as is reported in the writings of St. Jerome. The eternity of Rome had been a presupposition of the common consciousness. For the pagan Roman, the city of Augustan splendor had preserved unimpaired her architectural dignity through the many factions that had divided and weakened the Empire. The gods of fortune and war, of glory and peace, still ringed the seven hills. The likenesses of the Caesars and their temples still kept before the eyes of the Romans the imposing accomplishments of their people; and the addition of the Syrian gods who had adulterated the traditional Roman cult was a reminder of the Roman universality that extended with its far flung conquests. The *Pax Romana* ruled a universe and the eastern people welcomed her generals as divine deliverers from the anarchy of local rule. To the Christian, Rome was a symbol of the universality of the Church and Her eternal mission. Churches of Saints and mounds of martyrs ever looked with a deep sense of enduring victory to the catacombs that underlined the outskirts of the city. Yet Rome was still a fairly pagan city when she saw Alaric within her walls. The sack

4. DE TRINITATE Bk. V, c. III, VII, 205 (Dod's transl.).

of Rome could not but be the judgment of Jove. The mad policy of the Emperors in prohibiting sacrifices to the gods has produced its inevitable nemesis.⁵

Augustine answered the pagans with his *opus magnum*, *The City of God*. Its object, as indicated by the author himself, was twofold. Begun in 413, three years after the sack of Rome by Alaric, it was designed in the first instance "to refute those who, contending that the Christian religion was responsible for the overthrow of Rome, began to blaspheme the true God with even more than their habitual bitterness and virulence." From this standpoint it expanded into a general assault upon the philosophic foundations of pagan "eternity," in other words upon the claims of Virgil's *City of Men*. The inherent deficiencies of pagan achievement are analyzed by one who had traversed in full cycle an intellectual odyssey from boyhood Christianity to morbid Manichaeism, Stoicism, Academic scepticism, Neo-Platonism, and finally to the Divine Revelation of Christian Truth.

I. ST. AUGUSTINE AND THE PAGAN *POLITEIA*

It may seem astounding to the modern mind that St. Augustine should find the basic answer to the problem of the social order in the Christian Revelation of Divine Love. St. Augustine taught that every human society finds its constituent principle in a common will, a will to life, a will to enjoyment, above all a will to peace. The last word is not with the mind, but with what one loves. The will is the faculty of affectionate pursuit after that happiness which can give it lasting peace. To St. Augustine forms of government are irrelevant; what matters is that the moral quality of the State draws upon the morals of the citizens who compose the State. He defines a people as a "multitude of rational creatures associated in a common agreement as to the things which it loves."⁶ Hence in order to see what people are like we must consider the objects of their love. If the society is associated in a love of that which is good, it will be a good society; if the object of its love is evil, it will be bad.⁷ And thus the moral law of the individual and social life are

5. The conflicting theological positions of the Christians and the pagans on the fortunes of war is acutely illustrated by the alternating removal and restoration of the Altar of Victory which Augustus had installed in the Senate to symbolize the victorious fortunes of the Roman Empire.

6. *Id.*, c. XIX, 24.

7. GILSON, *INTRODUCTION A L'ETUDE DE SAINT AUGUSTIN* 222 (1929): "Les hommes . . . sont leurs volontés, c'est à dire leurs amours; on pourrait dire aussi, tel amour, tel peuple, car si l'amour est le lien constitutif de la cité, c'est-à-dire de la société, il suffit de savoir ce qu'un peuple aime pour savoir ce qu'il est: *ut videatur qualis quisque populus sit, illa sunt intuenda quae diligit.*"

the same, since both to the city and to the individual we can apply the same principle—*non faciunt bonos vel malos mores nisi boni vel mali amores*. From this standpoint the quality of any community may be measured in terms of the objects of its desires. The two great *civitates* of St. Augustine's vision are distinguished by two loves and their respective desires. Professor Arnold Toynbee in his monumental *Study of History* perceives clearly in the distinction which differentiates the two commonwealths that which seems to have escaped those historians and political scientists who have followed the lead of A. J. Carlyle.⁸ It may be noted that in this passage Saint Augustine starts from a premise which is common to him and to the philosophers, but that he arrives at a conclusion which is the opposite to theirs. The philosophers, too, condemn and reject love of mundane things; but they infer, from their unfavorable experience of Love when it is directed towards one particular kind of object, that Love itself is a spiritual infirmity which the sage must make up his mind to pluck out and cast from him, on the reckoning that it is profitable for him to be without the faculty of Love rather than to renounce the possibility of attaining that absolute Detachment which, in the judgment of a philosophically enlightened understanding, is the only complete cure for a spiritual malady that consists in the very fact of being alive. *The philosopher arrives at this radical conclusion because he does not take the precaution, which Saint Augustine does take, of looking into his premises before proceeding to argue from it; and the philosopher therefore overlooks the capital point that Love in vacuo is a logical abstraction which is morally neutral (adiaphoron in the Stoic terminology), while the moral character of real love in action is determined by the nature of the object towards which it is directed.* On this criterion the condemnation of the Love of the creature is a right moral judgment; but the correct inference from it is not that Love itself is bad, but that the *proper object of Love is not the creature but the Creator.*⁹

If you must achieve, it is not enough to know; knowledge must be re-inforced by love. And human history has a meaning because it forms a

8. 1 CARLYLE, A HISTORY OF POLITICAL THEORY IN THE WEST 166 (1903): "A State may be more or less corrupt, but so long as it consists of a multitude of rational beings associated together in the harmonious enjoyment of that which they love, St. Augustine thinks it may be regarded as a State of a Commonwealth. This is practically Cicero's definition, but with the elements of law and justice left out. No more fundamental difference could very well be imagined although St. Augustine seems to take the matter lightly; for Cicero's whole conception of the State runs upon this principle, that it is a means for attaining and preserving justice." (Italics mine.)

9. I TOYNBEE, A STUDY OF HISTORY 366 (1935), on *City of God* Bk. XIV, c. 13, 18. (Italics mine.)

part of a great providence which was conceived when time was not and shall be consummated when time is no more. Human history is not, as Stoics thought, a cyclic recurrence;¹⁰ human history has a goal and its destiny is governed by the law of its love.¹¹ That is the thought which lies at the heart of the *City of God*. *What role has God in His universal providence assigned to the State as a positive agency for realizing the Kingdom of God on earth and serve the purposes of the City of God toward eternity?* In St. Augustine's answer is the real fulfillment of the Roman aspiration of "eternity."

"And so he (Augustine) sets before us a philosophy of History—the continuous evolution of the Divine purpose in human society; he contrasts the earthly politics which change and pass with the eternal City of God which is being manifested in the world: he shows how these two are intermingled, interacting now, but how different they are in their real nature: one is of the earth, centered only in earthly things, while the other, because it has its chief regard fixed on that which is *Eternal*, gives us the best rule for the things of time. The earthly city which aimed only at earthly prosperity failed to attain even that, while the Heavenly City, aiming at an Eternal Peace, supplies the best conditions for earthly good as well. It is in the hope of the final triumph of the City of God, that the course of the world becomes intelligible, for then we may see that the rise and fall of earthly empires, the glories of ancient civilization, the sufferings of men in their ruin, have not been unmeaning or in vain; for they have served to prepare for the coming of the kingdom of God."¹²

The *City of God* is an ethico-theological apologetic of the Christian insertion of the divine action in the world and consequently of a supra-rational historical finalism in counterpoint to the *politeia* as a reality existing by itself, autonomous, irreducible to anything but itself. It accepts the pale aspirations and the desperate strivings of Virgil's *City of Men* and annexes them to a transcendental and absolute principle moving towards a transcendental and absolute end while actualizing at the same time sound and legitimate human development. It infuses the virtues of the City of God into the City of Men without tragically confounding the two. From these lofty yet immanent perspectives St. Augustine provides us *sub specie aeternitatis* (and therefore on the higher level of principles) a fresh foundation for a new polity. In addition, we excerpt disparate passages from *De Libero Arbitrio*, *Confessiones*, and *De Doctrina Christiana* with a more direct and immediate rapport with

10. I SERTILLANGES, LE CHRISTIANISME ET LES PHILOSOPHIES 50-1.

11. GILSON, *op. cit. supra* note 7, at 221: "Ces deux cités une fois conçues sans leur essence pure, la philosophie morale va s'épanouir en philosophie de l'histoire, discerner sous la multiplicité des peuples et des événements la persistance des deux cités depuis le début du monde et degagner la loi qui permet d'en présager le destin."

12. CUNNINGHAM, ST. AUGUSTINE AND HIS PLACE IN THE HISTORY OF CHRISTIAN THOUGHT 114 (1886).

the temporal order. Out of the polemic against the Graeco-Roman secularism, issued forth a body of positive moral, social, and philosophic doctrine, which (as we shall see as the larger argumentum of this article) will for centuries to come provide the lay and religious leaders and makers of Christendom with the inner core of a Christian polity. For our immediate purpose we have selected four radical enigmas of the *politeia* and inquired what principles, if any, St. Augustine offered for their resolution. The first serious flaw of the *politeia* was the paralyzing conception of justice as a universal, eternal, immutable, and objective due order whose correlative was rigidly actualized (or to be actualized) in the cosmopolis. At its best, this cosmological necessitarianism presaged the Augustan Eternal Law; at its worst, for want of a valid theology and adequate metaphysics, it arrested the juridical order into immobility. Secondly, the resultant tension of the divine investiture of the temporal (expressed in one form in the civil legislative plenary powers of the Pontifex Maximus) was resolved by St. Augustine with a dynamic conception of a variable temporal law which imparts to the dynamic variants of time and change meaning and values born of human exigencies and conditioned by historical contingencies. The legitimacy—rather the justification—of changes rests on the conformity not the identity of the temporal with the eternal law and in this wise secures the permanence of virtue in the process of amendment. To date, this was the most refreshing answer to the Greek dread of the *stasis* and the recurrent Roman revolutionary upheavals. Thirdly, to the pagan concept and actual assumption of plenary power as absolute and unlimited, St. Augustine responded with the only valid credentials for the exercise of authority over fellow-equals—the consent of the governed understood in the light of their personal transcendence. Fourthly, to the pagan aspiration for a creative politics, St. Augustine provided the doctrine of sound human nature as the essential prerequisite to a just social order.

In the *first* part of this article, we will summarily review these four central doctrinal theses of St. Augustine and weigh their significant relevance to any sound polity. In the *second* part, we will take the measure of St. Augustine's influence in the general scenery of history as a growing and expanding tradition in the historical genesis of political thought and in the institutional embodiments of that tradition. With due regard to both orders of actualities and thought, we will select evidences of the Augustinian tradition on four levels—the higher level of *principle* as instanced in the writings of St. Isidore of Seville, Jonas of Orleans, and Hincmar of Rheims—on the experient level of *juridical embodiment*, such, for example, as the *Law of the Visigoths*, the *Carolingian Capitularia*, and the *Assizes of Jerusalem*—on the level of *legal doctrine* as

expressed by the Feudal lawyers, Bracton and Beaumanoir—and fourthly, on the level of *political philosophy* as evolved by John of Salisbury and St. Thomas Aquinas. In a subsequent article we will consider the resurgence of Roman Law in the historic Reception on the Continent and the survival and triumph of the Christian polity in Catholic England. And in conclusion, we will then trace the logical and historical consequences of the Augustinian-Isidorian-Thomistic tradition in the development of constitutionalism through representative government as evolved first in the religious orders and then in civil society.

1. *The Augustan Eternal Law and the Liberation from Monistic Naturalism*

When Plato sought to define and determine the ideal of justice, he thought of it in terms of geometry and described it as "geometrical equality." Since geometry signified for Plato eternal and immutable verities, the inference was drawn by analogy that the ethical laws of justice have neither beginning nor change. This conception of an eternal and impersonal law, which was inherited and assimilated by the Roman Stoics into their Cosmic Reason was, however disguised or interpreted, utterly unacceptable and incomprehensible to the Christian Augustine. The law of Revelation, Mosaic and Christian, presupposes a *personal* lawgiver, who reveals the law and guarantees its truth, validity, and its authority; it cannot otherwise but be an intellectual standard, a measure (a metric *ratio*) of activity, without moral sanction to justify compulsory submission binding in conscience. For want of a transcendent theology and a metaphysics of the will, the ancients were arrested by virtue of their excessive and disjunctive intellectualism and voluntarism into a necessitarian monism. The philosophic process by which St. Augustine broke out of the all inclusive system of nature was as follows:

With Socratic intuition he maintains that self-knowledge is the first and indispensable step toward Truth.¹³ But in order to find an unchangeable, absolute truth, man must go beyond the limit of his consciousness and his own contingent existence. Whereas the ancients failed to seize upon the significance of the mutable not only as a point of departure but as a necessary term of relation to the immutable, St. Au-

13. "Noli foras ire, in te ipsum redi; in interiore homine habitat veritas," DE A RELIGIOSO c. XXXIX, 72. This is entirely in the spirit of Greek and Roman classical tradition. But after that there follow the words that mark the sharp difference. "Si tuum naturam mutabilem inverteris, transcede it te ipsum . . . illuc tende, unde ipsum lumen rationis ascenditur." By this transcendence the whole method of Greek dialectic is changed. Reason surrenders its self-sufficiency.

gustine proceeded from one to the other through the mediacy of man, denying neither meaning to time and change nor compromising immutable eternal verities. God has given to man that he "holds a middle place between the unchangeable Truth above him and the changeable things beneath him,"¹⁴ that he "should live *according to his own nature* . . . namely, *under Him* to Whom he ought to be subject, and above those things to which he is preferred; under Him *by Whom he ought to rule with reason*."¹⁵ This order is governed by the Eternal Law, which is *separate* from the nature whose exemplar it is (against the Stoics); it is the mind of the Supreme Divine Personal God for only thus can it yield the laws for men, norms to which, in the very nature of being, the human mind is bound to subscribe. But while transcending human reason, it must not be either beyond reach, like Plato's "pattern laid up in heaven," nor yet esoteric, accessible only to the moral and intellectual superior man or charismatic leader. It must be immanent in man in the sense that he has the intellectual ability to discern a law obligating him in conscience.

"The assimilation of the Greek idea of beauty to Christian morals was effected by St. Augustine, *De div. quaest.* 83, qu. 30. What is especially to be noted in Augustine's text, is the *transformation imposed on the idea of virtue*, on which alone the Ancients based their morals. For Cicero, virtue is the *honestum* and *vice versa*: and this for him is sufficient. For the Christians, virtue is still the *honestum* and, as such, is distinguished from the *utile* (what is desirable, not for its own sake, but as a means to something else); only, the whole order of the *utile* henceforth includes all that divine providence had disposed in view of the supreme end, and the *honestum* is that which is to be enjoyed (*frui* not *uti-utile*), but not used, that is to say, God. Thus Cicero's virtues are always *honestum* but henceforth wisdom, fortitude, justice and temperance are virtues because they pertain to a soul that rejoices in God, and makes use of all the rest in view of God: *neque enim ad aliquid aliud Deus referendus est (loc. cit.)*. If then the virtues are to be desired *propter se (op. cit., qu. 31, 2)* it is not because they suffice, or suffice for us, for to the Christian they come from God and lead to God, which is the reason why they are good: 'Quid ergo? Jam constitutis ante oculos nostros tribus, Epicureo, Stoico, Christiano, interrogemus singulos. Dic Epicuree, quae res faciat beatum? Respondet: voluptas corporis. Dic, Stoice, Virtus animi. Dic Christiane. Donem Dei . . . Magna res, Laudabilis res: lauda Stoice, quantum potes; sed dic, unde habes? Non virtus animi tui te facit beatum, sed quod tibi virtutem dedit, qui tibi velle inspiravit, et posse donavit.' (Sermo 150, 7, 8-8, 9). This text not only affirms the necessity of grace, which does not appertain to the philosophical order, but also marks that *virtue, of which the seeds lie in us naturally (De div. quaest. 83, 31, 1), depends on God* and grace not only as regards its efficacy, but also *as regards its existence and worth, since God is both its principle and end*; non virtus animi tui te fecit beatum, sed qui tibi virtutem dedit. As the supreme moral value *Christianity replaces virtue by God, and the moral end is thereby transformed.*"¹⁶

14. DE DOCTRINA CHRISTIANA II, 28, 57.

15. DE TRINITATE X, 5, 7.

16. GILSON, THE SPIRIT OF MEDIEVAL PHILOSOPHY 473 n. 4 (1931). (Italics mine.)

Thus did St. Augustine achieve on the ground of reason a departure from the moral naturalism of the pagans.¹⁷ By his insistence upon the eternal law as transcendent, he freed men's minds and wills from the fatalism inherent in Stoic pan-naturalism. For by vindicating the distinctness of human reason from the Mind of God, he saved the will by imparting to it that element of rationality without which it must degenerate into mere subjective willfulness or passive acceptance of the course of Nature. St. Augustine was completely dominated by the idea of the Eternal Law, which he describes as the ultimate pattern of all law,¹⁸ as the *ratio divina et voluntas Dei ordinem naturalem conservari iubens, perturbari vetans*.¹⁹ Throughout the whole of the *City of God*, the *Pax* which is to characterize all life, is the direct product of order; an objective due order apprehended by reason and with which *will*, in making its fiats of law, must be squared; for laws exist only *ut omnia sint ordinatissima*. Because the law is made manifest by a freely creative act of God, *voluntas Dei* is conceived as consequent to His reason, and so the law of God is not arbitrary but just for He commands what is in accord with His Divine essence.²⁰ And as its counterpart human law, from *jussus*, a mere command of the will, becomes an *ordinatio rationis*. Thus Reason as a flickering immanent principle has become law as the expression of a transcendent Will. The importance of St. Augustine's eternal law in political thought is that it supplies us with the true idea of objective justice, antecedent to human positive law, towards which Civil Society must tend as an end. Lack of conformity to such a standard does not destroy the Commonwealth, as Cicero held, but the more it conforms to the true standard of justice, the more instinct with the virtue of justice does Civil Society become. Thus by his concept of the eternal law as transcendent and of justice as objective, exemplary, and non-arbitrary did St. Augustine break from the Stoic naturalism with its tendency to reduce all law to a purely monistic

17. BOYER, *L'IDÉE DE VÉRITÉ DANS LA PHILOSOPHIE DE SAINT AUGUSTIN* 262 (1941).

18. CONFESSIONS 3, 8. See also LAGARDE, *RÉCHERCHÉS SUR L'ÉSPRIT POLITIQUE DE LA RÉFORME* 17 (1926): "Le Droit tel que le définissaient les Pères de l'Église n'était pas l'expression de la volonté arbitraire du peuple ou du prince, il était l'adaptation à la communauté des principes éternels de la nature et de la justice."

19. *CONTRA FAUSTUM* XXII, 27.

20. LAGARDE, *op. cit. supra* note 18, at 29: "Le Droit venait de Dieu, tous en convenait, mais existait-il dans la raison du Législateur, ou dans sa volonté? Le problème n'est pas une pure subtilité. Accepte-t-on le premier système? On reconnaît au droit une nécessité absolue, car les concepts de la raison divine sont immuable et éternels. Si l'on tient pour le second, le droit devient une qualification arbitraire que Dieu accorde ou retire à nos actes selon son bon plaisir." Cf. ROLAND-GOSSELIN, *LES FONDLEMENTS DE LA MORALE DE SAINT AUGUSTIN* 198-200 (1931). St. Augustine's explanation of the eternal law repudiates rationalism and naturalism without falling into the opposite errors of Kantian nominalism.

principle immanent in all things alike. The result was a revolutionary challenge to the traditional jurisprudence of the Romans. For though Stoicism offered a specious basis for the inviolability of the Roman Imperium, it was wholly inadequate to give intrinsic content to "law" and "rights." The Roman jurists invested the notion of law and right with a formality entirely legal. The consent of the people or the will of the prince, to whom the common sovereignty had been delegated, sufficed to constitute the full content of the law and its right to compel compliance. This *formalism* is aptly expressed by Ulpian's "Justitia est constans et perpetua *voluntas* jus suum cuique tribuendi."

At the base of the juridical equilibrium there exists a principle more ulterior than the consent of a popular assembly or the will of a prince. The source of all law and right is the eternal law conformity to which invests a human act with the virtue of justice.²¹

2. *St. Augustine's Concept of Temporal Law*

The second problem, an ethico-juridical problem of antiquity, which St. Augustine endeavored to answer, followed logically upon the first just considered. Is a law once invested with the virtue of justice forever inviolable and impervious to change? The perennial Parmedian-Heraclitean philosophical antithesis of permanence and change, of being and flux was transposed from the order of speculative philosophy to the public domain in the correlation of *phusis* and *nomos*. Could there possibly be an objective justice which was temporal, transient, and mutable? St. Augustine showed that the eternal law was widely comprehensive of all human exigencies and historical contingencies to provide the ultimate basis of the legitimacy as well as the norm of morality for the variable applications of eternal prescriptions to variant human needs and evolving circumstances. The permanency of justice is in the conformity of human law to the eternal law and the proximate title for change rests directly on the necessities of rational choice and consent. Philosophically, St. Augustine's answer conferred a significance and value to time and change which the Parmedian-Heraclitean polar tension had obfuscated. Historically, St. Augustine's solution was the answer to the legitimate aspiration for creative politics and provided the doctrinal basis for the development in theory and actuality of medieval constitutionalism.

21. *Id.* at 199: "C'est bien parce que Dieu défend une action qu'elle est mauvaise. Mais s'il la défend, c'est qu'elle contredit la Vérité, matière à la forme de la moralité et non pas de la qui est Dieu. Il faut aller rationnellement de la matière à la forme de la moralité et non pas de la forme à la matière. S'il est permis, pour raisonner, de poser en Dieu des distinctions, on dira que Saint Augustin fonde la morale dans l'Essence créatrice, origins et fin des essences crées. Le créationisme et l'exemplarisme sont, dans son esprit, seuls à même de justifier le caractère rationnel et le caractère moral de la loi naturelle."

A constant endeavor of the pagan *politeia* was to contrive a procedure for legal changes without risking the dreaded *stasis*. In principle all laws were endowed with the sacred quality of immutability, since they were of divine origin, and were, in fact, never abrogated. Men could indeed make new ones, but the old ones still remained, however they may conflict with the new ones. This character of the religious inviolability of laws proved to be the great cause of the confusion which is observable among ancient laws. Contradictory laws and those of different epochs were found together and all claimed compliant obedience.²² The resolution was but an *ad hoc responsum* of the ruler or of his judges. When the religious basis of law gave way before the Stoic's philosophic cosmic principle, the difficulty remained to plague Roman jurisprudence.²³ Legal formalism and the authoritarian *responsum* combined to give the power of the state an unlimited legal "discretion."

Three significant passages in the writings of St. Augustine treat directly with this ethico-legal problem and, historically, were frequently cited to provide the premises for the evolution of constitutionalism of medieval provenance.

"Let us call that temporal which, although it is just, may be *justly changed in accordance with the changes of time*. Then would it seem to any intelligent being that law which is called supreme reason, which must ever be obeyed and in accordance with which the evil merit wretchedness and the good happiness: *in accordance with which* finally that law which I have said should be called *temporal*, is *rightly enacted and rightly changed*, is immutable and eternal? . . . Therefore, that I may briefly explain insofar as I am able to do so in words the idea of the *eternal law* which is impressed on us, it is *that whereby it is just that all things be rightly ordered*. Since then this is the one *law in accordance with which all those temporal affairs* pertaining to the government of men *are changed*, can this law itself be changed in any manner?²⁴ The author of temporal laws, if he be a good and wise man, will consult that eternal law of which it is not given to any soul to judge, that in accordance with its immutable rule he may discern what in the order of time should be commanded or forbidden. . . . Just as in the case of *temporal laws*, although men may judge of them when they enact them, *once they are enacted and confirmed, it is no longer the judge's part to judge of them, but only according to them.*"²⁵

"Man, therefore, finds for the changeable fortunes of human life an unchangeable rule of action in this eternal law, and his law, though varied according to circumstances, will always conform to it."

22. FUSTEL DE COULANGES, *THE ANCIENT CITY* 254 (1889).

23. CICERO, *REP.* 3, 31: Justice "will require such laws as can never be abrogated."

24. *DE LIBERO ARBITRIO* 1, 6.

25. COMBÈS, *LA DOCTRINE POLITIQUE DE SAINT AUGUSTIN* 142 (1927): "Quelle erreur donc et quelle naïvete de vouloir fixer pour toujours la justice dans une formule. La justice est trop grande pour y contenir, et le peu qu'on réussit à y enfermer s'y trouve bientôt à l'étroit et tend sinon à s'évader, du moins à élargir sa prison. Car la propre de la justice, dans la conscience comme dans la cité, est de vouloir sans cesse grandir."

"Those actions which are offenses against the customs of men, are to be avoided according to the customs severally prevailing: *so that a thing agreed upon and confirmed, by custom or law of any city or nation, may not be violated at the lawless pleasure of any, whether native or foreigner.* For any part, which harmoniseth not with the whole, is offensive. But when God commands a thing to be done, against the *customs or compact* of any people, though it was never done by them heretofore, it is to be done; and if intermitted, it is to be restored; and if ordained, is now to be ordained."²⁶

Several fundamental principles of law and governance are inherent in these three passages: First, there can be no contingency or necessity in the needs of the State that can exempt itself from the universal sweep of the eternal law. All changes in the administration of justice, including changes in government, find no impediment but rather their source of justification in the law of God. Secondly, once a disposition has taken place in "temporal affairs pertaining to the government of men," rightly enacted or rightly changed, agreed upon and confirmed, there is brought into existence an objective social truth, arising out of the commitment in justice, according to which justice is to be administered. The eternal law is not only the supremacy of the divine law and the moral limitation of society as well as its source of justice; *but it also establishes the obligation of recognizing the supremacy of human positive law by reason both of the justice inherent in it and the consent from which it arises.* But this is too often forgotten, either because there is a tendency to confound power with justice and thus place force and law on the same footing; or because justice is considered inferior to power, whence instead of submitting to law it seeks to dictate to it (in which case force is rendered paramount over law); or again because justice is looked upon not only as inferior but as contrary to power, whence it follows that in order to govern more effectively justice is suppressed and force is substituted for law. St. Augustine attributes to positive law, particularly custom law, a content and significance which had escaped the ancients. Custom law as a product of popular usage is an expression of the people's will (in the sense that it is not imposed upon them with complete disregard of their natural sense of discretion). Consequently, these positive expressions of sound human needs rooted so strongly in the acknowledgment and agreement of the people can function as a *rudimentary form of constitutional law* and can be considered as limiting and defining the terms of agreement between the ruler and his subjects. But St. Augustine is quick to point out that this popular law is not merely the expression of the popular *will*. "Where there is no true justice there can be no right" applies just as rigidly to the people as

26. CONFESSIONS 3, 8.

to the ruler. "For the unjust inventions of men are neither to be considered nor spoken of as rights . . . by those who misconceive the matter, that right is that which is useful to the stronger party."²⁷ Justice is created neither by popular opinion, nor by usage, but it endures by itself immutable and constant through all the justifiable and necessary changes in temporal law.²⁸ "There can be no justice or legitimacy in temporal law that is not derived from the eternal law."²⁹ It is not born of opinion. It does not issue from the decision of a prince nor is it constituted by the vote of an assembly. The prince is subject to error. The majorities are capricious and fickle; they are moved by their emotions and interests. If their votes created the "right" then the day will come when they will legislate that it is just to steal, etc.³⁰ It follows, then, that temporal law must embody eternal justice as an objective truth to be discerned and established by human agreement as the order amongst men in accordance with the "order" of God.³¹ Law as the product of prudential reason must issue forth into *order*: hence law is defined as *ordinatio rationis*.

The early Church had forced the Empire to recognize a *higher* law that did not come from the State. St. Augustine³² urged that the rulers govern and adjudicate within the limits set by law. In his day till the later middle ages, the function of adjudication was delegated by the ruler but never alienated by him. It was not till the fifteenth century that the judiciary developed as an independent branch of government from the executive. Consequently, St. Augustine's "*judex*" at least indirectly refers to the conformity of the ruler to the laws of the land. The "*pactum*" suggests rather distantly what will develop in time into a social contract theory of society. Whether or not St. Augustine intended the ruler to be obliged by law to submission to that law ought to be decided in the light of the meaning the Fathers gave to their ap-

27. CITY OF GOD xix, 21.

28. COMBÈS, *op. cit. supra* note 25, at 137.

29. DE LIBERO ARBITRIO 1, VI, 15.

30. COMBÈS, *op. cit. supra* note 25, at 136.

31. *Id.* at 140: "Sa législation doit donc s'élaborer selon une courbe idéale qui part de la conscience, passe degré par degré du moral au matériel, de l'individu à la collectivité et aboutit à la texture extérieure de la société. Il la soudera ainsi aux lois intérieures de l'âme et prolongera l'ordre naturel que met en nous la justice dans l'organisation toute entière de la cité."

32. This is not exclusively St. Augustine's notion. St. Ambrose in his XXI letter to Valentinian II expresses the same supremacy of positive law over the ruler as well as the subjects. "And how, O Emperor, are we to settle a matter on which you have already declared your judgment, and have even promulgated laws, so that it is not left to any one to judge otherwise? But when you laid down this law for others, you laid it down for yourself as well. For the Emperor is the first to keep the laws which he has passed."

propriation of the Roman *legibus solutus*.³³ Certainly the ruler is bound by moral obligation from what we have said of the relation of eternal law to temporal law. But for want of those institutions which define the powers of the state (which the modern state has inherited from the progressive experiments of medieval times) the Roman State must needs accept in a Christian sense the *legibus solutus* in order to preserve within the state a principle of change which every sovereignty must imply.

3. *St. Augustine's Principle of Equality and Consent*

The *specific* equality of men was first definitively known when Our Divine Lord taught the inviolable and transcendent right of man to attain eternal beatitude, and revealed the universal salvific will of God. This principle of equality, expressed as an equality in the adopted sonship of God, together with Pauline dogma that "all power descends from God" constituted the greatest liberalizing force in the political world.

"The effects of the Church upon the Empire may be summed up in one word, 'freedom.' In a word, *authority was seen to be a form of service according to God's will* and such service was freedom. It was, however, *not from Seneca but from Christ and St. Paul* that the Fathers took their constant theme of the *essential equality* of men before which slavery could not stand. . . . Not only did the Fathers establish the primitive unity and dignity of man, but seeing slavery as a result of the Fall, they found that in the *sacrifice of Christ a road to freedom that was closed to Stoicism.*"³⁴

It was to St. Augustine's credit that he was the first Father to correlate these two truths and make them the basic principles of the political order. He brought out, as the pagans had never done before him, the true *significance of consent as bearing on law and authority*.

Consent as a practical source of power was recognized as far back as Solon. But the idea of a defined relationship between government and governed necessarily presupposes the Christian specific equality of men, namely, that the individual is inviolable both in reference to the conduct of others towards him and by reason of his transcendent destiny. This more definite and enlarged view of man's essential nature is the basis of inherent and inalienable rights, which, because they are God-given, must guide and limit the use of that consent. Not consent alone but consent involving reservations demanded by the objective *due* order rising from the nature of reality, constitutes the true basis of government.

What distinguishes St. Augustine's principle of equality as the basis

33. Cf. 1 CARLYLE, *op. cit. supra* note 8, at 163-4.

34. CAMBRIDGE MEDIEVAL HISTORY c. xx, 592-3.

for consent in government from the pagan *politeia* is the underlying clearer Christian concept of the *natural law*. In the light of the Christian revelation of divine and human personality, the natural law is now considered as involving the *due* order founded in the nature of things and their essential relations, to which the free-will of man ought to conform. Limitations upon the power of government must rest not solely on consent but on those reservations dictated specifically for human conduct by the natural law. This obviated the pantheistic interpretations given by the Stoics and the Roman jurists. Writing of the use among the ancients of the terms *natural law* and *law of nations, ius gentium*, Viscount Bryce³⁵ observes that "the (Roman) jurists use the two terms as practically synonymous, though generally employing *ius naturae* or *naturalis ratio*, when they wish to lay stress on the motive or ground of a rule; *ius gentium* when they are thinking of it in its practical application." This confusion is due to the Stoic's pantheistic concept of the natural law as *common* to man and beasts, and the similarity in the laws of nations was but a manifestation of the all-pervading Cosmic Reason. But being peculiar to the nations as distinguished from animals such laws as were found to be alike, were held to constitute the *ius gentium*.³⁶ St. Augustine broke through this all-inclusive pan-naturalism by distinguishing between the *due* order (*City of God* XIX, 13, 14) and an order established by human agreement (*City of God* XIX, 24) as a consequence of the "order of nature" (*City of God* XIX, 15) created by God, wherein *equal* men rationally achieve a temporal order subject to and defined by the eternal law.³⁷ From this new standpoint important inferences follow. Henceforth the *ius gentium* will be correctly understood³⁸ as a positive human law, expressive of a traditional equity, that is, approved and consented to by the free agreement of men who have found it both good, useful, and therefore truly just. National customs, as a product of popular usage, and consequently the expression of a people's reason, will gradually assert its supremacy, and as rudimentary form of constitutional law, limit and define the terms of agreement

35. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 585 (1901).

36. Gaius' definition runs, "Quod vero naturalis ratio inter omnes homines constituit, id quod omnes populos peraeque custoditur, vocaturque jus gentium, quasi quo jure omnes homines utuntur," *INSTIT.* II, 1.

37. GILSON, *INTRODUCTION A L'ETUDE DE SAINT AUGUSTIN* 159 (1929): "Ainsi toutes les prescriptions particulières de notre conscience morale, toutes les législations changeantes qui régissent les peuples, découlent d'une seule et même règle, adaptée sans cesse à des besoins eux-mêmes changeants et divers, mais qui, en elle-même, ne change jamais. Tout ce qu'il y a de légitime dans l'individu et dans la cité en dérive; elle est véritablement *la loi les lois*."

38. ISIDORE OF SEVILLE, *ETYMOLOGY* V, c. 4.

between the ruler and his subjects. This will appear for the first time in practical forms in the early coronation oaths of the Merovingians and, later, in the *capitula* of Charlemagne.

Thus the temporal law, ensuing from equal men with a right to consent according to the dictates of the natural law, establishes a positive right based on the natural right to *immunity from the arbitrary*. It will be centuries before institutions will develop to guarantee effectively the enjoyment of this right; but from the day the Churchmen and Christian rulers attend to those passages of Augustine—*De Libero Arbitrio* 1, 6; *De Vera Religione* c. 31; *Confessions* 3, 8; *City of God* XIX, 15—European society labored to embody in the law of the land the administration of justice. Just as there is no natural right or title in any one to lord it over his equals, so too there is no natural right even in a duly constituted ruler to disregard arbitrarily the law "agreed upon and confirmed" by his equals. In the light of our highly developed institutions this seems fairly elementary to us at this later date in the history of Western Civilization. But if we project ourselves into the age of St. Augustine, we can see what a tremendous energizing and revitalizing force he is injecting into society. He harmonizes in "well-ordered" relation and proportion the equality of men and the subjection implied in government. This he does in relation of freedom embodied in and protected by law. For liberty is not that which is conceded by governments to an individual but rather the security of natural rights by positive law against the arbitrary action of any individual or power. In effect, consent to law should restrain authority from compelling an individual to do what is not required by his nature.

The pagans had always invested authority with a moral idea, namely, that it was essentially a divine power (*a quid divinum*).³⁹ But owing to their erroneous doctrine on the subject of equality, which is the essential correlative to any definition of the powers of government, their authority, either from religious motives or from philosophical misconceptions, left the individual completely helpless.⁴⁰ St. Augustine strikes at the roots of absolutism however concealed under the guise of divine representation. He distinguishes clearly between the power, which is from God, and the office itself which is of human origin.⁴¹ By his repeated

39. COULANGES, *CITE ANTIQUE* 206.

40. COMBÈS, *op. cit. supra* note 25, at 121.

41. St. Ambrose and St. John Chrysostom, both contemporaries of St. Augustine, draw this distinction too but they do not, as St. Augustine does, bring in the significance of consent as related to the equality of men, as the wider basis for the further development of constitutional government. AMBROSE, *EXPOSITO IN LUCAM*, lib. 4, 29; CHRYSOSTOM, *HOMILIES ON ROMANS*, Hom. 23: "I am not now speaking about individual rulers, but about

insistence upon the principle that no man has the right by reason of his nature to rule another,⁴² and that the State is an association ensuing for a purpose common to all its members, St. Augustine prepares the way for a theory of consent as the basis of the right to rule.

"In this sense then in a Christian political order *authority* may be said to be of *divine right*. The *classical misconception* on the point consists in supposing that all power is legitimate because all power comes from God. The *true doctrine* is that no power is legitimate save that which comes from God. *To have the right to exact obedience, the authority must first itself obey the eternal law*; its whole legitimacy consists in being an expression of that law."⁴³

By relating the divine origin of authority to the principle of equality, St. Augustine has provided us with a basis for constitutional limitation, not merely as a limitation of wrongdoing but as a limitation of the power

the *thing* in itself . . . (Paul) does not say 'there is no ruler but from God'; but it is the thing he speaks of, and says: 'There is no power but from God.'"

42. CITY OF GOD XIX, 15: According to St. Augustine, the State is willed by God as a remedial institution consequent to the Fall of man. Authority is therefore for him, in the words of St. Paul (Romans, xiii): "God's minister for good" and "an avenger to execute wrath upon him that doth evil." Paul's exhortation to the Romans, who felt that their Christian faith exempted them from obedience to the temporal rulers, is not a dogmatic definition of the nature of political society but a statement of the beneficent consequences of a power given by God Himself. St. Augustine cited *Romans* xiii in his polemic with the Donatists to justify his recourse to State intervention for protection against the violence of the Circumcelliones and the extreme rabid elements of the Donatists. It is not till the thirteenth century, that St. Thomas is to show that the State is an essential requirement for the natural final end of man, and on this account, then, authority, so necessary for the purpose of the State, is equally natural.

43. GILSON, THE SPIRIT OF MEDIEVAL PHILOSOPHY 475 n. 21 (1931), *De Libero Arbitrio* I. 6. Bishops of the Middle Ages and a number of political writers and counsellors of kings made repeated and countless references to the words of St. Augustine and underscored in forcible terms the root of political evil as the *libido dominandi*, the sin of the devil, the sin of pride. Portraits of Christian Princes and Mirrors of Justice were modelled on the passages from the City of God. In the absence of institutional checks, there was no more effectual moral restraint on the Christian conscience of the Middle Ages than the charge of pride, particularly at a time when noble birth and force of arms accounted in part for the power of many rulers. Pride, not greed, is the great deadly sin that does violence to the "just peace of God, and loves its own unjust peace." Today, the *superbia* has been replaced by *humilitas* as the most deadly of the seven deadly sins by our modern anti-Christians. St. Augustine scores in word repeatedly quoted in medieval times the arbitrary assumption of power over fellow-equal as the *libido dominandi*. It is a "sinful soul that aspires to lord it even over those who are by nature its equal, that is, its fellow-men. This is a reach of arrogance utterly intolerable." DE DOCTRINA CHRISTIANA I, 23, also: "It is thus that *pride* in its perversity *apes* God. It abhors equality with other men under Him; but, instead of His rule, it seeks to impose a rule of its own upon its equals. It abhors, that is to say, the *just peace* of God, and loves its own unjust peace; but it cannot help loving peace of one kind or another. For there is no vice so clean contrary to nature that it obliterates even the faintest traces of nature." CITY OF GOD c. XIX, 12.

itself. The pagan philosophers, Plato, Aristotle, and Cicero, had formulated a hierarchy of duties in accordance with "justice." But none of them could enter into the intrinsic value of justice except to refer it to a cosmic functional disposition of human action that eliminated disintegrating conflict and resulted in a pacific and aesthetic order of co-existence.⁴⁴ St. Augustine makes morality inherent in the social order and invests it with the virtue of justice in a way never understood by the pagans. His Christian principle of equality arising out of a *free* personality, and, as related by him to the true origin, nature, and function of authority, becomes the basis for a Christian version of creative politics in answer to the pagan secular *autarchia*. A social consciousness is awakened by the necessary demands of the natural order and out of a multitude of "people" is constituted by a *pactum societatis* with a view to concord and peace founded on justice. Not then the peace of conquest, which even an organized band of thieves have amongst them; but a peace resulting from the harmonious activity of men according to an order that is above purely human contrivance yet within the cooperative efforts of a people to discern and realize.⁴⁵

44. COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE 501 (1940): "The error of Classicism may be summarily described as a *failure to identify the true source of power and, therewith, its true character and conditions*. The error thus indicated is original, and to it may be ascribed the whole tissue of fallacies which frustrate the secular aspirations of men. These fallacies Christianity explodes in a sentence: *all power cometh from on high*. In so doing, it does not subscribe to the antithesis which sets 'power' in opposition to benevolence after the manner of those flabby sentimentalists whom Aristotle so sharply criticizes in a famous chapter of the *Politics*. Nor is it condemned to labour with Aristotle himself in a vain endeavor to effect a partial reconciliation between the two. For it perceives that, however vicious in principle, the secular *desire of man to apprehend and possess himself of power* is but the perversion of a wholly natural and proper impulse to save himself from danger and destruction; and that it may be explained as a consequence of his *inability to recognize his own highest and greatest good*. Accordingly, for the Christians, the antithesis is not between 'benevolence' and 'power'; *it is rather between the love of power and the power of love*. From this standpoint the *pax caelestis*, the order of the divine society, constitutes at the same time the order of love. This may well be mysterious, but it is not mythical or hypothetical. For it means simply that the self-same human wills have attached themselves, not to the transcendental objects (that they leave to Platonism) but to a principle which gives to the 'object' world a wholly fresh complexion thus 'making all things new.' That is to say, *what it prescribes is adhaerere Deo, adhesion to God, the source of truth, beauty and goodness, the supreme reality, as the one fundamental principle for individual regeneration and for social reformation, the point of departure for a fresh experiment in human relationships, on the acceptance of which rests the only real hope of fulfilling the promise of a secular life.*" (Italics mine).

45. COMBÈS, *op. cit. supra* note 25, at 78: "Concord, that is to say, the union of hearts, constitutes the first foundation of the city. The second, according to St. Augustine, is the union of wills (*compositio voluntatum*). These two he takes up into the third, a communion of nature. This communion of nature, or narrow concentration of interests of

4. *St. Augustine's Doctrine of Sound Human Nature*

It would be a serious error, in appraising pagan *politeia*, simply to depreciate ancient institutions and classical ideas. Antiquity possesses legitimate claim upon our respect because Greece and Rome bore a masterful part in the struggle between good and evil, truth and error, liberty and oppression. We have inherited their wisdom and have drawn lessons from their failures. To dissever the present from its connexion with and indebtedness to the past is to cut the present from its roots. For, barring the intellectual achievements of the Fathers and the Schoolmen, modern non-Christian thought has been a retrogression in comparison with the inventive progress of pagan thought. The lessons born of the contrasts of pagan and Christian polity is the full appreciation of the implications of the flaws, limitations, and inadequacies of the classical commonwealth, (of antiquity or in any revived form thereafter), *when assumed as absolutes* and to realize the tremendously significant import of the Christian contribution to the science of governance.

St. Augustine traced the flaws in the Roman Imperium to the acceptance of a defective starting point. What was needed to rehabilitate the Roman State was the radical revision of first principles, and this he proposed to his countrymen as the *real* fulfillment of the Roman aspiration to secular achievement. The Graeco-Roman speculation had pried into the nature of man and left it more captive than ever. St. Augustine had known this only too intensely from his own personal life. In his treatises *Contra Academicos*, *De Moribus Manichaeorum*, *De Libero Arbitrio*, and *De Trinitate*, to mention only the pertinent ones, we have St. Augustine's liberation from the world of doubt, from irresponsible animality, and the assertion of conscious self-determination, which by reason of man's direct ordination to God, is endowed with stewardship over the irrational universe. This sense of freedom, arising from the certain knowledge of man's destiny, is based on his concept of *sound human nature*.

By sound human nature, we understand, in brief, that the intrinsic finality of man is operative and can attain its distinctive *finis*. It does not matter whether we consider man before or after the Fall, or in any

all kinds, moral and material, within the same groups, nature—which is one and the same in all men—has placed under the charge of all members. This union of hearts and wills and interests, this *factum societatis*, as St. Augustine calls it in his *Confessions*, constitutes a bond '*redacta in vinculum . . . devincta*,' which binds all the members of the society one to the other. This bond comprises all reciprocal commitments, all acknowledged rights, all the duties that have been consented to, and a whole code of mutual obligations and sacrifices."

possible natural state, viz., destined to natural beatitude. We can know the soundness of human nature either by its relation to realities distinct from itself—God, and the universe—or by a study of its own faculties.

In place of Destiny, Fate, Ananke, Prime-Mover, the "formal" god of Ideas, or the physical god, nature or universe, the Judaic-Christian revelation made known the true nature of a provident and loving God. A new and sound cosmology could now be evolved based on a free creative act. Only a "personal" God could differentiate between different orders of existence and perfections, and be the same Author of human personality and its inviolable freedom and of irrational creatures governed by necessary law. It was now possible to envisage the divine reality as both transcendent and immanent, prior to nature, the world of time and space, in which we live, and yet operative within it. The word "creation" defined as "productio ex nihilo, ab omni necessitate libera" expresses the sense of direct and immediate divine activity and its freedom from all compulsion, while in the knowledge of the divine and human personality we have the key to the understanding of man as the "image" of his Creator⁴⁶ and the full moral import of that relationship. Man and his destiny was no longer subject to any part of physical creation; he was liberated from the nightmare involved in the concept of nature as a closed system, determined by its own exclusive laws, and of the antithesis between liberty and cosmological necessitarianism.⁴⁷ The Promethean drama was cancelled and virtue no longer strove desperately against chance and necessity. For, by the Christian negation of the classical antithesis between man and environment, men could breathe with the freedom of the sonship of God to realize the Kingdom of God both within themselves and without. God, the *Summum Bonum*, is the *bonum necessarium* of man and in terms of this transcendental relation we have the *ratio* of any human achievement and the measure of true progress. The Good thus proposed is strictly a "per-

46. BUTCHER, SOME ASPECTS OF GREEK GENIUS 79 (1916): "Not until man was rescued out of the kingdom of nature and taken up into the commonwealth of God and into personal relations with the Divine being, could he be more than a member of a social organism, or an instrument for achieving the ends of the State. Then only did a universal morality become possible and the idea of personality receive its full content."

47. Stoicism began with an attempt to get behind the merely formal definition of superstition and to discriminate between popular and vulgar belief on the one hand, and true religion on the other, on the basis of a cosmology erected upon "fate," *ordo, series causarum* of "nature." It then proceeded to assert, as the supreme command of ethics, the precept: Follow nature. The significance of such a command must, however, remain questionable in this particular context; since, if nature is in fact fate or destiny, it is not clear how far anyone is at liberty to defy her ordinances, is perhaps indicated by the famous verse from the hymn of Cleanthes: *ducunt volentem fata nolentem trahunt*.

sonal" good, not a "corporative" or "collective" good. The relation of the individual conscience to a living personal God transcends all social, national, and racial divisions and introduces a new element into the problems of political philosophy. It radically diminishes the old prerogatives of the civil State; it is the moral limitation of all authority, law and government and offers the ultimate basis for constitutional (that is to say, self-imposed) limitation.

This *Summum Bonum* is not imaginary nor problematic. It is real and attainable. Wisdom⁴⁸ is the knowledge and possession of this Sovereign Good. Therefore it is within the power of man to *know* and *choose* God. Herein is the essential difference between the Stoic "reason" as the "common patrimony of humanity," and the Augustinian *active* intelligence of each individual to discern for itself, with Divine assistance, the

48. This, summarily, is the direct answer of St. Augustine to the Academics who failed to see the contradiction implied in their academic doubt. They strove for "wisdom," a way of life that gives its fulfillment of "satiety" while they asserted at the same time the uncertainty of its attainment. St. Augustine rejected scepticism with complete assurance. "Academic doubt," he says, "is academic madness." Both intellectually and morally its consequences are dire; it leads to a cult of the unintelligible and finally to the suicidal end of the Stoics. But St. Augustine's conviction proceeds from an inescapable fact. We do know the truth and we cannot not know it. There are subjective evidences which would not exist if they did not consist in the apprehension of objective truth, in the attainment of which sense knowledge is a reliable vehicle. And, if for the sake of argument, we were to grant and not concede the objections the Academics urged against the validity of the evidence of our sense, St. Augustine points out there are kinds of knowledge to which these objections do not apply. The distinction between right and wrong, the force of a logical argument, the apprehension of unity in numbers, the apprehension of being, beauty, goodness and truth—these are proofs of intellectual activity, where the illusions of sense cannot affect us, and about which we are in complete agreement with one another. There is an intelligible order which is not revealed to us by mere sense-perception and which is not subject to the variableness of things of sense. But whence can we attain to a knowledge of these unchanging realities? Just as the sun not only makes all other things to appear but is itself apparent to the eye, so is it that God Who is the Truth, not only makes all truths known to man, but is Himself knowable by our intelligence. For the attributes of truth are the attributes of God. We prescind here from the debate between Gilson and Boyer on the intimate nature of knowledge according to St. Augustine. What is pertinent here is the assurance of the certitude of knowledge implied in the doctrine of illumination. We cannot know that which is not. That which is real is intelligible for in the "being" which it has received from God, it possesses the intelligibility of its own existence, had by participation from Creative Truth. Here we have the ultimate reason for the goodness and order in the universe, according to which, each degree of existence seeks its own finality in realizing that perfection which God has willed to it. Order is not superadded to being; it is identical with being. The dialectic process does not create this vision however helpful it be in the cognizance of this objective order. There are intellections which are common to all intelligences and force the way to objective knowledge, to the knowledge of truth outside the individual mind, which determines the predications of judgments.

essential relation of things; and though it may err, it asserts the independent competence of each to regulate human activity. Felicity, wisdom, "insight" into truth are not confined to the Aristotelian civilized man, nor are they the peculiar privilege of certain Platonic "types." These blessings depend upon the power of rational choice, and as this, in turn, is a function of conscious life, it is inherent in the native endowment of mankind. As such, it is *inalienable*, in the sense, at least, that it can be impaired by no power from outside. Thus St. Augustine is able to posit the individual within the social order⁴⁹ without destroying his independence.⁵⁰ St. Augustine, in denying the pretensions of reason to omniscience and infallibility on the one hand and on the other its individual uncertainty, saved reason by affirming the existence of an order of truth and value, which, being in the world as well as beyond it, was within the power of man to apprehend.⁵¹ And, in saving the reason, at the same time he saved the will, by imparting to it that element of rationality without which it must degenerate into mere subjective wilfulness. St. Augustine liberates human nature from any determinations outside itself. He vindicates for man the power to find "peace" for his body, and its appetite, "*peace*" of the rational soul in the harmony of knowledge and action, "peace" between man and man in *well-ordered concord*, civil peace in the righteous relations between the citizens; and all relations and ordinations rising according to the objective order of things to a *harmonious enjoyment* of God. The tranquillity issuing from this *just* order is the peace of God.

The freedom of the rational soul is part and parcel of its rationality. In this conception of the will, as an autonomous determination of the total self and as the power to bring about in the social world the order prescribed by the nature of things—*its naturalis ordo prescribit*—St. Augustine discovered the true principle of "creative politics" whose

49. 1 SERTILLANGES, *LE CHRISTIANISME ET LES PHILOSOPHIES* 209: "L'oeuvre du bien et l'obtention de la béatitude n'est pas seulement un fait individuel; c'est un fait social, en ce que, liés par nature et voués à l'amour, nous ne pouvons vivre, progresser et aboutir qu'ensemble. Ici, théologien toujours, Augustin se garde bien de fonder la société humaine uniquement en raison. Ne fût-elle qu'un fait de raison, elle s'enracinerait toujours en Dieu, et l'autorité qui en est le lien serait toujours finalement une autorité de Dieu. Mais elle se fonde sur la charité, c'est-à-dire sur Dieu pris comme objet commune de la béatitude dernière. On s'aime parce qu'on aime Dieu et qu'on est animé envers lui d'une commune espérance. L'ordre social n'est justifié finalement qu'ainsi, parce que tel est l'ordre vrai et telle notre finalité véritable."

50. BOYER, *op. cit. supra* note 17, at 95: "Un peuple est autre chose que quelques millions d'individus. C'est que ceux-ci ne sont pas produite au hasard ni sans concourir à un but déterminé. Ils sont parties d'un tout."

51. GILSON, *L'Avenir de la Métaphysique Augustinienne* in *MELANGES AUGUSTINIENS* 376 (1931).

vitality and vigor sprang from every member of society. This he vindicated vigorously against every pagan school of thought which destroyed the independence of the individual by a bewildering scepticism or assumption into a World-Soul. The significance of the freedom of the will is not wholly in its efficacy, its power as efficient cause but in its affectionate pursuit of the true good, which is outside itself, God. The topic of temporal felicity, if it be related to wisdom, as the pagan sages admitted, rests on the philosophic and theological conception of God as the *Summum Bonum*. The moral gulf between the pagans and the Christians could be traced to the pagan eudaemonism and the Christian Paternity of God. The Aristotelian *appetitus ad formam* assumes in St. Augustine a mystical meaning. It goes beyond the cosmological order to the human order and finds in the necessity of adhering to God by loving fidelity, its real personal happiness. From this point of view, any effort at achieving a *just* social order should treat men as ends rather than as means. It condemns as false, exploitation and power politics and gives the individual citizen a stature in the State never conceded nor even conceived by the pagan state. When Christianity established with definitive clarity the transcendental relation of man to God, he was freed from Greek contingency, Epicurean chance, and Stoic fate. The cult of the unintelligible dissolves in the certain possession of divine truths, and the apotheosis of the fortuitous exception to the order of necessity, namely, the charismatic leader, becomes unbearably repugnant. In asserting our independence of "external causes," St. Augustine is far from declaring a state of warfare between ourselves and the things about us. Rather the existence of evil is to be explained by the *deordination* of man's will, which St. Augustine calls the sin of the devil—pride.

*Falsitas non ex rebus sed ex peccatis*⁵²

The pagan world justified power politics as a surety against the accidents of human co-existence. St. Augustine strikes at the false picture of nature underlying the pagan *cupiditas dominandi*. All that God gives us is in its own nature good, as the Creator at first pronounced it to be. In the full view of all the evil in the world, physical and moral, all the suffering and all the sin, St. Augustine maintains, in the light of revelation and with the help of Plato, that evil is not an absolute, positive factor in the world but that it is only the privation of good. There is no existence apart from the good. By thus insisting on the unreality of evil, on its unsubstantiality and nothingness, St. Augustine is able to strike a blow at the pessimistic foundations of any *politeia* that would herd or coerce human beings like so many recalcitrant animals. Society,

52. DE VERA RELIGIONE XXXVI, 66.

rather, is to foster those conditions of co-existence that would increase the freedom of the individual in seeking his true happiness while yet sojourning on earth. St. Augustine's doctrine on the soundness of human nature can not be more sublimely suggested than by the resemblance he draws between our will, intellect, and memory and the Three Divine Persons. With the courage of the convert who has seen the Truth and been liberated by it, St. Augustine does not hesitate to defend the soundness of human nature, in spite of any harrowing memories of his past. He exposes the error of the Platonists which rested upon a false antithesis between body and soul. He rejects Stoic impassivity as a monstrous vanity. All things work for the good of those who love God. The very passions which disturb the even tenor of life may be rightly directed and offer occasions for self-discipline. The ancients had labored under a defective psychology. They never had any clear idea of the will as a factor in moral actions, and therefore they ascribed to knowledge functions which it cannot perform.⁵³ St. Augustine offered Christianity to them not as a superior gnosis but as a way of life which would regenerate the individual from the decadence of pagan ethics and religion, and as a living creative force restore the health of the State. As for his doctrine on grace, it emerges as the answer to a perfectly normal and legitimate human demand for illumination and power. Reason strives toward the prizes of power and faith secures the greater adventures of reason.

We cannot help observe that there is providence (for the history of philosophy) in the heresies that St. Augustine combated. In opposing the morbid depravity of Manichaeism, he vindicated the goodness of the nature of man. In opposing Pelagianism, he rejected the resurgence of the Stoic's optimistic naturalism, and defined the limitations of human nature. Since evil is not inherent in the nature of men, no one can ever assert that it is rooted in the corrupting institutions of society; certainly not if society, to which men are impelled by a sense of human

53. If for Socrates knowledge is virtue, and one were to insist against the objections of Aristotle that Socrates referred to a moving, compelling personal conviction, St. Augustine on the other hand casts light on the inadequacy of the Socratic psychology by proving the converse untrue. Socrates held that error and wrongdoing proceeded from ignorance whereas for the Christian culpability presupposes knowledge and deliberation. It is the turning away from truth that helps confirm wrongdoing.

Cf. DE LIBERO ARBITRIO III, 52: "It is the most just punishment of sin, that everyone should lose that which he would not use well, when he might have done so without any difficulty if he had wished: that is to say that he who knows what is right and does not do it should lose the knowledge of what is right; and that he will not do right when he might should lose the power of doing it. For in actual fact ignorance and incapacity are penalties that befall every soul that sins."

solidarity and the need for one another, is the work of good will guided by the true objects of love. Corruption is not inherent in the political fabric, independently of the wills which create and sustain it. St. Augustine is far from denying that society is bound together by a community of interests and legal rights. The utilitarian aspects of society is but part and parcel of the character of our temporal existence. Yet conflict can not be avoided, nor justice be but an imposition, and the individual reduced to a numerical expression of activity, if society is organized apart from God. The soundness of human nature is vindicated by the unhappiness and the disorders that ensue when society denies to it the true objects of love. The explanation of evil is rooted in the refusal of man to acknowledge his privileges and responsibilities according to the condition of his nature, and strives to create his own truth and his own vision of happiness.

"St. Augustine thus discovers the clue to human history, . . . purely and simply in the congenital impulse of human beings to attain happiness. And this happiness they find in order, that is to say, a disposition of arrangement of equal and unequal things in such a way to allocate each to its own place. . . . Life is thus conceived as inherently and intrinsically order. In the effort to achieve such an order, success or failure will depend upon (a) an *accurate estimate* of the things in which *true felicity* may be found, and (b) *the subordination of all other values to those which are found to be ultimate*. In other words it depends upon a *combination of intellectual insight and moral power*. . . . In the first place it presupposes a *grasp of first principles*, in default of which thought must inevitably run wild. And, in the second place, it *involves processes which are no less moral than mental*, that of gravest danger confronting the thinker being that of permitting his own shadow to fall between himself and the truth. 'It is obvious,' observes St. Augustine, 'that error could ever have arisen in religion, had not the mind chosen to worship either itself or body or its own vain imaginings. That it should have succumbed to this temptation is, of course, to be attributed to *pride* (superbia) which thus for him, as for Tertullian, is the *devil's own sin*, and peculiarly, the *sin of philosophers*. . . .'"⁵⁴

"Can Paganism, I ask you, produce anything equal to ours, the one true philosophy?"⁵⁵

54. COCHRANE, *op. cit.* *supra* note 44, at 486-7.

55. CONTRA IULIANUM IV, 14, 72.

II. ST. AUGUSTINE AND MEDIEVAL CONSTITUTIONALISM

After the destruction of the Roman World by the great barbarian invasions of the fifth century, an enormous task of organization fell upon the Pontiffs, Bishops, and the Christian leaders. From the ruins and disillusionments of the heretofore imperishable *Roma Aeterna* there was to rise a new social order reconstructed on Christian truths and on St. Augustine's four master ideas of peace, justice, order, and law. Scholars differ on the paramountcy of each. Bernheim⁵⁶ maintains that the Augustan *pax* is primary amongst St. Augustine's political concepts; Arquilliere⁵⁷ holds first *justice* and then *order*; Otto von Gierke's⁵⁸ preference is for St. Augustine's concept of *order* and the immense influence it had in medieval, social, and political doctrine, particularly in the social philosophy of St. Thomas Aquinas. A contemporary scholar⁵⁹ inclines to the view that the true guiding idea for St. Augustine is his concept of *law*, which, as he observes, while it is not mentioned as often as others, is certainly conceived as their presupposition. This emphatic divergence of preference attests to the equally great importance and significance of these four central ideas in the teaching of St. Augustine. Certainly these concepts essentially connote one another at least mediately and the inferences drawn from one cannot but affect the logic of the other no less than the application of one to the problems of society would not involve the immediacy of the others.

Of the Christian truths which bore direct import for the new social order of Christendom, the principal one, from which most of the others are but necessary derivatives, was the inviolability of the human personality. This Christian revelation caused a radical revision of the traditional viewpoint of the individual in society and, as a consequence, a fresh reevaluation of values.⁶⁰ The tremendous effects of the Christian revelation of human personality on the ensuing Christian era not only in social thinking and upon the social order but also in the evolution of

56. ARQUILLIERE, L'AUGUSTINISME POLITIQUE 9 (1934).

57. *Id.* at 17.

58. POLITICAL THEORIES OF THE MIDDLE AGES 101 n. 3 (1913).

59. PARSONS, THE INFLUENCE OF ROMANS XIII ON CHRISTIAN POLITICAL THOUGHT IN THEOLOGICAL STUDIES 326 (Feb. 1941).

60. STURZO, CHURCH AND STATE 23 (1939): "In the sociological field Christianity brought about an inversion and re-ordering of values. Society is nothing more than the projection of the individual; all social foundations are laid by the individual. The submergence of the individual in the social form, as in pre-Christian societies, was a deviation and in many cases a perversion; the return of the individual as the basis of very social value is a conversion and a restoration."

a doctrine of rights, connatural and juridical, was to prove one of the most significant contributions of Christendom to the genesis of medieval constitutionalism.

"In this sense Medieval Doctrine was already filled with the thought of the inborn and indestructible rights of the individual. The formulation and classification of such rights belonged to a later stage in the growth of the theory of the Natural Law. Still, as a matter of principle, a recognition of their existence may be found already in the medieval Philosophy of Right when it attributes an absolute and objective validity to the highest maxims of Natural and Divine Law. Moreover, a fugitive glance at Medieval Doctrine suffices to perceive how throughout it all, *in sharp contrast to the theories of Antiquity, runs the thought of the absolute and imperishable value of the Individual: a thought revealed by Christianity. . . . That every individual by virtue of his eternal destiny is at the core somewhat holy and indestructible even in relation to the Highest Power; that the smallest part had a value of its own, and not merely because it is a part of a whole; that every man is to be regarded by the Community, never as a mere instrument, but also as an end: all this is not merely suggested, but is more or less clearly expressed.*"⁶¹

The doctrine of the rights had by human nature and therefore inalienable, prior to and superseding the prerogatives of the state authority was entirely alien to the pagan *politeia*. From this doctrine would evolve in the course of history a succession of *legal* guarantees variously denominated as *franchises*, *liberties*, *privileges* in order the better to secure through cooperative organized effort the inviolability and immunity of man against arbitrary action. In this historic development, the political philosophy of St. Augustine worked as a ferment for a better clarification of the meaning of these rights, and concurrently, toward the more concrete embodiment of them in institutional forms till finally the *homo legalis* became consonant with the *homo liber*. This development will express itself on the three levels of *ideas*, political *virtues* or practical *habits*, and *institutions*, and within the two categories of thought and actualities.

1. ECCLESIASTICAL WITNESSES

a. *St. Isidore of Seville*

In the construction of the new social order, the *Pax Christiana*, two doctrines in particular acted forcibly upon the minds of the Christian leaders, namely, St. Augustine's principle of equality and his concept of the nature and purpose of temporal law. As we trace the expansion of St. Augustine's teaching into a tradition, we will select from the aggregate multitude of evidence only such specific references which will illustrate successive stages of development both doctrinal and actual.

61. VON GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* 81-2 (Maitland's transl. 1927).

The first major advance based upon St. Augustine's teaching occurred in the seventh century. In the *Etymologiae* and *Sententiae* of St. Isidore of Seville we find the first striking illustration of the slowly modifying influence of St. Augustine's ideas upon the principles of Roman Law.⁶² In a land where several distinct cultures met and blended, the Iberian, Goth, Roman, and Christian, the writings of Isidore, which were to serve actually as the textbooks of the Middle Ages, together with his keen practical evaluation of the contributions of Roman institutions, were responsible for the origins of a nascent national unity in Spain. He was learned in the best achievements of pagan thought and freely acknowledged his indebtedness to the "ancients."⁶³ Yet at the same time he was acutely aware of the serious deficiencies of the pagan's polity. Both his *Etymologies* and *Sentences* present a whole thesis of political theory, and what he says is significant because "he is giving us not merely his own judgments but the generally current conceptions of his time."⁶⁴ His definitions were eventually embodied, in the twelfth century, in Gratian's *Decretum*, and so passed into the structure of the Canon Law, and furnished the form of all the medieval ecclesiastical treatment on the subject of law. St. Isidore transmitted the doctrine of St. Augustine by his own use of Orosius.⁶⁵ Roman law was characteristically "formal"; it derived its right to compliance by the very fact that it was enacted by the consent of a popular assembly or by the will of the Prince. St. Augustine had shown how the norms of justice antecede and must govern human choice. St. Isidore clarified the content of the Augustan objective norm by defining (with a sound juridical sense) the *material* characteristics of law.⁶⁶

62. SÉJOURNE, SAINT ISIDORE DE SEVILLE, *Son rôle dans l'histoire du droit canonique* 66 et seq. (1929). Cf. *id.* n. 2, 64: "La philosophie du droit marque des conquêtes dans Saint Isidore. S'il est vrai que 'les Jurisconsultes romains n'ont pas donné des "choses", la définition large et philosophique que nous en donnons, et qui comprend en elles tout ce qui peut être l'objet d'un droit' (Ortolan) ils faut dire que cette définition se trouve au livre V des *Étymologies*, chapitre xxv: 'Res sunt quae in nostro iure consistunt.'"

63. DE LABRIOLLE, *HISTORY AND LITERATURE OF CHRISTIANITY* 517 (1925). Long before the Arabs awakened to an appreciation of Greek philosophy, Isidore had introduced Aristotle to his countrymen.

64. 1 CARLYLE, *op. cit.* *supra* note 8, at 107.

65. In his edition of *HISTORIANUM ADVERSUM PAGANOS* lib. vii, 5 of *CORPUS SCRIPTORUM ECCLESIASTICORUM* (1882), Zangmeister shows that its author, Orosius, used St. Augustine 53 times, borrowing from the *De Civitate Dei*, the *Confessions*, and the letters. He says it is certain (p. xxx) that Isidore, though he does not mention Orosius, used him in his *De Natura*, the *Chronicon*, the *History of the Goths, Suevoi and Vandala*, and in the *Etymologies*.

66. LA GARDE, *RECHERCHES SUR L'ESPRIT POLITIQUE DE LA REFORME* 17 (Picard's transl. 1926).

"Law should be *honest*, just, possible, according to nature, conformed to the customs of the country, suitable to place and time, necessary, useful, 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."⁶⁷

In St. Isidore's matter for positive law and its ethical quality, we have the first beginnings of that long tradition which is to evolve into "fundamental rights of men," "traditional liberties," long established usages that are rooted in the consent of the people and their usefulness, and in all those instruments which retain positive guarantees of natural law rights. For the natural law is nothing but the law of God imprinted in our rational natures for the conservation of our nature and for the promotion of its perfective end; a law which man discerns by his reason and recognizes its moral necessity. But this law is not, and cannot be, in itself a code. It is no substitute for human law, though it gives authority and direction to human law.

Another contribution of St. Isidore was his teaching that consent must be consequent upon the *reasonableness* of law evidenced by the popular origin of law, in its sound discretion and general adoption. This was a new and vital point for the Christian development of law and a sharp departure from the *benepiacitum* and *arbitrium* of the Roman ruler.

"Law is something *established by the people* which the elders together with the common people have *approved*. For what the king or emperor decrees is called constitution or edict. The institution of equity is twofold, sometimes in laws, sometimes in usage. The difference between law and usage is that law is written, but *usage* is *custom approved by length of time or unwritten law*, for law is so called from *legendo*, for it is written."⁶⁸

"Usage is a long standing custom *derived from manners only*. Custom is a kind of *right instituted by manners* which is taken for law when the law is lacking; nor does it matter whether it exists in writing or in reason, seeing that reason commends the law also."⁶⁹

"Moreover, if the law is founded on reason everything will be law which is *founded on reason*; so long as it accords with religion, it agrees with discipline and is an aid to salvation. It is called custom because it is in *common use*."⁷⁰

Gratian, who incorporated St. Isidore's divisions and definition 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 custom law, that he concluded that all valid law

67. ETYMOLOGIES 10, 6. It is repeated in IVO OF CHARTRES PANORMIA, the handbook of canon law.

68. 2 ETYMOLOGIES 10, 1.

69. 2 *id.* at 10, 2.

70. 2 *id.* at 10, 3.

is 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*. He prescribed for the legitimacy of enacted law the same virtues which constituted the validity of custom law and thus formulated a common basis of justification for any sort of good law. Whereas St. Augustine's principle of equality disclosed the necessity for consent in government, St. Isidore's analysis of the material objects of law brought out more fully the ethical and legal significance of that consent once given.

A third development of St. Isidore was based on St. Augustine's clear distinction between the *due* order and an order established by human agreement. In Isidore of Seville we have the first explicit instance of a definite recognition of a real difference between the natural law and the law of nations. The natural law is no longer seen as an instinct common to all, animals and men.⁷¹ True, St. Isidore says that men follow it "*instinctu naturae*," but this is contrasted, not with reason, but with "*constitutio aliqua*," and under the definition there is included an ethical habit such as the "*depositae rei vel commendatae pecuniae restitutio*." This "*instinctu naturae*" ought to be translated as "had by an instinct,"⁷² or the natural inclination of reason to detect, as Isidore says, what is "in accord with natural equity." Whence *jus gentium* is henceforth classed in the category of positive human law because the actions of St. Isidore lists in this definition are those which "nearly all nations have made their custom." *Jus gentium* is a species of international custom, and like national customs, are commitments in justice because of the popular consent involved in the general and prolonged practice. From the nature of the instances which St. Isidore adduces of the material (intrinsic) content of law as constitutive of its justice, viz., of its *reasonableness* as distinct from its legitimacy which derives from *will*—we may logically infer that his definitions, which bear many literal similarities to Ulpian and the *Institutes*, are actually radical emendations of the Roman legal *formalism*.

One of the dicta of St. Isidore, frequently quoted during the Middle Ages, was his famous definition of the true king. He converted an old proverb, "Thou shalt be king if thou do right: if not, thou shalt not be king," into a norm of the legitimacy of government. He was not content to say that the king was the representative of God and accountable to Him on the Last Day for the use of the regal power. Rather, he turned the original precept of St. Paul upon the prince himself. The corollary of that teaching is that all power must rule justly; and if the king does not use his power justly, he loses it. True, St. Isidore said

71. 1 ULPIAN, INST. 2.

72. 1 CARLYLE, *op. cit.* *supra* note 8, at 108. ETYMOLOGIES V, 4.

nothing of how the king is to be deprived of his power. But he did maintain that it is a just thing that a prince should obey his own laws. May we not legitimately suggest that St. Isidore vaguely felt the king's rule⁷³ should be subject somehow to the judgment of the realm? How else could a king effectively cease to be king? The logic implied in St. Isidore's dictum was to ferment in the minds of the political theorists and statesmen of medieval Christendom till it gradually evolved through the centuries in the struggle for constitutional supremacy into effective institutional ways and means of holding royal power responsible and accountable to the governed. The king⁷⁴ was to be recognized apart from the oppressive tyrant on the basis of St. Isidore's historic and distinguishing norm of governance for the public weal as against the rule for the sake of private interest and royal pleasure. Lastly, an entirely new meaning and construction is given to *lex* and *ius*, which in Roman law were antithetical.⁷⁵ The ethical and legal character of law were never considered disjunctively by the Christians and St. Isidore's *iuste disceptare est iuste judicare* dispensed with the Roman division of action in a legal process into *jus* and *judicium*. Rather he bound together for the administration of justice the *jurisdictio*, *imperium*, *judicium* which the Roman jurists had considered distinct.⁷⁶ We cannot stress too strongly the efficacious influence of St. Augustine and St. Isidore at a time when the *City of God* was the favorite reading of princes and the *Etymologies* and *Sentences* were the encyclopedias of the political writers. St. Augustine's general principles were channelled by St. Isidore into the structure of the law of Christendom and their contest with the Roman law principles proved victoriously challenging as early as the Merovingian dynasty.⁷⁷

73. 3 SENTENCES c. 51, § 1. This chapter is frequently referred to in later times and embodied in the twelfth century in GRATIAN DECRETUM, DIST. IX, 2.

74. ETYMOLOGIES 3. In one sense, the Isidorian dictum had more influence on the Middle Ages than any other element of political doctrine. Hrabanus Maurus, Sedulius Scotus, Jonas of Orleans, Cathulfus, and Hincmar of Rheims cited St. Isidore. The distinctive evil of the tyrant is for St. Isidore what it was for St. Augustine *cupiditas dominandi*.

75. Law for the Romans were certain fixed principles in the light of which *interpretationes* were given. *Jus* was that which the State in effect allotted to the individual.

76. SÉJOURNE, *op. cit. supra* note 62, at 64-6.

77. DECLAREUIL, HISTOIRE GENERALE DU DROIT FRANCAIS 111-2 (1925): "La souveraineté royale et impériale et ses nouveaux fondements: La révolution dynastique ne correspondit, malgré qu'on l'ait prétendu, ni à une réaction germanique, ni à une nouvelle invasion, mais à une renaissance partielle des idées romaines. Accomplie sous le patronage de l'Eglise, elle imprima à la souveraineté des caractères nouveaux. Celle-ci cessait d'être un *dominium* et devenait un *ministerium*: le roi gouvernait désormais *pro utilitate reipublicae*. Avec une nuance plus chrétienne, on se rapprochait de la conception du Bas-Empire. La

b. *Jonas of Orleans*

In the writings of Jonas of Orleans, a medieval bishop of the ninth century, we find striking evidence of the prevalence of the Augustinian-Isidorian tradition amongst the medieval bishops and rulers. Though there is no further development of the tradition in Jonas, the significance of his two tracts, *De Institutione Laicali* and *De Institutione Regali*⁷⁸ in particular, take on added importance because they were written at a time when feudalism was emerging as a social, political, economic pattern of society and novel relations of dependence based on social and economic inequalities multiplied. Jonas admonished the feudal lords not to mistake the differences in "power, dignities, and riches" for a real difference in nature. These inequalities have come to pass "by a Divine disposition of Providence" in order that the stronger may provide for the weaker. It is pride—*ex fonte superbiae*—which makes men forget this fundamental truth.⁷⁹ His tract on the conduct of Christian princes repeats almost verbatim the formula of St. Isidore on the concept of the king and tyrant.⁸⁰ We find this statement of Jonas on the nature of

royauté, mi-séculière, mi-ecclésiastique était tenue à la fois pour *délégation divine et institution rationnelle*, ses buts étaient la *paix* et la *justice* en ce monde, le *salut des âmes* dans l'autre. La littérature monastique qualifiait le roi de *minister Dei*, adopté au moment du sacre par Dieu à qui était le royaume et qui le donnait à qui lui plaisait. Mais le pouvoir souverain n'était légitime qu'exercé selon les voies de Dieu et de l'Eglise; au cas contraire, il devait être retiré; d'où le contrôle des évêques. Cependant, c'était la notion fondamentale de l'Etat renaissant. *L'imperium* merovingien, identifié au *dominium*, était arbitraire. La volonté du Prince n'avait de limites que celles qu'elle s'imposait en vue de son intérêt qui seul, en maintenant cette volonté stable, en faisait la loi. Dès lors, le Prince ne pouvait se concevoir dans un rapport de droit, entre que privé, avec une personnalité quelconque; il n'y avait pas de droit public. *L'imperium carolingien n'est plus arbitraire, mais exercé selon des règles de droit qui enclosent dans un champ donné sa puissance de commander. Il ne crée pas ces règles, il les reçoit des croyances morales et religieuses du temps; il les reconnaît à leur conformité au but que lui est assigné. Il y a un droit public.*"

78. JONAS OF ORLEANS, MIGNE PATROLOGIA LATINA vol. 106.

79. DE INSTITUTIONE LAICALI 22: "Those who are in authority should take care not to think those subject to them to be inferior by nature as they are by rank, for by a Divine disposition of Providence it has been brought to pass that one mortal man is defended by another mortal man, but by a certain rank in this life, as when a weak man is defended by a strong man through a proper authority in government, yet in such a manner that he is always recognized as equal by nature. Though this is so, many swollen with goods doomed to perish and soon slip away from them do not acknowledge as their equals by nature either those over whom they are in authority or those whom they excel in power and dignities and riches. And if they do not admit it in words, still they do not admit it in their attitude towards them. It is clear that this vice has its source in pride. For why are master and slave, rich and poor, not equal by nature, who have in heaven one and the same God, Who is not a respecter of persons?"

80. DE INSTITUTIONE REGALI 3: "A King (rex) is called such from ruling rightly

the true king reproduced in an address presented by the bishops to Louis the Pious in the year 829.⁸¹

c. *Hincmar of Rheims*

In the writings of a great contemporary of Jonas of Orleans, Hincmar, Archbishop of Rheims and counsellor of Charles the Bald, we have, after St. Isidore's analysis of the material content necessary for the justice of the law—a *further advance* in the doctrine of the supremacy of temporal law with explicit reference to St. Augustine. As ever the principle of equality appears fundamental not only as the theoretic but also as the legal point of view of governance.

"St. Augustine in the book '*De Vera Religione*' shows that the laws of the princes are to be observed, saying: 'In the case of those temporal laws, although men may judge of them when they enact them, once they are *enacted* and *confirmed* it is no longer a judge's part to judge of them but only according to them.' Therefore *just laws promulgated by the people are either to be observed or to be enforced justly and reasonably by the prince against every one without distinction.*"⁸²

Equality before the law is unmistakably inferred from the supremacy of law as resting upon the consent of equals. But by far the strongest expression of this doctrine appears in Hincmar's treatise *De Ordine Palatii* (A.D. 882) where the relation of the king to the law, and of the proximate source of the authority of the ruler is presented in such a way as to serve, we think, as the first summary presentation of the fundamental principles of government according to constitutional limitation. Hincmar begins the eighth chapter of this work by a reference to a rule that no priest must be ignorant of the canons, and then observes that in like manner the sacred laws, meaning the *Lex Romana Visigothorum*, decree that no one may be ignorant of the law or act contrary to its decrees. Since this admits of no exception, the kings and their ministers must rule according to the law of the land in which they have jurisdiction. They are bound by the *capitularies* of their predecessors, "*quae generali consensu fidelium suorum (tenere) legaliter promulgaverunt.*"⁸³

(*recto regendo*), for if he rules piously, justly, and mercifully he is properly called king. If he lacks these (virtues) he loses the name of 'king. The ancients called all kings tyrants, but later those who ruled piously, justly, and mercifully acquired the name of kings, while those who lorded it impiously or unjustly and cruelly had the name tyrant and not king applied to them."

81. MONUMENTA GERMANIAE HISTORICA, AUCTORES ANTIQUISSIMI, LEGES, § 11, vol. 11, no. 196, EPISCOPORUM AD HLUDOVICUM IMPERATOREM RELATIO 56.

82. HINCMAR OF RHEIMS, OPERA, MIGNE PATROLOGIA LATINA, DE REGIS PERSONA ET REGIO MINISTERIO, vols. 125-6, 27 (855).

83. 2 MONUMENTA GERMANIAE HISTORICA, LEGUM § 11, DE ORDINE PALATII 3: "A king ought to guard the dignity of his name in his own person; for the name of the king

Two conclusions follow from this passage. The explicit reference to the *capitula* is the specific norm of rule by law and is a definite historic beginning in the evolution of constitutional governance. Secondly, the reason alleged for the subordination of the prince to the positive law brings out the growing significance of consent for the authority of law. *Generali consensu fidelium*. Since, as St. Isidore insisted, the function of law is to realize the public welfare, it follows that the ruler, the administrator of law is bound to that purpose. Consent is the legal confirmation of the ethical function of kingship and of the final cause of law. Further, if no man by his nature has a natural right to rule others, it also follows as a correlative that no one by his nature has the exclusive insight into the true welfare of a people. Consequently, the function of making laws is necessarily reserved for the community, since all the obligatory force of laws flows proximately from the consent or implicit approval of equals for whose good these laws exist. In other words, law both as a function of *jurisdiction* and as an *objective social truth* must rest on the *judgment* and *approval* of the people. The king shares with his subjects the responsibility of enacting law; but once it is promulgated *generali consensu* that law enjoys a supremacy which defines both his administration and process of adjudication. This conception of medieval political thought is of the utmost importance in the development of *due process* and *equal protection* before the law or simply, justice according to law approved by the people and not according to the sole discretion of the ruler. As A. J. Carlyle never tired of maintaining, the authority of the law in medieval Christendom derived from the community, and secondly, justice consisted in its administration according to the law.

A particularly significant fact discloses that the Augustinian-Isidorian tradition had become a dominant doctrine amongst the rulers. Charles the Bald, who had summoned Hincmar to appear before a secular court

taken intellectually holds that he manages the office of ruler for all those who are subject. But how would he be able to correct others who did not correct his own ways lest they become unjust? 'For the throne is established by the *justice* of the king' and the government of peoples is strengthened by *truth*.' (Hincmar then discusses the knowledge priest should have of ecclesiastical law). And as it is declared concerning ecclesiastical laws that "no priest should disregard his canons, nor is it permitted to any to do what would offend against the rules of the Fathers," so in the sacred laws is it decreed that "*No one is to ignore the laws or condemn what is established,*" no person whatever be his worldly rank, is *excepted* so as not to be bound by this judgment. Kings and ministers of the commonwealth have laws according to which they dwell: they have the *capitula* of Christian kings and of their progenitor which, with the *general consent* of their faithful men they legally promulgated to be held. Concerning which the blessed *Augustine* says, "Although men are allowed to judge of them at the time when they enact them, nevertheless once they are enacted and confirmed it is not allowable for judges to judge them, but in accordance with them."

and passed sentence upon him in his absence, received as an answer Hincmar's judgment that this action was contrary not only to the canons as to the relation of ecclesiastical and secular courts, but also contrary to the laws of the emperors. Yet Charles had himself written to Pope Adrian in 875 in almost the same words:

"The holy canons are founded on the Spirit of God and rendered inviolate by the religious regard of the whole world, and as the blessed *Ambrose* says to Valentinian, 'The emperor enacts laws which you should be the first to keep, since what he prescribes for others he prescribes for himself, lest freedom be granted to another to judge differently.' And the blessed *Augustine* says that, 'After the laws have been subscribed to and confirmed it is not allowable for a judge to judge of them but in accordance with them.'"⁸⁴

It is clear how the doctrine of revelation on the equality of men as applied by St. Augustine to the juridical order was in fact a guiding principle in the construction of the *Pax Christiana*.⁸⁵

2. LEGAL TESTIMONY

a. *Law of the Visigoths*

In speaking of "tradition," we designate two constitutive elements as the test of its viability and prevalence; namely, that its doctrinal ideas are repeatedly taught and accepted as primary principles, and secondly, that these ideas become the directive factors in the actualities of the social order. An incontestable concrete expression of the evidence of such an influence is the *law* of the country. We have selected instances of the influence of St. Augustine's political principles upon three ecclesiastical leaders who were counsellors of kings and princes. It remains to be seen if this influence was translated into legal forms.

The outstanding practical achievement of St. Isidore's influence is the *Law of the Visigoths* known also as the *Forum Judicum*. Its beginning and development since the days of Euric (467-485) are very intricate and somewhat obscure.⁸⁶ But in the days of St. Isidore (560-636) and especially at the Fourth Council of Toledo (633) at which he presided, this legislation was marked with his Christian principles of law and governance, and in its final promulgation by Recceswinth at the Eighth Council of Toledo (653) we have the *first Christian Constitution*. Through

84. MIGNE, col. 892, vol. 124.

85. FIGGIS, *POLITICAL ASPECTS OF ST. AUGUSTINE'S CITY OF GOD* 86 (1921): "We have ample evidence that the influence of Augustine was not merely an universally pervading force in the Middle Ages, but was consciously adopted and felt."

86. See *GENERAL SURVEY OF CONTINENTAL LEGAL HISTORY*, Part VII (1912); *V CAMBRIDGE MEDIEVAL HISTORY*; HAZELTINE, *ROMAN AND CANON LAW IN THE MIDDLE AGES* 697-764 (1934).

St. Isidore, the ideas of St. Augustine supplanted in great measure principles of law and governance which the Romans and Teutons had brought to the Iberian peninsula. The *Forum Judicum*⁸⁷ is the most palpable historical evidence in contradiction of an assumption commonly made that the Roman tradition remained unbroken throughout the whole medieval era. No one could rightly question that the Western legal world was historically conditioned by Roman Civil Law and the Teutonic tribal law. The former laid undue stress upon the sovereign *will* from which the content as well as the promulgation of the law was supposed entirely to derive. This constituted the *formalism*, viz., the subjectivism and extrinsicism, of Roman juridicalism,⁸⁸ which, as we have seen, St. Isidore corrected by prescribing the objective presuppositions of legislative power. The Germanic people on the other hand, understood their law, which was preeminently immemorial custom law, to be a personal attribute unconfined by territorial boundaries. It was inevitable in the amalgamation of Germanic and Roman communities in the Iberian peninsula during the seventh and eighth centuries, consequent to the migrations of the earlier century, that German legal personalism and Roman juridical voluntarism would merge in the interests of peaceful survival and under stress of administrative exigencies into territorial custom law. Authoritarianism thus clung to the vestiges of the *imperium* by forcibly recognizing (what it seemed to confer benignly) the ineradicable, sociological actuality of the exaggerated personalism of barbaric custom. We do not mean to depreciate the positive elements of both these systems of law, such as the rudimentary constitutionalism of Teutonic custom law and certain aspects of *plenitudo potestatis* of Roman sovereign power,

87. References are to the VISIGOTHIC CODE (Scott transl. 1910).

88. DE LAGARDE, RECHERCHES SUR L'ESPRIT POLITIQUE DE LA REFORME 15-6 (Picard's transl. 1926): "*La tradition romaine*, féconde en principes de technique juridique, avait à sa base une philosophie un peu courte. Peu portés à la speculation, les grands juristes, dont les glossateurs retrouvaient la pensée dans le Digeste, ne s'étaient pas attardés aux développements sur l'origine et la nature du Droit. Quelques essais tentés dans ce sens se trouvaient çà et là. Tel le texte d'Ulpien: *Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*" *Digest*, 1, 10. "Telles encore les définitions hésitantes que le même auteur donne ailleurs du droit naturel '*jus naturae est quod natura omnia animalia docuit.*' Mais en fait les juristes donnaient le plus souvent du Droit une notion toute formelle. Le consentement du Peuple, ou la volonté du Prince (à qui la souveraineté commune avait été déléguée) suffisait à donner au droit sa forme et sa vigueur. Et lorsque l'on voulait exalter la vertu de la loi, on pensait qu'il était suffisant de montrer en elle toute la 'majesté' du 'Peuple Romain' . . . La théorie permettait d'expliquer la notion bâtarde de coutume. En elle survivait le pouvoir législatif de la communauté. Ce Ce pouvoir pouvait-il contredire celui que le Prince exerçait en vertu d'une délégation plus ancienne? On en discutait. Mais la pensée tournait toujours dans le même cercle étroit. On s'attachait surtout à l'origine extérieure et formelle du droit pour en définir la portée."

when we underscore their essentially radical deficiencies. For the Christian jurists assimilated what was sound in both systems, corrected and complemented what was partially acceptable, and rejected whatever contravened incontrovertible truths about law and society. But we do contend that medieval law was neither dominantly Roman nor dominantly Teutonic but distinctly Christian in principle and, in actuality, ever more Christian as the Christian transformation of the social order progressed to the historic unity of Christendom. The *Law of the Visigoths* is the outstanding major achievement in the transference of Christian principles to legislation in early medieval legal history.

A summary analysis of this code discloses how the two traditions, Roman and Christian, were recognized as antithetical, and though there was a partial confluence, their basic principles were clearly appreciated and not compromised. Rarely does it happen that a law of ancient or medieval times, is preceded by a doctrine on the origin and nature of power, the *finis* and virtues of law, and a disquisition on the rights and duties of the legislator. The authors of the *Law of the Visigoths* set down principles, and converted into law philosophical truths and evangelical rules of social relations.

The most important part of the *Liber Iudiciorum* from the point of view of legal philosophy is the *Primus Titulus, De Electione principum*, and Book 1 containing the titles on the *Legislator* and the *Law*. There is an unwritten, eternal, universal law, fully known to God and which the human legislator seeks after. Human law is good only in so far as it is the *emulator* and *messenger* of the divine law. The source of the legitimacy of laws is not to be found on earth; and this legitimacy originates, not in the will of him or them who make the laws, whoever they may be, but in the conformity of the laws themselves to truth, reason and justice—which constitutes the true law. The character of law is to be *universal, the same for all men, foreign to all private interests, given solely for the common interest*.⁸⁹ On the other hand, it was the characteristic of the other Barbarian codes that they were conceived for the furtherance of the private interest, either of individuals or classes and, consequently, their system of laws consisted of privileges, *privatae leges*. The councils of Toledo corrected this legal individualism by applying the principle of equality to the realm of public law. Thus, the *Law of the Visigoths* was, at this period, the only one that could be called *lex publica*. Under the influence of the unity of faith accomplished at the Third Council of Toledo (589), the unity and universality of a law common to all the inhabitants of the Peninsula supplanted with greater

89. FORUM JUDICIORUM 5 (Scott's transl. 1910).

ease the racial legislation peculiar to the Goths and the Romans. Far are we from suggesting that valid contributions of Roman law, which St. Augustine admired for its *iustitia civilis*, were completely forsaken. Rather, the Christian makers of the new Spanish State were ready to recognize the usefulness of the study of Roman Law.⁹⁰ But they refused to subscribe to a confused mass of laws which, presumably, only the select jurisperites could understand and interpret.

The first two books deserve our special attention for two reasons. First, the two titles of Book I, the *Lawmaker* and the *Law* are taken almost bodily from Books II and V of the *Etymologies* of St. Isidore. Secondly, both Book I, *Concerning Legal Agencies*, and Book II, *Concerning the Conduct of Causes*, contain many expressions of the supremacy and universality of law, precepts for the immunity of the individual against arbitrary action, regulations for due process and equal protection for all—which bear striking similarity to the later memorable document of Runnymede, the English Magna Charta. We select certain illustrations of Visigoth Whiggism to indicate the historical likelihood of the indebtedness of the English document to our tradition as made viable in the Ordinances of the Cortes of Castile and Leon of thirteenth century Spain.⁹¹

The bishops and the king were the only persons who could not personally defend their own cause, and who were bound to appear by proxy in such cases, lest their personal presence should influence the decision of the judge, "*lest the fear of royal power should suppress the truth.*"⁹²

"In rendering judgment, the judge 'should be no respecter of persons, and should avoid all appearance of partiality.'"⁹³

"Laws as amended, and approved by us . . . shall be binding thereafter upon all persons subject to our empire, irrespective of rank."⁹⁴

90. *Id.* at 20. The Christian interpolation of the useful elements in the Roman Law (*lex antiqua*) was properly designated as the *lex emendada*.

91. ALTAMIRA, *Magna Carta and Spanish Medieval Jurisprudence*, in *MAGNA CARTA COMMEMORATION ESSAYS* 227 (1917): "To an historian of Spanish Constitutional Law, Magna Carta may offer two fundamental and extremely interesting questions. One is concerned with the analogy between the rights—political and civil—which are defined in *Magna Carta*, and rights of the same king which are formulated in *contemporary or earlier Spanish legislation*; the two pictures may be compared as the results of a process common to all the nations of Europe in the Middle Ages, results produced in two distinct communities which were making their way towards the same end. The other question has to do with the possibility that certain liberties and customs, belonging to Spain and the adjoining lands, may have had some influence in the formation of the programme which was imposed upon King John by the English Barons." Cf. *id.* at 228-9. (Italics mine).

92. SCOTT, *op. cit. supra* note 89, at 47.

93. *Id.* at 3.

94. *Id.* at 12.

"The royal power, like the whole of the people, is bound to respect the laws. Obeying the will of heaven, we give, to ourselves as well as to our subjects, wise laws, which our own greatness and that of our successors is bound to obey, as are also the whole population of our realm."⁹⁵

"We decree that no king shall by any means, extort, or cause to be extorted, any documents whatever in acknowledgment of any debt, whereby any person can unjustly, and without his consent, be deprived of his property."⁹⁶

"No one has a right to hear a cause which is not authorized by the laws."⁹⁷

"It shall be lawful for no one to decide causes unless authorized either by the mandate of the prince, or by the prince, or by the consent of the parties. . . ."⁹⁸

"No one shall presume, either by decree, or by means of a bailiff, to imprison or oppress any person, in any way, in a district over which he has not been appointed, or where he has no judicial authority, unless by the order of the king, or by the agreement of the parties. . . ."⁹⁹

"The judge, when inquired of by a Party, should be able to give a reason for his decision. 'Every judge is hereby admonished that if a demand is made upon him by any one, he shall give the reasons, in their proper order, for the decision he has made.'¹⁰⁰

Book 11, Title 11, *Concerning the Conduct of Causes*, restates the necessary conditions for a just trial, namely, a clear and publicly known law, personal presence at the trial, norms for testing the reliability of testimony, written or oral. Any effort to influence fraudulently the justice of the case is severely censured and penalties attached. Equal protection before the law is clearly illustrated by the prescription that "no freeman shall refuse to answer the slave of another in court." The only adequate and compelling justification of the supremacy of the law is the equality of men which may never be disregarded in any unequal relation which the social order may impose for their good. Thus did the doctrine of the equality¹⁰¹ of men pass from religion to politics, from

95. *Ibid.*

96. *Id.* at 15.

97. *Id.* at 22.

98. *Id.* at 23.

99. *Id.* at 24.

100. *Id.* at 35.

101. A striking instance of how Christianity applied the new doctrine of the equality of men to mean equal protection before the law and due process appears in the treatment of slaves as compared with the meaningless humanitarianism of the enlightened Roman Stoics. FORUM JUDICUM: "If any one who is guilty or accomplice of a crime should not remain unpunished, how much more should those be punished who have committed homicide wickedly and with levity. Thus, as *cruel masters*, in their *pride*, frequently *put to death their slaves without any fault on their part*, it is fitting altogether to extirpate this license, and to ordain that the present law shall be externally observed by all. *No master or mistress may, without a public trial*, put to death any of their male or female *slaves*, or any person dependent upon them. If a slave, or any other servant, commit a crime which may lead to his capital condemnation, his master or accuser shall *immediately give information thereof to the judge of the place where the action was com-*

the Gospel to the codes. It is to the credit of the Visigothic bishops to have given this doctrine its first significant embodiment in the juridical order.

The law of the Visigoths is the first historical record of the promulgation of a national law based explicitly on the profession of Christian principles. It was the work of the clergy and to them belongs the credit for the formulation not only of principles but of detailed prescriptions covering the whole range of human conduct in a clear, definite, rational, and humane spirit which their Faith inspired. No pagan or barbarian legislation had ever founded the true good of the individual or of society on such a sound basis and on such lofty motives. Heretofore Christian ethics had governed the relation between master and slave. The Visigothic Code placed those relations, particularly those that refer to life and limb, on a juridical plane. A Christian law which had begun to elaborate itself¹⁰² in the half Roman half Christian Theodosian Code now rested entirely on its own Christian premises.

b. *Carolingian Capitularia*

As for the practical influence of Jonas of Orleans and Hincmar of Rheims, their writings give testimony of a tradition already accepted in the political order and which they repeatedly defended on the basis of the Christian principles underlying it. Jonas of Orleans simply attested to the prevalence of our tradition. In Hincmar, the lawful society of

mitted, or to the count, or to the duke. After the discussion of the affair, if the crime be proved, let the culprit suffer, either by sentence of the judge, or of his master, the punishment of death which he has deserved; in such sort, however, that if the judge will not put the culprit to death, he shall draw up a capital sentence against him, in writing, and then it shall be in the power of the master to kill him or to keep him in life. In truth, if the slave, by a fatal boldness while resisting his master, has struck him or attempted to strike him with a weapon, or a stone, or by any other blow, and if the master in self-defense has killed the slave in his anger, the master shall in no wise suffer the punishment of homicide. But he must prove that this was the case; and he must prove it by the testimony of oath of the slaves, both male and female, who were present at the time, and by the oath of himself, the author of the deed. Whoever, from pure wickedness and by his own hand or that of another shall have killed his slave without bringing him to public trial, shall be branded with infamy, declared incapable of giving evidence, and doomed to pass the rest of his life in exile and penitence; and his property shall be given to his nearest relatives, to whom the law grants an inheritance." FORUM JUDICUM Bk. V, Crimes and Torts, Tit. V, Homicide § xii at 222: the vital question of intent, or the existence or pre-existence of malice prepense is Christianity's contribution to the point at law—of guilt and the degree of crime. Cf. id., Bk. VI, Title D, Section xiii at 225: "No one shall deprive a male or female slave of a limb." (Italics mine).

102. See TROPLONG, *DE L'INFLUENCE DU CHRISTIANISME SUR LE DROIT CIVIL DES ROMAINS* (1868), particularly for the influence of Christian ethics and law on the Roman *patria potestas*.

the Ibernians acquired a *legal* status. The passage from *De Ordine Palatii* refers to an existing situation. *Kings and ministers* of the commonwealth *have laws* by which they must rule the inhabitants of every province. These laws are the laws of the *place* through which they pass. Besides, they must observe the *capitularies* of the Christian kings and their predecessors because their legal character derived from the general consent of the faithful. The meaning is unmistakable. The king is no more entitled than any person to ignore the law. His duty is to carry out the law because it is not merely his law, nor is it merely by his will that it has been made. Nothing could sound more startling to the Roman Emperor,¹⁰³ who normally was in his own person the direct source of law, nor anything more perplexing to the Roman governor than to be subject to the laws of the province. This passage from *De Ordine Palatii* immediately precedes the citation on the supremacy of law from St. Augustine's treatise, *De Vera Religione*. This citation was Hincmar's favorite for he uses it in his defense against the action of Charles the Bald and again in the *De Regis Persona*.

In the ninth century the prevalent laws were popular customs and kings were required from time to time to reiterate their intention to rule accordingly. But gradually, a deliberate process of law-making manifested itself particularly in the effort to adapt existing laws to changing circumstances. Consequently, any effort to *amend or improve* upon a law was a matter of popular concern. Consent did not simply mean agreement with the king; the medieval notion of consent was far more significant. The king and the people, represented somehow vaguely but truly so in the wise and noble men, together promulgated the law so that it took on the nature of a pact.¹⁰⁴

103. BUCKLAND AND McNAIR, *ROMAN LAW AND COMMON LAW* 7 (1936): "The Emperor was a legislator with a free hand and he could *lay down the law in any way he saw fit*. Whether he decided a point in general enactment or in the course of the hearing of a case, *what he said was law*. Thus, though there are cases in our books (English law) which definitely break with a pre-existing law and introduce absolutely new principles, in general, each decision is only a step forward on a way already marked out. But the *decreta* of the Emperor are under no such limitations. We have remains of some collections of *decreta* from which it is plain that the Emperor often establishes what he thinks a salutary rule without reference to its relation to an earlier law. . . . We ought not to say that decisions were binding if they were by the Emperor, but that *what the Emperor laid down was law even if it were merely in a decision*."

104. I *MONUMENTA GERMANIAE HISTORICA* 115 (1925): *Capitula Minora* art. 19. Charlemagne's instructions to his *missi* in 803: "Let the people be questioned concerning the *capitula*, lately added to the law, and after all have consented, let them affix their writing and subscriptions to the *capitula* themselves." Cf. *MONUMENTA GERMANIAE HISTORICA: Capitula Quae in Lege Salica Mittenda Sunt*. art. 803, 112; *CAPITULARE AQUISGRANENSE*, art. 813, 187.

In the *Edictum Pistense* of Charles II (864), we find an explicit and formal definition of the *joint action* of the king and the nation in making laws.

*Quoniam lex consensu populi et constitutione regis fit*¹⁰⁵—a phrase full of significance for the development of constitutional government when it is taken in its proper connection with the general tendencies of the Christian tradition. The general notion of the supremacy of law as required by the principle of equality and its correlative, the consent of the governed, became clearer as the changing conditions of the Middle Ages made deliberate modification of immemorial customs inevitable. Such action could only be taken with the assent, expressed or tacit, of the community represented in some way in the responsible members of the community, the bishops and the nobles. Even at that, public acclamation was not wanting. Nor are we to look down upon these popular expressions. The word *populus*, and *fidelibus omnibus* appear unfailingly after the words *communi consilio*. The consent of the subjects was also necessary in order that a hereditary succession be valid. *A fortiori*, it was required for the candidates not of the line of succession. In both instances, the consent gradually crystallized into a commitment in justice based on specific conditions so that the Isidorian *si rex eris* implied a more definite meaning than heretofore.

In 817, Louis the Pious convened his people, and after a three day fast his eldest son, Lothair, was *elected by Louis and the whole people to rule the empire*.¹⁰⁶ Then by common counsel, the title of king was given to the two younger sons and lands allotted to them according to specific *conditions* listed in the *capitula*. The document is then signed by Louis and all his faithful because—and there follows a principle of action which is to forward considerably the development of constitutional government—“*what is done by all might be held inviolable by all.*” In the latter part of the ninth century, we find not only the principle of election very clearly retained, but we can also discern more insistent exactions of avowals for the supremacy of law as a necessary condition prior to the election of the ruler. When Charles the Bald succeeded to the kingdom of Italy in 876, an exchange of promises and conditions for the faithful observance of law are made by subjects and king.¹⁰⁷ Hincmar, Archbishop of Rheims, who had consecrated the crowned Charles' successor, had occasion to remind Louis

*vos elegi ad regimen regni,
sub conditione debitas leges servandi.*¹⁰⁸

105. M. G. H., KAROLI II EDICTUM PISTENSE 490.

106. M. G. H., DIVISIO IMPERII art. 817, 198.

107. M. G. H., KAROLI II CONVENTUS TICINENSIS 528.

108. HINCMAR, EP. XX.

The custom of stating conditions on which the elections are made take on an added significance when we find the rulers reiterating their promises to abide by those conditions in the effort to retain the allegiance of their subjects since that allegiance depends on the mutual fulfillment of these conditions. In 851 Lothair, Louis, and Charles met at Mersen to reassure their subjects of their intention to administer justice according to law, whatever the rank or condition of the subject.¹⁰⁹ Then follow expressions for the immunity against arbitrary action which foreshadow the language of the English Magna Carta.

Henceforth we will not condemn or dishonor or oppress anyone in violation of the law, justice, authority, and right reason, nor will we burden anyone with unjust schemings.

These assurances are repeatedly made with enlarged implicates. Two ideas, which were to become paramount in feudal times, are evolving; first, the notion that allegiance depends on the fulfillment of mutual obligations; secondly, whoever acts illegally places himself outside of the law.

In the Carolingian *Capitularia* there is ample evidence of the growing recognition of the significance of consent as related to the promulgation of law and validity of a king's title to govern. Both add up to the Rule by Law which will through the centuries be the principle involved in the numerous struggles for constitutional government. This growing Christian tradition which superseded the purely Roman and primitive Gothic understanding and practices of law and governance in the newly created Christian State in Spain was just as successful and probably more so in the Frankish kingdoms. Certainly, Charlemagne labored energetically for the unity of a Christian society. This is abundantly apparent in the superabundant references to Christian motives of love of God and neighbor, which for Charlemagne as for St. Augustine, meant justice in the larger meaning of Christian charity. His *Capitula* and the instructions as to his *missi dominici* insisted on the administration of justice according to equity, which in those days, infused Christian virtue into the legal formula. The Christian rulers gave to the Teutonic people that which their customs and traditions lacked. They supplied sound political ideas and principles with which the Teutonic people could justify their native sense of popular government and, further, be able intelligently to account for any just resistance against arrogant exercise of authority. Genuine possibilities of sound development of constitutional rule became in the Frankish states a greater reality than it had ever been before.

109. M. G. H. HLOTHARI, HLUDOWICI, ET KAROLI CONVENTUS APUD MARSNAM 11, 6, 408.

c. *Assizes of Jerusalem*

The great central period of medieval civilization, the tenth to the thirteenth century comprised the so-called Dark Ages when European civilization was threatened by a second wave of barbarian invasions and was equally distinguished for the resurgence of Christian spirit made manifest in the Crusades. The victory of Alfred over the Danes, of Otto the Great at the Lefeld over the Magyars, and the limits within which the Norse invasion of France was finally contained, revealed the innate vigor of Christian society to which, as the Normans who settled North-western France proved, the barbarians had to accommodate themselves. This was so unlike the crumbling of the *Roman Imperium* which the forefathers of the Franks and the Visigoths had wrought five centuries earlier in the times of St. Augustine. The feudal tenure was as much a consequence of the confused factional strifes which contributed to the dissolution of the Carolingian Empire as it was a retrenchment against the perils of the barbarian transmigration. These new times brought new conditions, new and important forms of political and social relationships. We are not here directly concerned with the political, economic structure of the feudal hierarchical society. But we will examine the moral notions and principles upon which these relationships were founded and were regulated accordingly. The records of the feudal law books, such as the *Assizes of Jerusalem*, the writings of the contemporary lawyers, Bracton and Beaumanoir, and of the first Christian political philosophers, John of Salisbury and St. Thomas Aquinas, should provide adequate evidence on the three levels of theory, practice, and the interpretation of contemporary society, for the discernment of the principles underlying and operating in that society. In this wise, we will observe if the hypothesis we hope to vindicate was legitimately assumed, namely, that the Augustinian-Isidorian tradition was rather promoted than suspended by the novel social configuration; indeed, its broad principles and large implicates were elicited to more expansive logical evolutions. It asserted clearer and more firmly than before the inviolability of the rights of individuals, of the weak and insignificant as well as of the strong, of equal rights to unequal objects, of an obedience contingent for its legitimacy upon the mutual fulfillment of obligations, of an equality of nature unprejudiced and uncompromised by economic and social inequalities. In a word, it established the supremacy of the feudal bilateral contract as the historic prelude toward the evolution of medieval constitutionalism and toward the formulation of a sound social contract theory.

The *Assizes of Jerusalem* constitute a remarkable and, in some re-

spects, unique evidence of the growing appreciation that the supremacy of law must be translated from doctrinal formulas into concrete juridical forms the better to secure their professed virtues. This it does in regard to two things, which, of their very nature, are juridically interdependent, namely, constitutionalism and the judiciary. The supremacy of the law is expressed in the bilateral contract of the fief, and secondly, that the supremacy of law is in practice commensurate with the independent uncompromised judiciary process. Though at first consideration it would seem that the separatist pattern of feudal tenure was opposed to the development of a unified national governance still, paradoxically as it may appear, it emphasized and strengthened such practices as would provide substantial precedents for constitutional history. Thus, for example, medieval feudalism fixed both rights and obligations to such an extent as never to confuse or compromise them arbitrarily in the most vivid and chivalrous sentiments of personal loyalty and devotion of vassal to lord. In effect it spelt equality before the law while at the same time it enhanced the reverence for authority as a sacred trust for the administration of justice. This is admirably expressed in the Assizes of the Court of Burgesses of Jerusalem:

*"La dame ni le sire n'en est seignor se non dou droit. . . . Mais bien sachies qu'il n'est mie seignor de faire tort."*¹¹⁰

The authority of the lady or of the lord is only an authority to do law (or justice). They do not have authority for wrong doing. This is a conclusion of a passage which warns the king and queen against interfering with the execution of a judgment obtained in court. For they have sworn to observe the customs of the kingdom and to assure the rights of the poor as well as of the rich. If the lord should break his oath and refuse to administer justice and law to his people, *they are not to permit this. Et ne l'deivent souffrir ces homes ni le peuple.* This is but an echo of the *Capitula* of Charles II *ad Francos et Aquitanos Missa De Carisiaco*. The feudal lawyers insisted that supremacy of law does not actually exist unless both lord and vassals are equally subject to the adjudications of the courts. Neither lord nor vassal could take the matter into his own hands, but must submit his complaint to the court, and abide by its decision. *No one was a judge in his own cause.* Consequently, the supremacy of law exists in practice to the extent that the courts are not subject to interference on the part of the ruler. The law of the Visigoths recognized this principle when it prescribed that no person or power, ruler or bishop, should appear in person but through a representative in a process which concerned them, lest their presence

110. ASSISES DE LA COUR DES BOURGEOIS 26.

influence the judgments of the court. Feudal law sought to secure equality before the law by the practice of judgment by peers and by the support given by one's peers. Should a lord refuse to answer a vassal's complaint in the court, the vassal may have recourse to his peers to compel the lord to comply; or should the lord accept the court procedure and refuse to abide by its decision, the vassals are to renounce their service till justice is done. This pertains equally in the instance of a lord who fails to comply in a judgment in the favor of a man who is not his vassal. Should a lord put his vassal in prison without the judgment of the court, his peers will first peacefully seek his release or the judgment of the court. That failing, all are to renounce their service. In the *Assizes of Jerusalem*, the negative consequences of a lord's refusal to do justice to his vassal according to the law and the judgment of the court, was limited to the refusal on the part of the peers of the wronged vassal to discharge their services and feudal obligations. The equality of men by nature was explicitly alleged as the basis for the equality before the law, according to the rights and duties established by their society. For the authors of the *Assizes*, justice meant the supremacy of law, and the supremacy of law meant judgment by the members of the feudal court. In the gradual independence of the courts we have one of the most effective expressions of constitutional governance. In the judgment by peers and the recognized necessity of removing the court proceedings from the arbitrary influence of the lord we have the early intimations of the development of the institutional jury system. The law of the land meant due process of law, and the feudal oath which succeeded to the coronation oath retained its primary objective of abiding by the law of the land.

2. FEUDAL LAWYERS

a. *Bracton*

A striking fact about the history of the Roman and Christian tradition is that the survival of one or the other has depended in great measure upon the lawyers. In England, the Christian tradition prevailed by reason of a deliberate and prudent mastery of Roman law. In France, Spain, and Germany, Roman law was "received," that is to say, it was forcibly imposed upon the people, by the lawyers who preferred to serve their king with the teaching of the Bolognese school rather than protect the liberties of their people embodied in their common law. It was at an opportune period in English history that Henry of Bracton wrote *De Legibus et Consuetudinibus Angliae* for the instruction of men who aspired to be justices. By using Roman law maxims, which could be

referred to sound reasoning and by appropriating their technical language and divisions of law,¹¹¹ Bracton gave a definite form to the native English Common Law, which at a later century would in turn fortify England from being Romanized in doctrine at the very time the Roman Reception was to prevail on the Continent.

"Thus English law was saved from Romanism; by this we lost much—but we gained much. The loss, we may say, was juristic; if our lawyers had known more of Roman law, our law—in particular our land law—would never have become the unprincipled labyrinth that it became—the gain, we may say, was constitutional, was political—Roman law here as elsewhere would sooner or later have brought absolutism in its train."¹¹²

English Common law, once it was firmly established by its own "form," was further strengthened by the legislation of Edward I, and, consequently, any chances of the romanization of English law were seriously diminished. English resistance to the Reception was due more to this form-setting of the Christian principles of law which Bracton achieved rather than to the Year Books, which, by recording rules of precedents, channeled the fundamental principles of our tradition. The consequence was that at the end of the thirteenth century, the English courts were no longer staffed by men learned in "*utroque iure.*" After the times of Bracton, Englishmen found their legal studies in their own case laws and precedents and deliberately avoided "the alien law."

Bracton explicitly and repeatedly warned his country against a literal acceptance of the maxims of Roman jurisprudence. The Christian king, precisely because he is the servant of God's authority, must rule accord-

111. 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 284-6 (1922-25). See SOURCES AND LITERATURE OF ENGLISH LAW 29 (1925): "The Treatise consists of an introductory part, much influenced by Roman law, in which the Roman division of the law into the law of persons, things, and actions is put forward as a primary division. But this is a very small part of the Treatise. . . . The extent of Bracton's debt to Roman law has given rise to much controversy. But I think that we can say this: though it is true that the greater part of the Treatise consists of a body of thoroughly English rules, it can hardly be denied that Bracton used Roman terms, maxims, and Roman doctrines to construct, upon native foundations, a reasonable system of law out of comparatively meagre authorities. Roman law supplied him with the intellectual outlook and the technical language, which enabled him to mould native rules into a reasonable system." McILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 68 (1947): "Trying to state in general terms . . . what was Bracton's debt to civilians we may put it thus:—First he had learned certain wide principles of jurisprudence, had found some of the highest premises of all civilized law expressed in neat and accurate phrases. For these, at least for some of these, the England of his time was ripe. They are not he argued, specifically Roman; the Romans themselves regarded them as common to all mankind; they are dictates of reason implicit in all law."

112. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 21-2 (1919).

ing to the law. This is not merely a consistency with his own will, as Ulpian's phrase "*quod principi placet, legis vigorem habet*," meant in the *Institutes*, but as Professor McIlwain¹¹³ has rightly observed, Bracton deliberately converted a plain statement of "absolutism into an assertion of constitutionalism." That which the king wills has the force of law because it has been promulgated after due deliberation, with the counsel of great men, *in accordance with a lex regis* which had been made. "This passage in Bracton follows immediately upon a quotation of the English coronation oath," as McIlwain observes, "and serves as a commentary on it." Bracton's legal emendation of the *lex regia* is not an accidental gloss but a deliberate Christian adaptation. The king is subject to God and the law *because the law made him king*. Since by nature he has no title to rule over others, the source of his kingship is in the designs of God and the law of his subjects. And his formula, "there is no king where *will* and not the law dominates" is but a reiteration of St. Isidore's *si rex eris*, which Bracton quotes in confirmation of his position. These are not mere theoretic aspirations. The age of Bracton was one in which such fundamental questions as the relation of the king to the law was a burning issue. His own times coincided with the critical period between the Magna Charta and the defeat of Simon Montfort. It mattered considerably whether the lawyers would subscribe to the Roman authorities, and hold the view that the common law was the king's law or retain the Christian tradition that law is a rule of conduct independent of the king—thus making the law the bond uniting the various parts of the body politic. The answer given would be of tremendous historical consequence for it was the period of transition from medieval feudalism to the beginnings

113. McILWAIN, *op. cit. supra* note 111, at 70-2: "Where the former (Justinian) says the prince's will has the force of a *lex 'because' (cum) the people by a lex regia* have conceded to him the whole of their authority, Bracton says it has the force of a law 'in accordance *with* a *lex regia (cum lege regia)* which had been made.' In the *Institutes* the *cum* is a particle introducing a clause which gives merely an historical reason for a complete and arbitrary authority actually in the emperor; whereas in our Bractonian text the *cum* is a proposition governing a noun in the ablative. . . . No doubt Bracton was acquainted with the true wording of the original text, and his own book is conclusive proof of his skill in the Latin tongue; and yet our text of *Bracton*, in quoting this plain statement of *absolutism*, turns into an assertion of constitutionalism. . . . So far as I recall, attention has never been drawn to the significant fact that this passage in Bracton follows immediately upon a quotation of the English coronation oath and serves as a commentary on it. . . . But it is no *lex regia* which, like that of the *Institutes*, confers on the prince the people's entire authority. On the contrary, it *limits any authority* the prince may have to acts in conformity with its solemn promises. . . ." *Cf. id.* at 158 n. 9: ". . . Bracton consciously altered Justinian's statement. . . . It is *not* to say that he *misunderstood it*."

of national unity. Whatever answer was given to the principle underlying common law would determine the sort of popular sovereignty that would develop in England—that of Ulpian or of Christian tradition. In Bracton's summation of the medieval tradition, the king's ministers did their work not merely as royal deputies depending solely on the king, but as the dispensers of a law which should bind all within the realm—king and subject alike.

"It was an idea which came naturally to the judges of the courts who were *born in the atmosphere of ideas which conceived of the law as declared by the court*, and not by the king or lord whose court it was. And so it happened that in no branch of the law were *Roman doctrines more decisively rejected*. In no branch of the law did the *older ideas* as to the nature of the law and as to the powers and position of the court more signally *triumph*."¹¹⁴

In Bracton's exposition of the sound nature of law as embodied by England's "unwritten" or custom law, the traditional reason for the supremacy of law over king and subjects is reasserted. That has the force of law which is set out and approved with the counsel and consent of the great men, and the general approval of the commonwealth, and by the authority of the king. And again, in words so like those of St. Augustine, when these laws have been approved by the custom of those concerned (*utentium*), and by the oath of the king, they cannot be abrogated or changed without the consent of all those by whose counsel and consent they were made. But what if the king refused to obey the law? This is a question which every medieval lawyer and political philosopher must ponder in any serious consideration of the supremacy of law or rule by law. It was an abstract question of political science. The real difficulty of the matter lay, as we see it, in the fact that their principles of law and government, being truly *principles* and not mere theories, were far ahead of the actual development of institutions which must embody the guarantees for those human values which those principles declare inviolable. In the eleventh century, Manegold spoke of deposing the ruler who had broken his contract and this teaching was a great advance over the former, namely, that the ruler had to give an account of his rule to God. John of Salisbury in the twelfth century defended the lawfulness of slaying the tyrant. The authors of the *Assizes of Jerusalem* spoke of refusing to discharge any of their feudal obligations to the lord who failed to do justice to his vassel according to the law and the judgment of the court. But the underlying *principle* is the same. The king is subject to God and the law of the land.

114. 2 HOLDSWORTH, *op. cit. supra* note 111, at 254.

b. *Beaumanoir*

When we turn from Bracton to his contemporary, Beaumanoir, the greatest of the French feudal lawyers, we find the traditional ideas of the "rule of law" expressed in the feudal system in terms of reciprocal rights and duties, further advanced by an insistence on suitable judicial machinery.

Beaumanoir testified, like Bracton, to the transition in France from feudalism to a national governance. The desire to do away with serfdom and the distinction drawn between the laws promulgated by a king for the whole realm as distinct from those given as a feudal lord discloses the new political awakening of France occasioned in no small part by the Crusades. When the "*établissements*" are made for the whole kingdom, let the king make sure they are made for a reasonable cause, for the common good, and with serious consultations:¹¹⁵ "*par reasonable cause, et pour le common pourfit, et par grant conseil.*"

The rule of law is to be secured by an independent process of adjudicating and by equality before the law. In a dispute between the whole body of the vassals and their lord, the court of vassals cannot be judge; nor in a dispute between a single vassal and the lord is the case decided by the lord but by the court of the vassal's peers.¹¹⁶ In either instance no one or group is the judge of its own cause. In a serious dissatisfaction with the judgment of the court appeal may be made to the court of the overlord.¹¹⁷ The underlying operative principle is that the feudal court is not one in which the judgments depend on either of the contestants nor upon the caprice or self-interest of the lord, but rather, as the law of the place is to be referred to the consent of the people at least by reason of accepted practice, so too the maintenance of justice must be removed from *any* independent show of power. The supremacy of law is of course the first concern of the king. He must see to it that no one is so great that he cannot be called before the king's court, "*pour defaute de droit ou pour faus jugement.*"¹¹⁸

In our summary review of the feudal concepts of law and government according to the *Assizes*, and the writings of Bracton and Beaumanoir, we have observed that whatever was the peculiar structure of feudalism the basic principles of the tradition of St. Augustine retained their identity and even expanded. The bilateral contract of feudal tenure was an outgrowth of the oath of coronation. The constitutional limita-

115. DE BEAUMANOIR, LES COUTUMES DE BEAUVOISUS 263 (Bengnot's ed. 1842).

116. I *id.* at 39.

117. II *id.* at 456-8.

118. II *id.* at 22.

tion that we discerned in the *capitula* of the Carolingian reign was in no way weakened by the distinctive feudal principle of personal devotion and fidelity to the lord. The contractual relations were reciprocal, binding upon both parties, on the lord as much as on the vassal. Feudalism with its complex scheme of dependence and interdependence never conceded to the armed superiority of autocratic authority. The principle of justice underlying St. Isidore's "*si rex eris*" is embodied in the right to disown allegiance or fief where submission to duly administered justice is denied. There is a growing insistence that no one be a judge in his own cause and practical ways were devised for assuring an independent judicial process. "There is no king where will rules and no law." "The king is under God and the law." "La dame ne le sire n'en est seigneur se non dou droit." To the feudal lawyers the supremacy of justice meant the supremacy of law. To them the conception of an arbitrary authority was simply unthinkable. The distinction between the king who governs according to the law and the tyrant who violates it was the clearest of constitutional principles at a time of insufficiently developed constitutional governments. Consent was not merely an approval nor a sheer act of acceptance; nor is it a consent with any sort of reservation. *If the ruler was not legibus solutus in the sense we have explained neither was the community.* If the consent of the community was required for the promulgation of the law so was the consent of the ruler. This conception of a pact as being not a contract between him who is a king and the people but rather as a rudimentary sort of constitution which institutes governance and its conditions was to find fine philosophical expression, later on, in St. Thomas' representative government. The coronation oaths, the election, custom law, the *capitula*, and the functions of the *missi*—all presupposing the Christian moral law—could not but make of authority a service for the good of the people. The chaotic conditions of the tenth century could not uproot these principles from the structure of medieval society, and the civil and religious conflicts of the eleventh and twelfth century only sharpened the antithetical principles underlying the Roman Imperium and the Christian *au-*
toritas.

3. POLITICAL PHILOSOPHERS

a. John of Salisbury: "Higher Law"

Eight centuries after St. Augustine had given to the bewildered Romans the Christian *politeia* for the regeneration of their Imperium, John of Salisbury is the first Christian political philosopher to sum up systematically the basic principles of the Christian tradition and to warn his contemporaries of the necessity to preserve them if Christian society

is to survive and prevail. In spite of the centrifugal forces of feudalism, the central idea in John's political thought was strikingly progressive,—that of a people ruled by a public authority for the common good whose justification rests on its legitimacy. The notion of a *common* good was no longer narrowly opposed to the personal, selfish interests of a ruler, but gradually became commensurate with the dimensions of a territorial kingdom. In England, the earliest concrete expression of a common good was the extension of royal justice first by the inadequate expediency of the king's peace and later by the royal and popular attack upon seignorial justice to deprive it of its privileges and its franchises by means of royal writs and especially, the *Quo Warranto*. Only then could royal justice begin to assert a law that was common to all parts of the country and to all classes of the community, and on the foundations of that common law to construct a properly unified country. The elements of the common good comprehended by St. Isidore's objective content of custom law was yet to be adequately evolved by St. Thomas Aquinas. This is the time of transition and, in the ferment of events, principles and actualities exercise a mutually provocative influence. Extraordinary significance is attached to his work because of his great learning, his wide and intimate acquaintance with high ecclesiastical dignitaries and civil personages, and the immense popularity with which his book was received.

His *Policraticus* enjoyed in his day a great popularity as might be expected from the author's eminence in the religious world, which, in turn, gave his work a wider influence. Its timeliness adds to its importance. In a sense, John of Salisbury may be referred to as a modern because there is but a faint trace of the terminology of feudalism in his *Policraticus*.

"The *Policraticus* of John of Salisbury is the earliest elaborate medieval treatise on politics. Completed in 1159, the date of its composition makes it a landmark in the history of political speculation for two reasons. It is the only important political treatise written before western thought had once more become familiar with the *Politics* of Aristotle. It thus represents the purely medieval tradition unaffected by ideas newly borrowed from classical antiquity. It is the culmination in their maturest form of a body of doctrines which had evolved in unbroken sequence from patristic literature in contact with the institutions of the earlier middle ages. In the second place it comes just before the important, turning point in the institutional development at the end of the twelfth, and at the beginning of the thirteenth century, when legal precision began to be stamped on a great number of previously indefinite relations and when feudal interdependence tended to become consolidated into definite organs of political control. It therefore speaks from a point of view which was about to disappear, but which it is all the more necessary to understand because it contributed a heritage of ideas whose momentum made them, in spite of the newer influences, the dominant force in political thought down to at least the middle of the sixteenth century."¹¹⁹

119. THE STATESMAN'S BOOK OF JOHN OF SALISBURY xvii (Dickenson's transl. 1927).

The significance of the *Policraticus* is twofold: it sums up the sound Christian tradition as being distinct and antithetical to pagan *politeia*, and secondly, it was written with a deep realization of the need to remind Christian society of the principles on which it rested and by which it may endure. John of Salisbury recapitulates certain central notions of St. Augustine's social theory, namely, the reasons for the existence of society, the nature of social order, the source of civil justice in the "higher law," and the distinguishing marks of a tyrant.

St. Augustine had said that the end and purpose of power is the happiness of the citizens, which happiness is composed of three chief goods—order, union, and peace.¹²⁰ And this peace, the tranquillity of order, is all comprehensive and enters deeply into the secrets of human experience. It must first begin in the individual rational soul in the harmony of knowledge and action and then bring about as a consequence civil peace. John of Salisbury affirmed the "security of life" (*incolumitas vitae*) to be the end of the state and defined it as the "perception of truth and the practice of virtue" and this, a moral end, the state can attain when organized and directed by the highest equity (*summæ æquitatis nutu*). The *salus publica* must follow from the *salus singulorum et omnium*; it is, in fact, the safety and weal of the individual "writ large." He is the first one to derive a sound analogy of society from the natural body.¹²¹ For his position is a remarkably premature rejection of individualism and *laissez faire* politics. A well-ordered Constitution consists in the proper apportionment of functions to members and in the apt condition, strength, and composition of each and every member—all members must in their functions supplement and support each other, never losing sight of the weal of the others, and feeling pain in the harm that is done to another—the true *unitas* of the body of the State rests on the just *coherentia* of the members among themselves and with their head. This is no mere Platonic scheme of the individual "writ large." To John of Salisbury, the community in terms of an organic structure appeared as a sort of a person with great possibilities for goodness, not a Platonic functional order.

He is hardly concerned with a purely secular achievement in statecraft. Like St. Augustine, John of Salisbury recognized that righteousness cannot exist without *true* justice and the need in his day to refer all governance to the "higher law" bore striking similarity to the times of St. Augustine. Feudal relations were defined by specific stipulations and jurisdictions had consolidated into definite organs of political con-

120. COMBES, LA DOCTRINE POLITIQUE DE SAINT AUGUSTIN 105 (1927).

121. VAN GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES 24 (1927).

trol. The importance and significance of positive law was generally recognized and accepted. Furthermore, the *Policraticus* was written between the years 1155 and 1159, during the papacy of Adrian IV, and belonged therefore to the period when there was already some friction between the Pope and the Emperor, and at a time when John sensed the coming dispute between Henry II and his intimate friend Thomas à Becket. "Every censure imposed by (positive) law is vain if it does not bear the stamp of the divine law," and lest a prince think that he has a peculiar prerogative to exercise private judgment in the interpretation of the "higher law," John of Salisbury adds, "a statute or ordinance of the prince is a thing of nought if not in conformity with the teachings of the Church."¹²² At this point, John of Salisbury stands between St. Augustine and St. Thomas. St. Augustine's eternal law provided the true idea of objective justice, antecedent to human positive law, towards which Civil Society must tend as an end. John of Salisbury found in the "higher law" the purpose of society to be the "common good," which St. Thomas was to discern in the natural law and in the more enlarged meaning of the natural means of man's perfectibility.

We can identify two distinct elements in John of Salisbury's common good; first, impartial justice on the principle that men have equal rights to what is their due according to the law; secondly, Beaumanoir's "common interest" is enlarged to mean the "advantage of the commonwealth."¹²³ These two objectives distinguish the true king from the tyrant, who, he recognizes, rules in accordance with Roman law principles.

"However it is said that the prince is absolved from the obligations of the law; but this is not true in the sense that it is lawful for him to do unjust acts, but only in the sense that his character should be such as to cause him to practice equity not through fear of the penalties of the law but through love of justice; and should also be such as to cause him from the same motive to promote the advantage of the commonwealth, and in all things to prefer the good of others before his own private will. Who, indeed, in respect of public matters can properly speak of the will of the prince at all, since therein he may not lawfully have any will of the prince apart from that law or equity enjoins, or the calculation of the common interest requires: For in these matters his will is to have the force of a judgment; and most properly that which pleases him therein has the force of law, because his decision may not be at variance with the intention of equity."¹²⁴

122. STATESMAN 24-5.

123. STATESMAN 6: "Now equity, as the learned jurists define it, is a certain fitness of things which compares all things rationally, and seeks to apply like rules of right and wrong to like cases, being impartially disposed toward all persons, and allotting to each that which belongs to him. Of this equity the interpreter is the law, to which the will and intention of equity and justice are known." (Italics mine).

124. *Id.* at 5.

John of Salisbury's ethical and legal emendation of the *lex regis* was made with evident alarm at the return of Roman law in the imperial courts.

"Now there are certain precepts of law which have a perpetual necessity, having the force of law among nations, and which absolutely cannot be broken with impunity. . . . *Lét the whitewashers of rulers . . . trumpet abroad that the prince is not subject to the law, and that whatsoever is his will and pleasure, not merely in establishing law according to the model of equity, but absolutely and free from all restrictions, has the force of law. . . . Still I will maintain . . . that kings are bound by this law.*"¹²⁵

This central idea of law, as supreme over king and subjects is based no longer on its origin in the consent of equals, solely, but also on its positive ordination to the common good. In this enlarged sense, the king as administrator of the law, is the "representative of the commonwealth," the "minister of the common interest . . . and bears the public person." He is an "officer," and his acts are not his own, but those of the "*universitas*" or corporate community in whose place he stands. The king, who withdraws "from the obligations of the law" not only ceases to be king but becomes an "outlaw."¹²⁶ Of John of Salisbury's doctrine of tyrannicide we can only observe that it deviates from the normal development of the tradition of Augustine and from the normal doctrine of his times. He based his doctrine of tyrannicide on the conception that a private individual may lawfully act to enforce "the law" against a tyrannical or "outlaw" ruler. What later thought brought out was that law can be enforced only by an agent holding a legitimate mandate from the community. The emphasis in the *Policraticus* seems to be that the community is summed up somehow in the ruler—and this leads Salisbury to think that the community, or *universitas*, could not act except through the prince. Hence if action was to be taken against him, it had to be taken as private individual action. But what he did not perceive is that to vest the right of tyrannicide in a subject would be to make the subject the legitimate judge of his ruler; and a legitimate judge, even the king himself, may not condemn an accused person without summons, trial and conviction. Certainly no mere individual can have greater authority over one not lawfully subject to him than a king has over his subjects.

b. *St. Thomas Aquinas: "The Christian LEX REGIA"*

Had St. Thomas' political philosophy been accorded on the Continent a "reception" of its own, Roman law may not have revived so success-

125. STATESMAN 33 *et seq.*

126. *Id.* at 34.

fully as it did, since he lived at a very opportune time in the development of political doctrine. He was the first to rescue Aristotle from the Arabian philosophers and adapt him to the truths which Christianity attained through reason and revelation. Further, one of his distinctive contributions was to define the independent domain of philosophy and to vindicate for human reason an autonomy commensurate with its natural finality. The intelligibility of the actual and the power of the mind to discern the inner meaning of reality and the intrinsic demands of being made possible the Thomistic adequate concept of human nature as that of a rational, moral, social, and political animal. St. Thomas supplied the necessary correctives to St. Augustine's social theory by an adequate concept of sound human nature. Aristotle for want of the specific equality of men saw no essential social relationships and could evolve an idea solely of the "political" man. St. Augustine, engaged in the Roman *milieu* where there was no genuine political man (and wanting an adequate metaphysics), emphasized only the social man. St. Thomas formed the theory fitting both the political and social nature of man from the essential dynamism of human nature and from the scope of divine providence in society.¹²⁷

127. A very curious observation about the teaching of St. Thomas is that, while he uses Aristotle and the Roman Stoic Cicero without it being apparent that he is aware of their naturalism, he interprets them in such a way as to give the necessary distinctions corrective of Stoicism. For in St. Thomas' natural law doctrine we have an adequate answer to the blurred and confused identifications that plagued the philosophic thought of antiquity. St. Thomas distinguishes between the eternal law, the natural law, the divine law, and human law. (I, II, 90 *et seq.*) It is manifest, he says, that the whole universe is governed by the divine reason, and therefore this "*ratio gubernationis*" has the character of law, for law is reason directing things to their end. All things which are subject to the divine providence are controlled by the eternal law by participating somehow in the eternal law; (I, II, 91, 2) but the rational creature is subject to the divine providence in a more excellent way, for it shares in the work of providence, it "provides" for itself and others, and this participation of the rational creature in the eternal law is called natural law. Whether or not St. Thomas was cognizant of the doctrine of the Stoics, he distinguished correctly between the natural law in the sense of nature which man has in common with all animals and that natural law by which man is differentiated from irrational creatures. Thus Ulpian's "*jus naturae est quod natura omnia animalia docuit*" is repeated verbatim by St. Thomas, prefaced by the correct specification: "*Secundo, inest homini inclinatio ad aliqua magis specialia secundum naturam, in qua communicat cum ceteris animalibus et secundum hoc dicuntur ea esse de lege naturali, quae natura omnia animalia docuit.*" (191, I, II, 94, 2). The same emendation occurs when he discusses positive law. Men can, by a common agreement, establish a law as just, in matters otherwise indifferent, as long as it is not contrary to natural justice, and this is positive law. (II, II, 57, 2). He adverts to the definition of justice as embodied in this positive law given by Ulpian in the Digest "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*" And remarks that it is to be understood in the light of his whole discussion. *Respondeo dicendum, quod predicta*

For our present purpose, we will confine our study to St. Thomas' sound version of the *lex regia* since it comprehends many important implicates for constitutional supremacy through the agency of representative government. Is the transfer of authority by the people to the ruler revocable or irrevocable? Is the transfer made conditionally or absolutely, and what is the manner by which it takes place? The answers to these questions distinguish St. Thomas' *lex regia* from the Roman original which the Bolognese legists were restoring in the courts of national princes and overweening emperors.

In the *Summa*,¹²⁸ St. Thomas states his preference for the mixed form of government in which governance is "*shared by all* because *all* are *eligible to govern*, and because the rulers are *chosen by all*." This general participation in government is of course not the Greek egalitarian sort but a participation in different degrees and in different ways. The "*head*" is given the power to preside over all; "*a number of persons*" are set in authority under him, and these rulers (men invested with governing powers) can be chosen *from the people* and *by the people* because "*the people have the right to choose their rulers*." The *choice* of rulers, *as such*, by the people may mean no more than mere designation. Since St. Thomas is expressing a *preference* it follows (as well as from other reasons) that both the *form* of government and the choice of the rulers are of human origin.

In St. Thomas' reasons for the deposition of a tyrant, we enter intimately into his meaning of "*choice by the people*." A tyrant is a ruler who ignores the *common good* of the community, the *raison d'être* for that office. And since St. Thomas teaches that the people can take action against the tyrant "*not through the private presumption* of a few

justitiae definitio conveniens est, si recte intelligatur. (II, II, 58, 1). In giving an objective norm to the subjective content of justice, the question still remains how does the mind attain to the objective. St. Thomas resolves the Stoic antimony between the Cosmic Reason and human conduct by distinguishing between two orders of nature and their essentially different necessities, physical and moral, and their relation to the human intelligence as an active potency.

"Human reason is not of itself the rule of things. But the principles impressed on it by nature are general rules and measures of all things relating to human conduct, whereof the natural reason is the rule and measure, although it is not the measure of things that are from nature." (I, II, 91, 3).

128. *Id.* at I, II, 105, 1. The significance of this passage lies in the fact that it was written at a time when the French and English monarchs were finally succeeding in making the crown hereditary in their families through the practice of securing the election and coronation of the heir during the lifetime of his predecessor. St. Thomas was summing up the elective principle of the Carolingian period and of the pactum of the feudal baronage.

but by *public authority*,¹²⁹ it follows that the choice by the people implied transfer of authority that is conditional and revocable. This choice is, therefore, more than an election; it is a consent to government according to a "covenant," "a kind of pact." And it is in the nature of this pact that the powers of the rulers are such as are *given* them and according to the terms of the pact as well as the essential moral objectives of the exercise of civil power. The tyrant is "guilty of sedition"¹³⁰ because he has converted the power given him to his own personal advantage and interest. The *legitimacy* of public action against the tyrant arises not only from the terms of the contract but also from its moral nature. According to St. Thomas' notion of the pact, the ruler is chosen to rule *in place of* the people and *in the name of* the people for their common good. Failing in his representative character there is no basis for his kingship. Since the authority of the king is the authority of the community the people can revoke the power given him when he is faithless to his trust. Since then the power delegated is conditional and revocable by "public authority," there is some power vested in the very nature of civil society which is inalienable and which no contract can void.

If the legitimacy of action against a tyrant rests on the nature of a pact, its *justice* is based on the nature of the common good, which is the immediate objective of society and of the ruler who acts in its name and for its sake. "To order anything to the common good belongs either to the people, or to someone who is the vice-gerent of the whole people." Since law "regards first and foremost the order to the common good"¹³¹ it follows that "the making of law belongs either to the people or the public personage who has the care of the whole people." St. Thomas' doctrine of law distinguishes the representative character of his legislator from the Roman who possessed the plenitude of legislative power. The people indeed can judge what is an ordination to the common good and are therefore competent to judge tyranny. And in the ordination of law to the common good, St. Thomas finds another reason more basic than consent itself for the supremacy of law. The Prince is not *legibus solutus* but must obey his own laws which he, the vice-gerent of the people, legislates for their common good.¹³² This is the reason underlying the position he maintains together with St. Augustine and St. Isidore that a custom of the people has the force of law to invalidate

129. PHELAN, ON THE GOVERNANCE OF RULERS c. VI (1938).

130. SUMMA THEOLOGICA II, II, 42, 1.

131. *Id.* at I, II, 90, 3.

132. *Id.* at I, II, 90, 3; I, II, 96, 5.

some contrary law of a ruler.¹³³ Law is the expression of the reason and will of the legislator, but these are declared as plainly by men's actions as by their words, and therefore the frequently repeated actions of men which constitute custom can change or establish or interpret law. This concept of the legislative power as being basically popular and in no way the exclusive prerogative of the ruler is strikingly antithetical to the Roman Imperium.

St. Thomas counsels that authority be so *restrained (temperatur)* that the ruler can not easily fall into tyranny.¹³⁴ What these restraints are

133. *Id.* at I, II, 97, 3.

134. PHELAN, *op. cit. supra* note 129, at 1, 6. This form of constraint is through law and institutions. St. Thomas' treatment of the representative principle, of the elective method of creating this representation, of the distribution of power, and its administration according to the terms of a pact comes very near to the contemporary constitutional development and provides basic principles for its advance. Yet Professor McIlwain holds to the contrary. MCLLWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* 330 (1932). The misunderstanding of St. Thomas by Professor McIlwain can only be intelligible by his failure to distinguish between principles of Constitutional government and Constitutional institutions. Further, for reasons which we cannot discuss at length here, Professor McIlwain finds the growth of constitutional government in the revival of Roman law and in the breakdown of Christendom (*cf.* MCLLWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* (1947)). And in his entire section on St. Thomas ("The Growth") he makes no reference to the evaluation of St. Thomas given by Carlyle in his monumental work. In spite of the evidence that St. Thomas stressed the *representative function of princes* ("gerunt vicem Dei et communitatis", *SUMMA THEOLOGICA* II, II, 63, 3), of the election of the ruler by the people with the sole exception of his designation by a superior in the feudal system (*DE REG. PRIN.* 1, 1), of the distribution of power among a "number of persons" who "are set in authority" most likely by the ruler who "is given the power to preside over all" (1, 11, 105, 1) and who is "chosen" by the people who have the *right to choose their rulers*" (1, II, 105, 1), of St. Thomas' cognizance of *limited monarchy* attempted in antiquity (*COMMENTARY ON ARISTOTLE'S POLITICS* 1, 1, *potestatem coarctatam secundum aliquas leges civitatis . . . secundum leges positas per disciplinam politicam*, as distinct from absolute power, *plenarium potestatem—plenarium not arbitrarium*. McIlwain is aware of this, n. 1, 330) of St. Thomas' own clear *preference for a mixed constitution* (*est enim aliquod regimen ex istis commistum, quod est optimum*, 1, 11, 95, 4) in which, quoting St. Isidore (*ETYMOLOGIES* v. 10) laws are made by the "majores natu cum plebibus," of the *extraordinary constitutional significance* of his teachings of the deposition of the tyrant by *Public Authority* according to the pactum (*DE REG. PRIN.* 1, 6), namely that the laws are supreme not only over the ruler but also *supreme* against any *private presumptions* or any mob action (*si ad jus multitudinis alicuius pertineat, sibi providere de rege*), for here Thomas is teaching in different words "due process" and "equal protection before the law," Professor McIlwain can still say: "His (St. Thomas') preference seems to be for a pure monarchy in which the king is 'absolute.' Removal of a tyrant by private men St. Thomas condemns, but chiefly on the grounds of expediency." This shows how poorly McIlwain appreciates first the supremacy of law over any individual private action implied in St. Thomas' teaching but also the full meaning of the *common good* in the light of which and for whose sake any private or public act on a public matter must be measured both for its legitimacy and its justice. Even in our own American Con-

do not appear in the *De Regimine Principum* which unfortunately he did not complete himself. But from the parallel discussion in the *Summa Theologica* St. Thomas states that in order to achieve St. Augustine's *pax* (to which he alludes) all should have some share in the government "for this form of government ensures peace among the people, commends itself to all, and is more enduring."

The modernity of St. Thomas Aquinas has been controversial¹³⁵ among contemporary scholars of constitutional history. St. Thomas' mixed polity

stitutional tradition, court decisions have negated such private actions as illegal because of the proximate danger to the government, which would in safer circumstances be allowed by the law itself and by the courts. The sole exception to the deposition of a tyrant by the people—namely the recourse to some superior authority in the feudal system (DE REG. PRIN. 1, 6) is considered by McIlwain as the normal practice of the times and the action by the "public authority" as the exception. This discloses the root of McIlwain's misunderstanding. St. Thomas is not giving us a record of what is, merely, but teaching a doctrine which is ahead of its times—and at a time when the transition from the feudal structure of society to the national unit was gradually taking place. 5 CARLYLE, *op. cit. supra* note 8, at 97. It is clear that his (Thomas') conception of a good constitution is that of a monarchy limited by the authority of an aristocracy elected by and representative of the community.

135. MAX ADAMS SHEPHERD, *Theory of Sir John Fortescue* in ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD McILWAIN 308-9 (1936): "Such a government (*dominium regale et politicum*), in which the king be he elective or hereditary, is limited by the customary law of the land as well as by natural and divine law, was well known to Aquinas. The famous philosopher specifically states that in a free multitude (which we interpret as being his mixed government) 'the prince has no authority of legislating, except insofar as he bears the person of the multitude,' and that in such a state the whole people may enact law. Aquinas perhaps did not work out, as definitely as did Fortescue, the idea of a constitutional participation of specific representative organs in the process of legislation and administration. Nevertheless, the general idea of a mixed government, in which the king is limited by the customary law of the land in the making of which the community-at-large has an important part, certainly occurs in Aquinas. Indeed, we believe that St. Thomas favored this mixed government over the royal or despotic type. Admittedly, however, this point is a dubious one, and Professor McIlwain adopts a contrary interpretation. But in any event it would appear that Fortescue had some grounds for saying that he found an important precedent for his mixed government in the *dominium regale et politicum* of Aquinas. It is true that Fortescue cites the first book of Aquinas' *De Regimine Principum* rather than the stronger passages in the *Summa Theologica*. Still, the conception of a mixed monarchy, limited not only by natural and divine law, but also by a customary law (sometimes called *jus gentium*) and by the principle that 'what touches all should be approved by all,' was as much a general medieval one as a peculiarly English one. Custom was a compelling limit on all authority throughout the Middle Ages, and many thinkers seem, often hazily no doubt, to have recognized this. Its greatest defect was lack of specific sanctions and specific organs of government to act as checks and balances. Fortescue did something to clarify the conception and to establish specific organs to check royal tyranny. But with him, as with many previous medieval thinkers, the sanction inherent in the custom itself, and in the habits of obedience it implies, is still the predominant one."

in which the sovereign is limited by the law of the realm in the making of which the community at large has an important part and in whose administration the popularly designated representatives constitute a rudimentary sort of institutional check on arbitrary power, was historically the most opportune, though, as events bore out, premature, consummation of the *logic* inherent in medieval constitutionalism. It is at the same time a most remarkable testimonial to St. Thomas' profound penetration to the meaning underlying the quickened dissolution of feudalism and the emergence of the territorial national state. In a subsequent article, we will trace the fruition of medieval constitutionalism in England and ascertain to what extent it was contingent upon the institutional fixing of the Catholic polity in that country by her jurists and what measure of influence the ecclesiastical models of representative governance, viz., the Dominican Convocations—exerted upon the origin of the English Parliaments.

In this present study, we have limited our selection of historical indices to such as are illustrative of successive progressions in the evolution of the ethico-juridic attributes of medieval constitutionalism. St. Augustine was the first of the Fathers of the Church to apply to the political-juridical order doctrines of the Christian Revelation.¹³⁶ He founded the principle of consent for governance on the specific equality of men and by conjoining it to the Pauline dictum, "all power is from God," he provided an adequate basis for the title to command fellow-equals while at the same time he thereby delimited the objectives and claims of the *Politeia* in the light of man's transcendental destiny. Furthermore, by his doctrine of the eternal law, as the divine exemplar of a freely created universe, St. Augustine broke through the all inclusive and self-enclosed monistic naturalism of the ancients. He could thereupon vindicate the necessity of a human law, truly temporal and variable and, as a corollary, deduce the salutary distinction between legitimacy and justice, and so resolve the pagan antinomy between *phusis* and *nomos*. St. Isidore enlarged upon the material constituents of positive law as the reasonable presuppositions of choice and thereby conferred upon custom law those prerogative attributes which later legal development ascribed to prescriptive rights, franchises, immunities, and fundamental liberties. Hincmar, Archbishop of Rheims, posited the supremacy and binding force of positive law on the juridic title of "general promulgation and consent." The earliest Christian construct of law and governance is the *Law of The Visigoths*. Predominantly the work of the bishops of the Councils of Toledo under the guiding influence of St. Isidore, the Law

136. COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE (1944).

of the Visigoths was essentially a translation of ethico-religious principles of public and private law into a legal code and a deliberate emendation of the Roman *lex regia* and *patria potestas*. The Carolingian *Capitularia* operated as a rudimentary form of constitutionalism by conditioning the fealty of the people to each successive ruler upon his faithful observance of the "law of our predecessors." The inviolability of these laws from unilateral change or abrogation rested upon the *communis consilio et consensu* of their origin and consequently provided the only legitimate grounds for amendment and emendation. The growing appreciation of the supremacy of law as derived from the more enlarged juridic implicates of consent was greatly corroborated by the bilateral nature of the feudal contract. The deferential allegiance of imperial Rome is replaced by a personal devotion of mutually contingent rights, obligations, and services. Treason is *infidelitas* not *laesa maiestas*. The legislative sovereignty inherent in the *Imperium* could not find a place in the political tradition of a Christian customary law when the sovereign powers of an evolving *regnum* were interpretative and judicial. The *Assizes of Jerusalem* attest to the increased recognition of the necessity of *institutional* securities for constitutional supremacy. By establishing procedures of impartial adjudication on the canon law principle that no man is to be a judge in his own cause and by devising a system of appeal within the feudal hierarchy they contributed to the achievement characteristic of Christian medieval polity—the inalienable right to immunity from the arbitrary. Later-day positive legal provisions, such as "due process," "equal protection," and trial by peers may properly be considered as logical and historical developments of the medieval embodiments of St. Augustine's principles of equality and consent. John of Salisbury warned his generation against the deceptive pretensions of a renescent Romanism and he recapitulated for his contemporaries the Christian political heritage which had evolved in unbroken sequence from patristic literature. The Aristotelian-Thomistic synthesis served to complement and remedy the deficiencies of the pagan *politeia*¹³⁷ and of the Augustinian tradition. St. Thomas formulated a mixed polity by a scheme of duly elected governors—representative officers—for the ad-

137. With Plato and Aristotle, a rational Theory of the State came to light in Greek philosophy. They were the first to conceive of the City-State as an association of citizens bound together by common values and interests integrated by law (The Constitution) for the prosecution of a general welfare which they conceived as essentially ordained to the happiness of its members. The failure of the *politeia* was consequent to the flaws inherent in Greek intellectualism which conduced to all the captive restraints of a self-enclosed naturalism. See Costanzo, *Graeco-Roman Politeia*, 20 *FORDHAM LAW REV.* (1951).

ministration of civil justice according to the law of the land in the making of which the people at large had a great share and determination.

In the next article, we will survey the development of medieval constitutionalism in Catholic England and the reasons for its triumphant survival after the schism. Correlative to this study we will seek out some reasons for the paradox of centuries, namely—the loss of the Catholic political heritage in Catholic Continental countries and their surrender to Romanism.