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Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607

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BOSTON UNIVERSITY LAW REVIEW

LEGAL IDEOLOGY AND INCORPORATION I: THE ENGLISH CIVILIAN WRITERS, 1523-1607†

DANIEL R. COQUILLETTE*

“And sure I am that no man can either bring over those bookes of late written (which I have seene) from Rome or Romanists, or read them, and justifie them, or deliver them over to any other with a liking and allowance of the same (as the author’s end and desire is they should) but they runne into desperate dangers and downefals These bookes have glorious and goodly titles, which promise directions for the conscience, and remedies for the soul, but there is *mors in olla*: They are like to Apothecaries boxes . . . whose titles promise remedies, but the boxes themselves containe poyson.”¹

Sir Edward Coke

“A strange justice that is bounded by a river! Truth on this side of the Pyrenees, error on the other side.”²

Blaise Pascal

This Article initiates a three-part series entitled Legal Ideology and Incorporation. In this series, Mr. Coquillette demonstrates that, although England has fostered a strong common law system, significant intellectual work was done in England during the sixteenth and seventeenth centuries by students of the civil law systems dominant on the Continent. Mr. Coquillette traces the development of the juristic works of these English civilians, and examines the civilians’ intellectual influence on the English common law. It

† © 1980 by Daniel R. Coquillette. Earlier versions of this Article were presented on October 4, 1977 to a Cornell Law School faculty symposium and on December 18, 1979 to the Faculty Legal History Dinner at the Harvard Law School. I am particularly grateful to Professor Harold Berman of the Harvard Law School for his encouragement of the first version of this paper, and to Professor John P. Dawson of the Harvard Law School and the Boston University School of Law, Professor Charles Donahue of the Harvard Law School, and Professor John Leubsdorf of the Boston University School of Law for their invaluable assistance. Remaining errors are my own.

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¹ Coke, *Preface to 7 Coke Rep.* (8th page, unpaginated) (London 1608).

² B. PASCAL, *PÉNSEES* 101 (W. Trotter trans. 1941) (1st ed. Paris 1670).

is his central thesis that the English civilian jurists never intended to achieve a direct "incorporation" of civil law doctrines into the common law. Rather, their lasting achievement has been the significant influence that their ideas about law—their "legal ideology"—have exercised on leading common lawyers.

Mr. Coquillette divides the development of English civilian jurisprudence into three periods. The first period, which is the subject of this Article, includes the years from the publication of Christopher St. German's seminal *Doctor and Student* in 1523 to the storm of protest from common lawyers following the publication of John Cowell's highly controversial *The Interpreter* in 1607. During this significant period, English civilian writing tended to promote synthesis and accommodation with the common law, and formed a pioneering venture in comparative law, a remarkable ideological effort that rewards study for its own sake.

The second Article in this series, *Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607-1676*, which will appear in the March 1981 issue of the *Boston University Law Review*, discusses the second period of English civilian juristic development. This period includes the years from the publication of the civilian Sir Thomas Ridley's major work, *A View of the Civile and Ecclesiastical Law* in 1607 to the publication of the common lawyer Charles Molloy's great *Treatise of Affairs Maritime and of Commerce* in 1676. During this period, the common lawyers, initially led by Coke, mounted increasing jurisdictional and political attacks on the civilians and at the same time attempted to co-opt civilian methodology in those vital, growing fields in which the civilians had exhibited particular expertise, most notably the law merchant. In response, the civilians became defensive in their juristic attitudes. Instead of continuing previous attempts to synthesize civil and common law, they began to try to isolate and maintain whatever pockets of influence they had already established. The critical struggle was in important part literary and intellectual, and it centered on the traditional civilian strongholds of the international law merchant and the Admiralty jurisdiction.

The forthcoming third Article in this series, *The Restoration Civilians and Their Influence, 1629-1685*, discusses the third period of English civilian juristic development. This period essentially includes the years during and after the Commonwealth. By then, the common lawyers were succeeding in their attacks, leaving civilian scholars, such as Godolphin, Duck, Wiseman, Zouche, Exton, and Leoline Jenkins, with what could have been an increasingly narrow and specialized role in the English legal system. Mr. Coquillette argues that although the doctrinal work of later English civilian writers may be relatively better known than the work of their intellectual forebears, the most important contribution of these and earlier civilian writers to Anglo-American law lies in their influence, direct and indirect, on such leading common lawyers as Bacon, Selden, Hale, Holt, Mansfield, and Bentham.

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I. INTRODUCTION

Two years ago, a group of Russian jurists visited Boston as part of the exchanges made possible by the Prague Accords. It was their first trip out of Russia. They had prepared certain lines of questions, hoping to surmount both the language and cultural barriers.

I was part of a small group of nervous American lawyers assigned to be

their guides. The initial questions of the Russians all concerned what they hoped would be our common bond as lawyers and jurists, namely, our university programs in Roman and foreign legal systems, comparison of our legal procedures with those of Roman and other civil law systems, and our notions of *ius gentium* and universal principles of law. Owing to our narrow professional training as common lawyers, it was most difficult for us to respond in any meaningful way.

There is danger in a limited, provincial view of what a lawyer should know, and what legal principles can do. This danger was a basic concern of the early English specialists in civil and Roman law, the so-called English "civilians." These English civilians were dedicated to legal science as a transnational force and as a critical source of principles of universal application.

Harold Berman has emphasized that "the growth of nationalism in modern times has made inroads into the transnational character of Western legal education and the links between law and other university disciplines have been substantially weakened."³ The insular professionalism of legal education in America today would be striking to English civilians such as Alberico Gentili, William Fulbecke, or John Cowell. They believed that ideas about law were eminently suitable for transplanting.⁴ It made no difference to them whether the source was university scholarship, legal practice, or a foreign system. They were committed to the transnational character of Western legal science, and to the nature of law as a universal discipline inviting comparative study and innovative thought. As Fulbecke observed, "[T]he common lawe cannot otherwise bee divided from these twain [canon and civil law], then the flower from the roote and the stalké."⁵

It has been too easy to forget that not all "English lawyers" were "common lawyers." The English civilians played an important role in the development of English legal science.⁶ Stereotypical views of these civi-

³ Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 941 (1977).

⁴ See Donahue, *What Cause Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 60 (1979). See generally A. WATSON, *LEGAL TRANSPLANTS* (1974).

⁵ I W. FULBECKE, *A PARALLELE OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW AND THE COMMON LAW OF THIS REALME OF ENGLAND* 62 (2d ed. London 1618) (1st ed. London 1602) [hereinafter cited as I A PARALLELE].

⁶ Holdsworth asserted that "we must know something of the manner in which ideas drawn from the civil and canon law shaped the political theory of western Europe, if we are to understand the medieval history of [England] or of any other western European country . . ." Holdsworth, *The Place of English Legal History in the Education of English Lawyers: A Plea for Its Further Recognition*, in *ESSAYS IN LAW AND HISTORY* 20, 22 (1946). Donahue has commented,

The abrasive contact between the civil law taught in the academies, the non-civil law espoused in the courts, and the diverse human conflicts which call for resolution led thoughtful men to search for first principles. That contact occurred

lians, often invented by their enemies, have greatly obscured the extent and quality of their contribution.⁷ The critical distinguishing feature of English civilians was their specific legal ideology—their ideas about law.⁸ “The

in England at many times, most notably in the 16th and early 17th centuries, and it is the effect of this contact that ought to be more fully explored.

Donahue, Book Review, 84 *YALE L.J.* 167, 181 (1974) (reviewing B. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641*).

The *Boston University Law Review* has published a number of important Articles which have promoted the study of civil law ideas in America, many of them by a founder of the *Review*, the Roman law scholar Charles P. Sherman. See, e.g., Sherman, *Modernness of Roman Military Law*, 24 *B.U.L. REV.* 31 (1944); Sherman, *Roman Law in the United States: Its Effect on the American Common Law*, 14 *B.U.L. REV.* 582 (1934); Sherman, *Salient Features of the Reception of Roman Law into the Common Law of England and America*, 8 *B.U.L. REV.* 183 (1928); Setaro, *History of the English Ecclesiastical Law (Parts One & Two)*, 18 *B.U.L. REV.* 102, 342 (1938); Setaro, *Prologue to a History of English Ecclesiastical Law*, 16 *B.U.L. REV.* 158 (1936). Additionally, the *Review* has published significant Articles in conjunction with the Charles P. Sherman Lectureship in Comparative Law at Boston University. See Lawson, *Roman Law as an Organizing Instrument*, 46 *B.U.L. REV.* 181 (1966); Schiller, *The Nature and Significance of Jurists Law*, 47 *B.U.L. REV.* 20 (1967); Stein, *Logic and Experience in Roman and Common Law*, 59 *B.U.L. REV.* 433 (1979). See generally Speidel, *Foreword—Logic and Experience in Roman and Common Law*, 59 *B.U.L. REV.* 433, 433-36 (1979).

⁷ See, e.g., J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 50-58 (1st ed. 1971); 1 W. BLACKSTONE, *COMMENTARIES* * 19-23; A. HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 190-93 (1973); T.F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 298-300, 661-63 (5th ed. 1956). Whig historians such as Trevelyan linked the “[s]tudents of the Roman Law” directly with the excesses of the Stuart “prerogative courts,” G. TREVELYAN, *HISTORY OF ENGLAND* 391 (3d ed. 1945); Macaulay observed that these courts, “guided chiefly by the primate and freed from the control of Parliament, . . . displayed a rapacity, a violence, a malignant energy, which had been unknown to any former age,” 1 T. MACAULAY, *THE HISTORY OF ENGLAND* 88 (London 1849). Only recently has John Langbein laid to rest one of the worst curses on the civilians, that they introduced torture to England. See J. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 131-34 (1977).

⁸ If we look for civil law influence in the specific rules that the common law or equity courts adopted, we quickly find ourselves in a helpless morass. For every principle of common law alleged to have civil law ancestry, there is a case to be cited which explains it totally in common law terms, or a text from the *Digest* which suggests that the civil law rule was really quite different.

The problem with this kind of analysis is that it glorifies the specific rule by which the case is decided and underplays the basic principles underlying the rule and the methodology used to arrive at that rule. If it is true that the life of the law has not been logic but experience, it is equally true that experience has been shaped by the power of certain fundamental ideas and methods of proceeding. And in the development of these ideas and methods in England, civilian influence may have played some part.

Donahue, *supra* note 6, at 179-80.

community of civil law systems consists more in a unity of formal technique than of content."⁹ Although particular substantive legal rules can be characterized as "civilian" because of their Roman origins,¹⁰ the most critical contributions of the Roman jurists and their civilian followers have been in the nature of legal ideas and legal methods; not so much the formulation of specific substantive rules of law, but "the basic principles underlying the rule and the methodology used to arrive at that rule."¹¹

The writings of the English civilians in the sixteenth and early seventeenth centuries support this thesis. Their important contribution to English jurisprudence was not a system of specific rules, but a professional "world view" that was distinctly different from that of the common lawyers. In particular, these civilians were the pioneers of English comparative legal studies, the study of public international law in England, and the development of a private international law of commerce—all at a time when the intellectual efforts of the common lawyers were narrowly focused on the centralized national law courts in London. Furthermore, these early English civilians had a distinctive view of the study of law as a kind of humanistic study. Accordingly, they cultivated ties between civilian legal practitioners in London and law teachers in the English universities. By contrast, throughout the sixteenth century, legal study at the common law Inns of Court remained practical and insular.¹²

⁹ Sundberg, *Civil Law, Common Law, and the Scandinavians*, 13 SCAN. STUD. L. 181, 200 (1969) (quoting M. Rheinstein); see Donahue, *supra* note 6, at 179-80.

¹⁰ See generally W. HOWE, *STUDIES IN THE CIVIL LAW, AND ITS RELATION TO THE LAW OF ENGLAND AND AMERICA* (1896); Baker, *The Law Merchant and the Common Law Before 1700*, 38 C.A.M.B. L.J. 295 (1979); Sack, *Conflicts of Laws in the History of English Law*, in 3 LAW: A CENTURY OF PROGRESS, 1835-1935, at 342 (1937); Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 403-04 (1966); Stein, *Continental Influence On English Legal Thought, 1600-1900*, in 3 ATTI DE III CONGRESSO INTERNAZIONALE DELLA SOCIETA' ITALIANA PER LA STORIA DEL DIRITTO 1105, 1120 (1977) [hereinafter cited as Stein, *Continental Influence*]; Sutherland, *The Law Merchant in the Seventeenth and Eighteenth Centuries*, in 17 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 149 (4th ser. 1934).

¹¹ See Donahue, *supra* note 6, at 179-80.

¹² J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 147-48 (2d ed. 1978); J. DAWSON, *THE ORACLES OF THE LAW* 35-45 (1968); A. HARDING, *supra* note 7, at 187-90; see notes 38 & 42 *infra*.

Practicality and insularity also characterized fourteenth century common law literature. "The wretched poverty of English Year Book learning stands in striking contrast to the wealth and range and intellectual power of Italian legal literature of the fourteenth century." J. DAWSON, *supra*, at 143; see T.F.T. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 114 (1958); W. ULLMAN, *THE MEDIEVAL IDEA OF LAW* 5 n.1 (1946); Arnold, *Introduction to THE OLD TENURE & THE OLD NATURA BREVIUM* (1st page, unpaginated) (1974). "[T]he common lawyers became wholly ignorant of that fund of legal principles and material for legal speculation which were stored up in the writings of the civilians and canonists, and in the texts upon which

The early English civilians also believed that legal principles could form the building blocks for a cosmopolitan world order. This world order would rationalize international trade and relations between nations, and most importantly, establish universal conceptions of justice recognized by all educated jurists as part of the civilian *ius gentium*. Such a commitment to the study and use of transnational law was important in England in the sixteenth and seventeenth century, and it remains important today.¹³

This Article is the first in a three-part series called *Legal Ideology and Incorporation*. It focuses on the legal ideas of the English civilians, and their literary efforts to achieve incorporation of these ideas in the English legal system during the sixteenth and seventeenth centuries. Outwardly, the civilian story is one of failure. As a specialized branch of the English legal profession, the civilians became extinct in 1858. Their great London headquarters, Doctors' Commons, was destroyed, and its library—perhaps the best in Europe on comparative and international law—was scattered and sold. Their lucrative professional monopolies—admiralty, probate, and domestic relations—fell to the common lawyers.

Yet it is the thesis of these Articles that the English civilians, particularly the civilian writers, succeeded better than they knew—that their peculiar view of legal institutions and doctrines did impact on the development of common law jurisprudence in critical ways and, even where they failed,

they commented." 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 287 (rev. 3d ed. 1923).

¹³ It is ironic that the specialized civilian idea of a private law merchant, to be discussed in the second Article in this series, has attracted more continuing interest than the civilians' fundamental commitment to a cosmopolitan legal order. See Berman & Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARV. INT'L L.J. 221, 224-29, 272-77 (1978); Schmitthoff, *The Law of International Trade, Its Growth, Formulation and Operation*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 5 (C. Schmitthoff ed. 1964); Note, *A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?*, 3 BROOKLYN J. INT'L L. 210, 211-16 (1977). Nevertheless, American jurists and lawyers are beginning to recognize the importance of legal literature in the broader sense of "those fundamental distinctions in legal ideas that [affect] the way legal results are reached . . ." Donahue, *supra* note 4, at 59. As Dean Rostow stated:

The pressure of events and the piling up of statutes and decisions tend to confine perspective, both in the classroom and in much legal writing, to yesterday or the day before, or even to today and tomorrow. Social institutions have deep roots. And social groups have powerful memories. If law is cut off from its history, the student tends to emerge as a limited technician, who may find himself at sea as the law he has learned in school vanishes before his eyes. By the same token our legal literature could become more and more trivial and inadequate to its responsibilities.

Woodward, *History, Legal History, and Legal Education*, 53 VA. L. REV. 89, 109 (1967) (quoting E. Rostow); see Berman, *supra* note 3, at 941-43; Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727, 761-62 (1969).

their surviving literature may yet offer rich inspiration to Anglo-American lawyers, and insight into the historical relationship of law and science.¹⁴

¹⁴ Objective, analytical scholarship about English civilians has been remarkably scarce. The bulk of the work has focused not on the civilians themselves, but on the courts and government agencies in which they usually practiced and on the jurisdictional disputes concerning these courts. See notes 54 & 71 *infra*.

The first serious study was C. COOTE, *SKETCHES OF THE LIVES AND CHARACTERS OF EMINENT ENGLISH CIVILIANS* (London 1804). Following were the works of William Senior. W. SENIOR, *DOCTORS' COMMONS AND THE OLD COURT OF ADMIRALTY* (1922); Senior, *The Advocates of the Court of Arches*, 39 *LAW Q. REV.* 493 (1923) [hereinafter cited as Senior, *The Advocates*]; Senior, *Early Writers of Maritime Law*, 37 *LAW Q. REV.* 323 (1921) [hereinafter cited as Senior, *Early Writers*]. But by far the best early study was by a Belgian civilian. E. NYS, *LE DROIT ROMAIN, LE DROIT DES GENS ET LE COLLÈGE DES DOCTEURS EN DROIT CIVIL* (1910). The studies by Coote and Senior, although valuable, were primarily antiquarian in emphasis, and were romantic in their approach to Doctors' Commons. In some ways, the Nys study still remains the best juristic study of the English civilians.

Much of the better earlier work touched only indirectly on the English civilian experience. See F. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* (1901) [hereinafter cited as F. MAITLAND, *ENGLISH LAW*]; F. MAITLAND, *ROMAN CANON LAW IN THE CHURCH OF ENGLAND* (1909) [hereinafter cited as F. MAITLAND, *ROMAN CANON LAW*]; P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* (1909) [hereinafter cited as P. VINOGRADOFF, *ROMAN LAW*]; F. C. VON SAVIGNY, *HISTORY OF ROMAN LAW DURING THE MIDDLE AGES* (E. Cathart trans. Paris 1829); Hazeltine, *The Renaissance and the Laws of Europe*, in *CAMBRIDGE LEGAL ESSAYS* 139 (1926).

There have been a few outstanding studies on the contribution of English civilians in the area of public and private international law. See T. HOLLAND, *Alberico Gentili*, in *STUDIES IN INTERNATIONAL LAW* 1 (1898) [hereinafter cited as T. HOLLAND, *Alberico Gentili*]; T. HOLLAND, *The Early Literature of the Law of War*, in *STUDIES IN INTERNATIONAL LAW*, *supra*, at 40 [hereinafter cited as T. HOLLAND, *Early Literature*]; P. VINOGRADOFF, *Historical Types of International Law*, in 2 *THE COLLECTED PAPERS OF PAUL VINOGRADOFF* 248 (1928) [hereinafter cited as P. VINOGRADOFF, *Historical Types of International Law*]. See also Sack, *supra* note 10, at 342.

Last, but by no means least, are two recent books on the English civilians, each remarkable in its own way. First, G. SQUIBB, *DOCTORS' COMMONS* (1977), is the final, authoritative account of the physical setting of Doctors' Commons, and its library and institutional records and operation as a professional society. Squibb even includes a chapter on the silverware and the food. *Id.* at 76-87. But Squibb does not concern himself with the juristic work of the civilians. Second, B. LEVACK, *THE CIVIL LAWYERS IN ENGLAND, 1603-1641* (1973), is a most important study from which this Article has profited, as must all future works on English civilians. This book contains an invaluable "Biographical Dictionary" of English civilians who received their doctorates before 1641 and who resided in England between 1603 and 1641. *Id.* at 203-82. But Levack's work, as its subtitle, "A Political Study," indicates, focuses on the political, not the legal, activities of the English civilians. Additionally, as the title indicates, Levack's work focuses on a restricted chronological period. As Charles Donahue has rightly indicated, "[i]t is the work of a careful historian who is

Ironically, their most lasting contributions to the substantive law would be because of their influence on great common law jurists, particularly through civilian ideas about the law merchant, procedure, and codification.¹⁵ Among these common law jurists were Francis Bacon, John Selden, Mathew Hale, John Holt, William Murray, and even, Jeremy Bentham.¹⁶

interested in lawyers, their political ideas and alliances, but it is not really a work of legal history, if we define 'legal history' as the history of legal doctrine" Donahue, *supra* note 6, at 177. It is, nevertheless, a most valuable book.

¹⁵ The key link was Sir Thomas Ridley (1549-1629), the next major civilian writer after Cowell and Fulbecke. A man of affairs and of great perception, Ridley learned the lesson of his predecessors. To avoid the censure they incurred when they sought to synthesize common and civil law, Ridley formulated an entirely new approach to promoting civilian ideology: he concentrated on the practical civilian legal specialities—particularly the Admiralty jurisdiction. Ridley's writing will be the subject of the second Article in this series, *Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607-1676* (forthcoming in 61 B.U.L. REV. No. 2 (March 1981)).

¹⁶ This influence will be the subject of the third Article in this series, *Legal Ideology and Incorporation III: The Restoration Civilians and Their Influence, 1629-1685* (forthcoming). For discussions of the civilian influence on particular common law jurists, see Hazeltine, *Introduction to J. SELDINI, AD FLETAM DISSERTATIO IX-XVI* (1925); Ogg, *Introduction to J. SELDINI, supra*, at xix-lxvi; Yale, *A View of the Admiralty Jurisdiction, Sir Mathew Hale and the Civilians*, in LEGAL HISTORY STUDIES 1972, at 87 (D. Jenkins ed. 1975); Ziskind, *John Selden: Criticism and Affirmation of the Common Law Tradition*, 19 AM. J. LEGAL HIST. 22, 22 (1975).

The most overlooked example of civilian influence has been Francis Bacon. Like Gentili and Fulbecke, *see* note 309 and accompanying text & note 359 *infra*, Bacon was a member of Gray's Inn and not of the College of Advocates, but also like Gentili and Fulbecke, Bacon possessed a literary style and jurisprudence that reflected civilian influence. Bacon appears to have been tutored by Jean Hotman, the French civilian, during 1575-79, the time that Bacon was attached to Sir Amyas Paulet, the English ambassador to France. *See* Nys, *Introduction to A. GENTILI, DE LEGATIONIBUS LIBRI TRES 33a-34a* (second volume of Carnegie Endowment edition) (J. Scott ed., J. Laing trans. 1924). Bacon always wrote in Latin or English, and never in Law French. He believed that Latin was a greater language than English. He wrote treatises and collections of maxims, but never law reports. He never relied on cited authority, but used reason as his only test. *See* F. BACON, *Example of a Treatise on Universal Justice or the Fountains of Equity, by Aphorisms: one Title of it*, in 5 THE WORKS OF FRANCIS BACON 88-110 (J. Spedding, R. Ellis & D. Heath eds. new ed. 1870); F. BACON, *A preparation toward the Union of Laws*, in 7 THE WORKS OF FRANCIS BACON 727-43 (J. Spedding, R. Ellis & D. Heath eds. new ed. 1872); F. BACON, *The Argument of Sir Francis Bacon . . . In the Case of the Post-Nati of Scotland . . .*, in *id.* at 637-79; F. BACON, *Maxims of the Law*, in *id.* at 307-87; F. BACON, *Of Judicature*, in 6 THE WORKS OF FRANCIS BACON 506-10 (J. Spedding, R. Ellis, & D. Heath eds. new ed. 1870); F. BACON, *The Advancement of Learning*, in 6 THE WORKS OF FRANCIS BACON 79, 387-93 (J. Spedding, R. Ellis, & D. Heath eds. 1863). He proposed to James I a scheme to prepare *Institutes*, a *Code*, and a *Digest* of

English civilian writers never achieved any substantial "incorporation" in the sense of a "reception" of substantive Roman law doctrine into the English national law, either directly or indirectly.¹⁷ They never sought such a thing. The English civilians sought to enrich the existing English national law with civilian methodology and principles, most particularly the techniques of comparative legal study and the doctrines of the *ius gentium*. Later academic controversies about whether "Roman law" did or could "invade" England missed the point.¹⁸

English laws, together with a law dictionary. See F. BACON, *A Memorial touching the Review of Penal Laws and the Amendment of the Common Law*, in 12 THE WORKS OF FRANCIS BACON 84-86 (J. Spedding, R. Ellis & D. Heath eds. 1869) [hereinafter cited as F. BACON, *Memorial*]; F. BACON, *A Proposition . . . touching the Compiling and Amendment of the Laws of England*, in 13 THE WORKS OF FRANCIS BACON 61-71 (J. Spedding, R. Ellis & D. Heath eds. 1872) [hereinafter cited as F. BACON, *Proposition*]. Would Bacon's proposed law dictionary have been another *Interpreter*? See notes 398-421 and accompanying text *infra*. He wrote extensively on the problems of the union with Scotland's more civilian-oriented legal system, and welcomed the union as a chance to reexamine and reform the English law. F. BACON, *Preparation toward the Union of Laws*, in 7 THE WORKS OF FRANCIS BACON, *supra*, at 727-43. Most importantly, he looked to the cosmopolitan culture of Europe in matters legal, as well as scientific and artistic.

As to the influence of some civilian ideas on the English radical movements, the precursors of the Benthamites, see C. HILL, PURITANISM AND REVOLUTION 59-60 (1964); S. PRALL, THE AGITATION FOR LAW REFORM DURING THE PURITAN REVOLUTION, 1640-1660, at 12-13 (1966); D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM, 1640-1660, at 65-96 (1970).

¹⁷ At least, the civilians did not achieve "incorporation" in the sense of persuading the common lawyers to borrow "ready-made law from another jurisdiction." Baker, *supra* note 10, at 322. Baker demonstrates conclusively, for example, that a substantive foreign law merchant was not "incorporated" into the English common law during the Renaissance period. See Baker, *supra* note 10. Such "incorporation" of substantive legal rules or doctrine, however, was never the end sought by English civilian writing. The early civilian writers, who are analyzed in this Article, were concerned instead with broader issues of methodology and legal philosophy—particularly the issues of the usefulness of comparative legal study and the notion of *ius gentium*. See notes 73-132 and accompanying text *infra*. The later civilian writers, who are analyzed in the following two Articles in this series, sought to protect the jurisdiction of existing English civilian courts and institutions, not to "incorporate" civilian doctrines into the common law. See notes 15 & 16 *supra*.

¹⁸ Maitland's famous thesis was that such a "reception" threatened in the 16th century. See F. MAITLAND, ENGLISH LAW, *supra* note 14. Thorne has conclusively shown that this thesis was wrong, if what it meant by "reception" was a reception of substantive Roman law doctrines. See Thorne, *English Law and the Renaissance*, in ATTI DEL PRIM CONGRESSO INTERNAZIONALE DELLA SOCIETA' ITALIANA DI STORIA DEL DIRITTO, LA STORIA DEL DIRITTO NEL QUADRO DELLE SCIENZE STORICHE 436 (1966). But the proper focus for evaluating civilian influence in En-

II. THE ENGLISH CIVILIANS

A. *The Institutional and Educational Setting: Doctors' Commons and the Ancient Universities*

The English civilians are extinct. As one of their contemporaries put it, "[They] will ere long be as extinct as the dodo."¹⁹ Extinction occurred on January 15, 1858, when a majority of the last twenty-six surviving English civilians voted to distribute the considerable assets of their professional organization, the College of Advocates, to themselves.²⁰ There was about £4,000 for each; a lot of money at the time.²¹ This distribution entailed the breakup of their great library and the sale of their armorial relics and portraits. Ultimately, it also meant the destruction of the quadrangle and buildings of Doctors' Commons, for nearly two hundred years the home of civilians and the College of Advocates, and one of the great centers of cosmopolitan legal learning in the world.²² Much of the site is now under

gland is not specific substantive doctrine, but the influence on juristic literature and methodology. See Donahue, *supra* note 6, at 168-69, 179-80.

¹⁹ 1875 THE SPECTATOR 641 (1864), quoted in 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 422 (1971) (definition of "civilian").

²⁰ For the detailed account of the ultimate dissolution of Doctors' Commons—a story not without pathos, greed, and human drama—see 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 48-49 (1938); E. NYS, *supra* note 14, at 121-22; W. SENIOR, *supra* note 14, at 110-12; G. SQUIBB, *supra* note 14, at 102-09; F. WISWALL, THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800, at 75-95 (1970); Carr, *Introduction to PENSION BOOK OF CLEMENT'S INN* lxii-lxiii (Selden Soc'y Pub. No. 78, C. Carr ed. 1960); Manchester, *The Reform of the Ecclesiastical Courts*, 10 AM. J. LEGAL HIST. 51, 75 (1966).

²¹ G. SQUIBB, *supra* note 14, at 104.

²² Fragments of this great library of comparative law, legal history, and international law can now be found in the Admiralty Registry, Royal Courts of Justice, London, and in the storage basement of the Royal Courts of Justice in the Strand, London. F. WISWALL, *supra* note 20, at 91. The Subscription Book and the Minute Book of Doctors' Commons, as well as other important manuscripts, are at the Lambeth Palace Library, London. Other remaining records, most notably the Long Book, PRO 30/26/8, and the Library Account Book, PRO 30/26/9, are accessible at the Public Records Office, London. See B. LEVACK, *supra* note 14, at 293-95 (Select Bibliography); G. SQUIBB, *supra* note 14, at 9-13, 111-15. One of the best physical descriptions of Doctors' Commons was the brochure published in 1862 by the solicitor charged with the final sale. See E. NYS, *supra* note 14, at 122 n.1.

For accounts of the heroic but futile efforts of Dr. John Lee, a member, and others to save Doctors' Commons and its great library for the study of civil law, comparative law, and international law, see G. SQUIBB, *supra* note 14, at 104-06; F. WISWALL, *supra* note 20, at 188-90. At a critical meeting, Lee accused his fellows of "a palpable breach of trust" in vesting the Doctors' Commons property in themselves. G. SQUIBB, *supra* note 14, at 106. According to Lee, Doctors' Commons represented centuries of accumulated value property that should have been regarded as a public trust. *Id.*

Queen Victoria Street. The remainder is a modern office block. Such institutional mass suicide, using as a weapon an enabling clause in the 1857 Court of Probate Act²³ designed for that purpose by their rivals, the common lawyers, hardly speaks well of the civilians' idealism or the vigor of their intellectual allegiances.²⁴

Charles Dickens, at sixteen, covered Doctors' Commons as a freelance reporter.²⁵ He candidly observed that Doctors' Commons was, if not in fact dead, at least suffering advanced senility by 1828.²⁶ It was

a little out-of-the-way place where they administer what is called ecclesiastical law, and play all kinds of tricks with obsolete old monsters of acts of parliament, which three-fourths of the world know nothing about, and the fourth suppose to have been dug up, in a fossil state, in the days of the Edwards. It's a place that has an ancient monopoly in suits about people's wills and people's marriages, and disputes among ships and boats.²⁷

Dickens' great character, David Copperfield, visited Doctors' Commons shortly before its dissolution. It was like a nursing home:

The languid stillness of the place was only broken by the chirping of this

²³ Probate Act of 1857, 20 & 21 Vict., c. 77, §§ 116-117.

²⁴ There has been a "chicken or egg" controversy about who was most to blame for the tragedy—the Parliament that passed the enabling clause, or the remaining civilians, whose greed led them to exercise the statutory power. Senior puts the onus on the Act. W. SENIOR, *supra* note 14, at 110. Wiswall states that the truth was more "complicated." F. WISWALL, *supra* note 20, at 88. According to Wiswall, it was not really the fault of the common lawyers or Parliament "that they condemned the civilians and then handed them a razor with which to cut their own throats. . . . Sadly the main motive of the majority of the doctors in devising the dissolution of the College appears to have been nothing more than simple avarice." *Id.*

The heroes, however, were clearly those civilians who joined Dr. Lee and sought to preserve Doctors' Commons as a kind of institute for advanced legal study in comparative law. Ironically, London is now the home of the Institute for Advanced Legal Studies. If only it could have had the initial resources and setting of Doctors' Commons!

²⁵ Dickens knew Doctors' Commons well and was knowledgeable about law. At 15 he began work in the office of a firm of Gray's Inn solicitors. At 16 and 6 months, still too young to be a parliamentary reporter, he became a free lance reporter covering the Court of the Bishop of London at Doctors' Commons. W. HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN 9, 30-33, 35-36, 65 (1928); 15 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 377 (1965); Blount, *Introduction & Notes* to C. DICKENS, DAVID COPPERFIELD ix, 954 (T. Blount ed. 1966). The descriptions of Doctors' Commons in *David Copperfield*, first published in 1850, could have contributed indirectly to the passage of the Probate Act of 1857, 20 & 21 Vict., c. 77, §§ 116-117.

²⁶ C. DICKENS, DAVID COPPERFIELD 403 (T. Blount ed. 1966) (1st ed. London 1850).

²⁷ *Id.*

fire and by the voice of one of the Doctors . . . [a]ltogether, I have never, on any occasion, made . . . [a stop] at such a cosey, dosey, old-fashioned, time-forgotten, sleepy-headed little family-party in all my life; and I felt it would be quite a soothing opiate to belong to it in any character—except perhaps as a suitor.²⁸

How could this geriatric ward symbolize a vital option in the development of English law? By Dickens' day, the ideological juices at Doctors' Commons had almost ceased to flow.²⁹ The civilian jurisdictions had been pared away, and there was corruption among the staff.³⁰ The scent of decay hung in the air.

But three hundred years earlier the picture was very different. The renaissance of humanist legal study on the continent, closely related to the English civilian scholarship, could have made the English common law institutions appear isolated, parochial, and old-fashioned in a Europe of new national states.³¹ The triumph of the Tudor monarchy over the Church had largely eliminated the canonical lawyers as a distinct class, and powerful royal patronage was being exerted to see to it that the common lawyers, hardly more trusted by Henry VIII, would not exclusively benefit. Instead, favor fell on the civilians.³²

The civilians enjoyed nearly exclusive monopolies of university teaching in law at Oxford and Cambridge. Between 1540 and 1546 Henry VIII had

²⁸ *Id.* at 413.

²⁹ The last intellectual sorties of the civilians, including those of Lord Stowell, will be examined in the third Article in this series. For descriptions of the lingering civilian practice in admiralty and ecclesiastical law, respectively, see F. WISWALL, *supra* note 20, at 75-115; Manchester, *supra* note 20, at 58-75.

³⁰ In November 1853, the Deputy Registrar of the Admiralty Registry of Doctors' Commons, Mr. Henry B. Swabey, disappeared with approximately £75,000. The money was taken from various escrow funds and from the Doctors' Commons' Suitor's Fund. Wiswall reported that the Admiralty court, and its civilian practitioners, had "the gloom of scandal," F. WISWALL, *supra* note 20, at 52, and that its "tranquil atmosphere" was "shattered . . . by the revelation of the Swabey affair, and it was never regained." *Id.* at 83. It was only four years after the "Swabey affair" that Doctors' Commons was dissolved.

³¹ T.F.T. PLUCKNETT, *supra* note 7, at 39-44.

³² "[I]t was to the civilians that Henry VIII turned when he was founding or reorganizing such administrative courts as the Privy Council, the Star Chamber, the Court of Requests, the Court of High Commission, the Council of the North, the Council of Wales, and the rest." *Id.* at 43; see Logan, *The Origins of the so-called Regius Professorships: An aspect of the Renaissance in Oxford and Cambridge*, in 14 STUDIES IN CHURCH HISTORY 271, 277-78 (1977); note 49 *infra*. But see Elton, *The Political Creed of Thomas Cromwell*, in 6 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 69, 78 (5th ser. 1958) (stating that although "many of Henry VIII's lesser servants were civilians [as well as "some bishops"]," most supporters of the civil law were subordinates or "excluded from shaping . . . policy").

assisted in the establishment of the regius professorships in Civil Law.³³ These positions would provide prestigious leadership for the civilian cause.³⁴ By 1568, the civilians had also obtained a new and luxurious professional headquarters at Mountjoy House in Knightrider Street, London.³⁵ In addition, the powerful Sir Thomas Gresham, chief financial advisor to the Queen, had established Gresham College, which had a special mandate to provide civil law instruction, in London in 1597.³⁶ Blessed with royal

³³ Logan, *supra* note 32, at 277-78. Logan established that there was no evidence that linked Henry VIII personally to the establishment of the professorships; “[o]nly indirectly was the crown involved in their funding.” *Id.* at 278. According to Logan, “[c]ivil law was included quite probably to buttress the law school, which had suffered from the elimination of canon law as a university subject.” *Id.* at 277.

³⁴ Three of the five primary civilian writers—Sir Thomas Smith, Alberico Gentili, and John Cowell—held regius professorships in civil law; of the two remaining writers, St. German died before the chairs were established, and William Fulbecke was Gentili’s student at Oxford when Gentili was regius professor, although Fulbecke never held a regius professorship. The influence of the new professorships on civilian writing was very great. Logan, *supra* note 32, at 276.

³⁵ By 1500 groups of civilians began to associate in their own legal “inn” in Paternoster Row. The location was near St. Paul’s Cathedral, close to the ecclesiastical “Court of the Arches” at St. Mary le Bow, and not too distant from the Admiralty Court in Southwark across London Bridge. G. SQUIBB, *supra* note 14, at 56-57. From the beginning these civilians had trouble separating themselves, symbolically as well as legally, from the Dean and Chapter of St. Paul’s on the one hand, and their nominal landlord, Trinity Hall, Cambridge, on the other. But these civilians clearly wanted to be an independent *professional* association, not just another part of the Church or a university. Certainly by 1511, and probably earlier, their London professional association became structured, and known as the Association of Doctors of Law and the Advocates of the Church of Christ at Canterbury. E. NYS, *supra* note 14, at 114-15; G. SQUIBB, *supra* note 14, at 1-22; W. SENIOR, *supra* note 14, at 33; F. WISWALL, *supra* note 20, at 76. Admission to the Association usually required the degree of doctor of civil laws—a D.C.L.—or its equivalent, from a recognized university. B. LEVACK, *supra* note 14, at 2; G. SQUIBB, *supra* note 14, at 15-22, 31. In 1568, the Association of Advocates rented from the Dean and Chapter of St. Paul’s larger and more stately premises in London, on Knightrider Street. The Association and the premises both became known as Doctors’ Commons. E. NYS *supra* note 14, at 115-16. But university ties were still strong. The 1568 lease was technically granted to Trinity Hall of Cambridge University, an academic center of civilians; Trinity Hall in turn held the premises in trust for the Association. G. SQUIBB, *supra* note 14, at 60. Only over 200 years later, in 1770, did the members obtain their own lease, free from Trinity Hall. This was the main reason for the Association’s final incorporation by Royal Charter in 1768. Other ties to the universities remained, however. Most importantly, the criterion for membership in the Association remained in practice a university training in civil law. *Id.* at 30-31.

³⁶ See Buc, *The Third University of England, or a Treatise of the Foundations of All the Colleges . . . Within and About the Most Famous City of London*, in J. STOW, ANNALS 978-79 (London 1615); W. SENIOR, *supra* note 14, at 74-75. Gresham College, like Doctors’ Commons, is now extinct, together with all its brilliant

favor, and directly tied to a great renaissance of continental jurisprudence, the civilian prospect in England was at least hopeful. To some contemporaries, common lawyers and civilians alike, it seemed filled with exciting opportunity.³⁷

At the heart of this opportunity was the civilians' unique chance to unite university legal education, specialized practice, and government service. Unlike the common lawyers, whose powerful professional establishments, the Inns of Court, had cut off legal training from the study of the humanities,³⁸ the civilians—alone among English lawyers—required a university education. Admission to the Doctors' Commons and the civilian College of Advocates effectively required a university doctorate in civil law (D.C.L.)—hence the name "Doctors' Commons."³⁹ The English civilians also recognized appropriate doctorates from foreign universities as meeting these requirements,⁴⁰ a true and early form of interjurisdictional legal certification. The College of Advocates was thus the first English professional society to have direct, formal ties to higher education; its particularly close relationship to All Souls College at Oxford and Trinity Hall at Cambridge, as well as to the regius professorships, were sources of great potential influence.⁴¹

promise. It had a distinguished career as the seventeenth century seat of the Royal Society; for a contemporary account, see Buc, *supra*, at 980-81. Gresham College was dissolved by the Parliament in 1767, having been in decay since at least 1710. See E. NYS, *supra* note 14, at 70. One of the college's seven endowed chairs was for the study of civil law exclusively. Buc, *supra*, at 979. Samuel Pepys includes many accounts in his *Diary*—beginning on January 23, 1661—of his visits to Gresham College and of the "great company of persons of Honour there." See 2 S. PEPYS, THE DIARY OF SAMUEL PEPYS 21-22 (R. Latham & W. Mathews eds. 1970) (1st ed. London 1825).

³⁷ See note 439 and accompanying text *infra*.

³⁸ Many common lawyers, including Coke, were university graduates. But such training was largely regarded as irrelevant for professional purposes. For descriptions of the early curricula and educational techniques of the Inns of Court, see J. DAWSON, *supra* note 12, at 34-50; Baker, *Counsellors and Barristers: An Historical Study*, 27 CAMBRIDGE L.J. 205 (1969); Prest, *The Learning Exercises at the Inns of Court, 1590-1640*, 9 J. SOC'Y PUB. TCHRS. L. 301 (1967); Thorne, *The Early History of the Inns of Court with Special Reference to Gray's Inn*, 50 GRAYA 79, 82 (1959); Thorne, *Introduction to READINGS AND MOOTS AT INNS OF COURTS IN THE 15TH CENTURY* (Selden Soc'y Pub. No. 72, S. Thorne ed. 1954). "Unlike the education offered to common lawyers at the Inns of Court, the study of law at the universities was almost entirely theoretical and did not train the students in court procedures and techniques." B. LEVACK, *supra* note 14, at 16. There were similarities between common law and civilian training, however. The required "disputations" of the university did resemble, at least in form, the "moots" and "bolts" of the Inns of Court, and they were led by the professional faculties. See generally C. THOMPSON, UNIVERSITIES IN TUDOR ENGLAND 21 (1959).

³⁹ G. SQUIBB, *supra* note 14, at 30-31.

⁴⁰ *Id.*

⁴¹ Trinity Hall was founded in 1350 by Bishop Bateman specifically to "train more

Furthermore, the civilian "Roman law" curriculum came to dominate law instruction at Oxford and Cambridge.⁴² After the Act of Supremacy of 1534⁴³ and the expurgation of canon law instruction by Henry VIII,⁴⁴ the

lawyers for the Church and the State." It was to have "a Master, 20 Fellows, 10-13 Civilians and 7-10 Canonists." F. REEVE, *CAMBRIDGE* 32-33 (1964). New College and All Souls' College at Oxford had remarkable law collections in 1556, consisting almost exclusively of Roman law and civilian commentaries. See Ker, *Oxford College Libraries in 1556*, at 8, 46-49 (guide to Bodleian Library exhibition). See also Logan, *supra* note 32, at 277.

⁴² The "Roman law" curriculum was primarily the study of the Byzantine compilations of the classical Roman law in Justinian's *Corpus Juris Civilis*, together with the numerous scholarly glosses and commentaries on the Byzantine text. See J. DAWSON, *supra* note 12, at 100-28. By the 16th century, however, some "humanists"—under the influence of Cujas, Valla, Hotman, and other continental jurists—were trying to isolate and study the "true" Roman law of the earlier "classical period." See Hazeltine, *Introduction to W. ULLMAN, THE MEDIEVAL IDEA OF LAW* xxv (1946). See generally F. HOTMAN, *FRANCOGALLIA* (R. Giesey ed., J. G. M. Salmon trans. 1972) (1st ed. Geneva 1573); D. KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP* 39-43 (1970); J. A. C. SMITH, *MEDIEVAL LAW TEACHERS AND WRITERS, CIVILIAN AND CANONIST* (1975); Hazeltine, *supra* note 14, at 139-72.

The courses were rigorous. It took a candidate from three to four years to obtain a B.C.L. (Bachelor of Civil Law) if he already had the basic undergraduate degree, the B.A. Without a B.A., it took from five to six years to obtain a B.C.L. C. THOMPSON, *supra* note 38, at 14. The coveted D.C.L. or L.L.D. (Doctor of Laws) required at least four or five years more. H. LYTE, *A HISTORY OF THE UNIVERSITY OF OXFORD* 221-22 (1886); C. THOMPSON, *supra* note 38, at 14. Candidates were also required to lecture on the *Institutes*, the *Digestum Novum* and the *Infortiatum*. The candidate gave "an ordinary lecture for each regent doctor, and he must have opposed and responded in the school of each Decretit." 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 229 (3d ed. 1945).

Whether the civil law program was more rigorous than that of the common lawyers depended both on the specific historical period and how far the common lawyer had progressed on the hard road to the Sargeant's coif. As to minimum intellectual standards, the "civilian way" was, at most times, arguably more demanding. For comparisons of the civil and common law programs, see J. DAWSON, *supra* note 12, at 40-42; Thorne, *supra* note 38, at 82. Inarguably, the civil law program was different from the common law program. The lectures and scholastic disputations at the civil law program's core had little to do with the common law of England. Surprisingly, these lectures and disputations also had little to do with the substantive law of the canonical courts, the Admiralty, and other English courts that, at least nominally, had Roman-based rules and procedure. For comparisons of civilian and common law training programs, see note 38 *supra*.

⁴³ 26 Hen. 8, c. 1.

⁴⁴ Canon law instruction ceased with the commissioners' Visitation and Royal Injunction Act, 1535, 27 Hen. 8, c. 17, which opened all offices in the ecclesiastical courts to doctors of civil law, married or not. See generally Senior, *The Advocates*, *supra* note 14, at 503.

civilians enjoyed a complete monopoly over the teaching of law in the universities.⁴⁵ Despite the efforts of Blackstone, this monopoly was not broken until 1839, and then at the "new" University of London.⁴⁶ During the critical periods of the sixteenth and seventeenth centuries, the civilian university monopoly was fully intact. University fellowships and professorships were occupied by powerful spokesmen for the civilian cause, including Thomas Smith, Alberico Gentili, Thomas Ridley, John Cowell, Richard Zouche, and Arthur Duck.⁴⁷

The civilian specialties of international public law, admiralty law, and the international law of commercial transactions made the civilians natural candidates for governmental preferment in the developing renaissance nation-state, particularly in regard to foreign relations. Many English civilians became devoted civil servants of the Tudor Crown and its expanding bureaucracies.⁴⁸ It had even been suggested that the zeal of the civilians for humanistic learning and imperial authority was seen by Henry VIII as an excellent substitute for the influence of the clerics and canonists of the Roman Church, which he was rapidly dismembering and integrating into his government.⁴⁹

⁴⁵ Some canon law studies did continue in the universities after 1535, but only a handful of students specialized in canon law; a majority received instruction in both civil and canon law as part of the regular civilian curriculum. In as late a year as 1624, canon law study could be set forth as one of the objects of the founding of Pembroke College at Oxford, and the last application for a degree in canon law was at Oxford in 1715. See J. WILLIAMS, *THE LAW OF THE UNIVERSITIES* 18-19 (1910). Moreover, civilian control of university legal education did not extend to administration, but only to teaching. See B. LEVACK, *supra* note 14, at 30.

⁴⁶ See J. BAKER, *supra* note 7, at 148-49; F. LAWSON, *THE OXFORD LAW SCHOOL, 1850-1965*, at 1-5 (1968); Logan & Vyse, *Blackstone and Oxford* 19 (1980) (catalogue of Bodleian Library exhibit).

⁴⁷ All of the civilian leaders named above held regius professorships except Ridley and Duck. Ridley and Duck, however, held other academic positions. Ridley was at various times a fellow of King's College at Cambridge and Headmaster of Eton, and Duck was a fellow of All Souls' College at Oxford. See 1 *THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY* 453 (Cowell), 580 (Duck), 765 (Gentili) (1975); 2 *id.* at 1777 (Ridley), 1950 (Smith), 2357 (Zouche).

⁴⁸ See B. LEVACK, *supra* note 14, at 24-30. Francis Bacon, in a draft of an important letter to Sir George Villiers, later Duke of Buckingham, observed:

[A]lthough I am a professor of the common law, yet am I so much a lover of truth and of learning, and of my native country, that I do heartily persuade that the professors of law, called civilians, because the civil law is their guide, should not be discountenanced or discouraged: else whensoever we shall have aught to do with any foreign king or state, we shall be at a miserable loss, for want of learned men in that profession.

6 J. SPEDDING, *THE LETTERS AND LIFE OF FRANCIS BACON* 27, 39 (London 1872) (reprinting draft of Bacon's letter), reprinted as 13 *THE WORKS OF FRANCIS BACON* (J. Spedding, R. Ellis & D. Heath eds. 1872). Bacon was strongly influenced in his writing by civilian ideas. See note 16 *supra*.

⁴⁹ The initial effect of Henry VIII's Act of Supremacy, 1534, 26 Hen. 8, c. 1,

In all events, the late sixteenth century saw a great strengthening of Doctors' Commons. The physical facilities continued to improve, and the Court of Admiralty and lesser ecclesiastical courts began to meet in the hall itself.⁵⁰ The library grew steadily. It included not only the "classical" Roman law texts, but also many of the best continental commentaries. Many books about international law, law of trade, the "customary" or "common" law of continental countries, and ecclesiastical law were acquired, making Doctors' Commons one of the centers of cosmopolitan learning in London and Europe.⁵¹ The civilians' expertise in many fields of law was well recognized by the Tudor government.⁵² The members of the College of Advocates came to regard themselves as a professional elite, equal at least to the

abolishing the Roman Catholic Church as the English state religion, was nearly a disaster for the civilians. Enrollments in civil law at the universities plunged between 1544 and 1551, as students apparently foresaw the loss of the traditional Church careers and the advent of a secular Chancery. *See* C. THOMPSON, *supra* note 38, at 13-14. But Henry VIII, with his usual astuteness, apparently perceived the civilians as useful allies against the forces of both the Roman religion and the common law. The civilians thus received his patronage in professional and educational spheres, and their lot improved. *See* T. MACKIE, *THE EARLIER TUDORS, 1485-1558*, at 359-60, 564 (1972). "Henry VIII was well aware of the merits of the civilians As administrators and as judges in the prerogative courts their influence was paramount. They also maintained an ancient feud with the canonists and papacy." T. F. T. PLUCKNETT, *supra* note 7, at 44.

⁵⁰ It is not clear when the Admiralty Court moved from the Church of St. Margaret in Southwark—not far from the docks—to Doctors' Commons. According to Wiswall, it was "soon" after the civilians leased Mountjoy House in 1567. F. WISWALL, *supra* note 20, at 77. *But see* Steckley, *Merchants and the Admiralty Court During the English Revolution*, 22 AM. J. LEGAL HIST. 137, 175 (1978) (implying a later date).

The Admiralty Court continued to meet in Doctors' Commons—except in 1665, when the plague drove the civilians first to Winchester and then to the Hall of Jesus College, Oxford. From 1666-1671, after the fire of London had destroyed Mountjoy House, the Admiralty Court sat in Exeter House in the Strand, until the new buildings of Doctors' Commons were completed on the old site in 1671. *See* F. WISWALL, *supra* note 20, at 66.

Eventually, the Common Hall of Doctors' Commons became the home of nine ecclesiastical courts, including the Court of the Arches, the Admiralty, and, occasionally, the High Court of Chivalry. *Id.* at 78.

⁵¹ *See* Catalogue of the Books in the Library of the College of Advocates in Doctors' Commons (London 1818), *cited in* G. SQUIBB, *supra* note 14, at 216; A Catalogue of Sale of Library of College of Advocates (London 1861), *cited in* G. SQUIBB, *supra* note 14, at 216. Copies of these rare catalogues are kept at Lambeth Palace, where I have examined them. Only fragments of the Library of Doctors' Commons now remain. *See* note 22 *supra*.

⁵² *See* T. F. T. PLUCKNETT, *supra* note 7, at 43, *quoted in* note 32 *supra*. *But see* Elton, *supra* note 32, at 277-78, *quoted in* note 32 *supra*.

Sergeant's Order of the common lawyers,⁵³ and unequaled in their unique ties to university legal studies at Oxford and Cambridge.

B. *The English Civilians as Specialist Legal Practitioners: The "Civilian Monopolies"*

Nearly as important as the civilian monopolies in the university legal education were their monopolies in certain specialist areas of legal practice. The civilians had a complete monopoly over actions in the High Court of Admiralty, which included not only the law of prize and shipwreck, but many overseas commercial transactions as well.⁵⁴ Equally significant—as well as lucrative—was the civilians' stronghold on the central ecclesiastical courts. These courts represented a far more important practice than the church courts of today, and heard probate, matrimonial, and estate matters.⁵⁵ All wills in the Archdiocese of London were actually stored at Doctors' Commons until the Court of Probate Act of 1857⁵⁶ and the Matrimonial Causes Act of 1857.⁵⁷ Other less significant civilian monopolies included proceedings in the ancient court of the Constable and Marshal, and the High Court of Chivalry.⁵⁸ The latter court was still active in the seventeenth century and, indeed, had a case in 1954.⁵⁹

⁵³ On the nature of the Sergeant's Order, see J. DAWSON, *supra* note 12, at 12-34; Arnold, *Introduction to YEARBOOKS OF RICHARD II*, 2 RICHARD II, 1378-1379 xxviii-xxxv (M. Arnold ed. & trans. 1970). The Sergeants claimed precedence over the Masters in Chancery who, at least in Tudor times, were usually civilians. The civilians expressed displeasure through a speech in the House of Lords by Dr. Berkeley, and were rebuked. W. JONES, *THE ELIZABETHAN COURT OF CHANCERY* 106-07, 111 (1967).

⁵⁴ Eventually, the common lawyers limited civilian admiralty jurisdiction. See generally F. WISWALL, *supra* note 20, at 4-11. Among the best works on the courts in which the civilians regularly practiced are G. DUNCAN, *THE HIGH COURT OF DELEGATES* (1971); *SELECT CASES IN THE COURT OF REQUESTS A.D. 1497-1569* (Selden Soc'y Pub. No. 12, J. Leadam ed. 1898); *1 SELECT PLEAS IN THE COURT OF ADMIRALTY* (Selden Soc'y Pub. No. 6, R. Marsden ed. 1892) (encompassing the years 1390-1404, 1527-1545); *2 SELECT PLEAS IN THE COURT OF ADMIRALTY* (Selden Soc'y Pub. No. 11, R. Marsden ed. 1897) (encompassing the years 1547-1607); G. SQUIBB, *THE HIGH COURT OF CHIVALRY* (1959); R. USHER, *THE RISE AND FALL OF THE HIGH COMMISSION* (1913); Hill, *Introduction to J. CAESAR, THE ANCIENT STATE AUTHORITIE, AND PROCEEDINGS OF THE COURT OF REQUESTS ix-xlvi* (L. Hill ed. 1975); James, *Court of Arches During the Eighteenth Century: Its Matrimonial Jurisdiction*, 5 AM. J. LEGAL HIST. 55 (1961); Manchester, *supra* note 20.

⁵⁵ See Manchester, *supra* note 20, at 54 *passim*; James, *supra* note 54.

⁵⁶ 20 & 21 Vict., c. 77.

⁵⁷ *Id.*, c. 95. See generally G. SQUIBB, *supra* note 14, at 102-06.

⁵⁸ See generally G. SQUIBB, *supra* note 14, at 1-104.

⁵⁹ *Id.* at 123. The case was Manchester Corp. v. Manchester Palace of Varieties Ltd., [1955] P. 133 (1954), cited in G. SQUIBB, *supra* note 54, at 123. It involved the unauthorized use of the "arms, crest, and supporters" of the Manchester Corpora-

Also important were the civilian "specialties" in areas in which they did not have exclusive privileges. These areas included (1) legal positions in the provincial church bureaucracies, such as commissaries or prebendaries for archdeacons and bishops, and as deans;⁶⁰ (2) positions as legal deputies of vice-admirals, and judges of local admiralty courts;⁶¹ or (3) positions as commissioners and members for various conciliar courts, including the High Court of Delegates and the King's Council of the North.⁶² In addition, civilians traditionally held positions as Masters in Chancery⁶³ and had active practices in the busy and popular Court of Requests, although common lawyers could also practice in that court.⁶⁴ Finally, Levack's research has shown that a substantial number of civilians held important diplomatic positions, as well as some high academic posts at Oxford, Cambridge, and Gresham College.⁶⁵

In short, civilian legal practice and civilian careers were not narrowly confined during the renaissance. Their law practices spread from their valuable monopolies into many other fields. An Elizabethan man of affairs who needed a will, or had troubles with his wife, or suffered a shipwreck, or wished a coat of arms, or sought to import wine from France, or wanted to complain about his vicar's behavior, or sought advice about a sensitive foreign transaction, or wished to consult about the special equitable relief and procedures available in the Chancery or the Court of Requests, might

tion (city of Manchester) above the main curtain of a "variety theater." *Manchester Corp.*, [1955] P. at 135-37.

⁶⁰ B. LEVACK, *supra* note 14, at 23.

⁶¹ *Id.*

⁶² *Id.*; *see id.* at 12-26. Moreover, civilian "practice" was by no means limited to what we today would rigidly regard as "law courts." For example, they were involved in Privy Council matters. *See* Dawson, *The Privy Council and Private Law in Tudor and Stuart Periods I*, 48 MICH. L. REV. 393, 408-09 (1950). Civilians were regularly commissioned by the Privy Council to hear foreign merchants' arbitration cases. "The motives of the [Privy] Council in such cases were well summarized in 1595, when it explained its desire to settle the matter in question 'without processe and suite of lawe, the same being inconvenient for straungers not well acquainted with the lawes of our nation, for the better expedicion and for the especiall regard we have to dispatche the causes of straungers.'" *Id.* at 409 (quoting DASENT XXV 127 (1595)). For a description of the diplomatic role of the civilians, *see* M. PULMAN, *THE ELIZABETHAN PRIVY COUNCIL IN THE FIFTEEN-SEVENTIES* 33, 160 (1971). In 1549, the foundation of a civil law college at Cambridge, to be called Edward's College, was proposed. One reason for founding the college would have been to provide "a college of civilians to attend on the council." W. SENIOR, *supra* note 14, at 70.

⁶³ *See* W. JONES, *supra* note 53, at 380-81; B. LEVACK, *supra* note 14, at 27; R. TITTLER, *NICHOLAS BACON* 77 (1976) (some masters in chancery had doctorates in both civil and canon law).

⁶⁴ B. LEVACK, *supra* note 14, at 28-29; Hill, *supra* note 54, at 1x.

⁶⁵ B. LEVACK, *supra* note 14, at 23. *But see id.* at 30.

find his steps leading past St. Paul's Cathedral and down Great Knight-rider Street to consult with a civilian at Doctors' Commons.

The activities of the civilians did not escape the jealous attention of common lawyers. The number of civilians was small. There were roughly 200 during the period from 1603 to 1641, as contrasted to approximately 2,000 common lawyers.⁶⁶ It is not clear that civilians ever constituted a serious economic threat to their more numerous and powerful brethren.⁶⁷ Nevertheless, there is evidence that the common law writ of prohibition was used by common lawyers to keep the civilian courts strictly within their "proper" spheres. One common lawyer was moved to write of prohibition, "Blest Writ! by which their [civilians] fees are stay'd and briefs into our bags conveyed."⁶⁸ Particularly, however, in the years prior to the serious political

⁶⁶ *Id.* at 21-22. The total number of civilians active at any one time in Doctors' Commons rarely exceeded 20 or 25. The "proctors" who acted as the counterpart of common law solicitors in Doctors' Commons varied from a high of 43, at the end of the 17th century, to a low of 5. E. NYS, *supra* note 14, at 118. In 1696, their number was fixed at 34. H. KIRK, *PORTRAIT OF A PROFESSION* 19-20 (1976). During the same time periods, the number of practicing common lawyers in the Inns of Court was in the range of 400, with as many as 200 or 300 full-time students also within the Inns of Court. A. HARDING, *THE LAW COURTS OF MEDIEVAL ENGLAND* 119 (1973). The total number of common law attorneys or solicitors at these times is hard to estimate precisely, but there were more than a thousand. H. KIRK, *supra*, at 1-12; R. ROBSON, *THE ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND* 1-34 (1959).

⁶⁷ "Thomas Wilson, himself a civilian, said in 1600 that the civil law had declined very greatly in the previous half century; only a few made a good living and the majority had to be content to 'take great pains for small gains' in the ecclesiastical courts." D. VEALL, *supra* note 16, at 51 (citing T. WILSON, *STATE OF ENGLAND* 1600, at 25-26 (London 1600)). On the other hand, "Thomas Powell, an attorney, writing in 1631, said it was more expensive and more difficult to qualify as a civil lawyer, but once the civil lawyer was established he had greater opportunities . . . 'because their number is less, their learning more intricate. And they admit few or no solicitors to trample between them and the client, so that the fee comes to them immediately and with the more advantage.'" *Id.* at 51 (quoting T. POWELL, *TOM OF ALL TRADES* 22-23 (London 1631)).

⁶⁸ J. ANSTEY, *THE PLEADER'S GUIDE* 19 (London 1796), *quoted in* 13 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 461 (1952). The passage comes from a humorous volume by a barrister, John Anstey. The poem's description of civilians is extensive:

They set up shop at Westminster;
But of their practice were debarred,
And fairly kicked from Palace Yard,
Till thinking they had no intent
To hurt th' established Government,
O'er-rule the Laws and ride the Land
With Romish edicts contraband,
The Nation proud of the submission
Of men of birth and erudition,
Gave them a lodging, and in pity

problems which led to the Civil War, there is evidence of practical cooperation between civilian and common lawyers, not unlike the relationship between general practicing lawyers and specialists today.⁶⁹ The internecine jurisdictional battles between the common law courts themselves, particularly between the Common Pleas and the Kings Bench, were far more pronounced than any early tension between civilians and common lawyers.⁷⁰ Moreover, the common lawyers of the central courts also attacked their own minor common law courts, such as the Court of the Marshalsea, with relish.⁷¹ When serious hostility did develop between certain common lawyers and the civilians, intellectual and juristic differences were as serious a focus as any economic competition.⁷²

C. *The English Civilians as Jurists: The "Bartolist Cause"*

There was no question but that the English civilians did have important ideological differences with the common lawyers. The rapid change of English society in the late sixteenth century began to provoke and draw out these differences. At first the conflicts were literary only, and the purpose of the writers conciliatory. But then the lines hardened into jurisdictional battles between common law and civilian courts. These battles ultimately destroyed any possibility of coexistence.

1. The Proper Source of Law: The *Ius Gentium* and *Ius Naturale*

The first, and most profound, category of disagreement between the civilians and common lawyers concerned the proper sources of law. The

Sent them to settle in the City,
Begg'd them to gather up their alls,
And vend their drugs behind St. Pauls—
Provided always that if e'er
Said Quack or Quacks should interfere,
Or any Quack, in word or deed
presume his province to exceed,
Or take upon him as a Scholar,
Prohibitory writ should follow:
Blest writ! by which their fees are stay'd
And briefs into our bags convey'd.

J. ANSTEY, *supra*, at 17-19, quoted in 13 W. HOLDSWORTH, *supra*, at 461.

⁶⁹ See generally Baker, *supra* note 10; Steckley, *supra* note 50; Yale, *supra* note 16.

⁷⁰ See Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. 127 (1941); Gray, *The Boundaries of the Equitable Function*, 20 AM. J. LEGAL HIST. 192 (1976); Jones, *Conflict or Collaboration? Chancery Attitudes in the Reign of Elizabeth I*, 5 AM. J. LEGAL HIST. 12 (1961).

⁷¹ See generally Greene, *The Court of Marshalsea in Late Tudor and Stuart England*, 20 AM. J. LEGAL HIST. 267 (1976); Jones, *The Court of the Verge: The Jurisdiction of the Steward and Marshall of the Household in Later Medieval England*, 10 J. BRIT. STUD. 1 (1970).

⁷² This thesis will be developed fully in the second Article in this series.

English civilian, like the English canonist, looked—and often traveled—to foreign sources to find and study the “best law.”⁷³ Common lawyers would later accuse civilians of doing this out of subordination to foreign religious or political authority, but the true reason was intellectual, and rooted in Roman jurisprudence. As the Digest and Institutes of Justinian demonstrate, the Roman law taught the notions of *ius gentium* and *ius naturale*.⁷⁴ These terms roughly stood for the idea that legal systems can be tested for validity by natural reason, and that some legal precepts are universally valid.⁷⁵

The Romans themselves used these notions, through the different periods in their own legal history, in at least three different ways. First there was the *ius gentium* as the product of natural reason, *naturalis ratio*.⁷⁶ This was closely related to, but not identical with, the Greek notions of natural law.⁷⁷

⁷³ See Mitchell, *English Law Students at Bologna in the Fifteenth Century*, 51 ENG. HIST. REV. 270 (1936). For example, one medieval English civilian and canon lawyer named Richard of Wych studied at Oxford, took a degree at Paris, went back and taught at Oxford, and then went for seven years to Bologna. He finally returned to be Chancellor of Oxford about 1238. See H. LYTE, *supra* note 42, at 60-61. This pattern continued through the renaissance. Thomas Smith, educated at Cambridge, was awarded the first regius professorship in civil law there in 1540. Subsequently Smith went abroad to improve his knowledge, studying in France and earning a doctorate in law at the University of Padua. Maitland, *Preface* to T. SMITH, *DE REPUBLICA ANGLORUM* viii-ix (L. Alston ed. 1906). There are countless less distinguished examples. Many early civilians were better traveled “intellectually” than modern lawyers.

⁷⁴ See DIGEST 1.1.1.4, 1.1.9, 1.1.11pr., 48.19.17; INSTITUTES 1.2pr., 1.2.1, 1.2.2.

⁷⁵ See A. BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 528-29 (*ius gentium*), 530-31 (*ius naturale*) (1953).

⁷⁶ See DIGEST 1.1.9; INSTITUTES 1.2.1, 1.2.2.

⁷⁷ In later writing, “natural law,” *ius naturale*, was sometimes confused with *ius gentium*. See H. JOLOWICZ & B. NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 102-07 (3d ed. 1972). But there was a clear distinction in classical times. Natural law was “that which nature has taught all animals.” See DIGEST 1.1.1.3. This included breathing and mating. *Ius gentium*, on the other hand, was a function of man’s reasoning. Thus slavery could be contrary to natural law, *i.e.*, it was not something “taught” by nature, but yet be part of *ius gentium*, as it is found in all ancient societies. See DIGEST 48.19.17; INSTITUTES 1.2.2. For an account of the “bewildering controversy” that inconsistent usage of the term “natural law” has evoked in the context of international law over the centuries, see A. D’ENTRÈVES, *NATURAL LAW* 24-26 (1951); J. KOSTERS, *LES FONDEMENTS DU DROIT DES GENS* 97-98 (E. Brill ed. 1925); A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 21 (1947); P. VINOGRADOFF, *Historical Types of International Law*, *supra* note 14, at 280-83. This controversy became really complex as a result of the eighteenth century version of natural law, “which sought to deduce detailed universal rules from reason,” an idea quite unlike the classical Roman concept. Dias, *Temporal Approach Towards a New Natural Law*, 28 *CAMB. L.J.* 75, 95 n.50 (1970); see ANON., *A DISSERTATION ON THE LAW OF NATURE, THE LAW OF NATIONS, AND THE CIVIL LAW IN GENERAL* 1-38 (London 1723).

As the classical jurist Gaius said, "[T]hose rules prescribed by natural reason [*naturalis ratio*] for all men are observed by all peoples alike, and are called the law of nations [*ius gentium*]." ⁷⁸ In this usage, the *ius gentium*, later known as *ius omnium gentium* to distinguish it from narrower usages, was included as a part of the law of each nation—for example, in the Roman *ius civile* proper. ⁷⁹ Thus, it could be regarded as "incorporated" into the *ius civile* of each nation. It could not by its definition conflict with the *ius civile*, because it was part of the *ius civile*. The *ius gentium*, in other words, was that part of each national legal system that was demanded by natural reason. ⁸⁰

2. The *Aequitas Mercatoria* and Conflict of Law Doctrine

There was also a second usage of the phrase *ius gentium* which, though narrower, was no less important. This usage involved specific, factual questions as to existing foreign and mercantile law. ⁸¹ As the Roman state expanded, its contacts with foreign territories and its commercial relations with these territories likewise increased. There is some evidence that the *praetor peregrinus*, the Roman magistrate [*praetor*] with authority over a foreigner [*peregrinus*], had power to resolve disputes involving foreign transactions not governed by the *ius civile* of the Roman state, applying instead the

⁷⁸ DIGEST 1.1.9; see INSTITUTES 1.2.1. See generally A. BERGER, *supra* note 75, at 528-29; INSTITUTES 1.2.2.

⁷⁹ A. BERGER, *supra* note 75, at 528.

⁸⁰ "*Ius autem gentium omni humano generi commune est* [The law of nations is common to all mankind]." INSTITUTES 1.2.2. "Thus our ancestors distinguished between the law of nations and the civil law. The civil law is not always the law of nations, but the law of nations ought always to be the civil law." CICERO, DE OFFICIIS iii, 17, quoted and translated in H. WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA 27 (N.Y. 1845) (footnote omitted).

Maine has argued that the *ius gentium* became the ancestor of "international law" in the modern sense through a misunderstanding of this broader concept of classical *ius gentium*. "The early modern interpreters of the jurisprudence of Rome, misconceiving the meaning of *Jus Gentium*, assumed without hesitation that the Romans had bequeathed to them a system of rules for the adjustment of international transactions." H. MAINE, ANCIENT LAW 99 (London 1861) (emphasis supplied). "Setting aside the Conventional or Treaty Law of Nations, it is surprising how large a part of the system is made up of pure Roman law." *Id.* at 97. Another possibility is that the Roman influence was strong because, to the early civilians, the study of the Roman law, including its incorporated notion of *ius gentium*, was simply "the only science of universal jurisprudence then known." H. WHEATON, *supra*, at 33.

⁸¹ See Yntema, *The Historical Bases of Private International Law*, 2 AM. J. COMP. L. 297, 301 (1953); P. VINOGRADOFF, *Historical Types of International Law*, *supra* note 14, at 269-72. According to Vinogradoff, this narrower, practical process was what effectively broadened Roman law, not theories about "*ius gentium*." "Roman law became international as a combination of various currents of national laws." *Id.* at 272. But this combination of laws remained "*a ius gentium* and not a *ius civitatum*." *Id.* at 273.

custom of traders.⁸² Thus, this narrower *ius gentium* would also lead civilians to examine foreign sources to find the best rule.

The narrower usage of *ius gentium* gave rise in medieval times to two concepts of critical importance to English civilians. First was the notion of a "law merchant" which applied especially to mercantile transactions, according to mercantile custom. This was called the *aequitas mercatoria*.⁸³ Many disputes in later years between common lawyers and civilians turned, in part, on whether the law merchant was a "special" law for merchants, separate from the national law. The later English civilians argued that this law was *ius gentium* in the sense of being a special transnational law for merchants and it should, therefore, be handled by specialist jurists—*i.e.*, themselves—rather than by common lawyers.⁸⁴

A second concept that developed from the narrower *ius gentium* of the *praetor peregrinus* was conflict of law doctrine. English common lawyers had long regarded "conflict of law" as simply a matter of jurisdiction.⁸⁵ If the matter was appropriately in the court's jurisdictions, the law of the forum [*lex fori*] applied.⁸⁶ Thus choice of law would depend on which court established jurisdiction: the common law courts applied common law, the Admiralty court applied maritime and civil law, and the ecclesiastical courts applied canonical law. In England, therefore, issues that may best have been resolved by deciding which set of legal principles would be the most practical or appropriate were instead resolved by mechanical rules dividing jurisdiction. By contrast, the civilians argued the need for an intelligent application of foreign legal principles when appropriate.⁸⁷ This led to conflict between the common lawyers and the civilians, with the common lawyers permitting nontransversible fictions to expand common law jurisdiction, particularly *vis-à-vis* the Admiralty,⁸⁸ and the civilians arguing for the appropriate application of foreign legal principles, as to which they were the best English experts.

3. The *Ius Inter Gentes*: Public International Law

The term *ius gentium* had a final usage that was even more specialized, and of great interest to renaissance civilians. It was the *ius gentium* that

⁸² A. BERGER, *supra* note 75, at 528-29, 626-27; H. JOLOWICZ & B. NICHOLAS, *supra* note 77, at 48-49, 101, 104.

⁸³ The notion that more attention in commercial transactions should be paid to the "equity" of intent, rather than to strict form, was critical in the later commercial law. See J. JONES, *HISTORICAL INTRODUCTION TO THE THEORY OF LAW* 16 (1940).

⁸⁴ See, *e.g.*, T. RIDLEY, *A VIEW OF THE CIVILE AND ECCLESIASTICAL LAW* 388-96 (4th ed. London 1676) (1st ed. London 1607).

⁸⁵ See Sack, *supra* note 10, at 365.

⁸⁶ *Id.* at 365-66.

⁸⁷ See notes 198, 233-35 & 252 and accompanying text *infra*.

⁸⁸ See L. KNAFLA, *LAW AND POLITICS IN JACOBAN ENGLAND* 293-94 (1977) (account of Lord Chancellor Ellesmere). This conflict will be analyzed in detail in the second Article in this series.

governed the relations of Rome with other states. The civilians sometimes called this "*ius gentium*" by the name "*ius inter gentes*"; i.e., the law ("*ius*") *between* nations-tribes ("*gentes*") as opposed to "*ius gentium*" ("*the law of all nations-tribes*").⁸⁹ This usage included the law of war, *iura belli*, the law of diplomats, *iura legati*, and the law of the special early courts of treaties and relations between Romans *peregrini*.⁹⁰ The expertise of the English civilians in these "public" international law subjects was unchallenged by practicing common lawyers until a relatively late date.⁹¹ But the disputes between the civilians themselves, both in England and externally, were fierce. Was this *ius gentium* to be determined by natural reason, as with the law "common to all" [*ius omni gentes*]? Was it predetermined by the "natural law" [*ius naturale*]? Or was it a matter not of ideals, but merely of the actual custom and behavior of nations?

Each of the various aspects of *ius gentium* and *ratio naturalis* firmly directed the English civilian's mind to foreign sources of law. Only through extensive study of comparative rules and systems could the merits and demerits of any law be ascertained. The development of scientific methods of inquiry in the renaissance strengthened these civilians' notions.⁹² It was even irrelevant to the civilian whether a particular "system" of law presently existed. Led by the inquiries of Lodowick Lloyd, Gentili, Fulbecke, Wiseman and others, English civilians pioneered in crude comparative legal history.⁹³ If the *ratio scripta* of historical systems of law could be discovered and deciphered, their lessons could be learned. The common lawyers were certainly familiar with the use of historical records, but hardly with the

⁸⁹ See Senior, *Early Writers*, *supra* note 14, at 323-35.

⁹⁰ See A. BERGER, *supra* note 75, at 528-29, 669. See generally DIGEST 50.7.18 (*legati*); H. JOLOWICZ & B. NICHOLAS, *supra* note 77, at 102-07; G. SCELLE, *LES FONDATEURS DU DROIT INTERNATIONAL* (1904). It was this area that was the focus of one of the first major scholarly accomplishments of the English civilians. See A. GENTILI, *DE LEGATIONIBUS LIBRI TRES* (London 1585), *discussed at notes 277-305 and accompanying text infra*.

⁹¹ It could be argued that the first serious challenge to civilian "public" international law expertise by a common lawyer was C. MOLLOY, *DE JURE MARITIMO ET NAVALI* (London 1676). The effect of Molloy's book will be discussed at length in the second Article in this series.

⁹² The Scientific Revolution affected common lawyers and civilians alike. See generally Berman, *supra* note 3, at 941-43; Shapiro, *supra* note 13, at 761-62. Many members of the Inns of Court, as well as civilians, congregated at Gresham College to engage in scientific discourse. See Aikenhead, *Students of the Common Law 1590-1615: Lives and Ideas at the Inns of Court*, 27 U. TORONTO L.J. 243, 254 (1977). But civil law tradition lent itself better than the common law to the new modes of inquiry, particularly for the followers of the French legal humanists. See notes 130-31 and accompanying text *infra*. Indeed, it has recently been argued that the first common lawyer "to demonstrate a thorough mastery of humanist sources and methods" was John Selden, who did not publish his first major work until 1614. Ziskind, *supra* note 16, at 28.

⁹³ See notes 463-73 and accompanying text *infra*.

notion of the study of *foreign* legal history. And it was one thing to use the past to legitimize and then to establish the present order, as the common lawyers often did,⁹⁴ and something else to use it as an ideological gold mine of "external" ideas and standards against which the present order could be tested and thus improved.⁹⁵ This, to a large extent, was the way of the civilians.

4. The *Ratio Scripta* and the Flaws of the Common Law

The outgrowths of the civilian intellectual traditions of *ius gentium*, *ratio naturalis*, and *ratio scripta* could threaten the common lawyers in a most fundamental way. For by the tests of "external" reason and universality, it was clear at least to some English civilians that the common law was flawed.

Juries, for example, may have been competent "memories for fact," but as arbitrators of customary rules they were clearly without qualification. The civilians doubtless suspected that juries were devices for saving common law judges labor—and possibly for saving the common law judges from the responsibility of open and principled decisionmaking as well. Would not law be best made and best applied by the most intelligent and educated? Except for the "collective witnesses of fact" rationale, the basis for jury trial seemed to be posited in terms of negatives: the common law courts lacked money, skilled manpower, and power on the part of the judge to enforce a decision without "community participation."⁹⁶ Worst of all, residual super-

⁹⁴ See C. ALLEN, *LAW IN THE MAKING* 30-37, 128-53 (2d ed. 1930). Probably the best example of a common lawyer using the past to justify the present is provided by Coke himself. See L. ABBOTT, *LAW REPORTING IN ENGLAND 1485-1585*, at 252-555 (1973); W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 124-32 (1938).

⁹⁵ See Genzmer, *A Civil Lawyer's Critical View on Comparative Legal History*, 15 *AM. J. COMP. L.* 87, 89 (1967).

⁹⁶ Any civilian suspicions, at least as to the lack of skilled judicial manpower as an incentive for jury development, have been confirmed by modern writers.

It seems clear that the road [to adopting the canonist inquest] was open, just as open in England as it was in France. What was needed was extra zeal of sustained curiosity on behalf of the English judges, inspired by a conviction that determination of the facts on which the judgment must rest was an essential part of the judge's task. But zeal and curiosity were both repressed. . . .

The answer seems to be that at the outset the crown had no choice. . . . Crude and clumsy as it was, the early common law jury was an essential means of conserving manpower in a government that had taken on new tasks of immense scope and complexity.

J. DAWSON, *A HISTORY OF LAY JUDGES* 126-28 (1960) (footnotes omitted); see 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 626-28 (2d ed. 1898) (commenting that the use of juries "saved the judges of the middle ages not only . . . moral responsibility, but also from enmities and feuds"). The advantages of jury trial as a bulwark against centralized totalitarianism, rather than its tool, was a rationale discovered centuries later, most notably by Fortescue. See J. FORTESCUE, *DE LAUDIBUS LEGEM ANGLIAE* 57-67 (S. Chrimes ed. & trans. 1942) (1st ed. n.p. c. 1545-46). As Van Caenegem has observed, "[t]here are moments when archaic uses

stitution may have required an inscrutable factfinder as a substitute for the newly disallowed ordeal and oath-helping.⁹⁷ Thus, English civilian courts used inquisitorial procedures, written interrogatories, and depositions. They subpoenaed witnesses, cross-examined the parties themselves, and requested the advice of experts on relevant subjects, such as the Elder Brethren of Trinity House on maritime questions.⁹⁸ With rare exception, they did not use juries.⁹⁹

Furthermore, to the civilians the "common law" method of "shaping" legal doctrine by incremental decisionmaking could hardly have appeared ideal. What kind of notice did that method give the average citizen of changes in the rules, and what opportunity did it give anyone for building a systematized, harmonious legal system? Of course one could try to force the raw dross of the common law, *ex post facto*, into some elegant jurisprudential mold—as Englishmen from Bracton to Cowell had done—but it would be like "crushing an Ugly Sister's foot, bunions and all, into Cinderella's glass slipper."¹⁰⁰ As one civilian said of the Lombard customary law, "[N]on lex, sed faex."¹⁰¹

suddenly appear to have a value that nobody suspected" R. VAN CAENEGEM, *THE BIRTH OF ENGLISH LAW* 84 (1973).

⁹⁷ The Fourth Lateran Council (1215), which forbade clergy to take part in judicial ordeals, was probably influenced by the revival of civilian learning at that time; there was no affirmation of ordeal in the *Corpus Juris*. Evolution of jury trial was promoted in England to fill the resulting void. See T. F. T. PLUCKNETT, *supra* note 7, at 118-21; Wells, *Early Opposition to the Petty Jury in Criminal Cases*, 30 *LAW Q. REV.* 97 (1913).

⁹⁸ Trinity House Brethren were distinguished mariners charged with certain duties as to navigation and lighthouses. They were called by civilian judges in admiralty proceedings as "experts." The use of "expert" juries, closely associated with civilian practices, is now being revived in the so-called "commercial list" in England, as provided by the Administration of Justice Act, 1970, c. 3. See generally TRINITY HOUSE (CHARTERS, CONFIRMATION, GRANTS, ETC.) (London 1768); R. WALKER, WALKER & WALKER'S *THE ENGLISH LEGAL SYSTEM* 303 (4th ed. 1976) (commercial list); Hale, *Considerations Touching the Amendment or Alteration of Laws*, in *A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND* 249 (F. Hargrave ed. 1787).

⁹⁹ There was one exception—jury trial under the Admiralty Courts' criminal jurisdiction. These were held at the Old Bailey before two common law judges, with the civilian Admiralty judge presiding. These exceptional proceedings were pursuant to a statute, 28 Hen. 8, c. 15, which required that these offenses be tried before "commissioners of oyer and terminer," *i.e.*, common law judges, with trial by a petty jury, after indictment by a grand jury. Blackstone observed that otherwise "a man might be there deprived of his life by the opinion of a single judge, without judgment of his peers." 4 W. BLACKSTONE, *COMMENTARIES* * 268.

¹⁰⁰ Simon, *Dr. Cowell*, 26 *CAMBRIDGE L.J.* 260, 263 (1968).

¹⁰¹ *Id.* at 262; F. MAITLAND, *ENGLISH LAW*, *supra* note 14, at 87 (roughly translated as "Not law, but the dregs."). The civilians have been joined by modern observers. "Of all the developed systems of law, the English common law is proba-

One solution, of course, would be to develop a written, systematic, codified body of law, setting out the rules clearly and publicizing them widely, on the model of the *Institutes*.¹⁰² The fragmented structure of common law courts, with the Common Pleas and the King's Bench in rivalry and with a complex substructure of local and feudal courts still in existence, would have been to the civilian mind, primitive. Such a system lacked the virtues of clarity, consistency, and structure, those virtues that were at least in theory paramount to Justinian and—centuries later—to the Benthamite radicals.¹⁰³

Short of codification, the English civilians considered other possibilities for reform of the English legal system. For example, the civilians attempted to use specialized courts and special commissioners, such as the Court of the Arches and the Admiralty, to remedy some abuses of the common law. This was a stop-gap measure, but it was, for civilians, better than nothing. It was particularly useful in those legal areas where English merchants and diplomats had to deal with foreigners who were accustomed to the more cosmopolitan legal culture of Europe. Such transactions, at least, could be isolated from the rest through the special jurisdictions of the King, the Admiral, and the Marshall. At least in those areas, as in the university, learned men could still treat the law as a science and a humanity.¹⁰⁴

5. Relations with the Crown: *Quod Principi Placuit*

Codification and specialized courts, both areas of particular civilian involvement, required close association with the Crown. Major "law reform" legislation remained a Crown prerogative throughout the Tudor period, and those special courts that dealt with foreign trade and shipping were obviously related to Crown diplomacy and Crown revenues. Indeed, civilian officials of these courts regularly took on diplomatic missions for the Crown in which their cosmopolitan legal learning proved important.¹⁰⁵

Proud of such expertise, the English civilians must have regarded themselves as the modern equivalent of the great Roman jurists—men who

bly the least intellectual, the most pragmatically higgledy-piggledy, and the English lawyers have always been trained to absorb the guidance of the 'authorities' rather than attempt independent and reasoned appreciations themselves." G. ELTON, *ENGLAND, 1200-1640*, at 181 (1969).

¹⁰² See F. BACON, *Memorial*, *supra* note 16, at 84-86; F. BACON, *Proposition*, *supra* note 16, at 61-71; J. COWELL, *INSTITUTIONES JURIS ANGLICANI* (London 1605).

¹⁰³ See J. BENTHAM, *OF LAWS IN GENERAL* 186-95 (H.L.A. Hart ed. 1970); J. DAWSON, *supra* note 12, at 122-23; H. JOLOWICZ & B. NICHOLAS, *supra* note 77, at 479-96; B. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 38-45 (1962); Harrison, *Introduction to J. BENTHAM, A FRAGMENT ON GOVERNMENT* xv-xvi (W. Harrison ed. 1967). Indeed, Bentham discussed Justinian's compilers, finding them all too inconsistent: "they debate where they should decide: they quote, where they should command . . ." J. BENTHAM, *OF LAWS IN GENERAL*, *supra*, at 303.

¹⁰⁴ This was Sir Thomas Ridley's great thesis. See T. RIDLEY, *supra* note 84.

¹⁰⁵ See E. NYS, *supra* note 14, at 128-38; F. WISWALL, *supra* note 20, at 79.

achieved authority not through public office or judicial power, but through the force of their learning and argument.¹⁰⁶ This self-image may have been comforting for a group of men who held few judicial positions in the growing common law system.¹⁰⁷ It also drew them closer to the Crown. After all, in light of the Byzantine texts, the most important audience of the Roman jurists appeared to have been the Emperor.¹⁰⁸ Would not enlightened English monarchs similarly be the civilians' best avenue to power?¹⁰⁹

Whig historians, following the lead of Edward Coke, have long tarred the civilians with the brush of royal absolutism. The famous *Digest* motto, *quod principi placuit, legis habet vigorem* (what the Prince determines, has the force of law),¹¹⁰ became an accusatory challenge to the civilians from men who understood its qualifications not at all—or chose not to.¹¹¹ Civilian legal science no more postulated absolutism than did the common law.¹¹² Indeed, the civilians' dedication to known abstract principles of justice, written laws, and expert jurists was an obvious bar to tyranny. Some English civilians might have favored a powerful royal executive over an entrenched squire-

¹⁰⁶ See J. DAWSON, *supra* note 12, at 107-08; Schiller, *supra* note 6, at 25 & 32.

¹⁰⁷ See Elton, *supra* note 32, at 78.

¹⁰⁸ See H. JOLOWICZ & B. NICHOLAS, *supra* note 77, at 478-598.

¹⁰⁹ See generally B. LEVACK, *supra* note 14, at 81-85.

¹¹⁰ "*Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit.*" INSTITUTES 1.2.6, translated in THE INSTITUTES OF JUSTINIAN (5th ed. J. Moyle trans. 1913) ("Again, what the Emperor determines has the force of a statute, the people having conferred on him all their authority and power by the *lex regia*, which was passed concerning his office and authority."). The passage was originally from the DIGEST 1.4.1.

The Roman state gave power not to the person, but to the office. The "Emperor or his images" could wield the power absolutely, but only "for the interest of all and in the name of all." E. MEYNIAL, THE LEGACY OF THE MIDDLE AGES 363-99 (1932); see 2 H. BRACTON, THE LAWS AND CUSTOMS OF ENGLAND 305-06 (S.E. Thorne ed. & trans. 1968) (1st ed. London 1569) (written c. 1220-1257).

VACARIUS, LIBER PAUPERUM (written c. 1149), the first English civilian text, omitted the *quod principi placuit* maxim and played down its sister maxim, *princeps legibus solutus* (DIGEST 1.3.31). Vacarius emphasized in his gloss that "the emperor is subject to the laws, though it is true that no one can coerce him, so his submission is voluntary." de Zuleuta, *Introduction* to THE LIBER PAUPERUM OF VACARIUS lxxiv (Selden Soc'y Pub. No. 44, F. de Zuleuta ed. & trans. 1927).

¹¹¹ See generally Jolowicz, *Political Implications of Roman Law*, 22 TUL. L. REV. 62-81 (1947).

¹¹² H. NENNER, BY COLOUR OF LAW 32-83 (1977). Bracton, who was strongly influenced by Roman legal thought, has been said to have postulated that "the ruler had a duty to obey the law but . . . the fulfillment of the duty could be ensured only by his will to adhere to its provisions, not by legal coercion." Tierney, *Bracton on Government*, 38 SPECULUM 295, 301 (1963); see D. HANSON, FROM KINGDOM TO COMMONWEALTH 110-11 (1970); E. MEYNIAL, *supra* note 110, at 382-87.

archy served by the common lawyers.¹¹³ Yet, other civilians, such as Isaac Dorislaus, Walter Walker, Calibute Downing, and John Godolphin, were fervent Parliamentarians,¹¹⁴ and some later civilians, such as John Ayliffe, were loyal Whigs.¹¹⁵

The vice most civilians would have feared was ministerial weakness and ineffectiveness, for it could make a mockery of any "scientific" improvements in the law. From the civilian viewpoint, arguments for decentralized private power could too often masquerade as appeals for "freedom." Progress to the civilians demanded faith in human nature and the human intellect. The enlightenment of humanist learning showed the way. The object was a strong central system that would give every citizen "his due," efficiently and certainly. This, to some civilians' minds, was the precondition of real freedom.¹¹⁶

6. Bartolism

The English civilians were much aware of continental "advances" in political theory, culminating in the writing of Jean Bodin.¹¹⁷ The laicization¹¹⁸ of English and French society was important in promoting the civilian cause over that of the canonists. The rise of the national state and the

¹¹³ B. LEVACK, *supra* note 14, at 196-202; Jolowicz, *Some English Civilians*, 2 CURRENT LEGAL PROB. 139, 141-42 (1949). Approximately 83 civilians in Levack's study survived to witness the Civil War. Of those, Levack has determined that 19 were active Royalists and three active Parliamentarians. Twenty-one were passive Royalists, and 19 passive Parliamentarians. Some had distinguished careers under the Commonwealth. In 1656, 18 active civilians remained. B. LEVACK, *supra* note 14, at 196-99.

¹¹⁴ *Id.* at 196 (Dorislaus was a regicide; Walker was an advocate for the Parliamentary fleet; Downing was a chaplain in Essex's army); 1 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 794 (1975) (Godolphin was appointed Judge of the Admiralty during the Commonwealth).

¹¹⁵ 12 W. HOLDSWORTH, *supra* note 20, at 610-11 (Ayliffe was an "ardent Whig").

¹¹⁶ See B. LEVACK, *supra* note 14, at 97-109.

¹¹⁷ See J. BODIN, THE SIX BOOKES OF THE COMMONWEALE (K. McRae ed. 1962 of R. Knowles translation London 1606) (1st ed. Paris 1576). Bodin's influence was particularly strong on the leading English civilian theorist, Alberico Gentili. See A. GENTILI, DE LEGATIONIBUS LIBRI TRES 83, 156 (second volume of Carnegie Endowment edition) (J. Scott ed., C. Lang trans. 1924) (translation of edition published in Hanover 1594) (1st ed. London 1585) [hereinafter cited as DE LEGATIONIBUS] (See note 266 *infra* for bibliographical information). The first English translation of Bodin's *Republique* was published in the critical year of 1606, just before Ridley's major defense of the civilian cause, *A View of the Civile and Ecclesiasticall Law*. T. RIDLEY, *supra* note 84; see McRae, *Introduction* to J. BODIN, *supra*, at A38-A67.

¹¹⁸ "Laicization may be defined as the development of a society in which primary allegiance is given to lay governments When society has laicized leadership has passed from the church to the state." Strayer, *The Laicization of French and English Society in the Thirteenth Century*, in CHANGE IN MEDIEVAL SOCIETY, EUROPE NORTH OF THE ALPS 1050-1500, at 103 (S. Thrupp ed. 1964).

Reformation did not diminish the idealism or the zeal of the civil lawyers, and continental writers quickly found converts among the English civilians. Bodin was especially popular,¹¹⁹ possibly because his view of an effective, rationalist, central state closely coincided with civilian convictions and self-interest.

The practical need for English civilians to accommodate themselves to what was, in their view, a parochial and backward legal system was aided, ironically, by developments in Italy in the study of Roman law, particularly the spread of the so-called "Bartolist School." Bartolism was a reaction to the results of early civilian scholarship. The early civilians had regarded the Byzantine text of the *Corpus Juris Civilis* with awe. They limited themselves to the glossing of its passages—hence they were called "glossators."¹²⁰ Like early biblical students, the glossators considered it their duty to "explain and expound" the text, not to suggest that the text could be revised, or even worse, that the text was imperfect. As Dawson has observed, however, "[t]he intellectual environment in which the glossator worked was greatly altered by the effects of his own teaching."¹²¹ The success of their students in attaining positions of power, particularly in Italy, ensured a "reception" of Roman law there, at least in part. Following this "reception," a new breed of scholars led by Bartolo di Sassoferrato (Bartolus)¹²² addressed themselves to the inherent challenges of applying an ancient law to practical, contemporary problems. The Bartolists began openly to use the *Corpus Juris* as an instrument for organizing a modern system of Italian law.¹²³

¹¹⁹ See B. LEVACK, *supra* note 14, at 97-98. In particular, "Gentili's reliance upon and imitation of Bodin was strong" *Id.* at 97. See also J. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 53-54 (1935); G. VAN DER MOLEN, ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW 239 (1938); McRae, *supra* note 117, at A38-A52.

¹²⁰ See A. BERGER, *supra* note 75, at 483; J. DAWSON, *supra* note 12, at 124-34; P. VINOGRADOFF, ROMAN LAW, *supra* note 14, at 43-69.

¹²¹ J. DAWSON, *supra* note 12, at 125.

¹²² Bartolus (1314-1357) was, in turn, professor of civil law at Bologna, Pisa, and Perugia. See generally C. WOOLF, BARTOLUS OF SASSOFERRATO (1913).

¹²³ "[Bartolus'] preoccupation was—'What groups of relationships fall under a given rule of law?'" C. CHESHIRE, PRIVATE INTERNATIONAL LAW 21 (1965) (quoting WOLFF, PRIVATE INTERNATIONAL LAW 24 (2d ed. 1950)). Bartolus' followers applied this analysis to determine the proper sphere of application for legal rules, particularly in statutory interpretation and in conflict of laws doctrine. See J. BEALE, BARTOLUS ON CONFLICT OF LAWS (1938). The Bartolist ideas were particularly developed by the "neo-Bartolists" of France, led by Dumoulin (1508-1566), d'Argentué (1519-1590), and Gui Coquylle (1523-1603). See generally J. JONES, *supra* note 83, at 15-17; J.A.C. SMITH, *supra* note 42, at 81-82; Hazeltine, *supra* note 42, at xv; Hazeltine, *supra* note 14, at 139-71. The maxim of "*Nemo jurista si non Bartolista* [No jurists but they are Bartolists]," expressed "the professional domination of the Post-Glossatorical school even in the sixteenth century." Hazeltine, *supra* note 42, at xxv. As Clarence Smith puts it, "Not everyone agreed with all [Bartolus] said, but he could be called their spiritual domicile in the sense that it was from him

In the attempt to organize current Italian law according to the *Corpus Juris*, the Bartolists developed important attitudes toward customary law. Some glossators had assumed that the *Corpus Juris* was still law in medieval Italy.¹²⁴ But obviously it was inconsistent with the customary law of many Italian principalities. Which should prevail? After considerable intellectual agony, it became accepted that, when there was no conflict between the *Corpus Juris* and custom, the custom could take on the validity of law, particularly when not prohibited by the state.¹²⁵ Even when there was a possibility of conflict, "special custom" could be established by common consent of the users.¹²⁶ The Bartolists thus opened the way to compromise with customary legal systems and greatly increased the attraction of "applied" Roman law. In England, the writings of the Bartolists were found in major libraries, and were obviously studied.¹²⁷ Jean Bodin himself was an

they set out on their journey, and to him at the end of the day that they returned." J.A.C. SMITH, *supra* note 42, at 82.

¹²⁴ J. DAWSON, *supra* note 12, at 124; see authorities cited in note 120 *supra*.

¹²⁵ That custom, even unreasonable custom, could be a source of law was recognized by the Romans: "*Non omnium quae a majoribus nostris constituta sunt ratio reddi potest* [A reason cannot be given for all the laws that have been established by our ancestors]." DIGEST 1.3.20. There were rules established by ancient customs "like a tacit agreement of citizens." DIGEST 1.3.35. "The unwritten law is that which usage has approved: for ancient customs, when approved by consent of those who follow them, are like statute." INSTITUTES 1.2.9. As Dawson points out, the problem to the glossators was acute when the *Corpus Juris* conflicted directly with the national custom, particularly since the *Corpus Juris* contained other statements, usually Byzantine, which were less enthusiastic about custom. J. DAWSON, *supra* note 12, at 128-29; see CODE 8.32.2 (Rescript Constantine) ("The authority of custom and ancient usage is not contemptible but it will not carry weight so far as to overcome either reason or statute."). Bartolism was one response to this conflict.

Somewhat similarly, a most interesting aspect of Bartolus line of inquiry, at least from the viewpoint of commercial law, was the conceptual flexibility it permitted. For example, Bartolus saw no harm in consulting merchants about mercantile custom before deciding the proper scope of a particular legal rule in a commercial case. In this respect, he was "like Lord Mansfield after him." J. JONES, *supra* note 83, at 16.

¹²⁶ "The general result of this process was that lawyers on the continent applied a mixed legal system whose components were on the one hand local statutes and customs and on the other hand the lawbooks of Justinian and the Canon Law." Coing, *The Roman Law as Ius Commune on the Continent*, 89 LAW Q. REV. 505, 514 (1973). Vacarius equated interpretations by custom of statutory language with interpretation by the emperor himself, with the exception that, in the event of a direct conflict, an imperial statute cannot be abrogated by popular comment as expressed in custom. See de Zuleta, *supra* note 110, at lxiii, lxxvi.

¹²⁷ It is hard to determine the contents of these libraries. See G. ELTON, *supra* note 101, at 194-95. Nevertheless, this fact seems clear from the limited evidence. See Ker, *supra* note 41, at 47-48. It is also becoming clear that, to the extent that the contents of common lawyers' libraries can be determined, there were many continen-

acknowledged Bartolist,¹²⁸ as were such English civilians as the great Alberico Gentili, Regius Professor of Civil Law at Oxford, and his eccentric disciple William Fulbecke.¹²⁹

It is most striking that these English civilians, led by the great Gentili, rejected the attempts by the Frenchman Cujas¹³⁰ and the new continental "humanist" movement to return to the study of the "pure" classical Roman texts. Cujas and his colleagues had brilliantly introduced modern linguistics and techniques of textual criticism to isolate and reject "interpolations" and impurities in the Byzantine compilations. This permitted, for the first time, a knowledge of what the classical Romans' texts actually said.¹³¹ It was a great achievement of the European renaissance. Yet, most English civilians stoutly resisted this movement. For Gentili and his English civilian followers, the civilian cause in England was best served by Bartolism. The time was hardly right for them to retreat to the ivory tower of the *Corpus Juris*.¹³² Their struggle was to reconcile civilian enlightenment with the growing challenge of the common law. The Bartolist dialectic, a constructive dialogue between customary law and Roman legal science, provided a way.

tal and/or English civilian books. See, e.g., A CATALOGUE OF THE LIBRARY OF SIR EDWARD COKE 38-41 (W. Hassall ed. 1950); Ives, *A Lawyer's Library in 1500*, 85 LAW Q. REV. 104, 107 (1969).

¹²⁸ See Hazeltine, *supra* note 42, at xxv-xxvi.

¹²⁹ See text accompanying notes 265 (Gentili) & 339 (Fulbecke) *infra*.

¹³⁰ Jacques Cujas (1522-90), professor of civil law at various times at Cahors, Bourges, Valence, and Turin, is said to have "secured the triumph of the historical humanist school of jurists over the glossators and commentators." D. WALKER, *THE OXFORD COMPANION TO LAW* 324-25 (1980). As to Cujas' relationship to Gentili, see Nys, *supra* note 16, at 20a.

¹³¹ See generally D. KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP* (1970); Kelley, *Budé and the First Historical School of Law*, 72 AM. HIST. REV. 816 (1967); Jolowicz, *Utility and Elegance in Civil Law Studies*, 65 LAW Q. REV. 322-36 (1949). The new "humanist" school was known as the *mos gallicus* (French style) to distinguish it from the continuing influence of the Bartolists, the *mos italicus* (Italian style). The *mos gallicus* had the questionable distinction of introducing pure invective into pure scholarship. "Here lively contempt [for contemporary rivals] was fashionable . . ." J.A.C. SMITH, *supra* note 42, at 110.

¹³² See E. MEYNIAL, *supra* note 110, at 380 *passim*. As Meynial astutely observed,

It is easy to understand the holy zeal with which the humanists set about the destruction of this sacrilege, and the reknown achieved by those (of whom, in France, Cujas is the chief) who made it their life's work to restore Roman compilations to their original purity. But from our present point of view the important fact is that the humanists in their single-minded restoration of the old Roman Law in its classical framework have finally banished it from the present to the everlasting calm of the past. They saved it from the distortion of everyday life and practice; but they made of it for the future no more than a frigid work of art . . . The humanists, one might almost say, ended the popular destiny of Roman Law in the West.

Id. at 380.

It was at this fundamental juncture between the English civilians and the classical civilian scholars of the continent that the English civilians began to develop their own indigenous literature.

III. THE ENGLISH CIVILIAN WRITERS (1523-1607)

A. *The Importance of the English Civilian Literature*

The English civilian writers of the sixteenth and early seventeenth centuries have been inadequately appreciated. It is not an exaggeration to say that they represented the most important manifestations of both the Reformation and the renaissance in contemporary English legal culture. The ultimate domination of English common lawyers has sanctified Littleton, Perkins, Fortescue, Fitzherbert, Pulton, and the other early common law writers.¹³³ But compared with the civilian literature, the works of the common lawyers were unadventurous, technical, and, above all, limited conceptually. If it were not for the colossal presence of Edward Coke, the disparity between the common lawyers and civilians would be only too clear.

Civilian writing during this period was a forceful attempt to reconcile and synthesize English national law with the cosmopolitan legal science of Europe. That this attempt ultimately failed was not due to its merits as legal thought, but to the powerful common law profession and to English political forces largely outside the civilian sphere of influence.

As noted before, the English civilians had a complete jurisprudential worldview. Their later characterization as narrow "specialists" in maritime, probate, and ecclesiastical matters was symptomatic of their failure to achieve any intellectual leadership in English jurisprudence. Yet, in earlier years—particularly after the Royal Injunctions and Commissioner's Visitations Act of 1535¹³⁴—the civilians' august positions in the universities, together with their belief in the "primacy of learned men" inspired by their limited understanding of the nature of the Roman legal system,¹³⁵ had

¹³³ See, e.g., T.F.T. PLUCKNETT, *supra* note 7, at 277-84; P. WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 302-30 (1925).

¹³⁴ Canon law instruction in the English universities ceased with the commissioners' Visitation and Royal Injunction Act, 1535, 37 Hen. 8, c. 17, which opened all offices in the ecclesiastical courts to doctors of civil law. See generally 1 J. MUL-LINGER, *HISTORY OF THE UNIVERSITY OF CAMBRIDGE* 630-35 (1911); Senior, *The Advocates*, *supra* note 14, at 503.

¹³⁵ By emphasizing the role of the jurists, Justinian's *Corpus Juris* obscured the reality of the Roman judicial process, which, as Dawson has demonstrated, also relied a great deal on the *judex*—the law judge—and the *praetor*—the elected magistrate—who were "informed and responsible laymen," not jurists. J. DAWSON, *supra* note 12, at 107. But the jurists gave the system doctrinal cohesion, and it was their writing that survived. The result gave the medieval civilians a picture of the judicial function in Rome which over-emphasized the importance of the jurists and made the "primacy of the learned men" part of civilian faith to this day. *Id.* at 138-47. See also H. DEVRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* 64-67 (1976)

naturally led them to seek such a leadership role in England. It was this intellectual ambition that apparently threatened common lawyers such as Coke,¹³⁶ despite the civilians' relatively confined professional work and limited political influence.¹³⁷ Because the civilians constituted a small minority of all English lawyers, their attempts to achieve this intellectual leadership were fundamentally, although not exclusively, literary.¹³⁸ This literary effort was not only the most interesting aspect of the English civilians, but also, as I hope to demonstrate in this Article and the following Articles in this series, the most persistent.

It is helpful, if not fully accurate, to regard this critical production of legal literature as occurring in three distinct stages.¹³⁹ This Article will discuss the first of these stages. This stage was marked by exciting but crude attempts at comparative law, and by brave attempts to synthesize civil law, canon law, and "common" national law. Under the influence of Christopher St. German, Alberico Gentili, William Fulbecke, and John Cowell, English civilians were outgoing and generous in their attitude toward the common law. These English "Bartolists" went substantially beyond the continental civilian writers in their efforts to compromise with the "national" English common law.¹⁴⁰ The English Bartolists also tried to open a dialogue with the common

(outlining the authoritative role of the French academic jurists in modern French legal development and contending that this French emphasis on juristic elites, which contrasts so strongly with American practice, led in France to "a higher degree of abstraction, less procedural analysis, and a strong consciousness of the interrelationship of the legal system as a whole").

¹³⁶ See notes 439-62 and accompanying text *infra*.

¹³⁷ By 1607, Ridley would describe the financial condition of young civilians as "beggary." T. RIDLEY, *supra* note 84, at 140. Their numbers were always a small fraction of the total of common lawyers. See notes 66-67 *supra*. See also 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 606 (rev. 7th ed. 1956); Jolowicz, *supra* note 113, at 140.

¹³⁸ The English civilians had little choice. There was a lack of significant published reports in the civilian courts until a later period. There were relatively few civilians in England, and these few were isolated in universities and Doctors' Commons. Literary influence was the best available means for wide influence. Nevertheless, direct civilian influence—through their activities in governmental agencies, as Masters in Chancery, as diplomats, or as commissioners and advisors to the Privy Council—was not negligible. It would certainly reward future study. For examples of what remains of early civilian court records, see PUBLIC RECORD OFFICE, GUIDE TO THE CONTENTS OF THE PUBLIC RECORD OFFICE 148 (Requests), 156-62 (Admiralty), 163-64 (High Court of Delegates) (1963); 1 PUBLIC RECORD OFFICE, LIST OF ADMIRALTY RECORDS (PRO List & Index No. 18, 1904); 1 PUBLIC RECORD OFFICE, LIST OF PROCEEDINGS IN THE COURT OF REQUESTS (PRO List & Index No. 21, 1906).

¹³⁹ For other variations on this theme, see 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 3-25 (3d ed. 1945); B. LEVACK, *supra* note 14, at 124-50; E. NYS, *supra* note 14, at 49-71; W. SENIOR, *supra* note 14, at 84-112.

¹⁴⁰ As to the continental civilian writers, see notes 117-31 and accompanying text

lawyers, and had some limited initial success, particularly with Francis Bacon and his followers.¹⁴¹

B. *The First Advocates: The Early Civilian Writers*

The important early civilian writers were, in chronological order, Christopher St. German (1457-1539), the pioneer of comparative legal writing; Sir Thomas Smith (1513-1571), the first Regius Professor of Civil Law at Cambridge; Alberico Gentili (1552-1608), Regius Professor of Civil Law at Oxford; William Fulbecke (1560-1603), Gentili's student at Oxford; and John Cowell (1554-1611), also a Regius Professor of Civil Law at Cambridge. The last three, Gentili, Fulbecke, and Cowell, worked at the same time and knew each other.

St. German was the spiritual "grandfather" of the group. His seminal work, *Dialogues between a Doctor of Divinity and a Student of the Common Law*,¹⁴² was the first effort by any Englishman for over two hundred years to "integrate the doctrines of the common law either with those of the academic learned laws or with political and moral theory."¹⁴³ It was also the first work to analyze the principles of equity as applied by the Chancellor and, arguably, the first serious English effort to undertake comparative legal analysis.¹⁴⁴ St. German was a common lawyer and a member of Inner Temple,¹⁴⁵ but his writing and vision transcended professional demarcations. As will be seen, he had a clear impact on all the following civilian writers, both in style and substance.¹⁴⁶

Sir Thomas Smith, on the other hand, was a "pure" civilian academic and

supra. Some English civilians, most notably Sir Thomas Smith, emulated the "pure" classical humanists rather than the Bartolists. See note 254 and accompanying text *infra*.

¹⁴¹ See note 16 *supra*.

¹⁴² C. ST. GERMAN, *DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT OF THE COMMON LAW* (London 1523 (Dialogue I), 1530 (Dialogue II)).

¹⁴³ Donahue, Book Review, 47 *TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 182, 183 (1979) (reviewing C. ST. GERMAN, *DOCTOR AND STUDENT*).

¹⁴⁴ *Id.* at 183-86; see J. BARTON, *ROMAN LAW IN ENGLAND* 63 (*Ius Romanum Medii Aevi* pars V. 13a 1971).

¹⁴⁵ 2 *THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY* 1841 (1975).

¹⁴⁶ See *id.* St. German's work on equity could be described in Hill's terms as "proto-civilian" (*i.e.*, a precursor of later English civilian work). See Hill, *supra* note 54, at xxxii. Of the other notable early civilian writers, Fulbecke and Gentili were also members of an Inn of Court, Gray's Inn. Gentili, however, was definitely a doctor of civil law (University of Perugia), 1 *THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY* 765 (1975), and Fulbecke "'tis said, had the degree of doctor of civil law conferred on him elsewhere [from Oxford]" but "at what place, or by whom, I [Wood] cannot yet find," *id.* at 743.

a notable diplomat. His great book, *De Republica Anglorum*,¹⁴⁷ contrasts the English and French legal systems. Smith pioneered the English comparative study of foreign legal institutions, just as St. German had pioneered the comparative study of legal doctrine.¹⁴⁸ Smith also developed direct comparisons between English and Roman legal institutions.¹⁴⁹

Gentili, Fulbecke, and Cowell formed a "second generation" of civilian writers. They all were influenced by St. German's and Smith's initial efforts in comparative legal analysis.¹⁵⁰ Gentili, the senior member of the group, was a religious refugee from Italy and a committed Bartolist.¹⁵¹ Not only did he write the first English treatise on public international law, *De Iure Belli*,¹⁵² but as Regius Professor of Civil Law at Oxford he was in a position to advocate the study and adaptation of Roman legal principles, particularly in the area of international law.¹⁵³ His student and avid follower, Fulbecke, actually attempted to relate the basic principles of the civil law, the canon law, and the common law in one massive work, *A Parallele or Conference of the Civil Law, the Canon Law, and the Common Law of this Realme of England*.¹⁵⁴ Cowell, the last of this generation, shared the Bartolist sympathies of Gentili and Fulbecke and strove to relate civilian principles and techniques to the common law. His efforts culminated in the famous law dictionary, *The Interpreter*,¹⁵⁵ which, in defining English legal terms, drew heavily on civilian doctrines. But, unlike the others, Cowell was brought by his efforts directly into the eye of the gathering political storm between the parliament and the Stuart monarchy. *The Interpreter* was publicly burned, and Cowell died a year later, in 1611.¹⁵⁶

Thus, what had begun with St. German's and Smith's pioneering efforts in

¹⁴⁷ T. SMITH, *DE REPUBLICA ANGLORUM* (London 1583).

¹⁴⁸ 2 *THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY* 1950 (1975).

¹⁴⁹ See, e.g., T. SMITH, *DE REPUBLICA ANGLORUM* 71 (L. Alston ed. 1906) (1st ed. London 1583) (comparisons between English "Chauncellor" and Roman "Praetor").

¹⁵⁰ See notes 266-73 & 319 and accompanying text *infra*.

¹⁵¹ 5 W. HOLDSWORTH, *supra* note 139, at 52.

¹⁵² A. GENTILI, *DE IURE BELLI LIBRI TRES* (London 1588-89).

¹⁵³ See A. GENTILI, *HISPANICAE ADVOCATIONIS LIBRI DUO* 101-02 (second volume of Carnegie Endowment edition) (F. Abbott trans. 1921) (translation of 2d ed. Amsterdam 1661) (1st ed. Hanover 1613) [hereinafter cited as *ADVOCATIO HISPANICA*] (See note 268 *infra* for bibliographical information).

¹⁵⁴ 1 & 2 W. FULBECKE, *A PARALLELE OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW AND THE COMMON LAW OF THIS REALME OF ENGLAND* (London 1602).

¹⁵⁵ J. COWELL, *THE INTERPRETER OR BOOKE CONTAINING THE SIGNIFICANCE OF WORDS* (Cambridge 1607) [hereinafter cited as *THE INTERPRETER*].

¹⁵⁶ J. COWLEY, *A BIBLIOGRAPHY OF ABRIDGEMENTS, DIGESTS, DICTIONARIES AND INDEXES OF ENGLISH LAW TO THE YEAR 1800*, at lxxxvi (1932); 1 *THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY* 453 (1975).

comparative legal study, soon matured with the efforts of Gentili, Fulbecke, and Cowell into a serious attempt to introduce the common law to foreign legal science and to relate English national law to the cosmopolitan jurisprudence of Europe. That these early civilian efforts would eventually be swept up in the English civil war¹⁵⁷ was surely a great loss.

1. The Doctor and Student: Christopher St. German (1457-1539)

St. German was the beginning. Of course, it could be argued that there were attempts to reconcile English common law with both the canonical and civilian intellectual tradition long before he wrote:¹⁵⁸ the medieval treatises *Glanvill*,¹⁵⁹ *Bracton*,¹⁶⁰ and Vacarius' *Liber Pauperum*¹⁶¹ may be examples of such attempts,¹⁶² and there are also arguable attempts by later English canonist writers.¹⁶³ But the first great English writer to attempt to bridge the gap between disparate legal ideologies, at least in modern times, was Christopher St. German.¹⁶⁴

St. German's major book was the *Dialogues Between a Doctor of Divinity*

¹⁵⁷ See notes 422-34 and accompanying text *infra*.

¹⁵⁸ See J. BARTON, *supra* note 144, at 4-28; E. MEYNIAL, *supra* note 110, at 363-99; J.A.C. SMITH, *supra* note 42, at 81; R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 360-90* (Selden Soc'y Pub. No. 77, 1959).

¹⁵⁹ THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND CUSTOMARILY CALLED GLANVILL (G. Hall ed. & trans. 1965) (1st ed. London 1554) (written c. 1187-89) [hereinafter cited as GLANVILL].

¹⁶⁰ H. BRACON, *supra* note 110.

¹⁶¹ VACARIUS, THE LIBER PAUPERUM OF VACARIUS (Selden Soc'y Pub. No. 44, F. de Zuleta ed. & trans. 1927) (written c. 1149).

¹⁶² See, e.g., GLANVILL, *supra* note 159, at xxxvi-xi; 1 F. POLLOCK & F. MAITLAND, *supra* note 96, at 120; P. VINOGRADOFF, *ROMAN LAW*, *supra* note 14, at 84; Donahue, *supra* note 6, at 168; de Zuleta, *supra* note 110, at xv-xvii. See also Mitchell, *supra* note 73.

¹⁶³ See generally F. MAITLAND, *ROMAN CANON LAW*, *supra* note 14, at 1-30; E. G. MOORE, *AN INTRODUCTION TO ENGLISH CANON LAW 1-7* (1967); B. TIERNEY, *FOUNDATIONS OF THE CONCILIAR THEORY* (1955); Berman, *The Religious Foundation of Western Law*, 24 CATH. U.L. REV. 490 (1975); Jones, *Relations of the Two Jurisdictions: Conflict and Cooperation in England During the Thirteenth and Fourteenth Centuries*, in 7 STUDIES IN MEDIEVAL AND RENAISSANCE HISTORY 77 (W. Bosky ed. 1970); Keeton, *The Canon Law and Its Influence*, 19 LOY. L. REV. 1 (1972-73).

¹⁶⁴ St. German was a man of immense learning. He was a member of Inner Temple, but also sat as a Master of Requests in 1528, a position often held by civilians. See J. BARTON, *supra* note 144, at 63; Donahue, *supra* note 143, at 183-86; Thorne, *St. German's Doctor and Student*, in 10 TRANSACTIONS OF THE BIBLIOGRAPHICAL SOCIETY 421 (2d ser. 1930). But see Hogrefe, *The Life of Christopher St. German*, 13 REV. ENG. STUD. 398, 402 (1937) (St. German may have belonged to Middle Temple).

and a Student of the Common Law.¹⁶⁵ The book is structured around a “friendly” debate between a “Doctor of Divinity,” the possessor of a university training in canon law, theology, and Latin, and a “Student in the Lawes of England,” an English common lawyer fluent in Law French and *Year Book* law. Thus, St. German emphasized how, both literally and symbolically, the universities and the common lawyers were speaking different languages. Indeed, the Doctor cannot even understand the Student’s professional language, being “no thynge experte” in the “frenche tonge.”¹⁶⁶ St. German’s “dialogue” format was designed to show how communication could begin and how mutually valuable it could be.

This “language” symbolism makes it all the more striking that the *Doctor and Student* was one of the first important law treatises to be printed in English.¹⁶⁷ Even more remarkably, parts of the book may originally have been written in Law French, and the first printing of the *First Dialogue*, in 1523, was in Latin.¹⁶⁸ By 1530 a second section, the *Second Dialogue*, was printed in English, and by 1532 both sections were reprinted in English in a new version.¹⁶⁹ Not only the book’s dialogue format, but the key choice of

¹⁶⁵ The definitive modern edition is C. ST. GERMAN, DOCTOR AND STUDENT (Selden Soc’y Pub. No. 91, T. Plucknett & J. Barton eds. 1974) (1st eds. London 1523 (Dialogue I), 1530 (Dialogue II)). This edition translates all portions of the first Latin version—the 1523 printing of the *First Dialogue*—and collates the texts of the first three editions. *Doctor and Student* enjoyed over thirty printings. Early editions followed the 1523 printing in 1528 (2 editions), 1530, 1531 (3 editions), 1532 (2 editions), 1554, 1556, 1569, 1580, 1593, 1598, 1604, 1607, 1613, 1638, 1660, 1668, 1671, 1673, 1687, 1709, 1721, 1740, 1751, 1815, and 1878. There have been several modern facsimiles in addition to the 1974 Selden Society edition. J. BEALE, A BIBLIOGRAPHY OF EARLY ENGLISH LAW BOOKS 169-72 (1926 & Supp. 1943); P. WINFIELD, *supra* note 133, at 321-24; Barton, *Introduction* to C. ST. GERMAN, *supra*, at lxix-lxxvi.

¹⁶⁶ A Doctoure of Dyvynytye that was of great acquayntance and famylyartye with a student in the lawes of Englande sayde thus unto him I have had great desyre of longe tyme to knowe whereupon the lawe of Englande is grounded but because moche part of the lawe of Englande is wryten in the frenche tonge. Therefore I can not through myne own studye atteygne to the knowledge thereof: for in that tonge I am no thynge experte.

C. ST. GERMAN, *supra* note 165, at 7.

¹⁶⁷ The first English edition of *Doctor and Student*, Beale No. T463, was printed in 1531. Barton, *supra* note 165, at lxx-lxxi. The first *Littleton’s Tenures* in English, Beale No. T39, was undated, but was probably printed in 1532. It was printed by Robert Redman in London. See J. BEALE, *supra* note 165, at 115, 300.

¹⁶⁸ Plucknett translated the *Prologue* to indicate that the “larger part [of *Doctor and Student*] was written in French.” C. ST. GERMAN, *supra* note 165, at 3. Barton, with justification, points out that St. German could simply be saying that the “larger part” of the grounds of the laws of England were written in French, which is consistent with the Doctor’s remark to that effect in *The Introduccyon*. Barton, *supra* note 165, at xviii-xx; see C. ST. GERMAN, *supra* note 165, at 7, quoted in note 166 *supra*. There is no compelling evidence of an earlier French version.

¹⁶⁹ Barton, *supra* note 165, at lix-lxxvi. Thorne has argued that the first English

English for the *Second Dialogue*'s printing, must be regarded as symbolic. English was the language that English canonists, civilians, and common lawyers had in common. It was also the language they shared with the concerned English layman. *Doctor and Student* could bring all these groups together, at least for the purpose of reasoned discourse.

Doctor and Student was of enormous importance. It appeared just before the secularization of the Chancery by Henry VIII, and emphasized and preserved those rules of equity derived from canon law in a format readily understandable by common lawyers and all learned men. In so doing, it laid the foundation for English equity jurisprudence.¹⁷⁰

Although St. German was technically a common lawyer, his work was influenced by civilian ideas both through and apart from the obvious canonist influences.¹⁷¹ St. German may also have been influenced by the continental Bartolists, who tested the rules of the secular civil law with cases of "conscience."¹⁷² He attempted to do the same, with the English common law as the applicable "secular" law.¹⁷³ The result was a pioneer excursion into comparative law and a brilliant attempt to analyze the legitimate sources of English law.

St. German was particularly concerned with those sources of English law *apart* from the common law. Thus the Student requested that the Doctor describe those laws which were *not* the "lawe of England" but that "per-tayne most," and the Doctor listed in response "the lawe eternall," the "lawe of nature [of reasonable creatures]," the "lawe of reason," the "lawe of god," and the "lawe of man."¹⁷⁴

The "lawe eternall" was defined by St. German as the "reason of government in the supreme governor [God]"—and "necessarily all reasons of government in inferior governors must be derived from the reason of the

version of the *First Dialogue* was not written by St. German, and the second English revision of the *First Dialogue* was St. German's effort to revise the earlier work. See Thorne, *supra* note 164, at 421. Barton, however, disagrees. Barton, *supra* note 165, at xvii.

¹⁷⁰ See Donahue, *supra* note 143, at 183-88.

¹⁷¹ Proving the civilian influence on St. German, beyond the obvious jurisprudential parallels, would be a difficult task. The main cause of this difficulty is St. German's omission of most citations of authority. One explanation for this peculiar omission might be that citations "would puzzle rather than enlighten the intelligent non-lawyer." Barton, *supra* note 165, at xxi. Another explanation might be that St. German, like Francis Bacon and later English legal writers under the influence of the "new learning," revolted against the slavish recitation of authority in legal writing: either the ideas were right on their own merits, as seen by natural reason, or they were defective, and then no amount of "authority" could save them. See note 16 *supra*; cf. Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 40-41 (1936) (urging a similar "revolution" in the twentieth century).

¹⁷² Barton, *supra* note 165, at xx-xxxix.

¹⁷³ See generally *id.* at xx; Thorne, *supra* note 164, at 421.

¹⁷⁴ C. ST. GERMAN, *supra* note 165, at 7.

supreme governor."¹⁷⁵ The problem was, as the Student pointed out, that no man can attain this "supreme eternal reason."¹⁷⁶ The best a man's intelligence could comprehend was "the lawe of reason."¹⁷⁷ The "lawe of reason" was the "lawe of nature of creatures reasonable" (*i.e.*, man).¹⁷⁸ It was distinguished from "the law of nature," which included all animals, and included the laws of physics and biology.¹⁷⁹ This same distinction had been drawn by the Roman jurists, such as Ulpian, between *ius naturale* and *ius gentium* in the philosophical sense: *ius naturale* included the basic "laws" of physics and biology, *e.g.*, the universal "law of gravity," whereas *ius gentium* represented the universal law recognized by men of reason, *e.g.*, principles of universal justice.¹⁸⁰ Like the Roman *ius gentium*, St. German's "lawe of nature of reasonable creatures" was common to all men. Thus, the Doctor stated that "this law ought to be kept as well among Jewes and gentyles as among crysten men,"¹⁸¹ and the Student agreed, stating that "the lawe of reason is wryten in the herte of every man."¹⁸²

But because man had original sin and "evyll customes," the law of reason was, in St. German's view, inadequate.¹⁸³ Thus there was a need for two other kinds of law: the "lawe of god" and the "lawe of man." The "lawe of god" could manifest itself in actual revelation by God, as through the "Gospels delivered by Christ,"¹⁸⁴ or in those laws that "are only deduced as self evident consequences from the foregoing."¹⁸⁵ The "*decisions of the Church*" could also be a source of the "lawe of god,"¹⁸⁶ but St. German was careful to point out that not all the canon law of the church was the "lawe of god": "[A]ll the lawes Cannon be not the lawes of God. For many of them be made only for polytycall rewle and conversacyon of the people *and should be reckoned as human law rather than deviine.*"¹⁸⁷ The "lawe of man"—also referred to as "human law" or "the lawe posityve"¹⁸⁸—was "deryvved by reason as a thinge whiche is necessarily & probably folowyng the lawe of reason & of the lawe of god, *for the due end of human nature.*"¹⁸⁹ Thus the "positive" law would include the national customary

¹⁷⁵ *Id.* at 11.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 11, 13.

¹⁷⁹ *Id.* at 15.

¹⁸⁰ See notes 74-78 *supra*.

¹⁸¹ C. ST. GERMAN, *supra* note 165, at 13.

¹⁸² *Id.* at 15.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 23.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (italicized words omitted in the earlier English version).

¹⁸⁷ *Id.* (italicized words omitted in the earlier English version).

¹⁸⁸ *Id.* at 27.

¹⁸⁹ *Id.* (italicized words omitted in the earlier English version).

and statutory law.¹⁹⁰ Different nations could have different "positive" laws, but they would still have to be tested by the universal laws of reason and God which, by definition, were unchanging.¹⁹¹

St. German then stated, through the Student, what constituted the "groundes of the lawe of Englande." The first was the same "lawe of reason" that the Doctor had given as his second kind of law,¹⁹² the equivalent of the Roman concept of *ius gentium*. The next was the "lawe of god," the Doctor's third kind of law.¹⁹³ The final grounds of English law were aspects of the "lawe of man," in particular the "general customs" of the realm (*i.e.*, the common law)

used through all the realm:—which have been acceptyed and approvyd by our soveraygne lorde the kynge and his progenytours and all theyr subgettes. And bycause the sayd customs be neyther agaynst the lawes of god nor the lawe of reason [they] have ben alwaye taken to be good and necessarye for the common welth of all the realme.¹⁹⁴

The Student illustrated this "lawe of man" by the example of the ancient courts of the fairs and traveling merchants, the courts "Pypowdres," whose authority was largely a question of unwritten custom.¹⁹⁵ Other examples of the "lawe of man" in English law were particular customs and the statutes.¹⁹⁶

The critical question, of course, was what happened when an aspect of the secular "lawe of man" conflicted with the "lawe of god" or with the "lawe of reason." This question took St. German into his famous discussion of "What is Equytie," in which he had the Doctor make the famous statement that

wherfore it apperyth that yf any lawe were made by man without any suche excepcyon [of equity] expressyd or implyed it were manyfestly unresonable & were not to be sufferyd for suche cases myght come that he that wolde observe that lawe shuld breke both the law of god/ and the laws of reason.¹⁹⁷

¹⁹⁰ *Id.* at 29.

¹⁹¹ *Id.* at 27.

¹⁹² *Id.* at 31.

¹⁹³ *Id.* at 39-40.

¹⁹⁴ *Id.* at 45-47.

¹⁹⁵ *Id.* at 47.

¹⁹⁶ *Id.* at 57-75. St. German shared a belief with Fortescue that certain customary maxims of English law were *principia*, "these being certain universals called maxims, which are not demonstrable by reason." *Id.* at 67-71; Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77-93 (2d ser. A. Simpson ed. 1973). This Aristotelian notion was hardly new to English jurists. See 2 FLETA 2 (Selden Soc'y Pub. No. 72, H. Richardson & G. Sayles eds. & trans. 1955) (1st ed. London 1647) (written c. 1290); see GLANVILL, *supra* note 159, at 2.

¹⁹⁷ C. ST. GERMAN, *supra* note 165, at 97.

St. German's position was that the English national law, whether based on statute or on general custom, must, at least in special cases, be tested against reason and the law of God. This would make English law by necessity an open system. Later English civilian writers would be encouraged by this spirit of the *Doctor and Student* to compare the English law with the cosmopolitan legal culture of the Church and the continent.¹⁹⁸ Their purpose, naturally, would be to ascertain what aspects of foreign legal culture could be applied in England to make English law more reasonable and thus more legitimate.

St. German also pointed to other legal cultures by mentioning the *ius gentium*. The way he chose to use the term, however, was important. St. German did not adopt the broad *ratio naturalis* usage of the Roman jurists Ulpian and Gaius, which equated *ius gentium* with *ratio naturalis*, "natural reason"; this usage would be equivalent to St. German's "lawe of reason."¹⁹⁹ Instead, St. German used the term "*ius gentium*" in a narrow sense similar to the civilian idea of *aequitas mercatoria*, the international customary law of traders' contracts, debts, and obligations.²⁰⁰ For example, the Student stated that contract law was related to the *ius gentium*: "after the law of propyrtie was ordayned the people myght not conveyently lyve togyther without contractes and therefore it semyth that contractes be groundyd upon the lawe of reason (or at the leste upon the lawe that is called Ius gentium.)"²⁰¹ The Doctor replied, "[T]hough contractes be groundyd upon that lawe that is called the *ius gentium* bycause they be so necessarye and so generall amonge all people yet that provyth not that contractes be groundyd upon the law of reason for thoughe that law called *Ius gentium* be muche necessarye for the people yet it may be chaungyd."²⁰² Thus the principles of contract law, in St. German's view, were grounded on an

¹⁹⁸ See notes 233-35 & 319 and accompanying text *infra*.

¹⁹⁹ See notes 178-82 and accompanying text *supra*. The words "*ius gentium*" are used once in the original Latin text of *Doctor and Student* in the broad conceptual sense of Gaius and Ulpian, *i.e.*, as an equivalent of *ratio naturalis*. C. ST. GERMAN, *supra* note 165, at 13 (*De Lege Rationis* section, Dialogue I, ch. ii). The early English versions carefully suppressed this usage in the English texts, as Plucknett and Barton must have noticed, and used instead the words "lawe of reason." See *id.* Barton argues that this change looks "uncommonly like author's corrections." Barton, *supra* note 165, at xviii. He thus attempts to refute Thorne's argument that the first English versions of the *First Dialogue* were not written by St. German. See Thorne, *supra* note 164, at 421; note 169 *supra*.

²⁰⁰ See notes 81-84 and accompanying text *supra*.

²⁰¹ C. ST. GERMAN, *supra* note 165, at 133.

²⁰² *Id.* at 133-34. In the critical section on "What is a nude contracte or a naked promyse . . ." the Student says: "First it is to be understande that contractes be grounded upon a custome of the realme and by the lawe that is called (Jus gentium) and not dyrectly by the lawe of reason for whan all thynges were in common: yt neded not to have contractes. . . ." *Id.* at 228; see A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 375-405 (1975).

international law of obligations which was *ius gentium* and "much necessary for the people," but not required by an immutable law of reason. This notion of a specialized *ius gentium*, which was narrower than that which the "law of reason" ordained for all legal systems, would later be critical to the thought of the "new school" civilians who followed Sir Thomas Ridley.

It is revealing to contrast *Doctor and Student* with the other great English legal treatise of the period, *Littleton's Tenures*.²⁰³ *Littleton's Tenures* first appeared in English simultaneously with the second English version of *Doctor and Student*, although there had been many previous editions in Law French.²⁰⁴ Littleton's book was certainly admirable for its concise statement of the common law of property, tenures and estates, but to the civilians the book would appear hardly better than a modern law school "nut shell." Not one rule was analyzed as to origin, rationale, or effect. Nor was there any attempt to compare English customary law with anything else. *Littleton's Tenures* was a very narrow book, at least when compared with *Doctor and Student*.

But *Littleton's Tenures* became a kind of sacred relic for the common lawyers, particularly in disputes with civilians. When the French civilian Hotman attacked Littleton's book as confused and inelegantly written,²⁰⁵ and the English civilian John Cowell quoted Hotman's remarks in his law dictionary in 1607,²⁰⁶ there was an uproar of protest from the common lawyers.²⁰⁷ Coke wrote, "it is a desperate and dangerous matter for Civilians and Canonists . . . to write either of the common lawes of England which they professe not, or against them which they knowe not."²⁰⁸ Even more extraordinary, *Littleton's Tenures* was chosen by Coke as the structure for the first massive attempt to do for the English common law what Justinian had done for the Roman law—to create an *Institutes*, a systematic compila-

²⁰³ T. LITTLETON, *LES TENURES* (London 1604) (1st ed. n.p. n.d.).

²⁰⁴ *Littleton's Tenures* was probably the first book about English law ever printed: an undated *Littleton's Tenures* (Beale T3) was printed by Johannes Letton and William de Machlinia in London about 1482. See J. BEALE, *supra* note 165, at 111. A. POLLARD & G. REDGRAVE, *SHORT TITLE CATALOGUE OF BOOKS PRINTED IN ENGLAND, SCOTLAND & IRELAND . . . 1475-1640*, at 345-55 (1950), lists 70 editions before 1641, in addition to 14 editions of E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND* (London 1628) (popularly known as "Coke on Littleton"). The almost incredible popularity of *Littleton's Tenures* was doubtless due to its concise organization and reputation for accuracy.

²⁰⁵ F. HOTMAN, *DE FEUDIS COMMENTATIO TRIPARTITA* 661 (Cologne 1573); see Simon, *supra* note 100, at 269; note 415 and accompanying text *infra*.

²⁰⁶ *THE INTERPRETER*, *supra* note 155, entry on *Littleton*.

²⁰⁷ Simon, *supra* note 100, at 269-70.

²⁰⁸ Coke, *To the Reader*, in 10 Coke Rep. (21st page, unpaginated) (London 1614). In the same section, Coke also says of "Hotoman and his Author," "let us leave them among the number of those *qui vituperant quae ignorant*," possibly in reference to *Ignoramus*, the satirical play with pro-civilian sentiment. *Id.*; see note 434 *infra*.

tion of the law. Coke's *First Part of the Institutes of the Laws of England*,²⁰⁹ commonly called "Coke on Littleton," was a prodigious treatise on English common law. It included subjects far removed from Littleton's narrow focus, but the entire effort was literally "hung" on Littleton's text, which was set out in the center of the page, with the vast discussive commentary surrounding it—a style distinctly reminiscent of the glossators and their treatment of the "sacred" Roman texts.²¹⁰ In his introduction to the book, Coke states of *Littleton's Tenures*: "[T]his Booke is the ornament of the Common Law, and the most perfect and absolute Worke that ever was written in any humane Science [I]t is a Worke of as absolute perfection . . . as any Booke that I have knowne to be written of any humane learning" ²¹¹

Coke's attitude toward Littleton would obviously offend those civilians, such as the Bartolists, who were already reacting against the Roman "sacred text" worship of the glossators.²¹² It would also offend the new civilian humanists, such as Cujas and Hotman, who took a critical look at any romantic use of history.²¹³ But, most of all, this attitude reflects poorly on the English common lawyers, who allowed Littleton's insular *Tenures*, not St. German's inquisitive and analytical *Doctor and Student*, to become their standard and the structure for their advances; for by almost any test, *Doctor and Student* was the greater book.²¹⁴ St. German was firmly patriotic,

²⁰⁹ E. COKE, *supra* note 204.

²¹⁰ See notes 120-21 and accompanying text *supra*.

²¹¹ E. COKE, *Preface* to E. COKE, *supra* note 204, at 8th unpaginated page.

²¹² See notes 120-21 and accompanying text *supra*.

²¹³ See notes 130-31 and accompanying text *supra*.

²¹⁴ It is also instructive to contrast *Doctor and Student* with J. FORTESCUE, *supra* note 96. This book, unlike *Littleton's Tenures*, made an effort—but hardly a sustained effort—to compare English law with civilian doctrine. Written in France in about 1470-1471, while Fortescue was in exile with the Lancastrian party, *De Laudibus* was ostensibly for the guidance of the young Prince Edward of Lancaster. Fortescue, a serjeant-at-law, was openly hostile to civilian legal doctrine; he defended jury trial and idealized limited monarchy and the Inns of Court. Many of the false generalizations about civilian use of torture and *quod principi placuit* may have originated with Fortescue's *De Laudibus*. See note 7 & notes 110-15 and accompanying text *supra*.

Some writers, such as Hazeltine, regard Fortescue as "the true founder of the English school of comparative law and comparative politics." Hazeltine, *Preface* to J. FORTESCUE, *DE LAUDIBUS LEGEM ANGLIAE* xxxii (S. Chrimes ed. & trans. 1942). Others have had a different view. Winfield regards Fortescue as a "eulogizer" who "would have maddened any contemporary Bentham." P. WINFIELD, *supra* note 133, at 316. Schlatter calls Fortescue a "fifteenth-century English advocate of the middle class." R. SCHLATTER, *PRIVATE PROPERTY* 72 (1951), *quoted in* C. HILL, *supra* note 16, at 59.

The truth, of course, lies in between these poles. Fortescue did make a serious effort to describe foreign legal ideas. On the other hand, he made no pretense of impartiality or synthesis. He lambasted the barbarism of French torture, while

anti-clerical, and conservative, but unlike Littleton he boldly and critically analyzed the sources of the English national law. His object was mutual reinforcement between custom and reason, nationalism and learning.²¹⁵ His true heir would be Francis Bacon.

ignoring the harsh reality of *peine forte et dure* (the pressing to death of those who refuse to plead) in England. See J. FORTESCUE, *supra* note 96, at 47-53. He eulogized the jury, and even defended such archaic procedures as *essoins* (formal "excuses" causing vast delay) on the ground that things were worse in France. "Delays in the King's courts are necessary and reasonable," he contended. *Id.* at 131-35. Fortescue's prose speaks for itself: "O! what horrible and detestable result often ensues from the method of proceeding by the [civilian] deposition of witness!" *Id.* at 77. "Do you not see now, most excellent prince, that the more you criticise the laws of England, the more they shine?" *Id.* at 79. Fortescue actually defended the fact that there was a deep division in England between the universities and the practice of law on the ground that "since the laws of England are learned in these three languages [Latin, French, and English], they could not be conveniently learned or studied in the Universities, where the Latin language alone is used." *Id.* at 117.

The contrast with St. German's efforts to explore conflicting ideas and overcome superficial language and intellectual barriers is obvious. In the abstract, however, Fortescue did recognize a potential in the civil law to become a universal law of nations, and he spoke of "[t]hose illustrious Civil Laws, which have so long been, as it were, the laws of all the world." J. FORTESCUE, *Natura Legis Naturae*, in 1 THE WORKS OF SIR JOHN FORTESCUE 214-25 (T. Clermont ed. London 1869); see Mosse, *Change and Continuity in the Tudor Constitution*, 22 SPECULUM 18, 20 n.13 (1947).

Although Fortescue wrote long before St. German, his book was not printed until about 1545-46. But it became immensely popular, appearing with an English translation in 1567, 1573, 1575, 1578, 1598, 1599, and 1609. Another translation with notes by Selden occurred in 1616, and was printed again in 1660 and 1672, with yet another translation appearing in 1737, 1741, and 1775. There have been many modern editions. Chrimes, *Introduction to J. FORTESCUE, DE LAUDIBUS LEGEM ANGLIAE XCV* (S. Chrimes ed. & trans. 1942).

²¹⁵ Elton described *Doctor and Student* as "at heart a rather tendentious piece of propaganda for the excellence of English law and its superiority to the law of Rome." G. ELTON, *supra* note 101, at 185. On the other extreme, *Doctor and Student* has been praised as a "master philosophical and legal justification of . . . the equitable jurisdiction," which favored neither "royal despotism" nor "the church," but sought "a well-ordered and peaceful society in which the dictates of reason and conscience would prevail . . ." S. PRALL, *supra* note 16, at 5 & n.2. Neither view really describes accurately the work of St. German, a toughminded pamphleteer and political theorist who earned the wrath of Sir Thomas More, and whose jaundiced view of the misuse of canon law equaled his ready application of its better principles. See J. GOUGH, *supra* note 119, at 23-24; D. HANSON, *supra* note 112, at 256-57, 262-63; L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 64-67 (1968).

The fairest assessment of St. German is that he achieved a link between medieval notions of divine justice, and the renaissance concept of positive human law as something that can be tested and perfected by being conceived in substantive terms in which justice should be rationally manifest. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 80-81 (1969). This was a great achievement, and, in itself, provided a considerable inspiration to English civilians and common

It has been argued that St. German's approach required "total incorporation" of the civil law into the English law.²¹⁶ But it would be equally accurate to say that St. German "incorporated" English national law into the cosmopolitan legal culture of intelligent men. To St. German, the question was not of conflicting jurisdiction or binding authority, but of the universal validity of principles, derived as they may have been from the law of custom, of the Church, or of Rome. By opening the English legal system to appropriate foreign influences, this approach created the constructive tension between reason, justice, and the enacted "lawe posytyve" which, in St. German's view, made "equity" possible and necessary.²¹⁷

Yet, there were important areas in which St. German's thought was incomplete. One example was his hesitation about the nature of some canon law principles and the propriety of their incorporation into English law. Some aspects of the canon law were hardly the "law of god," as when such law was "made only for the polyticall rewle . . . and should be reckoned as human law rather than divine."²¹⁸ Considering some canon law this way—as human law—would lead to its "secularization" and selective "incorporation." But St. German also recognized that truly "revealed" religious law was quite a different thing from national law, the law of men.²¹⁹ As to how all this law should be treated, he was unclear. St. German was also very uncomfortable with the traditional signification of the *ius gentium* as constituting a higher universal law required by natural reason. He seemed to recognize that there were some laws, including some laws related to international commerce and property, that were neither religious nor absolutely compelled by natural reason.²²⁰ Nevertheless, these laws had a universal international acceptance and were rightly called international law, *ius gentium*. St. German's theories did not fully explain why this should be so, but his implication of a secular basis for international law was a fundamental idea.

Henry VIII's dramatic break from the Roman Church, which ended the Church's external authority over England, and the subsequent suppression of canon law studies reinforced a growing secularization in the sources of the moral and political legitimacy of law, a trend that was evident throughout Europe.²²¹ It also reflected the growing importance of an international

lawyers alike who, a century later, struggled to maintain a link between national law and a cosmopolitan, scientific humanism, based on a strong secular government.

²¹⁶ D. HANSON, *supra* note 112, at 264.

²¹⁷ C. ST. GERMAN, *supra* note 165, at 95, 97.

²¹⁸ *Id.* at 23 (italicized words omitted in the earlier English version).

²¹⁹ *Id.* at 21-25. "[M]an may only make a lawe of such thynges as he may luge upon and the Iugement of man may not be of inwarde thynges, but only of outwarde thynges Therefore it was necessary to have the lawe of god the whiche shuld orde a man as well of inwarde thynges as of outwarde thynges." *Id.* at 25.

²²⁰ See note 197 and accompanying text *supra*.

²²¹ See generally J. GREEN, *The Revival of Learning, 1485-1514*, in 2 HISTORY OF THE ENGLISH PEOPLE 67 (1880); Stone, *The Educational Revolution in England*,

culture based more on Mammon than Jehovah. Against this backdrop, St. German's struggling initial efforts to define a customary, secular basis for the *ius gentium* were of particular importance.

2. The English Humanist: Sir Thomas Smith (1513-1577)

It was appropriate that Sir Thomas Smith was the initial appointee to the new Regius Professorship of Civil Law at Cambridge in 1540.²²² He was determined to be a "true" civilian, and his reaction to the appointment was to go immediately to Europe, where he studied in Paris and obtained his doctorate in civil law at Padua in 1541.²²³ In his inaugural lecture, Smith praised the new French school of humanist civilians and their leaders Alciat and Zasius.²²⁴ He was "incorporated" as a D.C.L. at Cambridge in 1542 and taught until 1549.²²⁵ He joined The College of Advocates, Doctors' Commons, in 1574.²²⁶

It was during one of his frequent periods of diplomatic service, as Elizabeth I's ambassador to France from 1562 to 1565, that Smith wrote his most important book, *De Republica Anglorum*.²²⁷ The book was not printed until 1583, six years after Smith's death.²²⁸ It was deliberately written in

1560-1640, in 28 PAST AND PRESENT 41 (1964); Thorne, *Tudor Social Transformation and Legal Change*, 26 N.Y.U.L. REV. 10 (1951); Trimble, *Early Tudor Historiography, 1485-1548*, 11 J. HIST. IDEAS 51 (1950).

²²² Maitland, *supra* note 73, at ix.

²²³ *Id.*; 2 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 1950 (1975).

²²⁴ See E. NYS, *supra* note 14, at 54-55; 1 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD 369 n.156 (3d ed. 1937).

²²⁵ 2 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 1950 (1975). Part of the cosmopolitanism of the civilians is reflected in the policy of "incorporation of doctorates," *i.e.*, the recognition of legal doctorates earned at foreign universities not only by English universities but by the College of Advocates as well.

²²⁶ See J.A.C. SMITH, *supra* note 42, at 118; G. SQUIBB, *supra* note 14, at 160; Maitland, *supra* note 73, at xii.

²²⁷ T. SMITH, *supra* note 147. Mary Dewar has recently argued that the book *A Discourse of the Commonweal of This Realm of England* was also "unmistakably" from Smith's pen. Dewar, *Foreword* to A DISCOURSE OF THE COMMONWEAL OF THIS REALM OF ENGLAND xxii (M. Dewar ed. 1969). If so, it makes Smith all the more remarkable as, according to Dewar, the *Discourse* was "the brilliant and most enduring" of the Tudor economic pamphlets. *Id.* at ix. It was also a powerful early argument for liberal education, even for those who want to be lawyers. A DISCOURSE OF THE COMMONWEAL OF THIS REALM OF ENGLAND 24 (M. Dewar ed. 1969) (1st ed. London 1581). Smith's acknowledged works cover subjects ranging from the new pronunciation of Greek, a treatise on Roman money, poems, and a book of propaganda for his planned colonization of Ireland. Dewar, *supra*, at xxi-xxii.

²²⁸ It is not entirely clear why Smith did not publish the book during his lifetime. It may have been due to his governmental positions of Secretary of State, after 1572,

English, although soon translated into Latin.²²⁹ It had an extraordinary success, at home and abroad.²³⁰

In a letter he wrote in Bordeaux to his friend, Walter Haddon, Smith said:

I have put together three books here . . . I have furnished fruitful argument for those who would debate after the fashion of philosophers on single topics and raise nice points as to justice and injustice, and whether what is held yonder in England as law be the better, or what is held here and in those regions which are administered in accordance with the Roman law.²³¹

Smith then apologized for a characteristic he shared with both St. German and Francis Bacon: he used no legal citations, "because I brought with me not a single book and no men of law to consult."²³² Smith's book was thus written purely through empirical observation, combined with Smith's reason.

De Republica Anglorum was an explicitly comparative work. In describing the English laws and constitution, Smith wished to

sette before your eies the principall pointes wherein it doth differ from the policie or government . . . in Fraunce, Italie, Spaine, Germanie and all other countries, which doe followe the civill lawe of the Romanes compiled by *Justinian* into his pandects and code: in that sort as *Plato* made his commonwealth . . . nor as *Syr Thomas More* his *Utopia* being feigned common wealths, such as never was nor never shall be . . .²³³

Thus, the book was an empirical comparison, based on fact, of "common wealthes, which be at this day in *esse* [being], or doe remaine discribed in true histories, especially in such pointes wherein the one differeth from the other . . ." ²³⁴ But Smith's purpose was also normative, "to see who hath the righter, truer, and more commodious way to governe the people as well in warre as in peace."²³⁵

De Republica Anglorum was not only a detailed comparative view of the English legal system, but also contained some important and characteristic

and member of the Privy Council, after 1571. See 2 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 1950 (1975).

²²⁹ The first Latin version was undated, but it was probably published in 1610. T. SMITH, *supra* note 149, at 145 (Appendix A).

²³⁰ There were English editions in 1583, 1584, 1589, 1601, 1609, 1612, 1621, 1633, 1635, and 1640. There was a Latin version in London in 1610, and in Leyden in 1625, 1630, and 1641. There was a Dutch version in 1673, and a German edition in 1688. *Id.* at 146-47 (Appendix A).

²³¹ Alston, *Introduction* to T. SMITH, *DE REPUBLICA ANGLORUM* xiv (L. Alston ed. 1906) (quoting Smith's letter).

²³² *Id.* (quoting Smith's letter); see notes 16 & 171 *supra*.

²³³ T. SMITH, *supra* note 149, at 142.

²³⁴ *Id.* at 142-43.

²³⁵ *Id.* at 143.

civilian analysis of that system. First, Smith was deeply concerned with the need for a central, positivist authority. "To rule, is understoode to have the highest and supreme authoritie of commaundement," he said.²³⁶ His description of Parliament as "the most high and absolute power of the realme,"²³⁷ while gratifying to parliamentarians, also raised the specter of alleged civilian absolutism and the heritage of *quod principi placuit*.²³⁸ But Smith was not an absolutist: although he used the word "absolute," he used it solely in terms of comparison between the powers of the King in *Parliament* and the power of the lesser courts.²³⁹ He did not anticipate the debate of the next century between King and Commons, and certainly did not agree with Bodin that mixed government was a logical absurdity.²⁴⁰ There was nothing to indicate that Smith's civilian training had led him to a theory of government more lawless than the carefully limited conceptions of sovereignty that already existed in both the Tudor constitution and the *Corpus Juris*.²⁴¹

Smith did share the civilian respect for defined authority, however, and he relied far less on custom than did common lawyers such as Fortescue.²⁴² But

²³⁶ *Id.* at 9.

²³⁷ *Id.* at 48. Smith compared Parliament's power to that of Justinian. *Id.* at 126.

²³⁸ Jean Bodin's great *De la Republique* was published in French in 1576 and in Latin in 1586, long after Smith wrote *De Republica Anglorum*. But because Smith's book was first published in 1583, contemporaries and historians alike have linked them. The two writers' actual connection, both personal and intellectual, has been the subject of continuing controversy beyond the scope of this Article. It is clear, however, that Bodin's conception of state sovereignty was very much more closely defined and analytical than Smith's, and that the two men described the actual form of English government in very different ways: Bodin regarded it as having absolute sovereignty in the monarch; Smith, as having absolute sovereignty in the monarch in Parliament. See J. BODIN, *supra* note 117, at 91-94; S. PRALL, *supra* note 16, at 12; Alston, *supra* note 231, at xli-xliii; Hinton, *English Constitutional Theories from Sir John Fortescue to Sir John Eliot*, 75 *ENG. HIST. REV.* 410, 424 (1960). Bodin's real impact on English legal thought occurred at the time of the first English edition in 1606, translated by Richard Knolles. McRae, *supra* note 117, at A52-A67.

²³⁹ See Hinton, *supra* note 238, at 410, 423.

²⁴⁰ See *id.* at 418-21 & 424.

²⁴¹ See A. D'ENTRÈVES, *supra* note 77, at 66-68; notes 112-16 and accompanying text *supra*. Smith's French contemporary, the civilian humanist Francois Hotman, explicitly defended this civilian outlook in his *Francogallia*, first published in 1573. "[A] boundless and unlimited power was not allowed the kings of *Francogallia* by their subjects and they cannot be described as free from all laws." F. HOTMAN, *supra* note 42, at 459, *quoted in* Berkowitz, Book Review, 19 *AM. J. LEGAL HIST.* 74, 77 (1975).

²⁴² Both types of monarchy [the king ruling 'regally' and the king ruling 'politically'], Fortescue thought, originated under natural law. The law of nature was a divine law arising from the very earliest beginnings of human nature; under it and by it the *dignatas regia* originated and has ever since been ruled. All rights of kings (*jura regum*) were ultimately derived not from the prince's authority, but from the law of nature. This law not only established the royal dignity, but

Smith's arguments for this tendency were strictly practical. Thus, it has been said of Smith's views: "Constitutions may be likened to shoes, and each nation must get what fits best . . . There is a curiously modern strain in all this: . . . a certain contentment in relativity and a distrust of the absolute . . . Civilian though he [Smith] is, he is remarkably unjuristic in his method."²⁴³

Smith also was concerned with equity. He identified the English Chancery with civilian antecedents, particularly the Roman *praetor*, who "might . . . mitigate the exactness . . . of the lawe written, give exceptions, as *metus, doli, mali, minoris, aetatis, etc.*, for remedies, and maintain alwaies *aeguum & bonum*."²⁴⁴ Moreover, Smith regarded Chancery procedure as being basically civilian:

in this court the usuall and proper forme of pleading of Englande is not used, but the forme of pleading by writing, which is used in other countries according to the civill lawe and the tryall is not by xii men, but by the examination of witsse as in other courtes of the civil lawe.²⁴⁵

For all of Smith's familiarity with civil law and Roman law terms and analogies, he used them primarily for descriptive, expository purposes.²⁴⁶ Indeed, there are instances when a bit of chauvinism shows. For example, Smith spoke as though torture were absolutely unknown in England.²⁴⁷ Furthermore, although Smith apologized for such archaic English procedures and institutions as benefit of clergy, wardship, and trial by battle,²⁴⁸ he emphasized that English villainage was better than Roman slavery.²⁴⁹ Nevertheless, Smith was remarkably fair in describing civilian alternatives to jury trial and inquisitorial procedures.²⁵⁰ There was none of the strident nationalism and defensiveness of Fortescue, or, for that matter, Coke. Nor was there the kind of elitest praise of civil law expected from a Regius Professor of Civil Law. Smith's tolerance for differing systems founded on

also—since there is less virtue in ruling than in creating—governed it. Both the *ius tantum regale* and the *ius regale et politicum* were subject to natural law.

S. CHRIMES, *ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY* 311 (1936) (citations omitted).

²⁴³ Alston, *supra* note 231, at xxxv.

²⁴⁴ T. SMITH, *supra* note 149, at 71.

²⁴⁵ *Id.*

²⁴⁶ See, e.g., *id.* at 72-75 (description of English trials), 65-66 (description of judgments).

²⁴⁷ "Likewise, torment or question which is used by the order or the civill lawe . . . to put a malefactor to excessive paine . . . is not used in England, it is taken for servile." *Id.* at 105.

²⁴⁸ Alston, *supra* note 231, at xxxix.

²⁴⁹ "[The villains] were not used with us cruelly not in that sort as the bondsmen of Romane civill law, as appeareth by their Comedies." T. SMITH, *supra* note 149, at 132.

²⁵⁰ See *id.* at 78-80.

different principles, and his intellectual curiosity, made his work seem very modern and liberal.

But what was truly peculiar about Smith was not his empirical descriptions or his laudable effort to be objective, comparative and factual; rather, it was his disregard of any medieval notions of natural law or law of reason. For Smith, foreign law, past or present, seemed useful solely for its comparative value in tinkering with existing national law. It had no intrinsic validity or superiority except as so incorporated. This was even true when Smith discussed issues—such as that of “bondage”—that had been a traditional forum for discussing natural law issues,²⁵¹ and it was true despite Smith’s own avowed purpose of describing comparative institutions so that normative judgments can be made as to the “righter, truer, and more commodious way to governe.”²⁵² In Smith’s view, each nation might be best suited by uniquely different laws and a unique and different constitution.²⁵³

Was this view a product of Smith’s association with the “new humanist” school of civilians in France? There was no question about Smith’s allegiance to the humanists and his enthusiasm about their “scientific” methods.²⁵⁴ Their purpose in discovering and studying only “true” classical Roman texts, rather than medieval “corruptions,” was to be “scientific” and empirical.²⁵⁵ They made no special claims for intrinsic authority or normative relevance, any more than do the modern schools of scientific and historical scholarship which are their intellectual heirs.²⁵⁶ Smith, it is true, acknowledged that others could make normative judgements about his “data,” but he himself did not.²⁵⁷ He left one with a sense of his own conviction that the “truths” to be gained from such a comparative study

²⁵¹ For example, under the heading “Of the question what is right and just in everie commonwealth,” Smith approached the classical problem of whether men should obey the laws of a tyrant. *Id.* at 13. After pointing to a few instances of rebellion against tyranny in classical literature—“*Thrasibulus* against the xxx tyrants and *Brutus* and *Cassius* against *Caesar*”—Smith continued, “Certaine it is that it is alwayes a doubtful and hasardous matter to meddle with the chaunging of the lawes and government, or to disobey the orders of the rule or government, which a man doth finde alreadie established.” *Id.*

²⁵² *Id.* at 143.

²⁵³ “And as all these iii kinde of commonwealthes are natural, so when to ech partie or espece and kinde of the people that is applied which best agreeth like a garment to the bodie or shoe to the foote” *Id.* at 28.

²⁵⁴ See 2 J. MULLINGER, *THE UNIVERSITY OF CAMBRIDGE* 129 (1884); F. Maitland, *English Law and the Renaissance*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 168, 176, 178 nn. 16, 18 (1907); note 224 and accompanying text *supra*.

²⁵⁵ See 4 W. HOLDSWORTH, *supra* note 42, at 225-28; Hazeltine, *supra* note 42, at xxv-xxvi; Maitland, *supra* note 254, at 171-76.

²⁵⁶ See, e.g., E. CARR, *WHAT IS HISTORY?* 3-35 (1961); F. GILBERT, *HISTORY: CHOICE AND COMMITMENT* 442-53 (1977); Gilbert, *Introduction to HISTORICAL STUDIES TODAY* xvii-xxi (1971).

²⁵⁷ T. SMITH, *supra* note 149, at 142-43.

may indeed be completely relative, differing from nation to nation, man to man.

But was there to be no external or international standard of justice? St. German had posited a universally valid "lawe of eternall" of God.²⁵⁸ Smith, on the other hand, viewed the canon law applied in the English church courts entirely as a species of the English national law. Because Smith viewed the English national law as having incorporated the canon law, he viewed the canon law's civil aspects as just a kind of English law for certain special proceedings. Accordingly, Smith considered it clearly unfair for English common law courts to threaten English church courts with writs of *praemunire*, which prevented obedience to an alien process. Despite the Church courts' extensive use of civilian doctrines, the church courts, in Smith's view, still derived all their "force, power, authoritie, rule, and jurisdiction, from the royall majestie and the crowne of England."²⁵⁹

Thus, Smith did not directly address the tough questions left open by St. German. As to whether there was an external test of reason or justice to which English national law *must* be subject, or whether there was a substantive secular international law, Smith's comparative study of legal institutions gave little guidance.²⁶⁰

3. The Refugee: Alberico Gentili (1552-1608)

In contrast to Smith, another English civilian writer did try to resolve the questions left by St. German. This writer was Alberico Gentili. Gentili, like Smith, held one of the Regius Professorships of Civil Law: he had the chair at Oxford from 1587 to 1608.²⁶¹ Beyond that similarity, however,

²⁵⁸ C. ST. GERMAN, *supra* note 165, at 9-13.

²⁵⁹ T. SMITH, *supra* note 149, at 141.

²⁶⁰ There is one last puzzle. For whom was *De Republica* written? It is primarily a description of *English* institutions and laws, often going into elementary details—such as how English women change surnames when they change husbands. *Id.* at 125. Surely the appropriate audience for this would be intelligent foreigners. Then why did Smith write *De Republica* in English, when he was fluent in Latin and probably in French? See Alston, *supra* note 231, at xliii-xliv. Despite Smith's initial choice of tongue, there were later foreign Latin editions, some of which were bound with topographical descriptions of England, definitely for tourists.

Of course, Smith himself never published the book; it was published after his death. My thesis is that Smith wrote it for the reason he gave to his friend Haddon: to provide empirical data "for those who would debate after the fashion of philosopher . . . and raise nice points as to justice and injustice." *Id.* at xiv. Also, Smith was homesick in France, "[a]nd . . . in my absence I feel a yearning for our commonwealth." *Id.* at xiii. This might explain the use of English. In any event, providing empirical grist for future conceptual mills has remained a legitimate function of "pure" humanist scholarship.

Why was *De Republica* so popular? As Alston suggests, even a knowledgeable Englishman might find the book a relatively clear explanation of complex institutions, a virtue of the comparative method. *Id.* at xliii-xliv.

²⁶¹ 1 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 765 (1975).

the two men were very different. Gentili did not travel to the Continent to become a cultured humanist, as Smith had done. Indeed, Gentili had fled the Continent, leaving his native Italy in 1579 with his father and brother to avoid persecution as heretics.²⁶² Unlike Smith, Gentili held the heroes of the new civilian humanism—Cujas, Alciat, and Zasius—in open contempt, attacking them viciously for selling out the hope of the civil law tradition in exchange for a comfortable, pedantic scholarship.²⁶³ Far from engaging in the descriptive relativism of Smith, which fit legal systems to people like “shoes,”²⁶⁴ Gentili saw in the civil law tradition the key to building an international order, respected by all men and nations.

Most importantly, Gentili, unlike Smith, was a Bartolist. He regarded the Roman law as useful primarily in its application to customary law. Gentili did not focus on customary national law, however. Rather, he focused on the *ius gentium*, and wrote about it particularly in the narrower sense of *ius inter gentes*, the customary law *between* nations.²⁶⁵ This was the customary law governing embassies, ambassadors, treaties, delegates, and diplomatic immunities. Gentili became a pioneer in the modern “factual” treatment of this customary law between nations, which is now called the “public international law.”

But Gentili did owe an unspoken debt to Smith, or at least to the new humanist learning. Gentili’s important books, *De Legationibus Libri Tres*,²⁶⁶ *De Iure Belli Libri Tres*,²⁶⁷ and *Hispanicae Advocacionis Libri*

²⁶² The classic descriptions of Gentili’s life are T. HOLLAND, *Alberico Gentili*, *supra* note 14, at 1-40; Holland, *Preface* to A. GENTILI, *DE JURE BELLI LIBRI TRES* (T. Holland ed. 1877). For other biographical material on Gentili, *see* 5 W. HOLDSWORTH, *supra* note 139, at 52-54; E. NYS, *supra* note 14, at 59-62; Nys, *supra* note 16; 1 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 765 (1975).

²⁶³ “[I]l défendait . . . Bartole contre Alciat; il refusait à ce dernier et à Cujas le titre de jurisconsulte [He defended . . . Bartolus against Alciatus, and refused to give to the latter and Cujas the title of jurist].” E. NYS, *supra* note 14, at 61. *See* A. GENTILI, *DE IURIS INTERPRETIBUS DIALOGI SEX 77* (G. Astuti ed. 1937) (London 1582) [hereinafter cited as *DE IURIS INTERPRETIBUS*]; Nys, *supra* note 16, at 19a-20a.

²⁶⁴ *See* note 253 *supra*.

²⁶⁵ Gentili acknowledged a broader definition of *ius gentium* as “[w]hat all nations agree upon, or rather, the ‘*maior pars orbis*.’ ” T. HOLLAND, *Alberico Gentili*, *supra* note 14, at 22-23. But Gentili’s books are primarily concerned with a narrow concept of *ius gentium*. In the context of free international trade he called this body of law “sort of a law of nations.” *ADVOCATIO HISPANICA*, *supra* note 153, at 102.

²⁶⁶ A. GENTILI, *supra* note 90. This book arose from the famous case of Don Bernardino de Mendoza. When he was Spanish ambassador to England, de Mendoza took part in the Throckmorton conspiracy against Queen Elizabeth. Upon the discovery of the conspiracy, de Mendoza was summoned by the Privy Council, which consulted Gentili and Jean Hotman, who was in England at the time, as to what it should do. *See* Nys, *supra* note 16, at 21a-22a; notes 300-05 and accompanying text *infra*. Out of Gentili’s consultation came *De Legationibus*. There were many foreign editions.

Duo,²⁶⁸ were remarkable for their narrow, objective approach. They focused on factual data about customary law, not on hypotheticals, ideals, or academic theories. Smith would have approved.²⁶⁹ Gentili's work included none of what Smith would have termed "vaine imaginations, phantasies of Philosophers."²⁷⁰ Instead, they contained only descriptions of the actual customary dealing between nations.²⁷¹ Gentili distinguished this customary international law from religion, and for that matter from justice.²⁷² As Holdsworth remarked, there was something very modern about Gentili's

I am using the Carnegie Endowment edition of *De Legationibus*. This edition consists of two volumes. The first volume, A. GENTILI, *DE LEGATIONIBUS LIBRI TRES* (Hanover 1594) (1st ed. London 1585), is a facsimile of an early edition. The second volume, *DE LEGATIONIBUS*, *supra* note 117, is an English translation. For the sake of convenience, I shall usually cite the translation.

²⁶⁷ A. GENTILI, *supra* note 152. *De Iure Belli* was first published in three parts in London from 1588-89. It subsequently went through many foreign editions. That it was placed on the *Index* in 1603 comments on its utility, however limited, for theologians.

I am using the Carnegie Endowment edition of *De Iure Belli*. This edition consists of two volumes. The first volume, A. GENTILI, *DE IURE BELLI LIBRI TRES* (Hanover 1612) (1st eds. London 1588-89), is a facsimile of an early edition. The second volume, A. GENTILI, *DE IURE BELLI LIBRI TRES* (J. Rolfe trans. 1933) (translation of Hanover 1612) (1st eds. London 1588-89) [hereinafter cited as *DE IURE BELLI*], is an English translation. For the sake of convenience, I shall usually cite the translation.

²⁶⁸ A. GENTILI, *HISPANICAE ADVOCATIONIS LIBRI DUO* (Hanover 1613). This book was first published under the auspices of Gentili's talented younger brother Scipio, who had escaped with him from Italy. It contains much material on international maritime law—including Gentili's famous discourse on the protection of sea territory—derived from his experience as Advocate to the Spanish Embassy in London. See the English translation of *ADVOCATIO HISPANICA*, *supra* note 153, at 35-38.

I am using the Carnegie Endowment edition of *Advocatio Hispanica*. This edition consists of two volumes. The first volume, A. GENTILI, *HISPANICAE ADVOCATIONIS LIBRI DUO* (2d ed. Amsterdam 1661) (1st ed. Hanover 1613), is a facsimile of an early edition. The second volume, *ADVOCATIO HISPANICA*, *supra* note 153, is an English translation. For the sake of convenience, I shall usually cite the translation.

²⁶⁹ See T. SMITH, *supra* note 149, at 142.

²⁷⁰ *Id.*

²⁷¹ Like most post-Bartolists, and, for that matter, most English common lawyers of the time, Gentili was not particularly rigorous in his use of history, classical or modern. Although he praised the study of history by ambassadors, see *DE LEGATIONIBUS*, *supra* note 117, at 154, Gentili considered historical studies nonessential for lawyers. See *DE IURIS INTERPRETIBUS*, *supra* note 263, at 77; J. JONES, *supra* note 83, at 42-43. Other Bartolists were roundly criticized by the new humanists on the continent for their uncritical use of the *Corpus Juris* and other classical history. Cf. 4 W. HOLDSWORTH, *supra* note 42, at 225-27 (expressing the differences in the respective approaches of the Bartolists and the new humanists).

²⁷² See *DE LEGATIONIBUS*, *supra* note 117, at 126. Gentili's greatest achievement was the nontheological basis for the law of warfare that he presented in *De Iure Belli*. See T. HOLLAND, *Early Literature*, *supra* note 14, at 40-58.

work, as there was about Smith's work—more than there was about the work of Grotius or many of the later proponents of natural law.²⁷³

Yet, despite this realistic approach, Gentili did attack in *De Iure Belli* those who had relied too much on "bare recital[s] of history," "*nudam historiarum recitationem*."²⁷⁴ He attempted to replace the old discussions of the Catholic theologians with a secular, universal doctrine, and to find this doctrine he looked to the *reipublicae sed omnium*, the "great commonwealth of mankind."²⁷⁵ Moreover, although Gentili defined *ius gentium* broadly, as being close to the law of nature—or certainly to the Roman *naturalis ratio*, "natural reason"—he also looked for guidance to something akin to the Roman *aequitas mercatoria*, the "equity of merchants," based on the concrete custom and practice of private international law or the law merchant.²⁷⁶

Gentili's treatment of the issue of what law should bind ambassadors residing in foreign nations illustrates this approach. In *De Legationibus*, Gentili observed that "[i]t is well established that if ambassadors are to be tried [by their host nation], they can only be tried under *ius gentium*."²⁷⁷ Of course, sometimes it would be better, from an ambassador's own point of view, if he were to be tried under the national civil law of his host nation: the national rule of law might be more favorable to the ambassador than the corresponding rule of the customary *ius gentium*. But, said Gentili, an ambassador should not be able to pick and choose his law:

It would be contrary to all the principles of international law [*ius gentium*] that he [the ambassador] should have the power to play fast and loose with legal procedure; and undoubtedly an ambassador would have an unparalleled opportunity for doing so, if this privilege were granted him, since many things which could not be done under one code could be done under the other.²⁷⁸

Characteristically, Gentili used a concrete example to illustrate this point. There were, he observed, many transactions which, at national law, required more than two witnesses. But "in international law more than two are never required."²⁷⁹

Therefore in accordance with what has been said above, if an ambassador evades a contract to which only two witnesses have been summoned, although by civil [national] law more are required, judgment will

²⁷³ 5 W. HOLDSWORTH, *supra* note 139, at 54.

²⁷⁴ See DE IURE BELLII, *supra* note 267, at 4 (English translation); T. HOLLAND, *Alberico Gentili*, *supra* note 14, at 22.

²⁷⁵ T. HOLLAND, *Alberico Gentili*, *supra* note 14, at 22.

²⁷⁶ See ADVOCATIO HISPANICA, *supra* note 153, bk. 1, ch. 21; T. HOLLAND, *Alberico Gentili*, *supra* note 14, at 22; notes 83-84 and accompanying text *supra*.

²⁷⁷ DE LEGATIONIBUS, *supra* note 117, at 97.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 98.

justly be given against the ambassador on the basis of international law, because he would be able to get judgment against his adversaries on similar grounds. Otherwise, would you not consider it a glaring example of injustice?²⁸⁰

This analysis, however, led inexorably to a tougher question. If one adopted the rule that an ambassador's contracts should be ruled by *ius gentium*, and not by national law, what if the outcome under *ius gentium* was unjust? Could this, theoretically, occur? Or was *ius gentium*, by definition, the "just" resolution?

This problem may also be illustrated by Gentili's treatment of ambassadorial contracts. First he observed that "a sort of agreement" existed that *ius gentium* should govern such contracts.²⁸¹ Moreover, Gentili argued that contracts "entered into during [an ambassador's] embassy" should always be subject to the rules of the *ius gentium*, even after the ambassador steps down from his post and leaves the host nation to return home to another state and another legal system.²⁸² Even though this "home" state's law might not recognize or enforce the ambassador's obligation to pay back a debt or fulfill a bargain made in the host country, Gentili contended that the ambassador still be bound.²⁸³ Gentili gives two reasons for such a rule, both derived from the *Digest*: (1) that if it were not followed, then "the ambassadors would be unjustly enriched and carry home someone else's property,"²⁸⁴ and (2) that if it were not followed, then ambassadors would be barred from commerce because no one "would be willing to make a contract with them."²⁸⁵ The first reason, according to Gentili, was "especially clear" and was derived from "natural law, which prescribes that it is in the interest of justice that no one's increase in wealth should involve loss and injury to another."²⁸⁶ Thus, this blanket rule was clearly a universal "natural law" proposition of the traditional *ius gentium* type.²⁸⁷

Having established that a transnational *ius gentium* exists, Gentili then went to the critical question of whether the *ius gentium* should completely displace applicable national law in certain cases.²⁸⁸ Gentili's answer was "yes," and he concluded with the startling proposition that, in the case of transactions with foreign ambassadors, the result reached under international law—the *ius gentium*—could never be unjust.²⁸⁹ This was because

²⁸⁰ *Id.* (citing DIGEST 2.2.1) (I added the word in brackets; Gentili is using *ius civile* in the sense of the national law.).

²⁸¹ *Id.* at 106.

²⁸² *Id.* at 97, 106.

²⁸³ *Id.*

²⁸⁴ *Id.* at 106 (citing DIGEST 5.1.25).

²⁸⁵ *Id.* at 106 (citing DIGEST 4.4.24, 16.1.11, 26.7.12).

²⁸⁶ *Id.*

²⁸⁷ See generally notes 73-80 and accompanying text *supra*.

²⁸⁸ DE LEGATIONIBUS, *supra* note 117, at 106-07.

²⁸⁹ *Id.* at 107.

“[h]e who makes a contract with another either is or ought to be aware of his status.”²⁹⁰ Thus, a citizen should know when he contracts with an ambassador subject to international law.

Gentili advanced another reason, however, for always applying *ius gentium* to ambassadorial contracts: “the royal [sovereign] power, as it is called, will itself give judgment in every business and law suit in which ambassadors are concerned, for royal power is the [*ius gentium*].”²⁹¹ But the meaning of this statement is ambiguous. Using Gentili’s example, suppose that an ambassador entered into a contract while abroad that, under the national law of his home country, required three witnesses to be valid. After returning home, he seeks to evade his obligations under the national law on the ground that there was only one witness. Under Gentili’s formulation that the “royal power is the *ius gentium*,” however, it is unclear which rule the national courts should apply. They could apply the national rule, or the rule of the host country in which the contract was made. They could look to agreements between the host country and the home country concerning ambassadorial privileges. They could apply Gentili’s rule that “an ambassador should be subject to legal procedure on every contract which he enters into during his embassy,”²⁹² or the conventional rule of the *ius gentium* that “more than two [witnesses] are never required.”²⁹³ Finally, the national courts could just do whatever is required by “equitie and soundness of reason,” presumably in the name of natural law.²⁹⁴

Gentili’s conceptual problem was that he was using the term *ius gentium* in too many ways: first, as a manifestation of *ius inter gentes*, the public law of treaties and customary relations between nations;²⁹⁵ second, as a specific body of private international legal doctrine with ascertainable, private customary rules, not unlike the law merchant;²⁹⁶ and third, as a form of natural reason, a *ratio naturalis* common to all.²⁹⁷ What Gentili’s *De Legationibus* finally recommended as the appropriate law to govern ambassadors’ contracts was *ius gentium* of the second category: a special body of private international legal doctrine with specific and ascertainable customary rules.²⁹⁸ These rules for special international transactions such as ambassadorial contracts were to be “incorporated” by the sovereign national power, for special purposes, into the court proceedings of each nation, even

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 106.

²⁹³ *Id.* at 98.

²⁹⁴ These are the terms of Fulbecke, Gentili’s student. See Fulbecke’s treatment of ambassadors’ contracts in I A PARALLELE, *supra* note 5, at 5. The quoted words are in reference to international recognition of “pyrats’” contracts. *Id.* at 6.

²⁹⁵ See, e.g., DE LEGATIONIBUS, *supra* note 117, at 99 (need to examine embassy’s reception by host nation).

²⁹⁶ See *id.* at 98, 106-07.

²⁹⁷ See *id.* at 98.

²⁹⁸ See, e.g., *id.* at 98 (“two witness” rule).

though the rules could be very different from the "common" national law for ordinary transactions usually applied by the same courts.²⁹⁹ The implications of this reasoning for other "special" laws—particularly Gentili's notion of an international law merchant, the *ius commercium*—are striking. By extension, Gentili could be read to advocate the establishment of a "special law" for soldiers, or for shipowners and sailors.

At a later point in *De Legationibus*, Gentili again approached the difficult question of whether the *ius gentium* was a body of substantive customary international law, or a concept of justice and reason incorporated by definition in the application of any national law. This time, he reached no definite solution. The context, however, revealed the need of the new "nation" states of Europe for a customary, specialized *ius gentium*. The question was tough—what law governs when a diplomat commits a serious crime against a host nation—and it was no hypothetical puzzle. The Privy Council had sought Gentili's advice as to the treasonous activities of Don Bernadino de Mendoza, the Spanish Ambassador.³⁰⁰ The issues presented were several: Could de Mendoza be seized? Should a diplomat who plots the death of an enemy sovereign be tried under the law of the host nation or the law of his home state? Should one look to the customary international law of legate immunity? Or should one look to abstract principles of natural justice, as illustrated centuries later by the Nuremburg trials and Israel's trial of Adolph Eichmann?³⁰¹

Gentili backed away from a clear solution. Looking for classical authority, Gentili presented a quotation allegedly from the Roman historian Sallust that seemed to distinguish between the *ius gentium* and "principles of justice."³⁰² According to Gentili, Sallust reported that the Romans had seized a similar conspirator who had come to Rome as part of a foreign envoy and tried him in a Roman tribunal according to "principles of justice," or the "law of nature," even though the conspirator would have enjoyed a diplomatic immunity under established international law.³⁰³ Gentili suggested that the English might "cling . . . to the authority to decide vested in the magistrate," as did the Romans when they seized and tried this conspirator "who under the established law of nations was inviolable."³⁰⁴

²⁹⁹ *ADVOCATIO HISPANICA*, *supra* note 153, at 101-02.

³⁰⁰ *See* note 266 *supra*.

³⁰¹ For a perceptive analysis of the problems of applying abstract principles of natural justice to concrete situations, see the account of the chief American counsel at the Nuremburg trials, T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 19-94* (1970).

³⁰² *DE LEGATIONIBUS*, *supra* note 117, at 126.

³⁰³ "Bomilcar [a conspirator] was put on trial in accordance with principles of justice rather than in conformity with [*ius gentium*], as he was a member of the suite of one who had come to Rome under a national guarantee." *Id.* at 126. This passage does not appear in at least one leading modern translation of the extant works of Sallust. *See* SALLUST, *THE JUGURTHINE WAR & THE CONSPIRACY OF CATALINE* (S. Handford trans. 1963).

³⁰⁴ [W]e must in this whole matter cling to that which we set forth touching the

Perhaps reflecting the ambiguity of Gentili's advice, the English authorities were more cautious than the Roman tribunal. Without conceding a right to try de Mendoza under natural law, Elizabeth I gave him two weeks to leave England. At the same time, however, she reportedly said that "in vain he appeals to the immunity of the nations who violates the Law of Nations."³⁰⁵ Yet, despite the Queen's statement, the fact remains that de Mendoza had plotted a terrible crime contrary to English common law and to natural law, but had escaped under the customary *ius gentium* of legal immunity. The existence of this problem—and of Gentili's resultant theoretical struggle—demonstrated the need that emerging European nationalism created for a customary, specialized *ius gentium*. Serious problems of incorporation, both diplomatic and commercial, would inevitably arise, but a secular substitute for the laws of the crumbling international Church, so carefully examined by St. German a generation before, was an increasing necessity.

In assessing Gentili's influence, it is significant that he was neither English, nor English-trained. Like Smith, he was "incorporated" as a D.C.L. at Oxford, in 1581, but he was trained in Perugia.³⁰⁶ Throughout his life, Gentili kept in contact with his younger brother, Scipio, who had settled as a jurist in Germany. Under Scipio's supervision, he often published abroad; in fact, Gentili published abroad almost as much as he did in England.³⁰⁷ And he always wrote in Latin, not in English. Although Gentili's advice was sought by the English Privy Council in critical matters, such as the de Mendoza case, he had also served as Advocate to the Spanish Embassy.³⁰⁸ Most peculiarly, Gentili, though a civilian through and through, never joined the College of Advocates and Doctors' Commons—nor apparently supported them. Instead, in 1600, eight years before his death, he joined Gray's Inn, one of the common lawyers' Inns of Court.³⁰⁹

authority to decide vested in the magistrate, and which the Romans may be observed to have adhered to in the indictment of Bomilcar, a member of Jugurtha's suite, who under the established law of nations was inviolable [*iure hoc gentium sanctum constituto*].

DE LEGATIONIBUS, *supra* note 117, at 125-26 (Latin interpolated).

³⁰⁵ J. HOTMAN, *DE LA CHARGE ET DIGNITE DE L'AMBASSADEUR* (4th ed. 1616) (1st ed. Paris 1603), *quoted in Nys, supra* note 16, at 21a-22a. According to Hotman, both he and Gentili advised the Queen that de Mendoza's immunity could be abrogated, at least provided that de Mendoza's sovereign was notified: "We told them that the most *expedient* and *customary* method and the one most salutary for the state was to advise his sovereign and to await his approval or disapproval [of the seizure and proposed punishment]." J. HOTMAN, *supra*, *quoted in Nys, supra* note 16, at 22a.

³⁰⁶ Nys, *supra* note 16, at 18a.

³⁰⁷ For example, Scipio supervised the initial publication of *Advocatio Hispanica* in Hanover, *see* note 268 *supra*, and Hanover also became the city of origin for early editions of all Gentili's major works, *see* notes 266-67 *supra*.

³⁰⁸ Ostensibly "honorifico salario constituto." T. HOLLAND, *Alberico Gentili*, *supra* note 14, at 12-13.

³⁰⁹ Nys, *supra* note 16, at 28a.

The explanation for this apparent avoidance of the organized English civilians probably lies in Gentili's religious background. A Protestant, he had fled a Catholic country for England. Victim of the Inquisition, he was violently opposed to the canon law of the established religion, whether English or Catholic—and he said so, in no uncertain terms.³¹⁰ To the members of Doctors' Common, with their close ties to the religious law of the Court of Arches and the Archbishop of Canterbury, this might have been just too much. In any event, Gentili apparently never bothered to try to join. Perhaps this same Protestantism was the driving force behind Gentili's desire to secularize the *ius gentium*.

Gentili was also a political absolutist.³¹¹ He was concerned with fundamental law, but only in the context of conflicts between sovereigns. As a matter of positive law, he believed in the absolute right of kings, and wondered whether even the Kings of France and Spain were truly sovereign, since they recognized the Pope.³¹² This belief cut him off from more moderate Englishmen, and was to have a tragic repercussion on Cowell.

Not surprisingly, Gentili's most significant impact was on public international law. The great Grotius was in his debt.³¹³ In England, his influence was more limited, but, as will be seen, his secular Bartolist philosophy had an important effect on Fulbecke and Cowell.

Maitland said that the later English civilians were unlike Gentili. "They were no refugees: they were easy Englishmen, and year by year they were becoming more English and less cosmopolitan."³¹⁴ Maitland's statement, however, is not completely accurate. It was true that the later English

³¹⁰ As to canonical sources, Gentili wrote, "*Flammis, Flammis libros spurcissimos barbarorum, non solum impiissimes antechristi. Flammis, omnes flammis!* [Into the fire with the detestable books of the barbarians; into the fire with the impious books of the Anti-Christ.]" A. GENTILI, *DE NUPTIIS LIBRI TRES* bk. 1, ch. 19 (2d ed. Hanover 1614) (1st ed. Hanover 1601), quoted in Nys, *supra* note 16, at 36a. See F. MAITLAND, *ROMAN CANON LAW*, *supra* note 14, at 95. See generally authorities cited in note 262 *supra*.

³¹¹ Gentili was deeply impressed by Jean Bodin, whom he cites constantly. See, e.g., *DE LEGATIONIBUS*, *supra* note 117, at 83, 159. In *De potestate*, Gentili quotes Bodin's description of state sovereignty, that "absolute and perpetual power which the Latins called *majestas*." A. GENTILI, *De potestate Regis absoluta*, in *REGALES DESPUTATIONES TRES* 9 (London 1605) (quoting J. BODIN, *supra* note 117, at 125), quoted in B. LEVACK, *supra* note 14, at 97. But Gentili was not really "the theoretical founder of absolutism in England." G. VAN DER MOLEN, *supra* note 119, at 239. It was Bodin himself who was first published in English, with Richard Knolles' important translation in 1607. See McRae, *supra* note 117, at A52-A67. Furthermore, Gentili did believe that, although the Prince was above all positive law, he was conceptually under a sanctionless natural law. See A. GENTILI, *supra*, at 17; A. D'ENTRÈVES, *supra* note 77, at 68.

³¹² Nys, *supra* note 16, at 35a-36a.

³¹³ See *id.* at 31a.

³¹⁴ F. MAITLAND, *ROMAN CANON LAW*, *supra* note 14, at 95.

civilians became increasingly concerned with strictly national matters. Yet it was not by free choice. Rather, it was because after 1600 they had to defend their future role in England against sustained attack from certain powerful common lawyers, particularly Sir Edward Coke.

4. The "Bartolist Bee": William Fulbecke (1560-1603)

William Fulbecke idolized his teacher, Gentili. According to Fulbecke, Gentili had "by his great industrie . . . quickened the dead bodie of the Civil Law written by the ancient Civilians . . . Learning in him hath shewed all her force."³¹⁵ But Fulbecke chose a method and a format that were quite different from those used by his teacher. Fulbecke's major works, unlike Gentili's, were entirely in English. In addition, Fulbecke's most important work, *A Parallele or Conference of the Civil Law, the Canon Law and the Common Law of this Realme of England*,³¹⁶ was directed at the English

³¹⁵ W. FULBECKE, *A DIRECTION OR PREPARATIVE TO THE STUDY OF LAW* 26(b) (London 1600) [hereinafter cited as *A DIRECTION*].

³¹⁶ 1 & 2 W. FULBECKE, *supra* note 154. *A Parallele* was first printed in two parts. For the first part, I shall cite to the second edition: 1 *A PARALLELE*, *supra* note 5. For the second part, I shall cite to the first edition: 2 W. FULBECKE, *A PARALLELE OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW AND THE COMMON LAW OF THIS REALME OF ENGLAND* (London 1602) [hereinafter cited as 2 *A PARALLELE*].

A Parallele was sometimes bound with Fulbecke's treatise on international law, W. FULBECKE, *THE PANDECTES OF THE LAW OF NATIONS* (London 1602) [hereinafter cited as *THE PANDECTES*]. This book was directed toward "[g]iving great light to the understanding and opening of the principall objects, questions, rules, and cases of the Civill Law, and Common law of this Realme of England." *Id.* at title page.

A Parallele and *The Pandectes* were not, however, Fulbecke's most successful books. Rather, Fulbecke's biggest success was a guide book for law students, *A DIRECTION*, *supra* note 315. This book was printed in 1600 and 1602, and in a revised edition in 1829; a facsimile of the 1600 edition was published by Garland Publishing, Inc., in 1980. *A Direction* contained advice to law students and included a suggested reading list, as well as a compendium of "certain [legal terms] . . . whereof the common law of this Realme and the Civill Law do seeme to agree." *A DIRECTION*, *supra* note 315, at 62. This compendium may have inspired Cowell's famous dictionary. See note 155 and accompanying text *supra*, notes 403-21 and accompanying text *infra*. Fulbecke praised Bartolus in *A Direction*, ranking him over the humanists, and "yea above, these, him whom I lately named, Albericus Gentilis." *A DIRECTION*, *supra* note 315, at 26b.

A Direction remains famous mostly for its arguments why law students should not eat a lot: "A fat and full belly yeeldeth . . . grosse spirits, by which the sharp edge of the mind is dulled and refracted . . ." *A DIRECTION*, *supra* note 315, at 12b, *quoted in* P. WINFIELD, *supra* note 133, at 333 n.1. Also celebrated is its explanation of why law students should not study after supper: "if a man studie soone after supper, the nourishment is resolved into grosse vapours which doe fill the bodie and are verie noisome obstupatives to the senses." *A DIRECTION*, *supra* note 315, at 18b, *quoted in* P. WINFIELD, *supra* note 133, at 333 n.1.

Fulbecke was also a great joker, and his jokes were usually at the expense of

national law, not at the law of nations. Furthermore, Fulbecke chose a format for *A Parallele* completely unlike any used by Gentili, a set of dialogues between four representative characters: Nomomathes (a rich and "liberally minded" sponsor), Canonologus (a canon lawyer), Codicgnostes (a civilian), and Anglonomophylax (a common lawyer).³¹⁷ Finally, and most importantly, Fulbecke's works did not attain the depth and sophistication displayed by the works of Gentili.

Fulbecke's objective was clear. He purported to discuss "the agreement and disagreement of these three lawes [canon, civil, and common], and the causes and reasons of the said agreement and disagreements."³¹⁸ Fulbecke was thus following the lead of St. German's dialogues in *Doctor and Student*;³¹⁹ his purpose was to compare and to synthesize canonist and civilian principles with the principles of the common law.

Of course, the "dialogue format" was not original with either Fulbecke or St. German. Fortescue and a score of other early English writers on law and politics had used it.³²⁰ In politically sensitive times, a dialogue could be safer than more direct formats: the author of a dialogue never had to firmly

common lawyers, jurors, and litigious neighbors, "who are so full of Law-points, that when they sweat, it is nothing but Law . . . when they dreame it is profound law." W. FULBECKE, *Introduction to 2 A PARALLELE*, *supra*, at 11th unpaginated page. As to his neighbors, "[t]he booke of *Littleton's tenures* is there breakfast . . . , their supper, and their rere-banquet," *id.*, and as to legal jargon, "there is a vengeance deale of Latin in it, which put mee to the cost to buy a *Thomases Dictionarie*, but it is no great matter for that, for it wil serve my sone *Reginold*, when he shall bee tenne yeares olde" *Id.* at 13th unpaginated page.

³¹⁷ W. FULBECKE, *Introduction to the Dialogues*, in 1 A PARALLELE, *supra* note 5, at 20th unpaginated page.

³¹⁸ 1 A PARALLELE, at title page.

³¹⁹ See notes 165-69 and accompanying text *supra*.

³²⁰ See J. FORTESCUE, *supra* note 96 (a dialogue between "The Chancellor" and "The Prince"); note 214 *supra*. Only a few years before Fulbecke published *A Parallele*, a writer identifying himself as "W.S." (William Stafford?) published a five-way "dialogue," A COMPENDIOUS OR BRIEFE EXAMINATION OF CERTAIN ORDINARY COMPLAINTS OF DIVERS OF OUR COUNTRY MEN IN THESE OUR DAYES: WHICH ALTHOUGH THEY ARE IN SOME PARTE UNJUST & FRIVOLOUS, YET THEY ARE BY WAY OF DIALOGUE THOROUGHLY DEBATED & DISCUSSED BY W.S. GENTLEMAN (London 1581). This work featured a "knight," a "merchant," a "farmer," a "hatmaker," and a "doctor of law." St. German himself had also employed a dialogue format in his dispute with Sir Thomas More on religious matters. C. ST. GERMAN, A DIALOGUE BETWIXTE TWO ENGLISHMEN, WHEREOF ONE WAS CALLED SALEM AND THE OTHER BIZANCE (London 1533), noted in 2 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 1841 (1975). In 1572, a civilian, Thomas Wilson, published a similar type of work. T. WILSON, A DISCOURSE UPPON USURYE, BY WAY OF DIALOGUE AND ORACIONS, FOR THE BETTER VARIETYE AND MORE DELITE OF ALL THOSE THAT SHALL READE THYS TREATISE (London 1572). Wilson undoubtedly chose the usually inoffensive dialogue format because usury was such a hotly contested intersection between canon law and common law.

commit his opinion to one side or the other. Earlier civilians, such as Thomas Martin, had discovered that unqualified attack provoked retaliation.³²¹ Dialogues, on the other hand, suggested reasonable discourse and a resolution of differences.

The popularity of such "discourse" and "dialogue" as literary devices among educated Elizabethans was a mark of the Elizabethans' dynamic, optimistic attitude. The Elizabethans had a faith that a "cosmic order" was inherent in all existence, both physical and abstract; this faith was manifest in Hooker's theology; in the art of Marlowe, Spencer, and Shakespeare; and in the philosophy of Bacon and Raleigh.³²² Synthesis of the old with the new, of the religious with the secular, and of the law with reason and science, was more than possible—for the Elizabethans it was natural and right. The speed with which radical change was actually occurring in Tudor society³²³ placed a very high premium on such a faith, because the faith implied that apparent opposites could be reconciled. It was a necessary faith in a progressive synthesis.

This faith had already encouraged some attempts by English jurists to synthesize the substantive law into what St. German called "maxims,"³²⁴ or at least to superimpose on legal rules something more than the chronological or topical order typical of many medieval texts. Thus, books such as Abraham Fraunce's *The Lawyers Logike*, published in 1588, attempted to "exemplify the praecepts of logike by the practise of the common lawe."³²⁵ Fraunce proceeded to reduce the complex Earle of Northumberland's case to an elaborate structured diagram,³²⁶ with only mixed success. He also "diagrammed" a popular law text, Stanford's *Pleas of the Crown*,³²⁷ and even a section of Virgil!³²⁸ The result was hardly enlightening.

Lodowick Lloyd tackled an even more astonishing task in his *A Briefe Conference of Divers Lawes: Divided into certaine Regiments*,³²⁹ published

³²¹ See T. MARTIN ("Doctour of the Civile Lawes"), A TRACTISE DECLARYNG AND PLAINLY PROVYNG, THAT THE PRETENDED MARRIAGE OF PRIESTES AND PROFESSED PERSONES IS NO MARRIAGE (London 1554) (Beale T414). Martin's treatise was answered in kind by ANON., A DEFENSE OF PRIESTES MARRIAGE, STABLYSSHED BY THE IMPERIALL LAWES OF THE REALME OF ENGLANDE, AGAYNST A CIVILIAN, NAMING HYMSELFE THOMAS MARTIN DOCTOUR OF THE CIVILE LAWES & c. (London 1565) (Beale T263). Martin, a member and generous patron of the College of Advocates, got his D.C.L. at Catholic Bourges, whence may have come his canonical views of priest marriage. See G. SQUIBB, *supra* note 14, at 63, 65, 81, 151.

³²² See generally E. TILLYARD, THE ELIZABETHAN WORLD PICTURE 1-15 (1944).

³²³ See Thorne, *supra* note 221, at 10.

³²⁴ See note 196 *supra*.

³²⁵ A. FRAUNCE, THE LAWYERS LOGIKE, at title page (London 1588).

³²⁶ *Id.* at 125-39.

³²⁷ *Id.* at 139-51 (diagramming W. STANFORD, LES PLEES DEL CORON (London 1560)).

³²⁸ *Id.* at 123-24.

³²⁹ L. LLOYD, A BRIEFE CONFERENCE OF DIVERS LAWS: DIVIDED INTO CER-

in 1602. This book swept the Old Testament, the classic literature, the civil law, and whatever else Lloyd knew about "old Gaules," "Egiptians," "Israelites," "Athenians," and others into broad generalizations.³³⁰ Lloyd's purpose was to "prove" propositions such as, "The choice of wise Governours [is] to governe the people, and to execute the lawes among all Nations, and also the education and obedience of theyr children to their Parents and Magistrates."³³¹ Lloyd was convinced that an examination of "divers lawes," for all their imperfections and faults, would, *in toto*, make clear the cosmic order which all laws, as well as all nature, ultimately reflected.³³²

The same faith that motivated Fraunce and Lloyd motivated Fulbecke. But like their works, Fulbecke's *Parallele* was an intellectual disappointment. Fulbecke had neither the insights of a St. German nor the massive knowledge of a Gentili. He incorrectly described the development of canon, civil, and common law as if they were "unrelated systems of separate growth."³³³ Yet, at the same time he paradoxically underestimated the actual differences between the three systems doctrinally.³³⁴ Fulbecke failed to even acknowledge the problems that synthesis would present.

Fulbecke's failure is illustrated by his treatment of contract law. Contract law loomed large both in Fulbecke's book and in the legal world in which he lived. But that law was in a period of transition. As Thorne has observed, Tudor "[c]ommercial transactions were handled by means of self-executing, medieval forms ingeniously adapted to post-medieval enterprises"³³⁵—*i.e.*, defeasible bonds or the processes available under the Statutes Staple. Because relief against these bonds in the case of abuse was to be had in Chancery, contract law remained theoretically vestigial, even though there was a large and growing amount of commercial activity. To the extent that this activity was international—and a good deal was—fascinating questions could and did arise. Thus, the more sophisticated civilian contractual theory found itself, through mishap, tested in the English courts.

It should not be surprising, therefore, that when Fulbecke set out to provide "diverse repast" to "the severall students of the Canon lawe, the

TAINÉ REGIMENTS (London 1602). Garland Publishing, Inc., published a facsimile edition, edited by Professors David S. Berkowitz and Samuel E. Thorne, in 1978.

³³⁰ See, *e.g.*, *id.* at 44.

³³¹ *Id.*; see *id.* at 53-56.

³³² *Id.* at 1-10. This spirit of comparative study was not limited to lawyers. See, *e.g.*, T. GODWYN'É, ROMANÆ HISTORAE: AN ENGLISH EXPOSITION OF THE ROMAN ANTIQUITIES; WHEREIN MANY ROMAN AND ENGLISH OFFICES ARE PARALLEL'D, AND DIVERSE OBSCURE PHRASES ARE EXPLAINED 204-05 (rev. ed. Oxford 1661) (1st ed. Oxford 1614). Godwyn was a Bachelor of Divinity.

³³³ Stibbs, *Sir Walter Raleigh's Discourse of Tenures*, 22 TUL. L. REV. 273, 275 (1947).

³³⁴ See Jolowicz, *supra* note 113, at 139, 146.

³³⁵ Thorne, *supra* note 221, at 21.

Civill law, and the Common law" according to "their disagreeing appetites,"³³⁶ he devoted his first chapter to "Contract"³³⁷ and his third to "Bargaining and Sales."³³⁸ If one were a good Bartolist, and Fulbecke so aspired, one would find "in the garden of the Common-weale, some lawes like to weeds, others like to flowers; as a diligent Bee he extracted a good juice out of the better lawes."³³⁹ In Fulbecke's view, a good law survived "because other nations with whom wee have commerce, & entercourse, doe not find their commodities or liberties to be impeached by this Lawe."³⁴⁰ Contract and commercial law, therefore, was an obvious place for Fulbecke to start.

But Fulbecke, as the "Bartolist Bee," simply did not rise to the challenge. Instead, he flitted from legal system to legal system and topic to topic, avoiding both the doctrinal conflicts and the tough questions. For example, he had his character Codicgnostes (the civilian) state that "the chiefe ground of contracts is consent, consent groweth of knowledge and from a man's free will."³⁴¹ But he then shifted the discussion to the contractual capacity of "Monkes & Friers," about which Canonologus (the canonist) spoke at length.³⁴² Then he made Nomomathes (the sponsor) raise the issue of infant contracts, on which Anglonomophylax (the common lawyer) continued at great length, comparing the capacity of infants and monks.³⁴³ This continued as to servants, wives, etc., until finally Nomomathes raised the tough question: "I would have you proceed to declare now by the material causes of contracts, they may stand or fall?"³⁴⁴ The answer was from Codicgnostes,

³³⁶ W. FULBECKE, *To the Courteous Reader*, in 1 A PARALLELE, *supra* note 5, at 5th unpaginated page. Fulbecke continued, "It seemed straunge unto me, that these three lawes, should not as the three *Graces* have their handes linked together, and their lookes directly fixed the one upon the other, but like the two faces of *Ianus*, the one should be turned from the other . . ." *Id.* This Fulbecke found most regrettable, because "these lawes are the sinewes of a state, the Sciences of government, & the arts of a comon weale . . ." *Id.*

³³⁷ 1 A PARALLELE, *supra* note 5, at 1a.

³³⁸ *Id.* at 11b.

³³⁹ W. FULBECKE, *supra* note 336, at 7th unpaginated page. Fulbecke was speaking of King Edward the Confessor.

³⁴⁰ *Id.* at 18th unpaginated page. According to Fulbecke, the other two reasons why much of the law of England "flourished long in this good estate" were "that there is nothing in it which to the Law of God is crosse or opposite" and because it is "rather popular, then peremptorie, rathere accepted, then exacted, and rather embraced, then perswaded." *Id.* The primary position accorded canon law is consistent with Fulbecke's view that, of the three, the canon law was the "more auncient, then the other twaine, and of greater continuance." *Id.* at 13th unpaginated page. Fulbecke, like Lodowick Lloyd, included examples such as "ancient Egipitian[] priests [that] were judges" and "Druidae" judges. *Id.* at 13th-14th unpaginated pages.

³⁴¹ 1 A PARALLELE, *supra* note 5, at 1a.

³⁴² *Id.* at 2a.

³⁴³ *Id.* at 2a, 4b.

³⁴⁴ *Id.* at 4b (misnumbered "3b" in the 1618 ed.).

who replied that a contract had a "materiall substance whereof it is made" and that "in contracts and covenants as well these which are determinable by the Law of Nations, as these which are sentenced by the Civil Law and other Lawes, . . . some material cause is requisite."³⁴⁵ Thus Fulbecke had developed the dialogue into a critical contrast between "consideration" at common law and the "*causa*" required by the canon and civil law—a contrast not unlike the one developed in St. German's discussion of *nudum pactum*.³⁴⁶

At this critical point, however, Fulbecke allowed Nomomathes to change the subject: "Why," he interposed, "are any contracts ordered by the Law of Nations?"³⁴⁷ Codicognostes responded by raising Gentili's favorite example, the contracts of ambassadors. Fulbecke simplistically described these contracts as subject to the "Law of Nations"³⁴⁸—and that was all. There was no serious analysis of what the "Law of Nations" was, despite Gentili's excellent analysis in *De Legationibus*.³⁴⁹ Fulbecke defined the basic principles of the *ius gentium* as deriving from the "civil law," which was "not . . . any other then *ius Romanum*, or *ius antiquū Romanum*."³⁵⁰ But he went on to include "that which hath beene commented thereupon, or added thereunto."³⁵¹ Did these additions include the contemporaneous substantive law specifically governing ambassadors' contracts? In fact, the bulk of Fulbecke's cited authority was from the Roman *Digest*.³⁵² Gentili's exhaustive research concerning the actual customary international law of Europe was almost completely ignored.

In the end, Fulbecke was less helpful than Gentili. Although Fulbecke's dialogue format provided a perfect opportunity for analysis, he shied away whenever the opportunity arose. Fulbecke's closest approach to any coherent theory of *ius gentium* was in his analysis of the contracts of "Pyrats and robbers." Is one bound by a contract to supply goods to a pirate ship, or to pay a debt to an outlaw? "The question is not what may be done unto [pyrats

³⁴⁵ *Id.* at 5a.

³⁴⁶ See C. ST. GERMAN, *supra* note 165, at 301-07; note 149 *supra*.

³⁴⁷ 1 A PARALLELE, *supra* note 5, at 5a.

³⁴⁸ "Yea, for by that law an Ambassador may be impleaded . . ." *Id.* Fulbecke did not discuss Gentili's hard question of whether an ambassador should always be free from obligation if, under customary international law, he would not be bound, and whether there also should be a "natural law" based on mutuality or unjust enrichment. See notes 281-94 and accompanying text *supra*. Fulbecke touched on the unjust enrichment question, see 1 A PARALLELE, *supra* note 5, at 5a, but reached no resolution.

³⁴⁹ See notes 275-305 and accompanying text *supra*.

³⁵⁰ W. FULBECKE, *supra* note 336, at 15th unpaginated page.

³⁵¹ *Id.*

³⁵² All of Fulbecke's cited authority as to ambassadors' contracts came from civil law sources. See 1 A PARALLELE, *supra* note 5, at 5a.

and robbers] . . . but how by the rule of equitie and soundness of reason they ought to be dealt with. For to dispute of Law is to dispute of a publike bond whereby wee are bound . . . but we are not bound to such lawless people . . . by anie common respect."³⁵³ Thus, while such men apparently might have contract rights under a particular national law, in Fulbecke's view they should have none under the *ius gentium*, because their activities put them beyond the protection of the international community of law abiding people.³⁵⁴ Furthermore, although his language is not clear, Fulbecke may have distinguished this *ius gentium* from "the rule of equitie and soundness of reason," which *could* be applied by national courts to the contracts of "pyrats and robbers."³⁵⁵

Thus, the old, tough theoretical problem was again encountered. The *ius gentium* apparently had some specific substantive rules, quite distinct from vague postulates of *ratio naturalis*, "natural reason." But Fulbecke gave no sustained analysis of how these rules were to be dealt with, particularly vis-à-vis national law, in terms of contract law or anything else.³⁵⁶ At least

³⁵³ *Id.* at 5b-6a.

³⁵⁴ *Id.* at 6a.

³⁵⁵ *Id.*

³⁵⁶ In *The Pandectes*, Fulbecke developed a "consent" theory which is similar to the Roman *ius inter gentes*. See THE PANDECTES, *supra* note 316, at 82; notes 89-90 and accompanying text *supra*. "[T]he Law of Nations" is defined as "nothing else but the communion and league of Nations." THE PANDECTES, *supra* note 316, at 82. Thus, Fulbecke's discussion of this law consisted of "several discourses of the questions, points, and matters of Law, wherein the Nations of the world doe *consent* and accord." *Id.* at title page (emphasis supplied). Fulbecke added that these areas of consent would give "great light" to both the "Civill Law" and "Common law of this Realme of England." *Id.* But, in fact, all of his specific categories involved either great principles "respected of all Nations"—including rules of "time" and "seasons," and "consent" in marriage, *id.* at 22-28, "that by the practice of all Nations Democracie hath been sette down, and Monarchie established," *id.* at 28-33—or matters based on the general consent of nations, *i.e.*, treaties, safe conduct guarantees, rules of war, etc. *Id.* at 33-51. Thus Fulbecke either chose areas where the *ius gentium* was, by his definition, fully part of all national laws, or where the parties were nations themselves. This neatly avoided the critical area of controversy in England: whether there was a private, customary *ius gentium*, neither part of the national law nor pertaining to relations between nations as states, which should be applied in the Admiralty or in other national courts *instead of the common law* in special transnational cases involving merchants or other private parties.

Fulbecke did state that private civil law should be used in matters involving heraldry. "I doe respect the good of the civilian, who in these matters is verie often employed. And of the professors of common Law, who shall not doe amisse, in considering . . . the Statute of 13 Rich. 2 cap. . . [which states that matters of arms] *can not be determined, nor discussed by the Common Law.*" *Id.* at 33b. As to the critical area of contracts with foreign merchants, Fulbecke merely observed that they deserve the special protection of the Prince. *Id.* at 71b-72b.

Gentili had seen the issue.³⁵⁷

Fulbecke's book continued in this frustrating, unfocused way through many doctrinal topics, avoiding or misunderstanding the tough questions, usually in a manner which minimized the doctrinal distinctions between the three rival systems of law.³⁵⁸ The *Paralleles* was a wonderful piece of wishful thinking. Fulbecke shared, with Lodowyck Lloyd and Abraham Fraunce, the great Elizabethan faith. A cosmic consensus must be out there, somewhere.³⁵⁹

This faith was predicated on a view of the *ius gentium* as old as Ulpian.³⁶⁰ Man was basically a reasonable creature. This fact meant that there must be a "law of all men," common to all the differing but reasonable peoples. Thus, Fulbecke's major premise was that common legal principles must have united the differing but reasonable legal cultures of the civilians, canonists, and common lawyers. This was an Elizabethan dream. A *Parallelele* was published in the last year of Elizabeth's reign. The terrible irony was that within five short years that dream would be an irreparable wreck, and English civilian literature would have taken a new and bitter turn, prescient of civil war.³⁶¹

³⁵⁷ See notes 300-05 and accompanying text *supra*.

³⁵⁸ For example, take the section on Bargains and Sales. 1 A PARALLELE, *supra* note 5, at 11b. The section began with "what things are forbidden to be sold," *i.e.*, "evill poisons." *Id.* It focused on the difference between an "evill" and a "good" poison, rather than on questions of legal doctrine. *Id.* at 12a. And so it went. The remaining passage of the section, which was structured around the Roman law of mistake, duress, and fraud, has Anglonomophylax arguing that the common law "differeth verie little, or nothing from yours [civil law]," *id.* at 15a, and citing, among other things, the doctrine of *non est factum* for deeds and grants. *Id.* at 15a-b.

There were some superior sections on contracts, at least in terms of insight into contemporary legal developments. *Id.* at 6a-7a (implied consideration); *id.* at 54b-57a (civil and English law of delivery, bailment); 2 A PARALLELE, *supra* note 316, at 18a-b (mutuality); *id.* at 21b-22b (remedies, forms of action).

³⁵⁹ Fulbecke's analytical shortcomings raise questions about his credentials. He was not a member of the College of Advocates. He did receive the Oxford B.A. and M.A., apparently in civil law study. He claimed to have received a doctorate in civil law "at an undesigned continental university," but he was never "incorporated" as a D.C.L. at Oxford or Cambridge, and modern writers are skeptical. See B. LEVACK, *supra* note 14, at 136. He was a member of Gray's Inn, like Gentili, and he praised Gray's Inn: "I pray God *this s[h]ining pot [Gray's Inn] may still continue her silver of Learning and Law.*" THE PANDECTES, *supra* note 316, at 56b. But I question Levack's conclusion that "Fulbecke's lack of association with Doctors' Commons detracts from the significance of his pioneering efforts." B. LEVACK, *supra* note 14, at 137. Rather, it was his lack of resolution and clarity of analysis that marred his work.

³⁶⁰ See note 77 and accompanying text *supra*.

³⁶¹ Despite his good intentions and Gray's Inn associations, Fulbecke had some civilian doctrinal traits that would have been unwelcome to common lawyers. Thus Fulbecke's section on "Monarchie" in THE PANDECTES, *supra* note 316, ch. 6, started

5. The "Interpreter": John Cowell (1554-1611)

For all his failings, Fulbecke's valiant efforts appear to have inspired another English Bartolist to try his hand at reconciliation and synthesis. This was a more ingenious and subtle jurist, John Cowell.

Cowell, like Smith, was Regius Professor of Civil Law at Cambridge; Cowell held the chair from 1594-1611. As a student, he had distinguished himself in civil law, earning an LL.D. from Cambridge in 1588. He early came under the patronage of the powerful Bishop Bancroft, for whom he later acted as vicar-general.³⁶² Cowell joined the College of Advocates, Doctors' Commons, in 1589 or 1590, became Regius Professor in 1594, and, in 1598, became Master of Cambridge's Trinity Hall, the stronghold of civil law and the landlord of Doctors' Commons.³⁶³ There was no doubt that he was a man of prominence and learning, a thorough civilian and a Bartolist.

Cowell gave careful thought to his choice of a "vehicle" for his views. Unlike St. German and Fulbecke,³⁶⁴ Cowell did not try a dialogue. Nor did he try a descriptive treatise like Smith's.³⁶⁵ Instead, Cowell "invented" two vehicles that no English civilian had yet employed. First, he created an *Institutes* of English law,³⁶⁶ following the headings of *Justinian's Institutes*. Next he wrote a law dictionary, perhaps the most famous law dictionary in English legal history, the great *Interpreter*.³⁶⁷ These vehicles were brilliant

out with the royal absolutism of Gentili. "If any man be so straitly minded, that he thinketh this Royal prerogative to be too large and ample for an absolute Monarchie: let him think withall that himselfe is so base minded that he cannot sufficiently judge of the great worth and demerit of so high an estate." *Id.* at 9a-b. Concededly, Fulbecke did repeat the classical limitations on the King's power under the law of nations: "[t]hat by the law of nations Kinges have no such an indefinite power over their subjects as fathers by the civill law have over their children: for by the law of nations kinges were chosen . . . for the safeguard . . . of the lands, good & persons of their subjects . . ." *Id.* at 13a-b. But Fulbecke was a true civilian elitest when it came to popular democracy. "[F]or the heele can not stand in place of the head, unlesse the bodie be destroyed and the anatomie monstrous: it is against the nature of the people to beare rule . . ." *Id.* at 29.

³⁶² For biographical information on John Cowell, see 5 W. HOLDSWORTH, *supra* note 139, at 20-22; B. LEVACK, *supra* note 14, at 4-5, 55, 221; G. SQUIBB, *supra* note 14, at 164; 1 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 1300 (1975); Simon, *supra* note 100, at 260-72. It is particularly appropriate that Sir Jocelyn Simon be one of these authorities, as he was President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, the "incorporated" civilian jurisdictions that are now part of the Family Division of the High Court of Justice.

³⁶³ See note 35 *supra* (relationship of Trinity Hall to Doctors' Commons).

³⁶⁴ See notes 166-69 (St. German) & 317-20 (Fulbecke) and accompanying text *supra*.

³⁶⁵ See notes 233-35 and accompanying text *supra*.

³⁶⁶ J. COWELL, *supra* note 102.

³⁶⁷ THE INTERPRETER, *supra* note 155. European Bartolists had already used both "Institutes" and Dictionaries. For contemporaneous examples, see J. IMBERTO,

ideas, and there is every reason to believe that Cowell chose them because they were inherently noninflammatory. For example, Cowell could have argued that his *Institutes* was *not* advocating Roman or civil law, but was simply setting out English national law in a particular structure.³⁶⁸ Similarly, Cowell could have argued that *The Interpreter* was simply intended to help with difficult legal words.³⁶⁹ True, some of these words would have civil law roots, or meanings that could be clarified by reference to civil law counterparts, but such civil law references could be justified as being helpful to the reader. If Cowell incidentally pointed out how much the common law had in “common” with civil law, or what the relevant rule would be in other European countries, or if he incidentally conveyed some information about the *ius gentium*, or even some limited comparative criticism of the common law, so much the better.

There is no reason to suspect Cowell of any ulterior purpose other than Fulbecke’s: to “educate” both civilians and common lawyers about their differences and their common ground—with an emphasis on the latter. Apparently, Cowell hoped to find a literary vehicle that would, at least, encourage a thoughtful, low-keyed reception of civilian ideas. If this be true,

ENCHIRIDION IURIS SCRIPTI, MORIBUS & CONSUECUDINE FREQUENTIORE GALLIAE (Utrecht 1647) (a French civilian dictionary with an alphabetical structure built around terms of French law); F. ZYPAEO, NOTITIA IURIS BELGICI (Arnheim 1642) (a Belgian “Institutes”). There are more, and earlier, examples. For discussion of Dutch examples, see R. FEENSTRA & C. WAAL, SEVENTEENTH CENTURY LAW PROFESSORS AND THEIR INFLUENCE ON THE DEVELOPMENT OF THE CIVIL LAW 18-44 (1975).

³⁶⁸ This was certainly the implicit argument of his translator when the book was reprinted in 1651, during the Commonwealth. See “W. G.,” *Preface* to J. COWELL [sic], *THE INSTITUTES OF THE LAWE OF ENGLAND* (“W.G.” trans. London 1651). The translator represented that Cowell’s prior unpopularity was due to his “too much crying up Parliament Priviledge, rendred him not so much a favorite of those former times as his worth merited; nor his Bookes so vendible as they have been since these late changes in England” *Id.* at 3d unpaginated page. He added, “I hope, for the Authors sake it will find no less acceptance in the English World, then if he had lived to mayntaine what he in that Age durst avow; and thereby appeared in his owne naturall and proper coulours.” *Id.* at 4th unpaginated page.

³⁶⁹ See *THE INTERPRETER*, *supra* note 155, “[w]herein is set fourth the true meaning of all, or the most part of such Words and Termes, as are mentioned in the Lawe Writers, or Statutes of this victorious and renowned Kingdome A Worke not onely profitable . . . but necessary” *Id.* at title page.

The civilians of other nations . . . raised this kinde of worke . . . to an inexpected excellencie Lastly one Caluinus a Doctor of Heidelberge, like a laborious Bee, hath gathered . . . the best iuyce of their flowers, and made up a hive full of delectable honie. And by this example would I gladly incite the learned in our common lawes and antiquities of England

J. COWELL, *To the Readers*, in *THE INTERPRETER*, *supra* note 155, at 5th unpaginated page. Note Cowell’s reference to the “laborious Bee” as a symbol of Bartolist efforts, a page out of Fulbecke’s book. See note 339 and accompanying text *supra*.

Cowell was, for all his originality, a spectacular failure. *The Interpreter* was suppressed, almost at once, by royal proclamation.³⁷⁰ It produced a parliamentary outcry. *The Institutes* became one of the truly rare books of English legal literature. It appeared only once in English—and that was during the Commonwealth, when it was translated pursuant to the act of the Rump Parliament that abolished Latin and French in law books.³⁷¹ For Cowell, all of this would have been the ultimate irony.

Cowell had, besides his *Institutes* and his dictionary, a third idea for a work that would bring together the civil and common law. He intended to publish a tract called *De Regulis Iuris*, “wherein my intent is, by collating the cases of both lawes, to shewe, that they both be raised of one foundation, and differ more in language and termes than in substance, and therefore were they reduced to one methode (as they easily might) to be attained (in a manner) with all one paines.”³⁷² In 1607, Cowell said that he had the tract in “some towardness,” but apparently he never finished it. “[M]y time imported to these studies, being but stolne from mine employments of greater necessitie,” he explained, “I cannot make the haste I strive, or perhaps that the discourse may deserve.”³⁷³ Perhaps the manuscript still exists. This work could have been the fulfillment of the promise of a great comparative work, worthy of St. German. It would undoubtedly have surpassed Fulbecke’s efforts.

Cowell’s first attempt at such a work was *The Institutes or Institutiones Juris Anglicani*.³⁷⁴ It was published in 1605, just three years after Fulbecke’s *Parallele*. Unlike Fulbecke’s books, *The Institutes* was published in Latin. This, in itself, would seem peculiar for a book designed to give an organizational structure to a national English law still written in an archaic professional tongue, Law French. It was reprinted, once again in Latin, in 1630.³⁷⁵ In 1651, in the middle of the Commonwealth and within two years after Charles I’s execution, it was finally translated into English and printed for the last time.³⁷⁶

³⁷⁰ See note 426 and accompanying text *infra*.

³⁷¹ An Act for turning the Books of the Law, and all Process and Proceeding in Courts of Justice, into English, ACTS & ORDS. INTERREGNUM 455 (1650) (repealed 12 Car. 2, c. 3, § 4 (1660)); see J. COWELL [*sic*], THE INSTITUTES OF THE LAWES OF ENGLAND (“W.G.” trans. 1651) (1st ed. London 1605) [hereinafter cited as COWELL’S INSTITUTES]; note 376 and accompanying text *infra*.

³⁷² J. COWELL, *supra* note 369, at 6th unpaginated page.

³⁷³ *Id.* Levack states that the tract never appeared. B. LEVACK, *supra* note 14, at 138 n.4. The manuscript would be a magnificent find!

³⁷⁴ J. COWELL, *supra* note 102.

³⁷⁵ J. COWELL, INSTITUTIONES JURIS ANGLICANI (2d ed. London 1630) (1st ed. London 1605).

³⁷⁶ COWELL’S INSTITUTES, *supra* note 371. The words “according to Act of Parliament” on the title page of the 1651 edition must refer to the act of the “Rump” Parliament abolishing the use of Latin and law French in law works. An Act for turning the Books of the Law, and all Process and Proceedings in Courts of Justice, into

It was certainly a most peculiar book. As Sir Jocelyn Simon observed, "Not surprisingly, it was unsuccessful . . ." ³⁷⁷ The English law was fairly faithfully set out, and there were extensive citations, largely to English sources. But the legal sources were heavily weighted toward the great medieval treatises—particularly *Bracton* ³⁷⁸ and its "imitators," *Britton* ³⁷⁹ and *Fleta* ³⁸⁰—and these works were themselves strongly influenced by the civil law. Thus, Cowell advanced civilian ideas while citing English common law sources. ³⁸¹ For example, he began *The Institutes* with the motto, "Justice is a constant and perpetual will of sending unto everyone their Due." ³⁸² This he cited to *Bracton* "1.1.c.4, num. 2." ³⁸³ *Bracton* was a good English

English, ACTS & ORDS. INTERREGNUM 455 (1650) (repealed 12 Car. 2, c.3, § 4 (1660)). See Mathew, *Law French*, 55 LAW Q. REV. 358, 364 (1938). See also 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 571 (2d ed. 1937). According to Francis North, "[D]ivers books were translated, as the great work of Coke's Reports, etc., but upon the revival of the law [Restoration], those all died and are now but waste paper." *Id.* at 571 n.3 (quoting F. NORTH, DISCOURSE ON THE STUDY OF THE LAW 12).

³⁷⁷ Simon, *supra* note 100, at 263 (Simon's statement continued, "it was rather like crushing an Ugly Sister's foot, bunions and all, into Cinderella's glass slipper.').

³⁷⁸ H. BRACTON, *supra* note 110.

³⁷⁹ BRITTON (F. Nichols ed. & trans. 1865) (1st ed. n.p. c. 1530) (written c. 1290); see P. WINFIELD, *supra* note 133, at 263-65.

³⁸⁰ FLETA (Selden Soc'y Pub. Nos. 72 & 89, H. Richardson & G. Sayles ed. & trans. 1953, 1972) (1st ed. London 1647) (written c. 1290); see P. WINFIELD, *supra* note 133, at 263-65.

³⁸¹ Thus, in a typical section—Title IX, "Of Paternal Jurisdiction" (Legal Power of Parents Over Children)—there were roughly thirty-four citations. COWELL'S INSTITUTES, *supra* note 371, at 16-18. Of these, thirty-three were technically to English sources; the remaining one was to *Justinian's Institutes*. *Id.* at 18. But of these "English" citations, all but nine were to *Bracton* or to *Bracton's* imitators, *Britton* and *Fleta*. *Id.* at 16-18. Of the remaining nine citations, one was to *Glanvill*, and one was to *Doctor and Student*. *Id.* at 18. Only seven citations were to contemporary "common law" sources. *Id.* at 16-18.

Elsewhere in *Cowell's Institutes*, there were also citations to Cujas "on civil marriage" and "Biblical parallels to Roman Law." *Id.* at 20-21; see Ziskind, *supra* note 16, at 22, 27. But there was a good deal more Roman doctrine included, as Cowell systematically reproduced those passages in *Bracton*, *Britton*, and *Fleta* that were derived directly from the *Digest* or *Justinian's Institutes*. There were also citations to Hotman, COWELL'S INSTITUTES, *supra* note 371, at 73, 85, & 90, together with direct citations to *Justinian's Institutes*, usually by indicating "institut-Imperiales eod. tit." or just "Inst. eod." in the margin. The parallel construction of *Cowell's Institutes* to *Justinian's Institutes*, a very common student book in the 17th century, made it simple for any student to cross-reference any part of English law to Roman law even without explicit citations. See, e.g., *id.* at 17 ("cross-cite" on Roman adoption), 131 ("cross-cite" on substitution). There were other citations to continental civilians. See, e.g., *id.* at 102, 105 (custom).

³⁸² COWELL'S INSTITUTES, *supra* note 371, at 1.

³⁸³ *Id.*

source, but, as Cowell knew, *Bracton* at that point was quoting the Roman *Justinian's Institutes*, book I, title 1³⁸⁴—the corresponding title to Cowell's *Institutes*. Cowell repeated throughout the book this process of citing Roman law "in disguise" by citing sections of medieval English sources which in turn were quoting Roman law.³⁸⁵ Moreover, Cowell also cited extensively to such civilian-oriented sources as St. German's *Doctor and Student*,³⁸⁶ to Hotman,³⁸⁷ and to Swinburne, the leading civilian practitioner in York.³⁸⁸

The Institutes was not a success. Perhaps it was in the wrong language to reach the common lawyers or, as Holdsworth speculates, it was in too unusual or radical a form.³⁸⁹ Civilians could probably have learned little new about English law from it, since such law could be found in the standard common law texts already included in most civilian libraries.³⁹⁰ But it is striking that the book was translated and reprinted during the Commonwealth, when radical schemes of codification and simplification of the law were being seriously discussed. That a work by the conservative Cowell could provide a potential blueprint for radical reform was an ironic by-product of his attempt to apply civilian principles of structure to English law. His attempt may have had an impact on Francis Bacon and Jeremy Bentham.³⁹¹

The Institutes had other important aspects. According to Cowell's original "Epistola Dedicatoria" in the Latin edition, omitted in the English "Commonwealth" edition, one of the objectives of *The Institutes* was to promote the union of the legal system in Scotland and England.³⁹² For years,

³⁸⁴ 2 H. BRACON, *supra* note 110, at 23; INSTITUTES 1.1 pr.

³⁸⁵ E.g., COWELL'S INSTITUTES, *supra* note 371, at 77, 82, 108, 132, & 144.

³⁸⁶ *Id.* at 4, 6, 18, 33, 58, 80, 107, 108, 125, 140, 146, 150, 155, 156, 157, 171, 172, 187, 188, 192, 193, 194, 195, 200, 202, 203, 205, 206, 212, 226, 227, 230, 231, 250, & 251.

³⁸⁷ *Id.* at 73 & 85.

³⁸⁸ *Id.* at 118, 119, 121, 122, 123, 124, 138, 143, & 149. Henry Swinburne of York was a brilliant civilian lawyer. London had no monopoly on civilian talent. There was a substantial number of civilian lawyers in the English provinces, particularly those "humble part-time civilians" who acted as judges in the northern ecclesiastical courts. See J. DERRETT, HENRY SWINBURNE, CIVIL LAWYER OF YORK 6 (Barthwick Papers No. 44, 1973). Swinburne was the first Englishman to write a manual of canon law. *Id.* at 1. Like Cowell and Fulbecke, he admired Bartolus. *Id.* at 2.

³⁸⁹ 5 W. HOLDSWORTH, *supra* note 139, at 21.

³⁹⁰ *Id.* For an example of an English civilian's knowledge of common law at the time, see J. DERRETT, *supra* note 388, at 47-48 (setting out an extensive list of Swinburne's sophisticated common law sources).

³⁹¹ The impact of the works of such early civilian writers as Cowell on such later common law jurists as Bacon and Bentham will be discussed in detail in the third Article in this series.

³⁹² J. COWELL, *supra* note 102, at 10; see 5 W. HOLDSWORTH, *supra* note 139, at 21 & n.3; B. Levack, English Law, Scots Law, and the Union, 1603-1707 (unpublished paper delivered at 1977 meeting of American Society of Legal History).

the civilian influence in Scotland had been far stronger than in England. Scottish law students studied on the continent in large numbers: for example, at Leyden, from 1601 to 1700, nearly 351 Scots matriculated for civil law studies, the largest foreign group except for the Germans.³⁹³ English civilians, including Cowell, would have regarded themselves as well-suited intermediaries between Scotland and England, particularly after the union of the crowns in 1603. Cowell doubtless hoped that his *Institutes* would assist in this important process.³⁹⁴

The Institutes also made Cowell a rival of the powerful Sir Edward Coke, who, as noted before, was preparing his own *Institutes* of the English law. The first volume of Coke's *Institutes* was to be structured around the *Tenures* of Littleton³⁹⁵—the same Littleton that Cowell had subjected to derision in his *Interpreter*. Coke was not pleased. "Thenceforward, in his amiable and elegant way, Coke referred to the Master of Trinity Hall [Cowell] as 'Dr. Cowheel.'" ³⁹⁶ Indeed, it is very likely that Cowell's *Institutes* spurred Coke forward both in his efforts to complete his own massive *Institutes* and in his attack, to commence only two years after the appearance of Cowell's *Institutes*, on the civilian Admiralty stronghold.³⁹⁷

Paradoxically, Cowell's law dictionary, *The Interpreter*,³⁹⁸ enjoyed an entirely different fate from his *Institutes*. Although *The Interpreter* initially met an intense storm of protest and was suppressed in 1610,³⁹⁹ it became extremely popular. In fact, *The Interpreter* went on to become one of the most popular of all the early English law books, going through more than twelve editions before 1727.⁴⁰⁰

When *The Interpreter* was first published, the "air was thick with controversy."⁴⁰¹ The year was 1607. One year before, Richard Knowles had

³⁹³ R. FEENSTRA & C. WAAL, *supra* note 367, at 82 n.405.

³⁹⁴ See note 392 *supra*. Three years earlier, in 1603, Sir Thomas Craig (1538-1608), the Scottish jurist, published his *Ius Feudale*, patterned on Cujas' *De Feudi* of 1566. T. CRAIG, *IUS FEUDALE* (London 1655). One of his objects was to encourage the unification of the Scottish law and the English common law. See Stibbs, *supra* note 333, at 297.

³⁹⁵ Coke's *First Institute* ("Coke on Littleton") was published in 1628. E. COKE, *supra* note 204. The other three *Institutes* were published after his death; one was published in 1642, and two in 1644. See P. WINFIELD, *supra* note 133, at 336-37. For Cowell's derision of Littleton, see notes 414-16 and accompanying text *infra*.

³⁹⁶ Simon, *supra* note 100, at 263.

³⁹⁷ See notes 457-58 and accompanying text *infra*.

³⁹⁸ THE INTERPRETER, *supra* note 155.

³⁹⁹ See notes 422-26 and accompanying text *infra*.

⁴⁰⁰ It was published in the "unexpurgated" version in 1607, and reissued, sometimes in expurgated form, in 1637, 1638, 1672, and 1684, and edited by Kennet in 1701, 1709, and 1727. S. W. HOLDSWORTH, *supra* note 139, at 21 n.2; B. LEVACK, *supra* note 14, at 104 n.1. It remains today "most useful, but prescientific." P. WINFIELD, *supra* note 133, at 17-18.

⁴⁰¹ J. DERRETT, *supra* note 388, at 27.

translated Bodin's controvertial *Republique* into English.⁴⁰² This made Bodin's absolutist views of royal sovereignty easily available in England for the first time. In 1607, Sir Thomas Ridley published his aggressive *A View of the Civile and Ecclesiastical Law*,⁴⁰³ which responded in kind to Coke's attack on the civilian Admiralty jurisdiction, an attack which peaked in 1607. All in all, it was a hot year. Nevertheless, the massive outcry against Cowell's *Interpreter* was unprecedented, and must have been a surprise. Senior's theory is that Coke and the common lawyers were already incensed at Cowell. Cowell had, at Bishop Bancroft's request, drafted the complaints of the clergy against the common law prohibitions, hardly an endearing gesture. Coke may have already been concerned about the rivalry presented by *The Institutes*, and decided that now was the time to stop this spokesman for absolutism and alien learning.⁴⁰⁴ But, as Chrimes rightly pointed out, there was no hard evidence that Coke personally played any part in the suppression.⁴⁰⁵

What was so offensive about Cowell's *Interpreter*? The critical "offending definitions" were "King," "Parliament," "Prerogative of the King," and "Subsidy." Also offensive were the sections on "Praemunire," "Prohibition," "Martiall Law," "Litleton," and even "Admirall," which gave a particularly early origin for the embattled civilian Admiralty jurisdiction.

For example, in defining "King," Cowell stated that the King "is about the Law by his absolute power" and only consents "for the beter and equall course in making Lawes [to the three estates of Parliament] . . . yet this, in divers learned men's opinions, is not of constreinte but of his owne benignitie, or by reason of his [coronation oath] . . ." ⁴⁰⁶ In defining the "Preroga-

⁴⁰² Jean Bodin's *Republique* was translated into English and published in the critical year of 1606 under the title *The Six Bookes of the Commonweale*. J. BODIN, *supra* note 117. The translator was Richard Knolles (c. 1548-1610). Knolles was a Fellow at Lincoln College at Oxford, and had close connections to the English Roman Catholic College at Douay, but very little is known about Knolles himself. He left Oxford in about 1572, and "the next twenty years of his career are blank." McRae, *supra* note 117, at A57. He turned up as a schoolmaster in Sandwich, where he translated Bodin under the encouragement of the school's patron, Sir Peter Manwood. *Id.* at A60.

⁴⁰³ T. RIDLEY, *supra* note 84.

⁴⁰⁴ W. SENIOR, *supra* note 14, at 86-88; see 5 W. HOLDSWORTH, *supra* note 139, at 22; Simon, *supra* note 100, at 269. It is clear that Coke had read part of *The Interpreter*, and did not like it. See Coke, *supra* note 208. But personal relations between Cowell and Coke, although sensitive, did not seem bitter. Indeed, Cowell was said "to have brought dishonor both to Cambridge University and the civilians by relinquishing the place of the Vice-Chancellor at dinner to Sir Edward Coke during a visit of the justice there in 1604." B. LEVACK, *supra* note 14, at 141.

⁴⁰⁵ Chrimes, *The Constitutional Ideas of Dr. John Cowell*, 44 ENG. HIST. REV. 461, 465 (1949). But see Simon, *supra* note 100, at 260-69.

⁴⁰⁶ THE INTERPRETER, *supra* note 155, entry on *King (Rex)*. Cowell thus gave an indicative short shrift to the medieval *lex regia* texts, which could be read to base royal authority on the subjects' consent. See, e.g., 2 H. BRACON, *supra* note 110, at 304-05 (providing a basis for royal authority in the coronation oath, and apparently

tive of the King," Cowell also declared that it was an "especial power . . . that the King hath in any kind over and above other persons, and *above the ordinary course of the common law* . . ." ⁴⁰⁷ As to "Subsidie," it was a tax "assessed by Parliament," but it was not "granted" by Parliament—it was the King's absolute right, and the King "doth of favour admit the consent of his subjects therein." ⁴⁰⁸

Seen in a civilian context, there was little question that Cowell did not perceive the King personally as above the law. It was only the King's sovereign power that was, by necessity, above the law: no one could be the King's equal if the King was to be sovereign. ⁴⁰⁹ This reasoning was shared by Gentili, and certainly Fulbecke was equally adamant. ⁴¹⁰ Obviously, the King *should* obey the positive law, except where to do so would injure his trust to the people. This trust was ordained by the higher law of God, or by natural reason, the *ratio naturalis*—a point made by Fulbecke. ⁴¹¹ Thus, under "Martiall lawe," Cowell gave the following definition:

[T]he law that dependeth upon the voice of the King, or the King's lieutenant in warres. For how be it, the King for the indifferent and equal temper of lawer to all his subjects, doe not in time of peace make any lawes but by the consent of the three estates in Parliament: yet in warres by reason of great daungers rising of small occasions, he useth absolute power: in so much as his word goeth for law. ⁴¹²

Cowell's authority was no less than his civilian predecessor, Sir Thomas Smith. ⁴¹³ Cowell added insult to injury with his dictionary entry on "Little-

presenting the *lex regia*—the law that binds the king—as flowing from below—the subjects—rather than from above), cited in THE INTERPRETER, *supra* note 155, entry on *King (Rex)*. I owe this insight to Charles Donahue.

⁴⁰⁷ *Id.*, entry on *Prerogative of the King* (emphasis supplied).

⁴⁰⁸ *Id.*, entry on *Subsidie*.

⁴⁰⁹ *Id.*, entries on *Prerogative of the King & Subsidie*.

⁴¹⁰ THE PANDECTES, *supra* note 316, at 9-14, 28-33; A. GENTILI, *supra* note 311, at 9.

⁴¹¹ THE PANDECTES, *supra* note 316, at 28-33.

⁴¹² THE INTERPRETER, *supra* note 155, entry on *Martiall lawe*.

⁴¹³ *Id.* (citing T. SMITH, *supra* note 149, bk. 2, ch. 3). There is no question but that Cowell read and was influenced by Jean Bodin's *Republique*. See B. LEVACK, *supra* note 14, at 97-98; Chrimes, *supra* note 405, at 473-81. But there is no evidence that Bodin was more influential than Thomas Smith or the classical sources, on which Cowell relied far more heavily. Moreover, Smith's writing predated Bodin. See note 238 *supra*. In any event, recent scholarship has demonstrated that Bodin's own debts to the older, medieval notions of authority are a good deal greater than Bodin acknowledged. See McRae, *supra* note 117, at A16-A17. Bodin's major innovation, an emphasis on the Sovereign's power to make law rather than on the traditional prerogatives of the crown, *id.* at A14, is not particularly marked in Cowell. See THE INTERPRETER, *supra* note 155, entries on *King (Rex)* & *Prerogatives of the King*; notes 406-07 and accompanying text *supra*.

The civilian distinction between the King's royal power and his royal duty may not be completely dissimilar from the Hohfeldian "right" vs. "power" distinction so

ton," the common lawyers' saint.⁴¹⁴ The entry did acknowledge that Littleton "wrote a booke of great accompt," but then quoted the civilian Hotman's *Commentaries De Feudis Commentatio Tripartita*, which characterized Littleton's *Tenures* as "inconditè, absurde, & inconcinnè scriptum [confusedly, discordantly, and inelegantly written]."⁴¹⁵ It can only be imagined how this struck Coke, who was at that immediate time preparing to arrange his grand *First Institute* around Littleton as the "sacred text."⁴¹⁶

But Coke's greatest concern would be with the definitions of "Prohibition" and "Praemunire."⁴¹⁷ These writs were the powerful common law weapons for restricting the competing jurisdictions of the ecclesiastical courts and the conciliar courts, including the Admiralty.⁴¹⁸ Cowell, however, observed that these writs were no longer necessary, now that papal authority and the King's authority were united:

For they [prohibition and praemunire] were helpers to the King's inheritance and Crowne, when the two swords were in two divers hands. Whereas now both the Jurisdiction being settled in the King, there is small reason of either, except it be to wearie the subject by many quircks and delays, from obtaining his right.⁴¹⁹

For his authority on "praemunire," Cowell again turned to his predecessor, Smith: "Sir Thos. Smith saith very rightly, and charitably, that the uniting of the supremacie ecclesiasticall, and temporall in the king, utterly voideth the use of all those [praemunire] statutes. *Nam cessante ratione, cessat lex* [when the reason ends, so does the law]."⁴²⁰

In light of these major constitutional issues, Cowell's definition of "Admirall" would seem relatively harmless. But Cowell defined the legal jurisdictions under the "admirall," *i.e.*, the Admiralty court, to include "all causes of Merchants and mariners, and things happening within the flood

familiar today. See W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTS* 36-53 (W.W. Cook ed. 1964). According to the civilians, the "King" had no legal *right* to disregard the higher law which made him King, and which set upon him responsibilities to protect his subjects and to deal with them justly. But he had an unlimited legal *power*. In the civilian view, the "ordinary course of the common law" could not, and should not, control this royal power, "for otherwise were he [the King] a subject after a sort, and subordinate." THE INTERPRETER, *supra* note 155, entry on *King (Rex)*. Cowell's common law critics, of course, made little effort to appreciate this distinction, and tarred him as an absolutist.

⁴¹⁴ See THE INTERPRETER, *supra* note 155, entry on *Littleton*.

⁴¹⁵ *Id.* (quoting F. HOTMAN, *supra* note 205, at 611).

⁴¹⁶ See notes 209-11 and accompanying text *supra*.

⁴¹⁷ THE INTERPRETER, *supra* note 155, entries on *Prohibition, Praemunire*.

⁴¹⁸ See F. WISWALL, *supra* note 20, at 16-17; Mears, *The History of the Admiralty Jurisdiction*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 353-64 (1908).

⁴¹⁹ THE INTERPRETER, *supra* note 155, entry on *Prohibition*.

⁴²⁰ *Id.*, entry on *Praemunire* (citing T. SMITH, *supra* note 149, bk. 3, ch. 9).

mark" since "the daies of Ed. the first, but also King John."⁴²¹ This was a serious assertion which set forth a particularly expansive jurisdiction for the civilian-dominated Admiralty courts, and in 1607, this cut close to the common lawyers' bone—as close as did Cowell's attack on prohibitions.

For all, or some, of these reasons the dictionary proved intolerable to a powerful group within the House of Commons. The *Journal of the Commons* accused Cowell of "Rashly, Dangerously and Perniciously asserting certain heads to the overthrow and destruction of Parliaments, and the Fundamental Laws and Government of the Kingdom."⁴²² The Lords were as "equal wounded."⁴²³

The uproar forced James I himself to intervene. The King promised to condemn Cowell and *The Interpreter* by proclamations. According to Petyt's *Miscellanea Parliamentaria*, the King agreed that the positions in Cowell's books were "mistaken" and "absurd."⁴²⁴ According to the parliamentarians, Cowell's "principles with evident Inferences from them were this:"

1. That the King was *solutus a Legibus*, and not bound by his Coronation Oath.
2. That is was not *ex necessitate*, that the King should call a Parliament to make Laws, but might do that by his absolute Power; for *voluntas Regis* (with him) was *Lex Populi*.
3. That it was a favour to admit the consent of his subjects in giving of Subsidies.
4. The Doctor draws his arguments from the Imperial Laws of the Roman Emperours; an Argument which may be urged with as great reason . . . for the reduction of the State of the Clergy of *England* to the . . . Polity and Laws in the time of those Emperours; as also to make the Laws and Customs of *Rome* . . . to be binding and obligatory to the cities of *London* and *York*.⁴²⁵

The Royal Proclamation of March 25, 1610, read rather differently, however:

[A] Book written by Dr. Cowell called *The Interpreter*: for he being only a civilian by profession . . . by meddling in matters above his reach, he hath fallen in many things to mistake and deceive himself: In some things disputing so nicely upon the Mysteries of this our Monarchy, that it may receive doubtful interpretations: *yea in some points very derogatory to the supream power of this Crown*: In other cases mistaking the true state of the Parliament of this Kingdom, and the Fundamental

⁴²¹ *Id.*, entry on *Admirall*.

⁴²² H. C. JOURNAL, anno. 7 Jacobi (1609), quoted in Kennet, *Preface* to J. COWELL, *THE INTERPRETER OR BOOKE CONTAINING THE SIGNIFICANCE OF WORDS* (7th page, unpaginated) (Kennet ed. 1701); see 5 W. HOLDSWORTH, *supra* note 139, at 21 n.2.

⁴²³ Kennet, *supra* note 422, at 7th unpaginated page.

⁴²⁴ *Id.* at 7th-8th unpaginated pages (quoting W. PETYT, *MISCELLANEA PARLIAMENTARIA* 64-66 (London 1680)).

⁴²⁵ *Id.* at 8th unpaginated page (quoting W. PETYT, *supra* note 424, at 64-66).

Constitutions and Privileges thereof: And in some other points speaking unreverently of the Common Law of *England* . . . it being a thing utterly unlawful to any Subject, to speak or write against the Law . . . which we are sworn and are resolved to maintain. Wherefore . . . , upon pain of our high displeasure [copies of the books are to be delivered to the Lord Mayor of London or to the Sheriff of the appropriate country] . . . to the intent that further order may be given for the utter suppressing thereof. And because there shall be better oversight of Books . . . we have resolved to make choice of Commissioners, that shall look more narrowly into . . . all those things that shall be put to the Press, either concerning our Authority Royal, or concerning our Government, or the Laws⁴²⁶

Whether these words reflected James' true sentiments or not, Cowell felt disgraced. He retired completely from public life, and lived in seclusion at Trinity Hall.⁴²⁷ He died the next year, on October 11, 1611, during an operation for removal of a kidney stone.⁴²⁸

Why was there so much hostility to *The Interpreter*? It could be argued that the offending definitions, in the light of civilian doctrine, did not support the four charges in the *Miscellanea Parliamentaria*. "But, alas, when a suspected Book is brought to the torture, it oftens confesses all, and more than All it knows."⁴²⁹ It has been argued that James suppressed the book because he believed it went too far in limiting his authority.⁴³⁰ That argument appears to be borne out by the words of the Proclamation; *i.e.*, "disputing to nicely upon the Mysteries of this our Monarchy . . . in some points very derogatory to the supream power of this Crown."⁴³¹ As Kennet observed, *The Interpreter* may have offended both sides: "It is natural enough to imagine, that by giving offence to both Parties, he meant no harm to either. Nothing can displease two opposite sides, but moderation."⁴³²

James' true intent was probably to exploit the inevitable suppression of Cowell's book by using a Royal Proclamation. By so doing, he could at one time accomplish three objectives: first, to use a means to support the Parliamentarians that in other contexts would be very offensive to them;⁴³³

⁴²⁶ *Id.* at 8th-9th unpaginated pages (quoting Royal Proclamation of March 25, 1610) (emphasis supplied).

⁴²⁷ *Id.* at 9th unpaginated page; Simon, *supra* note 100, at 270.

⁴²⁸ Kennet, *supra* note 422, at 9th unpaginated page; Simon, *supra* note 100, at 270.

⁴²⁹ Kennet, *supra* note 422, at 8th unpaginated page.

⁴³⁰ "[R]oyal prerogative was of such a sacred and mysterious quality that unnecessary discussion of it was to be avoided. Queen Elizabeth had repeatedly reminded her parliaments of this, and James I objected to Cowell's *Interpreter* on the same grounds." B. LEVACK, *supra* note 14, at 98. *See also* Chrimes, *supra* note 405, at 473.

⁴³¹ Kennet, *supra* note 422, at 9th unpaginated page (quoting Royal Proclamation of March 25, 1610).

⁴³² *Id.* at 7th unpaginated page.

⁴³³ When measures like these were not only allowed by a House of Commons, famous for its championship of the subject's liberty . . . but welcomed with gratitude and applause as the fit retribution . . . we cannot wonder that exception

second, to permit the King to confuse the actual issues and to even suggest that Cowell had threatened the Royal Prerogative; and third, to suggest that a Royal Commissioner be named to supervise the publishing of law books, another discomfoting thought for the King's opponents. There was, in fact, some evidence that James' actual sympathy for Cowell was strong.⁴³⁴

was occasionally taken by the Council to opinions supposed to be derogatory to the Prerogatives of the Crown

4 J. SPEDDING, *THE LETTERS AND THE LIFE OF FRANCIS BACON* 345, 346 (London 1868), reprinted as 11 *THE WORKS OF FRANCIS BACON* (J. Spedding, R. Ellis & D. Heath eds. 1868), reprinted in 5 W. HOLDSWORTH, *supra* note 139, at 22 n.6.

⁴³⁴ See J. COWLEY, *supra* note 156, at lxxxiv-lxxxvi. According to Cowley, James' intervention "saved Cowell from probable impeachment [by the Commons]." *Id.* at lxxxvi. But see D. WILLSON, *KING JAMES VI AND I* 260-64 (1956).

Following the "Cowell affair" came "a curious aftermath which has given a word to the English language." Simon, *supra* note 100, at 270. The King visited Cambridge in 1614. This was the first royal visit in many years. The King was shown a play, apparently put on by civilian students, that mocked the common lawyers. Its author was one George Ruggle (1575-1622), and it was called *Ignoramus*. The title *Ignoramus* came from a grand jury endorsement meaning "we know nothing about it" which was put on a "not true" bill. Ever since the play the word "ignoramus" has been a popular term for a stupid person.

The "star" character, Sir Ignoramus, was, according to John Aubrey, "dressed . . . like Chief Justice Coke and cutt his beard like him and feigned his voyce . . ." *Id.* at 27 (quoting AUBREY'S *BRIEF LIVES* 163 (Dick ed. 1957)). "Ruggle's play was an enormous success with the King, who was already to have the common lawyers ridiculed: he actually came back to see a second performance." *Id.* Coke was apparently very much put out.

The lawyers in London resented Ruggle's sharp satire. [John] Chamberlain, writing on 20 May 1615 of the king's second visit "to Cambridge to see the play of " 'Ignoramus,' " related that the piece "hath so nettled the lawyers that they are almost out of all patience; and the lord chief-justice [Coke], both openly at the king's bench and divers others places, hath galled and glanced at scholars with much bitterness; and there be divers inns of court men have made rhymes and ballads against them, which they have answered sharply enough; and to say truth it was a scandal rather taken than given; for what profession is there wherein some particular persons may not be justly taxed without imputation to the whole?"

2 *THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY* 1822 (1975). Another contemporary noted:

The King comes to Cambridge in a sharp Winter, when all the world was nothing but Aire and Snow. Yet Scholars Wits did not Freez with the Weather, witness th pleasant *Play* of *IGNORAMUS*, which they presented to *His Majesty*. Yet whilst many laughed aloud at the *mirth* thereof, some of the graver sort were sad to see the *Common Lawyers* made ridiculous therein. If *Gowns* begin once to abase *Gowns*, *Cloaks* will carry away all. Besides, of all *wood*, the *Pleaders Bar* is the worst to make a *Stage* of.

10 T. FULLER, *THE CHURCH-HISTORY OF BRITAIN; FROM THE BIRTH OF JESUS CHRIST, UNTIL THE YEAR MDCXL VIII*, at 70 (London 1655).

Although primarily an attack on the common lawyers, *Ignoramus* also mocked some of the definitions in Cowell's *Interpreter*, and may originally have been written

The hostile characterizations made of *The Interpreter* were parodies of the true objectives and nature, and of the principles of English Bartolism as developed through the prior century.⁴³⁵ Cowell may have overreached himself, but his brutal suppression marked a fundamental shift in the intellectual climate of English jurisprudence. To flourish, Bartolism required more relaxed, temperate, fertile conditions. This lesson was not lost on a new breed of English civilians. Led by the brilliant Sir Thomas Ridley, they adopted an entirely different approach to achieving a *modus vivendi* with the common lawyers. Abandoning the essential ends of Bartolism, most particularly the desire to achieve a constructive influence of civil law principles on the English common law, they focused instead on the existing strongholds of Doctors' Commons—the ecclesiastical courts, the universities and, most critically, the Admiralty Court. Instead of seeking a synthesis of civilian principles and methodology with the common law, they argued for a strict separation of English civil law and common law courts and for the utility of a separate legal elite that served the specialized needs of these civil law courts, particularly in those areas of English law that related to the outside world.⁴³⁶

This narrower focus of civilian thought required a redefinition of *ius gentium*. Because they had to separate themselves from the common law

to satirize the counsel for the Cambridge mayor, Francis Braken, who had earned Ruggle's dislike in a protracted precedence dispute. See 2 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 1822 (1975). But Sir Jocelyn Simon was nevertheless right that this play was good evidence that the "Cowell affair" was remembered with bitterness at Cambridge, and that it was most indicative of royal support for civilians that the King visited the university so shortly after the "Cowell affair" and chose to see this particularly symbolic play twice. See Simon, *supra* note 100, at 270.

In the wake of the "Cowell affair," in 1637 and possibly again in 1638, *The Interpreter* was illegally reprinted in uncensored versions at Doctors' Commons, in violation of the Proclamation of Suppression. See J. COWLEY, *supra* note 156, at lxxxvi-lxxxvii. William Laud was accused of complicity with the civilians in this, and there was again a large outcry from the common lawyers. See B. LEVACK, *supra* note 14, at 104 n.1.

⁴³⁵ Take, for example, the tone of Sir Walter Raleigh's attack on Cowell in Raleigh's *Discourse of Tenures*:

Plainly, by the common law, in lands or goods, several men by several titles, cannot lawfully have interest, possession, or freehold; the *dominium utile*, and *dominium directum* (as the actual estates of inheritance) are as inseparable, and twined together, as English . . . twins. *The error of Dr. Cowell is so gross and dangerous*, insomuch that it may be questioned whether every subject of England, that hath any land of inheritance, may not bring an action of the case against him, if he were alive, for his strange assertion in print; as that the subjects of England in their land have only *utile dominium*, and not *dominium directum*.

W. Raleigh, *A Discourse of Tenures*, in 8 THE WORKS OF SIR WALTER RALEIGH 613 (London 1829) (emphasis supplied); see Stibbs, *supra* note 333, at 276.

⁴³⁶ This change in the focus of English civilian thinking will be examined in the second Article in this series.

system, the later civilian writers had to move away from Ulpian's classical concept of *ius gentium* as an inherent part of any national system,⁴³⁷ and toward a narrower concept. Building on Gentili's foundation, they chose that view of the *ius gentium* which emphasized a specialized customary law adopted between nations or between and among mariners and merchants. This narrowing process might indicate that the English civilians eventually gave up on their quest for general intellectual leadership in English jurisprudence. One authority, Alan Harding, has even stated that "[i]f there had ever been any danger from the civilians, by 1600 the common lawyers were triumphant."⁴³⁸

Yet, the matter seems to have looked differently at the time to the leaders of the common lawyers, including Sir Edward Coke. Coke's serious literary attacks on civilians had just begun in 1605.⁴³⁹ His first target was the ecclesiastical jurisdictions. He first attacked these jurisdictions in the preface of *5 Coke's Reports* in 1605.⁴⁴⁰ As a pamphleteer, Coke chose his initial target excellently. An attack on the ecclesiastical courts permitted an appeal to popular anti-Catholicism, and tainted the civilians by association. Moreover, Coke's language was not mild:

Error (Ignorance being her inseperable twynne) doeth in her proceeding so infinitely multiply herselfe, produceth such monstrous & strange chimeraes, floateth in such and so many incerteinties, and sucketh downe such poyson fró the contagious breath of ignorance, as all such into whó she infuseth any of her poisoned breath, she dangerously infects or intoxicates⁴⁴¹

The most fervent response to the first attack came from what Coke must have viewed as a perfect source. "A Catholice Devyne" wrote *An Answer to the Fifth Part of Reportes Lately Set-Forth by Sir Edward Coke*⁴⁴² in 1606. The author was, in fact, an English Jesuit named Robert Parson, who had published the equally controversial *Conference About the Next Succession to the Crown of England*⁴⁴³ in 1593 under the name "Dolman." Parson's arguments, supporting the "Kinge's Bench of Christ on Earth,"⁴⁴⁴ could be expected to receive a thoroughly jaundiced hearing by an anti-Catholic English majority.⁴⁴⁵

⁴³⁷ See note 179 and accompanying text *supra*.

⁴³⁸ A. HARDING, *supra* note 7, at 261.

⁴³⁹ See Coke, *To The Reader*, in *5 Coke Rep.* (7th-11th pages, unpaginated) (London 1605). Although Coke was the leader of the common lawyers in this attack on the civilians, he was by no means alone. See Steckley, *supra* note 50, at 137.

⁴⁴⁰ Coke, *supra* note 439.

⁴⁴¹ *Id.* at 7th unpaginated page.

⁴⁴² [R. PARSON], AN ANSWERE TO THE FIFTH PART OF REPORTERS LATELY SET-FORTH BY SIR EDWARD COOKE, BY A CATHOLICHE DEVYNE (London 1606).

⁴⁴³ [R. PARSON], CONFERENCE ABOUT THE NEXT SECESSION TO THE CROWN OF ENGLAND, BY DOLMAN (London 1593).

⁴⁴⁴ [R. PARSON], *supra* note 442, at 3.

⁴⁴⁵ Ironically, the arguments of the English Jesuits were not absolutist. Instead, they espoused a political theory that split Church and State authority. *Id.* at 47-91.

Coke continued his attack in his Preface to 7 *Coke's Reports* in 1608.⁴⁴⁶ In that essay he lumped civilians and Catholics together under the apt term "Romanist," and threatened both with *praemunire*⁴⁴⁷ for importing a "foreign authority":

And sure I am that no man can either bring over those bookes of late written (which I have seene) from Rome or Romanists, or read them, and justifie them . . . but they rune into desperate dangers and down-fals; for the first offense is a *praemunire* . . . and they, that offend the second time therein, incurre the heavie danger of high Treason. These bookes have glorious and goodly titles . . . but there is *mors in olla*: They are like to Apothecaries boxes . . . whose titles promise remedies, but the boxes themselves containe poyson.⁴⁴⁸

Having accused his rivals of being both foreign and disloyal, Coke then claimed they were impotent: "I am not afraid of gnats that can pricke and cannot hurt, nor of drones that keep a buzzing, and would but cannot sting."⁴⁴⁹ He clearly did not intend these barbs for foreigners; they were directed to "my deere cuntry men of what persuasion in religion soever they be."⁴⁵⁰ Civilians such as Cowell, whose *Interpreter* had just been published the year before, fit that description nicely.

There was no question but that Cowell himself was the target of Coke's next attack in the prefatory section of 10 *Coke's Reports* in 1614;⁴⁵¹ Coke referred directly to *The Interpreter*, singling out Cowell's quotation of Hotman under the definition of "Littleton." Coke wrote,

Of *Hotoman* and his author I may justly say, and will say no more, *volentes esse legis doctores, non intelligentes neque quae loquuntur neque de quibus affirmant*, and therefore let us leave them among the numbers of those *qui vituperant quae ignorant*. It is a desperate and dangerous matter for Civilians and Canonists (I speak what I know, and not without just cause) to write either of the common lawes of England which they professe not, or against them which they knowe not.⁴⁵²

Coke's final attacks on civilian influence were contained in his *Second*,⁴⁵³ *Third*,⁴⁵⁴ and *Fourth Institutes*⁴⁵⁵ and some later volumes of his reports,

⁴⁴⁶ Coke, *supra* note 1.

⁴⁴⁷ See text accompanying notes 259 & 417-18 *supra* (*praemunire*).

⁴⁴⁸ Coke, *supra* note 1, at 8th unpaginated page.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ Coke, *supra* note 208, at 42d unpaginated page.

⁴⁵² *Id.*

⁴⁵³ E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND (London 1642).

⁴⁵⁴ E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (London 1644).

⁴⁵⁵ E. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (London 1644).

which were published posthumously.⁴⁵⁶ The Admiralty jurisdiction became a special area of his concern.⁴⁵⁷ Accordingly, Coke and the other common law judges attempted to narrow the definition of the civilian Admiralty jurisdiction. Through fictional pleading and the use of prohibitions, they tried to remove most of the Admiralty's law merchant business.⁴⁵⁸

Coke's instincts were right. A legal elite that controlled both the universities and the foreign relations of Englishmen, particularly with respect to commercial transactions, would have become a force to deal with. Its ideas, incubated in such specialized sanctuaries, could spread again at times when the common law would be more vulnerable. For the common lawyers, the area of particular danger was the Court of Admiralty as it related to the law merchant. Yntema has observed the civil law doctrines "provided a more flexible basis to satisfy the needs of international commerce than either the primitive regime of [common law] personal laws or the system introduced by feudalism, in which the law of the land was paramount."⁴⁵⁹ This was particularly true in the fields of contracts, insurance, joint partnership, complex multi-party commercial litigation, allocation of risk in investment

⁴⁵⁶ The posthumous nature of these publications may have been related to the controversial nature of some passages. Coke died in 1634. The *Second Institute*, which includes the famous commentary on the Magna Carta, was published in 1642. E. COKE, *supra* note 453. The *Third* and *Fourth Institutes* were both published in 1644. E. COKE, *supra* note 455; E. COKE, *supra* note 454. The *Twelfth* and *Thirteenth Reports* were published in 1658 and 1659 respectively. Winfield regards the *Thirteenth Report* as "very likely spurious." P. WINFIELD, *supra* note 133, at 189.

⁴⁵⁷ [T]he Lord Admiral his Officers and Ministers [*i.e.*, civilians] . . . for want of learned advice have unjustly incroached upon the Common laws of this Realm, And they now wanting in this blessed time of peace causes appertaining to their naturall jurisdiction [*i.e.*, prize law], they now incroach upon the jurisdiction of the Common law, lest they should sit idle and reap no profit. And if a greater number of prohibitions (as they affirm) hath been granted since the great benefit of this happy peace, then before in time of hostility, it moveth from their own incroachments upon the jurisdiction of the Common law. So as they do not only unjustly incroach, but complain also of the Judges of the Realm for doing of Justice in these cases.

E. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND * 136. In *The Case of the Admiralty*, 77 Eng. Rep. 1461, 1461-62 (Star Chamber 1610), similar sentiments are expressed: "by the common law the admirals ought not to meddle with any thing done within the realm, but only with things done upon the sea. . . . [t]he admirals and their deputies encroach to themselves divers jurisdictions and franchises more than they ought to have"

⁴⁵⁸ For a good account, see Steckley, *supra* note 50, at 143-46. For an economic interpretation of the shift from civil law to common law authority in the mercantile area, see D. NORTH & R. THOMAS, *THE RISE OF THE WESTERN WORLD* 146-48 (1973). Steckley, however, demonstrates conclusively that the purely economic analysis cannot explain the changes. Steckley, *supra* note 50, at 138.

⁴⁵⁹ Yntema, *The Comity Doctrine*, 2 *VOM DEUTSCHEN ZUM EUROPÄISCHEN RECHT* 65, 69-70 (1963), reprinted in A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 26-27 (1965) (footnotes omitted).

ventures, and negotiability.⁴⁶⁰ Some of this "civil law" was from the *Corpus Juris*, but most was part of the new *ius commune* of European merchants, developed by hard Bartolist labor throughout the 16th century.⁴⁶¹ The Admiralty, with its traditional jurisdiction over law merchant and maritime law, could be the door by which these ideas entered England, and the English civilians would have the exclusive importer's franchise.

Such civilian hopes were narrower and more limited than the Bartolist dreams of Cowell and Fulbecke. But they nevertheless presented a serious intellectual challenge, which the common lawyers also perceived. The law merchant would be the ultimate battleground on which would be determined whether the English civilians would survive as a serious force in English jurisprudence or be "specialized" into safe insignificance.⁴⁶²

IV. CONCLUSION:

THE CONTRIBUTION OF THE EARLY CIVILIAN WRITERS

Before St. German and Sir Thomas Smith, no Englishman had deliberately and seriously compared foreign legal doctrines and legal institutions with their English counterparts. The primary contribution of the early civilian writers lay in their great efforts in developing English comparative legal studies.

Comparative law, as a legal methodology, assumes some basic principles, particularly that such a comparison is possible (*i.e.*, that different legal systems can be adequately described in common terms), and that such an exercise is useful.⁴⁶³ But is it useful? St. German, Smith, Gentili, Cowell, and Fulbecke all believed that comparative studies were useful because they could be used to identify better legal institutions and better rules.⁴⁶⁴ This did not mean that a rule or institution effective in France would necessarily be better than an existing English institution; it was a principle of Bartolist philosophy that each national legal system had to be peculiarly adapted to its setting.⁴⁶⁵ But such national systems were not automatically "perfect" as they had evolved through custom and history. For English civilians, comparison of different national doctrinal systems and different national legal

⁴⁶⁰ For a concise discussion, see Steckley, *supra* note 50, at 170-73. See also Baker, *supra* note 10, at 295.

⁴⁶¹ See generally Coing, *supra* note 126, at 505.

⁴⁶² This "battle" will be the focus of the second Article in this series.

⁴⁶³ See, e.g., W. BUCKLAND & A. MCNAIR, *ROMAN LAW AND COMMON LAW* xv-xxii (2d ed. F. LAWSON ed. 1965); H. DE VRIES, *supra* note 135, at 1-8; G. PATON, *A TEXTBOOK OF JURISPRUDENCE* 41-43 (4th ed. 1972); Hazard, *Comparative Law in Legal Education*, 18 U. CHI. L. REV. 264 (1951); Rheinstein, *Comparative Law—Its Functions, Methods and Usages*, 22 ARK. L. REV. 415 (1968).

⁴⁶⁴ See T. SMITH, *supra* note 149, at 143; T. HOLLAND, *Alberico Gentili*, *supra* note 14, at 22; Barton, *supra* note 165, at xx (on St. German); Maitland, *supra* note 73, at xiv (on Smith); Thorne, *supra* note 164, at 421 (on St. German).

⁴⁶⁵ See T. SMITH, *supra* note 149, at 143.

institutions provided critical data from which potential improvements in the system could be perceived and discussed.⁴⁶⁶

The efforts of the early civilian writers in this area were truly impressive. St. German's great dialogue in *Doctor and Student* has been widely appreciated.⁴⁶⁷ But the careful descriptive work of Sir Thomas Smith in *De Republica Anglorum* has been largely overlooked in the areas outside of his constitutional and political analysis. Gentili's powerful and scientific treatises on the law of relations between nations have been appreciated, but mostly in foreign countries,⁴⁶⁸ and the influence of his Bartolism on his English followers, Fulbecke and Cowell, has largely been ignored.

Finally, the bold efforts of Fulbecke and Cowell to use comparative legal studies to educate the English common lawyer have never been adequately appreciated. Fulbecke's massive and brave book, *A Parallele*, was for all its failings the first full, systematic, and categorical comparison of canon, civil, and common law doctrines.⁴⁶⁹ Cowell's extraordinary *Institutes* was nothing less than an attempt to restate the entire common law in a logical outline based on civilian forms.⁴⁷⁰ His *Interpreter*, the most intellectually exciting and controversial law dictionary ever published, represented an applied comparative law that was ingenuous and remarkable by any standards.⁴⁷¹ Yet, these books have been largely unavailable for centuries, or even, in *The Interpreter's* case, suppressed and censored.⁴⁷² Now, after over three hundred years, Fulbecke's *A Parallele*, Cowell's *Institutes*, and the first edition of *The Interpreter*, are being republished.⁴⁷³ Their contribution to comparative law will be rediscovered.

⁴⁶⁶ Thus, Smith emphasized, "[L]et us compare . . . common wealthes, wich be at this day in *esse*, or do remain discribed in true histories, especially in such pointes wherein the one differeth from the other, to see who hath taken the righter, truer and more commodious way" *Id.* at 142.

⁴⁶⁷ See Barton, *supra* note 165, at li-lix; Thorne, *supra* note 164, at 421-26.

⁴⁶⁸ It remains difficult to find English editions of Gentili's works, even today. The most easily available English editions of the major works remain those published in the 1920's and '30's by the Carnegie Endowment for International Peace. *ADVOCATIO HISPANICA*, *supra* note 153; *DE IURE BELLI*, *supra* note 267; *DE LEGATIONIBUS*, *supra* note 117.

⁴⁶⁹ See notes 233-61 and accompanying text *supra*. For insights as to European counterparts, see D. KELLEY, *supra* note 131; P. VINOGRADOFF, *Historical Types of International Law*, *supra* note 14, at 248. For the influence of the English civilians on their European counterparts, see Coing, *Das Schrifttum der englishchen Civilians und die Kontinentale Rechtsliteratur in der Zeit zwischen 1550 und 1800*, in *IUS COMMUNE: VERÖFFENTLICHUNGEN DES MAX-PLANCK-INSTITUTS FÜR EUROPÄISCHE RECHTSGESCHICHTE* 1-55 (1975). See also Stein, *Continental Influence*, *supra* note 10.

⁴⁷⁰ See notes 374-94 and accompanying text *supra*.

⁴⁷¹ See generally notes 398-421 and accompanying text *supra*.

⁴⁷² See notes 370-71 & 422-26 and accompanying text *supra*.

⁴⁷³ These books are being republished by Garland Publishing, Inc. as part of its series *Classics of English Legal History in the Modern Era* (selected by D. S. Berkowitz & S. E. Thorne).

The early civilian writers were the first Englishmen to describe, record, and systematically arrange data about different legal doctrines and legal systems. Their attempts to compare, analyze, and utilize this data, if struggling and imperfect, were nevertheless original in every sense. They were the true pioneers of Anglo-American comparative legal studies.

[T]hey belonged to a world immeasurably rich and wide in comparison to that of the average chancery clerk or bureaucrat. They were scholars in more than one kind of law, practitioners in more than one institution, and they had an interest and experience which wedded them to the international humanist tradition of their times.⁴⁷⁴

⁴⁷⁴ W. JONES, *supra* note 53, at 117. Jones spoke of William Lambarde and George Carew, Masters in Chancery, but his description is equally apt for their civilian contemporaries.