

HARVARD LAW REVIEW

VOL. XLII

DECEMBER, 1928

No. 2

THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW

"Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house."*

THE Reformation superseded an infallible Pope with an infallible Bible; the American Revolution replaced the sway of a king with that of a document. That such would be the outcome was not unforeseen from the first. In the same number of *Common Sense* which contained his electrifying proposal that America should declare her independence from Great Britain, Paine urged also a "Continental Conference," whose task he described as follows:

"The conferring members being met, let their business be to frame a Continental Charter, or Charter of the United Colonies; (answering to what is called the Magna Charta of England) fixing the number and manner of choosing members of congress and members of assembly . . . and drawing the line of business and jurisdiction between them: (always remembering, that our strength is continental, not provincial) securing freedom and property to all men . . . with such other matter as it is necessary for a charter to contain. . . . But where, say some, is the King of America? Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed in the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America the law is King."¹

* HOLMES, COLLECTED LEGAL PAPERS (1921) 200.

¹ I PAINE, POLITICAL WRITINGS (1837) 45-46.

This suggestion, which was to eventuate more than a decade later in the Philadelphia Convention, is not less interesting for its retrospection than it is for its prophecy.

In the words of the younger Adams, "the Constitution itself had been extorted from the grinding necessity of a reluctant nation";² yet hardly had it gone into operation than hostile criticism of its provisions not merely ceased but gave place to "an indiscriminating and almost blind worship of its principles"³—a worship which continued essentially unchallenged till the other day. Other creeds have waxed and waned, but "worship of the Constitution" has proceeded unabated.⁴ It is true that the Abolitionists were accustomed to stigmatize the Constitution as "an agreement with Hell," but their shrill heresy only stirred the mass of Americans to renewed assertion of the national faith. Even Secession posed as loyalty to the *principles* of the Constitution and a protest against their violation, and in form at least the constitution of the Southern Confederacy was, with a few minor departures, a studied reproduction of the instrument of 1787. For by far the greater reach of its history, Bagehot's appraisal of the British monarchy is directly applicable to the Constitution: "The English Monarchy strengthens our government with the strength of religion."⁵

The fact that its adoption was followed by a wave of prosperity no doubt accounts for the initial launching of the Constitution upon the affections of the American people. Travelling through various parts of the United States at this time, Richard Bland Lee found "fields a few years ago waste and uncultivated filled with inhabitants and covered with harvests, new habitations reared, contentment in every face, plenty on every board. . . ." "To produce this effect," he continued, "was the intention of the Constitution, and it has succeeded." Indeed it is possible that

² ADAMS, JUBILEE DISCOURSE ON THE CONSTITUTION (1839) 55.

³ WOODROW WILSON, CONGRESSIONAL GOVERNMENT (13th ed. 1898) 4.

⁴ On the whole subject, see 1 VON HOLST, CONSTITUTIONAL HISTORY (1877) c. 2; Schechter, *Early History of the Tradition of the Constitution* (1915) 9 AM. POL. SCI. REV. 707 *et seq.*

⁵ BAGEHOT, ENGLISH CONSTITUTION (2d ed. 1925) 39. "The monarchy by its religious sanction now confirms all our political order. . . . It gives . . . a vast strength to the entire constitution, by enlisting on its behalf the credulous obedience of enormous masses." *Ibid.* 43-44.

rather too much praise was lavished upon the Constitution on this score. "It has been usual with declamatory gentlemen," complained the astringent Maclay, "in their praises of the present government, by way of contrast, to paint the state of the country under the old (Continental) congress, as if neither wood grew nor water ran in America before the happy adoption of the new Constitution;" and a few years later, when the European turmoil at once assisted, and by contrast advertised, our own blissful state, Josiah Quincy voiced a fear that, "we have grown giddy with good fortune, attributing the greatness of our prosperity to our own wisdom, rather than to a course of events, and a guidance over which we had no influence."⁶

But while the belief that it drew prosperity in its wake may explain the beginning of the worship of the Constitution, it leaves a deeper question unanswered. It affords no explanation why this worship came to ascribe to the Constitution the precise virtues it did as an efficient cause of prosperity. To answer this question we must first of all project the Constitution against a background of doctrinal tradition which, widespread as European culture, was at the time of the founding of the English colonies especially strong in the mother country, though by the irony of history it had become a century and a half later the chief source of division between mother country and colonies.

It is customary nowadays to ascribe the *legality* as well as the *supremacy* of the Constitution — the one is, in truth, but the obverse of the other — exclusively to the fact that, in its own phraseology, it was "ordained" by "the people of the United States." Two ideas are thus brought into play. One is the so-called "positive" conception of law as a general expression merely for the particular commands of a human lawgiver, as a series of acts of human will;⁷ the other is that the highest possible source of such commands, because the highest possible embodiment of human will, is "the people." The same two ideas occur in conjunction in the oft-quoted text of Justinian's *Institutes*: "Whatever has pleased the prince has the force of law, since the Roman

⁶ Schechter, *supra* note 4, at 720-21.

⁷ Bentham, as quoted in HOLLAND, *ELEMENTS OF JURISPRUDENCE* (12th ed. 1916) 14. For further definitions of "positive law," see *ibid.* 22-23; WILLOUGHBY, *FUNDAMENTAL CONCEPTS OF PUBLIC LAW* (1924) c. 10.

people by the *lex regia* enacted concerning his *imperium*, have yielded up to him all their power and authority."⁸ The sole difference between the Constitution of the United States and the imperial legislation justified in this famous text is that the former is assumed to have proceeded immediately from the people, while the latter proceeded from a like source only mediately.

The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents, however, a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of essential and unchanging justice. The theory of law thus invoked stands in direct contrast to the one just reviewed. *There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.*⁹ The Ninth Amendment of the Constitution of the United States, in its stipulation that "the enumeration of certain rights in this Constitution shall not prejudice other rights not so enumerated," illustrates this theory perfectly, except that the principles of

⁸ INST. I, 2, 6: "Quod principi placuit, legis habet vigorem, cum lege regia quae de ejus imperio lata est, populus ei et in eum, omne imperium suum et potestatem concessit." The source is ULPIAN, DIG. I, 4, 1. The Romans always regarded the people as the source of the legislative power. "Lex est, quod populus Romanus senatorie magistratu interrogante, veluti Consule, constituebat." INST. I, 2, 4. During the Middle Ages the question was much debated whether the *lex regia* effected an absolute alienation (*translatio*) of the legislative power to the Emperor, or was a revocable delegation (*cessio*). The champions of popular sovereignty at the end of this period, like Marsiglio of Padua in his *Defensor Pacis*, took the latter view. See GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (Maitland's tr. 1922) 150, notes 158, 159.

⁹ For definitions of law incorporating this point of view, see HOLLAND, *op. cit.* *supra* note 7, at 19-20, 32-36. Cf. 1 BL. COMM. Intro.

transcendental justice have been here translated into terms of personal and private rights. The relation of such rights, nevertheless, to governmental power is the same as that of the principles from which they spring and which they reflect. They owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete.

Thus the *legality* of the Constitution, its *supremacy*, and its claim to be worshipped, alike find common standing ground on the belief in a law superior to the will of human governors. Certain questions arise: Whence came this idea of a "higher law"? How has it been enabled to survive, and in what transformations? What special forms of it are of particular interest for the history of American constitutional law and theory? By what agencies and as a result of what causes was it brought to America and wrought into the American system of government? It is to these questions that the ensuing pages of this article are primarily addressed.

I

Words of Demosthenes attest the antiquity of the conception of law as a discovery: "Every law is a discovery, a gift of god, — a precept of wise men."¹⁰ Words of President Coolidge prove the persistence of the notion: "Men do not make laws. They do but discover them. . . . That state is most fortunate in its form of government which has the aptest instruments for the discovery of law."¹¹ But not every pronouncement of even the

¹⁰ HOLLAND, *op. cit. supra* note 7, at 44n. "If there be any primitive theory of the nature of law, it seems to be that laws are the utterance of some divine or heroic person who reveals . . . that which is absolutely right." 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1895) xxviii.

¹¹ COOLIDGE, HAVE FAITH IN MASSACHUSETTS (1919) 4. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 85-86n., juxtaposes the above definitions, and also one from ST. AUGUSTINE, DE VERA RELIGIONE c. 31 in 34 MIGNE, PATROLOGIA LATINA (1845) 147: "Aeternam . . . legem mundis animis fas est cognoscere, judicare non fas est." This notion of the possibility of the spontaneous recognition of higher law has its counterpart in American constitutional theory, as will be pointed out later. Bacon voiced the "discovery" theory of law-making in the following words: "Regula enim legem (ut acus nautica polos) indicat, non statuit." DE JUSTITIA UNIVERSALI, Aphor. lxxxv, quoted in LORIMER, INSTITUTES OF LAW (2d ed. 1880) 256. Burke also accepted the theory: "It would be hard to point out any error more truly subversive of all the order

most exalted human authority is necessarily law in this sense. This, too, was early asserted. A century before Demosthenes, Antigone's appeal against Creon's edict to the "unwritten and steadfast customs of the Gods" had already presented immemorial usage as superior to human rule-making.¹² A third stage in the argument is marked by Aristotle's advice to advocates in his *Rhetoric* that, when they had "no case according to the law of the land," they should "appeal to the law of nature," and, quoting the Antigone of Sophocles, argue that "an unjust law is not a law."¹³ The term law is, in other words, ambiguous. It may refer to a law of higher or a law of lower content; and, furthermore, some recourse should be available on the basis of the former against the latter.

But as Aristotle's own words show, the identification of higher law with custom did not remain the final word on the subject. Before this idea could enter upon its universal career as one of the really great humanizing forces of history, the early conception of it had to undergo a development not dissimilar to that of the Hebrew conception of God, although, thanks to the Sophists and to their critic, Socrates, the process was immensely abbreviated. The discovery that custom was neither immutable nor invariable even among the Greek city states impelled the Sophists to the conclusion that justice was either merely "the interest of the strong," or at best a convention entered upon by men purely on considera-

and beauty, of all the peace and happiness of human society, than the position that any body of men have a right to make what laws they please; or that laws can derive any authority whatever from their institution merely, and independent of the quality of their subject-matter. . . . All human laws are, properly speaking, only declaratory. They may alter the mode and application, but have no power over the substance of original justice." BURKE, TRACT ON THE POPERY LAWS (c. 1780) c. 3, pt. 1, 6 BURKE, WORKS (1867) 322-23; LORIMER, *loc. cit. supra*. To the same effect is James Otis' assertion: "The supreme power in a state, is *jus dicere* only: — *jus dare*, strictly speaking, belongs only to God." OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1765) 70. For a brilliant effort to effect a logical reconciliation of the "positive" and the "discovery" theories of law making, in a modern terminology, see DEL VECCHIO, THE FORMAL BASES OF LAW (Mod. Leg. Philos. Ser. 1914).

¹² HOLLAND, *op. cit. supra* note 7, at 32n; SOPHOCLES, ANTIGONE, vv, 450 *et seq.* Creon typifies in Sophocles' drama the Greek tyrant, whose coming had disturbed the ancient customary régime of the Greek city state.

¹³ RITCHIE, NATURAL RIGHTS (1903) 30, citing ARISTOTLE, RHETORIC I, 15, 1375, a, 27 *et seq.*

tions of expediency and terminable on like considerations.¹⁴ Ultimately, indeed, the two ideas boil down to the same thing, since it is impossible to regard as convenient that which cannot maintain itself, while that which can do so will in the long run be shaped to the interests of its sustainers. Fortunately these were not the only possible solutions to the problem posed by the Sophists. Building on Socrates' analysis of Sophistic teaching and Plato's theory of Ideas, Aristotle advanced in his *Ethics* the concept of "natural justice." "Of political justice," he wrote, "part is natural, part legal — natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent. . . ." ¹⁵ That is to say, the essential ingredient of the justice which is enforced by the state is not of the state's own contrivance; it is a discovery from nature and a transcript of its constancy.

But practically what is the test of the presence of this ingredient in human laws and constitutions? By his conception of natural justice as universal, Aristotle is unavoidably led to identify the rational with the general in human laws. Putting the question in his *Politics* whether the rule of law or the rule of an individual is preferable, he answers his own inquiry in no uncertain terms. "To invest the law then with authority is, it seems, to invest God and reason only; to invest a man is to introduce a beast, as desire is something bestial, and even the best of men in authority are liable to be corrupted by passion. We may conclude then that the law is reason without passion and it is therefore preferable to any individual."¹⁶ Nearly two thousand years

¹⁴ BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* (1906) 33-37. "Right is the interest of the stronger," says Thrasymachus in *PLATO, REPUBLIC* (Jowett tr. 1875) bk. I, § 338. "Justice is a contract neither to do nor to suffer wrong," says Glaucon, *ibid.* bk. II, § 359. See also Philus in *CICERO, DE REPUBLICA* bk. III, 5.

¹⁵ ARISTOTLE, *NICOMECHAN ETHICS* (Ross tr. 1925) v, 7, §§ 1-2. See also BARKER, *op. cit. supra* note 14, at 328.

¹⁶ ARISTOTLE, *POLITICS* (Welldon tr. 1905) bk. III, 15-16, especially at 154. I have departed slightly from the translation at one or two points. As Professor Barker points out, the Greek was apt to think of the law as an ideal code, the work of a sole legislator of almost superhuman wisdom, a Solon or a Lycurgus. Indeed, Plato and Aristotle look upon themselves as just such legislators. BARKER, *op. cit. supra* note 14, at 323. In comparison should be recalled the virtues attributed to the framers of the Constitution of the United States, and one source of its

after Aristotle, the sense of this passage, condensed into Harrington's famous phrase, "a government of laws and not of men,"¹⁷ was to find its way successively into the Massachusetts constitution of 1780¹⁸ and into Chief Justice Marshall's opinion in *Marbury v. Madison*.¹⁹ The opposition which it discovers between the desire of the human governor and the reason of the law lies, indeed, at the foundation of the American interpretation of the doctrine of the separation of powers and so of the entire American system of constitutional law.

It has been said of Plato that "he found philosophy a city of brick and left it a city of gold."²⁰ The operation of the Stoic philosophy upon the concept of a higher law may be characterized similarly. While Aristotle's "natural justice" was conceived primarily as a norm and guide for law makers, the *Jus Naturale* of the Stoics was the way of happiness for all men. The supreme legislator was Nature herself; nor was the natural order the merely material one which modern science exploits. The concept which Stoicism stressed was that of a moral order, wherein man through his divinely given capacity of reason was directly participant with the gods themselves. Nature, human nature, and reason were one.²¹ The conception was, manifestly, an ethical, rather than a political or legal one, and for good cause. Stoicism arose on the ruins of the Greek city state. Plato's and Aristotle's

worship. On the equity of general laws enacted with deliberation and "without knowing on whom they were to operate," see Marshall, C. J., in *Ex parte Bollman*, 4 Cranch 75, 127 (U. S. 1807).

¹⁷ HARRINGTON, *OCEANA AND OTHER WORKS* (1747) 37. "An empire of laws and not of men." *Ibid.* 45, 240; see also *ibid.* 49, 240, 257, 362, 369. Harrington ascribes the idea to Aristotle and Livy.

¹⁸ DECLARATION OF RIGHTS, art. 30; see THORPE, *AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS* (1909).

¹⁹ 1 Cranch 137, 163 (U. S. 1803).

²⁰ JOUBERT, *PENSÉES* (5th ed. 1869) xxiv.

²¹ On the doctrines of the Stoics, see DIOGENES LAERTIUS, *LIVES AND OPINIONS OF EMINENT PHILOSOPHERS* (Yonge tr. 1853) bk. vii, "Zeno," cc. 53, 55, 66, 70, 72-73. "Again, they say that justice exists by nature, and not because of any definition or principle; just as law does, or right reason." *Ibid.* c. 66. "The Stoics . . . thought of Nature or the Universe as a living organism, of which the material world was the body, and of which the Deity or the Universal Reason was the pervading, animating, and governing soul; and natural law was the rule of conduct laid down by this Universal Reason for the direction of mankind." SALMOND, *JURISPRUDENCE* (7th ed. 1924) 27.

belief that human felicity was to be achieved mainly by political means had proved illusory; and thrown back on his own resources, the Greek developed a new outlook, at once individualistic and cosmopolitan.

The restoration of the idea of natural law, enlarged and enriched by Stoicism, to the world's stock of legal and political ideas was accomplished by Cicero. In a passage of his *De Republica* which has descended to us through the writings of another (the preservative quality of a good style has rarely been so strikingly exemplified), Cicero sets forth his conception of natural law:

" True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions. . . . It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed by neither the Senate nor the people can we be released from this law; nor does it require any but ourself to be its expositor or interpreter. Nor is it one law at Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through all time. . . ." ²²

It is, however, in his *De Legibus* that Cicero makes his distinctive contribution. Identifying "right reason" with those qualities of human nature whereby "man is associated with the gods," ²³ he there assigns the binding quality of the civil law itself to its being in harmony with such universal attributes of human nature. In the natural endowment of man, and especially his so-

²² LACTANTIUS, DIV. INST. (Roberts and Donaldson tr. 1871) vi, 8, 370; see also *ibid.* 24. It will be observed that Cicero does not overlook the imperative element of law. Bracton knew of the passage from the *DE REPUBLICA*, and Grotius' indebtedness to Cicero is beyond peradventure. "Jus naturale est dictatum rectae rationis, . . ." I GROTIUS, *JURE BELLI AC PACIS* (Whewell ed. 1853) 10. See also note 24, *infra*.

²³ CICERO, *DE LEGIBUS* (Müller ed.) I, 7, 23: "Inter quos autem ratio, inter eosdem etiam recta ratio et communis est; quae cum sit lex, lege quoque consociati homines cum dis putandi sumus." *Ibid.* I, 8, 25. "Est igitur homini cum deo similitudo." See also *ibid.* I, 7, 22-23. The entire passage is the source of Shakespeare's famous apostrophe to man in *Hamlet*. It ought to be remembered that the classical conception of "nature" was of an active, creative force, so that the "nature" of a thing became an innate tendency toward the realization of a certain ideal of the thing. Both Cicero's conception of "human nature" and his conception of "natural law" rest on this basis. The former is an expression of the highest attributes of man; the latter is the perfect expression of the idea of law.

cial traits, "is to be found the true source of laws and rights,"²⁴ he asserts, and later says, "We are born for justice, and right is not the mere arbitrary construction of opinion, but an institution of nature."²⁵ Hence justice is not, as the Epicureans claim, mere utility, for "that which is established on account of utility may for utility's sake be overturned."²⁶ There is, in short, discoverable in the permanent elements of human nature itself a durable justice which transcends expediency, and the positive law must embody this if it is to claim the allegiance of the human conscience.

Ordinarily, moreover, human authority fulfills this requirement — this Cicero unquestionably holds. Hence his statement that "the laws are the foundation of the liberty which we enjoy; we all are the laws' slaves that we may be free."²⁷ The reference is clearly to the civil law. And of like import is his assertion that "nothing is more conformable to right and to the order of nature than authority [*imperium*],"²⁸ and the accompanying picture of the sway of law, in which the civil law becomes a part of the pattern of the entire fabric of universal order. That, none the less, the formal law, and especially enacted law, may at times part company with "true law" and thereby lose its title to be considered law at all, is, of course, implied by his entire position. We do have to rely upon implication. "Not all things," he

²⁴ *Ibid.* I, 5, 16: "Nam sic habetote, nullo in genere disputando posse ita pateferi, quid sit homini a natura tributum, quantam vim rerum optimarum mens humana contineat, cujus muneris colendi efficiendique causa nati et in lucem editi simus, quae sit conjunctio hominum, quae naturalis societas inter ipsos; his enim explicatis fons legum et juris inveniri potest." This passage is especially significant for its emphasis upon certain qualities of human nature as the immediate source of natural law. The idea is not lacking in Stoic teaching, but it is subordinate. The same feature reappears in the continental natural law school of the seventeenth and eighteenth centuries. "Naturalis juris mater est ipsa humana natura," 1 GROTIUS, *op. cit.* *supra* note 22, Proleg. 16, xlix. Puffendorf and Burlamaqui also illustrate the same point of view, which contrasts with the legalism of Hobbes and Locke.

²⁵ CICERO, DE LEGIBUS I, 10, 28.

²⁶ *Ibid.* I, 15, 42.

²⁷ PRO A. CLUENTIO ORATIO c. 53, § 146.

²⁸ "Nihil porro tam aptum est ad jus condicionemque naturae . . . quam imperium, sine quo nec domus ulla nec civitas nec gens nec hominum universum genus stare nec rerum natura omnis nec ipse mundus potest. . . ." DE LEG. III, I, 2-3.

writes, "are necessarily just which are established by the civil laws and institutions of nations"; nor is "justice identical with obedience to the written laws."²⁹ The vulgar, to be sure, are wont to apply the term "law" to whatever is "written, forbidding certain things and commanding others"; but it is so only in a colloquial sense.³⁰ "If it were possible to constitute right simply by the commands of the people, by the decrees of princes, by the adjudications of magistrates, then all that would be necessary in order to make robbery, adultery, or the falsification of wills right and just would be a vote of the multitude"; but "the nature of things" is not thus subject to "the opinions and behests of the foolish."³¹ Despite which, "many pernicious and harmful measures are constantly enacted among peoples which do not deserve the name law."³² True law is "a rule of distinction between right and wrong according to nature"; and "any other sort of law not only ought not to be regarded as law, it ought not to be called law."³³

But what, when that which wears the form of law is at variance with true law, is the remedy? Certain Roman procedural forms connected with the enactment of law suggested to Cicero, in answering this question, something strikingly like judicial review. It was a Roman practice to incorporate in statutes a saving clause to the effect that it was no purpose of the enactment to abrogate what was sacrosanct or *jus*.³⁴ In this way certain maxims, or

²⁹ *Ibid.* I, 15, 42.

³⁰ *Ibid.* I, 6, 19.

³¹ *Ibid.* I, 16, 43-44.

³² *Ibid.* II, 5, 13.

³³ *Ibid.* II, 6, 13.

³⁴ See BRISSONIUS (Barnabé Brisson), *DE FORMULIS ET SOLENNIBUS POPULI ROMANI VERBIS* (Leipsic, 1754) Lib. 2, c. 19, 129-30. This admirable work first appeared in 1583. The Leipsic edition, for the loan of which I have to thank the authorities of the Elbert H. Gary Library of Law, is based on a revision and extension of the original work by one Franciscus Conradus, and contains a life of Brisson, who was one time President of the Parlement of Paris. The customary form of the saving clause was, "Si quid sacri sanctique est, quod jus non sit rogari, ejus hac lege nihil rogatur." In his *PRO CAECINA ORATIO*, Cicero gives a somewhat different form, taken from an enactment of Sulla: "Si quid jus non esset rogari, ejus ea lege nihilum rogatum." *Ibid.* cc. 32-33. A variant on this form appears in his *PRO DOMO SUA* c. 40. See note 37, *infra*. On these occasions Cicero is relying on the saving clause; but in his *PRO BALBO*, the shoe is on the other foot, and he there argues against the extension of such a clause to a certain

leges legum, as Cicero styles them,³⁵ some of which governed the legislative process itself,³⁶ were erected into a species of written constitution binding on the legislative power. More than once we find Cicero, in reliance on such a clause, invoking *jus* against a statute. "What is it," he inquires on one such occasion, "that is not *jus*! . . . This saving clause [*adscriptio*] declares that it is something, otherwise it would not be provided against in all our laws. And I ask you, if the people had commanded that I should be your slave, or you mine, would that be validly enacted, fixed, established?"³⁷ On other occasions he points out that it was within the power both of the Augurs and of the Senate to abrogate laws which had not been enacted *jure*, though here the reference may be to the procedure of legislation, and he mentions instances of the exercise of these purgative powers.³⁸ On one occasion, finally, in addressing the Senate, we find him appealing directly to "*recta ratio*" as against the "*lex scripta*."³⁹

Whether Cicero's adumbrations of judicial review ever actually came to the attention of the framers of the American constitutional system to any considerable extent seems extremely doubtful.⁴⁰ Taken, none the less, along with Aristotle's similar sug-

treaty, that nothing can be "*sacrosanctum — nisi quod populus plebesve sanxisset*," whereas the treaty in question had been made by the Senate. *Ibid.* c. 14. Cicero himself suffered from "a new and previously unheard of use" of the clause by his enemy Clodius, who endeavored by affixing it to the law exiling Cicero and confiscating his property, to render the latter irrevocable. For Cicero's argument against the possibility of thus clothing statutes with immortality, see *EPISTOLAE*, III, 22; *BRISSENIUS*, *supra*, at 130.

³⁵ *CICERO*, *DE LEGIBUS* II, 7, 18. Here Cicero is dealing with the laws of religion. In book three he treats of the civil laws similarly.

³⁶ "The *lex Caecilia et Didia* was a portion of the *jus legum* which prohibited the proposal of any law containing two or more matters not germane." COXE, *JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION* (1893) iii, citing SMITH, *DICTIONARY OF GREEK AND ROMAN ANTIQUITIES* (1842) art. *lex*.

³⁷ *PRO CAECINA* c. 33. *Cf.* *PRO DOMO SUA* c. 40. I must acknowledge the valuable assistance so kindly lent by my friend, Professor John Dickinson, in tracing down these anticipations by Cicero of judicial review.

³⁸ *CICERO*, *DE LEGIBUS* II, 12, 31; *PRO DOMO SUA* cc. 16, 26, 27.

³⁹ *PHIL.* XI, 12. Here Cicero invokes natural law in the public interest—an anticipation of one aspect of the doctrine of the police power.

⁴⁰ There is, however, one apparent instance of this happening. In the notes for his argument in *Rutgers v. Waddington*, Mayor's Ct., New York City (1784), Hamilton included the following passage: "Si leges duae aut si plures aut quot quot erunt conservari non possunt quia discrepent inter se ea maxime conservanda

gestion, they serve to show how immediate, if not inevitable, is the step from the notion of a higher law entering into the civil law to that of a regular recourse against the latter on the basis of the former. And if Cicero did not contribute to the establishment of judicial review directly, he at any rate did so indirectly through certain ideas of his which enter into the argumentative justification of that institution. The first of these is his assertion that natural law requires no interpreter other than the individual himself,⁴¹ a notion which is still sometimes reflected in the contention of courts and commentators that unconstitutional statutes are unconstitutional *per se*, and not because of any authority attaching to the court that so pronounces them. The other consists in his description of the magistrate as "the law speaking [*magistratum legem esse loquentem, legem autem mutum magistratum*]." ⁴² The sense of this passage from the *De Legibus* is reproduced in Coke's *Reports* in the words, "*Judex est lex loquens*."⁴³ The importance of both these ideas for the doctrine of judicial review will be indicated later.

Of the other features of the Ciceronian version of natural law, the outstanding one is his conception of human equality:

"There is no one thing so like or so equal to one another as in every instance man is to man. And if the corruption of custom and the variation of opinion did not induce an imbecility of minds and turn them aside from the course of nature, no one would more resemble himself

sunt quae ad maximas res pertinere videatur," citing DE IN: L 4, No. 145. See A. M. HAMILTON, HAMILTON (1910) 462. The passage is in fact from DE INVENTIONE II, 49. The context casts some doubt on whether it was intended by Cicero in quite the sense for which Hamilton appears to have employed it.

⁴¹ "Neque est quaerendus explanator, aut interpret ejus alius." DE REP. III, 22; LACTANTIUS, DIV. INST. vi, 8. See also note 11, *supra*.

⁴² CICERO, DE LEGIBUS III, 1, 2-3.

⁴³ Calvin's Case, 4 Co. 1 (1609). "Neither have Judges power to judge according to that which they think to be fit, but that which out of the laws they know to be right and consonant to law. *Judex bonus nihil ex arbitrio suo faciat, nec proposito domesticae voluntatis, sed juxta leges et jura pronuntiet.*" *Ibid.* 27(a). See Chief Justice Marshall's rendition of the same idea in *Osborn v. Bank of United States*, 9 Wheat. 738, 866 (U. S. 1824): "Judicial power, as contradistinguished from the power of the laws, has no existence." The maxim which assigns to the judges the power of *jus dicere* but not that of *jus dare* is traceable to BACON, ESSAYS, *Judicature* (Reynold's ed. 1890) 365. On the entire subject see my article, *The Progress of Constitutional Theory, 1776-1787* (1924-25) 30 AM. HIST. REV. 511-36; see also notes 104 and 121, *infra*.

than all men would resemble all men. Therefore, whatever definition we give to man will be applicable to the entire human race." ⁴⁴

Not only is this good Stoic teaching, it is the inescapable consequence of Cicero's notion of the constancy of the distinctive attributes of human nature, those which supply the foundation of natural law.

With respect to certain other elements of the doctrine of natural law as it entered American constitutional theory, the allocation of credit cannot be so confidently made. The notion of popular sovereignty,⁴⁵ of a social contract,⁴⁶ and of a contract between governors and governed⁴⁷ are all foreshadowed by Cicero with greater or less distinctness. The notion of a state of nature, on

⁴⁴ CICERO, *DE LEGIBUS* I, 10, 12-28, 33. "There is no conception which is more fundamental to the Aristotelian theory of society than the notion of the natural inequality of human nature. . . . There is no change in political theory so startling in its completeness as the change from the theory of Aristotle to the later philosophical view represented by Cicero and Seneca. Over against Aristotle's view of the natural inequality of human nature we find set the theory of the natural equality of human nature. . . . There is only one possible definition for all mankind, reason is common to all." 1 CARLYLE, *A HISTORY OF MEDIAEVAL POLITICAL THEORY* (1927) 7-8. The identification of *jus naturale* with *recta ratio*, the universal possession of mankind, leads to the doctrine of the equality of mankind, and this in turn paves the way for the translation of *natural law* into *natural rights*.

⁴⁵ *DE REP.* I, 25. Editors also assign to the same chapter, preserved by St. Augustine, the following: "Quid est res publica nisi res populi? Res ergo communis, res utique civitatis." See ST. AUGUSTINE, *EPISTLES* 138, 10, and *DE CIVITATE DEI* V, 18. From what has been said already, it is evident that the notion of popular sovereignty cannot be attributed to Cicero in the sense of unlimited legislative power. See *DE REP.* III, 3. See also notes 8 and 37, *supra*.

⁴⁶ *DE REP.* I, 26, 32; *ibid.* III, 31. "Generale quippe pactum est societatis humanae oboedire regibus." ST. AUGUSTINE, *CONFESSIONS* (Gibb & Montgomery tr. 1908) III, 8. "Est autem civitas coetus perfectus liberorum hominum juris fruendi et communis utilitatis causa sociatus." 1 GROTIUS, *op. cit. supra* note 22, I, 14. It should be recalled that *societas* in Roman private law meant partnership. The idea of the *civitas* as a deliberately formed association smacks of Epicurean and Sophistic ideas, rather than Stoic, but there is no necessary conflict between it and Stoic conceptions. That which is done with deliberation may still be done in response to natural impulse and necessity. The contribution of the Middle Ages to the social contract theory sprang from the nature of feudal society, and was a deepened sense of the obligation of contracts. See GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (Maitland tr. 1922) notes 303, 306, and GIERKE, *ALTHUSIUS* (*Zur deutschen Staats u. Rechts Geschichte* 1879-80) 99 *et seq.*; also note 61, *infra*.

⁴⁷ *DE REP.* III, 13. This is an interesting forecast of the process of "commendation" by which feudalism actually did arise in parts of Europe.

the other hand, is missing, being supplied by Seneca and the early Church Fathers, the latter locating their primitive polity in the Garden of Eden before the Fall.⁴⁸ It is Seneca also who corrects Cicero's obtuseness, later repeated by the signers of the Declaration of Independence, to the contradiction between the idea of the equality of man and the institution of slavery;⁴⁹ and his views were subsequently ratified by certain of the great Roman jurists. Ulpian, writing at the close of the second century, asserts unqualifiedly that "by the law of nature all men are born free," words which are repeated in the *Institutes* three hundred years later.⁵⁰ Natural law is already putting forth the stem of natural rights that is ultimately to dwarf and overshadow it.

The eloquence of Cicero's championship of *jus naturale* was matched by its timeliness. It brought the Stoic conception of a universal law into contact with Roman law at the moment when the administrators of the latter were becoming aware of the problem of adapting a rigid and antique code, burdened with tribal ceremoniousness and idiosyncrasy, to the needs of an empire which already overshadowed the Mediterranean world. In the efforts of the *praetor peregrinus* to meet the necessities of foreigners resorting to Rome, a beginning had early been made toward the building up of a code which, albeit without the conscious design of its authors, approximated in many ways to the Stoic ideal of simplicity and of correspondence with the fundamental characteristics of human relationship; but the clear presentation of the Stoic ideal to the Roman jurists may be imagined to have stimulated this development vastly. The outcome is to be seen in the concept of *jus gentium*, which is defined by Gaius and later in the *Institutes*, as "that law which natural reason established among all mankind" and "is observed equally by all peo-

⁴⁸ I CARLYLE, *op. cit. supra* note 44, at 23-25, 117, 134, 144-46; GIERKE, ALTHUSIUS 92-94; LANCIANTIVS, DIV. INST. v, 5. Cf. LUCRETIVS, DE RERUM NATURA (Merrill ed. 1907) v, 11, 1105-60. Especially to be noted is Lucretius' phrase, "communia foedera pacis." *Ibid.* at 1155.

⁴⁹ I CARLYLE, *op. cit. supra* note 44. Aristotle in his POLITICS is evidently dealing with an attack on slavery. ARISTOTLE, POLITICS i, 4-7. A certain Alcidas is reported to have said (4th century?): "God made all men free; nature made none a slave." RITCHIE, NATURAL RIGHTS (1903) 25.

⁵⁰ DIG. I, 1, 4; INST. I, 2, 2. Slavery is explained by Ulpian by reference to the *jus gentium*. "Quod ad jus naturale attinet, omnes aequales sunt." DIG. L, 17, 32; see I CARLYLE, *op. cit. supra* note 44, at 47.

ples," whereas the *jus civile* of each people is peculiar to itself.⁵¹ Recast in the light of this conception the Roman civil law became the universal code, and by the same token *jus naturale* took on the semblance of a law with definite content and guaranteed enforcement — in a word, that of "positive law."⁵²

The conception of a higher law pervades the Middle Ages; it also becomes sharpened to that of a code distinctively for rulers. In the pages of the *Policraticus* of the Englishman, John of Salisbury, the first systematic writer on politics in the Middle Ages, one learns that "there are certain precepts of the law which have perpetual necessity, having the force of law among all nations and which absolutely cannot be broken."⁵³ This clear reflection of the Ciceronian conception of natural law had found its way to later centuries notably through the writings of Saint Isidore of Seville and the *Decretum* of Gratian.⁵⁴ But joined with the same conception, and clearly contributing to its survival over a critical period, was the identification of the higher law with Scripture, with the teachings of the Church, and with the *Corpus Juris*. As remarked by his translator, John was not confronted with the difficulty which has so often troubled later exponents of *jus naturale* "of identifying any specific rules or precepts as belonging to this law." He had them "in the form of clear cut scripture texts" and in maxims of the Roman law.⁵⁵

⁵¹ INST. I, 2, 1-2. Gaius, in contrast with Ulpian, regards the *jus gentium* as identical with *jus naturale*. 1 CARLYLE, *op. cit. supra* note 44, at 38; BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* (1901) 581.

⁵² This work of revision fell to the great jurisconsults. As Dean Pound has pointed out: "The jurisconsult had no legislative power and no *imperium*. The authority of his *responsum* . . . was to be found in its intrinsic reasonableness; in the appeal which it made to the reason and sense of justice of the *judex* . . . it was law by nature." POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922) 29.

⁵³ DICKINSON, *THE STATESMAN'S BOOK OF JOHN OF SALISBURY* (1927) 33.

⁵⁴ POLLOCK, *ESSAYS IN THE LAW* (1922) 40 *et seq.*; 2 CARLYLE, *op. cit. supra* note 44, at 29, 41, 94-109. Gratian discusses the question why it was that while the *jus naturale* is contained in the "law," some of the latter is variable. He concludes that not all law is natural law, even when it claims the support of God. *Ibid.* 109. Later medieval writers distinguish two varieties of the *jus naturale*, the higher and the lower, of which only the first is unchangeable. Gratian also passes on to us the phrase *jus constitutionis*, signifying a system of written law, the first example being the legislation of Moses. *Ibid.* 115.

⁵⁵ DICKINSON, *op. cit. supra* note 53, at xxxv.

Of even greater importance is the fact that John addresses his counsels exclusively to princes. There were two sets of reasons for this. On the one hand, yielding to the Christian dispensation with its "other world" outlook, *jus naturale* had lost all significance as a "way of life" the promised goal of which was earthly bliss. At the same time, the art of legislation, which Aristotle and Cicero always had preëminently in mind, had for the time being ceased to exist. On the other hand, was the Teutonic conception of the ruler as simply soldier and judge. The business of the judge, however, is justice; yet justice by what standard? The answer that John returns to this question is in effect *jus naturale* furnished out with the content just described.

A not less significant feature of John's doctrine is his insistence upon the distinction between "a tyrant" as "one who oppresses the people by rulership based upon force" and "a prince" as "one who rules in accordance with the laws."⁵⁶ In these words John foreshadows the distinctive contribution of the Middle Ages to modern political science—the notion of all political authority as intrinsically limited. Proceeding from this point of view, John makes short work of those troublesome texts of Roman law which assert that the prince is "*legibus solutus*"⁵⁷ and that "what he has willed has the force of law."⁵⁸ It is not true, he answers, that the prince is absolved from the obligations of the law "in the sense that it is lawful for him to do unjust acts," but only in the sense that his character should guarantee his doing equity "not through fear of the penalties of the law but through love of justice"; and as to "the will of the prince," in respect of public matters, "he may not lawfully have any will of his own apart from that which the law or equity enjoins, or the calculation of the common interest requires."⁵⁹ Indeed the very title *rex* is

⁵⁶ *Ibid.* 335. The notion that the prince is subject to the law is, of course, much older than the *Policraticus*. Stobaeus credits Solon with saying that "that was the best government where the subjects obeyed their prince, and the prince the laws." Notice also Fortescue's quotation from Diodorus Siculus, that "the kings of Egypt originally did not live in such a licentious manner as other kings, whose will was their law: but were subject to the same law, in common with the subject, and esteemed themselves happy in such a conformity to the laws." FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (Amos tr. 1825) c. XIII.

⁵⁷ DIG. I, 3, 31.

⁵⁸ See note 8, *supra*.

⁵⁹ DICKINSON, *op. cit. supra* note 53, at 7.

derived from doing right, that is, acting in accordance with law (*recte*).⁶⁰

The sweep and majesty of the medieval conception of a higher law as at once the basis and test for all rightful power is emphasized by the German historian, von Gierke. Natural law constrained the highest earthly powers. It held sway over Pope and Emperor, over ruler and sovereign people alike, indeed over the whole community of mortals. Neither statute (*Gesetz*) nor any act of authority, neither usage nor popular resolve could break through the limits which it imposed. Anything which conflicted with its eternal and indestructible principles was null and void and could bind nobody. Furthermore, while there was no sharp disseverance of natural law from morality, yet the limits thrown about the legitimate sphere of supreme power should by no means, von Gierke insists, be regarded as merely ethical principles. Not only were they designed to control external acts and not merely the ruler's internal freedom, but they were addressed also to judges and to all having anything to do with the application of the law, who were thereby bound to hold for naught not only any act of authority but even any statute which overstepped them. They morally exonerated the humblest citizen in defiance of the highest authority; they might even justify assassination.⁶¹

Read in the light of Austinian conceptions, these words may easily convey a somewhat exaggerated impression. Yet the outstanding fact is clear, that the supposed precepts of a higher law were, throughout the Middle Ages, being continually pitted against the claims of official authority and were being continually set to test the validity of such claims. At the same time was oc-

⁶⁰ *Ibid.* 336. See also *ibid.* lxxvii-iii, notes 221-22, and ZANE, *STORY OF LAW* (1927) 214.

⁶¹ GIERKE, *op. cit. supra* note 46, 75-76, 85; GIERKE, *ALTHEUSIUS* 272, and n.22, where Aquinas, Occam, Baldus, Alliacus, Cusanus, Gerson, and others are cited; *ibid.* 275-76 and notes 30 and 31. The doctrine was stated that when the Emperor acted against the law he did not act as emperor ("non facit ut imperator"). Bartolus and his followers attributed greater authority to statutes than to judicial judgments, but held none the less that even statutes contrary to natural law were void. Laws were binding, it was taught, so far as they concerned those matters "quae ad potestatem pertinent, non in iis quae ad tyrannidem"; nor was a superior entitled to obedience "quando egriditur fines sui officii." See also *ibid.* 142, n.57, where Occam is cited for the expression "potestas limitata." See also 2 CARLYLE, *op. cit. supra* note 44, at 32, 78, 79.

curring throughout Western Europe the ever renewed contest between secular and ecclesiastical authority over the question of jurisdiction. The total result was to bring the conception of all authority as inherently conditional to a high pitch of expression.

Furthermore, the Middle Ages — which is to say certain writers of that period — must also be credited with at least a partial apprehension of the concept of natural rights. This is to be seen in the reference to *jus gentium* of the two most fundamental of modern legal institutions, private property and contracts. In the words of von Gierke: "Property had its roots . . . in Law which flowed out of the pure Law of Nature without the aid of the State and in Law which was when as yet the State was not. Thence it followed that particular rights which had been acquired by virtue of this Institution in no wise owed their existence exclusively to the State." Likewise, the binding force of contracts was traced from natural law, "so that the Sovereign, though he could not bind himself or his successors by Statute, could bind himself and his successors by Contract." It followed thence "that every right which the State had conferred by way of Contract was unassailable by the State," exception alone being made in the case of "interferences proceeding *ex justa causa*."⁶²

⁶² GIERKE, *op. cit. supra* note 46, 80-81, and notes 278, 279. To same effect is GIERKE, *ALTHUSIUS* 270-71, and notes 18 and 19. "Deus ipse ex promissione obligatur," wrote Decius Constantinus. Writers of the Middle Ages, it might be explained, distinguished *jus naturale*, *jus divinum*, and *jus gentium*. The first was described as having been planted by God in natural reason for purely mundane ends; the second as having been communicated by a supernatural revelation for purely supramundane ends, the last as those rules which flowed from the pure *jus naturale* when due account was taken of the human relationships which resulted from the fall of man, of which property and contract were instances. *Jus gentium* thus tended to take on a certain appearance of positive law, while the broader concept tended to be relegated to the sphere of ethics, lying midway between law proper and religion. Thus despite von Gierke's sweeping statement, which is substantially correct for the civilians, there would seem to have been considerable conflict of opinion among the canonists, deriving from the communism of the Church Fathers, whether property existed even mediately by *jus naturale*. 2 CARLYLE, *op. cit. supra* note 44, 49 *et seq.* ST. GERMAIN, DOCTOR AND STUDENT, written early in the sixteenth century, reflects this doubt. See the *Second Dialogue* in DOCTOR AND STUDENT (Muchall ed. 1787) 99. Von Gierke also asserts that "Mediaeval Doctrine was already filled with the thought of the inborn and indestructible rights of the Individual, the formulation and classification" of which, he admits, "belonged to a later stage in the growth of the theory of Natural Law." This and his sharp contrast between "the theories of Antiquity" and the "thought

In the writings which von Gierke thus summarizes, notably those of the Glossators and their successors, the emphasis, it is true, is upon the sanctity of the two institutions of property and contract as such. Yet both of these are quickly resolvable into terms of individual interest. The strong initial bias of American constitutional law in favor of rights of property and contract has, therefore, its background in speculations of the Middle Ages.

Upon the observed uniformities of the human lot, classical antiquity erected the conception of a law of nature discoverable by human reason when uninfluenced by passion, and forming the ultimate source and explanation of the excellencies of positive law. *Jus naturale* was thus a code which challenged the skill and stirred the intuition of legislators, and in the *Corpus Juris* the triumph of Roman jurisprudence in its approximation to this noble goal is to be seen. The inauguration of the Middle Ages was marked by the reverse process. An almost complete paralysis of legislative activity characterized the outset of this period, and as this fact indicates, rulership had become personal, irresponsible, and unhampered by institutional control. Meeting the needs of the time, a new attitude toward higher law became predominant. Definite texts of Roman law, teachings of the Church, and scriptural passages were projected upward, to become a mystic overlaw, "a brooding omnipresence in the sky."⁶³ The purpose of this naïve construction, the very reverse of that which generally pervades antique conceptions, was not to account for a prevalent justice but rather to correct a prevalent injustice, not to enlighten authority but rather to circumscribe it. In other words, whereas the classical conception of natural law was that it conferred its chief benefits by entering into the more deliberate acts of human authority, the medieval conception was that it checked and delimited authority from without.⁶⁴ This conception, the direct in-

revealed by Christianity and grasped in all its profundity by the Germanic Spirit" bespeak perhaps the enthusiastic Teutonist rather than the critical historian. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* 81-82; GIERKE, *ALTEUSIUS* 274-75.

⁶³ Compare Mr. Justice Holmes in *Southern Pac. Ry. v. Jensen*, 244 U. S. 205, 222 (1917).

⁶⁴ In ancient theory *jus naturale* was a *terminus ad quem*—a goal toward which actual law inevitably tended; in medieval theory it was a *terminus a quo*—a standard from which human authority was always straying. Cicero's optimism regarding human nature offers a similar and not unrelated contrast to the Christian doctrine of original sin.

heritance of American constitutional theory from the Middle Ages, was confirmed by the current struggle between Papacy and Empire over the question of jurisdiction, as it has been confirmed in American constitutional theory by the existence of a similar issue between the nation and the states.

That, on the other hand, the practical importance of the higher law doctrine in actually frustrating political injustice during this era may be easily exaggerated is, so far as the Continent is concerned, clearly apparent. Lacking the institutional equipment to make good its claims except very haphazardly, lacking, too, a final authoritative interpretation except at times that of the Papacy, the conception still remained, after all the confident asseverations of generations of writers, relatively vague and ineffective, and altogether incapable, as time revealed, of repelling despotism once the latter was furnished with an answering argument, as it was from the beginning of the sixteenth century. In England alone were these deficiencies supplied in appreciable measure, and in England alone were the pretensions of divine right defeated in the following century. So while we look to the Continent during the Middle Ages for ideas, we look to England during the same period for both ideas and institutions.

II

The eve of the controversy over rights which preceded the American Revolution found John Adams, a briefless attorney of twenty-eight, paying the following tribute to the subject of his favorite studies:

"It has been my amusement for many years past, as far as I have had leisure, to examine the systems of all the legislators, ancient and modern, fantastical and real . . . , and the result . . . is a settled opinion that the liberty, the unalienable, indefeasible rights of men, the honor and dignity of human nature, the grandeur and glory of the public, and the universal happiness of individuals, were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England."⁶⁵

This passage conveys admirably the outstanding characteristic of English higher law. Before it was higher law it was positive

⁶⁵ ADAMS, LIFE AND WORKS (1851) 440; and see note 96, *infra*.

law in the strictest sense of the term, a law regularly administered in the ordinary courts in the settlement of controversies between private individuals. Many of the rights which the Constitution of the United States protects at this moment against legislative power were first protected by the common law against one's neighbors. The problem we have hitherto been discussing takes on consequently an altered emphasis as we approach higher law concepts in medieval England. The question is no longer how certain principles that ought to be restrictive of political authority took on a legal character or of the extent to which they did so, but rather how certain principles of a legal character in their origin assumed the further quality of principles entitled to control authority and to control it as law. In other words, the problem is not how the common law became *law*, but how it became *higher*, without at the same time ceasing to be enforceable through the ordinary courts even within the field of its more exalted jurisdiction.

The generation in which the Constitution was framed was wont to ascribe the transcendental quality of the common law above all to its vast antiquity.⁶⁶ Nor was this by any means the first appearance of the idea. The Conqueror professed to restore the laws of Edward the Confessor, and Stephen did the same in the century following. The idea was, obviously, a politically valuable one, since it proclaimed from the first the existence of a body of law owing nothing to royal authority and capable therefore of setting limits to that authority. That the substance of the common law as it was known in 1787 really antedated the Norman Conquest is, none the less, the veriest fiction, however important a one. As Sir

⁶⁶ "Alfred . . . magnus juris Anglicani conditor . . . with the advice of his wise men, collected out of the laws of Ina, Offa, and Ethelbert such as were best, and made them to extend equally to the whole nation." Later kings, Edward the Elder, Edward the Confessor, William the Conqueror, and so on, continued the good work. "King John swore to restore them [the laws]; King Henry III confirmed them; Magna Charta was founded on them, and King Edward I in parliament, confirmed them." 3 ADAMS, LIFE AND WORKS 541-42. To like effect was Jefferson's quaint theory that the American constitutional system only restored to mankind the long lost polity of Anglo-Saxon England, along with which was broached the notion that the Tories of eighteenth century England were the lineal descendants of the Normans and the Whigs of the Saxons. *Jefferson to Cartwright, June 5, 1824*, in 7 JEFFERSON, WRITINGS (Washington ed. 1854) 355; JEFFERSON, COMMON PLACE BOOK (Chinard ed. 1926) 351-62.

Frederick Pollock has observed: "For most practical purposes the history of English law does not begin till after the Norman Conquest, and the earliest things which modern lawyers are strictly bound to know must be allowed to date only from the thirteenth century, and from the latter half of it rather than the former."⁶⁷ Indeed the so-called dooms which the constitutional fathers were wont to regard so worshipfully were, by modern standards, pretty poor affairs, being filled in large part "by minute catalogues of the fines and compositions payable for manslaughter, wounding, and other acts of violence"; while the most important of them in legend, the laws of Edward the Confessor, were, in the form in which they have come down to us, an antiquarian compilation in verse dating from the twelfth century.⁶⁸

The true starting point in the history of the common law is the establishment by Henry II in the third quarter of the twelfth century of a system of circuit courts with a central appeal court. To this fact beyond all others is due one striking difference between English and Continental higher law. The latter was not regarded as incorporating indigenous custom — rather it was an appeal from it — for the reason that on the Continent custom remained till the French Revolution purely local. The common law, on the contrary, was regarded from the first as based upon custom. In truth it was custom gradually rendered national, that is to say, common, through the judicial system just described. Yet it was not custom alone. For in their selection of what customs to recognize in order to give them national sway, and what to suppress, the judges employed the test of "reasonableness,"⁶⁹ a test derived in the first instance from Roman and Continental ideas. Indeed, the notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law. But once again a sharp divergence must be noted from Continental ideas. The right reason to which the maxims of higher law on the Continent were addressed was always the right reason invoked by Cicero, it was the right reason of all men. The

⁶⁷ 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 88.

⁶⁸ *Ibid.* 97. See also *English Law Before the Norman Conquest* in POLLOCK, EXPANSION OF THE COMMON LAW (1904) 139.

⁶⁹ For illustrative cases see ALLEN, LAW IN THE MAKING (1927) 359 *et seq.* Cf. CO. INST. I, 113(a).

right reason which lies at the basis of the common law, on the other hand, was from the beginning *judicial* right reason. Considered as an act of knowledge or discovery, the common law was the act of experts, and increasingly so, with the ever firmer establishment of the doctrine of *stare decisis*.

With certain nineteenth century historians of the law in mind, Dean Pound voices the legitimate complaint that they will not "hear of an element of creative activity of men as lawyers, judges, writers of books, or legislators. . . . They think of the phenomena of legal development as events, as if men were not acting in the bringing about of every one of them. For the so-called events of legal history are in truth acts of definite men, or even of a definite man."⁷⁰ Certainly the history of the common law is far from being a mere anonymous tradition; and especially is this so of the story of its elevation to the position of a higher law binding upon supreme authority. The story of *Magna Carta* is an important chapter in this larger story, and for our purposes is sufficiently treated as an event. But it is otherwise with the labors of that series of judicial commentators on the common law which begins with Bracton and ends with Blackstone. The signal contribution of each to the final result still remains identifiable — their total contribution spans some five hundred years.

Bracton, Henry of Bratton, was a judge of the King's Bench in the reign of Henry III.⁷¹ His great work, in preparation for which, in addition to his studies of Roman law, he collected some two thousand decisions; is entitled *De Legibus et Consuetudinibus Angliae*. For us the outstanding importance of the work consists in the fact that for the first time it brought the rising common law into direct contact with Roman and medieval Continental ideas of a higher law. "The King himself," runs an oft-quoted passage of this treatise, "ought not to be subject to man, but subject to God and to the law, for the law makes the King. Let the King then attribute to the law what the law attributes to him, namely, dominion and power, for there is no King where the will and not the law has dominion."⁷² In these words we have again the char-

⁷⁰ POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 118.

⁷¹ For an excellent sketch of Bracton's life see the *Introduction* in 1 BRACTON, *NOTE BOOK* (Maitland's tr. 1887) 13-25.

⁷² BRACTON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* (Twiss ed. 1854) f. 5b.

acteristic medieval idea of all authority as deriving from the law and as, therefore, limited by it. Bracton's own words, it will be noted, are strongly reminiscent of John of Salisbury, and elsewhere the similarity becomes even more striking. The King's power, he writes, is the power of justice, not of injustice. So long as he does justice, the King is the vicar of God; but when he turns aside to injustice, he is the minister of the devil. Indeed, he is called King (*rex*) from ruling well (*regendo*), not from reigning (*regnando*). "Let him therefore, temper his power by law, which is the bridle of power . . . likewise is nothing so appropriate to empire as to live according to the laws, and to submit the principedom to law is greater than empire."⁷³

What sharply distinguishes Bracton from his predecessors and contemporaries — men like John of Salisbury and Saint Thomas Aquinas — is his conception of law. Thanks to his study of the Roman law, and even more perhaps to his experience as judge, this is even by modern tests strikingly positivistic. He lets us know at the outset that the law (*lex*) which he has primarily in mind is the law which rests on "the common sanction of the body politic." It embraces various elements: customs (unwritten laws), decisions of prudent men, which in like cases should be treated as precedents — "It is good occasion to proceed from like to like" — and finally the law made by the King in Council.⁷⁴ The question arises whether he considered the last category as subject to any limitation, and on this point Bracton is ambiguous. Discussing the maxim that "the pleasure of the prince has the force of law," he says that it applies not to "whatever is rashly presumed of the King's own will" but only to "that which has been rightly defined with the counsel of his magistrates, the King himself authorising it, and deliberation and discussion having been had upon it."⁷⁵ The implication is that the requirements mentioned having been met in its expression, the will of the prince does have the force of law. And not less noteworthy is his attitude toward *jura naturalia*; these are said to be immutable because they cannot be repealed in their entirety; but in fact they can be and have been

⁷³ *Ibid.* f. 107b. Cf. DICKINSON, *op. cit. supra* note 53, lxviii, cc. 1, 2, 17, 22.

⁷⁴ BRACTON, *op. cit. supra* note 72, ff. 1, 1b.

⁷⁵ *Ibid.* f. 107b.

abrogated in part. Yet at the same time he asserts, in words harking back to Cicero, that not everything that passes as law (*lex*) necessarily is so. "Although in the broadest sense of the term everything which may be read is law, nevertheless, in a special sense it signifies a rightful warrant enjoining what is honest, forbidding the contrary."⁷⁶ The fact seems to be that Bracton is struggling to adjust the notion of legislative sovereignty, conveyed by the texts of Roman law, to his own desire to subordinate to the law the royal power in its more usual aspects. Blackstone, five hundred years later, is troubled by a like dilemma.

But what sanction does Bracton supply to his law as against the King? In the printed text of the *De Legibus* there is a passage which declares that not only is the King below God, but that he has also his court, namely, counts and barons, and that "he who has an associate has a master, and, therefore, if the King be without a bridle, that is without law, they ought to put a bridle upon him."⁷⁷ These words have been sometimes set down, on the ground of conflict with other passages, as an interpolation, but they easily may be a reminiscence, evoked perhaps by De Montfort's rebellion against Henry III, of chapter sixty-one of *Magna Carta*. That the ordinary remedies are not available against royal injustice, Bracton makes clear. No writ will run against the King, the author of all writs.⁷⁸ Through his domination of his judges, he may even bring about unjust judgments.⁷⁹ And while the King is subject to the law, yet if he orders an official to do wrong, the official can plead the royal order.⁸⁰ Also the official shares the royal immunity from jurisdiction and may be complained against only to the King or to those appointed by the King for the purpose.⁸¹ Bracton has, in brief, no idea of the modern concept of the "rule of law." In the last analysis, he intimates, the sole redress against tyranny is reliance on divine vengeance, though doubtless

⁷⁶ *Ibid.* f. 2; see note 22, *supra*.

⁷⁷ *Ibid.* f. 34. See Maitland's comment in BRACTON, *op. cit. supra* note 71, 29-33.

⁷⁸ "Sumoneri non potest per breve." *Ibid.* f. 382b. Cf. ff. 5b and 171b. See also EHRlich, PROCEEDINGS AGAINST THE CROWN (6 Oxford Studies in Leg. and Soc. Hist. 1921) 23, 26, 45, 54.

⁷⁹ BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE ff. 368b, 369.

⁸⁰ EHRlich, *op. cit. supra* note 78, 129.

⁸¹ *Ibid.* III.

this might operate through human agency.⁸² Thus the problem of providing an institutional control upon the acts of the King is left in the *De Legibus* exactly where it is left by the Continental writings of the period. The measure of such control should be the law, and Bracton's conception of this is full and definite; but the institution capable of applying this test with regularity and precision has not yet disclosed itself.

From the *De Legibus* we turn to *Magna Carta* and in so doing from the legal tradition of higher law to the political. Coke was eventually to bring the two together in his presentation of *Magna Carta* as "a restoration and declaration of the ancient common law";⁸³ but before this notion could become plausible, *Magna Carta* had to become absorbed into the common law.

The constitutional fathers regarded *Magna Carta* as having been from the first a muniment of English liberties, but the view of it adopted by modern scholarship is a decidedly different one. This is that *Magna Carta* was to begin with a royal grant to a limited class of beneficiaries, and more or less at the expense of the realm at large. The king promised his barons that henceforth he would not infringe their customary feudal privileges as he had done in the immediate past, even though many of these were by no means accordant with the best interests of the remainder of his subjects.⁸⁴

The eventual rôle, indeed, of *Magna Carta* in the history of American constitutional theory is due immediately to its revival at the opening of the seventeenth century, largely by Sir Edward Coke. The tradition which Coke revived was, however, by no means his own invention; it referred back to and was to a great extent substantiated by an earlier period in the history of this

⁸² DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE f. 369. The origin of the maxim that "the King can do no wrong" has been assigned by some authorities to the minority of Henry III; but if the saying existed in Bracton's day, it meant nearly the opposite of what it does today. "If the king, or anybody else, said that the king 'could not' do something, that meant, not that the act would not, if done, be attributed to the king, but that the king was no more allowed to do it, than a subject was allowed to commit a trespass or a felony." EHRLICH, *op. cit. supra* note 78, 127.

⁸³ CO. INST. I, 8; *ibid.* II, 81; *cf.* 2 HANSARD, PARLIAMENTARY HISTORY (1628) 333.

⁸⁴ ADAMS, ORIGIN OF THE ENGLISH CONSTITUTION (1912) c. 5; McILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY (1910) 54 *et seq.*

famous document — famous especially because it was a *document* and so gave definite, tangible embodiment to the notion of higher law.

From the first, *Magna Carta* evinced elements of growth, and it was fortunately cast into a milieu favoring growth. For one thing, its original form was not that of an enactment, but of a compact. It is, therefore, significant that when John sought escape from his solemn promises, he turned to the Pope; and while his suit was immediately successful, subsequent confirmation restored the impaired obligation in full force. Far more important is it that certain of the Charter's clauses, like those of the Fourteenth Amendment six hundred and fifty years later, were drawn in terms that did not confine their application to the immediate issues in hand or to the interests therein involved; while to match this feature of the document itself came the early discovery by the baronage that the successful maintenance of the Charter against the monarch demanded the coöperation of all classes and so the participation by all classes in its benefits. Then, toward the close of the thirteenth century, the king, no longer able to "live off his own," eked out by the customary feudal revenues, was forced to call Parliament into existence to relieve his financial necessities. Parliament's subventions, however, were not to be had for the asking, but were conditioned on, among other things, the monarch's pledge to maintain *Magna Carta*.⁸⁵ And all this took place, it must be again remembered, in an age whose thought was permeated with the idea of authority limited by law. Had *Magna Carta* been the source of this idea, or the sole expression of it, it must soon have disappeared. Its very different fate testifies to the fact that it not only supported but was also supported by the universal tradition.

For the history of American constitutional law and theory no part of *Magna Carta* can compare in importance with chapter twenty-nine.⁸⁶ Without embarrassing later discussion, this may be translated as follows:

⁸⁵ ADAMS, *op. cit. supra* note 84, particularly at 160n., 162 *et seq.*; McIlwain, *Magna Carta and Common Law* in MAGNA CARTA COMMEMORATION ESSAYS (Malden ed. 1917) 156-60.

⁸⁶ "Nullus liber homo capiatur vel imprisonetur aut disseisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis aut utlagetur aut exuletur aut aliquo modo destruat nec super eum ibimus nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae." Compare the issue of 1225 and caption 39 of the original issue. It is the later issue which "became the Great

"No free man shall be taken or imprisoned or deprived of his freehold or of his liberties or free customs, or outlawed, or exiled, or in any manner destroyed, nor shall we go upon him, nor shall we send upon him, except by a legal judgment of his peers or by the law of the land."

Our present interest in this famous text is confined to its opening phrase, "*nullus liber homo*," a term evidently intended to indicate the beneficiaries of the clause, perhaps of the Charter as a whole. Although the words *liber homo* may have designated at first few outside the vassal class,⁸⁷ in this as in other respects the Charter early manifested its capacity for growth. The second issue of the Charter in 1225 was contemporaneously described as conceding their liberties alike "to people and to populace (*tam populo quam plebi*)."⁸⁸ A quarter century later we find the term "common liberties" being used to characterize the subject matter of the Charter.⁸⁹ Even more striking is Bracton's term for it—"*constitutio libertatis*"⁹⁰—a phrase which, wittingly or not, attributes to the Charter the consolidation of all particular liberties into *one* liberty. Once again we encounter a form of words of greatest interest to the student of American constitutional law and theory. It is noted at the moment for the evidence it affords of the final and complete emergence of *Magna Carta* from its feudal chrysalis.

Nor did *Magna Carta* develop solely along one dimension. As the range of classes and interests brought under its protection widened, its quality as higher law binding in some sense upon government in all its phases steadily strengthened until it becomes possible to look upon it in the fourteenth century as something very like a written constitution in the modern understanding. By his *Confirmatio Cartarum* of 1297, Edward I ordered all "justices,

Charter of English law." ADAMS, *op. cit. supra* note 84, 282. It was also called "Magna Charta."

⁸⁷ ADAMS, *op. cit. supra* note 84, 265; McILWAIN, *op. cit. supra* note 85, 80-81, 170.

⁸⁸ McILWAIN, *op. cit. supra* note 85, 171. In 1354 it was enacted (28 EDW. III, c. 3) that "no man of what estate or condition he may be [nul homme, de quel estate ou condicion qil soit], shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law." 1 STAT. REALM 345.

⁸⁹ McILWAIN, *op. cit. supra* note 85, 172.

⁹⁰ BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE f. 168b. He also terms it simply "Constitutio," *ibid.* 169b.

sheriffs, mayors, and other ministers, which under us and by us have the laws of our land to guide," to treat the Great Charter as "common law," in all pleas before them. Furthermore, any judgment contrary to the Great Charter or the Charter of the Forest was to be "holden for nought"; and all archbishops and bishops were to pronounce "the sentence of Great Excommunication against all those that by deed, aid, or counsel" proceeded "contrary to the aforesaid charters" or in any point transgressed them.⁹¹ The conception of *Magna Carta* as higher law reached its culmination in the reign of Edward III. Of the thirty-two royal confirmations of the Charter noted by Coke, fifteen occurred in this reign,⁹² while near the end of it, in 1368, to the normal form of confirmation the declaration was added by statute that any statute passed contrary to *Magna Carta* "*soit tenuz p' nul.*"⁹³ The actual operation of such measures in curtailing royal action will be treated later.

The glorious epoch of *Magna Carta* is the century stretching from the confirmation of Edward I to the deposition of Richard II. Another hundred years and the Charter is found rarely mentioned, while from then on the obscurity in which it is wrapped becomes ever denser, till the anti-Stuart revival of it at the opening of the seventeenth century. For the later and longer portion of this period the explanation is simply Tudor despotism. As the biographer of Henry VIII points out, Shakespeare's *King John* contains not an allusion to *Magna Carta*.⁹⁴ For the period antedating the Tudors the explanation is less simple, but in general it consists in the fact that almost from its appearance *Magna Carta* was in process of absorption into the general stream of the common law. Bracton regards *Magna Carta* as a statute, part and

⁹¹ ADAMS AND STEPHENS, SELECT DOCUMENTS OF ENGLISH HISTORY (1911) 86-87.

⁹² Of these later confirmations Adams writes: "They express not so much a desire that specific provisions of the Charter should be reaffirmed . . . as a desire to get the king's acknowledgment in general that he was bound by the law." ADAMS, *op. cit.* *supra* note 84, 289-90n.

⁹³ 42 EDW. III c. 1 (1368); 1 STAT. REALM 388 (1368); 3 CO. INST. III; also 1 *ibid.* 81.

⁹⁴ POLLARD, HENRY VIII (1905) 35. But, as Pollard notes, allusion was made to the Charter in the proceedings against Wolsey for *Praemunire*; and a translation of *Magna Carta* by one George Ferrers was printed in London in 1541. *Ibid.* 35.

parcel of the entire body of law of which he is treating. Edward I, as we have seen, ordered his judges to give *Magna Carta*, in causes coming before them, the force and effect of common law. The circumstances of the Wars of the Roses aided the same development. The particular guardian of the integrity and identity of *Magna Carta* was Parliament; but with the extermination of the old nobility, Parliament ceased practically to exist till the Tudors recreated it out of their own adherents. On the other hand, at a time when people did not know from day to day whether Lancaster or York sat on the throne, the common law courts continued for the most part in the discharge of their proper business.⁹⁵ It resulted that, as Englishmen recognized in the daily practice of the courts an actual realization of most that *Magna Carta* had symbolized, they transferred to the common law as a whole the worship which they had so long reserved more especially for the Charter.

Writing with this period particularly in mind, Father Figgis has remarked:

"The Common Law is pictured invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man. As yet men are not clear that an Act of Parliament can do more than declare the Common Law. It is the Common Law which men set up as an object of worship. They regard it as the symbol of ordered life and disciplined activities, which are to replace the license and violence of the evil times now passed away. . . . The Common Law is the perfect ideal of law; for it is natural reason developed and expounded by a collective wisdom of many generations. . . . Based on long usage and almost supernatural wisdom, its authority is above, rather than below that of Acts of Parliament or royal ordinances which owe their fleeting existence to the caprice of the King or to the pleasure of councillors, which have a merely material sanction and may be repealed at any moment."⁹⁶

⁹⁵ For some evidence of interruption by sporadic violence, consult the PASTON LETTERS (Fenn ed. 1873) *passim*. *Magna Charta* is "part of the common law and the ancient law of this kingdom," 2 HANSARD, PARLIAMENTARY HISTORY 333 (1628). "The King cannot dispense with *Magna Charta*, which is incorporated into the Common Law." 6 COMYN, DIGEST (Dublin ed. 1793) 35 tit. *Praeogative*, D. 7, citing 2 ROL. 115.

⁹⁶ FIGGIS, DIVINE RIGHT OF KINGS (2d ed. 1914) 228-30. "The common law is

The spokesman *par excellence* of this attitude is Sir John Fortescue, Henry VI's Chief Justice, who followed his king into exile and there prepared his famous work. This is his *Praises of the Laws of England*,⁹⁷ the importance of which, slight as is the toll of its pages, is abundantly attested by Coke's and Blackstone's repeated citations of it, not to mention the unqualified adoption by both these writers of its estimate of English legal customs and institutions. The *De Laudibus* is, however, no mere ratification of past pieties; it contributes elements of the greatest importance to the development of Anglo-American constitutional theory. Written in France, it stresses the contrast between French autocracy and what Fortescue terms the "mixed political government" of England. The former is treated as sheer usurpation. Inasmuch as the people submitted themselves in the first place to royal authority only in order to preserve their properties and persons, he argues, it is clear that they could never have assented to absolute power and yet "if not from them, the King could have no such power rightfully at all."⁹⁸ Thus, as in Locke two centuries later, the notion of authority as limited is based on the notion of its popular origin. The laws of England, consequently, do not admit of the maxim, *quod principi placuit*; on the contrary, the king can neither "change the laws thereof nor take from the people what is theirs against their consent";⁹⁹ and these laws "in all cases, declare in favor of liberty, the gift of God to man in his creation."¹⁰⁰

the absolute perfection of reason." 2 Co. INST. 179. The common law, "having a principle of growth and progress in itself . . . is already . . . the most complete and admirable system of law—the most healthy and vigorous in its principles, the most favorable to civil liberty, standing the nearest to the divine law, and the best fitted to be the auxiliary and helper of religion itself in the government of individual men and of human society—that has ever existed on earth." BARNARD, DISCOURSE ON THE LIFE, CHARACTER, AND PUBLIC SERVICES OF AMBROSE SPENCER (1849) 52. See also ADAMS, *op. cit. supra* note 84, *passim*.

⁹⁷ FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (Amos ed. 1825). This edition follows Francis Gregor's translation of 1775—sometimes too faithfully. At the close of chapter 34, at 128, Fortescue is made by both editors to say: "It is not a restraint, but rather a liberty to govern a people by the just regularity of a *political* government, or rather right reason." No equivalent of the last four words appears in the Latin original. The page references here are to the 1825 Amos edition.

⁹⁸ FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* c. 14, at 41. See also *ibid.* 26, 38, 126.

⁹⁹ *Ibid.* cc. 9, 13, 18, 34, 36, at 26–27, 38, 55, 125, 136. The expression "Representatives in Parliament" occurs at 55.

¹⁰⁰ *Ibid.* c. 42, at 157.

Nor was liberty the only fruit of English institutions, for to this in turn was English prosperity directly traceable. A quaint passage of the *De Laudibus* reads:

" . . . every inhabitant is at his liberty fully to use and enjoy whatever his farm produceth, the fruits of the earth, the increase of his flock, and the like: all the improvements he makes, whether by his own proper industry, or of those he retains in his service, are his own to use and enjoy without the let, interruption, or denial of any: if he be in any wise injured, or oppressed, he shall have his *amends* and satisfaction against the party offending: hence it is, that the inhabitants are rich in gold, silver, and in all the necessaries and conveniences of life. They drink no water, unless at certain times, upon a religious score, and by way of doing penance. They are fed, in great abundance, with all sorts of flesh and fish, of which they have plenty everywhere; they are clothed throughout in good woollens; their bedding and other furniture in their houses are of wool, and that in great store; they are also well provided with all other sorts of household goods and necessary implements for husbandry: every one, according to his rank, hath all things which conduce to make life easy and happy . . . they are treated with mercy and justice, according to the laws of the land; neither are they impleaded in point of property, or arraigned for any capital crime, how heinous soever, but before the king's judges, and according to the laws of the land. These are the advantages consequent from that *political mixed government* which obtains in *England*. . . ." ¹⁰¹

And as English legal institutions supported English prosperity, so English prosperity supported them. In no other country in the world, Fortescue contends, would trial by a jury of the vicinage be feasible, for the simple reason that in no other country would there be a sufficient number of honest men of the neighborhood capable of undertaking the service.¹⁰²

But the distinctive contribution of the *De Laudibus* has still to be mentioned, that feature of it which discriminates it sharply

¹⁰¹ *Ibid.* c. 36, at 136-38.

¹⁰² *Ibid.* cc. 25, 26, 29, especially at 91, 104-05. In chapter 27, at 93, occurs the famous sentiment that "one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally." Fortescue's complacency with English institutions, as well as his contempt for French, is most amusingly illustrated by his comment on "modern French," that "it is not the same with that used by our lawyers in the *Courts of Law*, but is much altered and depraved by common use." *Ibid.* 78.

from all earlier eulogies of higher law. This is Fortescue's conception of the law as a professional mystery, as the peculiar science of bench and bar. Almost at the outset he asserts the identity of "perfect justice" with "legal justice."¹⁰³ Later, through the mouth of his chief interlocuter, the chancellor, he develops the same thought at length.¹⁰⁴ The laws of England, he says, involve two distinct constituents: first, customs, statutes, or acts of Parliament, and the law of nature, all of which correspond to Aristotle's "elements of natural things"; secondly, "maxims," "principles which do not admit of proof by reason and argument," but carry with them their own evidence, and which correspond to that same philosopher's "efficient causes." But the knowledge which men in general have of either of these categories of legal learning is, and can be, but superficial, comparable with that which they have of "faith, love, charity, the sacraments, and God's commandments," while leaving "other mysteries in Divinity to those who preside in the Church." Nor is the case of the ruler himself different from that of the generality of his subjects in this respect; wherefore the chancellor is made to say:

"My Prince, there will be no occasion for you to search into the arcana of our laws with such tedious application and study. . . . It will not be convenient by severe study, or at the expense of the best of your time, to pry into nice points of law: such matters may be left to your judges and counsel . . . ; furthermore, you will better pronounce judgment in the courts by others than in person, it being not customary for the Kings of England to sit in court or pronounce judgment themselves. [*Proprio ore nullus regum Angliæ iudicium proferre usus est.*]

"I know very well the quickness of your apprehension and the forwardness of your parts; but for that expertness in the laws the which is requisite for judges the studies of twenty years [*viginti annorum lucubrations*] barely suffice."¹⁰⁵

The colloquy thus imagined by Fortescue was enacted in solemn earnest one hundred and thirty years later. On Sunday morning,

¹⁰³ *Ibid.* c. 4, at 11.

¹⁰⁴ *Ibid.* c. 8, at 20.

¹⁰⁵ *Ibid.* c. 8. On this subject see an excellent note by Amos in FORTESCUE, *op. cit. supra* note 97, 23-25; see also 2 Co. INST. 56. Bodin recognized that the Prince ought not to administer justice in person. BLUNTSCHLI, *THEORY OF THE STATE* (1895) 517. For Bracton's very different view, see DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ f. 107. Edward III endeavored to make royal interference with the course of justice impossible.

November 10, 1608, Coke and "all the judges of England, and the Barons of the Exchequer" faced James I at Hampton Court to confute the notion which had been instilled in him by Archbishop Bancroft that, inasmuch as the judges were but his delegates, he was entitled to decide cases in his own person. "The judges informed the King," Coke records, "that no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the courts of justice. . . ." To this the king answered that "he thought the law was founded on reason, and that he and others had reason, as well as the Judges"; but Coke pointed out the fallacy of this view in the following words:

"True it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace."

"The King," the report continues, "was greatly offended," saying that, "then he should be under the law, which was treason to affirm," to which Coke responded in Bracton's words: "*Quod Rex non debet esse sub homine, sed sub Deo et lege.*"¹⁰⁶

We are thus brought back to a question raised earlier: By what methods was the supremacy of the common law maintained against the royal power? Or to phrase the same question somewhat differently: By what methods was "higher law" kept "positive"? In Bracton's day, as we have seen, there was no regular remedy

¹⁰⁶ Prohibitions del Roy, 7 Co. 63-65 (1609). "Law was to an important extent conceived by both governors and governed as a subject of science, capable of being learnt by special study, but not capable of being altered by the mere arbitrary will of government, any more than the principles or conclusions of mathematics." SIDGWICK, *ELEMENTS OF POLITICS* (2d ed. 1897) 652-53, quoted in MCILWAIN, *HIGH COURT OF PARLIAMENT* (1910) 47. "A portion, and a very large portion, of that justice which it belongs to God alone to dispense with exact and unerring equity, is committed to them [judges] to administer." BARNARD, *loc. cit. supra* note 96.

available to a subject who deemed himself to have been wronged by the king or by the king's officials; but in this respect institutional improvement in the course of the century following was notable. In the first place, as to his lower officials Edward I began the policy of waiving their, that is *his*, immunity. By chapter thirteen of the statute of Westminster II, enacted in 1285, persons illegally imprisoned by sheriffs were given as complete recovery as if the authors of the wrong had no official capacity.¹⁰⁷ Still more important was the development during the same reign of the so-called petition of right.¹⁰⁸ Such a petition might be addressed to the king, his chancellor, or his council. On the granting of it, the issues raised were determined by the chancellor, the council, the Exchequer, or the King's Bench, and in accordance with the law;¹⁰⁹ since, when the king sued or consented to be sued, he was considered a party and nothing more.¹¹⁰ The climax of this development was reached in 1346, when Edward III having instructed his justices that they should not, on account of any letters or orders purporting to come from him, "omit to do right," a proviso to that effect was inserted in the oath of the justices.¹¹¹ Hence, royal acts and royal claims were brought constantly to the test of the ordinary law, and often as administered by the ordinary courts.

Such a system was certainly not far from realizing the modern conception of the rule of law. There were, nevertheless, facts of a contrary tendency that must not be overlooked. For one thing, the king was recognized by the courts themselves to be in many instances above the law by virtue of his prerogative, and that for the common good.¹¹² Again, the judges who decided such matters were the king's appointees and held their offices at his pleasure. Yet again, one of these prerogatives was a quite undefined power of rendering statutes ineffective, called the "dispensing power." Lastly, and most important of all, shortly after

¹⁰⁷ EHRlich, *op. cit. supra* note 78, 111.

¹⁰⁸ *Ibid.* 82-96, *passim*; *ibid.* 179-88. For an ancient fiction dating from the time of Edward I, supporting the courts on the ground of right and usage in the jurisdiction acquired by petition, see *ibid.* 54.

¹⁰⁹ *Ibid.* 107, 120.

¹¹⁰ *Ibid.* 108.

¹¹¹ *Ibid.* 131.

¹¹² *Ibid.* 17-19, 40-41, 51, 56-64, 131-41.

1500 theories gained currency which claimed for the king, at least in his legislative capacity, complete independence from every legal restraint. It was the clash of facts and theories such as these with the notion of a higher law which filled English history in the seventeenth century, and it was forces emergent from this clash which projected the notion of higher law across the Atlantic into eighteenth century America.

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(To be concluded)