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**“AM I, BY LAW, THE LORD OF THE WORLD?”:
HOW THE JURISTIC RESPONSE TO
FREDERICK BARBAROSSA’S CURIOSITY
HELPED SHAPE WESTERN
CONSTITUTIONALISM**

*Charles J. Reid, Jr. **

THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION. By *Kenneth Pennington*. Berkeley and Los Angeles: University of California Press. 1993. Pp. xiii, 335. \$40.

INTRODUCTION

Kenneth Pennington’s¹ new book can fairly be called a *tour de force*. Pennington begins his book with a subtle and thorough examination of some of the basic elements of the constitutional order that first emerged in Western law in the twelfth and thirteenth centuries — including theories of sovereignty, power, rights, and due process — and goes on to examine some of the ways in which these concepts developed in the juristic thought of the fourteenth and fifteenth centuries. He closes with a brief overview of how these concepts influenced sixteenth-century juristic thought. Acutely sensitive to questions of manuscript sources and transmission, Pennington brings his learning to bear on some traditionally important questions of constitutional history with considerable effect.

But as with any truly important book, Pennington also succeeds in provoking a number of questions. A whole cluster of questions center around Pennington’s use of the expression *Western legal tradition*. What precisely is the Western legal tradition? What is the relationship of “medieval constitutionalism” to the larger Western legal tradition? What is the significance of the constitutional history Pennington discusses for contemporary debates?

This review is divided into two Parts. The first Part evaluates the main lines of Pennington’s argument and situates his argument in the context of the received historiography of medieval constitutionalism.

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This examination demonstrates that Pennington's book is one of the leading works of constitutional history of the last decade. The second Part then turns to some of the questions Pennington's use of the expression *Western legal tradition* prompts and briefly responds to them.

I. FREDERICK BARBAROSSA'S CURIOSITY AND THE RESPONSE OF THE LAWYERS

A. *Setting the Scene*

As Harold Berman has established, a revolution broke out in 1075 — the first of the great revolutions of the West.² Pope Gregory VII declared the Roman Catholic Church to be independent of the empire, thereby touching off a war between Gregory and Emperor Henry IV — a conflict that persisted intermittently even after the deaths of the two antagonists and was settled only in 1122 with the Concordat of Worms.³ This conflict occurred at a time of rapidly developing legal sophistication, and the new legal learning was put to use by both sides in the controversy. The revolution's settlement allowed room for the Church to exercise a sphere of independent jurisdiction over a number of matters, including marriages, contracts, corporations, wills and testaments, and a variety of other areas.⁴ The twelfth century subsequently witnessed the rapid development of a system of canon law to respond to these legal needs.⁵

Simultaneously, the princes and lawyers of Western Europe expressed renewed interest in the Roman law of Justinian. The *Digest* was reintroduced to a Western readership in the late eleventh century. A school of law was organized expressly for the teaching of the *Digest* and the other books of Roman law that were now being mined for

2. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 94-107 (1983).

3. *Id.* at 98.

4. See JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 176-486 (1987) (discussing the canon law regulating marriage and sexuality); R.H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* (1974) (describing marriage litigation in English ecclesiastical courts in the thirteenth through fifteenth centuries); JULES ROUSSIER, *LE FONDEMENT DE L'OBLIGATION CONTRACTUELLE DANS LE DROIT CLASSIQUE DE L'ÉGLISE* 46-175 (1933) (discussing the development of contract doctrine in canon law); MICHAEL M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND: FROM THE CONVERSION OF THE ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY* 119-230 (Pontifical Inst. of Mediaeval Studies, Studies & Texts Vol. 6, 1963) (discussing the development of canonistic theories of wills and testaments); BRIAN TIERNEY, *FOUNDATIONS OF THE CONCILIAR THEORY* 106-53 (1955) (reviewing the development of canonistic corporation law); Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 J.L. & RELIGION 103 (1986) (establishing the canonistic roots of much Western contract doctrine); R.H. Helmholz, *Assumpsit and Fidei Laesio*, 91 LAW Q. REV. 406 (1975) (exploring the development of contract doctrine in England and the interaction between the canon law and common law). See generally BERMAN, *supra* note 2, at 205-54.

5. On the systematic character of the canon law that emerged in the twelfth century, see BERMAN, *supra* note 2, at 201-04, 225-26.

information.⁶ Unlike the canon law, the Roman law was not, for the most part, the positive law of any European jurisdiction.⁷ Nevertheless, the princes and lawyers of Western Europe looked to the Roman law — as well as to the canon law — for guidance in shaping their responses to the new complexities of twelfth-century life.

Constitutional law was one of the creations of the so-called Papal Revolution. The rivalry of Church and state — to use somewhat anachronistic categories⁸ — forced jurists to consider the proper spheres of each. Juristic reflection on the nature of corporations — most ecclesiastical and secular organizations were corporations — gave rise to theories of representation, consent, and rights.⁹ Consideration of the nature of *jurisdiction* — understood not as the competence of the judiciary but as the power of governance — gave rise to theories of obligation and legitimacy.¹⁰ As Brian Tierney has noted, “[in] the juridical culture of the twelfth century . . . Roman and canon lawyers . . . formed a kind of seedbed from which grew the whole tangled forest of early modern constitutional thought.”¹¹

Several generations of scholars have now researched the history of what is somewhat inaccurately called “medieval constitutionalism.”¹² Pennington nevertheless succeeds in contributing many original and valuable insights to this scholarship. One of the greatest contributions he makes is the result of his deep sensitivity to the vagaries of manuscript transmission. The invention of the printing press gave rise to what can be termed a “boom” in legal publishing. Publishers hurried into print many of the important legal texts of the twelfth through fifteenth centuries in the years especially after 1500. But this rush to publish occasionally “canonized” inaccurate readings. Many modern scholars have relied on these early printed editions — a reliance sometimes betrayed by the replication of slips committed four hundred years ago. By looking behind the early printed editions, Pennington attempts to retrieve what the lawyers whose works he reviews actually said. Pennington’s unstinting desire to recover accurate readings of the jurists pervades nearly every page of *The Prince and the Law*.

6. See *id.* at 122-27.

7. See Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 SYRACUSE J. INTL. L. & COM. (forthcoming 1994).

8. On the question of Church and state, see BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE, 1050-1300*, at 33-157 (1964).

9. See TIERNEY, *supra* note 4, at 106-53; cf. Yves M.-J. Congar, *Quod omnes tangit, ab omnibus tractari et approbari debet*, 36 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 210 (4th ser. 1958).

10. See BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650*, at 29-53 (1982).

11. *Id.* at 1.

12. See *infra* notes 93-96 and accompanying text.

B. *The Vocabulary of Sovereignty*

Although Pennington's book is richly textured and nuanced, one could state its thesis in the following two broadly phrased sentences: The twelfth and thirteenth centuries gave rise to theorizing by both canon and Roman lawyers about the nature and scope of governmental power, on the one hand, and, on the other, to speculation about the appropriate means of restraining its arbitrary exercise. Succeeding generations of jurists in the fourteenth and fifteenth centuries subsequently developed, elaborated, and adapted the theories advanced in the twelfth and thirteenth centuries; those theories deeply shaped the legal and political thought of early modern Europe.

In the process of developing this thesis, Pennington deals with other concerns as well. He challenges anachronisms that have crept into many of the questions twentieth-century historians have asked of their sources. Pennington argues, for instance, that many historians, led astray by modern debates over the divisibility or indivisibility of sovereignty, have tried to see clear jurisdictional lines between, say, the powers claimed by the emperor and those claimed by the king of France, even when the sources do not yield clear-cut answers. The result is a historiography distorted by twentieth-century concerns and wrongly focused on a struggle for national independence from imperial rule.¹³ The reality, Pennington stresses, is that most of the lawyers of the twelfth through fifteenth centuries were not greatly exercised by the question of the relationship between king and emperor (p. 30). Similarly, Pennington rejects the claim made by some historians that the scope of jurisdiction claimed by the Church for the canon law prevented a proper understanding of the "state" in the twelfth through fifteenth centuries. The modern belief that the state must be the sole source of law in a given territory, Pennington asserts, led these historians astray. Instead, Pennington stresses, historians should focus on what the lawyers of the time had in mind when they spoke about the concept of statehood.¹⁴

13. Pp. 30-36, 101.

Modern historians, imbued with twentieth-century theories of sovereignty, have focused on questions of the emperor's and the pope's claims of universality to the exclusion of other issues that had, in fact, more relevance for medieval jurists. They have sometimes assumed, for example, that national states could not be truly sovereign until the jurists had stripped the emperor and the pope of their claims of universal rule.

P. 30. Pennington cautions, however, against making overly broad generalizations, noting that some lawyers, especially French lawyers in the second half of the thirteenth century, were concerned with clarifying the imperial-royal relationship. Pp. 31-32.

14.

Some modern historians have argued vehemently and vigorously that the "state," in fact, did not exist in medieval juristic thinking because papal and imperial universal claims of sovereignty made the concept of state logically impossible. They ask how a state could exist in a legal system in which every jurist and monarch acknowledged that the pope had the right to judge the subjects of the monarch in matters governed by canon law.

Pp. 30-31.

Pennington himself focuses on the gradual construction of theories of power and rights from the first groping formulations of the twelfth century through the refined analyses of the fifteenth century. Patiently, incrementally, he adds to his narrative the layers of thought the jurists themselves elaborated.

Pennington commences his account at the Court of Frederick Barbarossa. An experienced and worldly thirty-year-old at the time he acceded to the German imperial throne, a veteran of the Second Crusade, and a gifted politician, Frederick was elected to the imperial office in 1152 and was crowned emperor in 1155. Frederick's empire, at its largest, extended over large parts of Germany and Italy. Frederick died of drowning in 1190, while on the Third Crusade.¹⁵ The keeper of an elegant and refined court, Frederick often heard his rule praised in terms derived from Roman law.¹⁶ Frederick's curiosity was thereby aroused.

1. *Dominium and Merum Imperium*

"Am I, by law, the lord of the world [*dominus mundi*]?" Legend has it that Frederick posed this question to Martinus and Bulgarus, two of the famous "four doctors," while riding horseback with them.¹⁷ Bulgarus replied that Frederick was not lord over private property, but Martinus answered cryptically that he was indeed lord (*dominus*). Frederick promptly dismounted and presented his horse to Martinus but gave nothing to Bulgarus. Subsequently Bulgarus complained, in an untranslatable pun, "I lost an equine because I upheld equity, which is not equitable."¹⁸

15. Harold Berman provides the following portrait of Frederick's appearance and character:

The accounts of Frederick's contemporaries give the impression of a man of great personal power, striking in appearance, with a fine physique and red beard, eloquent in speech, highly intelligent, moderate in his appetites and emotions, pious and respectful toward the church, a man who in general preferred to work within the traditional restraints that his society imposed on him — but who was also capable of great anger and of violent excesses of cruelty that horrify the modern reader although they apparently shocked only a few of his contemporaries. His reputation for moderation was also belied by his enormously imaginative and bold policies, and especially by his dream of subjecting the northern Italian cities to the imperial authority. The total, systematic destruction of Milan by his army in 1162 was hardly an example of moderation.

BERMAN, *supra* note 2, at 489. For further biographical detail, see PETER MUNZ, *FREDERICK BARBAROSSA: A STUDY IN MEDIEVAL POLITICS* (1969).

16. Pp. 11-12; see Robert L. Benson, *Political Renovatio: Two Models from Roman Antiquity, in RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY* 339, 348-51 (Robert L. Benson & Giles Constable eds., 1982) (documenting the variety of political uses to which Roman law was put and the purposes it served at Frederick's court).

17. P. 16. The four doctors were Martinus, Bulgarus, Jacobus, and Hugo. They were among the earliest and most important teachers of Roman law in twelfth-century Italy. Frederick Barbarossa relied on their services in drafting legislation for the Diet of Roncaglia. See BERMAN, *supra* note 2, at 489-90.

18. P. 16. Some accounts suggest that Azo (fl. 1190-1220), the author of one of the most important *summae* of Roman law, also lost a horse this way. Pennington's effort to determine the veracity of this later story provides an interesting subtext to his account of the juristic re-

Pennington stresses that we cannot know exactly what Frederick meant when he posed his question to Martinus and Bulgarus. Rather, Pennington wishes to use this question and the answers it generated as a symbolic reference point and as a means of focusing on the issues of constitutional restraint on arbitrary power that he returns to throughout his book. As Pennington himself asks: "Could the prince expropriate the property of his subjects? Could the prince act arbitrarily? Did the prince's power have limits? These questions provide a framework for the problems that we shall discuss . . ." (p. 37).

Pennington begins his inquiry into the scope of the prince's power with the relationship of the prince to property. The lawyers singled out for examination the term *dominium*, a term they took from Roman law and understood to encompass the full power of ownership over property.¹⁹ By the thirteenth century, lawyers had become dissatisfied with the vagueness and imprecision of Frederick's question to the two doctors. In an effort to confine Frederick's curiosity to a manageable scope, some thirteenth-century lawyers, such as Odofredus (fl. c. 1240-1265), tried to use Bulgarus's reply to narrow the question. Frederick meant simply to inquire, according to Odofredus, into his relationship to private property: Was he lord over the property of others (*dominus omnium rerum singularium*)? Odofredus was quick to respond in the negative: logically, Odofredus contended, two parties could not simultaneously have total ownership of a piece of property. The emperor could not exercise *dominium* over the *dominium* of property holders (p. 24).

Odofredus's view was representative of the side that carried the day. Pennington uses the fourteenth-century jurist Baldus (1327-1400) as representative of the further development of the proposition that the emperor had only limited power over the property rights (*dominium*) of his subjects. A doctor of Roman and canon law, active in Italian politics, and possessed of a wide range of scholarly interests, Baldus enormously influenced his successors.²⁰ Baldus maintained that the emperor could invade the *dominium* of others and confiscate private property only when he had a *ratio motiva*, literally a "motive reason."

As Pennington demonstrates, *ratio* is a term of art that carried

sponse to Frederick's curiosity. (It turns out that Azo did not share Bulgarus's misfortune.) Pp. 18-26.

19. For a discussion of *dominium* in Roman law, see W.W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 186-90 (3d ed. 1963). The term *dominium*, as used by the jurists of the twelfth and thirteenth centuries, was ambiguous. In addition to referring to property ownership, it might also convey the meaning of the power of governance. Baldus (1327-1400) ultimately distinguished two types of *dominium*, a public *dominium* exercised by the prince and a private *dominium* exercised by individual property holders. See p. 18.

20. For a brief biography of Baldus, see JOSEPH CANNING, *THE POLITICAL THOUGHT OF BALDUS DE UBALDIS* 1-10 (1987).

with it a basic concept of justice and precluded "arbitrary actions" (p. 212). Baldus used *ratio* to convey the understanding of governmental restraint.²¹ Although some lawyers continued to adhere to the view that the emperor could exercise full control over the *dominium* of others, this was clearly the minority position (pp. 112-15).

Other lawyers took Frederick's question in a different direction. Azo, in reformulating Frederick's question, asked whether *merum imperium* belonged "only to the prince" (p. 19). Pennington indicates that while this query might seem remote from Frederick's concerns, it was, in fact, closely related (p. 19). In the Justinianic texts, the term *merum imperium* essentially meant judicial competence over criminal matters; it was defined by Ulpian as the power to chastise wrongdoers.²² The lawyers of the twelfth and thirteenth centuries took the term as a rough equivalent for *iurisdictio*, the power of governance.²³

In framing the question the way he did, Azo was actually inquiring into the nature of the power exercised by subordinate magistrates. Although Azo stated that only the prince possesses full jurisdiction, he also acknowledged that high magistrates (*sublimiores potestà*) might hold *merum imperium* (pp. 19-20). Pennington cautions readers against assuming that Azo meant that high-ranking magistrates derived their power from the prince (p. 20). These magistrates could have derived their power from an independent source.

The source and potential independence of subordinates' authority was an important question in some of the constitutional debates of the twelfth and thirteenth centuries. In the mid-to-late thirteenth century, for instance, the question whether bishops derived all their authority from the pope greatly aroused theologians. If bishops did not derive any of their authority from the pope, then they had a sphere of rights, prerogatives, and powers with which the papacy ought ordinarily not interfere.²⁴

21. P. 210. In the process of developing his argument on *ratio motiva*, Pennington effectively refutes Canning's claim that this expression was equivalent to saying that the prince could confiscate property without cause (*sine causa*). See Kenneth Pennington, *The Authority of the Prince in a Consilium of Baldus de Ubaldis*, in *STUDIA IN HONOREM EMENTISSIMI CARDINALIS ALPHONSI M. STICKLER* 483, 490 n.22 (Rosario Iosepho ed., 1992).

22. See DIG. 2.1.3 (Ulpian, *De Officio Quaestoris* 2) ("Imperium aut merum aut mixtum est. Merum est imperium habere gladii potestatem ad animaduertendum facinorosos homines, quod etiam potestas appellatur. [Imperium is either pure or mixed. Pure *imperium* consists in holding the power of the sword for the purposes of chastising wrongdoers; it is also called *potestas*.]"); cf. Ivo Pfaff, *Imperium merum*, in 9 *PAULYS REAL-ENCYCLOPÄDIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFT* 1211 (Georg Wissowa & Wilhelm Kroll eds., rev. ed. 1916) (further expanding on Ulpian's definition).

23. Azo, for one, understood the term in this way. P. 19.

24. See TIERNEY, *supra* note 10, at 60-66; cf. Brian Tierney, *Grosseteste and the Theory of Papal Sovereignty*, 6 J. ECCLESIASTICAL HIST. 1, 9 (1955) (documenting Robert Grosseteste's assertion of episcopal rights against perceived papal encroachments); Yves M.-J. Congar, *Aspects ecclésiologiques de la querelle entre mendiants et séculiers dans la seconde moitié du XIIIe siècle et le début du XIVe*, 28 ARCHIVES D'HISTOIRE DOCTRINALE ET LITTÉRAIRE DU MOYEN AGE 35,

Pennington himself explored some of these issues in an earlier work, in which he established that even as canonists developed sophisticated and far-reaching theories of papal power, episcopal rights always presented an obstacle to unfettered papal authority.²⁵ In fact, thirteenth-century canon lawyers conceptualized the office of bishop as a bundle of rights known as the *ius episcopale*.²⁶ Bishops were empowered on their own authority (*suo iure*)²⁷ to investigate and to judge criminal misconduct, to conduct visitations of monasteries and other ecclesiastical entities located within the diocese, and to dispense from a wide variety of laws.²⁸ The canonists resorted to a number of legal devices to resist encroachment on the integrity of the *ius episcopale*.²⁹

Pennington's treatment of *merum imperium* is extremely terse.³⁰ He never fully explores what the possession of *merum imperium* by magistrates other than the prince might mean for constitutional thought. Nevertheless, Pennington's treatment of *dominium* and *merum imperium*, taken together, provides important lessons on the ways in which lawyers began to develop constitutional restraints on unfettered power. The prince could not claim *dominium* over the property of private parties and had to respect the autonomy of other officeholders. The jurists had begun to satisfy Frederick's curiosity.

2. Pro Ratione Voluntas

Juvenal, the classical Roman satirist, describes an argument between a husband and wife over whether a slave they owned should be crucified. The slave had offended the wife but had done nothing to merit death; the wife wanted to test the limits of her authority. She overruled her husband's objections and the crucifixion went forward.

38 (1961) (elaborating upon the ecclesiological issues at stake in the mendicant-secular controversy).

25. See KENNETH PENNINGTON, *POPE AND BISHOPS: THE PAPAL MONARCHY IN THE TWELFTH AND THIRTEENTH CENTURIES* (1984).

26. *Conquerente oeconomio*, a decretal of Pope Honorius III, lists the rights that comprised the *ius episcopale*. See X 1.31.16.

27. *Suo iure* is an old expression, which might best be translated as "by one's own authority," or "by one's own right." It is found in the Roman law texts of Justinian. DIG. 2.1.5 (Julianus, Digestorum 1). Hostiensis distinguished between two types of ordinary power, that exercised *suo iure* and that exercised through a grant of the prince. See HOSTIENSIS, *SUMMA AUREA*, bk. 1, *De officio ordinarii* § 2.

28. On the episcopal power to judge and punish, see, for instance, X 1.31.1. On visitation, see, for example, X 1.31.16; C.R. CHENEY, *EPISCOPAL VISITATION OF MONASTERIES IN THE THIRTEENTH CENTURY* (1931). On the episcopal power to dispense, see, for example, X 4.6.1; X 4.6.2. See also J. BRYNS, *DE DISPENSATIONE IN IURE CANONICO PRAESERTIM APUD DECRETISTAS ET DECRETALISTAS USQUE AD MEDIUM SAECULUM DECIMUM QUARTUM* (1925).

29. See, for instance, Pennington's review of the arguments over whether bishops continued to possess the right to dispense "pluralists" — the holders of more than one benefice — after the Fourth Lateran Council. PENNINGTON, *supra* note 25, at 135-47.

30. Pennington confronts the issue again, however, when he turns to Baldus and the fourteenth century. Pp. 213-14.

"This I wish, so I command; let my will stand for reason. [*Hoc volo, sic iubeo, sit pro ratione voluntas.*]"³¹

Pro ratione voluntas, the second clause of this line of Juvenal's, became detached from its poetic roots sometime in the late twelfth century and entered juristic literature.³² Nothing seems a clearer statement of arbitrary and unfettered authority than the wife's attempt to justify her decision. How did thirteenth-century lawyers interpret the phrase?

Pennington begins his answer by noting that the canonists, unlike the Romanists, dealt with a living, vital legal system. As Pennington states, "The *Corpus iuris civilis* was ancient and unchanging (except for the very few medieval constitutions added to it)" (p. 48). The same was not true for canon law at the dawn of the thirteenth century. Popes had been producing substantial numbers of decretal letters for over fifty years.³³ The pace quickened during the pontificate of Pope Innocent III (1198-1216). This legislative activity forced the canonists to concentrate on the question of the ultimate source of law much more thoroughly than the Romanists (pp. 45-48).

In the second decade of the thirteenth century, Laurentius Hispanus (fl. 1200-1215) was among the first canonists to explore this question. Laurentius used *pro ratione voluntas* to describe papal power:

Hence [the pope] is said to have a divine will. . . . O, how great is the power of the prince; he changes the nature of things by applying the essences of one thing to another . . . he can make iniquity from justice by correcting any canon or law, for in these things his will is held to be reason [*pro ratione voluntas*]. . . . And there is no one in this world who would say to him, "Why do you do this?" . . . He is held, nevertheless, to shape this power to the public good.³⁴

31. The entire passage is as follows:

"pone crucem servo." "meruit quo crimine servus supplicium? quis testis adest? quis detulit? audi; nulla umquam de morte hominis cunctatio longa est." "o demens, ita servus homo est? nil fecerit, esto: hoc volo, sic iubeo, sit pro ratione voluntas."

JUVENALIS SATURAE XIV, 6.219-223, at 34 (J.D. Duff ed., Cambridge Univ. Press 1932).

"Put that slave on a cross!"

"What crime has he done to deserve it?

What witnesses are there? Who's his accuser? Give him a hearing.

When a human life is at stake, no delay is excessive."

"You fool! Is a slave human? What if he *hasn't* done wrong?

That is my wish, my *order*; my will is reason enough."

JUVENAL, *Roman Wives*, in THE SATIRES 37, 44 (Niall Rudd trans., Clarendon Press 1991).

32. See Gaines Post, *Vincentius Hispanus, "Pro Ratione Voluntas," and Medieval and Early Modern Theories of Sovereignty*, 28 TRADITIO 159, 161 (1972).

33. On the nature of the decretal law promulgated and collected in the twelfth century, see Charles Donahue, Jr., *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined After 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 680-82 (1974).

34. P. 47 (quoting Laurentius Hispanus, *Commentary* to 3 COMPILATO PRIMA 1.5.3 v. Puri Hominis (manuscript at Admont, Stiftsbibliothek)); see also Brendan McManus, *The Ecclesiology of Laurentius Hispanus (c. 1180-1248) and his Contribution to the Romanization of Canon*

Laurentius, Pennington continues, first considered and then rejected reason as the ultimate source of law (p. 47). Laurentius based his rejection on the realization that while some papal legislation was unreasonable, it was nevertheless good law. At the same time, Pennington cautions, one should not read Laurentius as sanctioning tyranny: "He did not mean that the prince could exercise absolute or arbitrary authority, and the jurists did not interpret *pro ratione voluntas* to license tyranny" (p. 47). Pennington concludes that Laurentius should be counted among the founders of legal positivism.³⁵

Pennington leaves largely unexplored the later history of the maxim *pro ratione voluntas*. He notes only that by the end of the thirteenth century it had become a "standard maxim with which the jurists defined the prince's legislative authority" (p. 118). When Thomas Aquinas made reason rather than will the ultimate source of law, Pennington adds, he resurrected a tradition that had become "antiquated" in the face of Laurentius's insight (p. 231).

In describing as "antiquated" Aquinas's reliance on reason as the ultimate measure of law's validity, Pennington does a disservice to Thomistic and neo-Thomistic theories of law.³⁶ Significantly, Laurentius himself must have been uncomfortable with an unrestrained legislative will when he obliged his ruler to conform his power to the public welfare (*utilitas publica*).³⁷

Laurentius did not develop the concept of public utility further.

Law Jurisprudence, with an Edition of the *Apparatus glossarum Laurentii Hispanii in Compilationem tertiam* (1991) (unpublished Ph.D. dissertation, Syracuse University) (providing a critical edition of Laurentius Hispanus).

35. Pennington states:

When jurists first distinguished between reason and the will of the prince in the early thirteenth century, they broke profoundly with past patterns of thought. By introducing the prince's will into political discourse, they fashioned an element of a new political language that became "the basis of a new philosophy of law with Marsiglio and [much later with] Hobbes and was the original kernel of the recently dominant theory of legal positivism." Marsiglio of Padua's thought was an important stage of this development, but he was not the first medieval thinker to exalt the will of the prince. The canonist, Laurentius Hispanus, first took that step.

P. 45 (quoting ANTHONY BLACK, *GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT* 55 (1984)) (alteration in original). Pennington's quotation of Black is not precise. Black wrote of

the basis for a new philosophy of law in those very thinkers who broke with the classical and Christian heritage, notably Marsiglio and Hobbes. It provided one ingredient for the theory of social contract, and was the original kernel of the recently dominant theory of legal positivism.

BLACK, *supra*, at 56.

36. Cf. ETIENNE GILSON, *REASON AND REVELATION IN THE MIDDLE AGES* 37-99 (1938) (stressing the importance of reason in Thomistic thought); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (proposing a contemporary Thomistic approach to law).

37. See p. 47. On the other hand, Pennington notes that Johannes Andreae grounded his understanding of public utility upon the prince's will. "Voluntas autem principis consistit in communi utilitate subditorum . . . [The will of the prince . . . resides in the common good of his subjects . . .]" P. 88 n.51 (quoting Johannes Andreae, *Repetitio* and *Additiones II*, to X 1.4.11 (manuscript available at Nuremberg, Stadtbibliothek)).

Instead, Panormitanus (1386-1445), working in the fifteenth century, developed the argument that the public good (*bonum publicum*), a concept related to the older notion of public utility,³⁸ was the ultimate foundation of law. Panormitanus "proposed a change in legal thinking just as radical as Laurentius's had been: law was established (*fundatam*) on the public good. The public good lay outside and transcended the prince's will and could serve as a bridle through which arbitrary authority could be reined in" (p. 232).

3. Potestas Absoluta et Ordinata

The question of the nature and extent of God's power was one of the most important questions asked by the scholastic theologians. Could God have created a world different from the one now inhabited by human beings? In the decades after 1200, the theologians began to render an affirmative answer to this question. In answering the question, they distinguished between two types of divine power: ordained power (*potestas ordinata*), or the sort of power God used to bring the world as we know it into existence, and absolute power (*potestas absoluta*), or the sort of power God might have used to create a world different from our own.³⁹

These reflections on divine power overflowed into juristic discourse, especially where the authority of the pope was concerned. Pennington identifies Hostiensis (1200-1271) as the jurist responsible for borrowing the concept of absolute and ordained power (*potestas absoluta et ordinata*) from the theologians. In so doing, Hostiensis himself wished to solve a problem. Papal legislation from the time of Innocent III had recognized that popes have a power to dispense from legal obligations, but the theoretical foundations of this power were unclear. Indeed, jurists did not automatically assume that the sovereign possessed such power. Henry de Bracton, for instance, who was roughly Hostiensis's contemporary, asserted that the English king did not have this power.⁴⁰

Hostiensis justified the papal power to dispense by associating papal power with divine power. Preceding generations of canonists who proclaimed that the pope served as the Vicar of Christ and possessed the "fullness of power [*plenitudo potestatis*]" over canon law anticipated this step.⁴¹ Hostiensis, Pennington stresses, surpassed these ear-

38. Pp. 232-33 (discussing the relationship of *utilitas publica* and *bonum publicum*).

39. Cf. Mary Anne Pernoud, *The Theory of the Potentia Dei According to Aquinas, Scotus, and Ockham*, 47 *ANTONIANUM* 69 (1972) (containing a detailed analysis of divine omnipotence in Aquinas, Scotus, and Ockham). See generally WILLIAM J. COURTENAY, *CAPACITY AND VOLITION: A HISTORY OF THE DISTINCTION OF ABSOLUTE AND ORDAINED POWER* (1990).

40. Pp. 57-58, 73; cf. MICHAEL BLECKER, *THE KING'S PARTNERS IN BRACTON* 108-17 (1984) (exploring the juridic relationship Bracton viewed as binding the king to the earls and dukes of the realm).

41. Helpful introductions to the history of the expression *plenitudo potestatis* include PEN-

lier developments when he stressed the uniquely divine nature of the canon law (pp. 50-51).

The pope, as Christ's Vicar, might exercise the absolute power the theologians held Christ to possess. The pope might, if circumstances warranted, suspend the laws of the Church in order to dispense from a legal obligation. He might, for instance, relieve a monk from the obligations of his monastic vow or release marriage partners from the obligations of marriage, provided the marriage had not been consummated (pp. 58-61).

But, as one might guess from the rule that the pope could dispense only from nonconsummated marriages, papal absolute power was capable neither of miracles nor, at least theoretically, of arbitrary or unfettered abuse. Pennington indicates that Hostiensis restricted the exercise of absolute power in two different ways. First, Hostiensis maintained that the pope could not violate the "state of the Church [*status ecclesiae*]" when exercising the power to dispense. The term *status ecclesiae* first entered canon law in the twelfth century and eventually came to mean the constitutional order of the Church.⁴² By saying that the pope could not violate the *status ecclesiae* even when exercising his absolute power, Hostiensis imposed a significant restraint on what might otherwise have been unfettered power. Second, Hostiensis limited papal authority by requiring the pope to have good cause (*causa*) for any exercise of absolute power. If the pope lacked cause, Hostiensis indicated, any action he undertook would be "not proper [*non decet*]" (p. 62-63). Pennington notes that ultimately it may be impossible to determine what Hostiensis meant by *non decet* in this instance, but he also suggests that Hostiensis used the expression *decet* with obligatory force elsewhere in his work.⁴³

The subsequent history of the expression *potestas absoluta* is rich and varied. Pennington closes his treatment of this expression with a

NINGTON, *supra* note 25, at 43-74; Robert L. Benson, *Plenitudo potestatis: Evolution of a Formula from Gregory IV to Gratian*, 14 *STUDIA GRATIANA* 195 (1967); and J.A. Watt, *The Use of the Term "Plenitudo Potestatis" by Hostiensis*, in *PROCEEDINGS OF THE SECOND INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW* 161 (Stephan Kuttner & J. Joseph Ryan eds., 1965).

42. See Yves M.-J. Congar, *Status ecclesiae*, 15 *STUDIA GRATIANA* 3 (1972); John H. Hackett, *State of the Church: A Concept of the Medieval Canonists*, 23 *JURIST* 259 (1963).

43. Brian Tierney has established that Hostiensis attached obligatory force to the verb *decet* when he required that the pope obtain the consent of the College of Cardinals prior to at least some exercises of papal power. See Brian Tierney, *Hostiensis and Collegiality*, in *PROCEEDINGS OF THE FOURTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW* 401, 405 (Stephan Kuttner ed., 1976).

In the course of his analysis of Hostiensis's theory of papal absolute power, Pennington challenges Dieter Wyduckel's argument that Hostiensis represents the "crystallization of that absolute power which was characteristic of early modern sovereignty," and that Hostiensis thereby "explode[d] the medieval legal system." P. 75. See DIETER WYDUCKEL, *PRINCEPS LEGIBUS SOLUTUS* 100 (1979). Wyduckel, Pennington suggests, was "misled by Hostiensis's rhetorical creativity." P. 75.

brief discussion of its fate in the period from 1270 to 1350. *Potestas absoluta* met with a mixed reception during this period. William of Ockham (c. 1280-1349) generally avoided the expression in his polemical writings, preferring to describe papal authority in terms of "fullness of power," while Pope John XXII "rebuked those who equated God's absolute power with the pope's" (p. 109). Lawyers tended to avoid the expression, although Albericus de Rosate (fl. 1340-1360) wrote an extended commentary on the term. Albericus's commentary calls to mind Martinus's reply to Frederick's question. Albericus maintained that the emperor possessed *dominium* over all things and could exercise this authority in an arbitrary but legal fashion. The emperor would sin if he misused his power, but there were no other constraints upon its use or misuse. This arbitrary but legal power Albericus denominated *potestas absoluta* (p. 113). Albericus had few immediate followers, but ultimately, with the passage of time, his image of absolute power as unrestrained and arbitrary was the one that prevailed in the West (pp. 115-16).

4. Princeps Legibus Solutus Est

Was the prince always bound to obey the law or was he sometimes released from its obligations? The jurists faced this question when they considered the maxim "the prince is released from the law [*princeps legibus solutus est*]." This expression originated in a fragment from Ulpian found in the *Digest*.⁴⁴ Other passages having a more "constitutionalist" orientation, however, balanced the sense of limitless power this expression connoted, even in the texts of Justinian. Perhaps the most important of these passages is the statute of the emperors Theodosius II and Valentinianus III, *Digna vox*, which provided:

It is a statement worthy of the majesty of a reigning prince for him to profess to be subject to the laws; for Our authority is dependent upon that of the law. And, indeed, it is the greatest attribute of imperial power for the sovereign to be subject to the laws and We forbid to others what We do not suffer Ourselves to do by the terms of the present Edict.⁴⁵

A large part of Pennington's treatment of *princeps legibus solutus*, in fact, serves as an account of the balance the jurists of the thirteenth and fourteenth centuries struck between the competing political theories found in these two texts. Pennington begins with the Romanist commentaries of Azo and Accursius (fl. 1225-1263). Azo realized that the emperor could not formally be compelled to follow the law. Nevertheless, Azo argued that the emperor should obey the law because

44. DIG. 1.3.31 (30) (Ulpian, Ad Legem Iuliam et Papiam 18).

45. CODE J. 1.14.4 (Theodosius & Valentinian 429) ("Concerning the Laws and Constitutions of the Emperors and Edicts").

only in that way might he persuade his successors to obey the law and because obedience to the law was virtuous (pp. 80-81). Accursius, Pennington demonstrates, relied on Azo for his own constitutionalist interpretation of *princeps legibus solutus* (p. 83). In his treatment of Accursius, Pennington agrees with Brian Tierney's assessment that although we begin with a "famous 'absolutist' text . . . at the end of the trail we find ourselves led to a sort of rhapsody on the rule of law."⁴⁶

Azo and Accursius explicitly concerned themselves with the power of the emperor. But what of kings? As noted above, one can certainly find arguments exalting the newly emerging national kings into *principes* for purposes of Roman law. The new maxim "the king was emperor in his kingdom [*rex imperator in regno suo est*]" was one expression of this sentiment (pp. 31-32). But other jurists, in the years just before and after 1300, reacted to these efforts by attempting to define the office of king in such a way as to subject it to the laws of the national monarchy.

Guido of Suzzara (fl. c. 1270-1291) was one of the more important but also more obscure of these lawyers.⁴⁷ Most of the lawyers reviewed thus far wrote extended commentaries on Roman or canon law. Guido, however, preferred to write *additiones*, also called *suppletiones* (additions or supplements), to the *Ordinary Gloss* appended to the *Digest* and the *Code*.⁴⁸ In an *additio* that commented on the phrase *princeps legibus solutus*, Guido stated:

Note that the prince is not bound by the laws. Are kings? [That is, Guido asks, "Are kings princes?"] Certainly they are bound because no one is loosed from the laws other than the prince. Although here [in the text of the *Digest*] the prince is not bound by the laws, he submits himself to them voluntarily.⁴⁹

Pennington proceeds to review other variations on this general theme. He establishes that a significant number of academic lawyers tried, either through Guido's device of defining the *princeps* narrowly so as to exclude kings, or through other devices, to bind kings to the law (pp. 95-106).

In his treatment of the vocabulary of sovereignty, Pennington establishes that many lawyers tried to work constitutional restraints into the very language of sovereignty. To be sure, this phenomenon was not universal. Martinus's ambiguous endorsement of unrestrained power had its adherents in succeeding generations. Pennington's history takes appropriate account of these crosscurrents in constitutional

46. Brian Tierney, "The Prince Is Not Bound by the Laws." *Accursius and the Origins of the Modern State*, 5 COMP. STUD. SOC. & HIST. 378, 394 (1963).

47. A brief biographical notice appears at Gérard Fransen, *Guy de Suzaria*, in 22 DICTIONNAIRE D'HISTOIRE ET DE GÉOGRAPHIE ECCLÉSIASTIQUES 1291 (R. Aubert et al eds., 1988).

48. Pennington includes a brief discussion of *additiones* and *suppletiones* at pp. 93-94.

49. P. 94 & n.72 (alteration in original) (quoting and translating Guido of Suzzara, *Suppletiones* to DIG. 1.3.31(31) (*Princeps legibus*) (manuscript available at Munich, Staatsbibliothek)).

thought. But the picture that emerges from Pennington's analysis is that even expressions that came to be associated in the popular mind with the worst sort of unrestrained despotism — *pro ratione voluntas*, *absoluta potestas*, *princeps legibus solutus est* — were hedged in with constitutional safeguards. Constitutional restraint on arbitrary power was part and parcel of the Western legal tradition from its very founding.

But this conclusion by no means makes up the whole of Pennington's story. He also wishes to tell us how other elements — rights, and a belief in the due process of law — came together to shape Western constitutionalism. We now turn to that aspect of the story.

C. *Restraints on Sovereignty*

1. *Rights*

Historians of rights have generally taken one of two approaches to the origins of Western rights theories. Anglo-American historians, for the most part, portray the concept of subjective rights as emerging full-blown in the writings of the seventeenth-century English "liberal" philosophers Thomas Hobbes and John Locke.⁵⁰ Accordingly, a number of Anglo-American jurisprudential writers have assumed that rights are somehow "naturally" biased in favor of an individualistic as opposed to a communitarian vision of society.⁵¹ Continental historians, on the other hand, have tended to assume a somewhat different historical pedigree. William of Ockham, it is commonly asserted, developed the first theory of subjective rights out of the voluntaristic and nominalist elements of his philosophy.⁵² Ockham thereby shattered a Thomistic synthesis that exalted objective justice and a fitting distribu-

50. See, e.g., C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962); IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* (1986). At the outset of his study, Shapiro declares his intent to commence with Thomas Hobbes's work because it represents the "earliest recognizably modern" form of rights. *Id.* at 23. For criticism of this view, see Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37, 47-51 (1991).

51. Thus Morton Horowitz has written:

[R]ights conceptions emerged in the 17th- and 18th-century intellectual environment in which the religious basis for natural law was rapidly crumbling. . . .

... .

... [N]atural rights conceptions were conceived in radical individualism and continue to express an individualistic perspective on social relations. Natural rights philosophy is rooted historically in an adversarial vision of human interactions and a negative idea of human freedom as the absence of external restraint.

Morton J. Horowitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 399-400 (1988) (footnotes omitted). Scholars can no longer maintain assertions of this sort. See *infra* notes 55-58 and accompanying text.

52.

As a voluntarist, Ockham stressed power as the guiding element of creation, not an objectively knowable just order. At the highest level, God Himself possesses an absolute subjective right, the *divina potestas*. That is, God can do anything He wishes. This conception of power is reflected in the social order. In the Thomistic system, legislation mirrored the naturally just order of the universe. In Ockham's, legislation was the product of power, the

tion of goods, replacing it with a theory that favored blind power and the satisfaction of individual interests.⁵³ Like their Anglo-American counterparts, continental scholars conclude that these supposed origins render subjective rights radically incompatible with objective theories of justice.⁵⁴

This historiography has been challenged in recent years, most especially in the work of Brian Tierney. In a series of important articles, Tierney demonstrated that the canonists of the twelfth and thirteenth centuries developed sophisticated theories of rights — theories that had far-reaching, if little-noticed, influence on the development of Western jurisprudence.⁵⁵

Pennington bases his own work on rights on Tierney's pioneering studies. For the most part, he concerns himself with the relationship of rights to the judicial process.⁵⁶ The Latin word *ius* can mean either an objective law or a right. When the *Institutes* of Justinian defined an action (*actio*) as the *ius* of judicial prosecution to obtain what one is owed, the author came close to recognizing the existence of a right.⁵⁷

subjective right of the legislator. To Thomas, jurists were "priests of justice." To Ockham, they were simply servants of individual interests.

The second element to Ockham's thought [is] nominalism. Only the individual had real existence; hence, the only logical starting point for legal development was the individual person. Thus, the protection and advancement of individual claims and powers, not an objectively just distribution of goods, became the starting point of legal development.

Reid, *supra* note 50, at 56 (footnotes omitted).

53. Michel Villey has most effectively promoted the view that rights have their origin in Ockhamist philosophy. MICHEL VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE* (1975); MICHEL VILLEY, *SEIZE ESSAIS DE PHILOSOPHIE DU DROIT* (1969); MICHEL VILLEY, *LEÇONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT* (1962). Brian Tierney comprehensively reviewed and criticized Villey's work in Brian Tierney, *Villey, Ockham and the Origin of Individual Rights*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION* (A TRIBUTE TO HAROLD J. BERMAN) 1 (John Witte, Jr. & Frank S. Alexander eds., 1988). A second example of this school of thought is LOUIS LACHANCE, *LE DROIT ET LES DROITS DE L'HOMME* (1959).

54. Cf. MICHEL VILLEY, *LE DROIT ET LES DROITS DE L'HOMME* 151-54 (1983) (exploring the jurisprudential implications of his historiography of rights).

55. In addition to Tierney's article on Villey, Tierney, *supra* note 53, see Brian Tierney, *Ius and Metonymy in Rufinus*, in *STUDIA IN HONOREM EMINENTISSIMI CARDINALIS ALPHONSI M. STICKLER*, *supra* note 21, at 549; Brian Tierney, *Natural Rights in the Thirteenth Century: A Quaestio of Henry of Ghent*, 67 *SPECULUM* 58 (1992); Brian Tierney, *Aristotle and the American Indians — Again: Two Critical Discussions*, 12 *CRISTIANESIMO NELLA STORIA* 295 (1991) [hereinafter Tierney, *Aristotle*]; Brian Tierney, *Ius dictum est a iure possidendo: Law and Rights in Decretales*, 5.40.12, in *CHURCH AND SOVEREIGNTY C. 590-1918: ESSAYS IN HONOUR OF MICHAEL WILKS* 457 (Diana Wood ed., Studies in Church History Series No. 9, 1991); Brian Tierney, *Marsilius on Rights*, 52 *J. HIST. IDEAS* 3 (1991); Brian Tierney, *Origins of Natural Rights Language: Texts and Contexts, 1150-1250*, 10 *HIST. POL. THOUGHT* 615 (1989); Brian Tierney, *Conciliarism, Corporatism, and Individualism: The Doctrine of Individual Rights in Gerson*, 9 *CRISTIANESIMO NELLA STORIA* 81 (1988); Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 *J.L. & RELIGION* 163 (1987); and Brian Tierney, *Tuck on Rights: Some Medieval Problems*, 4 *HIST. POL. THOUGHT* 429 (1983).

56. See pp. 132-64 for Pennington's discussion of due process and rights. But Pennington also discusses property and contract rights. Pp. 119-32.

57. "Actio autem nihil aliud est, quam ius persequendi iudicio quod sibi debetur. [An action is nothing other than the *ius* of prosecuting judicially what one is owed.]" *J. INST.* 4.6.pr.

Justinian's definition seems to recognize that individual litigants possess a certain competence or freedom to pursue claims judicially (p. 144). By the third and fourth decades of the thirteenth century, canon lawyers, echoing the language of the *Institutes*, began to use the terms *actio* and *ius* very nearly synonymously to express the concept of a right.⁵⁸

But, Pennington indicates, a crucial ingredient was still lacking, at least where *actio* was concerned. The *ius* that individual litigants possessed needed protection from arbitrary deprivations. The canonists of the late twelfth and early thirteenth centuries extended protection to litigants when they emphasized the need to observe the requirements of the order of law (*ordo iuris*) in legal proceedings, but the sovereign nevertheless continued to possess the authority to remove an individual's *actio* (pp. 147-48). In this respect, the jurists followed the Roman law which recognized that *actiones* were a part of the civil law — as opposed to the natural law — such that the sovereign could abrogate them (pp. 147-48).

The situation changed under Pope Innocent IV. In what Pennington describes as a "statement of great originality" (p. 150), the pope taught: "But then some say that although it may be sustained that [the prince] takes an action away, nevertheless he cannot take away [the duty] that he render justice. This would be against natural law. If, indeed, the right is not taken away, but only postponed, [the law] is valid."⁵⁹

By this statement, Pope Innocent IV grounded the *ius* and *actio* of litigants in the natural law. Sovereign powers were powerless to remove this right. Its exercise might be deferred, but a deprivation of the right would violate fundamental norms.

Innocent's innovation did not win immediate or universal acceptance. (The reader should bear in mind that Innocent made his statement in his *Commentaria*, which he authored in his private capacity.) Hostiensis, Pennington recounts, largely repeated Innocent's comment but edited it so as to excise the reference to natural law (pp. 150-51). Nevertheless, by the end of the thirteenth century, Innocent's teaching became "firmly entrenched in the literature" (p. 155).

Pennington closes his treatment of rights by noting that Innocent's comments took root in the climate of increasing concern for due pro-

58. See, for example, HOSTIENSIS, LECTURA, X 1.6.41, v. *ultionem*, in which Hostiensis discusses the distinction between an "active" and a "passive" *actio*, v. This discussion closely tracks Bernard of Parma's distinction between active and passive *iura*. See BERNARD OF PARMA, GLOSSA ORDINARIA, X 1.6.41, v. *ipsius*; cf. Reid, *supra* note 50, at 58-59 & n.92 (discussing the implications of this terminology for the history of rights).

59. "Sed et tunc ut quidam dicunt licet sustineatur quod auferat actionem tamen quin reddat iustitiam auferre non potest, cum esset contra ius naturale. Si vero non auferatur ius, sed differatur, tenet" P. 150 n.121 (quoting INNOCENT IV, COMMENTARIA, X 1.2.7 (manuscript available at Munich, Staatsbibliothek)).

cess. Jurists articulated and fleshed out the presumption of innocence and promulgated rules limiting recourse to torture (pp. 157-60). Although a limited recourse to torture may not seem like a great advance, the emergence of restrictions on torture began to cloud its use — it came to resemble “an evil that infringed on the rights of a free individual” (p. 160). Still further developments occurred in the area of due process in the first years of the fourteenth century.

2. *Due Process*

In November 1308, the imperial electors unanimously named Henry of Luxemburg king of the Romans, succeeding the assassinated King Albert. Henry was probably in his midthirties and was known for his “noble virtues.”⁶⁰ Shortly after his election as king, Henry decided to seek papal coronation as emperor of the Romans. It had been one hundred years since Frederick II was crowned emperor and more than fifty since his death and the violent suppression of his Hohenstaufen dynasty. Although no one had been crowned emperor in the intervening decades, by the summer of 1309 Henry had arranged for his own coronation by Pope Clement V. He would travel to Rome to receive the crown from the papal legate.⁶¹

King Robert of Naples was a potential adversary to Henry’s imperial ambitions in Italy. Pope Clement had negotiated an alliance between Henry and Robert that the parties intended to seal by a dynastic marriage, but the alliance proved evanescent. By the time Henry arrived in Italy from Germany in the autumn of 1310, Robert was in active opposition (pp. 166-68). After a year and a half of sporadic combat, Henry arrived in Rome in the spring of 1312, but he had to alter his plan to be crowned in St. Peter’s because of street fighting. The coronation eventually took place in St. John Lateran (p. 167).

Following his coronation, Henry’s ambitions expanded. He circulated a carefully worded letter to the kings of Europe suggesting that “in imitation of the celestial hierarchy . . . God established the city of Rome as the future seat of ecclesiastical and imperial power” (p. 168; footnote omitted). The letter constituted a veiled assertion of imperial prerogatives vis-à-vis the monarchies of Europe and was not warmly received (p. 168). Henry also accused Robert of treason against the imperial office.⁶² This accusation prompted Pope Clement to demand that Henry promise both to abide by a year’s truce and to submit to papal arbitration of the dispute with Robert.⁶³

60. WILLIAM M. BOWSKY, *HENRY VII IN ITALY: THE CONFLICT OF EMPIRE AND CITY-STATE*, 1310-1313, at 20 (1960).

61. *Id.* at 27-50.

62. P. 170; cf. BOWSKY, *supra* note 60, at 180-82 (developing further Henry’s legal case against Robert).

63. P. 168; see also BOWSKY, *supra* note 60, at 168-69.

Henry disregarded the papal demand and summoned Robert to his court. Henry, however, never served the summons on Robert, ostensibly because he would thereby place his messengers in danger. Robert continued his armed opposition, and Henry responded by issuing two decrees. The first, *Ad reprimendum*, declared that rebels "could be condemned *in absentia* in summary judicial proceedings" (p. 170), while the second, *Quoniam nuper est*, defined treason in such a manner as to include Robert's activity (p. 170). When Robert persisted, Henry tried him *in absentia* and declared that he should be beheaded upon apprehension and his lands confiscated (p. 160).

Henry fell ill and died in August 1313, before his conflict with Robert could be resolved. Even so, the whole affair prompted Pope Clement V to issue a series of three decrees: (i) *Pastoralis cura*, issued in March 1314, repudiating the summary procedures established by *Ad reprimendum*;⁶⁴ (ii) *Romani principes*, issued on the same day as *Pastoralis cura*, reminding Henry and his successors of the fealty they owed the papacy;⁶⁵ and (iii) *Saepe*, issued sometime between May 1312 and March 1314, establishing clear rules for summary judicial procedures.⁶⁶

Pope Clement promulgated this legislation against a backdrop of *consilia* literature that largely favored his position.⁶⁷ Pennington finds two *consilia* of Oldradus de Ponte (fl. 1302-1335) particularly important (pp. 178-79). In his first *consilium*, Oldradus argued that a natural right to defend oneself judicially existed by extension of the natural right of self-defense against violent attack.⁶⁸ In the second *consilium*, he argued that the emperor was not *dominus mundi* and so could not charge King Robert's armed opposition as treasonous (pp. 181-82).

These *consilia* form the backdrop to the papal legislation, which

64. CLEM. 2.11.2; p. 171 n.29.

65. CLEM. 2.9.1.

66. CLEM. 5.11.2. Pennington follows Stephan Kuttner's dating of this text. P. 171 n.31 (citing Stephan Kuttner, *The Date of the Constitution 'Saepe': The Vatican Manuscripts and the Roman Edition of the Clementines*, in *MÉLANGES EUGÈNE TISSERANT* 427 (1964)). Kuttner dates the text to between May 6, 1312, and March 21, 1314, "probably closer to the later date." Kuttner, *supra*, at 432.

67. Leading Romanists and canonists wrote *consilia* — essentially learned opinions — in response to particular legal problems. Raoul Naz briefly describes *consilia* in Raoul Naz, *Consilia*, 4 *DICTIONNAIRE DE DROIT CANONIQUE* 354 (Raoul Naz ed., 1949). For a discussion of the juristic response to the controversy between Henry and Robert, see pp. 172-201. On the proportion of proimperial to pro papal responses, see p. 175. While the lawyers seemed to favor the papal position, Dante Alighieri famously defended the imperial position. See p. 175; *THE MONARCHIA OF DANTE ALIGHIERI* (Aurelia Henry ed. & trans., Houghton, Mifflin & Co. 1904) (ms. ca. 1312-1314).

68. "Sicut enim iure nature permissa est unicuique defensio contra extraiudicalem uiolentiam . . . Idcirco in iudicialibus licet iure nature cuilibet se defendere iudicialiter, non iniuriis et obprobriis. . . . [Just as all persons are permitted by natural law to defend themselves against violent nonjudicial attack So by the law of nature all persons are permitted to defend themselves judicially against injury and oppression]" Pp. 180-81 n.84 (quoting OLD RADUS DE PONTE, *CONSILIA* no. 43 (Rome 1472)).

Pennington takes up next. Due process, Pennington maintains, was the preeminent concern of *Pastoralis cura* and *Saepe*. The faculty of self-defense, Clement declared in *Pastoralis cura*, is a part of the natural law, and the emperor may not deprive even his subjects of this right.⁶⁹ In *Saepe*, Clement went on to hold that even in expedited proceedings, "a judge may not omit necessary proofs or legitimate defenses from the proceedings" (p. 189), and the defendant must be properly summoned.⁷⁰

Historians have treated the controversy between Henry and Robert chiefly as a landmark in the development of the new national kingdoms of Europe. They tend to understand the contest to involve a vigorous national king with papal support asserting his independence vis-à-vis an emperor unable to make good on his claims.⁷¹ Pennington only considers this perspective after treating the due process issues. The result is a fresh approach to the orthodox historiography. *Pastoralis cura* was not so much a statement of papal jurisdictional supremacy as a summary of the shape natural law required trials to take. As Pennington notes: "By issuing *Pastoralis*, Clement publicized Henry's errors and instituted new norms for the courts of Christendom. He certainly did not espouse a doctrine that the pope was the secular superior of the emperor or exercised hegemony over him."⁷² *Saepe* simply built on *Pastoralis* by defining the appropriate contours of summary procedure.

Pennington closes his discussion of due process by reviewing the comments of Bartolus of Sassoferrato (1313-1357) on *Ad reprimendum*. Pennington maintains that many of the enormous number of studies on Bartolus have considered him anachronistically. Bartolus had declared that "Whoever would say that the emperor is not lord and monarch of the entire world would be a heretic."⁷³ Modern historians have asked how someone capable of such a proimperial stance could simultaneously favor a propapal interpretation of *Ad reprimendum*, reading it in the light of *Pastoralis cura* and *Saepe* (pp. 197-99). Summarizing Bartolus, Pennington replies:

A judge is obligated to observe all the judicial norms that have been established by the law of nations and natural reason. . . . [A] summons was necessary; after all, God had called Adam to judgment. Petitions, exceptions, delays, and proofs must also always be allowed because natural law had instituted them. Even the legal maxim that someone may

69. CLEM. 2.11.2; p. 188.

70. CLEM. 5.11.2; pp. 189-90.

71. P. 187 & nn.117-20.

72. P. 188. Pennington, however, does not discuss the legal foundation upon which Pope Clement relied in promulgating "new norms for the courts of Christendom."

73. P. 197 (quoting BARTOLUS, LECTURA, DIG. 49.15.24 (manuscript at Munich, Staatsbibliothek)).

not be judged twice for the same crime is a precept of natural law. [pp. 199-200; footnotes omitted]

Bartolus, Pennington thus establishes, must be read neither as a propapalist nor as a proimperialist, but rather as a lawyer chiefly concerned that the norms of due process be respected.

3. *The Pazzi Conspiracy*

Florence in 1478 was munificently governed by the brothers Lorenzo and Giuliano de' Medici. The Florence they governed was the Florence of humanist poetry and philosophy, of clever wordplay and extravagant carnivals. It was also the Florence of intense political intrigue and bitter rivalry with the papacy. Pennington uses the rivalry with the papacy, played out in violence and bloodshed, to test the constitutional principles developed in the prior three centuries.

Lorenzo and Giuliano made more than a few enemies in securing their position atop the Florentine state. Among the most implacable were the Pazzi — an old noble family who, like the Medici, had made its fortune in banking — and Francesco Salviati — the archbishop of Pisa and an old friend of the Pazzi family.⁷⁴ Members of the Pazzi family and Archbishop Salviati entered into a conspiracy to murder Lorenzo and Giuliano, a conspiracy that reached fruition in April 1478, on the Sunday before the Feast of the Ascension, at Mass, in the cathedral of Florence. Some of the conspiracy's ringleaders fatally stabbed Giuliano, probably at the Elevation of the Host, while other conspirators attacked Lorenzo. After fighting off his assailants, a wounded Lorenzo made his way to the cathedral's sacristy, where he reached safety.⁷⁵

Chaos reigned in Florence in the wake of the attack. Medici loyalists attacked and killed members of the Pazzi conspiracy and apprehended Archbishop Salviati. Unknown Medici partisans summarily hanged the archbishop.⁷⁶

The hanging of the archbishop provoked Pope Sixtus IV into action. The pope had likely given at least tacit approval to the Pazzi conspiracy and now brought the full weight of ecclesiastical sanctions to bear on Lorenzo. He excommunicated Lorenzo, both for the hanging of the archbishop and for various other antipapal activities in which Lorenzo had engaged, and placed Florence under papal interdict. Lorenzo responded to the crisis militarily, by making war on the papal state and its allies, and legally, by enlisting the services of some

74. On the Pazzi conspiracy generally, see HAROLD ACTON, *THE PAZZI CONSPIRACY: THE PLOT AGAINST THE MEDICI* (1979).

75. Pp. 238-39; see also ACTON, *supra* note 74, at 60-71 (providing further details concerning the attack).

76. Pp. 238-39; see also ACTON, *supra* note 74, at 72-73 (graphically describing the attack's aftermath).

of the leading lawyers of his time to prepare a defense for his actions.⁷⁷ Pennington focuses his attention on the legal aspects of this controversy.

The jurists Lorenzo enlisted in his cause concentrated on the question of whether the pope had the power to dispense with the procedural norms established by *Pastoralis cura* and *Saepe*. Pope Sixtus, after all, had imposed his sanctions against Lorenzo and Florence without a hearing or any other attempt at due process. The jurists resoundingly rejected the legality of Sixtus's actions.

Pennington indicates that at least four of the *consilia* Lorenzo solicited survive. Pennington reviews the arguments found in all four (pp. 242-68). Two *consilia* require special mention. Francesco Accolti (1416-1484), who was, according to Pennington, "the greatest living jurist," authored the first of these (p. 248).

Accolti concentrated on the elements of due process that Pope Sixtus apparently violated. Accolti stressed the requirement that the Pope summon Lorenzo to the papal court before imposing ecclesiastical sanctions upon him. The pope was powerless to suspend the rules laid down in *Pastoralis cura*. As Pennington notes, summarizing Accolti:

Divine law established the summons to court. God's calling Adam and Eve to judgment in the Book of Genesis is certain proof of the summon[s]'s] divine origins. Neither the pope nor the emperor can dispense with this part of the judicial process because no one can ignore a precept of divine law. [p. 252]

The second jurist of significance retained by Lorenzo was Bartolomeo Sozzini (1436-1507). Sozzini compared Pope Sixtus's position to that of Henry VII. Like Henry's judgment against Robert, the pope's judgment lacked ripeness (*non maturo fuit iudicio*) (p. 254). Sozzini rejected the possibility that the pope could have removed Lorenzo's right to due process through an exercise of his absolute power. The pope was powerless to violate the natural law in this way. Sozzini anticipated that Pope Sixtus might argue that the notoriety of Lorenzo's act empowered him to excommunicate Lorenzo. Such a claim could not be maintained, Sozzini argued, because the pope could excommunicate in a notorious case only when he had certain knowledge of the offense. Sozzini illustrated what he meant by "certain knowledge" by giving the example of a crime committed in the pope's presence. The pope might judge a defendant in such circumstances without first giving him a hearing, Sozzini conceded, but even then must proceed cautiously, because God had certain knowledge of Adam and Eve's offense and still gave them a hearing (pp. 256-57).

Pennington closes the main part of his book with the Pazzi conspiracy. The juristic response to Pope Sixtus IV's brazen manipula-

77. Pp. 239-68; see also ACTON, *supra* note 74, at 98-112.

tion of ecclesiastical sanctions stands as a synthesis of prior developments. Pennington is unable to find a single *consilium* prepared in defense of the papal action. A consensus was reached regarding due process and the exercise of arbitrary authority. Absolute power could not trump the right to due process. A sophisticated set of safeguards around the power of governance prevented it from overflowing its banks. A given ruler might still act in an extraconstitutional manner, as Pope Sixtus IV did, but jurists would bring the weight of the law to bear against such a ruler.

Pennington concludes with a brief review of the fate of due process arguments in the sixteenth century. He singles out Bartolomé de Las Casas (1474-1566) and Jean Bodin (1530-1596) for special scrutiny. Las Casas apparently received considerable training in the law⁷⁸ and is famous for his defense of the rights of the indigenous peoples of Latin America against the Spanish. Las Casas's assertion that the Spanish conquest of the New World unjustly deprived the native peoples of *dominium* over their territories is relatively well known.⁷⁹ Pennington establishes, however, that Las Casas based a substantial part of his argument on considerations of due process. The deprivation of *dominium* that occurred in the New World could not have been legitimate, Las Casas argued, because the Spanish never served the Indians with a summons or permitted a defense of their cause. In sanctioning the conquest, the pope violated the natural law as articulated in *Pastoralis cura*.⁸⁰

Pennington argues that we must also understand Jean Bodin against the backdrop of the sophisticated theories of due process that developed in the preceding three hundred years. Bodin favorably cited Panormitanus, Baldus, Bartolus, and other jurists in asserting that the prince could not arbitrarily deprive his subjects of property (p. 281). Furthermore, Pennington demonstrates, Bodin limited the power of the monarch by asserting that the prince could not be a judge in any case that affected his interests (p. 280 n.48). This limitation on royal

78. See Kenneth J. Pennington, Jr., *Bartolomé de Las Casas and the Tradition of Medieval Law*, 39 CHURCH HIST. 149, 151 (1970).

79. See, e.g., Tierney, *Aristotle*, *supra* note 55.

80. Las Casas wrote:

Potest etiam supplere juris defectus et solemnitatum quae non sunt fundatae in jure naturali; nec valet si dicat princeps vel papa in sua dispositione suppletentes omnem defectum ex plenitudine potestatis, quia intelliguntur defectus juris civilis mere non autem naturalis . . . vt in Clemen. Pastoralis . . . [It is possible to supply defects of law or solemnity that are not founded in natural law; but it would not be valid if the prince or pope in the disposition of a case supplied every defect from their fullness of power, because they are understood to remedy defects arising merely from civil law, but not natural law . . . as in Clement's *Pastoralis* . . .]

BARTOLOMÉ DE LAS CASAS, LOS TESOROS DEL PERU 402, 404 & n.650 (Angel Losada ed. & trans., 1958); see also pp. 272-73 & n.13 (detailing the evolution of Pennington's thought on this subject).

power, Pennington asserts, restricted sovereign power much more extensively than most of Bodin's predecessors recognized.

Pennington's observations are original and important. He clearly wishes to demonstrate the essential continuity of the sixteenth century with the preceding three hundred years. Certainly, we can find much continuity. But Pennington omits any consideration of the Lutheran Reformation and its effect on the course of the Western legal tradition. In fact, the Lutheran Reformation changed Western law in some profound and lasting ways, which should not be surprising, given the revolutionary character of Martin Luther's challenge to papal jurisdiction.⁸¹

II. THE WESTERN LEGAL TRADITION AND WESTERN CONSTITUTIONALISM

Pennington's book, and the use of the expression *Western legal tradition* in the subtitle, prompts a number of different questions. The expression receives no mention in the book itself. Readers are led to ask: What precisely is the Western legal tradition? How does Pennington's book contribute to a deeper understanding of it? How does medieval constitutionalism fit within this tradition? Each of these questions will be taken up in turn.

A. *The Western Legal Tradition*

One might begin with Harold Berman's use of the term *Western legal tradition*, since he first brought it to prominence.⁸² Although the term *the West* has any number of meanings, in the context of the expression *Western legal tradition*, the West, as Berman shows, must be the civilization that acquired critical mass beginning in the late eleventh and early twelfth centuries.⁸³

81. On the impact of the Lutheran Reformation on the Western legal tradition, see Harold J. Berman, *Law and Belief in Three Revolutions*, 18 VAL. U. L. REV. 569, 572-90 (1984); Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1575 (1989); Berman & Reid, *supra* note 7.

82. See BERMAN, *supra* note 2.

83. Describing the stance the West took toward its past, Berman states:

As a historical culture, a civilization, the West is to be distinguished not only from the East but also from "pre-Western" cultures to which it "returned" in various periods of "renaissance." Such returns and revivals are characteristic of the West. They are not to be confused with the models on which they drew for inspiration. "Israel," "Greece," and "Rome" became spiritual ancestors of the West not primarily by a process of survival or succession but primarily by a process of adoption: the West adopted them as ancestors. Moreover, it adopted them selectively — different parts at different times. Cotton Mather was no Hebrew. Erasmus was no Greek. The Roman lawyers of the University of Bologna were no Romans.

The West, from this perspective, is not Greece and Rome and Israel but the peoples of Western Europe turning to the Greek and Roman and Hebrew texts for inspiration, and transforming those texts in ways that would have astonished their authors.

Id. at 2-3.

The term *moderni* came to refer to contemporary persons and events in the late eleventh and twelfth centuries, in the context of the papal revolution.⁸⁴ Basic cultural institutions such as universities are traceable to the aftermath of the papal revolution. Indeed, the West received its basic shape at this time. The West was, and largely remains, the culture coterminous with that part of Europe from Poland to Ireland, and from Scandinavia to Sicily, that was predominantly Roman Catholic in the twelfth through fifteenth centuries, large portions of which became Protestant as the result of the Reformation.⁸⁵ The culture of the West would eventually spread to quite distant parts of the world, such as the Americas, but geographic distance did not prevent close contact or cross-fertilization from taking place.

This point leads to the second element of the expression *Western legal tradition* — it is about law. Modern law has its roots in the scholastic method or science invented by Peter Abelard and perfected by his successors beginning in the early twelfth century:

[T]he new science was the product of a new method, the method of *dialectic* [reasoning] . . . Underlying this was a new mode of analysis and synthesis that was first applied to law and theology. This method “presupposes the absolute authority of certain books,” which are taken to be fully complete, “but paradoxically[,] it also presupposes that there may be both gaps and contradictions” in the text, the solution to which is attained in the *resolutio* of the dialectical reasoner. This is the dialectical method which “seeks the reconciliation of opposites.”⁸⁶

Berman establishes that the application of this method to legal texts “revolutionized” law and, in effect, created Western legal science:

[T]he European jurists who revived the study of Roman law in the eleventh and twelfth centuries set out to systematize and harmonize the huge network of Roman legal rules in terms both of general principles and of general concepts, using methods similar to those which their colleagues in theology were employing to systematize and harmonize the Old and New Testaments, the writings of the church fathers, and other sacred texts. The jurists took as a starting point the concept of a legal concept and the principle that the law is principled.

This amounted to much more than the addition of a philosophical

84. On the invention of the term *moderni*, see Harold J. Berman, *The Roots of Modernity in the Western Legal Tradition* (unpublished manuscript, on file with author). The period 1050-1200 gave rise to a new concept of individualism that has endured to the present. See generally COLIN MORRIS, *THE DISCOVERY OF THE INDIVIDUAL, 1050-1200* (1972); John F. Benton, *Consciousness of Self and Perceptions of Individuality*, in *RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY*, *supra* note 16, at 263, 264 (examining literary, legal, and religious sources for evidence of a new sense of self-awareness in the twelfth century).

85. See BERMAN, *supra* note 2, at 2.

86. TOBY E. HUFF, *THE RISE OF EARLY MODERN SCIENCE: ISLAM, CHINA, AND THE WEST* 129 (1993) (quoting BERMAN, *supra* note 2, at 131) (footnote omitted). For Peter Abelard's contribution to the formation of the Western legal tradition, see BERMAN, *supra* note 2, at 139-43.

dimension to the more practical style of the Roman texts; it fundamentally changed the very meaning of everyday legal questions, such as, "What are my rights if my debtor does not pay up?" The Roman rules might still be cited, but they would be subject to interpretation in the light of their perceived underlying purposes and their perceived relationship to other parts of the whole system. For example, whereas the Roman rule might require the debtor to pay even if he had a valid counterclaim, leaving him to pursue his remedy against the creditor in a separate action, the European Romanists and canonists would apply the concept of mutuality of contractual obligation, based ultimately on the principle of good faith.⁸⁷

Reliance on the dialectical method has led the Western legal tradition to quest after synthesis since its very creation. As Berman notes: "In the Western legal tradition law is conceived to be a coherent whole, an integrated system, a 'body,' and this body is conceived to be developing in time, over generations and centuries."⁸⁸

Finally, the Western legal tradition should be seen as ongoing. It is a tradition.⁸⁹ From the twelfth century onward, lawyers understood the developmental nature of their subject matter. Some, like the English common lawyers of the seventeenth and eighteenth centuries, advanced sophisticated theories to demonstrate the essential continuity of the law despite the necessity of legal change.⁹⁰ Others, like the canonists and Romanists of the twelfth through fifteenth centuries, did not, for the most part, articulate their thoughts on the nature of legal development. Nevertheless, such a commitment was part and parcel of their faith in the law. This commitment was implicit in the language the jurists used to refer to those predecessors they considered particularly distinguished — "master [*magister*]" and "lord [*dominus*]."⁹¹

The Western legal tradition has endured to the present day, although, as Berman indicates, its continued survival is in doubt.⁹² Pennington's book is a welcome contribution to our knowledge of the early stages of the Western legal tradition, as its constitutional order began to take shape. One feels the generations move by slowly, as the

87. BERMAN, *supra* note 2, at 150. This *dialectical* method characterized canonistic as well as Romanist thinking. See *id.* at 143-48. The Western legal tradition that emerged in the late eleventh and twelfth centuries had some novel features. *Id.* at 7-10.

88. *Id.* at 9.

89. The Western legal tradition constitutes a *single* tradition. The systems of royal law that began to emerge in the twelfth century were a *part* of this larger tradition. See *id.* at 404-519. It is thus a mistake to assert, as von Mehren does, that there are "two Western legal traditions." See ARTHUR TAYLOR VON MEHREN, *LAW IN THE UNITED STATES: A GENERAL AND COMPARATIVE VIEW* 3 (1989).

90. See generally Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994).

91. The word *magister* means "master." See CHARLTON T. LEWIS & CHARLES SHORT, *A NEW LATIN DICTIONARY* 1097 (1907).

92. On the crisis of the Western legal tradition, see BERMAN, *supra* note 2, at 33-41.

answers to Frederick's question about whether he is "lord of the world" become more refined. The debates and dialectics that shaped the basic structure of these replies are thoroughly, one might even say lovingly, reconstructed. From the first to the last page, one senses that the lawyers of the twelfth through fifteenth centuries were, for the most part, deeply conscientious men, searching to ground order and to restrain arbitrariness on transcendent legal principles.

But at the same time, the reader unfamiliar with the story Pennington tells might see the whole account as exotic and foreign from contemporary needs. The deep connections that bind twentieth-century jurists with their twelfth-century predecessors are sometimes obscure. This obscurity may result from reliance upon the adjective — *medieval* — traditionally used to denominate the period between the Fall of Rome and the Renaissance.

B. *Medieval Constitutionalism or Western Constitutionalism?*

Expressions like *medium aevum*, *moyen âge*, and *middle ages* made their appearance in the sixteenth century as polemical devices. Writers used these terms to distinguish the humanist rebirth or the Protestant Reformation then occurring from the "abyss, thick with the fogs and swamps of 'dark ages'" and papal domination.⁹³

The expressions *middle ages* and *medieval* became a fixed part of the scholarly vocabulary with the publication of such basic works as Du Cange's *Glossarium ad Scriptores Mediae et Infimae Latinitatis* [*Glossary to the Writers of Medieval and Late Latin*] in 1678.⁹⁴ The repeated use of *medieval* by some of the most important of the eighteenth- and nineteenth-century historians only cemented its seeming appropriateness.⁹⁵

Accordingly, when the great constitutional historians of the early and middle twentieth century — John Figgis, for instance, or Walter Ullmann — wrote their histories of the constitutional thought of the twelfth through fifteenth centuries,⁹⁶ their work would come to be known as "medieval constitutionalism." Pennington's work fits squarely within this tradition, and he repeatedly uses terms like *medie-*

93. Nathan Edelman, *The Early Uses of Medium Aevum, Moyen Age, Middle Ages*, 29 ROMANIC REV. 3, 3 (1938). See generally GEORGE S. GORDON, *MEDIUM AEVUM AND THE MIDDLE AGE* (1925); PAUL LEHMANN, *VOM MITTELALTER UND VON DER LATEINISCHEN PHILOLOGIE DES MITTELALTERS* (1914) (vol. 5, *Heft 1* of QUELLEN UND UNTERSUCHUNGEN ZUR LATEINISCHEN PHILOLOGIE DES MITTELALTERS).

94. See Edelman, *supra* note 93, at 16-17.

95. See generally GEOFFREY BARRACLOUGH, *Medium Aevum: Some Reflections on Mediaeval History and on the Term "The Middle Ages,"* in HISTORY IN A CHANGING WORLD 54 (1955).

96. See, e.g., JOHN NEVILLE FIGGIS, *FROM GERSON TO GROTIUS* (1916); JOHN NEVILLE FIGGIS, *THE THEORY OF THE DIVINE RIGHT OF KINGS* (Cambridge, Cambridge Univ. Press, 1896); WALTER ULLMANN, *JURISPRUDENCE IN THE MIDDLE AGES* (1980); WALTER ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES* (1975); WALTER ULLMANN, *THE INDIVIDUAL AND SOCIETY IN THE MIDDLE AGES* (1966).

val to describe it. But does the use of a term like *medieval constitutionalism* contribute to an understanding of the past or cloud some basic features of it?

It seems that the term *medieval* does indeed obscure some important historical facts — chief among them, for our purposes, the close historical relationship between the traditional subject matter of medieval constitutionalism and the larger Western legal tradition. If the “Middle Ages” consist of “fogs” and “swamps” preceding a humanist or a Protestant rebirth, then one is committed, by the very language one uses, to minimizing the importance of the “Middle Time.” But to minimize the importance of the twelfth through fifteenth centuries does violence to the whole notion of a Western legal tradition, one of whose essential ingredients is continuity from the twelfth century to the present.

Most, probably all, “medievalists” would agree with the main lines of this argument.⁹⁷ In truth, Pennington’s concerns — constitutional limitations on sovereign power, rights, and due process — are not strange and exotic antiques, but questions of driving importance to today’s lawyers.

C. *The Contemporary Significance of Pennington’s Project*

Like a diptych, a pair of contemporary debates that might be illuminated by Pennington’s story opens and closes his book. Pennington begins with the Iran-Contra affair, asserting that the “rule of law” threatened by that scandal has a far deeper history than commonly assumed (pp. 1-2). He closes his story with the trial of two East German border guards convicted of killing someone trying to escape to the West (pp. 289-90). The principles vindicated in that trial originated in the legal controversies of the twelfth and succeeding centuries.

Indeed, Pennington’s story can help inform contemporary debates about due process, rights, and the rule of law. The desire to limit governmental arbitrariness, which is an essential ingredient of contemporary notions of due process, derives from the earliest formative era of the Western legal tradition.⁹⁸ Pennington’s work soundly refutes the mistaken belief held by many common lawyers that only the com-

97. Thus Barraclough states:

There never was a “Middle Ages” But once we have this idea of the Middle Ages in our head, we become its prisoner. We write our history to accord with it, leaving out (for we cannot write history at all without leaving out) what seems untypical of the Middle Ages; we even create an abstraction, “mediaeval Man,” and talk of his ideas and outlook, as though a man in the tenth and a man in (say) the thirteenth century must have the same ideas and outlook.

BARRACLOUGH, *supra* note 95, at 56.

98. See Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 4 (1992) (“Due process . . . is a set of stories, texts, and values which have been handed down over 700 years to regulate the relationships between people and government.”).

mon law system was historically concerned with due process, while continental systems, shaped by Romanist despotism, exalted the unrestrained power of the state. Similarly, the Western preoccupation with rights is not a product of seventeenth-century possessive individualism. It is simply a mistake to assert that "natural rights conceptions were conceived in radical individualism."⁹⁹ Jurisprudential writers who continue to hold this belief need to be corrected. Most importantly, however, is the sense of organic connection one feels after putting down Pennington's book. Constitutionalism is part of the core of the Western legal tradition. Frederick Barbarossa speaks directly to us when he asks: "Am I, by law, the lord of the world?" We must revisit our past as we attempt to answer this question for ourselves, and for the future.

99. Horwitz, *supra* note 51, at 399.