Why (Almost) Everything that Happened was Constitutional: Towards a New Paradigm for Constitutional Theory and History with Case Studies on the English Royal Minorities

Submitted by Stephen Michael Gates to the University of Exeter
as a thesis for the degree of
Doctor of Philosophy in Law
In October 2019

I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

Signature: ……..

Abstract

This thesis is a defence of constitutional history – a once prosperous field of study in the UK, but now fallen into disrepute and neglect. The first question addressed by this thesis, therefore, is: Why has constitutional history fallen from favour? It is argued that it is principally due to a fundamental and widespread misunderstanding as to the nature of constitutions and laws, and how these things change over time. Moreover, it is due to the field's association with a group of nineteenth-century writers, elements of whose approach and assumptions have – rightly – come to be regarded as outmoded and distasteful. These things need to be put aright if constitutional history is to be revived. Certainly, there has been some movement to resurrect the field, but this is unlikely to be successful or profitable without a solid underlying constitutional theory. This is still lacking.

This thesis, therefore, seeks to provide that solid underlying constitutional theory. It does so by suggesting an interpretative framework for constitutional theory and history in Part I. This consists of three theories: the Theory of Constitutional Ubiquity; the Associational Theory of Law; and the Generational Theory of Law. These are complemented by a chapter on the theory of succession and two appendices. Together, these argue that all societies – regardless as to time or place – have constitutions, which can and do change over time. Consequently, there is no reason why constitutional history should be disregarded. That it has been is regrettable.

Parts II and III seek, firstly, to show the framework's validity and explanatory power, and, secondly, to show how constitutional history might look in the future. They do this by considering constitutions in, primarily, mediaeval thought and practice – the mediaeval period being a time in which the existence of constitutions is often dismissed or, at least, viewed with considerable scepticism. Part II, concerning mediaeval thought, argues that people throughout the mediaeval period were primed to think about constitutional matters. Part III considers mediaeval and early modern practice through the lens of succession and governance *vis-à-vis* the royal minorities of mediaeval England. It argues that contemporary practice shows clear regard for what can rightfully be called a constitution, though it changed from generation to generation.

Having charted constitutional history's rise and fall, and having made the argument for its resuscitation based on the principles set out in the framework, the thesis concludes by considering constitutional history's future. There is, or seems to be, cause for optimism.

Acknowledgements

I would like to extend my thanks in several directions. First, to those involved in the Clifford Parker Memorial Scholarship, without which financial support I could not have undertaken a course of doctoral study. Second, to my friends and colleagues (in Exeter, Sidmouth, and elsewhere), as well as to my sometime students, who have often provided a welcome and much-needed distraction from my academic studies. Third, to my supervisors – Anthony Musson and Richard Edwards – for their advice and guidance. Fourth, to the various faculty members, administrators, etc. who have helped to resolve my queries, etc. along the way.

Finally, to my parents – without whose help and support I could not have begun, let alone finished, a doctoral degree.

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a.	after	bf.	before
a.d.	ante diem (the day before)	*c.*/ca.	circa
AD	Anno Domini	CE	Common Era
b.	born	d.	died
BC	Before Christ	nd.	no date
BCE	Before the Common Era	r.	reigned

Titles

Abp.	Archbishop (of)	E.	Earl (of)
Bn.	Baron/Baroness (of)	K.	King (of)
Bp.	Bishop (of)	Kt.	Knight
Capt.	Captain (of)	L.	Lord/Lady (of)
Card.	Cardinal	P.	Prince/Princess (of)
Ct./Ctss.	Count/Countess (of)	Q.	Queen (of)
D./Dss.	Duke/Duchess (of)	St.	Saint

N.B. One convention here adopted for signifying monarchs *before* their accession is the affixation of their regnal number in square brackets after their names. Thus, Henry [IV] denotes Henry Bolingbroke as he was *before* his accession as Henry IV.

Kinship

cuz.	cousin (of)
br.	brother (of)
dau.	daughter (of)
decd.	deceased
div.	divorced (in/on)
dsp.	*decessit sine prole* (died without issue)
dspl.	*decessit sine prole legitima* (died without legitimate issue)
dspms.	*decessit sine prole mascula supersita* (died without surviving male issue)
dsps.	*decessit sine prole supersita* (died without surviving issue)
f.	father (of)
h.	husband (of)
j.m.	*jure matris* (in the right of one's mother)
j.u.	*jure uxoris* (in the right of one's wife)
m.	married (to/in/on)
mo.	mother (of)
neph.	nephew
s.	son (of)
sis.	sister (of)
unc.	uncle (of)
unm.	unmarried
w./wf.	wife (of)

1 – Constitutional History's Rise and Fall

1.1 Introduction

This is a defence of constitutional history. The field was once prosperous and well-respected in Britain.[1] Indeed, it played a pivotal role in establishing History as a discipline in its own right, lending it 'academic respectability'.[2] However, whilst academic interest in constitutional history persists elsewhere,[3] that same interest is conspicuously lacking in Britain. Since the mid-twentieth century, the field of constitutional history has fallen into disrepute,[4] particularly among historians. As Carpenter has said, "many late mediaevalists would like to deny its existence all together".[5]

The obvious question, therefore, is: Why has constitutional history fallen so far from favour? The purpose of this chapter is to outline the field's development and to begin to consider the reasons for its decline. As will be seen, many factors were at work. However, as argued across this chapter and the next, one factor stands before all others: It is the ways in which constitutions and laws have been understood and interpreted, both regarding *what they are* and *how they change over time*, even to the point of

[1] Cosgrove has gone so far to say that constitutional history, alongside legal history, "reigned as the historical subdiscipline whose status overshadowed other fields of historical inquiry". Indeed, it was "perhaps the most prestigious form of historical inquiry on both sides of the Atlantic": Richard A Cosgrove, "The Culture of Academic Legal History: Lawyers' History and Historians' Law 1870-1930," *Cambrian Law Review* 33 (2002): 23.

[2] Christine Carpenter, "Political and Constitutional History: Before and After McFarlane," in *The McFarlane Legacy: Studies in Late Medieval Politics and Society*, ed. RH Britnell and AJ Pollard (Alan Sutton Publishing Ltd, 1995), 177.

[3] One need only look at the wealth of scholarship on the constitutional history of the Constitution of the United States for ample demonstration of this; one might also consider *Verfassungsgeschichte* (literally, 'constitutional history') in Germany, which charts how the German Basic Law (*Grundgesetz*) came about; see, e.g., Werner Frotscher and Bodo Pieroth, *Verfassungsgeschichte*, 7th ed. (CH Beck, 2008); Reinhold Zippelius, *Kleine Deutsche Verfassungsgeschichte: Vom Frühen Mittelalter Bis Zur Gegenwart*, 7th ed. (CH Beck, 2006).

[4] As Cogrove has said, constitutional history "stands far down the list of preferred historical specialities and many readers may have suffered the approach of colleagues that you must be brain dead to work in such an unfashionable field": Cosgrove, "Culture of Academic Legal History," 23. Moreover, as he was later to write with Brundage: "Scholars continue to work in mediaeval constitutional history in particular, as well as legal and constitutional history in general, are likely to draw pity from colleagues." Anthony Brundage and Richard A Cosgrove, *The Great Tradition: Constitutional History and National Identity in Britain and the United States, 1870-1960* (Stanford University Press, 2007), 232.

[5] Carpenter, "Political and Constitutional History: Before and After McFarlane," 175. This has caused some researchers, if not to disassociate themselves from constitutional history, to at least accept that it is an artefact of a bygone era. Something of this can be seen on George Garnett's academic profile on the University of Oxford's Faculty of History's website, where it says that "[h]is first research interests lay in English history of the tenth to thirteenth centuries, specifically what *used to be called* constitutional history." https://www.history.ox.ac.uk/people/professor-george-garnett#tab-270791 [Accessed 22 April 2019](emph. added).

misunderstanding. Indeed, it was the misunderstandings underpinning the writings of the constitutional historians of the nineteenth and early-twentieth centuries that, as much as anything else, contributed to the field's decline;[6] their misunderstanding blackened the field's reputation, even in spite of its overwhelming value.

This thesis seeks to redress this misunderstanding. It does so by setting out a solid constitutional theory (i.e. a solid interpretative framework) to underpin any future work – not only in constitutional history, but all fields interacting with constitutions. It is vital to do this,[7] and to do so before discussing anything else,[8] because it fundamentally affects the shape and direction of constitutional discourse. It determines the permissible and pertinent techniques of study and avenues of enquiry;[9] what is selected for inclusion, the manner of its inclusion, the vocabulary that is used,[10] and general tone.[11] Indeed, it determines whether or not constitutional history is a valid pursuit.

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[6] As Watts has said: "Scepticism about Victorian views of the constitution and of its productive role in the politics of periods other than the later middle ages has led political historians to reject the whole notion of an integrated, national and self-conscious political body which the constitutional approach assumes. The result, as McFarlane famously noted in 1938, was that the collapse of the 'Stubbsian framework' was followed not by the erection of 'a new order', a new model for the understanding of contemporary political and governmental arrangements, but instead by a state of 'anarchy'. In many respects, this state persists today." John Watts, *Henry VI and the Politics of Kingship* (Cambridge University Press, 1999), 3. Cf. KB McFarlane, *The Nobility of Later Medieval England* (Oxford University Press, 1973), 279ff.

[7] As Jouanjan has rightly said, "constitutional history not only needs historical methods, it also requires a constitutional legal theory": Olivier Jouanjan, "What Is a Constitution? What Is Constitutional History?," in *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, ed. Kelly L Grotke and Markus J Prutsch (Oxford University Press, 2014), 323. I would disagree with Jouanjan when he follows Carl Schmitt and says "[e]very fundamental concept in constitutional law is…but a secularized theological concept", although, as it will be seen, I would argue that he was nevertheless correct in concluding that belief and faith, though not in the religious sense, are at the heart of constitutions around the world and that "Everyone has to imagine his own personal constitution": Jouanjan, "What Is a Constitution? What Is Constitutional History?," 331.

[8] Loughlin and others have drawn on the metaphor of 'theories as maps'; they help to orientate us and give us our bearings. It is better to have even a rough map before setting out than to have no map at all. See: Martin Loughlin, *Public Law and Political Theory* (Oxford University Press, 1992), 37–38. Obviously, if a map is to be accurate and useful, it must be developed as the territory it delineates and describes is explored; if it is not, then it will be but fantasy and speculation. I should not wish to give any impression, therefore, that the theoretical chapters of this thesis were developed in any way in isolation. They were developed in tandem with the historical sections and through wider reading, which things often forced me to revisit my theoretical ideas; to correct, refine, and improve them.

[9] Cf. Peter J Bowler, *Evolution: The History of an Idea*, 2nd ed. (University of California Press, 1989), 16.

[10] The provision of definitions is a crucial element to any intellectual enterprise, much as Bodin said: "For a definition is nothing else than the very end and scope of the matter propounded, which if it be not well and surely grounded, whatsoever you build thereupon must together and in a moment fall." Jean Bodin, *The Six Bookes of a Commonweale*, trans. Richard Knolles (Impensis G Bishop, 1606), 1 [1.1].

[11] Cf. Hayek: "Social theory, in the sense in which I use the term, is, then, logically prior to history. It explains the terms which history must use. This is, of course, not inconsistent with the fact that historical study frequently forces the theorist to revise the constructions or to provide new ones in terms of which he can arrange the information which he finds. But in so far as the historian talks, not merely about the individual actions of particular people but about what, in some sense, we can call social phenomena, his facts can be explained as facts of a certain kind only in terms of a theory about how its elements hang

Part I, therefore, sets out three complementary theories that are intended to provide this interpretative framework and which together move towards something of a new paradigm. The first, concerning the nature of constitutions, is called the Theory of Constitutional Ubiquity; the second, concerning the nature of laws, is called the Associational Theory of Law; and the third, concerning how constitutions and laws change over time, is called the Generational Theory of Law. Together, these argue that *all* societies have constitutions, which *can* and *do* change over time. There is no time or place to which constitutional history is unsuited. Part I is concluded with a further theory, the Tripartite Theory of Succession, which concerns a crucial aspect of constitutions – how positions within groups are transferred from one individual to another. This will be particularly useful when it comes to the case studies later in the thesis.

It should be said that the ideas set out in Part I are not necessarily new in all of their particulars. Indeed, as can be seen from the volume of the footnotes and bibliography, I am in a great many ways indebted to the work of a great many people. However, if constitutional history is to be revived and placed on a solid footing, it is necessary for there to be a coherent and considered expression, as well as fusion, of all of these ideas. The aim of Part I, therefore, is to weave them together, and to synthesize and systematize them, adding in my own contributions where possible. Furthermore, it is to provide a defence where necessary of some of them, especially that of memetics (see Chapter 4).[12]

Having laid down the foundations in the first part, Parts II and III seek, firstly, to show the veracity and value of these theories through their application to history;[13] secondly, to give a sense of what constitutional history might look like in the future. To do this, I have chosen to focus on mediaeval thought and practice, and, more specifically regarding the latter, the royal minorities of mediaeval England. I chose the mediaeval period

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together. The social complexes, the social wholes which the historian discusses, are never found ready given as are the persistent structures in the organic (animal or vegetable) world. They are created by him by an act of construction or interpretation – a construction which for most purposes is done spontaneously and without any elaborate apparatus. But in some connections where, for example, we deal with such things as languages, economic systems, or bodies of law, these structures are so complicated that, without the help of an elaborate technique, they can no longer be reconstructed without the danger of going wrong and being led into contradictions." Friedrich August Hayek, *Individualism and Economic Order* (The University of Chicago Press, 1948), 72.

[12] Part I is also complemented by Appendices I and II. The first of these outlines how the Theory of Constitutional Ubiquity relates to corporations and States; the second to how the Framework ties in with ideas of the Rule of Law.

[13] It is hoped that it will pass Loughlin's tests of credibility, coherence, and utility. See: Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000), 21.

because, as has already been seen, there is some belief that it and constitutional history are incompatible. To show that they are, in fact, *compatible* would go a long way to rehabilitating constitutional history's reputation.

Part II concerns mediaeval thought and seeks to demonstrate that people during the period conceived of the world in constitutional terms. Part III concerns mediaeval practice and seeks to demonstrate that people during that time, as evidenced by their behaviours, clearly had a regard for constitutional principles and frameworks; for what can rightfully be called constitutions. This is demonstrated through two case studies presented in Chapters 8 and 9.[14] Chapter 8 focuses on the matter of royal succession and, more specifically, *transmission*; Chapter 9 focuses on government and, more specifically, *provision*.[15] All of this is designed to show that there is no reason why constitutional history cannot be pursued as an object of study in these ages – that constitutional history is a valid and valuable pursuit.

Having charted constitutional history's rise and fall, and having made the argument for its revival based on the framework set out in Part I, the thesis concludes by considering the future of constitutional history. The thesis begins, therefore, by looking to the past and ends by looking to the future. There is reason for optimism.

It is perhaps worthwhile saying something about the development of this thesis. It was always going to be a mixture of theory and history; the historical part was always going to focus on the royal minorities. One of the principal reasons for choosing the royal minorities was that little work has been done specifically on them heretofore,[16] and even

[14] In writing these, I have principally relied upon secondary sources, although I have attempted to familiarize myself with and cite the primary sources where possible.

[15] The terms *transmission* and *provision* will, naturally, be explained in due course and in the proper place. It can be noted that Chapter 9 is complemented by Appendix III, which discusses the concepts of regency and minority.

[16] Henry III's minority is probably the one that has received the most targeted and direct attention, e.g.: Kate Norgate, *The Minority of Henry the Third* (Macmillan & Co. Ltd., 1912); David A Carpenter, *The Minority of Henry III* (University of California Press, 1990); GJ Turner, "The Minority of Henry III. Part I," *Transactions of the Royal Historical Society* 18 (1904): 245–95; GJ Turner, "The Minority of Henry III. Part II," *Transactions of the Royal Historical Society* 1 (1907): 205–62. For the most part, the discussion of the other minorities has been subsumed within broader narratives. See, e.g.: W Mark Ormrod, *Edward III* (Yale University Press, 2011); Nigel Saul, *Richard II* (Yale University Press, 1999); Bertram Wolffe, *Henry VI*, Yale English Monarchs (Yale University Press, 2001); Ralph A Griffiths, *The Reign of King Henry VI*, 2nd ed. (Sutton Publishing, 1998). Naturally, because Edward VI did not outlive his minority, any work discussing his reign necessarily treats only his minority. See, e.g.: Jennifer Loach, *Edward VI*, ed. George Bernard and Penry Williams (Yale University Press, 2002). For a recent, comparative study of mediaeval royal minorities, see Ward's PhD thesis: Emily Joan Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250" (University of Cambridge, 2018). Further, for a volume in which all of the post-Conquest minorities are discussed – though not compared or particularly considered

less attention has been given to their constitutional dimension.[17] However, having found no (satisfactory) integrated constitutional theories that could have facilitated quick passage to the historical analysis, I found it necessary to develop the theories set out in Part I. After all, as has already been argued, such historical analysis would have been of questionable value without a solid underlying theory to support it – particularly in light of the current opposition to constitutional history. As this had to be done properly, the theoretical section naturally expanded to the expense of the historical section. Nevertheless, it was important that the historical chapters retained their place – both for their intrinsic and instrumental value.[18]

This thesis is very much future-facing – looking forward to a revival of constitutional history. However, to fully appreciate the current state of the field and to ensure that it moves forward appropriately, one must first understand its background. This is where we begin.

1.2 Course of Constitutional History

If one were to chart on a graph the interest in, and significance of, the field of constitutional history, one would be faced with a bell curve.

Phase I presents a relatively flat line throughout the seventeenth and eighteenth centuries, during which time the history of the constitution was often touched upon, but incidentally. It is difficult to say that constitutional history was a field in its own right at this time. *Phase II* begins in the first quarter of the nineteenth century: the history of the constitution came to be studied by a group of scholars that can comfortably labelled as 'constitutional historians'. Throughout the remainder of the nineteenth century, the field experienced a marked and steady rise. However, around the turn of the twentieth century, interest in the field began to peter out. It then entered *Phase III*: terminal decline. Since the 1960s, it has lived a half-life, operating at the fringes of political and historical analysis. Arguably, this represents *Phase IV*.[19] The following sections explain this process in more detail.

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from any legal or constitutional angle – see: Charles Beem, ed., *The Royal Minorities of Medieval and Early Modern England* (Basingstoke: Palgrave Macmillan, 2008).

[17] I attempted to start to address this gap in my MA thesis, which was a study of the constitution during Henry III's minority: Stephen Gates, "The Nature and Identity of the Constitution during the Minority of Henry III (1216-1227)" (University of Exeter, 2014).

[18] The reasons for focusing on the royal minorities is resumed and expanded at 8.1.

[19] This pattern of rise and fall is broadly in keeping with that identified by Brundage and Cosgrove: "Our argument concludes that the status of English constitutional history rose in the 1870s concurrently with new standards of historical research to prominence that peaked before 1914. After World War I, its place as the

1.2.1 Early Modern Antiquarians

The early modern antiquarians were a diverse group with diverse interests. They include Lambarde, Camden, Coke, Dodderidge, Spelman, Hakewill, Selden, Twysden, and Dugdale.[20]

The history of the constitution was not the object of their undivided attention; it was enmeshed within broader narratives. They are perhaps most notable for their belief in an *ancient constitution*;[21] this is an extreme form of the *continuity thesis*, which idea will be explained later.[22] They did not invent the idea of an ancient constitution. This had existed for a long time. However, one could reasonably argue, as Greenberg has, that they *radicalized* it.[23]

As their appellation suggests, ancient constitutionalists believed that the constitution – particularly as embodied by the common law – had existed since time out of mind. There was something convenient in this. It has not gone unnoticed that many of these writers, besides being educated at Oxford or Cambridge, also received training at the Inns of Court ("a third university in the early modern period"[24]). Many became practising lawyers and judges.[25] By placing the origins of the constitution so early, they made it, and the law which they practised, antecedent to (and, consequently, superior to) everything else – an idea put to both royalist and anti-royalist purposes.[26]

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premier area for historical investigation had already begun to erode. By 1930, its prestige as a research field had declined dramatically. As a taught tradition, however, constitutional history lasted into the early 1960s as a preferred teaching field." Brundage and Cosgrove, *The Great Tradition*, 231.

[20] William Lambarde (1536-1601), William Camden (1551-1623), Sir Edward Coke (1552-1634), Sir John Dodderidge (1555-1628), Sir Henry Spelman (c.1562-1641), William Hakewill (1574-1655), John Selden (1584-1654), Sir Roger Twysden (1597-1672), and William Dugdale (1605-1686). See: Janelle Greenberg, *The Radical Face of the Ancient Constitution: St Edward's 'Laws' in Early Modern Political Thought* (Cambridge University Press, 2001), esp. 4, 32, 36; Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (The Macmillan Press Ltd, 1992); JW Gough, *Fundamental Law in English Constitutional History* (Oxford University Press, 1955); JGA Pocock, *Ancient Constitution and the Feudal Law: A Reissue with a Retrospect* (Cambridge University Press, 1987).

[21] As Gough has said, there was widespread agreement in England during the seventeenth century that England had a constitution and, moreover, that it was "both real and ancient"; the sticking point was how it was to be interpreted. See: Gough, *Fundamental Law in English Constitutional History*, 67.

[22] *Infra,* 2.7.

[23] Greenberg, *The Radical Face of the Ancient Constitution*, esp. at 3.

[24] Greenberg, *The Radical Face of the Ancient Constitution*, 17.

[25] William Lambarde (Lincoln's Inn), William Camden (Oxford), Sir Edward Coke (Inner Temple), Sir John Doddridge (Oxford, Middle Temple), Sir Henry Spelman (Cambridge), William Hakewill (Oxford, Lincoln's Inn), John Selden (Oxford, Clifford's Inn then Inner Temple), and Sir Roger Twysden (Cambridge, Gray's Inn), and William Dugdale (N/A).

[26] Dugdale, for example, appears to have turned it to royalist purposes: See: Greenberg, *The Radical Face of the Ancient Constitution*, 252.

Even though the ancient constitutionalists were all agreed upon the "immemorial nature and continuity of English political and legal institutions",[27] there was some disagreement as to how ancient it was exactly. Coke, for instance, argued that it began with Brutus of Troy, who came to England in 1103BCE and established the *Laws of the Britons*; these were, naturally, in the 'Greek tongue'.[28] They were administered by druids, who Coke thought, based on his reading of Caesar, originated in Britain.[29] He concluded: "the laws of England are of much greater antiquity than they are reported to be, and than any the constitutions or laws imperial of Roman Emperors".[30] These laws had been collated into "seven volumes or books intituled *Leges Britannorum* [laws of the Britons]" prior to the Norman Conquest,[31] which event, if it represented any break with the past, was repaired by Henry I.[32] Indeed, any breaks were ultimately mended:

> "…I have observed, that albeit some time by acts of parliament, and some time by invention and wit of man, some points of the ancient common law have been altered or diverted from his due course, yet in revolution of time, the same…have been with great applause, for avoiding many inconveniences, restored again…"[33]

The Trojan originary myth was common throughout the mediaeval period.[34] It is first to be found in Nennius (fl. ca. 830),[35] but its later popularity is largely due to Geoffrey of

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[27] Greenberg, *The Radical Face of the Ancient Constitution*, 4.

[28] Edward Coke, *The Reports of Sir Edward Coke, Knt.*, ed. George Wilson, vol. 2 (J Rivington and Sons; W Owen; T Longman and G Robinson; G Kearsly; W Flexney and W Cater; E Brooke; T Whieldon and Co., 1777), viii.

[29] Coke's claims are probably too strong. Caesar – who might not be an infallible source, in any account – does not seem to say that the *druids* originated in Britain but, rather, a *particular system of druidic government or administration*: Coke, *Reports*, 2:ix; Cf. Caesar, *The Gallic War*, trans. HJ Edwards (Harvard University Press, 1917), 341-346 (Bk. VI, 13–21, esp. 13).

[30] Coke, *Reports*, 2:x. Fortescue, in the fifteenth century, had gone even further: "Indeed, neither the civil laws of the Romans, so deeply rooted by the usage of so many ages, nor the laws of the Venetians, which are renowned above others for their antiquity - though their island was uninhabited, and Rome unbuilt at the time of the origin of the Britons - nor the laws of any Christian kingdom, are so rooted in antiquity": John Fortescue, "In Praise of the Laws of England," in *On the Laws and Governance of England*, ed. Shelley Lockwood (Cambridge University Press, 1997), 26-27 (17).

[31] There is, it should be said, absolutely no evidence that these ever existed.

[32] Coke, *Reports*, 2:xi–xii.

[33] Coke, *Reports*, 2:xviii.

[34] Trojan originary myths were, of course, far from new. Virgil's *Aeneid* attempted to found Roman origins in Troy under the eponymous hero Aeneus – who was the supposed father of the Brutus supposed to have come to Britain. It should also be said that the Franks, in the seventh century, also developed a similar myth, which was "satisfyingly assertive of parity with the Romans": PD King, "The Barbarian Kingdoms," in *The Cambridge History of Medieval Political Thought, c.350-c.1450*, ed. JH Burns (Cambridge University Press, 1988), 137.

[35] JA Giles, ed., *Six Old English Chronicles* (Henry G Bohn, 1848), 388.

Monmouth (fl. ca. 1136), who even credited London's foundation to Brutus.[36] We find the likes of Fortescue adopting this myth,[37] as well as Coke's contemporary, Doddridge.[38] However, even before the time of Coke and Doddridge, a new orthodoxy had started to develop.

This new orthodoxy can be traced to the time of the Reformation. For Burrow, the Reformation had caused England to withdraw "into a proud, defensive insularity", thus prompting a search for a new national past – one not quite so dependent upon ancient (foreign) empires.[39] There is perhaps something to this, but it is also in no small part due to the fact that the historicity of the Trojan story had started to be undermined, particularly by Polydore Vergil.[40]

In its place, there arose 'Anglo-Saxonism'. This is found in authors like "Lambarde, Owen, Digges, and Pym" who "identified the Saxons as [the constitution's] authors".[41] Hakewill and Selden adopted a slightly more nuanced approach, allowing for Danish and Norman influences; the Saxon influence nevertheless remaining 'predominant'.[42] Even though there had been "few enthusiasts for race theories lauding Germanic origins and Saxon superiority" prior to the late sixteenth century,[43] from that time onwards Anglo-Saxonism waxed ascendant. In particular, it found a home in the works of Camden and Verstegen.[44] Although, it could at times be a dangerous argument to make, as Isaac Dorislaus discovered to his disadvantage,[45] Anglo-Saxonism went from strength to strength. Indeed, "its influence is still obvious in the high-Victorian scholarship of Stubbs,

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[36] Originally, it was supposedly called *Troia Nova* and then, later, *Trinovantum*: Geoffrey of Monmouth, *The History of the Kings of Britain*, ed. Lewis Thorpe (Penguin Books, 1966), 54–74. Cf. Hugh A MacDoughall, *Racial Myth in English History: Trojans, Teutons, and Anglo-Saxons* (Harvest House Ltd., 1982), chap. 1.

[37] Sir John Fortescue (c. 1394-1479). See: Fortescue, "In Praise of the Laws of England," 22 (13).

[38] Greenberg, *The Radical Face of the Ancient Constitution*, 32.

[39] John Wyon Burrow, *A Liberal Descent: Victorian Historians and the English Past* (Cambridge University Press, 1981), 108–9.

[40] This was in his *Anglica Historia*, which was produced in the early to mid-sixteenth century. For a modern translation, see: Polydore Vergil, *The Anglica Historia, A.D. 1485-1537*, ed. and trans. Denys Hay (Royal Historical Society, 1950).

[41] Greenberg, *The Radical Face of the Ancient Constitution*, 32. Those mentioned here for the first time are Sir Roger Owen (1573-1617), Sir Dudley Digges (1583-1639), and John Pym (1584-1643).

[42] Greenberg, *The Radical Face of the Ancient Constitution*, 32, 149–50.

[43] MacDoughall, *Racial Myth in English History: Trojans, Teutons, and Anglo-Saxons*, 45.

[44] Richard Verstegen, *né* Rowlands (c.1550-1640). See: MacDoughall, *Racial Myth in English History: Trojans, Teutons, and Anglo-Saxons*, 45–48.

[45] Dorislaus was assassinated in 1649, having supported the republican cause against Charles I and, indeed, was held partly responsible for Charles' 'murder'. His republicanism was informed by his Anglo-Saxonist interpretation of history. See: P Alessandra Maccioni and Marco Mostert, "Isaac Dorislaus (1595–1649): The Career of a Dutch Scholar in England," *Transactions of the Cambridge Bibliographical Society* 8, no. 4 (1986): esp. 423-429, 436; Burrow, *A Liberal Descent*, 110.

Freeman and Green".[46] Ancient constitutionalism remained. However, with the advent of Anglo-Saxonism, that ancient provenance was translated from Troy and the British Isles to the ancient Teutonic forests. In general tenor, little changed.

1.2.2 Eighteenth Century

During the eighteenth century, ancient constitutionalism and Anglo-Saxonism remained the orthodoxy. There was some disquiet regarding the idea of ancient constitutions,[47] but this was negligible.[48] The principal change wrought in the late-seventeenth and eighteenth centuries was that, whereas writers before 1688 might turn the ancient constitution as easily to the profit of the people as the Crown, those after 1688 spoke more exclusively of ancient liberties belonging to all. One can see this clearly in the writings of Bolingbroke:[49]

> "We [English] have been surprized, betray'd, forced, more than once, into Situations little better than that of *downright Slavery*. But the Usurpations have not become Settlements. They have disorder'd the Frame, but not destroy'd the Principles of a *free Government*. Like cloudy Mornings, they have soon pass'd over, and the sun of *Liberty* has broke out again with double Force, and double Lustre."[50]

The following passage also merits quoting:

> "Yet neither *he* [William I], nor *they* [William II and Henry I] could destroy the old Constitution; because neither *he*, nor *they* could extinguish the old *Spirit of Liberty*.
>
> On the contrary, the *Normans* and other Strangers, who settled here, were soon seized with it themselves, instead of inspiring a *Spirit of Slavery* into the *Saxons*.

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[46] Burrow, *A Liberal Descent*, 109.
[47] See, e.g.: Daniel Defoe, *Jure Divino* (1706), Book IX, at 205-206 and Jonathan Swift, *A Discourse of the Contests and Dissentions Between the Nobles and Commons in Athens and Rome* (first published 1701, FH Ellis (ed.) 1967) 118; 87
[48] MacDoughall, *Racial Myth in English History: Trojans, Teutons, and Anglo-Saxons*, 77.
[49] Henry St John, Viscount Bolingbroke (1678-1751).
[50] Henry St John, *Remarks on the History of England, From the Minutes of Humphrey Oldcastle*, 2nd ed. (R Francklin, 1747), 50.

> They were originally of *Celtick*, or *Gothick* Extraction, (call it which you please) as well as the People they subdued. They came out of the same *northern Hive*; and therefore they naturally resumed the *Spirit* of their Ancestors, when they came into a Country, where it prevail'd."[51]

What Bolingbroke characterized as an inextinguishable flame, Edmund Burke characterized as a natural tendency trammelled by respect for precedent and authority.[52] Reflecting on the French Revolution, Burke was at pains to stress that liberty without law was liberty not worth having;[53] the rule of law can only be guaranteed by reference to history and precedent. In England, this was the natural way of things:

> "The [Glorious] Revolution was made to preserve our *antient* indisputable laws and liberties, and that *antient* constitution of government which is our only security for law and liberty. […]. The idea of the fabrication of a new government, is enough to fill us with disgust and horror. We wished at the period of the Revolution, and do now wish, to derive all we possess as *an inheritance from our forefathers*. Upon that body and stock of inheritance we have taken care not to inoculate any cyon alien to the natural of the original plant. All the reformations we have hitherto made, have proceeded upon the principle of reference to antiquity…"[54]

[51] St John, *Remarks on the History of England*, 53–54.
[52] Edmund Burke (1729-1797).
[53] "I should therefore suspend my congratulations on the new liberty of France, until I was informed how it have been combined with government; with public force; with the discipline and obedience of armies; with the collection of an effective and well-distributed revenue; with morality and religion; with the solidity of property; with peace and order: with civil and social manners.": Edmund Burke, *Reflections on the Revolution in France*, ed. Conor Cruise O'Brien (Penguin Books, 2004), 90–91.
[54] Burke, *Reflections on the Revolution in France*, 117. For further discussion of Burke's ideas with respect to the constitution, see, *inter alia*: JGA Pocock, "Burke and the Ancient Constitution-A Problem in the History of Ideas," *The Historical Journal* 3, no. 2 (1960): 125–43; Adrian Vermeule, "Common Law Constitutionalism and the Limits of Reason," *Columbia Law Review* 183 (2007): 1–36.

The eminent jurist, William Blackstone, expressed similar sentiments.[55] Blackstone waxed lyrical about the constitution of his day;[56] preferred native sources;[57] believed in resumption of an ancient constitution;[58] and disliked irreverent, ill-educated, reckless legislators.[59] Whilst Blackstone is noteworthy for his historical approach, his *Commentaries* fall some distance short of a constitutional history – even the first volume, which deals most overtly with constitutional matters.[60]

There were important changes happening, however, in the light of the Scottish Enlightenment. In the context of historiography, this is found most importantly in the writings of Hume, Smith, Ferguson, and Millar.[61] The most important introduction was

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[55] Blackstone lived 1723-1780. He is particularly noted for his *Commentaries on the Laws of England*, the most recent edition of which has been published by Oxford University Press under the general editorship of Wilfrid Prest: William Blackstone, *Commentaries on the Laws of England. Book I: Of the Rights of Persons*, ed. David Lemmings, vol. 1 (Oxford University Press, 2016); William Blackstone, *Commentaries on the Laws of England. Book II: Of the Rights of Things*, ed. Simon Stern, vol. 2 (Oxford University Press, 2016); William Blackstone, *Commentaries on the Laws of England. Book III: Of Private Wrongs*, ed. Thomas P Gallanis, vol. 3 (Oxford University Press, 2016); William Blackstone, *Commentaries on the Laws of England. Book IV: Of Public Wrongs*, ed. Ruth Paley, vol. 4 (Oxford University Press, 2016).

[56] For example, Blackstone expressed his belief, in his concluding comments to his *Commentaries*, that, through the progress of time, the "laws and liberties" of England had reached a state of "perfection". Moreover, "Of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due – the thorough and attentive contemplation of it will furnish its best panegyric." Blackstone, *Commentaries*, 2016, 4:285.

[57] For example, Blackstone said: "But we must not carry our veneration [of the civil law] so far as to sacrifice our Alfred and Edward [I] to the manes [revered ghosts] of Theodosius and Justinian; we must not prefer the edict of the praetor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate." Blackstone, *Commentaries*, 2016, 1:10. He later drew out Alfred and Edward I for distinctive praise in the closing comments of the final volume: Blackstone, *Commentaries*, 2016, 4:265,274.

[58] This is evident throughout the thirty-third chapter of Book IV of the *Commentaries*, but, in particular: "I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time." Blackstone, *Commentaries*, 2016, 4:285.

[59] For example, Blackstone said: "The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy of public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rashness of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays…owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament…": Blackstone, *Commentaries*, 2016, 1:13.

[60] It is devoted to the "rights of persons"; his other volumes are largely devoted to the laws of property, law of torts, and criminal law.

[61] David Hume (1711-1776), Adam Smith (1723-1790), Adam Ferguson (1723-1816), and John Millar (1735-1801). See: Burrow, *A Liberal Descent*, 21–22. Millar is especially important, as he wrote one of the earliest books on constitutional history, even if it was not ovetly so-called: John Millar, *An Historical View of the English Government, From the Settlement of the Saxons in Britain to the Revolution in 1688*, ed. Mark Salber Philips and Dale R Smith (Liberty Fund, Inc., 2006). The first two parts of *An Historical View* were published in 1787, but the text remained unfinished at Millar's death. His nephew, John Craig,

the "conception of stages of the history of civil society" in which there could be "no appeal to earlier 'stages' to determine questions of right".[62] This presented a considerable challenge to the idea of an ancient constitution.[63] However, one must not overstate the position. The Scottish historians, like their English contemporaries, still believed in the possibility of essential continuities; they were simply more inclined to accept discontinuities and the contingency of history. In the context of English history, this challenge was most forcefully represented in Hume's *History of England* (1754-61), which was successful and enduring, even though it was "in defiance of almost every Whig prepossession"; many of the nineteenth-century constitutional historians, at one point or another, "announced…his intention of refuting the distortions of Hume".[64]

It is here necessary to introduce the idea of 'Whig historiography',[65] hinted at in the penultimate quotation. Whig interpretations of history have underlying narratives of *continuity* overlaid with narratives of *progress*, both of which are interlaced with a sense of *pride* and *triumphalism*;[66] they are typified, moreover, by their preoccupation with *liberty* as an inseparable feature of some supposedly ongoing national life.[67] Furthermore, they tend to see their own age as a 'culmination of a major stage' in the evolutionary

published, from Millar's papers, in 1803, an edition with two further parts: the third part carrying the history down to 1688 and the fourth to Millar's own day. Millar's earlier more theoretical work *The Origin of the Distinction of Ranks* (1771) is also of great interest: John Millar, *The Origin of the Distinction of Ranks; or, An Inquiry into the Circumstances Which Give Rise to Influence and Authority in the Different Members of Society*, ed. Aaron Garrett (Liberty Fund, Inc., 2006). Millar's *An Historical View* first appeared sixteen years after another early work on constitutional history of note, which was the posthumously published lectures given by Francis Stoughton Sullivan (1715–1766): Francis Stoughton Sullivan, *An Historical Treatise on the Feudal Law, and the Constitution and Laws of England: With a Commentary on Magna Charta, and Necessary Illustrations of Many of the English Statutes : In a Course of Lectures Read in the University of Dublin* (London, 1772).

[62] Burrow, *A Liberal Descent*, 23. See further: John Wyon Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge University Press, 1966), 10ff.

[63] On Millar and the idea of an ancient constitution, see: Loughlin, *Public Law and Political Theory*, 6ff.

[64] Burrow, *A Liberal Descent*, 25–26.

[65] It is so-called Whig because of the earlier writers associated with this kind of historical writing tended to have associations with the British Whig Party, who were essentially conservative liberals.

[66] Cf. Lee's definition: "So-called 'Whig' interpretations focus on British history as a *process*. This involves the gradual evolution of institutions and society through stages which are integral links in a chain of development. An underlying assumption is the triumph of progress." Stephen J Lee, *Aspects of British Political History, 1815-1914* (Routledge, 1994), 11.

[67] As Brundage and Cosgrove have said, Whig narratives tend to demonstrate a belief in "the long-term development of the English constitution and the placing of that development at the centre of the English national story. The country's history was considered to be largely one of incremental progress, punctuated indeed by some dramatic events and even a few setbacks, yet overall moving majestically forward toward greater inclusion and freedom." Brundage and Cosgrove, *The Great Tradition*, 3.

process;[68] in some cases, as a state of perfection.[69] Perhaps their greatest sin, however, is their study of "the past with reference to the present";[70] it is 'present-centred'[71] or 'temporocentric',[72] such that it is "unable to meet the past on its own terms and value it for its own sake".[73] The result: grand narratives of progress throughout the centuries, undergirded by basic continuities. English history was essentially "the story of the triumph of constitutional liberty and representative institutions".[74]

The challenge, posed particularly by Hume, led to what Burrow called the 'Whig compromise', in which "[t]he constitution was not ancient, in the sense of Saxon, but it was certainly not merely modern".[75] Whilst writers of the seventeenth and early eighteenth centuries were happier to accord the starting-date of their constitution to a very early period, by the late eighteenth century this was less tenable. Even though the narrative might still begin early, its date had to be moved forward in time; the period theretofore became a 'formative period'. Furthermore, whilst the earlier writers were content to adopt a more straightforwardly **substantive continuity thesis**, this was modified into a more overtly **essential continuity thesis**. In other words, earlier writers were happier to say that the constitution had remained *exactly the same in form and content*, whereas later writers claimed only that it had retained *some essential properties*. Nevertheless, there remained a desire to preserve as early a date as possible; it would then not only be old,[76] but also venerable:

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[68] This is a phrase taken from Gusfield, who had used it to refer to successive generations of sociological writers: Joseph R Gusfield, *Community: A Critical Response* (Basil Blackwell, 1975), 4.

[69] For example, George III, in writing to Pitt thanking him for having saved the constitution, said that the British constitution was "the most perfect of human formations". George to Pitt, 9 Mar. 1784, PRO. 30/8/103 fol. 71. Quoted in: Jeremy Black, *George III: America's Last King* (Yale University Press, 2006), 270. One might also think of James Bryce (1838-1922) who declared the British constitution to be "the Paragon of the World"; as Brundage and Cosgrove reported it, "a beacon of hope to other nations still struggling to find constitutional success": Brundage and Cosgrove, *The Great Tradition*, 21.

[70] Herbert Butterfield, *The Whig Interpretation of History* (WW Norton and Company, 1965), 11.

[71] Carpenter, "Political and Constitutional History: Before and After McFarlane," 177.

[72] This is a phrase from: Robert Bierstadt, "The Limitations of Anthropological Methods in Sociology," *American Journal of Sociology* 54, no. 1 (1948): 22–30. Cf. Colin Bell and Howard Newby, *Community Studies: An Introduction to the Sociology of the Local Community* (George Allen and Unwin Ltd., 1971), 63.

[73] Carpenter, "Political and Constitutional History: Before and After McFarlane," 178. Cf. Butterfield, *The Whig Interpretation of History*, 16.

[74] Burrow, *A Liberal Descent*, 3.

[75] Burrow, *A Liberal Descent*, 33.

[76] As Lockwood noted in a footnote to Fortescue: "This is not a claim that the laws are best *because* they are most ancient. Fortescue states that English laws are best because they are most just and have therefore not had to be changed. Thus the antiquity of the laws is the proof that they are the best, not the reason for their being so." Fortescue, "In Praise of the Laws of England," 27, fn. 96.

> "We procure reverence to our civil institutions on the principle upon which nature teaches us to revere individual men; on account of their age; and on account of those from whom they are descended."[77]

1.2.3 Hallam and the Victorian Constitutional Historians

During the nineteenth century, the Whig interpretation was "part of the landscape of English life"; indeed, it was not so much a 'Whig' interpretation as an 'English' interpretation.[78] It was during this period that constitutional history came to form a field in its own right – it would not be an understatement to say that it experienced a Golden Age. However, it could neither escape the prejudices of the time nor Whiggism. In many ways, it typified the High Victorian mindset. It remains highly readable, but has come to be regarded as fundamentally flawed.[79]

Constitutional history owes a great debt to Henry Hallam.[80] In particular, to his *View of the State of Europe during the Middle Ages* (2 vols., 1818) and *Constitutional History of England from the Accession of Henry VII to the Death of George III* (2 vols., 1827). The *Middle Ages* was essentially a collection of the constitutional histories of the major European countries until the end of the central Middle Ages; the *Constitutional History* continued the narrative for England whence the *Middle Ages* ended until the end of George III's reign. It is illuminating to note that Hallam was both a trained lawyer and highly active in Whig circles.[81]

It would be too much to say that Hallam single-handedly created the field,[82] but his importance cannot be underestimated. All later constitutional historians interacted with

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[77] Burke, *Reflections on the Revolution in France*, 121.

[78] Herbert Butterfield, *The Englishman and His History* (Cambridge University Press, 1944), 2; Cf. Burrow, *A Liberal Descent*, 92.

[79] One might here turn to Butterfield's refutation of the Whig approach: Butterfield, *The Whig Interpretation of History*.

[80] Lived 1777-1859.

[81] He was called to the bar in 1802; though active in the Whig party, he never became a Member of Parliament. See: Timothy Lang, "Hallam, Henry (1777–1859)," *Oxford Dictionary of National Biography* (Oxford University Press, 2004), http://www.oxforddnb.com/view/article/12002. [Accessed 19 February 2016].

[82] Sullivan's and Millar's work must not be forgotten (see *supra* 1.2.2). Moreover, it would be remiss not to mention the work of Hallam's contemporaries, Jean-Louis De Lolme (1740-1806) and Sir Francis Palgrave (1788-1861). De Lolme was born in the Republic of Geneva, but fled to England when he found himself at odds with the local authorities. He had studied and practised law, so it is not unsurprising that he should have taken interest in English legal affairs. In 1771, he published – in French – his *Constitution de l'Angleterre*. This was subsequently revised and released in an English edition under the title: *The Constitution of England; or, An Account of the English Government*. Although it was primarily an expository and comparative study of the English constitution as contrasted with other contemporary constitutions, *The Constitution of England* is marked by passages of historical discussion. We can note De

his works; in the third quarter of the nineteenth century, they were set texts at both Cambridge and Oxford.[83] This latter fact also cannot be underestimated. Constitutional history formed an integral part of the syllabi at those institutions and came to exist as a standalone subject – separate, for example, from political history, which was rather the leftover of constitutional history than *vice versa*.[84] This intensive teaching could only lead to the generation of interest in the subject – which there was in abundance.

Hallam was followed by a "great age of constitutional history",[85] which was made by a golden generation of constitutional historians. Their names have become almost inseparable from the subject. All of these writers were born in or around the second quarter of the nineteenth century, thus growing up in Hallam's shadow; they continued to contribute to the area throughout the second half of the nineteenth century and into the early years of the twentieth century. Given that this period coincides almost exactly with Queen Victoria's reign (r.1837-1901), these can aptly be called the Victorian Constitutional Historians.

Among this generation can be counted Erskine May, Freeman, Stubbs, Taswell-Langmead, Pollock, and Maitland.[86] Some of these stand more prominently: Freeman and Maitland in particular, but Stubbs most of all.[87] It would be wrong, however, to ignore the contributions of foreign scholars. We can include, for example, American scholars like Taylor and Adams,[88] as well as German scholars, especially Gneist and

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Lolme's belief, expressed on page 24, that 'the real foundation' of the English constitution is to be found at the time of the Norman Conquest. See: Jean-Louis De Lolme, *The Constitution of England; or, An Account of the English Government*, ed. David Lieberman (Liberty Fund, Inc., 2007). Turning to Palgrave: He was the Deputy Keeper of the Public Record Office from its foundation in 1838 until his death. Of especial importance in terms of constitutional history are the following titles: Francis Palgrave, *The Rise and Progress of the English Commonwealth: Anglo-Saxon Period, Containing the Anglo-Saxon Policy, and the Institutions Arising Out of Laws and Usages Which Prevailed Before the Conquest*, vol. 1 (John Murray, 1832); Francis Palgrave, *The Rise and Progress of the English Commonwealth: Anglo-Saxon Period, Containing the Anglo-Saxon Policy, and the Institutions Arising Out of Laws and Usages Which Prevailed Before the Conquest*, vol. 2 (John Murray, 1832); Francis Palgrave, *An Essay Upon the Original Authority of the King's Council* (Commissioners on the Public Records of the Kingdom, 1834).

[83] Peter RH Slee, *Learning and a Liberal Education: The Study of Modern History in the Universities of Oxford, Cambridge, and Manchester 1800-1914* (Manchester University Press, 1986), 34, 40–42, 47.

[84] See: Slee, *Learning and a Liberal Education*, 90–91.

[85] Carpenter, "Political and Constitutional History: Before and After McFarlane," 177.

[86] Thomas Erskine May (1815-1886); Edward Augustus Freeman (1823-1892); William Stubbs (1825-1901); Thomas Pitt Taswell-Langmead (1840-1882); Sir Frederick Pollock (1845-1937); Frederic William Maitland (1850-1906).

[87] As Richardson and Sayles have said, Stubbs has enjoyed something of an 'inexpungable dominance': Henry Gerald Richardson and George Osborne Sayles, *The Governance of Medieval England from the Conquest to Magna Carta* (Edinburgh University Press, 1963), v–vi. For a positive account of Stubbs' legacy, see: "Stubbs Seventy Years After" in Helen M Cam, *Law-Finders and Law-Makers in Medieval England: Collected Studies in Legal and Constitutional History* (Merlin Press, 1962), 188–211.

[88] Hannis Taylor (1851-1922); George Burton Adams (1851-1925).

Liebermann,[89] whose influence was not only felt on constitutional history but the undertaking of history in general.[90]

The Whiggish predilections of the Victorian Constitutional Historians have been thoroughly, albeit densely, studied by Burrow.[91] It is therefore not proposed to enter here into an extensive analysis of their writings. However, it is worthwhile briefly outlining who they were and their impact on the field.

We begin with William Stubbs – "a Tory with a whig historical understanding".[92] He began and ended his career in the Church,[93] but it is for his accomplishments as a mediaeval and constitutional historian that he is famed. Stubbs read Classics and Mathematics at Oxford, graduating in 1848. His first historical work, *Registrum sacrum Anglicanum*, was published in 1858. In 1863, he became an editor in the Rolls Series. After some attempts to gain a Chair at Oxford, Stubbs was appointed Regius Professor of Modern History in 1866. He held this post until 1884, during which time he produced his most important works.

In 1870, Stubbs published his *Select Charters*,[94] which was followed by his monumental three-volume *Constitutional History of England*.[95] It was this that firmly established him as the preeminent authority on English constitutional history.[96] The fact that this work begins with Caesar's and Tacitus's descriptions of the contemporary Germanic peoples

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[89] Rudolph Gneist (1816-1895) and Felix Liebermann (1851-1925). See: *Gneist, Das englishe Parlament* (1886, translated the same year as *The English Parliament*); Felix Liebermann, *The National Assembly in the Anglo-Saxon Period* (Halle a.S. Max Niemeyer, 1913). It is interesting to note that Liebermann met Stubbs in Göttingen in 1875 and they continued to correspond thereafter: See: William Holden Hutton, *William Stubbs, Bishop of Oxford 1825-1901* (Archibald Constable & Co. Ltd., 1906), 88–90. The work of the Austrian jurist Josef Redlich (1869-1936) might also be mentioned in this context, see esp.: Josef Redlich, *Local Government in England*, ed. Fracis W Hirst, vol. 1 (Macmillan & Co. Ltd., 1903).

[90] See: Burrow, *A Liberal Descent*, 119–21; Carpenter, "Political and Constitutional History: Before and After McFarlane," 177, 180; Cf. Slee, *Learning and a Liberal Education*, 131–32.

[91] Burrow, *A Liberal Descent*.

[92] Michael Bentley, *Modernizing England's Past: English Historiography in the Age of Modernism, 1870-1970* (Cambridge University Press, 2005), 10.

[93] He began in Navestock, Essex in 1850 and ended as Bp. Oxford, which post he held 1888 to 1901.

[94] This covered the period from "the earliest times" to the reign of Edward I. It went through nine editions, see: William Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First*, ed. HWC Davis, 9th ed. (Oxford University Press, 1913).

[95] These were originally published between 1874 and 1878, but each underwent a number of revisions during his lifetime.

[96] Indeed, his biographer, William Hutton, went so far as to say that "Nothing on so great a scale had been attempted in England since Gibbon; and the insight, the breadth, the extraordinary accuracy of the work recalled the memory of the greatest English historians": Hutton, *William Stubbs, Bishop of Oxford 1825-1901*, 85. A more recent biographer, J Campbell, appears to have largely agreed with this assessment, see: J. Campbell, "Stubbs, William (1825–1901)," *Oxford Dictionary of National Biography* (Oxford University Press, 2004), http://www.oxforddnb.com/view/article/36362. [Accessed 19 February 2016].

and ends at the close of the late mediaeval period is important for this is precisely the timespan in which constitutional history is most controversial, even if Stubbs provides it with its most reasonable and scholarly guise.[97]

Between Stubbs's *Select Charters* and *Constitutional History* came Freeman's *The Growth of the English Constitution from the Earliest Times*, which was first published in 1872:[98] "perhaps the most Whiggish of all histories, not only in its opinions but in its narrative".[99] Compared to Stubbs's *Constitutional History*, it is a 'slight work, written as lectures', although covering a similar period. Indeed, "[i]t is not really fair to compare the two as constitutional historians".[100] Freeman's tone is very different to Stubbs's. Whereas Stubbs was rather drier and more scholarly, Freeman was more colourful and populist – "consciously modelling himself on Macaulay".[101] Furthermore, it was perhaps, as Burrow noted, the English nation, rather than the constitution, that was truly the 'protagonist' of Freeman's work.[102] Besides differences in approach, there were also differences in some of their conclusions. For example, Stubbs found the continuity of the English constitution more in *local* institutions, whereas Freeman found it in *national* institutions.[103] However, there was no rivalry between the two: Freeman relied heavily on Stubbs's work;[104] on a personal level, they were 'lifelong friends'.[105] Although Freeman succeeded Stubbs as Regius Professor, he was – like his idol, Macaulay – essentially a private scholar.[106]

A number of other works were also published, designed as textbooks for students and popular consumption.[107] A good example is Taswell-Langmead's *Constitutional*

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[97] Bentley, for example, takes Stubbs as being a "bench-mark for a sophisticated version of whiggery": Bentley, *Modernizing England's Past*, 10. Whether Stubbs' high reputation is fully deserved has been doubted, particularly by Richardson and Sayles. They generally praised him as an editor of primary sources, though they found much to be desired in his historical writings – especially the *Constitutional History* in which there were not only 'errors and misconceptions', but also 'large deficiencies'. See: Richardson and Sayles, *Governance of Medieval England*, v–vi, 1–22, quoted phrases at 16.

[98] Edward Augustus Freeman, *The Growth of the English Constitution from the Earliest Times*, 3rd ed. (Macmillan & Co., 1894), xii.

[99] Burrow, *A Liberal Descent*, 195.

[100] Burrow, *A Liberal Descent*, 129.

[101] Burrow, *A Liberal Descent*, 157.

[102] Burrow, *A Liberal Descent*, 206.

[103] Burrow, *A Liberal Descent*, 139.

[104] Burrow, *A Liberal Descent*, 193.

[105] Hutton, *William Stubbs, Bishop of Oxford 1825-1901*, 91, 149.

[106] Burrow, *A Liberal Descent*, 155, 157.

[107] Early examples are two works by Sir Edward Shepherd Creasy (1812-1878), an English jurist and historian. In 1848, he published his *Text-Book on the Constitution*, which was essentially a selection of constitutional documents with historical commentary. When seeking to revise the *Text-Book*, he ended up substantially re-writing and reforming it. The result was the publication, in 1853, of his *Rise and Progress*

History: A Textbook for Students and Others.[108] Taswell-Langmead read Jurisprudence and Modern History, and was called to the bar in the early 1860s. Besides practising as a lawyer, he tutored in constitutional law and legal history at the Inns of Court. He was co-editor of *Law Magazine and Review* from 1875. In 1882, he was appointed Professor of English Constitutional History and Legal History at University College, London, although he died later that year.[109]

It is necessary to consider briefly two who were avowedly constitutional lawyers, rather than constitutional historians. The first is Sir William Anson.[110] He was called to the bar in 1869, held a number of positions at Oxford (including the vice-chancellorship), and later became an MP. His *Law and Custom of the Constitution* (2 vols., 3 parts, 1886-92), whilst principally an exposition of the late Victorian legislature and executive, was nevertheless keen to stress that the British constitution was the product of evolution: "The student of constitutional law realizes at every turn the truth of Dr. Stubbs' saying that 'the

of the English Constitution; this was a narrative constitutional history. Another example is to be found in the *Manual of Constitutional History*, which was published in 1875. It was written by Sir (James) Forrest Fulton (1846-1926), a judge and, later, a Conservative politician. Fulton, in his preface, states that his motivation for writing his book was that there was a "very general feeling" that the works of Hallam, Stubbs, etc. were difficult to access. His intended audience, besides the general public, were law students preparing for examination: "Constitutional Law and History are now special subjects both for General Examination prior to the call to the Bar, and for the first LL.B. at the University of London". Edward Shepherd Creasy, *The Text-Book of the Constitution: Magna Charta, The Petition of Right, and the Bill of Rights, with Historical Comments and Remarks on the Present Political Emergencies* (Richard Bentley, 1848); Edward Shepherd Creasy, *The Rise and Progress of the English Constitution*, 3rd ed. (Richard Bentley, 1856); Forrest Fulton, *A Manual of Constitutional History, Founded on the Works of Hallam, Creasy, May and Broom* (Butterworths, 1875), quotes at v and vi.

[108] Thomas Pitt Taswell-Langmead, *Constitutional History: A Textbook for Students and Others*, 1st ed. (Stevens & Haynes, 1875). This was renamed from the second edition as *English Constitutional History from the Teutonic Conquest to the Present Time*. Nevertheless, its essential purpose, as stated in the second edition, remained the same: "Intended primarily as a Text-book for students at the Universities and Inns of Court, it was my hope that the book might also prove not unacceptable to the general reader": Thomas Pitt Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time*, ed. CHE Carmichael, 3rd ed. (Stevens & Haynes, 1880), vii. Taswell-Langmead only lived to see the second edition, but its value was such that it continued to be revised by a series of editors, eventually reaching an eleventh edition, which was edited by TFT Plucknett: Theodore FT Plucknett, *Taswell-Langmead's English Constitutional History: From the Teutonic Conquest to the Present Time*, 11th ed. (Sweet & Maxwell, Ltd., 1960). Besides Taswell-Langmead – as well as Creasy and Fulton, mentioned above – other noteworthy examples include: Feilden's *Constitutional History*, first published in 1882, with its fourth edition revised by Etheridge in 1911; and Medley's *Manual*, first published in 1894, with its sixth edition in 1925. Henry St Clair Feilden, W Gray Etheridge, and DHJ Hartley, *A Short Constitutional History of England*, 4th ed. (Oxford University Press, 1911); Dudley Julius Medley, *A Student's Manual of Constitutional History*, 6th ed. (Oxford University Press, 1925).

[109] See: James McMullen Rigg and Catherine Pease-Watkin, "Taswell-Langmead, Thomas Pitt (1840-1882)," *Oxford Dictionary of National Biography* (Oxford University Press, 2004), http://www.oxforddnb.com/view/article/16031.

[110] Lived 1843-1914.

roots of the present lie deep in the past'."[111] For Anson, the British constitution and constitutional history were practically one and the same.

Likewise, Albert Venn Dicey,[112] Vinerian Professor of English Law at Oxford, whilst his principal work, *Introduction to the Study of the Law of the Constitution* (1885), was more concerned with the contemporary constitution, he nevertheless recognized a debt to constitutional history: "Not a page of my lectures could have been written without constant reference to writers such as Blackstone, Hallam, Hearn, Gardiner, or Freeman…"[113] Indeed, he showed great admiration for his 'friend and colleague' Freeman, although he simultaneously expressed reservations about the 'historical method': "it may induce men to think so much of the way in which an institution has come to be what it is, that they cease to consider with sufficient care what it is that an institution has become";[114] legal and historical analysis are different creatures.[115] In Dicey, we see a strong vein of *formalism*.[116] It is interesting to contrast Anson and Dicey. Both accepted the importance of constitutional history, although Dicey more readily accepted that present and past constitutions could differ. Indeed, Dicey argued at length in 1893 that the proposed Home Rule Bill would precipitate a 'new constitution'.[117]

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[111] William Reynell Anson, *The Law and Custom of the Constitution*, 4th ed., vol. 1 (Clarendon Press, 1911), ix.

[112] Lived 1835-1922.

[113] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Macmillan & Co. Ltd., 1915), vi. Quotes are from this edition, unless otherwise stated.

[114] Dicey, *Introduction to the Study of the Law of the Constitution*, vii–viii. Indeed, "in regard to English law and the law of the constitution, the *Landesgemeinden* of Uri, the witness of Homer, the ealdormen, the constitution of the Witenagemót, and a lot more of fascinating matter are mere antiquarianism. Let no one suppose that to say this is to deny the relation between history and law. […]. What one may assert…is, that the kind of constitutional history which consists in researches into the antiquities of English institutions, has no direct bearing on the rules of constitutional law in the sense in which these rules can become the subject of legal comment. […]. But let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law of England was yesterday, still less what it was centuries ago, or what it ought to be to-morrow; but to know and be able to state what are the principles of law which actually and at the present day exist in England. [Knowledge of antiquarian matters] throws as much light on the constitution of the United States as upon the constitution of England; that is, it throws from a legal point of view no light upon either the one or the other." Dicey, *Introduction to the Study of the Law of the Constitution*, 13–14.

[115] "[Constitutional historians and legal constitutionalists] are each concerned with the constitution, but from a different aspect. An historian is primarily occupied with ascertaining the steps by which a constitution has grown to be what it is. He is deeply, sometimes excessively, concerned with the question of 'origins'. He is but indirectly concerned in ascertaining what are the rules of the constitution [in the present day]. To a lawyer, on the other hand, the primary object of study is the law as it now stands; he is only secondarily occupied with ascertaining how it came into existence." Dicey, *Introduction to the Study of the Law of the Constitution*, 15. On this point, see: Cosgrove, "Culture of Academic Legal History," 27.

[116] See: Loughlin, *Public Law and Political Theory*, 18ff.

[117] Albert Venn Dicey, *A Leap in the Dark or Our New Constitution* (John Murray, 1893).

Next, there are two who are perhaps more comfortably labeled as lawyers and legal historians, although 'constitutional historian' would not be entirely amiss for the latter: Sir Frederick Pollock and Frederic William Maitland.[118] In 1895, the pair published their *History of English Law before the Time of Edward I*.[119] Even though they stated their intention to avoid the 'territory' of constitutional history where possible, they nevertheless saw it as a complementary endeavour; to understand the constitution required some understanding of, for example, the 'law of land tenure' and 'civil and criminal procedure'.[120] As Maitland was later to say, quite correctly:

> "Regarding the matter historically we may say that there is hardly any department of law which does not, at one time or another, become of constitutional importance. […]. If we are to learn anything about the constitution it is necessary first and foremost to learn a good deal about the land law. We can make no progress whatever in the history of parliament without speaking of tenure, indeed our whole constitutional law seems at times to be but an appendix to the law of real property."[121]

This comes from Maitland's *Constitutional History of England*, published posthumously in 1908.[122] Although not representing Maitland's 'polished and mature work', its editor, HAL Fisher,[123] nevertheless thought it would be a valuable teaching aid. Moreover, he notes that one Professor Dicey had looked over the work and 'urged its publication'.[124] It is a pity that Maitland never published a work on constitutional history to the scale of Stubbs's. As Burrow lamented: "Maitland's was a comparable mind, sharper, finer, more theoretical and impressionable, but in Maitland's case, though the *oeuvre* may be as

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[118] Sir Frederick Pollock (1845-1937) and Frederic William Maitland (1850-1906). It should be said that Pollock is generally regarded as the less able of the two and the merit of some of his work has been viewed with scepticism. On this point, see, e.g.: Cosgrove, "Culture of Academic Legal History," 27–28. For an appraisal of Maitland and his legacy, see: Cosgrove, "Culture of Academic Legal History," 28, 30–33.

[119] Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, ed. SFC Milsom, 2nd ed., vol. 1 (Cambridge University Press, 1968); Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, ed. SFC Milsom, 2nd ed., vol. 2 (Cambridge University Press, 1968).

[120] Pollock and Maitland, *History of English Law*, 1968, 1:cvi.

[121] Frederic William Maitland, *The Constitutional History of England*, ed. Herbert Albert Laurens Fisher (Cambridge University Press, 1908), 538.

[122] It based was on a series of lectures delivered by Maitland in 1887-8: Maitland, *The Constitutional History of England*, v.

[123] Fisher was, incidentally, also Maitland's brother-in-law; Fisher's sister, Florence, had been married to Maitland until his death in 1906.

[124] Maitland, *The Constitutional History of England*, vi. Dicey later wrote to Maitland's widow, saying that it was "out and out the best book written on the subject from the legal point of view which I have ever read." This is quoted in: Cosgrove, "Culture of Academic Legal History," 31.

impressive, there is no single work which is so obviously the summation of his talents and learning."[125] Another posthumous work of Maitland is also worth mention: *A Sketch of English Legal History* (1915). This was a compilation of some of Maitland's writings, combined with writings by Francis Charles Montague.[126]

From the turn of the century,[127] constitutional history fell into decline. Some of the older textbooks continued into new editions and some new works were written, e.g. by Hannis Taylor,[128] whose *Origin and Growth of the English Constitution* was published in two volumes in 1889 and 1898,[129] and George Burton Adams, whose *Origin of the English Constitution* was published in 1912 with a revised edition in 1920.[130] In truth, Taylor and Adams – both Americans – belong rather to the Victorian period than the twentieth century. They were born at the tail-end of the period in which the Victorian Constitutional Historians were born. Their place is, therefore, beside them.

During this period, the continuity thesis assumed a respectable garb. Constitutional history became an academic pursuit and attracted attention from very able minds; it was considered a worthwhile and important subject. This was soon to end.

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[125] Burrow, *A Liberal Descent*, 131. In a similar vein, Bentley has said of Maitland that he brought with him to historical study "a cool scepticism and a forensic legal intelligence that could only corrode structures that did not meet his standards of verification or styles of documentation…": Bentley, *Modernizing England's Past*, 33. Whether Maitland would have possessed the treasury of knowledge, at the time of his death, to write a work such as Stubbs' has been doubted by Cam; she thought, following Galbraith, that "Maitland's learning fell far short of that of Stubbs – as Maitland himself would have been the first to declare." "Stubbs Seventy Years After" in Cam, *Law-Finders and Law-Makers*, 188–211. For Cam's assessment of Maitland (at least, principally to history, rather than law), in which she concluded with Powicke that Maitland was one of the 'immortals', see: "Maitland - The Historians' Historian" in Cam, *Law-Finders and Law-Makers*, 212–34.

[126] Frederic William Maitland and Francis C Montague, *A Sketch of English Legal History*, ed. JF Colby (GP Putnam's Sons, 1915). Francis Charles Montague lived 1858-1935.

[127] Maitland died in 1906, i.e. around the turn of the century. Brundage and Cosgrove have argued that, "at his death the subject began to divide into separate channels: historians who emphasised public law and lawyers who concentrated on the tracing of private law." Brundage and Cosgrove, *The Great Tradition*, 224.

[128] Taylor had an international, if somewhat controversial, reputation. For a discussion of his public war of words with Henry Goudy over allegations of plagiarism in *The Science of Jurisprudence*, see: John W Cairns, "Henry Goudy, Hannis Taylor, and Plagiarism Considered as a Fine Art," *Tulane European and Civil Law Forum* 30, no. 1 (2015): 1–79.

[129] Hannis Taylor, *The Origin and Growth of the English Constitution*, vol. 1 (Houghton, Mifflin and Company, 1889); Hannis Taylor, *The Origin and Growth of the English Constitution*, vol. 2 (Houghton, Mifflin and Company, 1898).

[130] See: George Burton Adams, *The Origin of the English Constitution*, 1st ed. (Yale University Press, 1912); George Burton Adams, *The Origin of the English Constitution*, 2nd ed. (Yale University Press, 1920). This was largely a collection of previously published articles, which means that it contains work principally published somewhat earlier: Cf. Adams, *Origin of the English Constitution*, 1920, vii; Benjamin Terry, "Review: The English Constitution - George Burton Adams," *The American Historical Review* 18, no. 3 (1913): 567.

1.2.4 Decline

During their ascendency, the assumptions and opinions of the Victorian Constitutional Historians went essentially unchallenged. Those who might have challenged them directly (e.g. Carlyle, Southey, Cobbett, Pugin, Disraeli, Ruskin, and Morris) did not do so.[131] Froude, in the sense that he treated English history specifically, came closest, but he showed little interest in – even disdain for – ideas about constitutions. Yet, even in Froude, the pervasiveness of Whiggism can be detected. Even though he argued against continuities between the mediaeval and early modern periods, he 'approved' the discontinuity and 'appears to endorse the progress' made by the break: "Froude was no Whig, but his *History* ultimately supported rather than challenged a central Whig sentiment: a sense of the privileges the English derived from their history" – Froude merely placed the start date after the mediaeval period.[132]

Given the resounding success of constitutional history during the nineteenth century, its decline is somewhat surprising. One reason stands out, but there are a number of possible contributory factors to its decline.[133]

Even in spite of later criticisms, many of these writers remained highly regarded for the scope and depth of their learning. The task of surpassing their works was – and remains – formidable. Even Maitland was cautious of trespassing too far into constitutional history for fear of only saying "over again…what the Bishop of Oxford [i.e. Stubbs] has admirably said," with "no hope of being able to say with any truth what he has left unsaid".[134] Indeed, to rival these writers, one would need to have a working knowledge of English, Roman, and canon law, as well as other continental legal systems. Furthermore, a knowledge of various languages, including: classical and mediaeval Latin; Old and Middle English; German;[135] Anglo-Norman, Old and modern French; classical

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[131] These were: Thomas Carlyle (1795-1881), Robert Southey (1774-1843), William Cobbett (1763-1835), Augustus Pugin (1812-1852), Benjamin Disraeli (1804-1881), John Ruskin (1819-1900), and William Morris (1834-1896).

[132] On the writers mentioned in this paragraph, see: Burrow, *A Liberal Descent*, 236–38, 240-242. Quotation at 242.

[133] Cf. Brundage and Cosgrove's argument in their book, *The Great Tradition*, that "Constitutional history's loss of prestige certainly depended upon developments within academe, but it also hinged upon accelerating political, social, economic, and international transformations." Brundage and Cosgrove, *The Great Tradition*, xi.

[134] Pollock and Maitland, *History of English Law*, 1968, 1:cvi.

[135] Not only does this help one to read Old English, but there is also a substantial amount of scholarship that has been written in modern German.

Greek; as well as perhaps some knowledge of Brythonic and Gaelic languages.[136] Above all of this, one would need to have a firm understanding of historical events both in Britain and beyond over the course of millennia.[137] The task is not impossible, but it is forbidding.[138]

Another contributory factor is simply changing interests. The Victorian Constitutional Historians wrote in the so-called 'constitutional century' – a century of nation-building and constitution-writing.[139] There had been the likes of the English *Instrument of Government* (1653) and the Swedish *Regeringsformen* (1719, 1772, etc.), but it was only from the time of the US Constitution (1789) and the French Revolution (which occasioned a number of constitutions, the first of which was passed in 1791) that codified constitutions became a mainstay of 'States'. Even though the twentieth century saw the production of more constitutional documents than the nineteenth, they were by this time less of a novelty and, in any case, the constitutional history of Britain was felt to be largely settled. Moreover, with the disintegration of the British Empire and the decline of English/British exceptionalism, there was perhaps less impetus to study English/British constitutional history.[140]

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[136] These are both families of languages within the Celtic language family. Brythonic languages include Welsh, Cornish, Breton, and Cumbric; Gaelic or Goidelic languages include the Irish, Scottish, and Manx languages. This is particularly important if one wanted to undertake a constitutional history of the British Isles, i.e. a truly *British* constitutional history. However, it is even important for English constitutional history, particularly during the period of the English settlements, because it helps one understand the extent to which the English and non-English populations interacted and the extent to which they were influenced by one another.

[137] It is interesting to note Maitland's criticism of "a scheme for historical teaching on the ground that it was 'far too English'." John Neville Figgis, *Churches in the Modern State* (Longmans, Green and Co., 1913), 242–43.

[138] As Chrimes said in 1936: "But the history of the English monarchy, as an institution, has still to be written. The great length of that history, its extreme complexity, its profound ramifications into the very heart of English evolution – not to mention the parliamentary preoccupations of constitutional historians, and the Whiggish outlook of nearly all historians except the more recent – have seriously mitigated against its construction, in all its fullness. A great theme – one of the very few left – as rich in the play of personalities as in the subtleties of law and the machinations of politics, awaits its exponent; and he will need to be something of a Stubbs, of a Maitland, and of a Tout, all in one." Stanley Bertram Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge University Press, 1936), 2. Indeed, as Brundage and Cosgrove have said that, in regard to Maitland though it might be more generally applied, "such a high standard of accomplishment [had been set] that it was inevitable that the work of others would pale by comparison." Brundage and Cosgrove, *The Great Tradition*, 224.

[139] Kelly L Grotke and Markus J Prutsch, eds., *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences* (Oxford University Press, 2014), 10.

[140] On this point, see: Cosgrove, "Culture of Academic Legal History," 24; Bentley, *Modernizing England's Past*, 15, 70–91.

There were also changes in scholarly focus. As history developed as a discipline, it branched off in many directions;[141] constitutional history no longer represented the cutting edge.[142] Furthermore, whereas there had once been close ties between law and history, the subjects became increasingly divorced from one another. Whilst lawyers continued to learn about constitutional history for a while longer,[143] historians ceased to be formally schooled therein;[144] it became foreign.[145] Consequently, as other areas garnered increasing attention, constitutional history came to be neglected. Some interest remained among legal scholars, but little among historians.[146] Even those who fused law

[141] For example, social history, economic history, cultural history, women's history, etc. See: Carpenter, "Political and Constitutional History: Before and After McFarlane," 185.

[142] Brundage and Cosgrove, *The Great Tradition*, 67.

[143] It is worth noting Allison's argument that "History has [in recent times] lost prominence in the general understanding of English constitutional law". The historical dimension of the constitution has ceased to be written about and studied by lawyers, except, perhaps, in passing. This is undoubtedly true. Lawyers today are taught, generally speaking, only the most recent laws and principles of the constitution; only the law as it stands in modern times. Allison attributes this, in no small part, to the effect of Dicey and, in particular, his *Law of the Constitution*, written in the spirit of 'scientific rationalism'. As noted above, Dicey's intent – even if he was not wholly successful – was to focus only on *current* law. Arguably, this is all a lawyer need know; their task, after all, is merely to *describe* and *apply* the law *as it stands*. Indeed, perhaps the 'current' law is all a lawyer *should* know, so as not to be encouraged to focus overmuch on antiquated forms and forget the present-day; to start describing and applying laws no longer valid. This *descriptivism* has certainly gained a great deal of traction. As such, as history moved away from law, law also moved away from history. For Allison, see: JWF Allison, "History in the Law of the Constitution," *The Journal of Legal History* 28, no. 3 (2007): quotes at 263 and 266.

[144] See: Bentley, *Modernizing England's Past*, 19–22.

[145] It should be said that this is *not* to say historians are entirely unfamiliar with the works of the constitutional historians – particularly Stubbs and Maitland. References to these are often to be found in historians' writings, particularly in treatments with an overtly political and institutional angle. Their scholarship is clearly still respected enough to warrant interaction, even if they are not always cited approvingly.

[146] See: Grotke and Prutsch, *Const. Legitimacy, Power Ninet. Exp.*, 8–9.

and history – legal historians, like Holdsworth[147] and, later, Baker[148] – tended to avoid constitutional history;[149] their focus has rather been on the development of areas of private, procedural, and criminal law. However, matters were far more serious than a mere changing of focus or interests.

It is largely due to the next generation of historians – born during the third quarter of the nineteenth century – that constitutional history withered. Within this generation one may count Prothero, Round, Tout, Firth, Bury, and Pollard;[150] men "trained by the Stubbs generation at Oxford and Cambridge".[151] If the process of professionalizing history had begun under the previous generation, it was under this generation that it truly became professionalized. There arose a "desire for a truer historical picture, for the application of

[147] William Searle Holdsworth (1871-1944) was, like Blackstone and Dicey before him, Vinerian Professor of English Law at Oxford; he held this chair 1922-1944. He is largely responsible for the most extensive and comprehensive history of English law written by any single individual; his *History of English Law* amounted to some seventeen volumes (although, the latter volumes were finished by others after Holdsworth's death). Whilst these volumes – almost inevitably – touch on constitutional matters (e.g. the constitution of the courts, the roles of various officials, and matters of jurisdiction), Holdsworth rather attempted to steer clear of constitutional law. The sparsity of mention of constitutions in the indexes to his volumes is testament to this. It is also clear that he viewed himself as a legal, rather than constitutional, historian. Moreover, he was of the opinion that legal and constitutional historians sometimes might "take divergent views of the same events"; legal historians would look "mainly at the development of private law" and constitutional historians would look "solely at the development of public law". For the purposes of this thesis, the most relevant volumes of Holdsworth's *History* are the first five: William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 1 (Little, Brown, and Company, 1922); William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 2 (Methuen & Co. Ltd., 1923); William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 3 (Methuen & Co. Ltd., 1923); William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 4 (Methuen & Co. Ltd., 1945); William Searle Holdsworth, *A History of English Law*, 2nd ed., vol. 5 (Methuen & Co. Ltd., 1945). The quote is from Vol. II, p. 289. It is worthwhile adding that, whilst there can be little doubt of Holdsworth's importance in terms of having provided a continuous and in depth narrative, there have been doubts cast on the merits of his work; on his methods, conclusions, and ability: Cosgrove, "Culture of Academic Legal History," 29–30.

[148] Sir John Baker (1944-present) is Downing Professor Emeritus of the Laws of England at the University of Cambridge. His *Introduction to English Legal History* has become a standard textbook and covers the period from the Roman occupation (albeit very briefly) to the modern day; it has just entered its fifth edition. As with Holdsworth, Baker inevitably touches upon constitutional matters, but, once again, this is far from being his principal aim and discussion of the constitution is largely disaggregated. This can be seen by the fact that the index listing for "Constitution", besides two direct references, points the reader to certain other topics: Administrative Law; Due Process; King; Legislation; Liberty; Parliament; Royal Prerogative; Rule of Law; Separation of Powers; and Judges' Tenure. See: John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford University Press, 2019). It is interesting to note that Baker has written on the modern constitution – defending its unwritten form – but this was devoid of historical analysis: John Baker, "The Unwritten Constitution of the United Kingdom," *Ecclesiastical Law Journal* 15, no. 1 (2013): 4–27.

[149] Cf. Allison's statement that "After several decades during which legal historians have provided careful, modest and impressively nuanced historical accounts but seldom of public law, many pragmatic, politically driven or normatively inspired public lawyers might seriously doubt the practical, political or normative value of much legal history." JWF Allison, "History To Understand, and History To Reform, English Public Law," *The Cambridge Law Journal* 72, no. 3 (2013): 557.

[150] George Prothero (1848-1922), John Horace Round (1854-1928), Thomas Frederick Tout (1855-1929), Charles Firth (1857-1936), John Bagnell Bury (1861-1927), and Albert Pollard (1869-1948).

[151] See: Carpenter, "Political and Constitutional History: Before and After McFarlane," 180.

a truer historical method".[152] They took "advantage of the availability of so much more record material" and "began to study the records of the English government in far greater detail, and in a far more systematic manner".[153] Just as Polydore Vergil had started to unravel the historicity of an ancient Brythonic constitution through critical analysis of the sources, these authors began to "cast serious doubts on the impeccable Whig pedigree of England's law and legislature":[154]

> "The late mediaeval parliament and the historiographical tradition it had stood for, including even *Magna Carta*, were systematically debunked. The new heroes were the unsung administrators… The great theme of English history was no longer liberty and the representation of the people but the creation of the nation state, and the state was built in public by great kings like Henry VIII…and behind the scenes by the faceless apolitical 'middle-class' bureaucrats."[155]

Even still, these writers were not entirely guiltless of their teachers' sins.[156]

There followed two generations who dominated historical writing, particularly that of the mediaeval period. Carpenter has called this the 'Manchester-Oxford era', which extended

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[152] These are the words of Charles McLean Andrews (1863-1943), writing in the context of the development of the theory of the Mark, regarding which he argued that there was something of a disconnect between the evidence and the conclusions that had previously been drawn: Charles McLean Andrews, *The Old English Manor: A Study in English Economic History* (The John Hopkins Press, 1892), 5. Indeed, he reflected on how: "The history of the hypothesis forms an interesting chapter in the relation between modern thought and the interpretation of past history, and shows that in the formation of an opinion both writer and reader are unconsciously dependent upon the spirit of the age in which they live": Andrews, *The Old English Manor*, 1. Brundage and Cosgrove have said that the introduction to Andrews' *Old English Manor* "asserted that a racial explanation of institutional history simply no longer persuaded": Brundage and Cosgrove, *The Great Tradition*, 52. This is something of an overstatement. Andrews was rather arguing for a more nuanced and evidence-based approach. As indicated in his *History of England*, however, he clearly retained some idea of 'peoples'; he speaks of "the life, character, and progress of the English people", as well as its 'achievements'; he speaks of 'the social life of a nation'; he also speaks of the 'careers of peoples': Charles McLean Andrews, *A History of England* (Allyn and Bacon, 1903), iii, iv. Whether or not Andrews regarded 'races' and 'peoples' as exactly synonymous, he nevertheless appears to have perceived a connection between social organization, on the one hand, and some overarching and enduring entity, on the other.

[153] Carpenter, "Political and Constitutional History: Before and After McFarlane," 180. Round, in particular, was important in furthering this approach and method: Cosgrove, "Culture of Academic Legal History," 28–29; Brundage and Cosgrove, *The Great Tradition*, chap. 4.

[154] Carpenter, "Political and Constitutional History: Before and After McFarlane," 180.

[155] Carpenter, "Political and Constitutional History: Before and After McFarlane," 180–81.

[156] For example, one can detect a distinct vein of Whiggishness in Tout: "We are still rightly proud of the English constitution, of the continuity between our modern democratic institutions and our parliamentary institutions of the middle ages, and of the way in which in modern times the english parliamentary system has suggested the form of free institutions to nearly every civilised nation.": Thomas Frederick Tout, *Chapters in the Administrative History of Mediaeval England: The Wardrobe, the Chamber, and the Small Seals*, vol. 1, 1920, 1.

from the early twentieth century to the 1950s.[157] Here can be counted Powicke, Galbraith, Jacob, Cheney, Southern, and Roskell.[158]

Constitutional history continued to be written during this time, but became more focused – both to narrower periods and subjects. We might think of Lapsley,[159] Chrimes,[160] Clarke,[161] Cam,[162] and Wilkinson.[163] New textbooks on constitutional history ceased to be produced, especially those with any coverage of the mediaeval period; those that had been written now went through their final editions.[164] Joliffe produced his *Constitutional History of Medieval England* in 1937, which had its fourth and final revision in 1961,[165] and Bryce Lyon published his *Constitutional and Legal History* in 1960 with a second edition in 1980.[166] However, these are very much hangovers from the earlier period.

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[157] Carpenter, "Political and Constitutional History: Before and After McFarlane," 183.

[158] Sir Frederick Maurice Powicke (1879-1963), Vivien Hunter Galbraith (1889-1976), EF Jacob (1894-1971), CR Cheney (1906-1987), Sir Richard William Southern (1912-2001) and JS Roskell (1913-1998)

[159] Gaillard Thomas Lapsley (1871-1949). See: Gaillard Lapsley, "The Parliamentary Title of Henry IV," *The English Historical Review* 49, no. 195 (1934): 423–49; Gaillard Lapsley, "The Parliamentary Title of Henry IV (Continued)," *The English Historical Review* 49, no. 196 (1934): 577–606; Gaillard Lapsley, "Some Recent Advance in English Constitutional History (before 1485)," *Cambridge Historical Journal* 5, no. 2 (1936): 119–61.

[160] Stanley Bertram Chrimes (1907-1984). See: Chrimes, *English Constitutional Ideas in the Fifteenth Century*; Stanley Bertram Chrimes, *An Introduction to the Administrative History of Mediaeval England*, 3rd ed. (Basil Blackwell, 1966).

[161] Maude Violet Clarke (1892-1935). See esp.: Maude Violet Clarke, *Medieval Representation and Consent: A Study of Early Parliaments in England with Special Reference to the Modus Tenendi Parliamentum* (Longmans, Green and Co., 1936); Maude V Clarke and VH Galbraith, "The Deposition of Richard II," *Bulletin of the John Rylands Library* 14, no. 1 (1930): 125–81.

[162] Helen Maud Cam (1885-1968). See: Helen M Cam, *Studies in the Hundred Rolls: Some Aspects of Thirteenth-Century Administration* (Oxford University Press, 1921); Helen M Cam, *The Hundred and the Hundred Rolls; an Outline of Local Government in Medieval England* (Methuen, 1930); Helen M Cam, *Liberties and Communities in Medieval England: Collected Studies in Local Administration and Topography* (Cambridge University Press, 1944); Cam, *Law-Finders and Law-Makers*.

[163] Bertram ('Bertie') Wilkinson (1898-1981). See: Bertram Wilkinson, *The Constitutional History of England, 1216-1399: Politics and the Constitution, 1216-1307*, vol. 1 (Longmans, Green and Co., 1948); Bertram Wilkinson, *The Constitutional History of England, 1216-1399: Politics and the Constitution, 1307-1399*, vol. 2 (Longmans, Green and Co., 1952); Bertram Wilkinson, *The Constitutional History of England, 1216-1399: The Development of the Constitution, 1216-1399*, vol. 3 (Longmans, Green and Co., 1958); Bertram Wilkinson, *Constitutional History of England in the Fifteenth Century (1399-1485), with Illustrative Documents* (Longmans, Green and Co., 1964).

[164] For example, Feilden's *Short Constitutional History* had its fourth edition in 1911 and Medley's *Student's Manual* had its sixth edition in 1925: Feilden, Etheridge, and Hartley, *Short Constitutional History*; Medley, *A Student's Manual of Constitutional History*.

[165] John Edward Austin Joliffe (1891-1964). See: JEA Jolliffe, *The Constitutional History of Medieval England from the English Settlement to 1485*, 4th ed. (WW Norton and Company, 1961). Mention should also be made of the sister book to this written by Sir David Lindsay Keir (1895-1973), which was first published in 1938 and had its ninth and final edition in 1969. This book covered the constitutional history of "Modern Britain" from 1485. As such, the period that it covers is not quite as contentious as those other works here mentioned. David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485*, 9th ed. (Adam and Charles Black, 1969).

[166] Bryce Dale Lyon (1920-2007). Bryce Dale Lyon, *A Constitutional and Legal History of Medieval England*, 2nd ed. (WW Norton and Company, 1980). The volume by Goldwin Smith might also be noted here, which was published in 1955: Goldwin Smith, *A Constitutional and Legal History of England* (Charles Scribner's Sons, 1955).

Indeed, even though many of these authors lived into the 1980s and beyond, the majority of their contributions to constitutional history fall before the mid-1960s. Since that time, the field has been largely lifeless.[167] In the last few decades, the only real attempt at an expansive constitutional history is Ann Lyon's *Constitutional History*, first published in 2003 with a second edition in 2016,[168] though this is largely a political history. Seemingly, Christine Carpenter is currently writing *A New Constitutional History of Late Medieval England*,[169] although what this will look like remains to be seen.

Naturally, people have still been discussing constitutional issues,[170] and there have been some attempts to bring these somewhat to the fore. For example, JM Roberts, in his General Editor's Preface to the *New Oxford History of England*, a series of volumes commissioned in 1992, speaks of the "institutional core" that runs throughout English history. These volumes certainly do not neglect this, which is evident from their structure.[171] However, they aim to be general histories, lack a solid underlying constitutional theory, and do not overtly recognize constitutional history.

Historical analysis has not been entirely devoid of analysis of constitutional matters;[172] public law has not been entirely devoid of historical analysis.[173] Nevertheless, there is every reason to believe that constitutional history – as a field – remains on the fringe. Few and far between are those who would label themselves as constitutional historians.

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[167] The fact that constitutional history was ceasing, around this time, to be a "taught tradition" is a point not to be underestimated. See: Brundage and Cosgrove, *The Great Tradition*, esp. 234.

[168] Ann Lyon, *The Constitutional History of the United Kingdom*, 2nd ed. (Routledge, 2016). The lack of works on constitutional history in recent decades was, in fact, a large part of the impetus behind Lyon's writing of the book: Lyon, *The Constitutional History of the United Kingdom*, 2.

[169] This will seemingly cover the period 1215 to 1509. See her academic profile on the University of Cambridge's Faculty of History's website: https://www.hist.cam.ac.uk/directory/mcc1000@cam.ac.uk [accessed 19 April 2019]

[170] As will be argued subsequently, particularly in the context of the Theory of Constitutional Ubiquity, such issues are practically inescapable.

[171] For the time period covered by the present thesis, the most relevant volumes (that have been published) are: Robert Bartlett, *England Under The Norman And Angevin Kings, 1075-1225* (Oxford University Press, 2002); Michael Prestwich, *Plantagenet England, 1225-1360* (Oxford University Press, 2005); Gerald Harriss, *Shaping the Nation: England 1360-1461* (Oxford University Press, 2005); Penry Williams, *The Later Tudors: England, 1547-1603* (Oxford University Press, 1995).

[172] As McFarlane said, the attempt to perfectly 'isolate' political history from constitutional history would be in 'vain'. There is a great extent to which, as McFarlane argued, political history *is* constitutional history; discussion of one inevitably involves discussion of the other. McFarlane, *The Nobility of Later Medieval England*, 280.

[173] On some of the influence that historical analysis and approaches to the historical method have had on public law and discussion thereon, see, e.g.: Allison, "History To Understand, and History To Reform, English Public Law."

This is due in no small part to Namier and McFarlane.[174] This was not so much because they rejected constitutional history, but, rather, because their methods and approaches tended towards *realpolitik* and microanalysis, which stood in stark contrast to the grand Whiggish narratives. Since the 1950s, their approach, which focuses on individuals and their interests, has dominated.[175] The extremity of this swing is lamentable:

> "[L]ate mediaeval history is still so scared by the spectre of the Whigs that the institutions by which the realm was governed have all but disappeared, leaving politics devoid not just of conceptual structures but of the institutional framework within which they operated: politics are held to be about lordship, operating in a governmental vacuum. In sum, we now have the politics in full measure, but we have lost the constitution, and with it an intellectual point of focus."[176]

Of course, the issues that constitutional history treated have not gone away; they have often been treated under other guises. There is something deeply dissatisfactory about this; it borders on disingenuousness.

Whilst the foregoing largely explains why constitutional history was done *less*, it does not quite explain why it came to be altogether avoided. There are, broadly speaking, two charges that can be laid at the door of constitutional history. First, that constitutional history, as applied to pre-modern societies, is *anachronistic*: There was nothing in such societies that could meaningfully be called a constitution; to undertake a constitutional history, then, would be meaningless for lack of a subject. Second, that constitutional history's *method and approach is informed by distasteful and outmoded ideas* – in particular, by a brand of Whiggism. Any defence of constitutional history needs to deal adequately with both of these criticisms if it is to be successful. The framework set out in Part I is designed to do this.

1.3 Historical Constitutions as Anachronism

[174] Sir Lewis Namier (1888-1960); KB McFarlane (1903-1966).
[175] This is not to say that 'Whiggism' disappeared: "[T]he whigs did not die: they survived science, they survived Maitland; they found ways to survive the First World War and by keeping their heads down, or at least out of the universities, they survived the twentieth century." Bentley, *Modernizing England's Past*, 7.
[176] Carpenter, "Political and Constitutional History: Before and After McFarlane," 192.

There has been a long-standing and widespread cavalier attitude to the existence of mediaeval constitutions. This applies as much to those who support their existence as to those who deny it. There is little substantive argument on either side.

Of sceptics of mediaeval constitutions, Pickthorn and Holt are good examples.[177] Pickthorn, in the first volume of his *Early Tudor Government*, said that it was "hardly too much to say that" the mediaeval idea of the supremacy of law was "before the sixteenth century…all there was in England in the way of a constitution…"[178] Later, he remarked "how far the fifteenth century was from anything which can usefully be called a constitution."[179] The first remark is doubly flawed. In the first place, the supremacy – or rule – of law is not intrinsically a constitutional matter;[180] it cannot be all there is of a constitution. In the second place, there was a great deal more than this in any case. The second remark is simply false.

Holt did little better in his *Magna Carta*. Following his bold statement that "Twelfth-century England had no constitution," he went on seemingly to define 'constitution' in negative terms:

> "There was no general system of government in which powers were balanced, functions allotted and defined, rights protected, and principles stated or acknowledged. Instead there were the materials from which a constitution of some kind might ultimately and indirectly be compounded. Government was evolving routine procedures, methods which it found convenient to use in most, but not necessarily all, circumstances. It operated in a society in which privilege seemed to be part of the natural order of things… From these primitive elements to a settled constitution was a long, tortuous and often bloody journey in which the grant of charters of liberties was but one, and that, an early step."[181]

Holt provides no authority for his definition. Two fallacies are apparent. First, he appears to conflate *constitution* and *constitutionalism*, i.e. constitutions with the idea that power

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[177] Kenneth Pickthorn (1892-1975) and Sir James Clarke Holt (1922-2014).
[178] Kenneth Pickthorn, *Early Tudor Government: Henry VII* (Cambridge University Press, 1934), 55.
[179] Pickthorn, *Early Tudor Government: Henry VII*, 101. Cf. Chrimes's discussion of Pickthorn's views: Chrimes, *English Constitutional Ideas in the Fifteenth Century*, xviii, xix.
[180] See *infra,* Appendix I, 11.13
[181] James Clarke Holt, *Magna Carta*, ed. George Garnett and John Hudson, 3rd ed. (Cambridge University Press, 2015), 49. For the same in the previous edition, solely written by Holt, see: James Clarke Holt, *Magna Carta*, 2nd ed. (Cambridge University Press, 1992), 23.

ought to be delimited and divided, and that power-holders ought to be held to account. Second, he appears to be of the opinion that a constitution must of necessity be something that is *settled*. This rather begs the question as to at what point a constitution would be considered so unsettled as to no longer be a constitution.[182] However, if one reads what he wrote carefully, he seems to imply that the 'primitive elements', as he called them, made for an *unsettled* constitution during the mediaeval period, although this does not appear to be his intended meaning.

To Pickthorn and Holt we can add a number of others who are not historians by trade and who, in all fairness, have made greater effort to substantiate their positions. We find, for example, the statement of Ehrlich that "the chief characteristic of the feudal state is the fact that it has no constitutions, but only agreements."[183] As feudalism was the typical persuasion of mediaeval societies, so the orthodox opinion runs, the implication of this statement is that mediaeval societies had no constitutions. Alternatively, we can take the statement of Grimm that:

> "The mediaeval world did not have a constitution and it could not have had one. All talk about the constitution of the ancient Roman Empire, of mediaeval kingdoms, or of the British constitution refers to a different object."[184]

In all of these cases – Pickthorn, Holt, Ehrlich, and Grimm – the definitions of 'constitution' used, whilst not being without their merits and applications, are, it is argued, rather too narrow.[185]

By contrast, there are those who are prepared to interpret the term 'constitution' more expansively and extend it beyond the modern State. However, their arguments often do little better than to say: '*of course* there were (or are) constitutions'. We might consider Chrimes' reply to Pickthorn's previously cited argument:

> "For it is impossible to conceive of any established government without some sort of constitution, however primitive, crude, or unparliamentary. Since Mr Pickthorn analyses the government as established in 1485, at

[182] Cf. Neil Walker, "Our Constitutional Unsettlement," *Public Law*, 2014, 529–48.
[183] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L Moll (Harvard Library Law School, 1936), 32.
[184] Dieter Grimm, "The Achievement of Constitutionalism and Its Prospects in a Changed World," in *The Twilight of Constitutionalism?*, ed. Petra Dobner and Martin Loughlin (Oxford University Press, 2010), 11.
[185] See, *infra*, esp. 2.2-2.4.

> considerable length, we must needs believe that some sort of constitution existed even in that deficient century."[186]

More recently, one might look to Carpenter's discussion of constitutional history:

> "Thus, 'constitutional' means neither parliamentary nor institutional though, self-evidently, both may be part of the constitution, for, as McFarlane put it in a rather tetchy annotation to Chrimes's *English Constitutional Ideas in the Fifteenth Century*, 'All states have constitutions tho they may be difficult to define'. By the same token all states or their equivalent must have some constitutional thought."[187]

In many respects, it is this difficulty of defining 'constitution', hinted at by Chrimes and stated more explicitly by McFarlane, which lies at the heart of this divergence between the two camps. It would be fair to say that most people have some idea as to what a constitution is. However, it is rarely the case that this idea has been subjected to prolonged rigorous critical thought. This is somewhat understandable, given that determining what is, and what is not, a constitution *is* difficult. However, when such approximations and assumptions become bold statements, they are inexcusable; it is recklessness pure and simple. A person might not need to know much about engineering to know that motor-vehicles did not exist during the mediaeval period; the same does not apply to constitutions. Without fully and clearly understanding what they are, one is in no position to make judgement.

For the most part, those who affirm or deny the existence of constitutions beyond the modern State appear to regard their view as self-evident. This amounts to little more than pronouncements of faith. If anything is actually self-evident, it is the need for a more thoughtful, detailed, and rigorous definition of 'constitution'. Only with this can we properly decide on their existence in other places and at other times.

Naturally, for the (constitutional) historian, as Chrimes stated, it is important that any such definition is not 'unhistorical' – that it does not lead us into anachronism, i.e. superimposing ideas and objects onto backgrounds where they do not belong. However, Chrimes was wrong to conclude that "[t]he modern constitutional lawyer and the

[186] Chrimes, *English Constitutional Ideas in the Fifteenth Century*, xix.
[187] Carpenter, "Political and Constitutional History: Before and After McFarlane," 176.

constitutional historian cannot adopt the same definition."[188] For the term constitution to have any real meaning, there *must* be some fundamental sense in which the definitions adopted by historians and lawyers are the same. It will be the task of the Theory of Constitutional Ubiquity, developed in the next chapter, therefore, to set out a definition of 'constitution', which might be equally useful to all – historians and lawyers alike – and so provide a common footing.

1.4 Approach and Method

The philosophy and worldview behind this thesis – at least, in its theoretical dimensions – should be made plain. After all, only by properly understanding these can one properly understand the arguments – of this or any work. Firstly, this thesis is informed by a philosophy founded in *empiricism*,[189] *scepticism*,[190] *agnosticism*,[191] *realism,*[192] *materialism,*[193] *existentialism*,[194] and *compatibilism*;[195] in a word, **humanism**. It will be unsurprising, therefore, that little stock is invested in theories of natural law, or that disapproval is shown for metaphysical and teleological reasoning.[196] There will be nothing transcendental or mystical; neither will concepts, mental constructions, nor other fictions be reified.

There is also a vein of **liberalism**. In this light, the arguments of the Generational Theory of Law will be unsurprising (especially its *moral strand*). However, this element of

[188] Chrimes, *English Constitutional Ideas in the Fifteenth Century*, xix.
[189] Knowledge, to be considered as such, must be *a posteriori*, i.e. the product of experience.
[190] It is impossible to know anything for certain and, paradoxically, perhaps not even that – although, following Descartes, it does seem relatively certain that *something* exists even if we cannot be perfectly sure of what that something is.
[191] Given that we cannot be sure whether or not there is a deity or deities, the best thing to do is to suspend judgement; in practical terms, however, this translates into atheism.
[192] Reality is much as we perceive it to be.
[193] All phenomena have a material or physical basis; there is nothing metaphysical, supernatural, or mystical; in theory, and on some level, everything is observable and measurable.
[194] There is no intrinsic meaning or purpose in the universe and, consequently, it is incumbent upon us to create meaning and purpose for ourselves.
[195] Even in a deterministic universe, we can be said to have free will, such that we are, in some degree at least, able to make choices and be responsible for our actions.
[196] In the tradition of the likes of Bentham and the legal positivists, and American and Scandinavian Realism, this work will seek to excise metaphysical notions from the study of law. This is not in order to make law into a science, but merely to firmly base it in reality. On some of the difficulties facing ideas of natural law and, in particular, natural rights, see: Loughlin, *Sword and Scales*, 201. For Loughlin, the chief problem with natural rights doctrines is their 'inherent idealism'. In the first place, they face the problem that "the claim that humans are born equal in dignity and rights is patently untrue"; often religious arguments are made to defend this, but "[i]n a secular age, however, this is an unreliable method". Alternatively, appeals might be made to unchanging human nature, "but given the vagaries of human history, this also seems doomed from the outset". Loughlin concludes: "Claims to 'natural', 'inalienable' or 'fundamental' rights, it appears, are either tautological or fictional."

liberalism should not be misconstrued. It does not build into any claim – at least, insofar as the framework is concerned – as to *how* societies ought to be structured or, indeed, what *values* societies ought to have. Indeed, the moral strand only argues that each generation has a *choice* (insofar as that is possible in a deterministic universe) as to how it structures itself and as to what values it wishes to champion. It says nothing concerning the exercise of this choice. Ultimately, what the strain of liberalism does is allow for the *possibility of (social and constitutional) change* in a way that traditionalist, conservative, etc. approaches typically do not.[197] It *opens the door to change*, but goes no further than to argue (under the moral strand) that *the door should remain open*. Thus, the framework suggested here (with the sole exception of the moral strand, and that only to a degree) is descriptive, interpretative, and analytical – not evaluative or prescriptive. It falls within the realms of social science, not political philosophy or social engineering.[198]

In the spirit of social science, this thesis is also undergirded by an approach founded in **methodological reductionism**, i.e. in the idea that phenomena can be better – or, indeed, *only* – understood and appreciated by understanding the component parts that make up those phenomena, and the component parts that make up those parts, etc. This is in keeping with the materialist and empirical elements of the humanist approach.

This methodological reductionism is complemented by a strong vein of **social constructionism**. This approach begins with a 'critical stance' towards our ideas about the world and ourselves, and, more particularly, towards ideas of objective and necessary truths about reality that can be derived from observation or deduction. It "cautions us to be ever suspicious of our assumptions about how the world appears to be," for "the categories with which we as human beings apprehend the world do not necessarily refer

[197] After all, these are typically more prejudiced against change – both as to the reality of it and its merits, perhaps even arguing not only that change *should not* happen, but that it *does not* or *cannot* happen (at least, in some essential way). A theory of historical study founded on such a basis would most likely operate on the presumption that there are continuities to be found, which only have to be *identified*, if not *discovered*; thereafter, to be *defended* and *preserved*. The present thesis makes no such presumption or argument. There might be continuities or there might not be; there is neither any particular desire nor aversion to finding any. Yet, as will be seen, if there are continuities to be found, they will probably be of a different quality to that supposed by traditionalists, etc.; any such continuities will be the result of copying and reproduction, not some singular penetrating thread.

[198] Consequently, the historical studies in Part III will not be studies in the history of liberal ideas, the 'growth' or 'development' of liberalism, an attempt to impose liberal ideas on history, or an excuse to propound liberal values. They are purely to show that mediaeval societies had what can meaningfully be called 'constitutions' and that those constitutions changed over time – a process that was, admittedly, to a greater or lesser extent facilitated by the extent to which each generation felt itself to be bound to follow the views and practices of its predecessors.

to real divisions".[199] Social constructionism argues that our experience of physical reality is heavily influenced by the interpretative frameworks that we invent and derive from others; moreover, that our *social* reality is largely – if not wholly – socially constructed, i.e. our social relations and the nature thereof are determined, however consciously or unconsciously, by *us*; their fountainhead and seat is in our minds, even if the material basis of the objects to which they refer and concern are situated in the external world.[200] This means that, to understand social phenomena, we must turn to individuals and to individuals' minds (i.e. ultimately to neurology and psychology). This approach will be particularly apparent in the Theory of Constitutional Ubiquity and the Associational Theory of Law, and, in many respects is in keeping with the existentialism integral to the humanist approach – i.e. with the idea that meaning and value are not inherent in nature, but created by us.

In terms of historical approach, this thesis rejects the narratives of continuity and progress; it discards any feelings of pride or triumph. There is no danger of Whiggism here. Things change over time; sometimes we might think for the better, other times for the worse, but we must not confuse opinion with fact. The historian should always aim to be unassuming and non-judgemental. Moreover, following the *Annales* school, we must remember socio-economic context.[201]

The purpose of historical study is to understand the past better; *wie es eigentlich gewesen*, to quote Ranke.[202] As Tout said: "We investigate the past, not to deduce practical lessons, but to find out what really happened."[203] Even though historical study aids us in

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[199] Vivien Burr, *Social Constructionism*, 2nd ed. (Routledge, 2003), 2.

[200] For an alternative example of this approach, see esp.: John R Searle, *The Construction of Social Reality* (Penguin Books, 1995); John R Searle, *Making the Social World: The Structure of Human Civilization* (Oxford University Press, 2010).

[201] We might think of Voltaire's sarcastic remark on political history in his *Essai sur les Moeurs et l'esprit des nations*: "For the last fourteen hundred years, the only Gauls, apparently, have been kings, ministers and generals.": Quoted in: Jacques Le Goff, "Is Politics Still the Backbone of History?," trans. Barbara Bray, *Daedalus* 100, no. 1 (1971): 1.

[202] "History has had assigned to it the task of judging the past, of instructing the present for the benefit of the ages to come. To such lofty functions this work does not aspire. Its aim is merely to show what actually occurred [*Er will bloss zeigen, wie es eigentlich gewesen*]." Quotation and translation in: George Peabody Gooch, *History and Historians in the Nineteenth Century*, 2nd ed. (Longmans, Green and Co., 1913), 78. For the original, see: Leopold von Ranke, *Geschichten Der Romanischen Und Germanischen Völker von 1494 Bis 1514*, 3rd ed. (Duncker & Humblot, 1885), vii. Ranke's original formulation is not grammatically complete; the auxiliary verb (*ist*), which should be in the end position, is missing. The reason for this appears to be – not a typographical error – but, rather, the fact that the omission of the final verb, where it could be readily imagined by the reader, was a not uncommon literary feature of nineteenth-century German.

[203] Tout, *Chapters in the Administrative History of Mediaeval England: The Wardrobe, the Chamber, and the Small Seals*, 1:7.

understanding why things are as they are and better predicting how things will be tomorrow, we must never confuse the past and the present; neither should we be quick to assume that similarities between the past and the present entail some singular identity.

There have been a number of failings in the scholarship, including a lack of interdisciplinarity, theoretical frameworks, and system-building. The upshot is that there has been a signal failing in connecting everything together. There have been calls for a new kind of constitutional history;[204] there are even some who seem to think that constitutional history is already making a revival.[205] The latter opinion seems optimistic. Those historians who have made the call have yet to step outside the bounds of traditional history. They appear to be unacquainted with constitutional theory; they have made no real attempt to set out a theoretical framework to underpin their narratives. As a result, the chapters of their books that proclaim to outline medieval political ideas rather tend towards meandering discussions of the importance of kingship.

This thesis is highly interdisciplinary and integrative in approach. It draws on fields like jurisprudence, sociology, anthropology, psychology,[206] social psychology, neurology, social network analysis, zoology, memetics, *Begriffsgeschichte*, [207] philosophy, mathematics, and logic.[208] Through the synthesis in Part I, it seeks to start moving towards a more comprehensive system – one that reflects the unity of reality, rather than arbitrary disciplinary divisions.[209] After all, the attempt to understand constitutions and

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[204] These are, in particular, Edward Powell, Christine Carpenter, and John Watts. See: Edward Powell, *Kingship, Law, and Society: Criminal Justice in the Reign of Henry V* (Oxford University Press, 1989), 1–22; Edward Powell, "After 'After McFarlane': The Poverty of Patronage and the Case for Constitutional History," in *Trade, Devotion and Governance. Papers in Later Medieval History* (Stroud, 1994), 1–16; Carpenter, "Political and Constitutional History: Before and After McFarlane"; Watts, *Henry VI and the Politics of Kingship*. On this more generally, see: Watts, *Henry VI and the Politics of Kingship*, 4–6. Cf. AJ Pollard, "Review: John Watts, Henry VI and the Politics of Kingship," *The American Historical Review* 103, no. 3 (1998): 869–870.

[205] Cosgrove, "Culture of Academic Legal History," see esp. 23 and 34.

[206] For the purposes of jurisprudence, psychology is incredibly important, for, as Calnan has said: "Psychology, or the study of human mind and behavior, is the natural bridge between the natural and social sciences". Alan Calnan, "Beyond Jurisprudence," *Southern California Interdisciplinary Law Journal* 27, no. 1 (2017): 44.

[207] That is, the history of ideas.

[208] As Loughlin has commented, in the context of John Millar: "Any theory of government and law must be rooted in a theory of society." Loughlin, *Public Law and Political Theory*, 12. This is undoubtedly correct and it is for this reason that I have had great recourse to subjects like sociology, anthropology, social psychology, social network analysis, etc. Government and laws concern social agents; without some understanding of social agents and social groups, it would be impossible to understand government, laws, etc. properly.

[209] This approach has much in sympathy with that which the biologist and Harvard professor emeritus, EO Wilson, has (following the nineteenth-century polymath, William Whewell), called 'consilience' – an attempt to develop a unified system of knowledge: Edward O Wilson, *Consilience: The Unity of Knowledge* (Thorndike Press, 1998).

laws is really an attempt to understand the complexity of social life, which endeavour requires the "breakdown of boundaries between existing intellectual disciplines", as well as a "systematic denial of the [their] autonomy".[210]

It would be wrong to blame the Victorian Constitutional Historians entirely for the decline of constitutional history; they were products of their time. The blame must rather lie on those who have failed to reform the field in line with modern standards. This thesis intends to address this failure.

[210] Roger Cotterrell, *The Sociology of Law: An Introduction*, 2nd ed. (Butterworths, 1992), 5-6 and, further, on the impression of the "autonomy of law," 16-18.

Part I:
The Framework

2 – The Theory of Constitutional Ubiquity

2.1 Introduction

The Theory of Constitutional Ubiquity, in its simplest form, is this:

> Wherever there are social agents, there are constitutions.

This applies regardless as to time, place, or, indeed, species. All groups of social animals have constitutions;[1] they are facts inextricably linked with social life.[2] It would be impossible for us to imagine a group of social agents without also imagining *some kind* of constitution for them. Constitutions are ubiquitous.[3]

However, it does not follow that the *idea* of constitutions is likewise ubiquitous. It cannot be imagined for a moment that eusocial insects,[4] for example, can conceptualize constitutions – that they have the self and social awareness necessary to conceive of themselves as individuals amongst other individuals. This does not matter. Eusocial insects need not know how or why movement happens, or even what movement is, in order to move. Likewise, they need not know what a constitution is in order to be part of one. In such cases, constitutions are better understood as analytical frameworks that we, *as observers*, use to understand the workings of social groups; to make sense of their members' behaviours.

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[1] This includes both human and non-human animals, which latter would include, for example, 'eusocial' insects (e.g. ants, bees, wasps, etc.) and most mammals (e.g. bears, dolphins, elephants, chimpanzees, etc.). Cf. "Humans, like most mammals, are intensely social.": RIM Dunbar, "The Social Brain Hypothesis and Its Relevance to Social Psychology," in *Evolution and the Social Mind: Evolutionary Psychology and Social Cognition*, ed. Joseph P Forgas, Martie G Haselton, and William von Hippel (Psychology Press, 2007), 21.

[2] This is not entirely dissimilar to what Loughlin said when he said that "The formation of governing arrangements is a ubiquitous feature of group life. Whatever the type of governing arrangement established, an iron law of necessity holds sway." Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 5.

[3] Cf. Georges Renard: "Constitution, institution, these two terms are complementary: one expresses the generating act and the other the being that is engendered. // Every institution has its charters, which gives it being while determining its manner of being and consequently of behaving: this is its constitution, written on parchment or immanent, like customary law, in its structure, its internal development, and its external activity – it matters little! This institutional charter does not merely provide for a system of mutual obligations among its members; it effects a mutual integrations. // It follows that constitutional law is not just a branch of public law and *a fortiori*, within public law itself the object of constitutional law is not limited to the organization, operation, and relationships of powers in the state." Renard, from *La philosophie de l'institution*, in Albert Broderick, ed., *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T Delos*, trans. Mary Welling (Harvard University Press, 1970), 290. The French institutionalists – Hauriou, Renard, and Delos – were certainly *en route* to the Theory of Constitutional Ubiquity as presented here. However, exactly what they meant by the term 'institution' remained vague until the end and, furthermore, they were fully committed to the identification of *objective* phenomena. See further, *infra*, 3.2, 4.11 (n. 104), 4.18, and 4.19.

[4] See *supra*, n. 1.

This is an important point – not only for anthropologists and sociologists, but also for constitutional historians. It means that we can explicate the constitutions of past societies *even if they did not do so themselves*.[5] Indeed, a disinterested outsider might even be able to do so with greater accuracy and objectivity,[6] although the further removed in space and time the observer is, the greater the likelihood for misunderstanding and error.

The Theory of Constitutional Ubiquity makes a further claim: all humans possessed of normal cognitive function have, in the very least, some ideas concerning the constitutions of the groups to which they belong; most likely, too, ideas about the constitutions of other groups. All human social groups have constitutions of which their members are at least dimly cognizant. This is because the ability and propensity to conceptualize constitutions is ubiquitous among humans; almost all of us possess the requisite personal and social awareness to be able to think in complex terms regarding both social groups and individuals' places within them. It is a product of our neurobiology and there is no reason to suspect that this has not been true of all humans since humans first evolved.

Again, for the constitutional historian, this is important. It means we can study the constitutions of human social groups not only as emergent properties. We can study them as lived realities; we can study them *as they were understood by those who lived by them*. Indeed, if we are properly to understand them, we *must* do this.[7] Otherwise, much behaviour will remain puzzling and inexplicable, because we will not know the motivations and assumptions underlying it. Furthermore, it means that constitutions are not distinctively modern phenomena. There is no time or place beyond the reach of constitutional history; the only limiting factor is the availability of reliable evidence.

Complete proof of this would be impossible here. Instead, the present aim is more modest. It is to show that, contrary to the beliefs of some, mediaeval England was possessed of a

[5] Cf. Linton: "Every culture includes a series of patterns for what behaviour individuals or classes of individuals should be." Further: "The sum total of the ideal patterns which control the reciprocal behavior between individuals and between the individual and society constitute the social system under which the particular society lives." Ralph Linton, *The Study of Man: An Introduction* (Appleton-Century-Crofts, Inc., 1936), 103, 105. Thus, in Linton's view, to discover the 'ideal patterns' is to discover the 'social system' (i.e. the constitution); this is a descriptive enterprise and might be undertaken by anybody.

[6] Cf. "Not only does the average individual fail to apprehend the patterns which govern the life of his society as a social system, but he is rarely if ever familiar with all the patterns themselves. He has to know a certain number of them if he is to do his part as a member of society, but there is no necessity for him to know all of them." Linton, *The Study of Man*, 261 and, further, 272–75.

[7] Cf. Franz Boaz in his introduction to Benedict: "We must understand the individual as living in his [or her] culture; and the culture as lived by individuals." Ruth Benedict, *Patterns of Culture* (Houghton Mifflin Company, 1989), xx.

constitution. It could not have been otherwise. It was not necessarily like any modern constitution, but there was a constitution nevertheless.[8]

2.2 Breadth of Definition

It is undoubtedly apparent that, if constitutions are to be considered ubiquitous, the definition of 'constitution' will have to be widely drawn.

To draw a narrower definition would result in a lack of explanatory power and engender greater conceptual complexity than necessary. It would require the search for, and imposition of, unnecessary, arbitrary, and artificial distinctions and thresholds; it would entail an unwarranted proliferation of words, which might easily lead us 'into a labyrinth in which even the greatest geniuses might lose themselves'.[9]

Moreover, it would require the search for some critical moment in which societies suddenly switch from states of *no*-constitution to *has*-constitution. There are, it is true, many identifiable 'constitutional moments'. Many of these resulted in countries' first written and codified constitutions. However, these merely mark *dramatic* or, at least, *noteworthy* constitutional *changes* – not the sudden and miraculous advent of a constitution *de novo* or *ex nihilo*. Every constitutional moment is preceded and succeeded by a constitution of some description. The moment, such as it is, marks only a *transition*. No society has ever existed in a pre- or proto-constitutional state.[10]

There might be well-meant arguments in favour of narrower definitions, e.g. to avoid anachronism, anatopism, or even anthropomorphism.[11] If we are to understand things

[8] As Watts has said, "the notion of an entirely unprincipled and unconstitutional society demands suspicion": John Watts, *Henry VI and the Politics of Kingship* (Cambridge University Press, 1999), 4.

[9] This is adapted from Helvétius, who wrote, concerning abuses of words, that "the abuse of words, and the ignorance of their true import, is a labyrinth in which the greatest geniuses have lost themselves". Following Descartes, Helvétius argued that there were many who 'entrenched themselves behind the obscurity of words'; it is like a blind person seeking to gain the advantage over their clear-sighted rival by 'drawing them into a dark cavern'. Claude Adrien Helvétius, *De L'Esprit: Or Essays on the Mind, and Its Several Faculties*, trans. William Mudford (M. Jones, 1807), 26-27 (1.4).

[10] Habermas, for example, speaks of an "international proto-constitution", which he contrasts with "a republican constitution"; with "a constitution in the strict sense"; with "a 'politically' constituted community". Habermas very much seems to view the "international community" – as bound together in a common observance of international law, rather than, perhaps, subjection to a common governmental authority – as being in some state of existence *just prior to* a constitutional state. There has been some process of 'constitutionalization' and there are elements of a constitution, but, as yet, there is only a 'weakly constituted community'. In short, as Habermas himself says, he believes that "Classical international law is already a *kind of constitution*" (emphasis added). This kind of talk is misguided. What Habermas really means is that the international community is lacking a *formal* and *consolidated* constitution; it does, however, have a constitution. For Habermas, see: Jürgen Habermas, *The Divided West* (Polity Press, 2006), 133.

[11] I.e. misattributing feelings, ideas, beliefs, behaviours, objects, etc. to times, places, or non-human animals where they do not rightfully belong.

properly, it is important that we avoid such things. However, many have been overzealous in prosecuting these, such that they rather end up demonstrating ethnocentrism, anthropocentricism, and a lack of understanding of the societies in which we live. That is to say, they wrongly believe that certain feelings, ideas, behaviours, etc. *must* be exclusive to certain populations or species. A generous interpretation would have this as a lack of insight; a false belief that things outward differences signify actual and essential differences. A less generous interpretation would have it as supremacism, shot through with ideas of exceptionalism and elitism.

It is therefore necessary to adopt a broad but nuanced and careful approach to the concept of constitutions – recognizing not only the ways in which all constitutions are the same, but also the ways in which they differ.

2.3 Problems with Current Definitions

Most people have some general sense of what a constitution is; the word is part of common parlance.[12] Yet, when it comes to the matter of definition, there seems to be a great deal of difficulty and confusion. One is reminded of Augustine's musings on time,[13] or Walter Map's like musings on the mediaeval court:[14] so long as we are not pressed for a definition, we seem to know what constitutions are. McBain noted this problem, saying that "a constitution, generally conceived, does not lend itself to ready definition".[15] One can certainly agree with him that "it is easier to puncture [definitions] with criticism than it is to improve upon them".[16] However, his conclusion that "[w]e may…advantageously

[12] We might think here of what John Locke said regarding the abuses of words: "Men having been accustomed from their cradles to learn words which are easily got and retained, before they knew or had framed the complex ideas to which they were annexed, or which were to be found in the things they were thought to stand for, they usually continue to do so all their lives; and without taking the pains necessary to settle in their minds determined ideas, they use their words for such unsteady and confused notions as they have, contenting themselves with the same words other people use; as if their very sound necessarily carried with it constantly the same meaning. […].Men take the words they find in use amongst their neighbours; and that they may not seem ignorant what they stand for, use them confidently, without much troubling their heads about a certain fixed meaning; whereby, besides the ease of it, they obtain this advantage, that, as in such discourses they seldom are in the right, so they are as seldom to be convinced that they are in the wrong; it being all one to go about to draw those men out of their mistakes who have no settled notions, as to dispossess a vagrant of his habitation who has no settled abode." John Locke, "An Essay Concerning Human Understanding [1690]," in *An Essay Concerning Human Understanding with the Second Treatise of Government* (Wordsworth Editions Limited, 2014), 474-475 (3.10).

[13] "What then is time? If no one asks me, I know; if I wish to explain it to one that asketh, I know not…": Augustine of Hippo, "The Confessions," in *Augustine*, trans. Edward Bouverie Pusey, vol. 18, Great Books of the Western World (Encyclopaedia Britannica Inc., 1952), 93 [11.14].

[14] "In like spirit of perplexity [to Augustine] I may say that in court I exist and of the court I speak, and what the court is, God knows, I know not." Walter Map, *Du Nugis Curialium (Courtiers' Trifles)*, ed. MR James, CNL Brooke, and RAB Mynors (Oxford University Press, 1983), 3.

[15] Howard Lee McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* (The Macmillan Company, 1941), 9.

[16] McBain, *The Living Constitution*, 9.

abandon any attempt to define constitutions in general" because "everybody knows in a general way what a constitution is" lacks rigour.[17]

In spite of these difficulties, there have been many attempts to define constitutions. Most definitions tend to run along the following lines:

> (1) The fundamental, highest, or most important (2) values, principles, practices, customs, conventions, usages, rules, laws, norms, etc. (3) that are to some degree written and (4) to a greater or lesser extent codified (5) that pertain to the organisation, ordering, systematisation, governance, administration, etc. (6) of public life or political power (7) of a partially/wholly independent, autonomous, self-governing, self-determining, sovereign (8) people, state, nation, country, province, organization, community, etc. and (9) the branches, divisions, organs, institutions, offices, etc. thereof, (10) often prescribing the fusion or separation of those things and relationships therebetween, (11)(a) through or after the tacit or explicit assent, consent, agreement of the body concerned as a whole,[18] or (b) a tacit or explicit agreement or pact between some subsets of that body,[19] or (c) given by some authority, such as some god(s), suzerain(s), lawgiver(s),[20] etc., or (d) according to Custom, Reason, Justice, Necessity, Propriety, etc.,[21] and (12) persists as long as that basis persists or for a term certain and (13) are

[17] McBain, *The Living Constitution*, 10–11. Indeed, it undermines his argument that "[e]very country in the world is governed under something that may be called a constitution" – without a definition, this statement is unverifiable: McBain, *The Living Constitution*, 7.

[18] Whether a constitution emanated from the People or from a State was considered in one of the earlier decisions of the US Supreme Court in *McCulloch v Maryland*, 17 US 316 (1819), in which the Chief Justice of the Supreme Court, John Marshall, held firmly that constitutions were ultimately acts of the People: 402-405.

[19] For example, between the people, on the one hand, and the monarch, elite, or aristocracy on the other.

[20] After the manner of Solon (the lawgiver of Athens) or Lycurgus (the legendary lawgiver of Sparta), perhaps.

[21] In other words, constitutions are not the product of acts by some agent or agents, but, rather, are determined according to either (*abstract*) *principle* – even *wisdom*, perhaps – or *situation*. Thus, for example, Bolingbroke defined a constitution as: "that Assemblage of Laws, Institutions and Customs, *derived from certain fix'd Principles of Reason…*that compose the general System, according to which the Community hath agreed to be govern'd." Henry Bolingbroke, "Letter X (The Craftsman: 26 January 1734)," in *Bolingbroke: Political Writings*, ed. David Armitage (Cambridge University Press, 1997), 88 (emph. added). It is noteworthy that the idea of *consent* or *agreement* is here also intermixed. Alternatively, Montesquieu, as summarized by Hume, believed that the laws of a country – within which we can include constitutional laws – ought to have a 'constant reference' to "the manners, the climate, the religion, the commerce, the situation of each society." David Hume, *The Essential Philosophical Works* (Wordsworth Editions Limited, 2011), 731 [Enq. Con. Princ. Morals, para. 158]. Cf. Montesquieu, *The Spirit of the Laws*, trans. Anne M Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge University Press, 1989), Bks. 14-21. Regarding the idea that law emanated from reason, we might think of Hobbes's repost to Coke to see a contrary view: "it is not Wisdom, but Authority that makes a Law." Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, quoted in Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000), 134.

> antecedent to the state, government, etc. and branches, etc. thereof in (a) time and/or (b) priority,[22] and which (14) control, limit, or restrict the abilities or powers thereof (explicitly or impliedly), (15) introduce certain mechanisms, safeguards, checks-and-balances, etc. and (16) embody certain doctrines, dogmas, ideologies, etc., e.g. 'liberal democracy', (17) making anything not in accordance with it null-and-void, illegal, etc. and (18) exist for the general utility and benefit of the people, nation, subjects, citizens, etc., (19) providing them with, or giving force to, certain fundamental rights; (20) those who breach these principles, etc., or rights, can be held responsible and accountable, e.g. in a court of law; and (21) these principles, rights, etc. are elevated or entrenched such that they can only be amended or revoked consciously by a special and more strenuous procedure than that of 'ordinary' law,[23] i.e. 'not casually or carelessly or by subterfuge or implication'[24].

As such, there is normally some **claim to fundamentality and special status**; something about the **nature and directive force** of its tenets or provisions; something about the **format**, e.g. *written* or *unwritten*, *codified* or *uncodified*; something about its being the **structuration of some universe** (normally defined according to some territory or group); something about the **conditions under which it originated, subsists, and will cease to exist**, often turning about some relationship between *constituent* and *constituted* powers, as well as *ascending* and *descending* theories of government;[25] something about its **purpose**, which is usually construed in terms of *limiting powers*, *providing and protecting rights*, and *providing for the general utility of all*; something about its **enforceability**; and something about the **possibility and processes by which it can be changed or amended**. These are all important considerations. Nevertheless, any definition focusing on these misses the fundamental nature of constitutions. Indeed, they tend to suffer from a number of fallacies, some of which will now be outlined.

Firstly, there is often an obsession with the idea that constitutions impose limitations on government. There is here a confusion between *definition* and *restriction*. This can be

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[22] This element was most famously argued for by Paine in the fourth chapter of his *Rights of Man* (1792) entitled "Of Constitutions": Thomas Paine, "Rights of Man (1792)," in *Rights of Man, Common Sense and Other Political Writings*, ed. Mark Philp (Oxford University Press, 1995), 238, 244–45.

[23] Cf. Chief Justice John Marshall's statement that constitutions – in particular, the US Constitution – can only sensibly be regarded as "a superior, paramount law, unchangeable by ordinary means": *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) at 177.

[24] Kenneth Clinton Wheare, *Modern Constitutions* (Oxford University Press, 1951), 10.

[25] Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, 3rd ed. (Methuen & Co. Ltd., 1974), Intro.

termed the **restriction fallacy**. To explain: When one defines something, one naturally draws a line around it, thereby differentiating it from other things. In a sense, by recognizing the extent of something, one also recognizes its limitations. However, there is a difference between *recognizing* the limitations of something and *purposefully limiting* it, i.e. making it as small as possible. Thus, a constitution might *define* the powers of a government without markedly *restricting* them. Constitutions can equally provide for omnipotent – even tyrannical – rulers as for so-called 'constitutional governments'. This is no contradiction in terms. A constitution can equally say that "all power resides with the monarch" (a power *defined* but not *restricted*) as it can "all powers are to be exercised only subject to certain checks and restraints" (a power both *defined* and *restricted*).

In large part, this fallacy arises from another: confusing constitutions and *good* constitutions. This can be called the **evaluative fallacy**. Certainly, providing against concentrations of power seems sensible and laudable.[26] However, even though such views are prevalent today, this was not always the case. Indeed, many mediaeval publicists argued – not entirely unreasonably – that power ought to be concentrated rather than dispersed.[27] This concentration produces strength; strength produces order and stability. To believe that such systems are less deserving of the appellation 'constitution', simply because they diverge from modern tastes, is wrong. It confuses *identification* with *evaluation*. A table need not necessarily be a good table in order to be a table; a constitution need not necessarily be a 'good' one in order to be a constitution. A constitution is such, regardless as to whether we think it good or bad.

There is also an obsession with the idea of fundamentality – that constitutions represent the most 'important' or 'fundamental' principles.[28] This can be called the **fundamentality fallacy**. Again, it is as understandable as it is misguided.

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[26] One might invoke many instances from modern history to explain this view. For example, one might turn to the events of the French Revolution; to the experiences under the fascist regimes of Nazi Germany, Mussolini's Italy, Franco's Spain; to the experiences under the communist regimes in Russia, particularly that of Stalin. One might also point out that technological developments have meant that modern-day tyrants can do much more damage than their predecessors ever could. Furthermore, one might identify the wide availability of comprehensive education today as obviating the need to exclusively concentrate power in the hands of a few.

[27] This was particularly the case for defenders of monarchy, on the one hand, or theocracy, particularly as achieved through papal supremacy, on the other. As will be discussed in Chap. 7, there were many reasons why mediaeval people thought that society ought to be structured in such a way, but one of the most important was the belief that, if there were a person set above everybody else who might be impartial, then they can best stop squabbling and dispense justice.

[28] For McBain, fundamentality was perhaps the most important quality: "Whatever else a constitution is it is fundamental". However, Schmitt correctly noted that the notion of fundamentality, with regard to constitutions, "remains mostly unclear". Cf. McBain, *The Living Constitution*, 9–10; Carl Schmitt,

To a great extent, this idea of fundamentality is derived from associations with codified constitutions.[29] Their provisions *appear* to be fundamental because they were selected for inclusion, given the limited availability of time, space, and attention. To some extent this is true: they are often most needful of overt mention and explicit agreement. However, to think that something must (not) be fundamental simply because it is (not) included is wrong. After all, some provisions might be included simply because they were uncontentious or at the drafters' whim; others might be omitted due to oversight, their contentiousness, or a desire to keep 'fundamental questions of political authority in a state of irresolution'.[30] As such, a provision's inclusion or exclusion often reflects the circumstances in which the document was made or the shortcomings of the human mind, rather than any supposed fundamentality. Furthermore, it must be remembered that fundamentality is a relative concept – what appears fundamental to some might not necessarily appear so to others.[31] Indeed, this is reinforced by the inherent vagueness of the term 'fundamental'. It often boils down to an inability to imagine something without a particular feature(s); opinions will differ as to these.

When writing constitutions, it makes sense to focus on those things that appear to be of the greatest consequence, but to think that constitutions must be limited only to these is a grave error; it mistakes practicality, convenience, and chance for essence. Naturally, some constitutional ideas are more important than others.[32] However, to say that constitutions consist only or primarily of these things is fallacious.

Besides these fallacies, there is also the pervasive issue of **pathological terminological vagueness**, especially when it comes to ostensibly important terms like 'sovereignty' and 'statehood'. Indeed, these particular terms are problematic, not only because of their vagueness, but also due to their associations with modernity. The result is that we have a sense that constitutions must be a modern phenomenon, though we remain unsure as to what exactly that phenomenon is. We can return to the idea of exceptionalism – the idea

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Constitutional Theory, trans. Jeffrey Seitzer (Duke University Press, 2008), 59. See also: Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, 2nd ed. (Cornell University Press, 1947), 20–21.

[29] Especially those after the manner of the comparatively short US Constitution. For the American contribution to 'constitutionalist' thought more generally, see, e.g.: Friedrich August Hayek, *The Constitution of Liberty* (Routledge Classics, 2006), chap. 12.

[30] This is Foley's phrase, quoted in Loughlin: Loughlin, *The Idea of Public Law*, 50.

[31] Turpin and Tomkins, for example, have recognized that, in the UK, there is perhaps "a lack of certainty about what truly is fundamental to our constitutional order". They continue: "We may wish to claim that trial by jury, the right to silence or habeas corpus are fundamental values inherent in the constitutional order, but on what basis can such a claim actually be grounded, beyond one's own desire?" Indeed, as they ask, is there anything that is truly 'sacred'? Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials*, 7th ed. (Cambridge University Press, 2011), 9.

[32] *Infra,* 2.17.1.

that we advanced moderns have something that cannot be found in more 'primitive' societies. This leaves us in something of a quandary as to how to describe what they *did* have.

What is needed, therefore, is something that helps us to explain all societies with equal validity and force. Of course, words being what they are, it would be perfectly possible for us to define constitution in such a way that confines it to modern, advanced societies.[33] However, as has already been argued, this would be inadvisable.[34]

There is no suitable definition of constitution currently available. Most definitions are overcomplicated and, indeed, distinctly unhelpful. One also gets the impression that many have been plucked as though magically from the air, based on a *feeling* that constitutions must be *something-like-this* – revealing more about the education, assumptions, etc. of their authors than constitutions. It is time for a more suitable definition.

2.4 'Constitution'

As has already been said, most definitions of 'constitution' seem to fall within the precincts of the definition provided above, which definitions have their limitations and drawbacks. However, before proceeding, it would be worthwhile considering the definition given in the Oxford English Dictionary and utility thereof. It is there defined as follows:

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[33] By this, it is meant that words are *signifiers* and, as such, any given combination of letters and sounds can be given any meaning that we like; we can attach any idea thereto. Thus, the signifier "constitution" might signify a kind of animal or plant, a type of action, or anything else that we might label. We can agree with what Williams has said: "Every one is entitled for his own part to use words in any meaning he pleases; there is no such thing as an intrinsically 'proper' or 'improper' meaning of a word. The nearest approach to the 'proper' meaning is the 'usual' meaning; and certainly it is generally desirable to keep to usual meanings, and a person who uses a word in an unusual meaning must state clearly the meaning in which he is using it, on pain of being misunderstood if he does not." Glanville L Williams, "International Law and the Controversy Concerning the Word 'Law,'" *British Year Book of International Law* 22 (1945): 148. My contention here is that the 'usual' meaning of 'constitution', insofar as it can be said to have one, is not necessarily the most helpful; whilst it might suffice in many situations, there is, I think, a better definition available, which grasps the essence of the 'usual' meaning, but is more useful and versatile – especially to the constitutional historian, anthropologist, sociologist, etc. In this context, we can also very much agree with the words of Maine: "Nobody is at liberty to censure men or communities of men for using words in any sense they please, or with as many meanings as they please, but the duty of the scientific enquirer is to distinguish the meanings of an important word from one another, to select the meanings appropriate to his own purposes, and consistently to employ the word during his investigations in this sense and no other." Henry Sumner Maine, *Lectures on the Early History of Institutions*, 7th ed. (John Murray, 1905), 374. The investigations of a constitutional historian are, naturally, historical in nature. It is therefore important to see if there is a definition of 'constitution' that takes as little for granted as possible, whilst having the greatest possible explanatory power. Because of the scope of constitutional history, which stretches across all places and all times, there needs to be a sense in which the term adopted, if it is possible to adopt one (which, naturally, I think it is), is universally applicable.

[34] *Supra*, 2.2.

> "1. A body of principles according to which a state or organization is governed. 2. The composition or formation of something. 3. A person's physical or mental state."[35]

The second sense would seem to be the general sense; the first applies this general sense to certain human groupings and the third (with which we are not presently concerned) applies it to individuals. Ostensibly, the first sense touches most closely on the present endeavour. Yet, whilst it has its merits and might serve well for everyday usage, there is, I think, a definition better suited to the industries of the constitutional theorist and historian, which definition better delimits the subject-matter of study. In order to move towards this definition, we can begin with the second – and general – sense.

What is the 'something' with which the constitutional theorist and historian is concerned? We might say, in line with the first sense, that it concerns either (a) *human groupings* or (b) *particular and definite kinds thereof*. However, the former is too anthropocentric; the latter too restrictive and liable to cause trouble to the constitutional historian – especially if the only types of group supposed capable of having constitutions have strong associations with modernity (viz., 'the State').[36] It is argued, therefore, that this element

[35] Catherine Soanes and Sara Hawker, eds., *Compact Oxford English Dictionary of Current English*, 3rd ed. (Oxford University Press, 2005), 208 ["constitution"].

[36] There are some, such as Schmitt, who have argued that the definition of 'constitution' ought to be restricted to describing the State: "A proper understanding requires that the meaning of the term 'constitution' be limited to the constitution of the state, *that is to say, the political unity of the people.*" (p. 59, emph. added). Given the fact that Schmitt's agenda was to defend an absolutist state, and given his connections with Nazism and the NSDAP (which go towards making him a somewhat controversial theorist), it is perhaps unsurprising that he would be inclined towards trying to maintain that there was something special about the State. Indeed, that it possessed something special, i.e. a constitution – one with a deep connection to a unitary, if not indeed monistic, group from whom it emanates (through some 'fundamental political decision'), and only by whom can it truly and fundamentally be altered. In this regard, Schmitt mostly talks of a 'people', though the importance that Schmitt lays on the 'nation' is noteworthy and unsurprising given his nationalist sympathies. (p. 127) It is the focus on 'unity', informed by ideas of a common and single consciousness and will (both treated as having a very real existence) that underpins Schmitt's rejection of mediaeval constitutions: "Political unity as such as become problematical *factually and in terms of consciousness*. […]. One cannot denote these countless agreements [between the higher aristocracy, gentry, etc.] as constitutions of a state, as it is in general mistaken to apply concepts of modern public law to such medieval relationships. The actual object of modern constitutions, the type of existence and form of existence of the political unity, was not the object of these agreements. In the 'state' of estates, one may speak neither of a monarchical nor of a dualistic or pluralistic state; at most one may speak of a *jumble* of well-earned rights and privileges." (p. 97, emph. added). Essentially, Schmitt seems to see mediaeval societies as collections of self-interested individuals and groups, rather than as truly cohesive bodies, each possessed of a unity of feeling and direction. As will be seen, we need not assume – or, indeed, accept – the sorts of connection, levels of concreteness and corporateness, or ideas and importance of will and consciousness imagined by Schmitt. The reasons for this will become evident as this chapter progresses and especially as we reach the definition offered for 'social group'. All references are to Schmitt are from: Schmitt, *Constitutional Theory*. For Schmitt's career, see, e.g.: Volker Neumann and Carl Schmitt, "Carl Schmitt," in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink (University of California Press, 2000), 280–90. On the State and its relation to the present theory, see Appendix I.

can be expanded without loss. Indeed, such an expansion would result in a definite gain for it would help us to grasp the fundamental sense on which it rests. After all, human groupings – of whatever kind, including 'States' or 'organizations' – are fundamentally *social groups*, or, more accurately, *sets of social agents*.[37] This is the 'something' with which we are concerned, and it will be the especial concern of the ensuing sections to explain just what these terms mean and imply.

What does it mean, then, to say that a constitution pertains to 'the *composition* or *formation* of a social group (or set of social agents)'? Composition and formation, at least in this context, primarily concern two things: *substance* and *form*. What, then, is the 'substance' of a social group? The substance of any group is its *members* or *membership* (also called *elements*), which, in this case, are social agents. And what of 'form'? This has to do with *relations between things*: in this case, firstly, *as between social agents and other social agents*, and, secondly, *as between social agents and the environment*. The relations captured by the former are here referred to as *social influence* or, more simply, *influence*; the relations captured by the latter are here referred to as *activities*. Thus, the *composition of a social group* refers to *its membership* and the *distribution as between that membership of social influence and activities*. How that distribution comes about and how it is regulated, it is argued, is what the "a body of principles according to which…is governed" of the first sense is driving towards. This aspect will be treated more fully when we come to the Associational Theory of Law.

With the foregoing in mind, the following definition of 'constitution' is suggested, most particularly to the constitutional theorist and historian:

> The distribution within a social group, or as between a set of social agents, of activities and social influence.

It can be noted that the 'membership' aspect, discussed above, is encapsulated within the terms 'social group'/'set of social agents', and therefore does not require explicit mention within the definition. It will be the purpose of the rest of this chapter to explain this definition.

2.5 'Social Group'

[37] For the argument that States are social groups, see Appendix I.

In considering the meaning of 'set of social agents' or 'social group',[38] it is first necessary to discuss the idea of the social group as it exists in the scholarship. There is some diversity of opinion. Some formulations instil the idea of social groups with a sense of fatalism and mysticism; they are groups of individuals predestined to be together and, moreover, contain members that are essentially one and the same. By contrast, other formulations deny their existence altogether; there are merely individuals and social behaviours. For the former, the social group is a useful descriptor of naturally defined units; for the latter, merely a folk psychology.

Theories about the formation of social groups, it is suggested, generally fall under four headings: (1) Commonality Models; (2) Interaction Models; (3) Identification Models; and (4) Cohesion Models. Each will be discussed in turn.

2.6 Commonality Models: The Group Mind and the Real Personality of Groups

Commonality models are characterized by an argument that social groups exist where a set of social agents *have something in common with one another*, e.g. traits, experiences, history,[39] land, purpose, sense of familiarity, destiny or fate, etc.[40] At first glance, this

[38] The inclusion of 'set of social agents' or 'social group' in the present definition nicely illustrates the dangers of so-called working definitions. Working definitions can make for good hypotheses, but make for bad foundations for extended analysis. All too often, they are rashly-given formulae including profoundly vague elements. I had originally intended to have 'political community' as this element. It is not an uncommon phrase and one can certainly grasp something of its meaning intuitively. However, it lacks clarity and rigour. The word 'community', in particular, is a highly contested term. Further, it is difficult to differentiate precisely a *political* community from any other kind of community – writers tend to try to clarify matters by saying that they are, as Finnis did, 'complete communities' and suchlike, but this does not in reality get us very far. As such, if original impulse had carried the day, the resulting definition would perhaps have been passible, but not particularly good. For some discussions of different takes on 'community', see, e.g.: Colin Bell and Howard Newby, *Community Studies: An Introduction to the Sociology of the Local Community* (George Allen and Unwin Ltd., 1971); Dennis E Poplin, *Communities: A Survey of Theories and Methods of Research* (The Macmillan Company, 1972); Joseph R Gusfield, *Community: A Critical Response* (Basil Blackwell, 1975). For Finnis, see: John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford University Press, 2011), esp. chap. 6.

[39] Historians – professional and amateur alike – have likely played an instrumental part in shaping ideas concerning nations in many cases. By providing a singular narrative, they can create a sense of a singular identity persisting over time. However, whether 'nations were made by historians', as Guenée claims, is rather more doubtful. For history to play a role, presumably that history must be found somewhere. However, it can as easily be found in oral tradition, etc., as in the works of those who have devoted presumably at least some time and energy to historical research. On Guenée, see: Olivier de Laborderie, "A New Pattern for English History: The First Genealogical Rolls of the Kings of England," in *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, ed. Raluca L Radulescu and Edward Donald Kennedy (Brepols, 2008), 45–62.

[40] One might recall in this context Hume's three principles of association: *resemblance*, *spatio-temporal contiguity*, and *cause-and-effect*. Thus, the members of the social group might *resemble* one another, i.e. they might possess certain characteristics that are reminiscent of one another; they might exist or, indeed, *co*-exist in the same time and place, such that we think them to share a common condition; or we might thinking of them as being the *product of the same set of forces*, such that they might share, for example, a common origin, ancestor, or history. For Hume's principles of association, see: David Hume, *An Enquiry Concerning Human Understanding*, ed. Tom L Beauchamp, Oxford Philosophical Texts (Oxford University Press, 1999), 101-107 (§3).

might seem reasonable. It is, however, flawed. The reasons for this will be discussed further down, but, for the moment, it is important to focus on two ideas, which are founded in Commonality Models and which have had a considerable impact on constitutional theory and history: the Group Mind and the Real Personality of Groups.

The central idea of the Group Mind is that social groups emerge from *psychological homogeneity* – they are groups in which members share a way of feeling, thinking, or acting. This might be transitory, as with crowds; it might be deeper-rooted and longer-lasting, such that the group's members are thought to share a *common character and personality* – perhaps even a *common self and will*. This might persist when the members are apart, but is likely to be especially prominent when they are assembled together. Thus, one might say, Englishmen are quintessentially English; one might take an Englishman out of England, but one cannot take England out of the Englishman. Moreover, one might say that a group of Englishmen will feel, think, and act characteristically and differently, as compared to a group of, say, French, Italians, etc.

In some versions, psychological homogeneity is said to be the product of some metaphysical shared consciousness, which "exists over and above all individuals comprised in the group and that might continue to exist though all the individual members ceased to be."[41] Other versions, which are more naturalistic, think it the result of determinism. For *social* determinists, homogeneity is the result of individuals internalizing the ideas, beliefs, and behaviours of their peers such that they come to resemble one another. For *biological* determinists, homogeneity is the result of one's genetic make-up, which is inherited from one's ancestors and makes one similar to others descended from those same ancestors. Whatever the case, Group Mind theories lend themselves to the notion that there are naturally occurring definite groups; indeed, membership of such groups is practically *inescapable*.

The idea of the Real Personality of Groups is founded on the following premises: (1) individuals appear to behave differently when in groups; (2) individuals in groups often appear to behave in unison with one another, even though they are not being prompted or directed; and (3) groups often appear to feel, think, and act as one. One can see the connection with the Group Mind in the final premise. The impression of a unity of feeling, thinking, and action gives rise to an idea that groups are entities unto themselves; that

[41] William McDougall, *The Group Mind: A Sketch of the Principles of Collective Psychology with Some Attempt to Apply Them to the Interpretation of National Life and Character*, 2nd ed. (Cambridge University Press, 1927), xiii.

they have their own very real existence apart from their constituent members. They appear to have their own character and personality; their own identity. As the *gestalt* theory goes, the whole is greater (or, at least, *other*[42]) than the sum of its parts.

It is important to note that theories of the Group Mind and Real Personality of Groups lead very easily into ideas of races and nations, i.e. biologically-determined groups that have not only a shared character, consciousness, and memory, but also corporate identities that outlive their individual members and change only very gradually.

The idea of different races within humankind is not of recent provenance. We find the idea, for example, in Plato and Aristotle.[43] Such ideas probably existed from very early times. After all, it seems something of a natural conclusion when confronted with unfamiliar persons whose appearance, language, manner, and, perhaps, intelligence, seem so very different to our own. Of course, the trajectory of such ides is that, for better or worse, distinct groups of people form who are essentially different. Some have taken this to the extreme. For example, Knox argued in his *Races of Men* that race was the

[42] This was the distinction made by Koffka: "It has been said: The whole is more than the sum of its parts. It is more correct to say that the whole *is something else than* the sum of its parts…": Kurt Koffka, *Principles of Gestalt Psychology* (Routledge & Kegan Paul Ltd., 1935), 176 (emphasis added). Or, as he put it at another time, correcting some nameless questioner: "No, what we mean is that the whole is *different* from the sum of its parts": Grace M. Heider, "More About Hull and Koffka," *American Psychologist* 32, no. 5 (1977): 383.

[43] For example, Aristotle thought that 'better ancestors' led to 'better men', certain peoples were imbued with either a spirit of servility or dominion, and, foreshadowing those like Montesquieu, he intimated a connection between a people's character and the climate. Aristotle, *The Politics* in Aristotle, *The Politics and The Constitution of Athens*, ed. Stephen Everson, trans. Jonathan Barnes and JM Moore, 2nd ed. (Cambridge University Press, 1996), 80 [3.13], 84 [3.14], 90 [3.17], 61 [5.3], 175 [7.7]. On Plato in this context, see, e.g.: Karl Popper, *The Open Society and Its Enemies. Volume One - The Spell of Plato* (Routledge Classics, 2003), esp. 52-55. For Montesquieu: Montesquieu, *The Spirit of the Laws*, bk. XIV. Publius Flavius Vegetius Renatus ('Vegetius', late C.4th CE) also drew such a connection, as did Aquinas who drew on both Aristotle and Vegetius, among others, see: Publius Flavius Vegetius Renatus, *Military Institutions of Vegetius*, ed. John Clarke (London, 1767), 6-9 (I.3-4); Thomas Aquinas, *St Thomas Aquinas: Political Writings*, ed. and trans. RW Dyson (Cambridge University Press, 2002), 45-46 (De regimine principum, 2:1). Likewise, so did Ptolemy of Lucca (c.1236-c.1327), John Buridan (c.1295-1363), and Nicole Oresme (c.1323-1382), see: Antony Black, *Political Thought in Europe, 1250-1450* (Cambridge University Press, 1992), 112–13, 143. Bodin, also, did so in his *Methodus*: "[a] recurrent theme of the *Methodus* is that a state's destiny is determined by the character of its people. What therefore drives Bodin's comparative method is the search for factors that shape the character of a people, predominantly those of climate and geography.": Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 57. It is worthwhile adding that such thinking was certainly not entirely ubiquitous. For example, Helvétius went to great lengths to combat Montesquieu's ideas: Helvétius, *De L'Esprit*, 338ff (3.27). There is also the example of Lord Kames, who expounded a form of polygenism – arguing (*contra* Buffon) that there were different races of humankind and, moreover, that environment, etc. could not account for those differences, which differences could only be accounted for by acts of separate creation by God: Henry Home (Lord Kames), *Sketches of the History of Man*, vol. 1 (Edinburgh, 1807), in the Preliminary Discourse.

inescapable root of 'individual and national life and character': "Race is everything: literature, science, art, in a word, civilization, depend on it."[44]

Such ideas were reinforced by ideas of evolution, for which Anaximander and, more fantastically, Empedocles represent early proponents.[45] Over time, the idea of biological evolution became more scientific, particularly through the likes of Leclerc,[46] Diderot,[47] Erasmus Darwin,[48] Lamarck,[49] Chambers,[50] Wallace,[51] and Spencer.[52] However, it is, of course, with Charles Darwin's publication of his theory of natural selection that the idea came into its own.[53] It is from this point especially that scientific racialism gained a lease of life.[54]

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[44] Robert Knox, *Races of Men: A Fragment* (Lea & Blanchard, 1850), 7.

[45] Anaximander (c.610-c.546BCE) and Empedocles (c.490-c.430BCE). On these, see: Bertrand Russell, *History of Western Philosophy* (Routledge, 2000), 47, 72, 696.

[46] George-Louis Leclerc, Comte de Buffon (1707-1788). On Buffon's ideas, see: J.S. Wilkie, "The Idea of Evolution in the Writings of Buffon.—I," *Annals of Science* 12, no. 1 (1956): 48–62; J.S. Wilkie, "The Idea of Evolution in the Writings of Buffon.—II," *Annals of Science* 12, no. 3 (1956): 212–27; J.S. Wilkie, "The Idea of Evolution in the Writings of Buffon.—III," *Annals of Science* 12, no. 4 (1956): 255–66.

[47] Denis Diderot (1713-1784). This was principally in his work *Thoughts on the Interpretation of Nature*, for which see: Denis Diderot, *Thoughts on the Interpretation of Nature: And Other Philosophical Works*, trans. Lorna Sandler (Clinamen Press, 2000).

[48] Erasmus Darwin (1731-1802). See: Erasmus Darwin, *Zoonomia; or, the Laws of Organic Life*, vol. 1 (J. Johnson, 1794); Erasmus Darwin, *Zoonomia; or, the Laws of Organic Life*, vol. 2 (J. Johnson, 1796).

[49] Jean-Baptiste Lamarck (1744-1829). See: Jean-Baptiste Lamarck, *Zoological Philosophy: An Exposition with Regard to the Natural History of Animals*, trans. Hugh Elliot (Macmillan & Co. Ltd., 1914).

[50] Robert Chambers (1802-1871). See: Robert Chambers, *Vestiges of the Natural History of Creation*, 11th ed. (John Churchill, 1860).

[51] Alfred Russel Wallace (1823-1913). See: Alfred Russel Wallace, *Contributions to the Theory of Natural Selection: A Series of Essays* (Macmillan & Co., 1871); Alfred Russel Wallace, *The Malay Archipelago: The Land of the Orang-Utan and the Bird of Paradise*, 5th ed. (Macmillan & Co., 1874); Alfred Russel Wallace, *Darwinism: An Exposition of the Theory of Natural Selection with Some of Its Applications* (Macmillan & Co., 1890).

[52] Herbert Spencer (1820-1903). Spencer is noteworthy for his attempts to apply the idea of evolution to not only the organisms, but also to the development of the human mind and human society. It was also he who coined the term 'survival of the fittest', after having read Charles Darwin. See: Herbert Spencer, *Essays: Scientific, Political, and Speculative*, Library Ed (Williams and Norgate, 1891), esp. chap. 1 ("The Development Hypothesis" [1852]) and chap. 2 ("Progress: Its Law and Cause" [1857]); Herbert Spencer, *First Principles*, 6th ed. (Williams and Norgate, 1928); Herbert Spencer, *The Evolution of Society: Selections from Herbert Spencer's Principles of Sociology*, ed. Robert Leonard Carneiro (The University of Chicago Press, 1967).

[53] Charles Darwin (1809-1882). The *Origin of Species* was first published in 1859: Charles Darwin, *The Origin of Species by Means of Natural Selection or, The Preservation of Favoured Races in the Struggle for Life* (Wordsworth Editions Limited, 1998). As Hobhouse has rightly said: "Though Darwin was by no means the founder of the theory of biological evolution, he does occupy in the genesis of this theory a position not incomparable to that of Newton in the theory of the solar system. For if he did not invent the evolutionary hypothesis nor yet prove that hypothesis to be a demonstrable truth, he first, by amassing a vast store of material and by illuminating it with clear and simple conceptions drawn directly from experience, brought the hypothesis into contact with the facts and consolidated it as a basis for future investigation." Leonard Trelawney Hobhouse, *Social Evolution and Political Theory* (Columbia University Press, 1911), 18.

[54] For the evolution, so to speak, of evolutionary thinking, see: Peter J Bowler, *Evolution: The History of an Idea*, 2nd ed. (University of California Press, 1989).

In this context, one might think of Darwin's half-cousin, Galton,[55] the patriarch of eugenics and social Darwinism, who contended that there were superior races.[56] One might also call to mind Lombroso,[57] a criminologist and physician who argued that crime was biologically determined – certain kinds of people were simply more likely to become criminals.[58] It is a small step to the idea that certain races are inherently more primitive, violent, etc.

As with the idea of racialism, ideas of the Group Mind and the Real Personality of Groups, in one form or another, are probably ancient. Yet, given the above context, it is unsurprising that they flourished during the nineteenth century. This was a time when metaphysicalism, idealism,[59] romanticism,[60] and nationalism were rife; it was also a time of exploration, colonization, imperialism, which only served to polarise and reinforce feelings of difference. Perhaps one of the most important reasons why we find their apogee in this period, however, is due to the expansion of education and scholarship, and, particularly, the desire to create a science of humankind. Thus, although these ideas were common and ancient, it is during the nineteenth century that we find their most considered expression. [61] That this coincided with the time that the canonical constitutional historians were writing is a point to which we will return.

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[55] Lived 1822-1911.

[56] This easily leads into ideas of racial purification and ethnic cleansing. See: Francis Galton, *Inquiries into Human Faculty and Its Development* (Macmillan & Co., 1883); Francis Galton, *Hereditary Genius: An Inquiry into Its Laws and Consequences*, 2nd ed. (Macmillan & Co., 1892).

[57] Lived 1835-1909.

[58] This was often evidenced by certain physical characteristics, e.g. a sloping forehead and a heavy-set brow. See: Cesare Lombroso, *Crime, Its Causes and Remedies*, trans. Henry P Horton (Little, Brown, and Company, 1911).

[59] On Idealism in Victorian/Edwardian Britain, see, e.g.: WJ Mander, *British Idealism: A History* (Oxford University Press, 2011); Sandra M den Otter, *British Idealism and Social Explanation: A Study in Late Victorian Thought* (Oxford University Press, 1996); E Neill, "History of European Ideas Evolutionary Theory and British Idealism: The Case of David George Ritchie," *History of European Ideas* 29, no. 3 (2003): 313–38. Further, the chapters by Andrew Vincent, Avital Simhony, and David Boucher in WJ Mander, ed., *The Oxford Handbook of British Philosophy in the Nineteenth Century* (Oxford University Press, 2014).

[60] For the romantic movement in its philosophical context, see Russell, *History of Western Philosophy*, chap. XVIII.

[61] As Greenwood has said: "The notion that social groups, or societies themselves (or states or nations), form emergent supraindividuals or organisms has been popular with social theorists since at least the time of Plato and was particularly prominent among idealist social theorists such as Hegel, [Thomas Hill] Green, and Bosanquet. The notion of a social 'mind' or 'spirit' or 'soul,' usually but not invariably associated with a nation or state, became the common intellectual currency of such idealist thinkers and was imported into social scientific disciplines such as history, sociology, and the new German discipline of *Völkerpsychologie*." John D Greenwood, *The Disappearance of the Social in American Social Psychology* (Cambridge University Press, 2003), 109.

The names most closely associated with expounding the idea of the Group Mind are Le Bon,[62] and McDougall.[63] In the following extract from Le Bon, it is evident how the ideas of race, the Group Mind, and the Real Personality of Groups connect with constitutions and constitutional history:

> "A nation does not choose its institutions at will any more than it chooses the colour of its hair or its eyes. Institutions and governments are the product of the race. […]. Centuries are required to form a political system and centuries needed to change it. […].
>
> Moreover, it is in no way in the power of a people to really change its institutions."[64]

Indeed:

> "A people is an organism created by the past, and, like every other organism, it can only be modified by slow hereditary accumulations."[65]

These ideas – complemented by Hegelian idealism[66] – have influenced legal and constitutional scholarship.[67] One might think of the German Historical School with its emphasis on *Volk* (people) and *Geist* (spirit): laws and constitutions arise out of Peoples, conceived of as almost – if not actually – metaphysical entities. They might be seen as the products of some *Volkswille* (people's will),[68] which is not dissimilar to Rousseau's *volunté générale* (general will),[69] although the latter implies rather more contingency. As

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[62] Gustave Le Bon (1841-1931). See: Gustave Le Bon, *The Crowd: A Study of the Popular Mind* (The Macmillan Company, 1896); Gustave Le Bon, *The Psychology of Peoples* (The Macmillan Company, 1898). On something of Le Bon's approach and methods, see: Leonard A Ostlund, "Tarde, Le Bon, and Bagehot: Early Group-Interaction Theorists," *Social Science* 32, no. 3 (1957): 166–71.

[63] William McDougall (1871-1938). See esp.: William McDougall, *The Group Mind: A Sketch of the Principles of Collective Psychology with Some Attempt to Apply Them to the Interpretation of National Life and Character*, 2nd ed. (Cambridge University Press, 1927). On McDougall's thought, see *inter alia*: Lewis Rockow, *Contemporary Political Thought in England* (Leonard Parsons, 1925), chap. 1.

[64] Le Bon, *The Crowd*, 79.

[65] Le Bon, *The Crowd*, 74.

[66] On the reception of Hegelianism in Britain, and its relation to British Idealism (which school of thought is mostly associated with the latter part of the nineteenth century), see: den Otter, *British Idealism and Social Explanation*, esp. chap. 1.

[67] On this, see esp.: Léon Duguit, "The Law and the State," *Harvard Law Review* 31 (1917): 1–185.

[68] For example, we might look at the ideas of Hegel: "A constitution only develops from the national spirit identically with that spirit's own development, and runs through at the same time with it the grades of formation and the alterations required by its concept. It is the indwelling spirit and the history of the nation (and, be it added, the history is only that spirit's history) by which constitutions have been and are made." Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Mind*, trans. William Wallace (Oxford University Press, 1894), 137 [§540]. The fact that Hegel thought of nations as organisms should not be surprising. See: Georg Wilhelm Friedrich Hegel, *Outlines of the Philosophy of Right*, ed. Stephen Houlgate, trans. TM Knox (Oxford University Press, 2008), e.g. 242 [§269], 255-256 [§271], et passim.

[69] Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (Penguin Books, 2004), passim.

seen in the extract from Le Bon, however, choice did not always enter into it. Kantorowicz put it neatly:

> "The historical school teaches that the contents of the law are necessarily determined by the whole past of the nation, and therefore cannot be changed arbitrarily. Thus, like the language, the manners, and the constitution of a nation, all law is exclusively determined by the nation's peculiar character… Like language, manners and constitution, law has no separate existence, but is a simple function or facet of the [unceasing] whole life of the nation."[70]

The names associated with the German Historical School include Savigny, Puchta, and Gierke.[71]

Besides the historicists, one might also think of the early twentieth century pluralists, such as Figgis, and, before their disenchantment, Cole and Laski.[72] Like Gierke,[73] pluralism is particularly associated with the idea of the Real Personality of Groups. However, whereas the State for the historicists tended to represent the ultimate social body (as an embodiment of Nation and *Volksgeist*), for the pluralists it was but one of many social bodies – and perhaps neither the source of those others nor the most important.[74] Yet, even though the historicists advocated something approaching, if not actually, a form of (political) monism, and the pluralists advocated (political) pluralism,[75] their underlying

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[70] Hermann Kantorowicz, "Savigny and the Historical School of Law," *Law Quarterly Review* 53 (1937): 332. The notion of unceasing national life, which we have here added, can be seen directly in Savigny when he says: "the aggregate existence of the community, which it does not cease to be". Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (Littlewood & Co., 1831), 28. For a criticism of Historical Schools of Law, see, e.g.: Nicholas Sergeyevitch Timasheff, *An Introduction to the Sociology of Law* (Harvard University Press, 1939), esp. 118, 311.

[71] Friedrich Carl von Savigny (1779-1861); Georg Friedrich Puchta (1798-1846); Otto von Gierke (1841-1921). See, esp.: Savigny, *Vocation of Our Age*; Otto Gierke, *Political Theories of the Middle Age*, trans. Frederic William Maitland (Cambridge University Press, 1922). On the historical school, in Germany and elsewhere, see: Raymond G Gettell, *History of Political Thought* (George Allen and Unwin Ltd., 1923), 389–98.

[72] John Neville Figgis (1866-1919); George Douglas Howard Cole (1889-1959); Harold Laski (1893-1950). For a collection of relevant sections of their works, see: Paul Q Hirst, ed., *The Pluralist Theory of the State: Selected Writings of GDH Cole, JN Figgis, and HJ Laski* (Routledge, 1993). And see further: David Nicholls, *The Pluralist State* (The Macmillan Press Ltd, 1975); Stanislaw Ehrlich, *Pluralism: On and Off Course* (Pergamon Press, 1982); David Runciman, *Pluralism and the Personality of the State* (Cambridge University Press, 1997). For Laski, see, e.g.: Harold J Laski, *Authority in the Modern State* (Yale University Press, 1919); Harold J Laski, *The Foundations of Sovereignty* (George Allen and Unwin Ltd., 1921).

[73] Figgis' acknowledged 'debt' to Gierke is noteworthy: John Neville Figgis, *Churches in the Modern State* (Longmans, Green and Co., 1913), x, 55–56.

[74] See esp. Figgis, *Churches in the Modern State*; GDH Cole, *Social Theory*, 3rd ed. (Methuen & Co. Ltd., 1923).

[75] See further: Ellen Deborah Ellis, "The Pluralistic State," *The American Political Science Review* 14, no. 3 (1920): 393–407.

assumption was much the same: groups were generally seen as having distinctive characteristics, and a reality above and beyond their members.[76] As will become evident, even though we can agree with the pluralists insofar as the multiplicity of social groups,[77] – which are not *necessarily* prior or superior to, or reliant upon, one another,[78] – we cannot agree with their taking these to be real and objective entities.[79] Moreover, whilst pluralism seems to move between employing commonality, identification, and cohesion models, there is a common thread of its positing the existence of discrete, identifiable, and largely independent groups, which, admittedly, might in certain ways join together and work relatively harmoniously with one another in a 'community of communities', but

[76] For example: "No ideal of 'the great State' will ultimately succeed in doing the good anticipated if its founders ignore the fundamental facts of *the reality of small societies*." Figgis, *Churches in the Modern State*, ix [emph. added]. This theme is developed further throughout the aforementioned text. Such ideas also underlie, for instance, Laski's article, representing his earlier thought, on the personality of associations: Harold J Laski, "The Personality of Associations," *Harvard Law Review* 29, no. 4 (1916): 404–26. On Laski in this context, see: Runciman, *Pluralism and the Personality of the State*, 187–89. More generally, see further: Nicholls, *The Pluralist State*, chap. 4; Hirst, *The Pluralist Theory of the State*, 16–22. The fact, however, that the Real Personality of Groups might as easily support an absolutist State (i.e. the historicist conception) as pluralism was noted by Barker in his introduction to Gierke: Otto Gierke, *Natural Law and the Theory of Society, 1500-1800*, trans. Ernest Barker, vol. 1 (Cambridge University Press, 1934), lxxxiv–lxxxvii.

[77] There is also a strong strain of secularist thought and arguments for toleration in pluralist writings, which appears laudable, though whether this is a necessary consequence of positing the existence of a multiplicity of groups is uncertain. Nevertheless, on this, see, e.g.: Nicholls, *The Pluralist State*, chap. 7.

[78] Pluralism is often taken to be anti-statist or, indeed, taken to assert that the state, in the words of Coker, is but "one among a number of equal or coordinate associations". There is some truth to this in the sense that they: gainsay statist absolutism and assertions that the state has a necessarily "superior [and anterior] claim to the individual's [sole and undivided] allegiance"; argue that sovereignty is *limitable* if not actually *limited*; and, in real terms, if not also in legal terms, argue against the fiction and concession theories of corporations (i.e. against the idea that corporations are necessarily creations of the State). However, pluralists were not necessarily against the State. As Coker said: "They recognize the distinctive function and superior authority of the state as an agency of coordination and adjustment." Indeed, there is a strong argument that: "Such views should be characterized as doctrines of political federalism rather than of political pluralism. But the influence of such views upon the ideas of the pluralists is unmistakable, and the connection is insisted upon by the pluralists." For these quotes, see: Francis W Coker, "The Technique of the Pluralistic State," *The American Political Science Review* 15, no. 2 (1921): 188, 190.

[79] Cole is an exception here. Indeed, he moves some way towards adopting a social constructionist approach, for not only is he strong on the difference between persons and associations (p. 15), but he also views social groups – or, at least, communities – as being ultimately subjective and whose reality "consists in the consciousness of it among its members" (p. 25-26), which has the result that such communities might not always be terribly clear (p. 27). Indeed, he denies that we can speak with absolute propriety of a State, community, or Church 'willing' or 'aiming at' anything "without realizing clearly that the only wills that really exist are the wills of the individual human beings who have become members of these bodies" (p. 22). In fact, his basing of social theory in 'associative will and action' (p. 7-8) bears a passing resemblance, to John Searle's 'collective/we intentionality', and this opens the way, much as will be argued in the Generational Theory of Law, for social groups to vary across time and place (p. 64-65), though Cole strays when he talks of social forms "in the prime of life" or "beginning to assume true social shape of their maturity" (p. 199). Indeed, Cole focuses overmuch on notions of purpose and function being central to associations, and, moreover, his definitions of 'community', 'society', 'association', and 'institution', on which his analysis rests, are not necessarily the best available (chaps. 2-3). All quotes for Cole are from: Cole, *Social Theory*. For Searle: John R Searle, *The Construction of Social Reality* (Penguin Books, 1995); John R Searle, *Making the Social World: The Structure of Human Civilization* (Oxford University Press, 2010).

nevertheless maintain their discreteness.[80] This has something of a neatness to it, but, especially in an increasingly globalized and cosmopolitan world, that neatness has an air of unreality.[81]

2.6.1 Commonality Models and the Victorian Constitutional Historians

Theories of Group Mind and Real Personality of Groups – in one form or another – permeate the writings of the Victorian constitutional historians, particularly as they regard the 'nation' or the 'race'. One of the main reasons why the field of constitutional history developed such a bad reputation was because it became associated with this brand of Victoriana, which later historians found to be distasteful – with, it might be added, good reason.

The Victorian Constitutional Historians had few qualms in finding the origins of the modern constitution in earlier times, even if partially qualifying it by talking of 'formative' periods. Even if the parts had changed, the whole had remained the same. How could that be? Their answer appears to rely on an ever-present *essence*. Wherefrom came that essence? From the race.

Embedded in the approach of the Victorian Constitutional Historians was a theory of the Group Mind. In their eyes, there were particular qualities belonging to the English nation; especially, a spirit of liberty derived from the Anglo-Saxons. Individual Englishmen might perish, but Englishness and the English nation never dies.[82] This is apparent in Freeman's *Growth of the English Constitution*:

> "…England is England and…Englishmen are Englishmen. I will assume that we are not Romans or Welshmen, but that we are the descendants of the Angles, Saxons, and Jutes who came hither in the fifth and sixth centuries, of the Danes and Northmen who came hither in the ninth. I will assume that we are a people, not indeed of unmixed Teutonic blood…but a people whose

[80] Cf. "Figgis's idealised *communitas communitatum* presupposes that men are certain about the associations to which they belong, and that they only belong to one such association. It also presupposes that the life pursued by any one association has no bearing on the life pursued by any other. Here, again, Figgis's case rests on his sectarianism. In allowing that the state is entitled to regulate groups when they come into conflict with one another, Figgis is assuming that groups will not conflict very often. This is because he assumes that groups will on the whole concern themselves with ends which are theirs alone, and which impose demands on their members alone." Runciman, *Pluralism and the Personality of the State*, 145.

[81] On pluralism, see further, *infra*, 4.23.

[82] Cosgrove has also noted that the "racial assumptions" that underpinned the constitutional historians' "national narrative" was one of the contributing factors towards the field's decline: Richard A Cosgrove, "The Culture of Academic Legal History: Lawyers' History and Historians' Law 1870-1930," *Cambrian Law Review* 33 (2002): 24–25.

> blood is not more mixed than that of any other nation… I will assume that what is Teutonic in us is not merely one element among others, but that it is the very life and essence of our national being… I assume that, as we have had one national name, one national speech, from the beginning, we may be fairly held to have an unbroken national being."[83]

According to Freeman, the superiority of the English constitution stemmed from a superior character.[84] It is worth bearing in mind Freeman's general views on race. He was clearly anti-Semitic and, furthermore, during a tour of America, commented: "This would be a great land if only every Irishman would kill a negro, and be hanged for it".[85]

Even for more "subtle and cautious writers" like Stubbs,[86] the superiority and continuity of the English race was clearly an important factor. At the start of his *Constitutional History*, Stubbs lists 'national character' as the first of the three forces driving the development of the English constitution.[87] He went so far as to say that "it is not until a nation has arrived at a consciousness of its own identity that it can be said to have any constitutional existence".[88] Momentous events like the Danish and Norman invasions of the eleventh century could not destroy this deep consciousness but only affected "the upper ranges of the fabric," leaving "the lower, in which we trace the greatest tenacity of primitive institutions, and on which the permanent continuity of the modern with the ancient English life depends for evidence, comparatively untouched".[89] One might also consider the following lines from Stubbs's preface to the first edition of his *Select Charters*:

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[83] Edward Augustus Freeman, *The Growth of the English Constitution from the Earliest Times*, 3rd ed. (Macmillan & Co., 1894), 22–23.
[84] France suffered, for example, not for a "lack of great men" or "noble purposes" but because of the "differences in inborn character": Freeman, *The Growth of the English Constitution from the Earliest Times*, 67.
[85] Frank Barlow, "Freeman, Edward Augustus (1823-1892)," *Oxford Dictionary of National Biography* (Oxford University Press, 2004), http://www.oxforddnb.com/view/article/10146.
[86] These are the words of Chrimes: Stanley Bertram Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge University Press, 1936), xvii.
[87] Barker's definition of 'nation', from which comes its 'national character', as "a material basis with a spiritual superstructure" can be noted. In terms of material factors, Barker lists: race; environment; and population. For spiritual factors: the political factor (law and government); the religious factor; language, literature, and thought; and ideas and systems of education. Ernest Barker, *National Character and the Factors in Its Formation*, 4th ed. (Methuen & Co. Ltd., 1948), quote at 2.
[88] William Stubbs, *The Constitutional History of England in Its Origin and Development*, 6th ed., vol. 1 (Clarendon Press, 1903), 1. The other two forces that he noted were 'the external history' and 'the institutions of the people'. Whilst ostensibly seeming like a social identification theory, this idea of 'consciousness' speaks to the singularity and Gestalt fallacies of the Group Mind.
[89] Stubbs, *Constitutional History*, 1:74–75.

> "The study of Constitutional History is essentially a tracing of causes and consequences; the examination of *a distinct growth from a well-defined germ to full maturity*; a growth, the particular direction and shaping of which are due to a diversity of causes, but whose life and developing power *lies deep in the very nature of people*. […].
>
> [I]t is not credible to us *as an educated people* that while our students are well acquainted with the state machinery of Athens and Rome, they should be ignorant of the corresponding institutions of *our own forefathers*: institutions that possess a living interest for *every nation that realizes its identity*, and have exercised on the wellbeing of the civilized world an influence not inferior certainly to that of the Classical nations."[90]

With all of this talk of germs,[91] soil, and planting, I am reminded of the line from *Now, Voyager* in which Mrs Vale asks: "Are we getting into botany, Doctor? Are we flowers?"

2.7 Commonality Models' Shortcomings

At the start of the twentieth century, there was a reaction against, to use Greenwood's words, "[t]he notion that social groups, or societies themselves (or states or nations), form emergent supraindividuals or organisms",[92] i.e. against ideas of Group Mind and Real Personality of Groups. To best understand the shortcomings of the Commonality Models, one can profitably begin with the shortcomings of these ideas, especially as identified by their two most important critics: psychologist FH Allport,[93] and legal philosopher MR

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[90] William Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First*, ed. HWC Davis, 9th ed. (Oxford University Press, 1913), xv-xvi [emph. added]. This can be compared with a similar sentiment expressed at the end of the first volume of Stubbs' *Constitutional History*: "We have now, however imperfectly, traced the process of events by which the English nation had reached that point of conscious unity and identity which made it necessary for it to act as a self-governing and political body, a self-reliant and self-sustained nation… […]. Yet the continuity of life, and the continuity of national purpose, never fails: even the great struggle of all, the long labour that extends from the Reformation to the Revolution, leaves the organisation, the origin of which we have been tracing, unbroken in its conscious identity, stronger in the strength in which it has preserved, and grown mightier through trial." Stubbs, *Constitutional History*, 1:681–82.

[91] Stubbs and those sharing his predilections in this regard are sometimes referred to as being proponents of a 'germ theory of constitutional development' in which England developed out of a 'German parent': Michael Bentley, *Modernizing England's Past: English Historiography in the Age of Modernism, 1870-1970* (Cambridge University Press, 2005), 26.

[92] See: Greenwood, *The Disappearance of the Social in American Social Psychology*, 4ff, quote at 109.

[93] Floyd Henry Allport, *Social Psychology* (Houghton Mifflin Company, 1924). The similarities to Weber, whose *Economy and Society* was published two years earlier, have been noted by Greenwood: Greenwood, *The Disappearance of the Social in American Social Psychology*, chap. 5.

Cohen.[94] Though they wrote contemporaneously and their object was much the same, it is noteworthy that neither appears to have been aware of the other.[95]

Allport argued that Group Mind theories commit three fallacies, which we will call the singularity, *gestalt*, and continuity fallacies.

The **singularity fallacy** is treating a social group as though it were an organism with a single consciousness. It is as erroneous to think of groups of individuals as organisms (as Le Bon or Lord Hoffmann[96] did) as it is to think of a group of individuals as having a collective consciousness. Consciousness requires neural pathways, which groups – unlike individuals – do not possess. Indeed, if one takes consciousness to mean *attentiveness* or *awareness*, then it is difficult to see how groups can exist in such a state – individuals might be attentive or aware, but groups cannot be. Mental states – thoughts, feelings, emotions, attitudes, etc. – cannot be attributed to groups. Groups cannot be agitated, excited, angry, etc.[97] Thus, Barber's argument that we can speak of the 'character' of

[94] Morris Raphael Cohen, "Communal Ghosts and Other Perils in Social Philosophy," *The Journal of Philosophy, Psychology and Scientific Methods* 16, no. 25 (1919): 673–90.

[95] It is worthwhile also mentioning the work of Léon Duguit, who also wrote about the same time as Allport and Cohen. He wrote extensively on notions of the State and was distinguished by his denial of corporate personality, which he saw as reflecting metaphysical – and, therefore, badly founded and unjustifiable – modes of thought. See esp.: Léon Duguit, *Law in the Modern State*, trans. Frida Laski and Harold Laski (BW Huebsch, 1919); Duguit, "The Law and the State."

[96] Lord Hoffmann's use belies the fact that such ideas remain common: "What is meant by 'threatening the life of the nation' [this is the wording of ECHR, Art. 15]? The 'nation' is a social organism, living in its territory…under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the 'life' of the nation, the word is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity." Lord Hoffmann went on to argue: "This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community." *A & Others v Secretary of State for the Home Department* [2004] UKHL 56 at paras. 91 and 96. It has to be admitted that the wording of the ECHR, Art. 15, with respect to the words 'life of the nation', is unfortunate. Whilst still ambiguous, 'political community' or Lord Hoffmann's phrase 'civil community', or some such term, would have been better; 'social group' would have been best. Lord Hoffmann was in this case the dissenting opinion; his fellow judges, as well as the ECtHR subsequently (*A v United Kingdom* (2009) 49 EHRR 29), concluded that the interpretation of the phrase 'threat to the life of the nation' was to be interpreted by each of the governments of the contracting states.

[97] There is a nice quote by William Paley: "[A]lthough we speak of communities as of sentient beings; although we ascribe to them happiness and misery, desire, interests, and passions; nothing really exists or feels but *individuals*. The happiness of people is made up of the happiness of single persons; and the quantity of happiness can only be augmented by increasing the number of the percipients, or pleasure of

States, suggesting that they might be bellicose, indecisive, neurotic, etc. is misguided;[98] what one really means is the constituents and representatives thereof – or some portion – present such characteristics.[99] As Maitland once said: "[A state] is capable of proprietary rights; but it is incapable of knowing, intending, willing, acting… [It] does no act, speaks no word, thinks no thought, appoints no agent."[100] These can only be done by actual individuals, even if in the name of the group.[101]

The ***gestalt* fallacy** occurs when one elevates this singularity above the group as though the group itself were something other than its members,[102] "a separate entity participated in by all".[103] For Allport, this was fallacious: "Collective consciousness and behavior are simply the aggregation of those states and reactions of individuals which, owing to similarities of constitution, training, and common stimulations, are possessed of a similar character."[104] Social groups are the sum of individuals – nothing more, nothing less.

The singularity and *gestalt* fallacies arise out of metaphysical ideas, i.e. ideas that there is more than meets the eye. They are particularly associated with the idea of a spirit or soul. There is a significant problem with metaphysical ideas: they are meaningless.[105] After all, there is no way to test them in order to say whether they are true or false; whether

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their perceptions." William Paley, *The Works of William Paley: With Illustrative Notes and a Life of the Author* (William Smith, 1838), 681.

[98] Nick W Barber, *The Constitutional State* (Oxford University Press, 2010), 116–23.

[99] As Laski noted in his introduction to Duguit, summarizing Duguit's argument: "The action of the state means, in cold fact, simply that certain officials have carried out the order of a minister; there is nothing in that which gives use to any personality differing from that of those concerned in the conception and performance of the order." Duguit, *Law in the Modern State*, xix.

[100] FW Maitland wrote this in the context of his discussion on Savigny's ideas in his Translator's Introduction to Gierke: Gierke, *Political Theories of the Middle Age*, xx–xxi. Further, there is an interesting quote in the words of Lord Lindley, speaking on behalf of the court in *Citizens Life Assurance Company v Brown* [1904] AC 423, at 426: "To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious." After all, much as Greer LJ said, corporations have "no soul to be saved or body to be kicked": *Stepney Corporation v Osofsky* [1937] 3 All ER 289 at 291.

[101] We can profitably quote Weber here: "For still other cognitive purposes – for instance, juristic ones – or for practical ends, it may on the other hand be convenient or even indispensable to treat social collectivities, such as states, associations, business corporations, foundations, as if they were individual persons. Thus they may be treated as the subject of rights and duties or as the performers of legally significant actions. But for the subjective interpretation of action in sociological work these collectivities must be treated as *solely* the resultants and modes of organization of the particular acts of individual persons, since these alone can be treated as agents in a course of subjectively understandable action. Nevertheless, the sociologist cannot for his purposes afford to ignore these collective concepts derived from other disciplines." Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, ed. Guenther Roth and Claus Wittich, vol. 1 (University of California Press, 2013), 13.

[102] Durkheim, for example, appears to have committed this fallacy, although there is perhaps an extent to which he has been misunderstood. See: Greenwood, *The Disappearance of the Social in American Social Psychology*, chap. 3, esp. at 68; cf. Talcott Parsons, *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers*, 2nd ed. (Free Press, 1949), 350–68.

[103] Allport, *Social Psychology*, 5.

[104] Allport, *Social Psychology*, 6.

[105] I am here following Ayer. See esp.: Alfred J Ayer, *Language, Truth and Logic* (Penguin Books, 1946).

they represent something that does or does not exist. There is no way of isolating this supposed consciousness and observing it. The point that Allport makes is that we only see individuals; there is little reason to infer anything more. To do so would be to rely on faith – a most unscientific approach. We can say, then, that both the singularity and *gestalt* fallacies are examples of an overarching **metaphysical fallacy**.[106]

Beyond these fallacies, there is the **continuity fallacy**: the notion that this consciousness acquires a character and existence of its own such that "[i]ndividuals may come and go; but this organized mental life goes on indefinitely".[107] Individuals die, but nations continue forever. This is precisely the fallacy committed by the great majority of constitutional historians who supported a continuity thesis; they saw the nation and its constitution as everlasting entities, distinct from those who happened to be alive at any particular time. It is worth quoting Allport at length:

> "In order to answer the question where this mental structure of the group exists, we must refer again to the individual. Nationality, Free-Masonry, Catholicism, and the like are not group minds expressed in the individual members of these bodies; they are sets of ideals, thoughts, and habits *repeated in each individual mind and existing only in those minds*. They are not absorbed in some mysterious way from the group life, nor are they inherited. *They are learned by each individual from the specific language and behavior of other individuals*. Where such continuity of social contact ceases the organized life of the group disappears. Were all the individuals in a group to perish at one time, the so-called 'group mind' would be abolished forever. It is not necessary to have the *same* personnel for continuity of group structure; but there must be *some* personnel."[108]

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[106] For a discussion of something of the history of metaphysical notions of the State, as well as the contrasting 'realist' notions, see: Duguit, "The Law and the State," 6ff.

[107] Allport, *Social Psychology*, 8.

[108] Allport, *Social Psychology*, 9. [Emphasis in the second and fourth sentences added]. This can be compared with a similar sentiment, which was expressed by Hobhouse a little over a decade earlier, although Hobhouse is a more ambiguous and problematic thinker in this context: "Society exists in individuals. When all the generations through which its unity subsists are counted in, its life is their life, and nothing outside their life. The individuals themselves, indeed, are profoundly modified by the fact that they form a society, for it is through the social relation that they realize the greater part of their own achievements. Each man is, so to say, the meeting point of a great number of social relations. Each such relation depends on him, on his qualities, on his actions, and also affects him and modifies his qualities and his actions. The whole complex of such relations constitutes the life of society. It follows that social development is also in the end personal or individual development." Further: "To speak of society as if it were a physical organism is a piece of mysticism, if indeed it is not quite meaningless." Hobhouse, *Social Evolution and Political Theory*, 85, 87.

The processes by which such learning is passed on will be discussed in the Associational Theory of Law. What is important here is that any talk of a national feeling, character, or experience is nonsensical. If individuals happen to resemble one another, it is not because they are embodied with the same spirit, or because they participate in some ethereal group consciousness or other mystical phenomenon existing beyond the members of the group; there is simply some process either of transmission and assimilation, or convergence. It would be wrong to say that Allport completely denied the existence of social groups,[109] but he stressed that groups need to be studied from the perspective of the individuals comprising them;[110] indeed, he went so far as to say that "if we take care of the individuals…the groups will be found to take care of themselves".[111]

Whereas Allport's critique focused on combatting the Group Mind, Cohen's focused on the Real Personality of Groups, which is permeated by ideas of 'communal ghosts'.[112] Coming from a legal perspective, Cohen was particularly interested in ideas of corporations. Nevertheless, the fundamental reasoning was the same: although there might be the impression of some *anima* or spirit when looking at corporations, on closer inspection this disappears. A metaphysical fallacy has been committed; scientifically, it is insupportable. This does not mean we necessarily have to stop speaking of groups, corporations, etc. We merely have to remember that they are not metaphysical entities; rather, we are speaking metaphorically and in shorthand.

Aside from the problems suffered by the Group Mind and Real Personality theories, there is one particular failing to which most Commonality Models succumb. This will be treated further down.

2.8 Interaction Models

Since the turn of the twentieth century, the ideas associated with Commonality Models, whilst retaining popular appeal, have held increasingly less sway amongst scholars. In particular, the idea that there are naturally-occurring groups of which one is inevitably and inescapably a part now holds less traction. Most theories now accept that individuals have some choice as to which social groups they belong. However, considerable

[109] John C Turner et al., *Rediscovering the Social Group: A Self-Categorization Theory* (Basil Blackwell, 1987), 10. This was also implied by Nick Barber: Barber, *The Constitutional State*, 106. If this were true, Allport would not have defined the social group, as he did: Allport, *Social Psychology*, 10, 260.
[110] Allport, *Social Psychology*, 10.
[111] Allport, *Social Psychology*, 9.
[112] This bears a striking similarity to Ryle's later idea of the 'ghost in the machine', although Ryle's idea was in the context of mind and souls, rather than social groups. See: Gilbert Ryle, *The Concept of Mind* (Peregrine Books, 1963), 17ff et passim.

disagreement remains as to how exactly social group membership is determined. There are principally three kinds of model, which operate on something of a spectrum. On the one side, there are Interaction Models; on the other side, Identification Models; and, somewhere in between, Cohesion Models. We begin with the former.[113]

Interaction Models are predicated on the intuitive idea that *social* groups must in some sense actually be *social*,[114] i.e. there must be social agents exhibiting social behaviours. After all, it would be odd to suggest that there could be a social group without an actual *social* element, i.e. without some *interaction* between its members. To identify groups, Interaction Models look for **grouping behaviours**, i.e. repeated and patterned interactions between individuals, accompanied by some differentiation and discrimination as between in-group and out-group members. The higher the level of repeated and patterned behaviours discriminating thusly, the more group-like a given set of individuals will appear.[115]

An entire field is devoted to the study of interactions: social network analysis. The fact that it is called 'network', not 'group', analysis is noteworthy; it is indicative of the problems with Interaction Models. Social network analysts avoid the use of the word 'group' not only because it is constraining, but also because of the conceptual difficulties it presents, i.e.:[116]

(1) **Boundary Specification Problem**: how does one decide whether a particular individual is an in-group or out-group member?[117] For those seemingly at the centre of the 'group', this is unlikely to be an issue. However, as one moves towards the periphery, where individuals have as many connections within as outside of the 'group', it becomes difficult, without further information, to place

[113] For examples of this model, see, e.g.: George Casper Homans, *The Human Group* (Routledge & Kegan Paul Ltd., 1951), esp. 84-85; Frederick L Bates, "A Conceptual Analysis of Group Structure," *Social Forces* 36, no. 2 (1957): 103–11. One might also be tempted to include Bell and Newby on the basis of their definition of community as "on-going systems of interaction, usually within a locality, that have some degree of permanence": Bell and Newby, *Community Studies*, 55. More generally, see: Linton C Freeman, "The Development of Social Network Analysis - with an Emphasis on Recent Events," in *The SAGE Handbook of Social Network Analysis*, ed. John Scott and Peter J Carrington (SAGE Publications, 2011), 26–39; George J McCall, "Interactionist Perspectives in Social Psychology," in *Handbook of Social Psychology*, ed. John DeLamater and Amanda Ward (Springer, 2013), 3–30.

[114] Although, this is not to say that it should necessarily be *sociable* or *highly social*; merely that there should be some social aspect to it.

[115] If one plotted these interactions on a graph, one would expect social groups to show as clusters in which the nodes (i.e. individuals) interact more with one another than others, and that this difference is statistically significant.

[116] See: Alexandra Marin and Barry Wellman, "Social Network Analysis: An Introduction," in *The SAGE Handbook of Social Network Analysis*, ed. John Scott and Peter J Carrington (SAGE Publications, 2011), 13–14.

[117] Cf. Marin and Wellman, "Social Network Analysis: An Introduction," 12.

them.[118] Indeed, even if there are boundaries, there is every possibility of their being highly fluid and, therefore, difficult to determine with precision and accuracy.[119]

(2) **Large Network Problem**: in large networks, where individuals cannot possibly all interact directly with one another, the idea of interaction being the defining feature becomes less tenable.

(3) **Concordance Problem**: whilst individuals tend to associate with those whom they already know, this does not guarantee that individuals will feel themselves to be a part of the same group as those with whom they interact.[120]

(4) **Threshold Problem**: it remains unclear as to what level of interaction is sufficient to bring about a social group; casual, infrequent interactions would seem insufficient.

In truth, there are probably few that would support the interaction model in its purest form. It does, however, exert considerable force on people's preconceptions of social groups.

2.9 Identification Models

Identification Models are most closely associated with the Bristol School; especially, Tajfel, Turner, and Reicher.[121] Whilst interactions between individuals are deemed important, for these the crucial factor is whether the members concurrently *believe* themselves to be a part of the same group. This overcomes some of the problems with Interaction Models. Boundary specification is no longer an issue – the groups to which individuals belong are those with which they most identify (irrespective of those with which they most interact). Likewise, larger groups are more easily explicable as the impracticality of requiring everybody to interact – even if only very indirectly – is

[118] "In so far as frequency of interaction is one such criterion [of membership in a group], we must recognize that the boundaries between groups are anything but sharply drawn. Rather, 'members' of given groups are variously connected with other groups of which they are not *conventionally* regarded as members, though the sociologist might have ample basis for including them in these latter groups, by virtue of their frequent social interaction with its conventional membership." Robert King Merton, *Social Theory and Social Structure*, 3rd ed. (The Free Press, 1968), 287, 339.

[119] Cf. Merton, *Social Theory and Social Structure*, 318, 339, 340–42.

[120] For example, mediaeval Christians and Jews might have conducted much business together, and therefore interacted frequently, but it seems unlikely that they would have been considered – or considered themselves – to be members of the same group. As such, there is a lack of concordance between their own identification and the identification that we would attribute to them based on their interactions alone.

[121] See, e.g.: Henri Tajfel, ed., *Social Identity and Intergroup Relations* (Cambridge University Press, 1982); Turner et al., *Rediscovering the Social Group*. One might also consider Gusfield as falling within this category, see: Gusfield, *Community: A Critical Response*, esp. 34-35.

removed; its members need only believe that they are part of the same group. However, Identification Models also raise problems:

(1) **Awareness Problem**: it assumes relatively developed cognitive faculties, i.e. faculties capable of conceiving of oneself as an individual with a particular identity and as a member of particular groups with other particular individuals. This assumption is vindicated in most adults, but seems to exclude both infants and those whose cognitive faculties have been impaired. Are these then deprived of social membership and identity? Furthermore, it would appear to exclude most, if not all, non-human social animals,[122] as they also lack the cognitive functions necessary to make the kinds of identifications envisaged by the model.

(2) **Intersubjective Agreement Problem**: to what extent do individuals' *conceptions of their social identity* need to match before one can confidently say that they belong to the same social group? Furthermore, to what extent do individuals need to be able to *agree as to who is in the group* for that group to be said to exist? And how should one handle cases of so-called 'false consciousness'?[123]

Identification Models also leave something to be desired.

2.10 Cohesion Models

Finally, there are Cohesion Models, which are difficult to define owing to the notorious difficulties in defining 'cohesion'.[124] Their underlying premise appears to be that social groups are defined by a sense of *closeness*, *nearness,* or *unity*; a sense of we-ness; perhaps by an *esprit de corps*,[125] *shared commitments or convictions*,[126] or even a willingness on the part of a group's members to *work for, defend*, or *fight for* the group.[127] Cohesion

[122] See: Hans Kummer, *Primate Societies: Group Techniques of Ecological Adaptation* (Aldine Atherton Inc., 1971), 39–40. It can be noted that Kummer, for the purposes of primatology, adopts an interactionist model.

[123] These are cases where people "identify themselves with classes 'to which they do not belong'": Merton, *Social Theory and Social Structure*, 333.

[124] On social cohesion see, e.g.: David W McMillan and David M Chavis, "Sense of Community: A Definition and Theory," *Journal of Community Psychology* 14, no. 1 (1986): 6–23; P. E. Mudrack, "Defining Group Cohesiveness: A Legacy of Confusion?," *Small Group Research* 20, no. 1 (1989): 37–49; James Moody and Douglas R White, "Structural Cohesion and Embeddedness: A Hierarchical Concept of Social Groups," *American Sociological Review* 68, no. 1 (2003): 103–27; John Bruhn, *The Group Effect: Social Cohesion and Health Outcomes* (Springer, 2009), esp. ch. 2. Hiller might also be placed in this category: E. T. Hiller, "The Community as a Social Group," *American Sociological Review* 6, no. 2 (1941): 189–202.

[125] E.g. Linton, *The Study of Man*, 92, 271.

[126] On this, see: Roger Cotterrell, *The Sociology of Law: An Introduction*, 2nd ed. (Butterworths, 1992), 99–102.

[127] This idea that cohesion is produced, in addition to mutual identification, by members' willingness to defend the group has been argued, for example, by Peter Turchin, building on earlier ideas. See: Alex

Models can be thought of as sitting in between the other models. This is in the sense that having things in common, frequently interacting, and sharing identifications can all foster a sense of closeness, etc. The weighting given to each varies. In some cases, having some important trait in common might be seen as the primary driver of cohesiveness; in other cases, it might be regular interactions; in other cases still, it might be a widespread belief.

A prime example of a Cohesion Model is to be found in Finnis, who argued that a community or association was "an ongoing state of affairs, a sharing of life or of action or of interests, an associating or coming-together. Community in this sense is a matter of relationship and interaction."[128] He concluded: "Whatever else it is, community is a form of unifying relationship between human beings."[129] Here can plainly be seen elements of commonality, interaction, and cohesion; one cannot imagine identification being far away. It should be added that, insofar as commonality went, Finnis did not shy away from arguing for a biological, genetic link, or that the family constitutes a special case.[130] He went on to stress 'cultural unity' (i.e. sharing a given language, etc.) and the importance of 'common action';[131] Finnis appears to have believed that, in the main, it was commonality that produces cohesiveness. This, in turn, produces social groups (or, at least, his communities and associations).

Drawing, as they do, on the bases of the other models, Cohesion Models are susceptible to their respective flaws. However, their greatest downfall is their **pathological fuzziness**: What does *closeness* or *nearness* really mean? Indeed, there is, once again, a **threshold problem**: How 'cohesive' do groups need to be in order to be groups?

2.11 Models Concluded

Commonality Models focus on *shared characteristics*; Interaction Models on *behaviours* (i.e. grouping behaviours, especially interpersonal interactions); Identification Models on *beliefs* (i.e. about identity); and Cohesion models on *feelings* (i.e. feelings of closeness, nearness, etc.). One might also say that, whereas Commonality and Interaction Models focus on *external aspects* and are more *quantitative* in approach, Identification and Cohesion Models focus on *internal aspects* and are more *qualitative* in approach.

Mesoudi, *Cultural Evolution: How Darwinian Theory Can Explain Human Culture and Synthesize the Social Sciences* (University of Chicago Press, 2011), 128.

[128] Finnis, *Natural Law and Natural Rights*, 135.

[129] Finnis, *Natural Law and Natural Rights*, 136.

[130] Finnis, *Natural Law and Natural Rights*, 136.

[131] Finnis, *Natural Law and Natural Rights*, 137–38.

Whatever their basis, the greatest failing of all these models is that they believe in the existence of objectively identifiable groups. We can call this the **objective phenomenon fallacy**. Even Identification Models, which are the most subjective, look at individuals' beliefs in order to determine if they match; if so, they conclude that there is an extant social group. This gives a scientific aura to social groups; they can be identified, categorized, and measured. However, it misses the fundamental point about social groups: they are fictions. In order to understand this and properly to understand social groups, we must turn to mathematics and set theory.

2.12 Groups as Cognitive Constructs

In order to understand social *groups*, it is important to know what 'group' means. For this, we can turn to Cantor,[132] set theory's founder. He defined a *group* or, more formally, *set*, as follows: a collection of discrete objects ('elements' or 'members') that are together understood to form a whole.[133]

A mere collection or aggregation of objects is insufficient. There must be some *connection* or *association* made between them such that, as Cantor identified, they are *understood* or *considered together*. Otherwise, there would merely be a *coincidence of objects*. What transforms coincidences of objects into groups is our considering them to be such. If things are not considered together, they are not a group; they are just a number of things that happen to exist. It is only when we think of things being together that there is said to be a group.

In some cases, we do this because the things in question occur together in our **perceptions** or **impressions**, i.e. the sense-data we receive from them are interpreted by the brain within a relatively short time-frame, such that the brain considers them to be related. In this context, the brain's adeptness at **identifying and isolating patterns** is important, because many groups are really just that: patterns. Alternatively, we might think of things being together on a more **reflective** basis, though they are not immediately before our senses – rather than connecting immediate sense-data, the mind connects *ideas*. To do this, the mind utilizes some **principle of association**.

Hume divided the principles of association into three,[134] but we can divide them more usefully into two. First, there is **spatio-temporal proximity**, i.e. nearness in time or

[132] Georg Cantor (1845-1918).
[133] Georg Cantor, *Contributions to the Founding of the Theory of Transfinite Numbers*, trans. Philip EB Jourdain (Dover Publications, Inc., 1915), 85.
[134] Hume, *An Enquiry Concerning Human Understanding*, 101ff (§3).

space. This might be due to what can be called *coincidental proximity*, where the things occur closely together in time or space without necessarily affecting one another. Alternatively,[135] it might be based on some *inference of causation*, in which things occur together in time or space precisely because one brings about the other. Second, there is **resemblance**, i.e. there is some characteristic or property that they appear to have in common, such that the mind is carried from one to the other.

When the mind perceives or imagines things together, they have a certain **unity in our experience**. This is what creates the sense of their being a group. This is because the brain not only remembers individual things, but also the fact of experiencing them together. This experience is treated by the brain almost as a thing apart; it is something that can be given its own label.[136] It is in this way that we come by a sense of a *group identity*. It is this that gives us the feeling that groups and their members can be different things. This is, however, an illusion created by the way our minds work.

We believe in some groups more strongly than others. Again, this is a product of the ways in which our minds work. Firstly, it is due to the *forcefulness* of the group-idea. There are some connections that seem irresistible. In large part, this is due to repetition: when one repeatedly perceives or imagines things together, or repeatedly calls to mind the group-idea, one reinforces these in one's mind, thereby strengthening them. It does not matter whether it reflects reality. Secondly, it is also due to the *significance* that the mind attaches

[135] This is what Hume separated into a third heading.

[136] It is important, however, that no process of *reification* or *hypostatization* hereby takes place. As Locke warned: "Another great abuse of words, is the taking them for things. This, though it in some degree concerns all names in general, yet more particularly affects those of substances. To this abuse those men are most subject who most confine their thoughts to anyone system, and give themselves up into a firm belief of the perfection of any received hypothesis: whereby they come to be persuaded that the terms of that sect are so suited to the nature of things, that they perfectly correspond with their real existence. Who is there that has been bred up in the Peripatetick philosophy, who does not think the Ten Names, under which are ranked the Ten Predicaments, to be exactly conformable to the nature of things? Who is there of that school that is not persuaded that substantial forms, vegetative souls, abhorrence of a vacuum, intentional species, &c., are something real? These words men have learned from their very entrance upon knowledge, and have found their masters and systems lay great stress upon them: and therefore they cannot quit the opinion, that they are conformable to nature, and are the representations of something that really exists. The Platonists have their soul of the world, and the Epicureans their endeavour towards motion in their atoms when at rest. There is scarce any sect in philosophy has not a distinct set of terms that others understand not. But yet this gibberish, which, in the weakness of human understanding, serves so well to palliate men's ignorance, and cover their errors, comes, by familiar use amongst those of the same tribe, to seem the most important part of language, and of all other the terms the most significant: and should aerial and aetherial vehicles come once, by the prevalency of that doctrine, to be generally received anywhere, no doubt those terms would make impressions on men's minds, so as to establish them in the persuasion of the reality of such things, as much as Peripatetick forms and intentional species have heretofore done." Locke, "Essay Concerning Human Understanding," 479-480 (3.10).

to the group-idea.[137] As social animals, it is only natural for us to tend to have strong ideas about the groups to which we feel we belong.

Let us take an example. We can imagine a number of trees standing closely together in an otherwise unoccupied field. These, because of their spatio-temporal proximity, resemblance,[138] and remoteness, produce a forceful and almost irresistible impression in our minds that they are a group. To give them their proper group-name, we might call them a 'copse' or 'grove'.[139] However, without an agent to notice them and to think of them being together, they are merely a coincidence of objects; the trees themselves are quite indifferent to, and unaware of, their neighbours.

That it is not obvious that these trees should be a group can be illustrated by modifying the example. Let us suppose that the trees have remained in place, but, rather than being in a barren field, they are surrounded by many other trees. The trees themselves have not changed, but the idea of their being a group is now less appealing. We can still consider them as a group, because we can still imagine them being together. However, the presence of other trees *interferes* with our previous unity of experience. They no longer seem so obviously connected in a distinguishable way. Instead, they are subsumed within a newer and larger group (i.e. a woodland or forest).

Thus far, we have focused on the idea that groups arise from **experiential unity**, which mean that group-ideas must postdate the relevant perceptions or imaginings. However, it is obviously true that most adults are able to have group-ideas not arising from any corresponding perceptions or imaginings. For example, one might decide to make a set of all persons wearing a hat on a given day. This does not mean that one has seen or imagined a specific group of persons wearing hats; one is merely *priming* oneself to recognize a pattern. As such, the group-idea does not originally arise from an experiential unity but, rather, from a decision to henceforward connect certain things together.

From an evolutionary perspective, it would seem beneficial for our group-ideas to bear some relation to external reality. However, there is absolutely no necessity that our group-

[137] For example, the mind is likely to attribute great significance to mere 'social categories', i.e. aggregates formed according to some certain status or characteristic, such as age, sex, marital status, income, etc., where it is not presumed that the persons identified have much else in common besides these things, meaningful interactions with one another, or indeed, any especial awareness of one another. See Merton, *Social Theory and Social Structure*, 353–54. (Merton, it should be said, largely adopts an interaction model of social groups).

[138] That is, they resemble another in the sense that they have the features characteristic of trees (i.e. trunks, branches, leaves, etc.). This resemblance would be amplified if they were all of the same type of tree.

[139] In linguistics, these are known as collective nouns.

ideas be logical, rational, or, indeed, concordant with reality. Thus, one might believe in fairies and survive, even though there would not appear to be any individuals corresponding to such a group.[140] Even where our group-ideas seem reasonable, justifiable, and representative of reality, there remains the fact that they are nevertheless *subjective*. Group-ideas are formed in individual minds; they are the product of individuals' experiences, perspectives, and inclinations. They arise from our attempts to impose order on the world. Some element of arbitrariness is almost inevitable.

This does not mean that groups are so completely subjective as to be meaningless. Human brains are typically organized and function in the same ways; across individuals, the same stimuli will activate the same brain regions. Though education and upbringing have an impact, people are likely to come to similar – if not the same – conclusions when presented with the same sense-data. We can also communicate and compare our group-ideas, such that we can assimilate others' ideas. Indeed, we can agree rules to determine what is, and what is not, to be included in any particular group, which helps to harmonize individuals' conceptions.

Nevertheless, we must not mistake *intersubjective agreement* for *objective reality*. The fact remains that groups are essentially mental phenomena. They are constructs, creations, or creatures of the mind. They are subject to the idiosyncrasies, biases, prejudices, predilections, etc. of those who hold them. They are often somewhat arbitrary and vague. They are not things-in-the-world; rather, they are just a way in which our minds attempt to understand it.[141]

2.13 Group Properties

We have denied mental states – and attributions thereof – to groups.[142] However, might one speak of the 'properties' of groups? It is practically self-evident that it is possible. For example, we can speak of 'small' and 'large' groups, 'homogeneous' and

[140] Indeed, we might suppose even more serious causes for what might be called unrepresented groups, viz. some delusion or psychosis. A person might genuinely think that they are perceiving groups, even though they are uncorroborated by others.

[141] Cf. Whitehead and Russell: "Thus classes, so far as we introduce them, are merely symbolic or linguistic conveniences, not genuine objects as their members are if they are individuals." But: "It is not necessary for our purposes, however, to assert dogmatically that there are no such things as classes." Alfred North Whitehead and Bertrand Russell, *Principia Mathematica*, 2nd ed., vol. 1 (Cambridge University Press, 1963), 72. Having referenced these passages in the *Principia*, Eaton then went on to say: "The unity of a class is very loose indeed, but certainly a class has a unity and is an object *for thought*, as are the other entities with which logic deals; though *not an empirical object* like the particular things which might be its members". Ralph M Eaton, *General Logic: An Introductory Survey* (Charles Scribner's Sons, 1959), 258 [emph. added].

[142] *Supra*, 2.7.

'heterogeneous' groups, 'productive' and 'unproductive' groups, etc. These are clearly not properties of the constituent individuals themselves, but of the individuals taken together.

What has to be remembered is that all 'group' properties are *emergent properties* – they arise out of, and are a product of, individuals' characteristics and behaviours, though they remain tied directly to them. It must always be possible to identify how specific sets of individuals give rise to specific emergent properties. Often, when one starts investigating this, one finds that the picture is more complex than one at first imagined; that there is significant variation as between the members. This is usually a corrective to the generalizations that we are prone to making.

One must not confuse characteristics of individuals with the perceived characteristics of the groups to which they belong. We have to be incredibly cautious when imputing the supposed properties of groups to the individuals therein; likewise, when imputing the characteristics, properties, attitudes, etc. of individuals to groups. This would be a failure to see and appreciate individuals as themselves.

This is perhaps what Vermeule was driving at when he talked about the fallacies of *composition* (assuming that, if certain individuals have a property, the group must also have that property), and *division* (assuming that, if the group has a certain property, the individuals therein must also have that property).[143] These are certainly fallacies, albeit really two sides of the same coin. Nevertheless, we have to be cautious when claiming, for example, that the properties of groups and their constituents can be opposites and contradictory. One example Vermeule gives to demonstrate the fallacy of division is assuming "that unbiased groups must have unbiased members"; he argues that each member of a judicial panel might be biased, yet, because these biases cancel one another out, the judicial panel as a whole is unbiased.[144] This is not true. The panel is *patently biased*; however, it is also, in a sense, *balanced*. Whether this supposed balance compensates for the individuals' biases will depend largely on the nature of the biases represented and whether one can get a fair trial in spite of them. The best security for a fair trial is unbiased judges. A better example would be 'institutional bias'; the individuals working for an institution might not be especially biased, but their systems of working might produce that effect.

[143] See: Adrian Vermeule, *The System of the Constitution* (Oxford University Press, 2012), chap. 1 (these are also defined on p. 9).
[144] Vermeule, *The System of the Constitution*, 21–22, 59.

We must be *discerning* and *perceptive*; we have to use language appropriately. We have to remember that groups are constructs. Sometimes we have to draw back the veil to appreciate things properly. It is not always easy, but it is important.

2.14 Individuals as Constructs?

A group of trees, independently of observation, might only be a coincidence of objects, but would it be a violence on language to suggest that each individual tree is also merely a coincidence of branches, leaves, etc. independently of observation? Are individuals merely constructed groups?

To a great extent, individuals *are* constructed groups. Most things that we regard as single individuals are, in fact, *compounds* or *composites*. The human body, for example, has a much reduced sense of coherence and unity when one knows something of molecular and cellular biology, as well as something of microbes and symbiosis. Nevertheless, things like animal and plant bodies, as well as other objects, appear to have a greater sense of objective reality than social groups. Why?

There is a distinction to be drawn between what might be called **integrated physical structures and systems**, on the one hand, and **constructed groups**, on the other. Integrated physical structures are characterized by: (1) the presence of *physical binding agents or forces*, which give them their coherence; and (2) the *discreteness* of the materials that make up the structure from the surrounding environment (i.e. they are bound to one another in a way that they are not bound to other things). Integrated physical systems, moreover, also tend to be characterized by: (3) the *interconnectedness and interdependence* of their parts; and (4) oftentimes *permeating physical subsystems*, e.g. in the human body one finds the circulatory system, nervous system, etc.

Constructed groups, especially social groups, lack these in the ways that integrated physical structures and systems possess them – particularly the presence of *physical* binding agents and forces.[145] Mutual feelings of affection, friendship, etc. are very

[145] Hobhouse once drew a comparison between leaves strewn on a lawn, on the one hand, and the leaves themselves, on the other. Any act on any individual leaf (e.g. being picked up, the wind carrying it away, etc.) had no effect whatsoever on the other leaves lying about, except insofar as they are affected by the same force. The leaves, taken together, form a 'numerical whole', which represents "their arithmetical sum, no more and no less". However, actions on any *part* of any individual leaf is likely to have a knock-on effect on the other parts: "The leaf acts as a whole. If the wind catches a part of it, that part carries the rest along with it". For Hobhouse, the leaf "is a structure which is in every respect as real and significant as the elements which compose it. What we call the onesided analytical tendency is the tendency to deny this, to think the cells something more real than the leaf, which is thus conceived only as a certain arrangement of cells", etc. This Hobhouse carried by analogy to society. There are, of course, "many fortuitous aggregations, producing slight contact between individuals", e.g. people walking along a street at a given

different to, say, electromagnetic forces or chemical bonds. Indeed, when talking about integrated physical structures and systems, we tend to use the language of physics, chemistry, and biology; such language would be inappropriate with constructed groups except insofar as it is analogical or metaphorical.[146]

Perhaps the greatest difference, however, is **contingency**. Constructed groups are far more contingent than integrated physical systems on observers' perceptions and ideations. Without these, they have but little reality. To demonstrate, we can consider social groups. If there were a sudden bout of global retrograde amnesia and all records disappeared, there can be little doubt that the political map of the future would look rather different to that of today. Old divisions and identities would disappear; new ones would form. Social groups are contingent upon continued ideas of, and beliefs in, their existence.[147]

2.15 Nature of Social Groups

Social groups are constructed groups; they are cognitive constructs, rather than objective phenomena. This means that the aim of the four models to find some method by which we canidentify groups in the world, almost scientifically, is misguided. However, although we have come to some understanding as to what a *group* is, the question still remains as to what exactly a *social* group is.

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time. But there are groups with "deeper and more stable associations"; these "are of the organic type". Much as with the leaf, what makes these such is the fact that *affecting some part affects other parts*; their existence is intertwined, however directly or indirectly, to a greater or lesser extent, in a web of 'mutual determination'. Thus, a family bereavement might leave the other family members' lives "tragically altered". However: "The true organic theory is that the whole is just what is constituted by the co-operation of the parts, neither more nor less, not more real nor less real, not of higher nor of inferior value". The central problem with this is that Hobhouse got the analogy the wrong way around. Each leaf is what I would call an integrated physical structure (or, indeed, system, if it were alive); the group of leaves, a constructed group. Social groups are not like individual leaves; they are like the scattered leaves, albeit ones that are moving around and bumping into one another – it is in this way that they affect one another. It is not as individuals are connected together by fibrous strands, the pulling or tugging of which at one end produces an effect at the other. For Hobhouse's arguments, see: Leonard Trelawney Hobhouse, *The Metaphysical Theory of the State: A Criticism* (George Allen and Unwin Ltd., 1918), 126–33.

[146] Much as Spencer wrote in the *Fortnightly Review* in 1871: "analogies between the phenomena presented in a physically coherent aggregate forming an individual, and the phenomena presented in a physically incoherent aggregate of individuals [forming a society]…cannot be analogies of a visible or sensible kind; but can only be analogies between systems, or methods, of organization." Quoted in: Spencer, *The Evolution of Society: Selections from Herbert Spencer's Principles of Sociology*, xli. He thereafter went on to stress the importance of the interdependency – by which he seems to mean *mutual reliance*, but might merely mean *mutual interactions* – of parts as the chief point of commonality in 'individual organisms' and 'social organisms'.

[147] We can recall Allport's words, quoted *supra* at 2.7.

It is suggested that **social groups** are, quite simply, groups of social agents, i.e. groups of individuals capable of expressing social behaviours.[148] This means that they have to be animals of some kind.[149] Of course, for us to consider these agents as a group, we need to form some connection between them. It might be because they happen to be collected together before us, such that we perceive them together. However, a random assortment of individuals collected together in such a way for only a short period of time is unlikely to have an especially strong impact on our minds. We are more likely to have a more forceful and lasting impression if, for some reason, we think there to be some connection between the members of the group *even when they are not physically assembled*

[148] As a social group consists of *some number* of individuals, there is the question as to whether that number might be zero or one. In other words, might a social group be comprised of an *empty* or *single member set*? And might such a group have a constitution? The answer to these would seem to be in the affirmative. In the case of a single member set, the distribution of such activities and influence will naturally be concentrated – the totality will likely be invested in that single individual. This could, in theory, be carried to an extreme in thinking that a person could be both a criminal and their own judge, jury, and executioner. It is instructive to think about single member sets that have come about through a process of *depopulation*, which is not an uncommon phenomenon. It is possible, for example, that an individual was once part of a large and thriving social group. However, whether by reason of abandonment or death, this group might over time have become increasingly smaller, with fewer and fewer people undertaking the activities and influence associated with that group. Eventually, there is only one – a last Mohican. Even though that wider social group no longer seems to have an objective existence, it might still remain a frame of reference for that individual. To understand how empty sets can have constitutions, it has to be recognized that, whilst every social group must have a constitution of some kind, the converse is not true. It is not the case that every constitution has an actual social group to which it pertains. It is possible to draw up constitutions for hypothetical groups. For example, one might write a constitution for Atlantis, as Plato did in *Timaeus* and *Critias*, or, indeed, for an ideal community, as Plato did in the *Republic*. The fact that such groups *might one day become populated* makes the development of constitutions for them tenable. However, for the most part, the constitutions of empty and single member sets can be set aside as curiosities. For an interesting discussion as to why some groups fail and 'collapse', see: Jared Diamond, *Collapse: How Societies Choose to Fail or Survive* (Penguin Books, 2005). For Plato's accounts of Atlantis, see: Plato, *Timaeus. Critias. Cleitophon. Menexenus. Epistles*, trans. RG Bury (Harvard University Press, 1929), 3, 41, 256, 265, 279ff. And for his *Republic*: Plato, *The Republic*, trans. Robin Waterfield (Oxford University Press, 1993).

[149] Somewhat following Ellwood, it can be said that there is a difference between "[a] clump of grasses, a forest of trees, a colony of bacteria, or a group of protozoa" (all of which are groups of living things existing in close proximity) and social groups. This is because the "relations between their units [such as they are] seem to be purely physical or physiological", whereas social groups require some 'mental' or neurological element, i.e. some degree of "mental interstimulation and response". See: Charles A Ellwood, "The Relations of Sociology and Social Psychology," *Journal of Abnormal and Social Psychology* 19 (1924): esp. at 4. In effect, each individual is not acting and reacting merely with reference to its *environment without discrimination*, but *specifically with reference to other animals* – whether consciously or unconsciously. For the definition of 'social behaviour', we can adopt Allport's definition: "Social behavior comprises the stimulations and reactions arising between an individual and the *social* portion of his environment…" Allport, *Social Psychology*, 3.

together;[150] indeed, *when we think the group-idea to be in some sense meaningful, whether consciously or not, for its purported members and stakeholders*.[151]

We can return to the fact that our associations are principally founded upon spatio-temporal proximity and resemblance. We might, for example, imagine a number of individuals who seem similar in appearance, manner, or speech – who resemble one another in some way. Similarly, one might imagine a group of people who live in the same area, i.e. they share a space and time. Here is the basis of *Commonality Models*. Likewise, we might imagine a number of individuals who are frequently found together, i.e. in space and time; who *affect* one another. Here is the basis of *Interaction Models*. Alternatively, we might imagine a number of people who appear to have the idea that they are part of the same group; their beliefs resemble one another. Here is the basis of *Identification Models*. Similarly, we might imagine a number of individuals who seem to have a similar feeling of closeness to those around them, i.e. their feelings resemble one another. Here is one basis of *Cohesion Models*.

Any of the four models can give rise to ideas of social groups. Indeed, they are somewhat complementary. A number of individuals who seem to have much in common, are often found together, seem to identify with one another, and seem to have an emotional connection with one another would seem very strongly to us to be a social group. The more connections there seem to be, the stronger the impression will be that there is a social group. Nevertheless, social groups remain in the eye of the beholder; our perception is our reality.

As has been intimated, there seem to be many different kinds of social group. Some seem more *transitory*, whilst others seem more *enduring*;[152] some seem *smaller*, others *larger*;

[150] It is worthwhile considering the distinction that Durkheim drew, in which he was followed by Theodore Newcomb and Solomon Asch, between 'genuine social groups' and 'aggregate or category groups'. Aggregate or category groups are those which, in the words of Greenwood, "merely have some property or properties in common, such as the populations of persons with a mole on their left shoulder, who were in the park yesterday between 3.00 p.m. and 3.15 p.m., who are female, who are unemployed, who employ images in abstract thinking, who are afraid of spiders, or who walk with a skip in their step." These are in contrast to genuine social groups, which, according to the theory, require something more. However, I would argue that these category groups are still social groups, but only in a very weak sense, because, on the information given, the individuals seem largely unrelated and unconnected to one another. In other words, the connection that has been drawn does not appear to be especially meaningful or consequential – that is, unless it is made to be, in which case there would emerge a social group in a stronger sense. On Durkheim, Newcomb, and Asch, see: Greenwood, *The Disappearance of the Social in American Social Psychology*, 77–80, quote at 78.

[151] Cf. Weber's discussion of social relationships: Weber, *Economy and Society*, 1:26–28. It can be noted that Weber's theory of social groups was largely founded in an Identification Model, see: Weber, *Economy and Society*, 1:40ff, 387–93.

[152] Cf. "Groups, especially spontaneously formed ones, are not fixed, immutable entities. Almost constantly factors from within the group (such as friction between members over status, the lack of fulfillment [*sic*] of

some *independent*, others merely *subgroups* of larger *supergroups*; some more *formal*, others more *informal*. The members might be *real individuals*; they might be merely *posited* or *imagined*. Thus, a casual meeting of friends could be seen to constitute a social group, just as their wider friendship circle could be considered one. Businesses are social groups; departments, universities, etc. are social groups;[153] communities are social groups; towns, counties, countries, authorities, and states are social groups; even the entire global human population could be considered a social group.[154] Though these differ in many ways, they are all essentially the same in that they consist of a number of people (i.e. social agents) whom we can imagine together in some way.

Here is the important point: Every one of these social groups, without fail, has a constitution.

2.16 Social Groups, Purpose, and Rules

Before moving to the other parts of the definition of a constitution, some treatment ought to be given to the idea that social groups must, by definition, exist for a purpose,[155] or have a set of rules. These are common ideas, but, as hopefully can already be seen, they are misguided. Many social groups are formed of individuals working towards some common purpose and, in order to be peaceable, often have rules. However, neither purpose nor rules are intrinsic to the idea of social groups.

With regard to purpose, part of the problem is a confusion between things existing *as a result of or because of other things* and things existing *in order to bring about the fulfilment of some intention or design*; a confusion between *causes* and *ends*. Many

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expectations especially on the part of those who are in higher positions, dominance of individual motives over groups norms, etc.) and from without (e.g., the impact of other groups and of society at large) tend to break down the grouping." Muzafer Sherif, *An Outline of Social Psychology* (Harper & Brothers Publishers, 1948), 132–33.

[153] It is perhaps worthwhile quickly remarking on the so-called 'concession theory' of corporations, wherein, as Maitland put it: "The corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust." Not only does this presuppose the existence of States, but it also presupposes that they will concern themselves with expressly setting out what kinds of corporation are possible and in what ways they might be brought about. Of course, States can involve themselves in such matters and it makes sense for them to do so. However, there is no reason to suppose that a business could not be a business without the State's approval, or that a university could not be such without like approval. In sum, the kinds of social group possible in a given area and their nature might be determined by the State, but this is not a necessary precondition of their existence. It is whether we *perceive* a social group that ultimately matters; what we call it, of course, will depend upon the best use of language. For the quote by Maitland: Gierke, *Political Theories of the Middle Age*, xxx [Translator's Introduction].

[154] Cf. Hobhouse: "Humanity becomes the supreme society, and all smaller social groupings may be conceived as constituent elements of this supreme whole." Hobhouse, *Social Evolution and Political Theory*, 88.

[155] See, e.g.: Hiller, "The Community as a Social Group," 189; Barber, *The Constitutional State*, 26, 36.

grouping behaviours occur not because individuals decide to come together *in order to*, say, protect themselves from predation or maximise their food yields; rather, they occur simply *because of* such strategies prevailing and succeeding in the past, thereby making them an *evolutionary stable strategy*. Flocks of birds do not form so much for the purpose of protection as they do because they have found it a viable mode of living. Oftentimes, function follows form, rather than vice-versa; it exists not by design, but, rather, past success.

Many have also suggested that social groups must have rules. Barber makes this central to his definition of the social group, which he defined as a group "connected in a special way", i.e. consisting "of people, who are bound together by rules". In particular, he suggests rules identifying membership and regulating conduct as between those members.[156] Certainly, for social groups to be functional and cohesive, rules are sensible. However, we can equally well imagine dysfunctional and chaotic social groups as functional and ordered ones; it is the perception or imagining together of social agents that makes social groups, not rules.

2.17 'Distribution of Activities and Influence'

Having discussed the idea of the social group, it is time to turn to the other part of the definition of constitutions: *the distribution of activities and influence*.

Activities refers to individuals' ability to influence the environment. They are what an individual does (or does not), can (not), should (not) do, etc. We might substitute the word 'activities' for others like 'functions', 'tasks', 'responsibilities', 'powers', etc. We might also use terms like 'jobs', 'roles', 'offices', and 'employment'. Thus, we might say, a constitution is, in this respect, about how functions, etc. are distributed among a social group. It defines who is responsible for food production, tax collection, waging war, building and maintaining infrastructure, etc. The term 'activities' might seem awkward compared with these other words, but it is to be preferred because it is more neutral.

Social influence or, simply, **influence**, refers to individuals' ability to effect or prevent change in other social agents; to affect how others think and behave. For 'influence', we

[156] Barber, *The Constitutional State*, 25.

might substitute words like 'authority' or 'power'. Thus, a constitution is also about who can compel or command others, and who cannot; who leads and who follows.[157]

An important distinction to be made here is between **symmetrical** and **asymmetrical relationships**. In symmetrical relationships, the agents have roughly the same responsibilities, duties, etc. to(wards) one another. They might do different things (i.e. have different sets of activities), but they have no especial power over one another. By contrast, in asymmetrical relationships, the responsibilities, etc. that each has towards the other are different and, indeed, often place one 'above' the other, such that the one 'above' can make claims on the one 'below' that cannot be made in return. It is this idea of asymmetrical relationships, and **differentiated and unequal social influence** more generally, that leads into ideas of structure and hierarchy.

There is an argument that social groups do not merely *feature* asymmetrical relationships, but that they are *characterized* by them, such that there is – usually, if not always – a fundamental division between those who are *dominant* ('rulers', 'governors', etc.) and those who are *submissive* ('subjects', etc., or those who are 'ruled', 'governed', etc.).[158]

It can certainly be said that *humans appear to be hierarchical animals* and, moreover, that there does exist *material inequalities* – both in terms of physical characteristics (e.g. strength, speed, etc.), and in terms of the resources to which individuals have access and over which they have some measure of control (e.g. fertile land, livestock, tools, weapons, etc.). There are also *intellectual inequalities*, viz. differences in experience, knowledge, and mental capacity.[159] Furthermore, there are the *problems of decision-making and coordinating action*, which things are often associated with particular individuals, because – for better or worse – this tends to result in singular and clear solutions. Within

[157] Cf. Weber's famous argument that legitimate authority or 'domination' (i.e. influence) can be divided into three kinds: rational, traditional, and charismatic, which can be thought of as being founded in reason, habit, and feeling respectively. Weber, *Economy and Society*, 1:215ff.

[158] Thus, there is Timasheff's argument that, in humans and non-humans alike, groups have a tendency towards polarization, i.e. the group will become arranged such that there are those who are dominant ('dominators' or 'rulers') and those who are submissive ('subjects' or 'ruled'): Timasheff, *An Introduction to the Sociology of Law*, esp. 172-177, 223ff. Similarly, Loughlin: "As a general phenomenon, the activity of governing exists whenever people are drawn into association with one another, whether in families, firms, schools, or clubs. In order to maintain themselves, and certainly to be able to develop and flourish, such groups must establish some set of governing arrangements, however rudimentary. The formation of governing arrangements is a ubiquitous feature of group life. Whatever the type of governing arrangement established, an iron law of necessity holds sway. Since it is simply not possible for associations of any significant scale and degree of permanence to be capable of governing themselves, the business of governing invariably requires the drawing of a distinction…: the division between rulers and ruled, between a governing authority and its subjects." Loughlin, *The Idea of Public Law*, 5.

[159] Thus, for example, there is often thought to be an inequality between younger and older persons (e.g. children and parents, general population and 'elders', etc.), the outcome of which is that the former should defer to the latter's greater experience and knowledge.

this, too, is the problem of providing and maintaining public goods (e.g. public roads, bridges,[160] drains,[161] security, etc.), which are in everybody's interest to have, but not necessarily in anybody's private interest to provide and maintain without some guarantee that others will make their contribution also.

All of these things – hierarchical tendencies, material and intellectual inequalities, and problems of decision-making and coordination – tend to create situations in which there are differentiated types and levels of influence within social groups, in which 'leaders' and, by implication, 'followers' emerge. This is especially true in large and complex enterprises/endeavours. However, a few points can be noted.

First, even if there is differentiated and unequal influence, it does not follow that there must necessarily be some individual(s) with a plenitude of power or influence (*plenitudo potestatis*), such that they are the acknowledged superior of all. Second, we can differentiate between influence taking the form of *suggestion* as opposed to *compulsion*. In other words, people can cause others to act in certain ways, not because of some fundamentally asymmetrical relationship extant between them in which one is subservient to the other, but, rather, because the one thinks it wise and prudent to accept and follow the advice of the other. Third, even though it is often time-consuming and not cost effective, and even though it is sometimes unproductive or, indeed, counter-productive, there remains the possibility of all-inclusive collective decision-making, in which each contributor has a parity with their peers – one voice, one vote.

In all of these cases, it is unlikely that there will be a clear distinction between *ruler* and *ruled*. Certainly, anarchists would argue that there is no necessity – or, indeed, justification – for there being such a distinction. Whether this is overly idealistic is a question for political philosophers. For the present, it need merely be said that, for the purposes of description and analysis, such a clear distinction need not be assumed or taken

[160] In Anglo-Saxon England (and, indeed, afterwards), the construction and maintenance of bridges was one of a number of obligations often imposed upon landholders and communities, even if their land was largely free from other burdens. This duty – the *brycg bot* or *brycg geweorc* – was often imposed alongside two other duties: army-service and the repair of fortifications. These three are often collectively referred to as the *trimoda necessitas*. These things were regarded of such great importance to collective welfare that their provision was considered a burden on the land, which burden had to be shouldered by those who lived there. See: Frederic William Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge University Press, 1921), 270–74; FM Stenton, *Anglo-Saxon England*, 3rd ed. (Oxford University Press, 1971), 289–92; WH Stevenson, "Trinoda Necessitas," *The English Historical Review* 29, no. 116 (1914): 689–703.

[161] There is a charming line from the third of Joyce Grenfell's sketches entitled 'Eng. Lit.': "Mark you, I think anarchy in the abstract has a certain drawing power; and then I stop and I think, 'yes, but who is going to be responsible for the drains?' [To her invisible interlocutor:] Well, I think you should think about that, Mervin. Plumbing is central to the better life."

for granted – even if it is often realized in practice. It is also well to remember that, inasmuch as social groups are characterized by 'vertical' relationships, they are also characterized by 'horizontal' ones, and there is a danger in focusing overmuch on the question 'who governs whom?' and forgetting the more basic question 'who does what?' It is on this point that we can turn to the term 'distribution'.

As with 'activities' and 'influence', 'distribution' is preferred because it is relatively neutral. In many cases, one might use words like 'allocation' or 'division', although these have their drawbacks.[162] **Distribution** merely means the way in which things have fallen – whether by chance or design.[163]

Thus, activities have to do with how social agents **act**; influence with how they **interact**; and distribution with who so acts or interacts without any assumptions as to why or how that came to be so.

Naturally, there must be some subjects of this distribution, which leads to a fundamentally important question: Who is or might be included in that distribution? Who is, or is not, part of the social group? This goes right to the heart of a constitution, because the '*what*' of distribution only makes sense in the light of the '*to or concerning whom*'. This means that the nature of the social group – the set of social agents – is a fundamental constitutional matter; nothing can make sense unless this is understood.

In the most straightforward terms possible, then, constitutions have to do with *who is (to be) included in a group* and, of those individuals, *who does what* and *who might cause others to act or think in certain ways*.

2.17.1 Fundamentality Fallacy Revisited

We can revisit the fundamentality fallacy – the idea that constitutions pertain to those things most fundamental to societies.[164]

In any reasonably-sized social group, there will be many different kinds of activities and levels of influence capable of being exercised. Furthermore, there are countless ways in which these could be combined, such that each individual might easily have their own unique set of activities and influence proper to them. To reduce all of these permeations

[162] 'Allocation' implies some sort of agency and intention behind the distribution; that somebody has sat down and considered who should have what. Similarly, 'division' implies again something of a rational agency, as well as that activities and influence have been neatly separated.
[163] See, further, *infra*, 4.24, which concerns *taxis* (made order) and *cosmos* (spontaneous order).
[164] This was introduced, *supra*, at 2.3.

and nuances to writing would be immeasurably difficult – especially when one considers that such things change over time. Indeed, when writing constitutions, to attempt to include everything that is, as it were, constitutional, would be ill-advised.

Consequently, it makes sense to focus on those activities and influence seemingly of the greatest consequence or, perhaps, in greatest need of clarification. However, their capturing our attention does not make them categorically different. Rather than saying, therefore, that some things are constitutional whereas others are not, it would be better to say that there are *major* and *minor* constitutional matters; written constitutions tend to focus on the former.

The types of, and priorities accorded to, activities and influence will vary depending upon the type of social group in question, as well as the environmental and historical context. A landlocked country without large inland water bodies, for example, is unlikely to have much concern for providing for aquatic-related activities, e.g. fishing, guarding the coastline, etc.; countries with extensive coastlines, conversely, are much more likely to have activities related to this area and, moreover, to treat them as major constitutional matters.[165] Similarly, secular groups are unlikely to have activities relating to sacerdotal activities, whereas religious groups are much more likely to have positions, offices, etc. associated therewith.

2.18 Basic Considerations

With regard to the distribution of activities and influence within a social group, there are five intimately connected considerations. Without these, one cannot understand constitutions:

(1) **Nature**: the content or substance of the activities and influence, and distribution thereof.
(2) **Agency**: the person(s) or type(s) of person associated with performing the aforementioned activities or influence.

[165] For example, one finds specific mention "fish", either in the context of the fishing industry itself, the ownership of marine resources, or of the need to protect marine resources in the constitutions of: the Bahamas (1973 rev. 2002, s. 27(3)); Brazil (1988 rev. 2015, s. 97(3)); Cambodia (1993 rev. 2008, s. 59); Maldives (2008, s. 248(a)); Palau (1981 rev. 1992, s. 2); Papua New Guinea (1975 rev. 2014, s. 4(3)); Philippines (Art. XII, s. 2); and Switzerland (1999 rev. 2014, Art. 79). The majority of these are islands or situated on islands (i.e. Bahamas, Maldives, Palau, Papua New Guinea, and the Philippines), or have large coastlines (i.e. Brazil, in which the Amazon River also probably plays no small role); in Cambodia there is the large freshwater lake the Tonlé Sap and the Mekong River, as well as some coastline; in Switzerland there are a number of lakes, including Neuchâtel and Zürichsee, as well as Léman and the Bodensee which it shares with other countries.

(3) **Attendant Conditions**: the conditions under which such activities and influence are, can, or should be performed. There are four attendant conditions of import:
    a. *Commencement Conditions*: from which point they might be exercised?
    b. *Execution Conditions*: when exactly are they to be exercised?[166]
    c. *Adjustment Conditions*: when might they be modified?
    d. *Termination Conditions*: when are they no longer to be exercised?[167]
(4) **Qualifications**: any restrictions or limitations upon, or exceptions to,[168] the performance of such activities or influence.
(5) **Purpose**: the reason(s) such activities are undertaken, influence exercised, etc.

These five considerations pertain to the fundamental questions of *what, by whom, when, how*, and *why*?

Let us imagine a social group agrees to pool some money and decides that this will be best achieved by a regular collection; they call this a 'tax'. In order to make this collection, they appoint some person as 'tax collector'. This person has the activity of collecting taxes due. This is the *nature* of their activity. In so doing, they will inevitably have to interact with others. As such, they are allowed to influence others by requesting, or, perhaps even compelling, them to pay their taxes. These activities and this influence are unique to the tax collector. Were some other person to attempt to perform them, individuals would not be obligated to pay over their money; the matter is quite otherwise when the tax collector asks. This, then, is the matter of *agency*: the activities and influence are attached only to particular persons, i.e. the tax collector.

Let us proceed to the attendant conditions. It might be decided, for example, that the collection of the tax should begin on a particular day and, thereafter, be collected weekly, monthly, or annually. Likewise, it might be decided that, after a particular date, taxes should be collected as and when they arise, e.g. when goods pass through a town, when a stall is set up in a marketplace, when goods are taken across a bridge, when goods are traded at a border or port, or when the goods are manufactured, etc.[169] Alternatively, it might be decided that the tax collector can decide for themselves when to collect.

[166] It can be noted that commencement and execution conditions are in many cases practically one and the same thing.
[167] These attendant conditions are particularly important in the context of emergency powers, i.e. when do such powers begin, for how long do they last, might they be modified in any way during their term, and when do they end?
[168] We might also say '*derogations* from', which is often the terminology used in legal contexts – especially in the context of the employment of the European Convention on Human Rights (ECHR), Art. 15.
[169] Historically, these instances corresponded respectively with the payments of *passage, stallage, pontage, customs,* and *excise*. In each case, there would have been persons appointed to collect such payments.

Whatever the case, the fact is that the activity of tax collection – and any attendant influence – is limited to these times. A tax cannot be collected when it is not due; a tax collector cannot enter somebody's property *qua* tax collector except to collect taxes. Here we have focused on *commencement* and *execution* conditions; *adjustment* and *termination* conditions can be readily imagined.

We come to *qualifications*. For example, a tax collector might only be able to collect taxes of a particular kind in a particular area. Furthermore, they might be able to accept payment in kind rather than coin. In some cases, they might be able to assess the level of tax themselves; in other cases, that assessment might have to be undertaken by somebody else. In effect, these are all refinements to the original ideas.

Finally, we come to the matter of *purpose*, which is a matter in which we have to be most careful – not every activity or influence exists or is undertaken for a specific purpose.[170] In the case of the activity of tax collection, however, there is a quite specific purpose: the pooling of money. This, in itself, might be undertaken for some reason, e.g. to finance war, the repayment of debts, the maintenance and extension of infrastructure, etc.

Whilst this is a simplistic example, it hopefully provides some sense as to how these things might be applied.

2.19 Constitutional Complexity

It is obvious that the constitutions of small tribal villages and modern nation-states are quite different. However, this is not a difference in fundamental type; it is rather a difference of *degree* than *kind*. They are both social groups within which there is a distribution of activities and social influence. What makes them *appear* different is the particular associations that we have with each and, moreover, differences in their *scale* and *complexity*. There are a number of ways in which social groups can change in this regard.

Firstly, there are what might be called **primary changes**, which alter the group's basic structure. For instance, increases or decreases in population will undoubtedly affect the distribution of activities and influence. Larger groups tend to have greater liberty to allow

[170] Naturally, if one is designing a constitution and wishes to do so sensibly, then it makes sense to think carefully about what it is that one wishes to achieve and how it might be achieved, i.e. to allocate each activity and degree of influence according to the specific ends it is to serve, preferably with a view to how those will serve some wider end. This will mean that each position allocated will have greater utility and that no person will be undertaking things senselessly; it will help to reduce, if not eliminate, superfluity and inefficiency.

their members to divide labour and specialise, whereas the breadth of activities and influence found in smaller groups is likely, of necessity, to be broader. After all, there are fewer people to perform them. Furthermore, in larger groups there is more likely to be a greater diversity of activities performed and more levels of influence. As such, in larger groups there is greater potential for *differentiation*, *specialization*, *segmentation*, and *stratification*; for sub-groups and levels to form. Aside from changes in population size, there is also the effect of changing demographics, e.g. a changing age-profile. Similarly, there might be changes concerning the things in which a population is occupied. Pre-industrial (i.e. hunter-gatherer, pastoral, agrarian, etc.) societies are likely to have large proportions of their populations heavily involved in the collection or production of food; they are little able to do other activities. By contrast, in societies with larger surplus food yields, members have greater opportunity to undertake different tasks and to specialise.

Secondly, there are what might be called **secondary changes**, which are changes regarding the *cognizance* of the constitution of the group. These changes will probably introduce secondary rules of Hart's description, foremost among which will be rules of recognition.[171] This will probably lead to a process of *elucidation* and *formalization* – even *ritualization*. They will also become *habitualized* and there will be a presumption in favour of their preservation, which is to say that they will become to some degree *elevated* or *entrenched*.[172] Finally, to give them added force, a system of *sanctions* will probably be introduced. There need not be any changes to the material composition of the group or the sorts of things with which the group concerns itself.

Finally, there are **tertiary changes**, which one might regard as a *reorganization* of the constitution of the group. The constitution will become increasingly *abstract*, i.e. one will think rather of abstract roles within the group rather than activities and influence held by specific, named individuals. This abstraction will lead to processes of *institutionalization* and *professionalization*, which in a sense is the social group at large creating subsidiary

[171] See, *infra*, 3.15 and 4.20.

[172] As Gough noted, this idea of elevation or entrenchment – i.e. making it such that it "cannot be altered or repealed by ordinary legislative procedure" – has played a central role in the idea of 'fundamental law'. It becomes, in a sense, *extraordinary* law. As discussed earlier, however, it is important to remember that anything set aside in this manner is neither the be-all nor end-all of a constitution. Gough also later noted that certain principles might come to be regarded as fundamental "not so much because they could not legally be assailed as because it was assumed that no legal authority would wish to assail them". This is an important point to mark. Certain provisions might become, as it were, *informally* elevated or entrenched: ostensibly, they are like any other law, except there is such prevalent and potent positive regard in their favour that there is unlikely to be appetite to change them. Indeed, there is likely to be fierce resistance if the suggestion is made to change them. There is an argument to be made that this is the essential position of the modern-day UK constitution. For Gough, see: JW Gough, *Fundamental Law in English Constitutional History* (Oxford University Press, 1955), 2, 23.

social groups with particular sets of activities and influence. One might also include here the further elucidation of the constitution by its *reduction to writing and codification* and, to a degree, the *harmonization* of its particulars. It might also become more legalized in the sense that it becomes *positivistic* and *secular*.

Generally speaking, tertiary changes follow after secondary changes; secondary after primary. However, this is not always the case; they are not preconditions of one another.

In this light, Vermeule's contention that "any complex constitutional order…is best understood as a *system of systems*" can be seen to contain some truth.[173] Complex constitutional orders tend to occur in larger societies, which are divided into numerous, overlapping sub-groups and often include sub-groups with specific tasks (i.e. institutions); these are subsystems building into a larger system.

2.20 Context, Salience, and Frames of Reference

Most individuals, particularly in modern societies, are members of many different groups. There are family, friendship, interest, local community, entrepreneurial groups, etc. Some of these groups are largely independent; others merely subgroups of even larger – and often more diverse – groups. For individuals, this can present problems as to what activities they should be doing at any given time or what influence they might expect to exert. For observers, it presents problems as to what activities and influence fall within the constitution of one group rather than another.

In both cases, the matter is decided according to **social context** and **salience of social identity**. These *prime* us to think and behave in certain ways. With regard to social context, one performs certain activities and influence, say, when with family members as opposed to when in a professional context. Historically, a father might have expected to predominate at home (as *paterfamilias*), though he be a lowly clerk at work. From the social context, particularly from those with whom an individual is interacting at a given time, we gain a sense of which social group is relevant at that time.

This leads us into the notion of salience, which is similar. A set of activities and influence is relevant when a particular social identity pertains, i.e. when that identity is *salient*. Thus, we know we are thinking about the family social group when a person is acting *as*

[173] Vermeule, *The System of the Constitution*, 3. Vermeule's book draws heavily on systems theory, which is both refreshing and laudable; it is a step in the right direction. Systems theory certainly has its problems, but it attempts to take a more holistic approach. His theories, however, would have benefited greatly from also having taken into consideration set theory and theories of social groups.

a member of the family group. Likewise, we know we are thinking about an entrepreneurial group when a person is thinking of themselves as *a member of some enterprise* (e.g. as an *employee* or *employer*). The difference between social context and salience is really only that we assume salience where there is social context, but social identity might still be salient even though there are no others of that social group around.

We know which constitution is pertinent by knowing which social group is relevant at a given time; we know this from the social context and salience of social identity. For individuals, the social group provides a **frame of reference**, i.e. it primes them for a particular universe – to think, act, and respond in particular ways.[174] They know that there are certain activities and influence that pertain in a given social context or where a given social identity is salient.[175]

Oftentimes, there will be more than one frame of reference pertinent at a given time. Sometimes these will work together more or less harmoniously; other times, there will be conflict. As such, we often find that many smaller groups' constitutions are determined by, and are subject to, the constitutions of larger groups of which they are a part. They are, in part, **derivative** of the overarching constitution and are circumscribed thereby. The subgroup might only do those things permissible within the supergroup and, moreover, those things deemed permissible specifically for that subgroup. Where the subgroup and supergroup are in conflict, the ability of each to claim the loyalty and support of its members, to the exclusion of the other, is supremely important. This situation becomes particularly interesting where groups are not nested neatly within one another but, rather, intersect and overlap, or where the supergroup asserts its dominance more forcefully against an unwilling subgroup. Social life is complex.

2.21 Distribution of Resources

Besides activities and influence, it is arguable that the distribution of resources should have a place in a constitution. After all, the possession of certain resources – especially the so-called 'factors of production' – can dramatically affect the ways in which activities

[174] Cf. "That men act in a social frame of reference yielded by the groups of which they are a part is a notion undoubtedly ancient and probably sound." Merton, *Social Theory and Social Structure*, 288 and, further, 336–37.

[175] Frames of reference can be said to be positive or negative, as Merton has said (albeit in the context of 'reference groups'): "The positive type involves motivated assimilation of the norms of the group or the standards of the group as a basis for self-appraisal; the negative type involves motivated rejection, i.e. not merely non-acceptance of norms but the formation of counter-norms [even to the point of active rebellion]." Merton, *Social Theory and Social Structure*, 354. As such, frames of reference can motivate *conformist* and *compliant* behaviour, as much as they can *non-conformist* and *deviant* behaviour.

and influence are distributed.[176] Indeed, it can affect not only their distribution but also their execution – for if one does not have the wherewithal or tools to undertake certain activities, there seems little chance of their being successfully completed.

In this context, we might relate the ideas of **constitutional competence** and **institutional competence**. Constitutional competence seems to mean what activities and influence are *recognized as belonging to* or are *associated with* a particular body.[177] Institutional competence, by contrast, seems to mean those activities and influence that it is *actually capable of executing or accomplishing*; it has *sufficient means* to do so.[178] Thus, the former represents a theoretical power and the latter a practical power. For bodies to act *legitimately* and *effectively*, these should be concordant.

Even though resources – whether tangible or intangible – play a prominent part in shaping the constitution, it would incorrect to say that they are intrinsically a constitutional matter. This is because we can think of the distribution of activities and influence without having too great a regard to the distribution of resources. This does not mean that resources are unimportant; they are just not intrinsic to the idea of a constitution.

2.22 Conclusions

The Theory of Constitutional Ubiquity argues that all social groups have constitutions; that constitutions can be defined as the distribution of activities and social influence within social groups. It is simply impossible for us to imagine social groups without also imagining some distribution of activities and influence as between their members – or what that distribution would look like should the members ever have dealings with one another.

The Theory of Constitutional Ubiquity, as set forth here, can be considered as being within the sociological tradition of 'methodological individualism'.[179] This is not in itself

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[176] See *supra*, 2.17.

[177] In terms of decision-making, one might say that these are the matters *cognizable* by them, i.e. they are matters within their *jurisdiction* and, for that reason, capable of being decided by them. In terms of goals and direction, constitutional competence sets out both the *ends* to which the body may – or, indeed, must – work, as well as the *means* by which it might do so. The importance of the fact that there is here an *association* will become apparent when we come onto discussing the Associational Theory of Law.

[178] These means might come in many forms, but especially: *physical*, *financial*, or *human capital*. There must also not be *insurmountable barriers or opposition* preventing it from carrying out its activities or influence.

[179] This counts among its adherents the likes of Weber, Allport, Menger, Popper, and Hayek. The term 'methodological individualism' is due to Weber's student, Schumpeter, although the underlying idea stretches back to Weber himself and beyond. Schumpeter first used the phrase in German (*methodologische Individualismus*) in his book *Das Wesen und der Hauptinhalt der theoretischen Nationalökonomie* and then, a year later, used the English equivalent in his article 'On the Concept of Social Value': Joseph Schumpeter, *Das Wesen Und Der Hauptinhalt Der Theoretischen Nationalökonomie* (Duncker & Humblot,

a claim about the value of individuals or individual freedom. It merely holds that social phenomena can only be properly understood through social agents, i.e. through the thoughts and behaviours of individuals.[180] It, therefore, fits within the wider scientific idea of methodological reductionism and, indeed, marries well with the social constructionist approach.[181] Thus, whilst we might conceptualize social groups, institutions, etc. in the abstract, and even regard them in some respects as if they were real individuals (e.g. in juristic/legal terms), when we come to study them we must do so through the individuals that supposedly comprise (or comprised) them. They have no true existence beyond these individuals. It has been my endeavour to show here how this relates to, and informs, constitutional theory and, more particularly, constitutional history.

It has been argued that social groups are not objective phenomena; they are constructs of the mind. Their sense of objective reality is produced by the ways in which our minds work. Our perceptions, it is true, are not entirely capricious. However, we must not mistake our understanding of reality with reality itself. Our perceptions might become our reality,[182] but that does not mean that they are anything more than that.

Nevertheless, these perceptions profoundly affect how we navigate the world and social life. As social creatures, it is through these ideas that we understand our place in the world. We know what we can and cannot do; what we are expected to do and what we are expected *not* to do. We know who we are to follow, whose advice and instructions we are to heed, and who we must obey; who is to follow, listen to, and obey us. We know to whom we are to defer and give way; who is to defer and give way to us. We know with whom we can mate and with whom we cannot. We know with whom we might interact, treat amicably, and embrace in friendship; we know who we ought to avoid and who we

1908), see esp. I.VI; Joseph Schumpeter, "On the Concept of Social Value," *The Quarterly Journal of Economics* 23, no. 2 (1909): 231. For a discussion on Weber in this context and particularly his relation to Durkheim's thought, see: Greenwood, *The Disappearance of the Social in American Social Psychology*, chap. 3, esp. 80ff. For something of the 'ancestry' of methodological individualism, albeit part of a not entirely sympathetic analysis, see: Steven Lukes, "Methodological Individualism," *The British Journal of Sociology* 19, no. 2 (1968): 119–29. For Hayek in this context, see esp.: Friedrich August Hayek, *The Counter-Revolution of Science* (The Free Press, 1955); Friedrich August Hayek, *Individualism and Economic Order* (The University of Chicago Press, 1948), chap. 3.

[180] On methodological individualism, see e.g.: JWN Watkins, "Ideal Types and Historical Explanation," *The British Journal for the Philosophy of Science* 3, no. 9 (1952): 22–43; JWN Watkins, "Historical Explanation in the Social Sciences," *The British Journal for the Philosophy of Science* 8, no. 30 (1957): 104–17.

[181] See, *supra*, 1.4.

[182] As Novalis (Georg Philipp Friedrich von Hardenburg, 1772-1801) once wrote: „Die Welt wird Traum, der Traum wird Welt". This might be translated in a couple of ways. Firstly, "The world becomes (a) dream, the dream becomes (the) world": Novalis, *Heinrich von Ofterdingen*, ed. Julian Schmidt (FU Brodhaus, 1876), 127. However, a looser translation might be: "the world becomes a dream, and the dream becomes reality": Jostein Gaarder, *Sophie's World: A Novel About the History of Philosophy (20th Anniversary Edition)*, trans. Paulette Møller (Weidenfeld & Nicolson, 2015), 288.

ought to treat with hostility. We know with whom we can share certain resources and information, and with whom we cannot. This is as true for other social animals – especially highly gregarious mammalian species – as it is for us,[183] even if on a different level.[184]

Constitutions neither precede nor postdate the advent of social groups;[185] they arise, change, and expire together. There are at least as many constitutions as there are social groups. They vary widely in type, scope, scale, and complexity.[186] Superficially, they might appear different. However, we should not let appearances deceive us. Ultimately, they always have to do with social groups, activities, and influence. Sometimes resources, too, are important, but not always.

Constitutions can have areas of uncertainty, ambiguity, and controversy, and nevertheless remain generally workable and effective. As long as these problems are not insuperable or deleterious, group life, as it were, can continue with semblances of organization and regularity. The existence of areas in which there is a lack of clarity does not indicate the lack of a constitution; so long as groups are considered as such, they will have constitutions.

There is no reason for us to avoid the word 'constitution' when it is properly understood; it does not necessarily lead to anachronism. We use the word 'democracy' to describe both modern systems and the ancient Athenian system without fear of conflating them.

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[183] Cf., e.g.: Mark F Grady and Michael T McGuire, "A Theory of the Origin of Natural Law," *Journal of Contemporary Legal Issues* 8 (1997): 87–130; Mark F Grady and Michael T McGuire, "The Nature of Constitutions," *Journal of Bioeconomics* 1 (1999): 227–40.

[184] This is undoubtedly due to the comparatively large neocortex in human brains, which is considerably larger than most other animals (particularly the frontal and parietal lobes), including other primates: Bruce E Wexler, *Brain and Culture: Neurobiology, Ideology, and Social Change* (The MIT Press, 2006), 30–33. On the functions of these areas: "The frontal lobe is largely concerned with short-term memory and planning future actions and with control of movement; the parietal lobe with somatic sensation, with forming a body image and relating it to extrapersonal space…" Eric R Kandel et al., eds., *Principles of Neural Science*, 5th ed. (The McGraw-Hill Companies, Inc., 2013), 10.

[185] In constitutional theory, Fassbender has identified "two conflicting views as to the relationship between community and constitution". On the one hand, there are what might be called *enactive theories*, in which communities must first exist such that there is somebody both to create a constitution and for whom to create it. On the other hand, there are what might be called *constitutive theories*, in which communities are created by constitutions; until the creation of a constitution, they have no real form or existence; there must first be an act of 'constitution-making' before there can be said to be a constitution. See: Bardo Fassbender, "The United Nations Charter As Constitution of The International Community," *Columbia Journal of Transnational Law* 36 (1998): 561ff. Neither are correct; they arise simultaneously.

[186] For a discussion of how the Theory of Constitutional Ubiquity relates to ideas of the State, for example, see Appendix I.

Though there are recognized differences,[187] there is nevertheless a common core, which is sufficient justification for employing the same word.

For constitutional historians, the real problem is not whether there is an object to be studied, but, rather, from which *perspective* it is to be studied and which *aspects* are worthy of study. In terms of perspective, there are fundamentally two questions we can ask of the past: (1) how did *people at the time* understand what was happening and (2) how can *we* understand what happened? As such, there is the *internal perspective as participants* and the *external perspective as observers*. One of the criticisms levelled against the constitutional historians is that they had greater regard for the second question than the first.

Certainly, constitutional historians ought always to strive to access and understand the internal perspective insofar as possible, i.e. to attempt to understand how the social agents themselves conceptualized and imagined their social groups and the constitutions thereof. After all, it is by understanding this that we can best understand and explain their behaviours. However, three points can be made.

First, we can never really escape our own perspective. When we are asking how historical persons saw things, we are really asking: how can *we* understand how *they* saw things? In effect, we are attempting to reconstruct *their* constructions in *our* minds. Second, the internal perspective is not always entirely accessible; the evidence is either unreliable, biased, or non-existent. In effect, we have to use our judgement, which means employing our perspective. Constitutional historians ought always to identify where this is the case, provide justification, and never take liberties. Oftentimes, it is better simply to recognize the limits of our knowledge. Third, the internal perspective is not necessarily the most accurate, given that it varies depending on which social agents are being examined; indeed, sometimes social agents grossly misunderstood the constitutions of their social groups. Thus, the external perspective might act as something of a *corrective*. After all, disinterested outside observers can sometimes see things in ways that participants cannot.

Nevertheless, the external perspective ought to complement, rather than replace, the internal perspective. Moreover, constitutional historians ought to strive to understand the

[187] Most notably, in terms of suffrage, institutions, the nature and frequency of participation, and representation. Some of these differences are captured in the distinction between *direct* and *indirect* (or *representative*) democracy. In other words, they are distinguished *by way of qualification*, not segregation.

internal perspective insofar as it can be understood. The more we have to rely on our perspective alone, the weaker our understanding is likely to be. [188]

[188] Cf. HLA Hart, *The Concept of Law*, ed. Penelope A Bulloch and Joseph Raz, 2nd ed. (Oxford University Press, 1994), 89–91.

3 – The Associational Theory of Law (I): Structure

3.1 Introduction

We have discussed the meaning of 'constitution'; we have yet to understand what might be meant by constitutional *law*. In order so to understand, we must know what is meant by 'law'.

There is no shortage of discussion concerning this.[1] People have been arguing for millennia as to: *what* law is;[2] *wherefrom* it comes and *who* makes it; *where* and *to whom* it applies; *when* it applies and *for how long*; *how it works* and *how it differs* from similar concepts; and *why* we have it in the first place. Some answers have been more convincing than others; on the whole, they remain unsatisfactory.[3]

In this and the next two chapters, therefore, I develop a theory of law, which is at once structural, psychological, and dynamic.

3.2 Some Common Fallacies

Many theories of law are unsatisfactory because they commit, in one respect or another, a number of different, albeit common, fallacies.[4]

[1] "Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'": HLA Hart, *The Concept of Law*, ed. Penelope A Bulloch and Joseph Raz, 2nd ed. (Oxford University Press, 1994), 1. Others have expressed a similar sentiment, e.g. "[W]hat is Law? This is a question upon which whole libraries have been written, and written, as their very existence shows, without definite results being attained": Hermann Kantorowicz, *The Definition of Law*, ed. AH Campbell (Cambridge University Press, 1958), 1. Also, "The amount of printed matter on the meaning of the word 'law' is enormous. Thurman Arnold rightly says that any attempt to define this word leads us into a maze of metaphysical literature, perhaps larger than has ever surrounded any other symbol in the history of the world": Glanville L Williams, "International Law and the Controversy Concerning the Word 'Law,'" *British Year Book of International Law* 22 (1945): 146.

[2] The question "Law – in our view, what is it?" is how the *Minos* – one of the earliest surviving jurisprudential works – begins. This work has been attributed to Plato and was so attributed in antiquity, though his authorship has been doubted. *Minos* (trans. Michael Schofield) in Plato, *Complete Works*, ed. John M Cooper (Hackett Publishing Company, Inc., 1997), 1308. On this dialogue and for an alternative translation, see: Huntington Cairns, "What Is Law?," *Washington and Lee Law Review* 27, no. 2 (1970): 199ff. Also: William S Cobb, "Plato's Minos," *Ancient Philosophy* 8 (1988): 187–207; V Bradley Lewis, "Plato's 'Minos': The Political and Philosophical Context of the Problem of Natural Right," *The Review of Metaphysics* 60, no. 1 (2006): 17–53.

[3] In no small part, this is because the problem of defining law has proved to be a particularly difficult one, even in spite of – or, indeed, perhaps even due to – its frequency of use in common parlance. Cf.: "Almost everyone of ordinary information understands very well what is meant by the word 'law', but even the most learned jurists, when called upon to given an accurate definition of the term, find themselves at a loss." John Maxcy Zane, *The Story of Law*, ed. Charles J Reid Jr, 2nd ed. (Liberty Fund, Inc., 1998), 1.

[4] It is perhaps worthwhile stating clearly that these are all fallacies that I have identified independently.

The first of these can be called the **synonymic fallacy**, i.e. using words that are very much like 'law' to define 'law', especially 'rules' and 'norms'. This tends not to be terribly enlightening,[5] and often involves something of a sophistry.[6]

More developed theories tend to say that laws are norms and that norms are ought-statements. As such, laws express what one *ought* to do or how things *ought* to be. This is the **normative fallacy**.[7] It is attractive until one considers laws like 'murder is the unauthorized and intentional killing of another'. This does not mean that murder *ought* to be unauthorized and intentional killing or, even, that one *ought* not to kill;[8] it simply means that murder is *defined* in a certain way. Some try to manipulate these into ought-statements, e.g. by saying that such statements are directed at law enforcers and judges, telling them how they *ought* to view and treat certain situations. This is not only strained, but also leaves us in a quandary as to what to think where there are no such professionals – do such societies therefore lack law? This can be called the **directive fallacy**: the false notion that laws are directions to officials.[9]

There is then the **voluntarism fallacy**: the idea that all law must be traceable to some act of will and intention – whether human or divine, of some sovereign individual or body,[10]

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[5] For example, Clark defined a law as: "*a rule of conduct obtaining among a class of human beings and sanctioned by human displeasure*" [Edwin Charles Clark, *Practical Jurisprudence, a Comment on Austin* (Cambridge University Press, 1883), 134.]. Certainly, this definition is not without its merits, but the phrase '*rule of conduct*' is none too enlightening; it really only gives us *another way of speaking*, rather than telling us what a law actually is.

[6] For example, it is common to say that 'laws' are different from 'rules', though both are 'norms'. If one remembers that the word 'norm' comes from the Latin *norma*, meaning a kind of rule, then to say that 'rules' are 'norms' is to say that 'rules' are 'rules', albeit effectively in two different languages. To say laws are distinct from rules therefore becomes unsustainable. This is demonstrable with simple commutative logic. If laws are norms and norms are rules, then laws must therefore be rules, because if A = B and B = C, then A = C.

[7] This idea was central to Kelsen's philosophy: "By 'norm' we mean that something ought to be or ought to happen, especially that a human being ought to behave in a specific way." Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (University of California Press, 1967), 4; see also Hans Kelsen, *General Theory of Norms*, trans. Michael Hartney (Oxford University Press, 1991), 2. For another example, see MacCormick: "What are rules, conventions, standards, principles? How formal or informal can they or need they be? Let us start by saying that, in the sense relevant to the present purpose, they are all normative. That is, they enter essentially into judgment of what it is right or wrong to do, what ought or ought not to be done." Neil MacCormick, "Norms, Institutions, and Institutional Facts," *Law and Philosophy* 17 (1998): 303.

[8] Of course, to draw such an ought from a declarative statement would be to commit the is-ought fallacy. For the principal expression of this problem, see: David Hume, "A Treatise of Human Nature [1739-40]," in *The Essential Works* (Wordsworth Editions Limited, 2011), 409 (3.1.1).

[9] This, again, appears in the ideas of Kelsen. As GLF put it: "Kelsen proposed that all law must be recast into norms stipulating sanctions. These norms, however, are not prescriptive norms; they are norms that grant authority. Their norm- subjects are not the ordinary members of society but are the officials of the system who are authorized to apply a sanction in the event of a transgression." GLF, "The Distinction between the Normative and Formal Functions of Law in HLA Hart's The Concept of Law," *Virginia Law Review* 65, no. 7 (1979): 1366, n. 48. For Kelsen in his own words, see: Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Harvard University Press, 1945), 58ff (1.4).

[10] This would presumably be some subset of the wider social group or, potentially, some external agent, who might constitute what Austin referred to as 'political superiors'. These would posit laws for their

or some *Volkswille*/*volunté générale*.[11] Where it is said that laws are commands of sovereign individuals (i.e. positivism),[12] there is a problem when it comes to customary law.[13] The idea that customary laws are valid insofar as they are accepted by some sovereign individual is unconvincing.[14] Furthermore, it raises the question as to who makes the sovereign and whether there are any laws beyond their remit – the implication being that not all laws are their commands. The idea of the *Volkswille* handles the idea of customary law more readily, but runs into the problem as to how one determines the 'will of the people'. More damningly, such ideas approach very closely the ideas of the Group Mind and the Real Personality of Groups, which have been demonstrated to be badly founded. The Historical Schools of Law tend to suffer in this regard. Like the normative fallacy, there is some truth to the voluntarism fallacy, for it is obvious that many laws *are* given or made by, for example, individuals or groups with whom we associate the activity of generating law. It is not, however, essential to the idea of law.

Next, there is the **coercive fallacy**. This is the idea that laws are such because they are backed by punitive measures (i.e. sanctions) for non-compliance, particularly legitimated uses of force;[15] if not respecting every law in the system, then at least respecting some, which, supposedly, gives the system its integrity.[16] As will be seen, it is a law's *structure*

'political inferiors' – as well as for themselves, presumably. In Austin's thought, there are two kinds of political superior: God and other people. For there are: "Laws set by God to his human creatures, and laws set by men to men". John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (Weidenfeld & Nicolson, 1954), 9–10.

[11] *Volkswille* = will of the people; *volunté générale* = general will.

[12] See especially Austin, who said that "Every *law* or *rule*…is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands": Austin, *The Province of Jurisprudence*, 13, 133–34, et passim.

[13] International law, "which exists despite the absence of an international sovereign", and, perhaps, ecclesiastical law, "which has its origin and sanction in tradition and in the inner order of the church", are other problematic areas: Harold J Berman, William R Greiner, and Samir N Saliba, *The Nature and Functions of Law*, 5th ed. (The Foundation Press, Inc., 1996), 21.

[14] This idea concerning customary laws' validity was argued by Austin, for example. See: Austin, *The Province of Jurisprudence*, 30–32, 163–64.

[15] This fallacy can be seen, for example, in Austin, who thought that laws were commands: "A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded." Austin, *The Province of Jurisprudence*, 14. Indeed, for Kelsen, legal systems' coercive nature is what distinguishes them from other social orders; the decisive element, he thought, was force – resistance against which was 'ordinarily hopeless': Kelsen, *Pure Theory of Law*, 34, 37. Duguit, also, appears to fall foul of the coercive fallacy somewhat, except that the source of coercion in his case appears rather to be the social group at large, rather than any person or body therein. For Duguit, it is the "profound group reaction" to the violation of any principle that causes that principle to become "socially organized"; this can cause it to be transformed from a moral principle (*la règle morale*) into a 'jural principle' or rule of law (*un règle de droit*). In effect, laws, for Duguit, appear to be defined by the fact that non-compliance therewith will be attended by a concerted and organized negative reaction from other members of the social group; the presence of this coercive element transforms morality into law: Léon Duguit, "The Law and the State," *Harvard Law Review* 31 (1917): 4–5. Duguit was not far-removed from Weber in this regard, see: Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, ed. Guenther Roth and Claus Wittich, vol. 1 (University of California Press, 2013), 34–35, 316–17.

[16] See, e.g. Kelsen, *Pure Theory of Law*, 50–51.

and *basis* that matter, not whether there are consequences for non-compliance.[17] In view of the voluntarism and coercive fallacies, it will be evident that a purely positivistic conception of law cannot here be accepted.

There are also what can be termed the **reification** and the **objective category fallacies**. Such ideas treat laws as though they were, or become, facts with an independent existence; that they form an objective category, which is concrete and fully enumerable.[18] Laws, in this sense, are often treated as being *discoverable* – whether through observation or reason. Related to these fallacies are the **universalistic fallacy** (i.e. the idea that laws are the same everywhere), the **naturalistic fallacy** (i.e. the idea that at least some laws are inherent in nature and are, in a sense, inescapable and immutable),[19] and the **inherent goodness fallacy** (i.e. the idea that certain laws are inherently Good or Right, and that such things as fail to meet these criteria cannot be laws).[20]

The Natural (or Philosophical)[21] and Historical Schools of Law are particularly prone to these fallacies. [22] The former, in particular, tends to confuse what seems good/right/sensible with actual phenomena. In other words, it confuses *personal opinion* with *objective reality*. Historical Schools of Law tend to allow for a greater degree of relativism than Natural Schools, but they are not much better. They are largely founded on pseudoscience intermixed with romanticism and fatalism. It is worth adding that many lawyers – not necessarily of either the Natural or Historical Schools – also succumb to one or more of these fallacies. Indeed, many lawyers have been so indoctrinated in "the law" (especially constitutional law) that they fail to realize its contingency.

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[17] See further, *infra*, 3.18.1.
[18] See further, *infra*, 4.18.
[19] It is important to remember, as Hayek pointed out, that rejecting the idea of "rules of just conduct as natural in the sense that they are part of an external and eternal order of things, or permanently implanted in an unalterable nature of man, or even in the sense that man's mind is so fashioned once and for all that he must adopt those particular rule of conduct" does not mean embracing legal positivism; it does not mean that all laws must necessarily stem from some official and deliberate acts of some person or persons. Friedrich August Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge Classics, 2013), 222–24, quote at 223.
[20] Indeed, as MacCormick has argued, there are very good reasons for ensuring that morality is not made a precondition for the validity of law – not least because lending a 'moral aura' to certain persons, bodies, and acts; in and under the name of justice, a great deal of injustice might be done: Neil MacCormick, "A Moralistic Case for A-Moralistic Law," *Valparaiso University Law Review* 20, no. 1 (1985): 1–41.
[21] "The philosophical jurist studies the philosophical and ethical bases of law, legal systems, and particular doctrines and institutions, and criticizes them with respect to such bases." Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence. I.," *Harvard Law Review* 24, no. 8 (1911): 604.
[22] On the point of discoverability: "In opposition to the analytical jurist, the historical jurist and the philosophical jurist agree that law is found, not made, differing only with respect to what it is that is found." Pound, "The Scope and Purpose of Sociological Jurisprudence. I.," 599.

Related to the previous group of fallacies are the **emergence** and the **agentive fallacies**. Emergence fallacies are based on ideas of emergentism, which are themselves closely associated with Gestalt, epiphenomenalist, and other metaphysical ideas (e.g. vitalism, idealism, dualism, etc.), i.e. ideas that *new* and *distinctive* properties arise from the interactions and operations of certain phenomena, which properties have *fundamentally different qualities or characteristics* from those phenomena, are *irreducible* to those phenomena, and, moreover, are often believed to be able to *causally affect* those phenomena (so-called 'downward causation'). This is a layered view, in which higher-level (i.e. emergent) properties supervene upon lower-level (i.e. componential) properties.[23]

Thus, there is the idea of treating legal systems as though they were emergent properties of societies.[24] They are not only *produced* by societies, but, once produced, take on a character and existence of their own, which can then go on to *affect* the society that produced it. The fundamental problem with this is that it thoroughly idealizes legal systems. Indeed, it builds into the agentive fallacy – treating, and speaking of, law as though it were an active and autonomous agent or force, which thinks, moves, acts, reacts, interacts, observes, evolves,[25] etc. almost as if it were a machine or, indeed, an organism, and which as of necessity must have some sense of coherence, discreteness, and reality – whether physical or metaphysical.

In many respects, it is along these lines that Luhmann's and Teubner's conceptions of law as social systems of communication (or as 'discursive systems') – which are 'cognitively open but normatively closed' and 'autopoietic' (i.e. self-regulating, if not also self-contained, self-referential, and self-perpetuating),[26] as if they were *living* systems –

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[23] On emergentism, see esp.: O'Connor, Timothy and Wong, Hong Yu, "Emergent Properties", The Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2015/entries/properties-emergent/>. See also for an overview of, and sympathetic take on, emergentism: R Keith Sawyer, *Social Emergence: Societies as Complex Systems* (Cambridge University Press, 2005).

[24] A point should be noted: it has been said above that constitutions (*supra* 2.1), as well as group-ideas (*supra* 2.13), can be seen as 'emergent properties' of social life. It needs to be stressed that this is meant only in an experiential and epistemological sense: they are ways in which we *experience* and *understand* social life. However, these properties, insofar as they can be called 'emergent', are always reducible to individual phenomena and interactions therebetween. They do not assume a life of their own.

[25] "[L]aw has evolved by itself and…society as its environment has provided accidental impulses, which have caused variations and occasional innovative selections…" Niklas Luhmann, *Law as a Social System*, ed. Fatima Kastner et al., trans. Alex Ziegert (Oxford University Press, 2004), 262.

[26] On autopoiesis, see, e.g.: FG Varela, HR Maturana, and R Uribe, "Autopoiesis: The Organization of Living Systems, Its Characterization and a Model.," *Currents in Modern Biology* 5, no. 4 (1974): 187–96; Michael King, "The 'Truth' about Autopoiesis," *Journal of Law and Society* 20, no. 2 (1993): 218–36.

suffer.[27] Certainly, there are systems of law(s), but these are constructs, and, as such, cannot *do* anything except that which *we* make or have them do; indeed, they only have as much coherence, discreteness, and reality as we give to them, and, whilst 'operational' (if not 'causal') closure of the system might be a worthy aspiration from a logical and practical viewpoint, the idea that there is, and must be, a clear delineation between the 'legal system' and its 'environment' is misguided – particularly where humans are thought to constitute part of a legal system's environment, as if the legal system existed apart from them (and, perhaps, in spite of them).[28]

A similar problem to systems theories of law is encountered by institutional theories of law,[29] such as those of Hauriou and Romano.[30] These, to use the latter's words, treat law as a "complete and unified order" or, as he terms it, an "institution", which "means that the law, before it is norm, before it concerns a simple relationship or set of social relationships, is an organization, a structure, a position of the very society in which it develops and that *this very law constitutes a unity, as an entity in its own right*."[31] Indeed: "law is composed of norms, which are detached from the consciousness of those who

[27] See, esp. Niklas Luhmann, "Law as a Social System," *Northwestern University Law Review* 63, no. 1&2 (1989): 136–50; Niklas Luhmann, *Social Systems*, trans. John Bednarz Jn. and Dirk Baecker (Stanford University Press, 1995); Luhmann, *Law as a Social System*, 2004; Niklas Luhmann, *Theory of Society*, trans. Rhodes Barrett, vol. 1 (Stanford University Press, 2012); Niklas Luhmann, *Theory of Society*, trans. Rhodes Barrett, vol. 2 (Stanford University Press, 2013). On Luhmann and Teubner, see, e.g.: Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press, 1997), chap. 5; Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27, no. 2 (2000): 296–321. Further on Luhmann: Nico Stehr, "The Evolution of Meaning Systems: An Interview with Niklas Luhmann," *Theory, Culture & Society* 1, no. 1 (1982): 33–48; Daniel Lee, "The Society of Society: The Grand Finale of Niklas Luhmann," *Sociological Theory* 18, no. 2 (2000): 320–30; Ana Lourenço, "Autopoetic Social Systems Theory: The Co-Evolution of Law and the Economy," *Centre for Business Research, University of Cambridge Working Paper No. 409*, 2010; Guilherme Vasconcelos Vilaça, "From Hayek's Spontaneous Orders to Luhmann's Autopoietic Systems," *Studies in Emergent Order* 3 (2010): 50–81. Luhmann's systems theories were part of what Sawyer has termed the 'second wave' of systems theories, on which, see: Sawyer, *Social Emergence*, esp. 14-21. Sawyer places himself in the 'third wave', which, in his view, "is more appropriate for explaining complex social phenomena" (p. 21) and is based on developments in computer science since the 1990s. As he sets himself against methodological individualism (pp. 4, 7, et passim), his approach differs from the present one. Luhmann and Teubner were notably followed by MacCormick in setting out his theories: Neil MacCormick, *Questioning Sovereignty: Law, State, and Practical Reasoning* (Oxford University Press, 1999), 6–11.

[28] Indeed, autopoietic theories, as King said, reject "the kind of analysis that starts from the premise ''it's all down to people'…" Instead, "individuals are reconstructed or interpreted as epistemic subjects within different social meaning systems and also, simultaneously, as psychic systems. It is as psychic systems that individuals give coherence to and make sense of differentiated meaning systems of the social world." King, "The 'Truth' about Autopoiesis," 228.

[29] Institutional theories share features with legal pluralism, which flourished around the same time. Pluralism was discussed, *supra*, at 2.6. For pluralism in the writings of institutional theorists, see esp. Santi Romano, *The Legal Order*, trans. Mariano Croce (Routledge, 2017), chap. 2.

[30] Maurice Hauriou (1856-1929) and Santi Romano (1875-1947). See esp.: Albert Broderick, ed., *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T Delos*, trans. Mary Welling (Harvard University Press, 1970); Romano, *The Legal Order*.

[31] Romano, *The Legal Order*, 13 [§10, emph. added].

ought to comply with them, and have acquired *their own autonomous existence*."[32] This dualistic approach,[33] if not idealism of the highest order, is a metaphor taken too far,[34] and, as has and will be seen, simply cannot be sustained.[35] Laws and legal systems come

[32] It continues: "This is not to deny that law is deeply rooted in that conscience, that it is projected in its intimate core and it is not a shining reflection of it; but the law transcends, exceeds and conflicts with it." Romano, *The Legal Order*, 8 [§7, emph. added]. Alternatively, as Delos, one of the French institutionalists, put it: "This current of thought [institutionalism] cannot be properly understood unless one first accepts a resolutely objective point of departure. Positive law should be considered as a fact, a reality, an object, offered to our observation." Joseph T Delos, 'The Evolution of the Institutional Conception of Positive Law – A Backward Glance' in Broderick, *The French Institutionalists*, 35. Cf. Hauriou: "[W]hile individual ideas, perhaps, may not be objective facts, *currents of thought* are objective social facts. Fouillée has contributed much to this progress by his striking formula of idea-forces. A current of ideas, that is, an idea that animates a party, a people, a succession of generations, any collectivity whatsoever, very obviously becomes a social force. […]. The history of public law shows how currents of ideas influence legislation, and this is surely an objective social fact." Hauriou, 'The Two Realisms' in Broderick, *The French Institutionalists*, 49–50. And further: "But, in social groups, collective forces are unleashed that are so brutal that they escape the control of the minds of individuals…unless by a prodigious effort of organization the collective forces are themselves arranged after the fashion of a mind. […]. // There you have the whole secret of the personification of social institutions: it is an application of the maxim *similia similibus*. You will protest that this is anthropomorphism, but the result is good since it is to humanize social institutions, which are for men." Hauriou, from '*Principes de droit public*' in Broderick, *The French Institutionalists*, 60.

[33] Hauriou was explicit about the dualism inherent in institutionalism, viz. that of the individual and society. Even though society owes something to individuals and *vice versa*, there were, for Hauriou, qualities attributable to the one not attributable to the other: "This opposition itself can exist only if, on the one hand, the individual possesses an autonomy that does not owe everything to society, and, on the other hand, the social organization is the product of a necessity of things that does not owe everything to individuals. […]. It suffices for us to know that there are at issue *a power proper to the individual and a power proper to society* and that the problem is to justify the transformation of these two proper powers into rights." Hauriou, from '*Principes de droit public*' in Broderick, *The French Institutionalists*, 62 [emph. added]. Indeed, "[I]nstitutions undergo a phenomenon of incorporation… This incorporation leads to personification. It leads there all the more easily because in reality *the corpus that results…is itself a very spiritualized body*; the group members are absorbed in the idea of the work, the organs are absorbed in a power of realization, the manifestations of communion are psychical manifestations. *Since all these elements are more spiritual than material, this body is of a psycho-physical nature*." Hauriou, 'The Theory of the Institution and the Foundation' in Broderick, *The French Institutionalists*, 101 [emph. added].

[34] See *infra* 4.11, esp. at n. 104.

[35] Besides equating 'institution' and 'legal order', Romano also equates 'institution' with what seems to approximate to 'social group': "By institution I mean any entity or social body" [§12]; "I believe that the concept of institution and the concept of a legal order, considered as a unity and as a whole, are absolutely identical" [§11]; "[I]n order for an institution to arise, the existence of persons connected to each other through simple relationships is not enough, as there must be a closer and more organic bond. The formation of a social super-structure is required upon which not only their distinct relationships, but also their own generic position depends, or that sway them" [§18]. An institution, therefore, would seem to be some socio-legal entity with its own very real existence, which existence is irreducible ("[T]he institution can never be reduced to one or more specific legal relationships… It implies relationships but cannot be reduced to them" [§18]). This theory is metaphysical ("The entity I am talking about must possess an *objective and concrete existence*, and its individuality, *however immaterial*, must be outward and visible" [§12.1, emph. added]) and, with its talk of unity, wholeness, completeness, etc., seems to strive for an artificial neatness, which might be reflected in juristic abstractions, but which is not – and cannot be – reflected in the real world. Moreover, it seems to be somewhat chimerical by suggesting that institution, social group, and constitution ("The truth is that the law is first and foremost an arrangement, an organization of a social entity" [§16]) are all one and the same thing. They are not, though they are related. Institutions are a type of social group, but only a type. As a social group, they are constructs; they are not real (albeit perhaps intangible) things, as Romano believes. They have constitutions, which is to say that they can be described in terms of their membership and the distribution therebetween of activities and influence. But, as will be seen, whilst law plays an important role in all of this, it would be wrong to say that they are a unity. It is akin to saying that books are paper. That there is a connection between them is correct, but the relationship is misconceived. Books are not paper as much as paper is not books. The main constituent of books is paper, though they

from, and reside in, people; they are only as 'complete and unified' as those people make them. [36] This means, *contra* Hauriou and Romano, [37] that laws, legal systems, constitutions, etc. change as people change;[38] this will be argued further in Chapters 4 and 5.

There is also the **teleological fallacy**. This is the idea that laws must exist *for a purpose* or, in Aristotelian language, have a 'final cause'. It is true that many laws are made in order to achieve a particular end; to address a particular 'mischief'. However, it is equally true that many laws exist not so much *in order to* do anything, but exist only *because* there were certain things that brought them about – certain antecedents that occurred without any concrete or specific goal in mind. Indeed, even though many such laws – which are usually implicitly held – are the product of the "countless different purposes of different individuals",[39] it would be a *non sequitur* to argue that these resultant laws themselves have a purpose. We might rationalise their existence and identify any utility that they might have; we might even adhere to them precisely because of these things. But the point is that a *purpose is found for them* or *they are found to serve a purpose*, not that they are *brought into existence for a purpose* as if created by a rational and prodigious mind; to assume that they are, or must be, is fallacious.

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might be made from other things (e.g. papyrus, vellum, parchment, etc.), and there is also the binding and ink to consider; similarly, paper is often used for books, though it is often also used for other things. In other words, whilst they might together contribute to a certain idea, even to a certain identity, they are not identical with one another. See: Romano, *The Legal Order*, 16, 17, 25, 32.

[36] Indeed, whilst completeness and unity remain admirable aspirations, their achievement, for reasons we will see, remains doubtful. It is notable that Romano himself seems to have qualified his requirement of completeness, when he reworked his formulation a little while after the previous quotations: "the institution is a legal order, a self-standing, *more or less complete* sphere of law." Romano, *The Legal Order*, 20 [§13, emph. added].

[37] Hauriou: "In law, as in history, institutions stand for duration, continuity, and reality…" Hauriou, 'The Theory of the Institution and the Foundation: A Study in Social Vitalism' in Broderick, *The French Institutionalists*, 93. Romano: "The institution is a firm and permanent unity. In other words, its identity does not get lost, at least always and necessarily, as its distinct elements vary, as well as its members, patrimony, means, interests, addressees, norms, and so on. It can regenerate itself but continue to be itself without losing its own individuality. Here lies the possibility of considering it as a self-standing body, so as not to identify it with that which might be necessary to give it life but, at the same time, by giving it life, merges with it." Furthermore: "The law does not simply consecrate the principle of the coexistence of individuals, but above all takes it upon itself to overcome the weakness and limitedness of their forces, to exceed their feebleness, to perpetuate particular goals beyond their natural life, *by creating social entities that are more powerful and durable than individuals*. Such entities establish a synthesis, a syncretism in which the individual gets caught." Romano, *The Legal Order*, 19 [§12.4], 20-21 [§13, emph. added].

[38] This is because it is not the case, as Romano asserts, that "the law is the vital principle of any institution, that which animates and holds together the various elements that compose it, which determines, fixes and preserves the structure of immaterial entities". Rather than social groups – or 'institutions' – being tied to laws, which supposedly have an autonomous and enduring existence, they are tied to *social agents*, i.e. individuals. Romano, *The Legal Order*, 22 [§15].

[39] Hayek, *Law, Legislation, and Liberty*, 107.

Relatedly, there is the **functionalist fallacy**: the idea that laws are primarily defined, not by their basis, substance, or form, but by their *function* – the thing(s) that they do, role(s) that they play, or purpose(s) that they serve, particularly vis-à-vis some wider system.[40] Functionalism – especially when informed by *aetiology* rather than *teleology* – is attractive in that it appears to explain why certain forms have come to exist (i.e. why they have been selected), and the part that they play in maintaining and perpetuating a system (especially in terms of their *eufunctionality* or *dysfunctionality*, and *manifest* or *latent functions*[41]).

However, functionalist explanations tend to presuppose that: (1) some, if not *all*,[42] things have functions; (2) they have the function(s) we deduce for, and ascribe to, them; (3) these are intrinsic to the things in question; (4) the performance of these functions is somehow necessary or vital, which often involves value judgements;[43] and, indeed, (5) there are some phenomena to analyse, which might be defined by their function(s). These cannot always be assumed. Furthermore, there is also the problem that many supposed 'functions' are *incidental* to the things in question and so identifying them tells us very little except what a thing *has been used for* or *could be used for*.[44] However, the most fundamental problem is that functionalist definitions leave us largely in the dark as to *what the thing actually is* that is being described (i.e. its basis, substance, form, etc.); they are, therefore, incomplete. Functionalism is too often informed by holism and, moreover,

[40] Almeida, for example, following Luhmann, appears to present such a theory of law: Fábio Portela Lopes de Almeida, "Constitution: The Evolution of a Societal Structure (PhD Thesis)" (Universidade de Brasília, 2016), esp. 239ff.

[41] Thus, it might be said, for example, that the manifest function (i.e. its main function) of law is to create order or that it is a method of social control. Similarly, it might be said that a latent function (essentially a by-product) of law is the promotion of a shared social identity and social cohesion, or the maintenance of cooperation and reduction of variation. Cf. Almeida, "Constitution: The Evolution of a Societal Structure (PhD Thesis)," chap. 4.

[42] The idea that everything – at least, "all standardized social or cultural forms" – has or, indeed, *must have*, a (positive and adaptive) function is known as the 'postulate of universal functionalism'. See: Robert King Merton, *Social Theory and Social Structure*, 3rd ed. (The Free Press, 1968), 84–86, quote at 84. This postulate is often connected with two others – the postulates of the functional unity of society and indispensability. Together, these hold "first, that standardized social activities or cultural items are functional for the *entire* social or cultural system; second, that *all* such social and cultural items fulfill [*sic*] sociological functions; and third, that these items are consequently *indispensable*." Merton, *Social Theory and Social Structure*, 79–91, quote at 79.

[43] This is the postulate of indispensability – see Merton, *Social Theory and Social Structure*, 86–90.

[44] Thus, it would be wrong to define trees by their 'function' of being stores of carbon and oxygen pumps (the "Earth's lungs", even). These are certainly things that trees do, are good at doing, and, indeed, from the viewpoint of the biosphere, it is important that they continue to do them, but these 'functions' are not specific to trees (other plants, of course, do these things as well) and tells us next to nothing about trees' substance and form. Similarly, it would be wrong to define rivers by their 'function' of carrying water to lakes, seas, and oceans. This is what rivers tend to do, but, again, something that *happens* or *tends to happen* helps us to perhaps understand a thing's *behaviour* and *why that behaviour has arisen* – but not necessarily the thing itself.

too often slips into teleological thinking. There is also a looming danger of anthropocentrism – assuming that the function of the thing in question is somehow to be of benefit to us as humans.[45]

Thus, a purely functionalist explanation of law might tell us what law *does, can do,* or, indeed, what it *might be good at doing*; it might tell us what its *effects* are, and might even suggest *why* we have and continue to use law. Yet, it nevertheless fails to explain what law *is*. By focusing on function and functionality, it misses the point. Consequently, whilst we *might* employ law 'manifestly' as a 'tool' to create social order or as a 'method' of social control, and whilst law *might* 'latently' promote social identity and social cohesion (e.g. through promoting cooperation and homogenization), this still does not tell us what law *is* at its core – neither does it quite explain what it is about law that enables it to perform such functions.[46]

Finally, there is the **analytic fallacy** – the idea that the nature of law (or laws) can be ascertained through conceptual and logical analysis, through abstract reasoning and introspection. Of course, some of the chief merits of analytical jurisprudence and the analytical approach have been the separation of law from historicism and some supposed objective morality.[47] The danger, however, is that such analysis also becomes divorced from the human and social world, i.e. from reality. After all, "abstractions exist *in order to be applied*, and they are both meaningless and valueless unless they are capable of being translated into the terms of real life",[48] – to which we can add that they are likewise meaningless if they have no basis in empirical observation. It would not be fair to say that analytical jurisprudence, on the whole, has fallen foul of the analytical fallacy,[49] but the danger of getting carried away with inferences and deductions remains.

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[45] For example, thinking that the function of trees is to provide firewood or timber, or that the function of rivers is for washing or swimming. We *can* plant forests specifically intended to be used for firewood or timber, and we *can* specifically designate rivers for washing or swimming, but these are not intrinsic to the things themselves.

[46] See further on the subject of functionalism and critiques thereof: Carl G Hempel, *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science* (The Free Press, 1965); Melvin Tumin, "The Functionalist Approach to Social Problems," *Social Problema* 12, no. 4 (1965): 379–88; Merton, *Social Theory and Social Structure*, chap. 3; Joan Smith, "The Failure of Functionalism," *Phil. Soc. Sci.*, 1975, 33–42.

[47] This (at least, in relation to morality) is the so-called 'separability thesis' of legal positivism. Its thrust was couched nicely by Austin: "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995), 157. Cf. Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford University Press, 1931), 14–15.

[48] Allen, *Legal Duties and Other Essays in Jurisprudence*, 24.

[49] After all, it is doubtful whether there ever could be a purely analytic theory of law: Cf. Allen, *Legal Duties and Other Essays in Jurisprudence*, 13.

There are, then, numerous fallacies often committed when defining law. Some explanation has already been given as to why these are fallacies, but the best way of demonstrating this is by understanding properly what is meant by 'law'. However, it should be reiterated that there is some sense to many of these fallacies – for example, many laws *are* expressly formulated, issued by a central authority (viz. the State),[50] directed at interpretative authorities, designed with specific purposes in mind, and used to perform or facilitate certain functions. The fallacy is making these essential to the idea of law.

It is also worth stressing the fact that, whilst many theories feature one or other of the fallacies listed above, it does not mean that the theories are wholly without value. For example, the institutionalists – alongside the pluralists and, to a lesser extent, historicists – were correct to argue that there might be a multiplicity of laws and legal systems. Alternatively, Luhmann was entirely correct, at least in his earlier work, to stress the importance of 'expectations'.[51] However, it is vital that these are placed on a solid foundation.

3.3 The Present Theory

The theory of law proposed here is neither a historicist, positivist, nor rationalist/naturalist one; neither is it a functionalist nor analytic theory.[52] Instead, it is most closely allied to the group of theories known as sociological theories of law,[53] – at least insofar as it argues that laws are to be viewed and understood in their social context. Thus, even though jurists, legislators, etc. *can* construct formally defined and theoretically closed systems of law, which appear analytically distinct (and which, for the purposes of lawyers, legal practitioners, etc., can largely be treated as such), the present theory shares with sociological theories of law the belief that any such systems of law cannot be fully

[50] Cf. "A conception [of law] abstracted from state law is persuasive to many theorists because state law has become a *dominant* form of law." Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press, 2017), 42 [emph. added].
[51] Niklas Luhmann, *A Sociological Theory of Law*, ed. Martin Albrow, trans. Elizabeth King and Martin Albrow (Routledge & Kegan Paul, 1985), esp. chap. 2. Cf. also: Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, ed. Guenther Roth and Claus Wittich, vol. 2 (University of California Press, 2013), 754.
[52] There is value in all of these approaches and it is important to recognize this; identifying their respective flaws is not to dismiss or belittle them or their proponents. Indeed, as Berman et al. argued, there is an extent to which the course which jurisprudence ought to take is an *integrative* one – not to abandon all of the older theories, but to synthesize them by taking from each that which is good and insightful. (Though, we can disagree with Berman et al. that functionalism is the best way in which to approach law). Berman, Greiner, and Saliba, *The Nature and Functions of Law*, 24.
[53] There is an argument to be made that 'social legal theories' are nowadays largely neglected in jurisprudence. See: Tamanaha, *A Realistic Theory of Law*, esp. chap. 1.

understood and appreciated except in their social – or, indeed, wider – context.[54] Laws are not inherent in the universe, discoverable by *a priori* reasoning, etc.; they do not have an ideal, pure, and abstract existence (and, as such, might operate as an 'autonomous force'[55]). They come from social agents and can only be understood through those agents.

However, the present theory differs from most sociological theories of law in two respects. Firstly, it differs in that it argues that laws are not primarily *sociological* but, rather, *psychological* phenomena – even if their formulation, propagation, interpretation, coordination, implementation, enforcement, etc. quickly become sociological problems, and even if the individuals themselves cannot be properly understood apart from their social context. Secondly, it differs from such theories in the sense that it does not believe that laws are to be found in what are thought to be more or less concrete and objectively identifiable 'social facts' (i.e. they are not to be found in 'in social relations and structures',[56] or, indeed, processes), but in the individuals themselves.

It has been said that laws are psychological phenomena, which appears to be a point that has been little appreciated. There are certainly many books that discuss law in the context of psychology and neuroscience. However, these typically concern, not the nature of law, but rather the impact of psychological and neurological discoveries on legal principles and legal practice, e.g. on capacity, consent, responsibility, theories of crime and punishment, testimony, etc., and even exploring issues connected with transhumanism.[57] Their primary concern is people as *subjects* of law; the idea that law is a product of the mind is curiously absent.

There are some notable exceptions – e.g. Leon Petrażycki (1867-1931),[58] and Axel Hägerström (1868-1939) – but these theorists, to adapt Redmount's words, 'had much to

[54] Cf. Cotterrell: "[L]aw itself needs to be understood not merely in terms of lawyers' categories, but in the light of a theoretical understanding of the nature of the societies within which legal systems exist…in terms of social theory". Cotterrell, *Law's Community*, 77.
[55] "Law is an aspect of society, not an autonomous force acting on it": Cotterrell, *Law's Community*, 8.
[56] In its context: "Sociologically, law is to be seen as an aspect of social life, implicated *in social relations and structures* in connection with which 'the legal' refers only to a certain facet or field of experience, variously identified." Cotterrell, *Law's Community*, 95 [emph. added].
[57] For example, the possibilities of cognitive enhancement. See, e.g. Roger D Masters and Michael T McGuire, eds., *The Neurotransmitter Revolution: Serotonin, Social Behavior, and the Law* (Southern Illinois University Press, 1994); Terrence Chorvat and Kevin McCabe, "The Brain and the Law," *Philosophical Transactions: Biological Sciences* 359, no. 1451 (2004): 1727–36; Michael S Pardo and Dennis Patterson, *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience* (Oxford University Press, 2013); Owen D Jones, Jeffrey D Schall, and Francis X Shen, *Law and Neuroscience* (Wolters Kluwer, 2014); Luigi Cominelli, *Cognition of the Law: Toward a Cognitive Sociology of Law and Behavior* (Springer, 2018).
[58] Petrażycki's main work, in English translation: Leon Petrażycki, *Law and Morality*, trans. Hugh Webster Babb (Harvard University Press, 1955). On Petrażycki, see: Michalina Clifford-Vaughan and Margaret Scotford-Norton, "Legal Norms and Social Order: Petrazycki, Pareto, Durkheim," *The British Journal of*

say and still more to answer', and, in any case, their works are now dated.[59] Indeed, even though some theories sound very promising as psychological explanations of the nature of law, that promise is little realized.[60] This lack of a solid theory of law as a psychological phenomenon is all the more surprising given the fact that it seems to be almost implicit in a number of theories of law – especially the few memetic theories of law that exist.[61] Luhmann, in his focus on expectations, certainly approached a psychological theory of law, but does not seem to have quite identified wherefrom those expectations stemmed and got too caught up in abstractions. Thus, even though it would seem that laws can be described in psychological and, indeed, neurological terms, this does not appear to have been adequately developed anywhere. To do this will form part of the present endeavour.

With all of the foregoing in mind, we turn to the theory itself.

3.4 Associational Theory of Law

The theory can be stated as follows:

> A law is *a fixed set, or pattern, of ideas associated together in the mind*. This gives one a *strong and compelling feeling that certain things either do or do not go together*; the connection seems almost *irresistible*. In

Sociology 18 (1967): 269–77; Jan Gorecki, ed., *Sociology and Jurisprudence of Leon Petrażycki* (University of Illinois Press, 1975); Krzystof Motyka, "Law and Sociology: The Petrażyckian Perspective," in *Law and Sociology*, ed. Michael Freeman (Oxford University Press, 2006); Roger Cotterrell, "Leon Petrazycki and Contemporary Socio-Legal Studies," *International Journal of Law in Context* 11 (2015): 1–16; Edoardo Fittipaldi, "Leon Petrażycki's Theory of Law," in *A Treatise of Legal Philosophy and General Jurisprudence*, ed. Enrico Pattaro and Corrado Roversi, vol. 12, 2016, 443–504; Andrzej Dąbrowski, "Genesis and Nature of Moral and Legal Norms. Leon Petrażycki's Naturalistic Solution," *Studia Humana* 7, no. 3 (2018): 39–52.

[59] Redmount provides a useful overview of the limited extent to which psychology has featured in jurisprudential theories: Robert S Redmount, "Psychological Views in Jurisprudential Theories," *University of Pennsylvania Law Review* 107, no. 4 (1959): 472–513. The quote was originally about Hägerström and is at 489.

[60] For example, Ranyard West put forward a 'psychological theory of law' – but, by 'law', he meant 'the effective regulation of conduct', and, consequently, this theory is really about how the 'social instinct' overcomes the 'self-assertive instinct'; it is not an enquiry into the nature of law itself. Ranyard West, *International Law and Psychology. Two Studies: The Intrusion of Order. Conscience and Society.* (Oceana Publications Inc., 1974), II:57, II:159-160. See further: Ranyard West, "Law and Psychology," *Ethics* 54, no. 2 (1944): 146–48; Redmount, "Psychological Views in Jurisprudential Theories," 500–501. Similarly, Robert S Redmount's promising 'law as a psychological phenomenon' fails to address the question of the nature of law. It is rather concerned with law's 'functional attributes', i.e. with its effects on individuals on a psychological level and with 'legal experience'; given that the definition that Redmount adopted for law is a functionalist one, this approach is perhaps unsurprising: Robert S Redmount, "Law as a Psychological Phenomenon," *The American Journal of Jurisprudence* 18 (1973): 80–104. Earlier than West or Redmount, we also find the work of Sherif, whose *Psychology of Social Norms*, again, sounds promising, but this is a study of *social norms*, rather than *norms per se*, and, therefore, is rather concerned with their effects than their basis: Muzafer Sherif, *The Psychology of Social Norms* (Harper & Brothers Publishers, 1936); Muzafer Sherif, *An Outline of Social Psychology* (Harper & Brothers Publishers, 1948), pt. 2.

[61] See *infra*, 4.3.

other words, there is – in the mind, at least – an *established relationship* or *connection* between these things; often, this felt to be *exclusive*.

The mind does this naturally; it helps it to understand how the world works and make predictions, thereby helping individuals to navigate life successfully. The mind is adept at such pattern-recognition; it craves regularity. Our minds constantly re-evaluate and refine the mental models created by these associations, comparing our experiences with our pre-existing associations. Our associations are not purely reached through disinterested reflection; they are heavily influenced by our desires and interests, our notions of good and bad.

Where the mind feels there to be a fixed pattern, there arises *corresponding expectations* – ideas that the pattern will hold and be repeated. Where expectation and reality seemingly align, there is *concordance*; our expectations have been *fulfilled*, which normally reinforces those expectations. Where expectation and reality *do not* seemingly align, there is a *disparity*; our expectations have been *frustrated*. The psychological impact of frustration cannot be underestimated: we feel disappointed, confused, upset, and even angry; the world seems to be at odds to ourselves. From these associations and expectations, we derive our sense of justice and morality – our sense of right and wrong.

The expectation element of law is of supreme importance; it is in accordance with our expectations that we both act in and judge the world.

3.5 Etymology of Law and Fixedness

At the heart of the Associational Theory is the idea of *fixedness*, which idea underpins the idea of law.[62] This can readily be seen in the etymology of various words for law.

Some words for law draw on ideas of stable position and inertia. For example, the English *law* comes from the Old Norse *lagu*, meaning 'that which is laid down'.[63] Likewise, the

[62] When Hart said that "the most prominent general feature of law" was its obligatory nature, this is, I think, what he was driving towards: Hart, *The Concept of Law*, 6. Indeed, it seems to underlie all of those theories that connect law with the idea of 'order'. For an overview of a number of these, and, indeed, a defence of this idea, see: Iredell Jenkins, *Social Order and the Limits of Law* (Princeton University Press, 1980).

[63] This is related to modern words like *legen* (German), *lægge* (Danish), *lägge* (Swedish), *legge* (Norwegian), and *lay* (English), all of which mean to lay, set, place, or put. These are ultimately derived from the Proto-Indo-European $*leg^h$, which root meant to lie, recline, or set down: Linguistics Research

Old English word for law, *dōm*,[64] probably comes from the Proto-Indo-European root **dhē-*, meaning to put, place, set, or do.[65] The classical Greek *themis* (θέμις)[66] probably comes from the same root, through the verb *tithemi* (τίθημι).[67] A thing which is lying down or has been laid down remains where it is, and as it is, unless something else acts upon it. As such, *that which is lying or laid down becomes fixed in place and form, at least for a time*; it neither moves nor changes, especially if it is somehow entrenched (e.g. by engraving in stone or setting ink on paper).[68] It is possible that the act of writing – i.e. *setting* or *laying* letters and words on some surface – was influential in the development of these terms. Similarly, the German *Gesetz* comes from an idea of 'sitting' (*setzen*) and the Latin *statuere* (from which we get words like 'statute' and 'constitution') has the idea of 'standing' (cf. 'status'). If something is sitting or standing somewhere (often having been *placed* there), the implication is that it is in a fixed location – at least, for the time-being. In all of the foregoing, there is an idea of a *fixed and stable state of affairs*.

A slightly different metaphor is to be found in the etymology of the words *rule* (from the Latin *regula*, meaning 'measuring rod') and 'norm' (from the Latin *norma*, meaning a carpenter's square). These draw on the idea of there being a series of points (generally

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Centre of The University of Texas at Austin, *Indo-European Lexicon: Pokorny Etymon: 2. legh-* Retrieved 01 January 2019: https://lrc.la.utexas.edu/lex/master/1132. It is possible that the Latin *lex* (law) comes from the same root, although prevailing opinion favours PIE **leg-*, which meant to collect or gather. See: Elwira Kaczyńska, "The Indo-European Origin of Latin Lex," *HABIS* 44 (2013): 7–14. Interestingly, Aquinas thought that *lex* was related to the word *ligando*, which meant 'binding'. Whilst it is unlikely this is the correct derivation, it is revealing that Aquinas gravitated towards it, seeing as how it has a tenor of *fixedness* to it – that which is bound together is fixed together. *Summa Theologiae* (IaIIae 90) in Thomas Aquinas, *St Thomas Aquinas: Political Writings*, ed. and trans. RW Dyson (Cambridge University Press, 2002), 77. Returning to the etymology of *lagu*, cf. Clark's argument that "*Lagu* is that which *lies* or *rests*, not that which has been *laid* or *set*": Clark, *Practical Jurisprudence, a Comment on Austin*, 68.

[64] This is often translated with *judgment* or *sentence*, as did Sweet, and Mitchell and Robinson, though we might also suggest *determination, decision,* or *pronouncement* as alternative translations. See, e.g.: Henry Sweet and Norman Davis, *Sweet's Anglo-Saxon Primer*, 9th ed. (Oxford University Press, 1980), 111; Bruce Mitchell and Fred C Robinson, *A Guide to Old English*, 5th ed. (Blackwell Publishing, 1994), 55, 314.

[65] Linguistics Research Centre of The University of Texas at Austin, *Indo-European Lexicon: Pokorny Etymon: 2. dhē-*. Retrieved 20 October 2018: https://lrc.la.utexas.edu/lex/master/0376

[66] *Themis* not only meant *law* but, as a proper noun, also represented its embodiment in the goddess of law, order, and justice. See: "ΘΕΜΙΣ", *A Lexicon Abridged from Liddell and Scott's Greek-English Lexicon* (Oxford University Press, 1891), 314.

[67] This connection between the bases to place, set down, etc. and law in various languages was recognized by the compilers of the Oxford Dictionary of English Etymology: "law1", CT Onions, GWS Friedrichsen, and RW Burchfield, eds., *The Oxford Dictionary of English Etymology* (Oxford University Press, 1966), 518.

[68] It is interesting to note that Empress Matilda expressed displeasure in 1164 that the *Constitutions of Clarendon* had been put into writing. She thought that, in Baker's words, "in cases of difficulty it was better not to use writing" – the act of writing only serves to establish and reinforce the fixedness of an idea. It might provide some degree of certainty, but it also might set a bad precedent and bolster fixed associations for which one might not necessarily care a great deal. As such, the act of writing can be something of a double-edged sword. For Matilda's displeasure, see: John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford University Press, 2019), 216.

along a straight line) that have a fixed relation to one another;[69] there is a *fixed or set path* connecting them, from which there is no deviation.[70]

Underlying all of these is the idea that there is some pattern that holds and does not change; the elements of the pattern, and their relations to one another, are *fixed*. This is not to say that it will never change, but, for the time-being at least, it appears stable.[71]

3.6 Basis of Associations: Nervous Systems; Learning; Memory

Associations and their sense of fixedness are products of the architecture of the nervous system.

Nervous systems, like most physical systems, are essentially networks. Networks have two basic features in that they consist of: (1) **nodes/vortices**, which can be plotted on graphs as either *points* or *dots*; and (2) **edges**, which can be represented using *lines* connecting the nodes. Some networks – like nervous systems – have a third feature: (3) **terminals/interfaces**, which are the places where nodes and edges meet.

In the brain – the most important part of the nervous system – the nodes are called *neurons* or *nerve cells*, the edges are called *neurites*, and the terminals are called *synapses*. Neurons are the information processing and storage centres; neurites are the channels along which information is carried in the form of *signals*; synapses are the places where information is moved between neurons and neurites. Synapses normally feature a small

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[69] Cf. Clark's argument that the various words for 'right' – "the Latin *rectus*, the Gothic *raihts*, the Saxon *riht*, modern German *recht* [sic] and English *right*" – were all attached to "meanings of *physical straightness*, *truth*, and *moral rectitude*". He continued: "As to the *metaphor*, which I think can shew to be involved in these words, it may be that the *straightness* predicated of human conduct indicates its being *regular* or *uniform*." By 'regular or uniform', we can understand occurring according to some fixed pattern or patterns. Indeed, he thought physical straightness to be these words' "*first* meaning"; it was only later that they acquired the more abstract meanings. In consequence of all of this (and contrary to Austin's ideas), "*Right* does not mean that which is directed or regulated, any more than it means that which is commanded, although the words expressive of direction and regulation do often come from the same root as that of *right*, or from *right* itself." See: Clark, *Practical Jurisprudence, a Comment on Austin*, 79–82, 85–86.

[70] Just as 'right' arises from ideas of fixedness and regularity, Clark has argued that 'wrong' is associated with ideas of 'crookedness' and appears to derive from a root meaning 'to *bend* or *twist*'. This is very much the metaphorical antithesis to 'right', because that which bends or twists *appears* to happen in a way that is less predictable. Of course, with modern scientific understanding, we know that there are reasons why, say, a river bends or a plant winds, which are to a greater or lesser extent predictable, and occur according to certain mathematical principles and physical laws. But these are not necessarily immediately obvious and, consequently, they often *seem* more variable and arbitrary, i.e. not occurring according to a fixed pattern or patterns. For Clark, see: Clark, *Practical Jurisprudence, a Comment on Austin*, 84–85, 85–86.

[71] Cf. Clark's conclusions on the 'pervading idea of law': Clark, *Practical Jurisprudence, a Comment on Austin*, 90–93. In principle, Clark's conclusions do not differ markedly from my own, except that he did not go quite so far as to identify an underlying basis of *fixedness*, in the sense of a stable pattern.

gap, called a *synaptic cleft*; information travels across this gap either by a chemical signal (*neurotransmitter*) or, sometimes, an electrical signal.[72]

The neural network has three other important structural features. The first is **dynamic polarization**: signals travel only in one direction along the neurites.[73] The second is **connection specificity**: each neuron is only connected to, and communicates with, specific other neurons.[74] The third is **specialization**. Whilst we have much still to learn about the brain, it seems to be the case that specific neurons and specific neural pathways encode for specific things. Indeed, these tend to be grouped together such that the brain can roughly be divided into regions, each of which responds to different types of stimuli or controls different types of thing.[75]

Whether or not particular neurons or neural pathways are activated depends upon their being roused from their resting state. Generally speaking, the process is as follows: For a neuron to become active, it needs to be moved from the *resting membrane potential*.[76] This happens if the electrical charge around the axon hillock within the cell body (*soma*) of the neuron exceeds a given *threshold*. If exceeded, an *action potential* is generated and the neuron 'fires'. A *depolarizing current* travels to the synapse where a chemical or electrical signal is generated to cross the synaptic cleft. From there, a signal travels along the neurite to another neuron. This might have one of two effects. Some neurons create an *excitatory postsynaptic potential*, which means that their interlocutors are moved towards the firing threshold and thus *more likely to fire*. Others create an *inhibitory postsynaptic potential*, which means that their interlocutors are moved away from the firing threshold and thus *less likely to fire*. The weighing of these inputs is known as a cell's *integrative function*.[77]

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[72] It is worth noting that there are two kinds of neurite: axons and dendrites. Axons typically carry signals away from a *pre-synaptic cell*, whereas dendrites – on the other side of the *synaptic cleft* – typically carry them towards the *post-synaptic cell*; in other words, axons transmit and dendrites receive. See: Eric R Kandel et al., eds., *Principles of Neural Science*, 5th ed. (The McGraw-Hill Companies, Inc., 2013), 22–23, 71.

[73] Kandel et al., *Principles of Neural Science*, 24. 29-30.

[74] "[A] given neuron will communicate only with specific cells and not with others". Given the large number of neurons in that coexist in a limited space, the fact that signals can only travel in one direction along neurites, and the fact that each connection costs both energy and nutrients, the fact that "neurons do not form connections indiscriminately" is unsurprising: Eric R Kandel, *In Search of Memory: The Emergence of a New Science of Mind* (W. W. Norton & Company, 2006), 64, 65. See further: Kandel et al., *Principles of Neural Science*, 24.

[75] See: Kandel et al., *Principles of Neural Science*, chaps. 1 and 2.

[76] Kandel et al., *Principles of Neural Science*, 30.

[77] Kandel et al., *Principles of Neural Science*, 31–33.

Whether or not a given neuron will fire is largely a product of two things: (1) its *sensitivity* or *excitability*, i.e. the height of the threshold;[78] and (2) the *summation of changes to the resting membrane potential*, i.e. whether or not the sum of the incoming signals falls above or below the firing threshold. It is worth noting that action potentials are generated on an all-or-nothing, as well as something of an egalitarian, principle: "Stimuli below the threshold do not produce a signal, but stimuli above the threshold all produce the signals of the same amplitude"; it is their *number* and *frequency* that determines their force.[79]

The upshot of all of this is that information travels along set pathways within the brain; these are specific, separate, and non-random. When certain *neurons* are activated, certain other neurons will probably also be activated or not; when certain *pathways* are activated, certain other pathways will likely be activated or not.[80] It should already be becoming clear as to how associations are produced by the brain and how they come to have a sense of fixedness.

With all of this in mind, we can turn to memory and learning. Memory, as Tulving once put it, is "the capacity of nervous systems to benefit from experience".[81] Learning, as distinct from memory, would seem to mean the formation of connections between things – between stimuli and responses, perceptions and ideas, or ideas and other ideas. These things together mean that individuals' "responses [might be] determined by something else besides the immediately preceding sensory stimulation…"[82] It produces changes in thought and behaviour. Indeed, if we were to agree with Wolpert that the single reason why living things have brains is to "produce adaptable and complex movements,"[83] being able to do so whilst taking into consideration more than the immediate situation would seem hugely beneficial.

Memory and learning appear to require *material changes* within the brain. If we are to remember or learn anything new, the brain needs to change somehow – especially if it is

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[78] Kandel et al., *Principles of Neural Science*, 30–31.
[79] Kandel et al., *Principles of Neural Science*, 33, 35.
[80] It can be added that there are often several pathways that simultaneously work towards the same end; this is called *parallel processing*. As Kandel et al. have said, this means that "[t]he malfunction of a single pathway affects the information carried by it but need not disrupt the entire system. The remaining parts of the system can modify their performance to accommodate the breakdown of one pathway." Kandel et al., *Principles of Neural Science*, 17 and 37, quote at 17.
[81] Endel Tulving, "Introduction to Memory," in *The New Cognitive Neurosciences*, ed. MS Gazzaniga, 2nd ed. (MIT Press, 2000), 727.
[82] DO Hebb, *The Organization of Behavior: A Neuropsychological Theory* (John Wiley & Sons, Inc., 1949), 5.
[83] Daniel Wolpert, "The Real Reason for Brains," *TED Talks*, 2011, https://www.ted.com/talks/daniel_wolpert_the_real_reason_for_brains?language=en. [Accessed 16 September 2018].

to be retained in the long-term. The idea of neuroplasticity is particularly important in this regard.[84] Consequently, each time we remember and learn something, as when we forget something, there is a physical legacy in the brain. All later learning is influenced by earlier learning (and forgetting).[85] The brain must always adapt, or work around, those structures previously developed; those associations previously formed. New associations must also, to an extent, compete against these for supremacy, which process can take time.

There is some way to go before we fully understand how memory and learning work. Indeed, we do not yet fully understand how information is stored within the brain. For example, we do not know whether individual neurons encode for complete ideas, or whether ideas are divided into their constituent parts and encoded in different neurons along a neural pathway. Thus, for example, do we have cat or dog neurons, which encode the ideas of cat and dog respectively, or, rather, do we have neurons that encode for shape, size, colour, etc. which, when fired in sequence, bring to mind the idea of a cat or dog depending on which neural pathways are activated? As things stand, the weight of evidence would appear to favour the latter,[86] based on ideas of *multicellular functional units, integrated action*, *cell assemblies*, and *synaptic chains.*[87] In neuroscience, the theory behind this view is called **connectionism**.[88] However, it has to be said that, whilst the science behind this view is relatively new, the underlying idea is really a continuation and refinement of the philosophical school known as **associationism**, of which Locke and Hume are the foremost examples.

3.7 Developing Associations

Many patterns of associations seem almost second-nature. However, we tend to forget that these were only formed with much difficulty and after many mistakes. Indeed, we tend to forget that even simple patterns are "slowly and painfully learned",[89] especially early in our development and maturation.[90] Experiments have shown, time and again, that, in animals and humans alike, even "the perception of simple diagrams as distinctive

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[84] One particularly important theory concerning neuroplasticity is known as Hebbian Learning, which holds that '*neurons that fire together, wire together*', i.e. when particular neural pathways consistently fire in sequence, the brain reconfigures itself to connect them. Subsequently, if one fires, the other will also. See: Christian Keysers and Valeria Gazzola, "Hebbian Learning and Predictive Mirror Neurons for Actions, Sensations and Emotions," in *Philos Trans R Soc Lond B Biol Sci.*, 2014, 369:20130175.
[85] Hebb, *Organization of Behavior*, 109.
[86] Kandel et al., *Principles of Neural Science*, 17–18, 35.
[87] Bruce E Wexler, *Brain and Culture: Neurobiology, Ideology, and Social Change* (The MIT Press, 2006), chaps, 1 and 2.
[88] See: Sebastian Seung, *Connectome: How the Brain's Wiring Makes Us Who We Are* (Allen Lane, 2012).
[89] Hebb, *Organization of Behavior*, 77.
[90] See: Hebb, *Organization of Behavior*, chap. 6.

wholes is not immediately given but slowly acquired through learning."[91] That we tend to take these for granted is perhaps not unsurprising given the fact that we lose many of our earlier memories as we grow older – particularly as we pass through adolescence. As our brains become more powerful and adept, we forget that there was a time when this was not so – when learning was slow and laborious. As such, even though things might *seem* obvious, this does not mean that they actually are. We take many fixed associations for granted; we think them self-evident when they are anything but self-evident. It is important to bear this in mind.

3.8 Strength of Associations

The fixedness of an association is founded in the fact that specific neurons and neural pathways are attached to, or connected with, specific others. The extent to which we feel this fixedness is a function of the (relative) strength of that association. The strength of an association is itself a function of memory and learning, but we can posit two particular ways in which associations can be formed and strengthened.

First, there is **repetition** or **reinforcement** – the more the brain experiences the impression of an association, the firmer that association is likely to become. In some cases, this will make us more **sensitized** to instances of that association, producing within us a more powerful reaction; in other cases, it will make us **desensitized** to instances of that association, producing within us a weaker reaction.

There are three main principles that can be suggested as contributing towards the reinforcement of associations: **frequency**, **constancy**, and **uniformity**. If we experience something many times (frequency), in the same ways (constancy), and without remarkable exception (uniformity), then we are likely to develop a sense of connection. The same neurons and neural pathways will be activated and, as a result, they will become strengthened. Likewise, where there is a lack of frequency, constancy, and uniformity, one-time associations are likely to atrophy and weaken – after all, there would no longer appear to be a pattern.

Second, there is **significance** or **impact** – the more important an association seems, regardless of how many times it is experienced, the stronger it is likely to be. This is particularly true of associations that we develop in the course of traumatic events, but it is also true of negative experiences in general; this is the psychological phenomenon

[91] Hebb, *Organization of Behavior*, 35.

known as the **negativity bias**. This idea of significance very much underpins the use of extreme sanctions for certain behaviours in many legal systems. There is an attempt to strengthen certain associations by attaching to them a significant negative association. That this is not always an effective strategy is readily apparent from the frequency of their employment.

There is one other thing that serves to make an association appear strong and this is what might be called **exclusivity**. This all has to do with the fact that strength is relative. After all, if there is an association for which there are no competing associations, then this will appear relatively strong, as compared, for example, with associations that have such competition. They appear strong simply because we cannot comprehend or imagine an alternative. Often, this fact of exclusivity will be a product of repetition and impact, though we little realize it. There are many fixed associations – many laws – that we take for granted; they appear to be almost undeniable largely because we have never stopped for a moment to consider either why we have them or whether there are alternatives.

It is worthwhile adding that there is nothing in the brain categorically to prevent the development of strong associations that are at odds with one another.[92] This is the phenomenon of **cognitive dissonance** – the holding of contrary and conflicting ideas.[93] Insofar as possible and in order to function properly, it is necessary for us to reduce cognitive dissonance to a minimum, but that does not mean that it is never present.[94]

The brain is also prone to the development of **false associations**, i.e. associating things for which there is little rational and objective basis. The brain is adept at pattern-recognition, but it is also prone to seeing patterns that are not really there. For example, humans – and animals in general – are bad at understanding coincidences or, rather, understanding them as such.[95] After all, if we experience a correlation multiple times, or if some correlation appears to us to have some level of significance, then the brain will store it as an association and begin to strengthen it. We have here the basis of

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[92] As Linton colourfully put it: "All individuals possess a happy capacity for thinking or believing one thing and doing another." Indeed: "One school of anthropologists have devoted much time and erudition to proving that uncivilized peoples do not think logically. This is essentially correct, the only error being that neither do civilized ones." Ralph Linton, *The Study of Man: An Introduction* (Appleton-Century-Crofts, Inc., 1936), 361, 362.

[93] The classic example is having the idea that it is acceptable to eat meat whilst maintaining that animals have rights (e.g. not to be killed and eaten).

[94] Cf. JBS Haldane: "If my opinions are the result of chemical processes going on in my brain, they are determined by the laws of chemistry, not logic." Quoted in: Karl Popper, *The Open Universe: An Argument for Indeterminism* (Rowman and Littlefield, 1982), 82.

[95] Cf. Skinner's experiments on operant conditioning, especially those with pigeons: BF Skinner, "'Superstition' in the Pigeon," *Journal of Experimental Psychology* 38, no. 2 (1948): 168–172.

superstitions, which are often underpinned by some notion of cosmic laws, as well as notions of cosmic reward and retribution. This is particularly reinforced by the human tendency to see agency and design in nature – especially agency and design somehow directed at, or made around, us. When these things are understood, ideas of natural law seem far less appealing.

3.9 Expectations

An expectation is a *state of readiness* in which the brain makes guesses as to possible futures. This gives rise to a *state of belief* that some event is *possible, probable,* or *certain*. In a more neutral and detached sense, it is a state of anticipation or prediction; in a more involved sense, it is a feeling that something ought to be, which feeling is often clouded by our evaluative associations – by what we *desire* to be true. These guesses are based on past information and experience; on learning and memory. The evolutionary benefits of an ability to develop expectations are self-evident: it enables organisms to prepare themselves for given – potentially life-threatening – eventualities, as well as to respond both more promptly and appropriately to unfolding events; it enables organisms to develop strategies to survive and thrive. It does not take much to engage these expectations. As soon as the brain begins to detect familiar patterns, it becomes primed to remember patterns associated therewith; it begins to assess the likelihood that these latter will be realized. The brain does this constantly and without our always realizing it.

The brain is remarkably flexible, but also markedly rigid. After all, it is a physical system, which requires resources and energy to alter. As a consequence, it craves *constancy* and *consistency*, *regularity* and *conformity*; it also craves, insofar as possible, *simplicity*. It wants to be in an optimal state, in which the world is understood; a state in which things appear concordant with our expectations. If this is the case, then the brain can help the body to respond appropriately in order to maintain homeostasis. If it is unable to do this, there is a problem; there is a potential threat to the system. Consequently, the system will enter into a state of stress – sometimes mild, other times more extreme – in order to attempt to cope with this state of uncertainty. It becomes more sensitive and more responsive, and utilizes environmental feedback to make revisions and refinements to its associations and emergent expectations. Its aim is always to bring the system into that optimal state.

The mind prefers to treat similar things similarly; it would rather not develop new rules and principles where it can avoid doing so. Likewise, the mind prefers to utilize or refine

old strategies, rather than develop entirely new ones. We might call this the **transfer principle** and one can see how it underlies the law of precedent: the desire to apply the same ideas, etc. to situations that appear similar. It is also part of the reason why one often sees crossovers between different areas of law. For example, the crossovers between the laws of inheritance and royal succession; each tends to reflect the other. This does not mean that these areas do not have their differences, but people tend to feel a sense of **compulsion** to adopt a similar approach, as well as to feel uncomfortable when markedly different approaches are adopted.

It is important to differentiate between **loose expectations** and **fixed expectations**. Loose expectations arise from the general associations that we have regarding the thing or situation in question, as well as from our desires. They lead us to *hope* – if not *believe* – that things will or will not turn out a certain way, but we recognize that the opposite might be true, and, furthermore, that we are not necessarily in a position that to demand that they happen as we expect. By contrast, fixed expectations, which arise from fixed associations, give rise to a feeling that things *should* or *should not* turn out a certain way and, moreover, that we can demand this in practice – that our expectations be fulfilled.[96] However, it must not be supposed that these are distinct categories; they exist on a spectrum, such that there are very loose expectations, on the one side, and very much fixed expectations, on the other.

This leads us into the subject of **tolerance**. Obviously, our tolerance levels are much lower with fixed, as opposed to looser, expectations; we are less prepared to accept, and do so with good grace, those things that deviate from that which we expect. However, given the complexity of the real world, there normally remains a level of tolerance even with fixed expectations. This is because we rely very much upon **approximations**: How well do the facts fit some fixed pattern(s) we recognize? The answer to this will depend upon the principles determining the strength of the associations – in a word, bias.[97]

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[96] Loose and fixed expectations are roughly equivalent to what Luhmann called 'cognitive' and 'normative' expectations respectively. Luhmann's terms are not especially helpful, and the example that he draws to elucidate them shortly after their introduction is somewhat dated, but it is worth noting them nevertheless. See: Luhmann, *A Sociological Theory of Law*, esp. 32ff.

[97] Cf. *supra*, 3.8. It can be added that our *judgements* and *levels of tolerance* often vary across time – whether because of our mood, immediate environment, the relationships we have and trust we have in individuals, etc.; we are also often prone to making *exceptions*. This means that, even when people have an acknowledged fixed expectation, they are sometimes found to act inconsistently with it. Thus, they might contravene it themselves or overlook somebody else's doing so. Naturally, the stronger and more specific the expectation is, and the lower the bar of tolerance is set, the lower the probability of this being the case.

Of course, where these fixed expectations relate to the behaviour of the physical world, it would be futile to maintain those that have been consistently frustrated for very long, as they were obviously badly founded. However, where they relate to other social agents' behaviours, we need not necessarily adjust our expectations simply because they have been frustrated.[98] Their being broken does not mean that they were badly founded; merely, that some other person has chosen to act in a non-conforming manner.[99] This leads into the topics of compliance and coercion, which are treated further down.[100]

3.10 Structure of Associations

Fundamentally, associations are the result of either some **conjunction** (something *and* something else) or **disjunction** (something *or* something else). The relation between the 'somethings' might seem so strong that we feel that the truth-value of one determines the truth-value of the other(s), such that when one is true or false, we feel that the other(s) must also be true or false. For example, we might associate together the ideas of certain actions and tax liability; when the former is true, the latter is true also.

Disjunctions have two forms: (1) **exclusive disjunctions**, whereby the existence of one denies the other; and (2) **inclusive disjunctions**, whereby each might coexist with the other. An example of an exclusive disjunction might be being told that one might hold one office or another *but not both*; the holding of the one denies the holding of the other.[101] However, if one were told that one might hold each office separately or both offices simultaneously, then this would be an inclusive disjunction; the holding of one *does not* deny the holding of the other.[102]

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[98] It was for this reason that Luhmann defined norms as "counterfactually stabilised behavioural expectations", i.e. even if they have been frustrated in specific cases, we might continue to hold them nevertheless: Luhmann, *A Sociological Theory of Law*, 33.

[99] Cf. "Therein, then, lies a method of *attributing* blame for the discrepancy. It is not the expectant person who has mistakenly expected, but it is the actor who has wrongly, or at least unusually, acted; it is not a misconception that has to be explained, but behaviour that becomes the subject of investigation." Luhmann, *A Sociological Theory of Law*, 42.

[100] *Infra*, 3.18.

[101] We might take, for example, US Const., Art. 1, §6(2), which states that: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

[102] For example, in the UK at the present time, it is perfectly possible for a person to be an elected member of multiple local authorities simultaneously. Thus, for example, one might be either a parish/town/city councillor or a county councillor, or both simultaneously. It should perhaps be added that individuals are barred from being elected in multiple electoral divisions *of the same* local authority. Thus, one is not permitted to represent more than one ward or division for a given local authority; one cannot hold more than one seat on any given council. Cf. Local Government Act 1972, ss. 79-81.

It is worth remarking that it is often ambiguous as to whether disjunctions are exclusive or inclusive. Whatever the case, they involve *options* or *choices*.

3.11 Types of Association

There are, it is suggested, five categories of fixed association:

(1) Qualitative;
(2) Equivalence;
(3) Categorical;
(4) Sequential; and
(5) Evaluative.

The first three have to do with *identity*; the fourth has to do with *relations between non-identical things*; and the fifth has to do with our *attitude towards things*. Each will be treated in turn.[103]

3.11.1 Qualitative Associations

Qualitative associations are associations between things and particular *qualities, properties*, or *characteristics*. In some cases, we might say that these qualities, etc. are a universal property of the thing in question, such that every instantiation of that kind of thing has those qualities, etc.[104] In other cases, we might say that only *some* instantiations of that kind of thing have those qualities, etc.[105] There might be many qualities, etc. that are associated therewith; there might be few or even only one. They might be

[103] In so doing, some recourse will be made to the language of first-order logic and set theory. This is for the simple reason that these languages tend to admit of less ambiguity than natural languages like English. In terms of logic, what follows is principally based on what I have learned from: Alfred Tarski, *Introduction to Logic and to the Methodology of Deductive Sciences*, ed. Jan Tarski, 4th ed. (Oxford University Press, 1994); Graeme Forbes, *Modern Logic: A Text in Elementary Symbolic Logic* (Oxford University Press, 1994). With regard to set theory: Tony Barnard and Hugh Neill, *Mathematical Groups* (Teach Yourself, 1996). In all cases, however, they represent a common mode of discourse.

[104] In the language of logic, we would employ the *universal quantifier* in these cases, which is represented by the symbol "∀".This is an upside-down A, which stands for "all"; it can also stand for phrases like '(for) every' and 'any'. For example, one might say "All birds have feathers", in which case we are saying that every instance of things called 'birds' has feathers; all have this property. To write this sentence in sentential logic, we need to rephrase it: "For every x that is a bird, x has feathers. This can be represented as follows: ∀x(bird(x)→feathers(x)).

[105] In the language of logic, we would employ the *existential quantifier* in these cases, which is represented by the symbol "∃" (this is an inverted E, standing for "exists"). For example, one might say "*Some birds are flightless*" or, in the language of sentential logic, "*There exists some x, such that x is both a bird and flightless*". This can be written as follows: $\exists x\big(bird(x) \wedge flightless(x)\big)$.

complementary; they might be **exclusive**. Indeed, the association might even be that certain things *do not* have particular qualities, etc.[106]

In a constitutional context, qualitative associations are particularly important in defining individuals' activities and influence. Let us take the example of an official whom we will call "sheriff". They have two functions (i.e. activities): (a) assessing tax liability and (b) collecting tax duly assessed. We will assume that this is a **closed set**, i.e. they have only these activities. We will also assume that these are universal properties, i.e. all sheriffs have these two functions. By principle of implied exclusion, we can also assume that sheriffs are *only* allowed to undertake these activities. Consequently, if we were to find a 'sheriff' performing activities other than these two, our qualitative expectations would be frustrated.

3.11.2 Equivalence Associations

Equivalence associations are where we think a number of things to be exactly the same as one another; they share all of the same properties; they are *equal, equivalent, identical,* or *synonymous*.

For example, saying that a bachelor is an unmarried man is to say the same thing as saying that an unmarried man is a bachelor.[107] In this example, there are two *ideas* that are being mutually associated: (a) the idea of being a bachelor and (b) the idea of being an unmarried man. We can equally say that 'a bachelor is an unmarried man' as we can 'an unmarried man is a bachelor'. There is no bachelor who is not an unmarried man and there is no unmarried man who is not a bachelor. They are *precisely the same thing*.[108] These statements are the **converse** of one another and, because they are both equally true,

[106] In logic, we would express these using the negative versions of the logical quantifiers: $\neg\forall x(\dots)$ and $\neg\exists x(\dots)$. These might be written as "not all" and "there is no/there are none", etc. respectively.

[107] We can express this relationship formally. In order to do so, we can recognize that "unmarried man" is, in fact, a compound of the ideas of *being unmarried* and *being a man*. Thus, a person is a bachelor if they are unmarried and a man; likewise, a person who is unmarried and a man is a bachelor: $\forall x(bachelor(x) \rightarrow unmarried(x) \wedge man(x))$ and $\forall x(unmarried(x) \wedge man(x) \rightarrow bachelor(x))$. As these are the converse of one another, we can represent this relationship using a biconditional. In ordinary language, this is normally expressed with the phrase "if and only if", although it is sometimes written "iff". Thus, a person is a bachelor *if and only if* they are an unmarried man. This same thing can be represented symbolically with a double-headed arrow (↔): $\forall x(bachelor(x) \leftrightarrow unmarried(x) \wedge man(x))$. More simply, though less properly: $bachelor \leftrightarrow unmarried\ man$. Indeed, as they are precisely the same as one another, which is to say that they are exactly equivalent, we can also think in terms of its being an *equation* in which the two ideas are *equal* to one another. Thus: $bachelor = unmarried\ man$.

[108] "Unmarried man" is, in fact, a compound idea made out of two ideas, i.e. (a) the idea of being a man and (b) the idea that they are not currently in a valid bond of marriage or, more shortly, they are not married.

we know that we are dealing with an equivalence: the order in which we write the terms does not matter; it will be true either way. As such, they have the property of **symmetry**.

Equivalence associations have an important feature. If any side of the association is held to be true, then the rest must also be true – to think otherwise would be illogical. Thus, if either "bachelor" or "unmarried man" is true, one would *expect* the other to be true also. Indeed, associations such as this give rise to very firm expectations in this regard; for one part to be true and another part false would be to completely frustrate our expectations.

In a legal context, equivalence expectations are most prominently found in legal definitions. For example, we might define murder as the unauthorized and intentional killing of another.[109] In other words, *murder* and *the unauthorized and intentional killing of another* are *precisely the same*; they are equivalent:

$$murder = killing(unauthorized, intentional)$$[110]

This naturally gives rise to the expectation that if either side of this equivalence is true, the other side must also be true. If somebody has been killed intentionally and without authorization, then we would consider this murder. If it were not described or treated as such, our expectations would be frustrated. In all likelihood, we would have a strong sense of *injustice*, because that which should follow from 'murder' probably will not.

It is qualitative and equivalence associations that put paid to the idea that laws are 'norms' or ought-statements; they illustrate the *normative fallacy*. Many laws are based on qualitative and equivalence associations. They do not state that things *ought* to be a certain way; they say that they *are* that way. Whether that is right and good, and whether people ought to heed it, are different matters entirely.

3.11.3 Categorical Associations

The third type of association suggested is **categorical associations**. Rather than associating a thing with various properties (cf. qualitative associations) or associating things as though they are the same (cf. equivalence associations), categorical associations have to do with associating things with a number of other distinct things, such that they

[109] Cf. Sir James Stephens' definition of murder in his *Digest of Criminal Law*, Art. 233, where he defines it as *unlawful homicide with malice aforethought*. See: Oliver Wendell Holmes, *The Common Law* (Little, Brown, and Company, 1923), 51ff.

[110] This could be represented in a number of different ways. Other ways include:

$$\forall x(murder(x) \leftrightarrow killing(x) \wedge unauthorized(x) \wedge intentional(x))$$

or

$$murder = killing \wedge unauthorized \wedge intentional$$

have some **shared identity**. They have to do with situating things within a wider **category** or **class**; the thing in question is a *member* or *element* of a *group* or *set*.[111] As with the previous types of association, categorical associations are mostly found – in a legal context – in legal definitions.

As with the other forms of association, one of the most important effects of having categorical associations is the **priming effect**. Hearing the category primes us to expect the appearance of some elements of that category; hearing a number of elements of a category primes us to think in terms of that category. Thus, to bring this within a legal context, if somebody mentions to us "criminal offences", we are immediately primed to think of things like murder, assault, theft, fraud, etc.[112] Likewise, if somebody mentions to us that a murder has been committed, then, because we know this to be a part of the category of criminal offences,[113] we would conclude that a criminal offence has been committed. To be told otherwise would frustrate our expectations.

An important thing that differentiates categorical (and, indeed, qualitative) associations from equivalence associations is their **asymmetry**. If one part of an equivalence association is true, then the other parts must necessarily be true. However, just because it is true, for example, that a criminal offence has been committed, it does not mean that a murder has necessarily been committed. Murder is but one element or subset of criminal offences; there might have been a theft, etc. This has profound implications when it comes to our expectations, because it means that, if we are presented with the one, then we would expect the other, but not necessarily *vice versa*.

We can transfer these ideas into a constitutional context and return to our example of the sheriff who only assesses and collects taxes. In this case, both assessing tax and collecting tax form subsets of the sheriff's responsibilities.[114] If they were to attempt, for example, to *punish* those who have not paid their taxes, this would frustrate our expectations; it would not conform to the pattern of associations that we have fixed in our minds around the idea of the sheriff. It is not an activity we associate with them; it does not fall within their remit. If they frustrate our expectations in this way, we would probably say that they

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[111] In set theory, the idea of *being an element of* is represented by the sign ∈. Thus, we might say that "*Wensleydale is a type of cheese*", which is to say that "*Wensleydale is an element of the set of all cheeses*" or, using set theory notation, *Wensleydale* ∈ *cheese*.

[112] We might write the set of criminal offences, using set theory notation, as follows: $Criminal\ Offences = \{Murder, Assault, Theft, Fraud, etc.\}$.

[113] The idea that murder is an element or subset of the set of criminal offences, we might write as follows: $Murder \subset Criminal\ Offences$.

[114] We might say: $AssessTax \subset Sheriff's\ Activities$ and $CollectTax \subset Sheriff's\ Activities$

have acted *unlawfully* or *illegally*; they have acted *ultra vires*; they have frustrated our fixed categorical expectations.

3.11.4 Sequential Associations

We now come to **sequential expectations**, which express the idea that things follow after one another. This relationship is often one of **causation**, such that the former is the **cause** and the latter the **effect**, **result**, or **consequence**. These are often expressed using conditional sentences, such that: *If A, then afterwards B*.[115] *A* is the **antecedent** or **condition**; *B* is the **consequent**. Besides causation, the other principal type of sequential association is **logical implication**, whereby the antecedent logically entails the consequent.

In order to understand the dynamics of sequential associations, we need to understand something of necessity and sufficiency. **Necessity** is the idea that consequent is only ever true when the antecedent is also true, i.e. without the antecedent, the consequent is not possible.[116] **Sufficiency**, on the other hand, is the idea that if the antecedent is true, then the consequent will also be true, i.e. when the antecedent occurs, the consequent will always occur.[117] Not everything is either necessary or sufficient; some things are both.

Necessity and sufficiency are fundamentally important to the idea of fixed associations and, consequently, law. After all, if a thing is deemed necessary, then there is a strongly fixed association between that thing and the thing reliant thereon. Similarly, if a thing is sufficient to bring about another thing, then there is a fixed association between that thing and the thing to which it leads.[118]

With this in mind, we can suggest three basic forms of sequential association. The first we can call **implication**, i.e. the occurrence of the antecedent implies the occurrence of the consequent.[119] The second we can call **exclusion**, i.e. the occurrence of the antecedent *excludes* the occurrence of the consequent.[120] The third we can call **toleration**, i.e. the occurrence of the antecedent tolerates either the occurrence or non-occurrence of the consequent.[121] In legalistic terminology, these give rise to what might be called

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[115] In logical notation: $A \rightarrow B$.
[116] This might be expressed thus: $\neg P \rightarrow \neg Q$ or $\Box P \rightarrow Q$.
[117] This is usually expressed simply as: $P \rightarrow Q$.
[118] For the most part, it should be said, sequential associations assume that the antecedent is sufficient, although it might have to be composed of numerous parts in order to have enough cumulative power to give rise to the consequent.
[119] $P \rightarrow Q$.
[120] $P \rightarrow \neg Q$.
[121] $P \rightarrow [Q \vee \neg Q]$.

respectively **obligation**, **prohibition**, and **permission**, i.e. something *must* or *should* be the case,[122] something *must not* or *should not* be the case,[123] and something *may* or *may not* be the case respectively.[124]

Let us return to the legal context. We have already established, at least for the purposes of example, that murder is the intentional and unauthorized killing of another (equivalence association). Likewise, we have established that it is a criminal offence (categorical association). The idea that one *ought not* to murder other people (i.e. intentionally kill them without authorization) is a sequential association, more specifically it is an *exclusion* or *prohibition*. In other words, if we are presented with another person, we must not intentionally kill them *unless* we have authorization. If this prohibition is not followed, then, because it is a criminal offence, we would expect – by *implication* – some punishment (assuming, of course, a sequential association between the commission of criminal offences and punishment).

It is worthwhile remarking that ancient law codes typically consisted predominantly of statements of sequential associations.[125] These were presented in a straightforward if-then (i.e. conditional) form.[126] They prescribed consequences for actions or events, e.g.

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[122] We can take as an example II Cnut, c. 40: "If an attempt is made to deprive in any wise a man in orders or a stranger of either his goods or his life, the king shall act as his kinsman and protector, unless he has some other." In other words, if a person is either a churchman or a foreigner, then the king *must* protect them. It thus imposes as *duty* upon the king to act. See: AJ Robertson, ed., *The Laws of the Kings of England from Edmund to Henry I* (Cambridge University Press, 1925), 197.

[123] We can take as an example Henry I's Coronation Charter, c. 3: "And if any of my barons or my other vassals wishes to bestow in marriage his daughter or his sister or his niece or any [other] female relative he shall consult me on the matter, but I shall not take anything from him in return for my permission, nor shall I forbid him to bestow her in marriage, unless he desires to marry her to an enemy of mine." The first thing to notice is the *obligation* imposed upon Henry's barons: they *must* consult him if they wish to bestow a female relative in marriage. However, it also imposes some *prohibitions* or *restrictions* on Henry. He *must not* (1) charge for his permission or (2) withhold his permission (except in cases of marriage to an enemy of his). See: Robertson, *The Laws of the Kings of England from Edmund to Henry I*, 276–79.

[124] An example of a permission is to be found in the Hittite Laws (ca. 1650-1500BCE), ¶192: "If a man's wife dies, [he may take her] sister [as his wife]. It is not an offense." In other words, if a man is widowed, then the widower *may or may not* marry the sister of his deceased spouse, i.e. his sister-in-law; there is the possibility that this might happen. We might also note the categorical association attached at the end: the act of marrying one's sister-in-law is *not* a part of the category of (punishable) offences. See: Martha T Roth, *Law Collections from Mesopotamia and Asia Minor*, ed. Piotr Michalowski (Scholars Press, 1995), 236.

[125] As Stephen noted, certainly with regard to the early English laws in a criminal context, ancient law codes did not tend to concern themselves with definitions and categorizations, i.e. with stating equivalence, qualitative, or categorical associations. These were taken for granted. See: James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (Macmillan & Co., 1883), 53.

[126] For example, the world's oldest extant law code, attributed to Ur-Namma (ca. 2100BCE), though it might be the work of his son, Shulgi, consists entirely of provisions (at least, those that survive) couched in conditional terms. Each and every provision is introduced by the Sumerian *tukum-bi*, which means "if". For a discussion and translation of these, see: Roth, *Law Collections from Mesopotamia and Asia Minor*, 13–22. The same is true of most of the ancient Sumerian laws. See: Roth, *Law Collections from Mesopotamia and Asia Minor*, 13–56. A like thing is found in most of the Babylonian laws, where provisions are introduced with *šumma*, again meaning "if", or equivalent phrases (e.g. *awīlum ša*, "a man

methods for determining guilt/innocence,[127] punishments,[128] fines,[129] compensation,[130] etc.

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who…"). See: Roth, *Law Collections from Mesopotamia and Asia Minor*, 57–152. A similar pattern is seen in the earliest extant English law code, issued by Æthelbehrt of Kent in the early seventh century CE. The great majority of the 90 provisions begin with *gif*, which again means "if". For these in their original and translation, see: FL Attenborough, ed., *The Laws of the Earliest English Kings* (Cambridge University Press, 1922), 4–17.

[127] For example, ¶¶13 and 14 of the Code of Ur-Namma, do something of this where they say that *if there has been some accusation, which accusation has been cleared by the divine River Ordeal, then the accuser must pay some compensation*: Roth, *Law Collections from Mesopotamia and Asia Minor*, 18. Within these, there is an implication that the proper way for determining whether an accusation is true or false, in the absence of other evidence, is to conduct the River Ordeal. "In the Mesopotamian materials, a primary function of *id*, the (divine) River, was, as is well known, to serve as judge in certain legal cases. Trial by river ordeal was a widespread phenomenon, in which the accused was plunged into the river, where his success in withstanding the rushing waters was supposed to determine his guilt or innocence": P Kyle McCarter, "The River Ordeal in Israelite Literature," *The Harvard Theological Review* 66, no. 4 (1973): 403. In early mediaeval England, methods for determining guilt or innocence included, most notably: *compurgation* or *wagers of law*, i.e. the swearing of oaths on behalf of the accused by so-called oath-helpers (see, e.g. Alfred and Guthrum, c. 2); and *trials by ordeal*, i.e. the truth of the matter would be discovered by subjecting the accused to some ordeal (by fire, water, or, later, combat), by which their guilt or innocence would be determined through divine intervention (see, e.g.: Ine, c. 37). For an outline of early mediaeval proof and procedure in criminal cases, see: Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, ed. SFC Milsom, 2nd ed., vol. 2 (Cambridge University Press, 1968), 598–674; William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 1 (Little, Brown, and Company, 1922), 302–12. On trial by ordeal specifically, see: Attenborough, *The Laws of the Earliest English Kings*, 187–89; Margaret H Kerr, Richard D Forsyth, and Michael J Plyley, "Cold Water and Hot Iron: Trial by Ordeal in England," *The Journal of Interdisciplinary History* 22, no. 4 (1992): 573–95.

[128] Many ancient law codes, especially that of Hammurabi (ca. 1750BCE, Babylon), are permeated by ideas of *lex talionis* – or, an eye for an eye, a tooth for a tooth. In some cases, this was in the form of *mirror punishments*, i.e. the perpetrator of some wrong will be forced to suffer the same wrong as their victim. For example, Hammurabi, ¶¶196, 197, and 200, which all prescribe that if a person either blinded, broke the bone, or knocked out the tooth of another *of their own rank*, then they were to be blinded, have their bone broken, or tooth knocked out themselves. Roth, *Law Collections from Mesopotamia and Asia Minor*, 121. Whilst this form of retributive justice might in some ways seem harsh and primitive by modern standards, it is in many ways an attempt to ensure that justice is *proportional*: the perpetrator will receive that which their victim received, in the same way – no more and no less. Indeed, there is a sense in which these laws are an attempt to *restrict* retribution: *only* an eye shall be taken and no more: W.Gunther Plaut, *The Torah: A Modern Commentary* (Union of Hebrew Congregations, 1981), 571ff. *Lex talionis* did not always mean that there ought to be a mirror punishment; merely, that the punishment ought to be commensurate with the crime. Thus, the Code of Hammurabi, whilst providing that equals should be liable to the eyes, bones, teeth, etc. of their victims, also provided that the upper echelons of society would only be liable for money payments if they blinded, etc. commoners (¶¶198, 199, and 201): Roth, *Law Collections from Mesopotamia and Asia Minor*, 121.

[129] In the old English law codes, there were principally three kinds of fine: *wer,* i.e. a person's value, which was set according to their social station and was payable to their relatives if they had been killed; *bot*, i.e. the compensation payable to the victim of a crime (see n. below), which might be at a fixed rate (*angild*) or at the market-rate of the loss (*ceaf-gild*); and *wite*, i.e. a payment due to the lord or king, usually for reason of having broken their peace (*frith* or *grith*) or protection (*mund-bryce*). On these, see: Stephen, *History of the Criminal Law*, 1:57. One of the most famous fines was the *murdrum* fine, which was levied on a community if the identity of a murdered victim was unknown; it is possible that, in Cnut's time, the victim was assumed to be Danish, but hard evidence of this is lacking; after the Conquest, the victim was assumed to be Norman. The *murdrum* fine might be countered with the *presentment of Englishry*, i.e. proof that the victim was English. See: Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, ed. SFC Milsom, 2nd ed., vol. 1 (Cambridge University Press, 1968), 89; Frederick Coyne Hamil, "Presentment of Englishry and the Murder Fine," *Speculum* 12, no. 3 (1937): 285–98.

[130] It is often said that the Old English laws are principally *schemes of compensation*, behind which claim there is a great deal of truth. Rather than prescribing corporeal punishments, for example, the early English law codes tended to commute wrongs to money payments. Thus, for seizing a man by the hair, one would

Turning to a constitutional example, we might take the example of some person, whom we might call monarch or president, one of whose associated activities is discretionary clemency, i.e. they may or may not choose to grant a pardon to some person. In such a case, they would have *permission* to grant a pardon, but neither an obligation nor a prohibition compelling them either way. Having a power of pardon does not determine the outcome, but it makes certain outcomes *possible*; it is for this reason that it falls within the precincts of a fixed association. After all, if one does not have the power of pardon, one cannot choose whether or not to grant it. As such, there is a fixed association between having and exercising the power, regardless as to whether one actually exercises it.

Permission is closely related to **discretion**, which seems to mean some element of *choice* or *liberty*.[131] As this idea is particularly important in public law, it would be worthwhile quickly to say a few more things about it. We can begin by saying that discretion might be either **restricted** or **unrestricted**. Restricted discretion is where there is freedom to choose only between a given number of options, i.e. within a closed set. Unrestricted discretion is much the same, except that it works on the basis of an open set – the choice is non-limited. Truly unrestricted discretion is rare. After all, most sets are, at any given time, in practice *closed*. They might be very large and, consequently, *appear* unrestricted, but, ultimately, there will only be a *finite number of options*. In any case, discretion will almost certainly be limited within a **domain**, meaning that even if, once again, the choice is very broad, it will still be limited.

In public law, the most important application of the idea of unrestricted discretion is to the idea of sovereignty. As can already be seen, to maintain that sovereignty is universal and absolute is to carry the concept too far. In the very least, it will be limited within a certain domain. It will also be limited by what is physically possible and actually achievable, particularly in terms of gaining support and achieving compliance, and in

have to pay 50 sceattas (Æthelbehrt, c. 33); for striking off an ear, 12 shillings (Æthelbehrt, c. 40); for slaying another, the ordinary *wergild* was 100 shillings (Æthelbehrt, c. 21). Attenborough, *The Laws of the Earliest English Kings*, 8–9, 6–7.

[131] We can recall in this context the idea of disjunctions and how they tend to create *options* or *choices* (see, *supra*, 3.9). The disjunction forms an important part of permissive associations.

terms of having the material and economic means;[132] by what is logically sound;[133] arguably, too, by the lengths to which the 'sovereign' power is willing to go, the measures they are willing to take, and the ends that they are able and willing to conceive.[134] Thus, there are practical, political, logical, and intellectual limits to sovereignty, as there are to any form of discretion.

These are all, of course, limits on the *exercise* of sovereignty, but the question as to whether sovereignty must, [135] or can, be *legally* unlimited requires further consideration;[136] perhaps more to the point, whether *legal limitation* is consistent with the idea of sovereignty. It can be conceded that we *can* set our expectations such that we associate some person or persons with the ability to do whatever they please; that we can say that this is their right, and that there is consequently a duty created in each and every other person to respect and obey this power. Thus, sovereignty *might* be said to be legally unlimited; it *might* be said to be universal and absolute. However, this would be, in Laski's words, a "fiction of logic";[137] it could never be a reality. Indeed, if sovereignty is *actually* limited, it would not be inconsistent to say that it might be *legally* limited also.

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[132] Cf. Duguit: "We no longer believe in the dogma of national sovereignty any more than in the dogma of divine right. The rulers are those who actually have the power of compulsion in their hands. […]. The broad fact remains that in any given country there is a man or group of men who can impose on others material constraint. It therefore follows from this that power is not a right but simply an ability to act." Léon Duguit, *Law in the Modern State*, trans. Frida Laski and Harold Laski (BW Huebsch, 1919), 40. The implication of this, of course, is that the 'sovereign power' is limited to the extent to which that influential group has an ability to act; they might *imagine* it extending further and *aspire* to extending it, but the fact remains that, at any given point in time, there will be a finite limit to the extent of their power.

[133] This sentiment was captured by Lolme in his infamous statement that "Parliament can do everything, *except* making a woman a man, or a man a woman": Jean-Louis De Lolme, *The Constitution of England; or, An Account of the English Government*, ed. David Lieberman (Liberty Fund, Inc., 2007), 101. Of course, there is an extent to which this statement is now dated considering modern views, especially those on gender. However, the principle remains that the sovereign cannot make a thing into something that it is not nor could never be. By like token, a sovereign cannot declare a thing to exist that does not exist and that cannot be brought into existence in any meaningful sense by mere declaration alone; neither cannot it declare a thing not to exist, which cannot be destroyed by mere declaration. Thus, if there is a God (at least, after the manner of Christian theology), no earthly sovereign could declare there not to be; likewise, if there is no God, no earthly sovereign could create one. These are logically impossible. An omnipotent and omniscient being could neither be created nor destroyed by human agency, except in the imagination.

[134] Dicey suggested that, besides external limits to the exercise of sovereignty, there were also internal limits: "Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs. The Sultan could not if he would change the religion of the Mahommedan world, but if he could do so *it is in the very highest degree improbable that the head of Mahommedanism should wish to overthrow the religion of Mahomet*…" Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Macmillan & Co. Ltd., 1915), 77 [emph. added].

[135] Cf. Austin's argument for example, that the 'sovereign or supreme power is incapable of legal limitation', that it is 'legally absolute': Austin, *The Province of Jurisprudence*, 223.

[136] Indeed, this was how Dicey understood the term in the context of Parliament, taking it to mean "simply the power of law-making unrestricted by any legal limit". See: Dicey, *Introduction to the Study of the Law of the Constitution*, 69–82, quote at 70.

[137] Harold J Laski, *The Foundations of Sovereignty* (George Allen and Unwin Ltd., 1921), 236.

After all, this would merely align the position at law with reality. There are arguments that to make these align would be entirely sensible and rational.

Whether or not there is or ought to be a sovereign power, and, if so, where that power is or ought to be located, are questions for another time. However, the fact that sovereignty might be *legally limitable* and the fact that it is *in actual practice limited* are not necessarily reasons for dispensing with the concept, so long as it is taken to mean only the *greatest and most wide-ranging power within a given domain*; that the 'sovereign' is taken to mean *the person or body with the widest and strongest influence, and with the greatest degree of discretion*. Even though we speak in superlatives (i.e. greatest, most wide-ranging, widest, strongest), these do not imply absolutes for they are measured relative to other things. Naturally, the wider, greater, and stronger the influence and discretion of person or persons appear to be, and the more unrivalled they are, the greater will be the impression of something approaching an absolute power. But to recognize practical and theoretical limits is not to diminish the import or consequence of sovereignty; insofar as everybody within their jurisdiction is concerned, the sovereign remains the ultimate and supreme power.

More generally, one of the greatest constitutional concerns is defining the discretion held by particular individuals and bodies. Great effort is often made to clarify both the *domain* and *extent* of discretion. Indeed, besides ensuring that individuals and bodies undertake only those activities and influence allotted to them in a manner concordant with the basic considerations,[138] ensuring that discretion is exercised *properly* and *sensibly* is one of the fundamental pillars of judicial review. Whether judges are always best-placed to make such determinations is debateable.

3.11.5 Evaluative Associations

Evaluative associations are, in a sense, meta-associations; they are things that we associate with other associations. There are three kinds.

First, there are **correspondence** or **veracity associations**. These have to do with whether we think associations *true* or *false*.[139] Do they *correspond* with one's experiences, i.e. one's impressions and ideas? Is it a *fact* or not?

[138] See, *supra*, 2.18.

[139] Where a thing is true, it can be represented symbolically by T. Where a thing is false, it can be represented symbolically either by F or $\perp$.

Second, there are **validity associations**. These have to do with whether we think associations *valid* or *invalid*, whether we think them: (1) *well-made*, i.e. created and expressed in the right way; (2) *well-formed*, i.e. logically – and, perhaps, rationally – sound;[140] (3) *current*, i.e. still applicable; and (4) *undefeated*, i.e. not invalidated by some other well-made and well-formed association.[141]

Third, there are **affective associations**, which are rooted in ideas of *desirability* and *significance*. Is an idea or belief *desirable* (i.e. good) or *undesirable* (i.e. bad, evil, etc.); *important* or *unimportant*? There is an *attraction* towards those things regarded as good and an *aversion* to those regarded as bad or evil. The former produces in us a *positive* reaction, oftentimes *pleasure*; the latter produces in us a *negative* reaction, oftentimes *pain*. We are placed in a *heightened state* where we regard things as important; in a *subdued state* where we regard things as unimportant. If we find something neither desirable, undesirable, nor significant, we are likely to treat it with indifference. Evaluative associations are closely linked with our emotions, as well as our predispositions and inclinations; in a word, *feelings*. They build into ideas of *merit* and *demerit*, *praiseworthiness* and *blameworthiness*. They underlie our sense of ethics or morality.

Let us take the idea that a certain form of punishment, such as the death penalty, is either permitted or proscribed in a certain place. Firstly, there is the factual question: Is this thing allowed or not in that place? Here, there are correspondence associations. Thus, we have the idea that, at the present time, the death penalty *is* permitted in Alabama;[142] that it is *not* in the UK.[143] Correspondence associations are often heavily affected by validity

[140] Kelsen has said that "A norm, however, cannot be either true or untrue, but only valid or not valid." This is not strictly true. For example, whether or not there is an association between 'murder' and 'unauthorized, intentional killing' can be either true or false. In some places, it might be true that this is considered to be the case; in other places, it might *not* be considered to be the case (e.g. murder might just be thought to be intentional killing). Whether or not we think the association to be true or false – whether or not we think there actually to be an association – naturally will rely heavily on whether or not we think it valid or invalid, i.e. whether we think it was made in the right way and whether we think it logically sound. For Kelsen, see: Kelsen, *Pure Theory of Law*, 19.

[141] As Raz noted, there is a close connection between the ideas of *validity* and *bindingness*: those fixed associations that are valid ought to be binding because they are well-made and well-formed, those that are binding ought to be valid if they are to bind us. As such, 'legally valid' might be used interchangeably with 'legally binding'. See: Joseph Raz, "Legal Validity," *ARSP: Archiv Für Rechts- Und Sozialphilosophie/Archives for Philosophy of Law* 63, no. 3 (1977): 342.

[142] Code of Alabama 1975, §13A-5-39(1)

[143] The use of the death penalty was restricted, suspended, and abolished over the course of several stages in the UK. The Children Act 1908, and Children and Young Persons Act 1933, abolished the death penalty with respect to persons under the age of 16 and 18 respectively. The Homicide Act 1957 created the distinction between capital and non-capital murders: only the former thereafter attracted the death penalty, the latter mandatory life imprisonment. The Murder (Abolition of Death Penalty) Act 1965, s. 1(1) then abolished the death penalty in cases of murder, though the death penalty remained available respecting

associations. Thus, for example, whether or not we think the death penalty available will depend heavily on whether we think the formal provisions either prescribing or proscribing it well-made, etc. For positivists, validity will be a matter entirely determined by positive law, which may or may not respect certain principles of morality; for others, there might be some further requirement that, in order to be valid, any provision must be concordant with, for example, some natural law.[144] Finally, there are affective associations. The death penalty often evokes strong emotions – both from those that endorse and those that condone it. To a great extent, our affective associations are distinct from our correspondence and validity associations. Thus, we might – albeit grudgingly – accept that the death penalty is validly permitted in a given place. Whether or not it *should* be such is determined by our affective associations, which might be formed as much according to feeling as reason. However, oftentimes our affective associations can affect our correspondence and validity associations. Thus, if one believes the death penalty to be profoundly immoral, one might refuse to accept any positive law allowing it to be valid and, therefore, a true statement of the law.

It is worthwhile adding that evaluative associations are often **situation-specific**, i.e. held *in some situations but not others*.[145]

3.12 Principle of Implied Exclusion

Some associations are more open-ended and more easily permit additions; others not so. In the latter case, anything not expressly part of the association is *by implication excluded*; in the former case, it is more indeterminate. This is the **principle of implied exclusion**:

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some other crimes, e.g. high treason, violent piracy, arson in royal dockyards, and military offences. The Criminal Damage Act 1971 abolished the death penalty respecting arson in royal dockyards; the Crime and Disorder Act 1998, s. 36 abolished it respecting treason and piracy. The death penalty respecting military offences was first abolished by the Human Rights Act 1998, s. 21(5). The Human Rights Act 1998 (Amendment) Order 2004 amended the Human Rights Act, s. 1(1)(c) to incorporate ECHR, Protocol 13 abolishing the death penalty in the UK in all circumstances. Consequently, the proposition "the death penalty is legal in the UK" (which is an association either between the death penalty and the *quality* of illegality in the UK or the death penalty and the *category* of illegal things in the UK) would have the correspondence association of *false*; it is *not* true. On the history of the abolition of the death penalty, see: Julian B Knowles, *The Abolition of the Death Penalty in the United Kingdom: How It Happened and Why It Still Matters* (The Death Penalty Project, 2015).

[144] For example, the biblical commandment 'thou shalt not murder' might be invoked to support arguments that the death penalty might never be permissible – no law allowing it could ever be valid, howsoever made.

[145] Again, we can consider the death penalty, which, as seen above, has been considered a true statement of valid law with respect to some circumstances (e.g. murder, treason, etc.), but not others (e.g. petty theft). However, in recent times, there has been a movement towards the idea that the death penalty is *never* permissible; it is *not* situation-specific. Many see this as a natural consequent of the right to life as enshrined, for example, in the United Nations' Universal Declaration of Human Rights (UDHR, 1948), Art. 3. Protocol 6 of the European Convention on Human Rights (ECHR, 1953) requires that the death penalty only be used during times of war. All of the Council of Europe have signed and ratified Protocol 6, except Russia which has signed but not yet ratified it.

anything not expressly included in an association is thereby impliedly, though not necessarily, excluded.[146] Whether or not a thing is actually excluded is largely dependent upon the strength of the pre-existing association; if that association is very strong, the thing in question is likely to be *actually excluded*; if it is weaker, then the matter is more likely to be open to discussion.

It is important to note that we often take implied exclusions for granted. For example, a chicken is impliedly excluded from holding the presidency of a modern nation-state, not because people have a fixed association between presidency and not-chickens, but, rather, because we associate the post with human beings, thereby excluding all other animals – including chickens. They are excluded by implication, which fact we take for granted.

Sometimes implied exclusion arises very much by design – the association is designed to be restricted. Other times, it is less a result of design as *habit* or the *limitations of human imagination*. We might be used to things a certain way or fail to see how they could be different. It would not be unusual to experience resistance to adopting an updated association to include these things – not because people really strongly feel that the association is absolutely fixed and exclusive, but simply because it engenders a change and change requires new learning and adaptation.

3.13 Laws: Physical and Human

It is at this point that we can distinguish the laws of physics and human laws. There are some fixed associations that the brain has the impression of being *universal*, *inviolable*, *immutable*, *eternal*, and *independent of human agency*. They apply everywhere, all of the time; they do not change and can never be broken. These fixed associations we believe to represent and reflect *fixed relationships* between phenomena, which relationships exist independently of ourselves.[147] These are the **laws of physics**. By contrast, there are some fixed associations that the brain has the impression of being *spatio-temporally specific*, *violable*, *mutable*, *transient*, and *dependent on human agency*. They apply in certain places at certain times; they can be changed and broken; they are human constructions. These are **human laws**.

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[146] We might think here of the Latin maxim, sometimes discussed in the context of statutory interpretation: *expressio unius est exclusio alterius*, or, alternatively, *inclusio unius est exclusio alterius* – the expression or inclusion of one thing is the exclusion of another. For its legal context, see, e.g.: James Holland and Julian Webb, *Learning Legal Rules*, 6th ed. (Oxford University Press, 2006), 241.

[147] Cf. Pollock: "What we call a law of nature is an expression of the *uniform manner* in which some particular portion or combination of the physical forces of the universe produces its effects." Frederick Pollock, "Law and Command," *Law Magazine and Review* 1, no. 3 (1872): 205 [emph. added].

We use the laws of physics to develop expectations about how the *physical world* will behave; human laws to develop expectations about how *(other) people* will behave (within the confines, of course, of physical possibility).[148] These two categories have often been confused. It is such confusion that has given rise to notions of Natural Law, i.e. the idea that there are some universal principles that are immutable, eternal, and independent of human agency, though they are violable. This confusion, as we have already intimated, arises largely from a disproportionate influence being exerted by one's affective associations – by one's ideas of desirability and significance. These, in turn, will largely be a product of one's experiences and education. However, the fact is that the laws of physics determine how we do and can behave, but they say nothing as to how we should behave. That is for us to determine, as best we can.

3.14 Propriety and Justice

It is from our fixed associations and corresponding expectations that we get our sense of **propriety**, i.e. our sense of correctness and rightness. We develop clear expectations as to what we feel will (not) or should (not) be the case.

It is also from our expectations that we derive our sense of **justice** and **fairness**. Justice is where we think people *have or receive in accordance with our expectations*; injustice where they *have or receive contrary to our expectations*.[149] Our sense of injustice will be particularly strong where some inexplicable or insupportable discrimination seems apparent, i.e. there seems to be no (good or logical) reason why some people have, or have received, something that others have not – or *vice versa*. Justice in the first instance, we call **distributive justice**;[150] justice in the second instance, where our expectations

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[148] Cf. "The behaviour of [another] person cannot be expected to be a determinable fact; there is a need to see it in terms of his selectivity, as a choice between various possibilities. This selectivity is, however, dependent upon others' structures of expectation." Luhmann, *A Sociological Theory of Law*, 26. In other words, every action that a person takes is a conscious or unconscious choice between different possible courses of action. In order to understand the courses of action that a person has taken, and in order to predict the courses of action that they are likely to take, it is necessary to consider (a) what that person thinks will be the probable consequences of any course of action and (b) which courses of action are possible or permissible.

[149] Much as the *Institutes* said: "*Justitia est constans et perpertua voluntas jus suum cuique tribuens*" – "Justice is the constant and perpetual wish to render every one his due". Thomas Collett Sanders, trans., *The Institutes of Justinian, with English Introduction, Translation, and Notes* (Longmans, Green and Co., 1952), 5 [1.1]. This wish to give each their due was identified by the *Institutes* as one of the three central maxims of law: "*Juris præcepta sunt hæc: honeste vivere; alterum non lædere; suum cuique tribuere*" – "The maxims of law are these: to live honestly; to hurt no one; to give everyone their due." Sanders, *Institutes*, 6 (1.1.3).

[150] Distributive justice has to do with *apportionment* and has regard to a number of things: the *nature of the thing* being apportioned, the *availability* thereof, the *number of individuals* between whom it is being apportioned, and the *nature of those individuals*. In some cases, it might be felt that some individuals warrant more, whereas others warrant less; in other cases, it might be felt that all ought to receive precisely

have initially been frustrated, but in some way things have been amended, we call **corrective justice**.[151] To be concordant with our sense of justice, it is important that people *have and receive* both the *right things* and the *right amount*;[152] this latter underlies the importance of **proportionality**.[153]

Our senses of propriety and justice are heavily influenced by our affective associations. In terms of desires, our senses of propriety and justice are particularly influenced by our sense of self-importance and our self-involvement, i.e. by selfish motives. After all, we are more likely to overlook injustice and unfairness if we stand to benefit. Our positive attitude towards ill-gotten gains can easily override any sense of frustration that might otherwise been had concerning their procurement; we are prone to rationalization, selective interpretations, and wilful ignorance. It is an important part of the ongoing process of socialization that people – especially children – learn to control such selfish desires, such that they do what others expect rather than what they desire.

Feelings of justice/injustice and propriety/impropriety often evoke an emotional response from us. Where our expectations – our sense of propriety and justice – have been fulfilled, we are likely to feel a sense of satisfaction, even elation. Where they have been frustrated, we are likely to feel angry, cheated, confused, or disappointed. The stronger the associations, the greater the concordance or disparity therewith, and the greater the sense of desirability and significance, the greater our emotional response is likely to be.

With all of the foregoing in mind, we can discuss the distinction drawn between *social* and *legal justice*.[154] **Social justice** pertains to that which we think people ought to have and receive – particularly in terms of wealth, opportunities, rights, and privileges – as a member of a social group or, indeed, as a human being. **Legal justice**, by contrast, is

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the same, for there are no relevant and compelling grounds upon which to differentiate them. For things that are scarce, there are more compelling arguments that they might have to be apportioned or divided unequally. For things that are abundant, including more abstract things such as certain rights and freedoms, arguments that they ought to be apportioned unequally are much less convincing; certainly, there is little by way of justification to be found in economics.

[151] As Zane put it, corrective justice has to do with "the enforcement of rights", in cases where they have not initially been realized, and "the redress of wrongs": Zane, *The Story of Law*, 111.

[152] Thus, injustice might arise because a person has had or received the *wrong thing*; they might have had or received *too little* or *too much* of the right thing.

[153] Where corrective justice is involved, it is commonly thought that the severity of the breach ought to be reflected by the severity with which the offending party is treated; that in criminal cases the punishment ought to be condign. What this punishment ought to be, and whether some additional punishment ought to be added as a deterrent, are questions for debate – as is whether leniency or clemency ought to be shown and, if so, when.

[154] It can be noted that whether social justice and legal justice present a true dichotomy has been questioned, for example, by Sadurski: Wojciech Sadurski, "Social Justice and Legal Justice," *Law and Philosophy* 3 (1984): 329–54.

narrower: it is what we think people ought to have and receive in accordance with law, formally defined – normally conceived of as being secured by certain procedural safeguards and as of being immune to moral considerations. Such justice might even fly in the face of what we think to be social justice. That said, to a greater or lesser extent, laws can be used to seek to achieve social justice, although, at least insofar as the distribution of wealth and material resources are concerned, there is an argument that perfect social justice is unachievable outside of communist or socialist political systems. Of course, whether social justice is an end worth pursuing and, if so, in what form, to what extent, and how achieved, are questions for another place.[155]

3.15 Systematization

Lawyers *qua* lawyers are rarely interested in the totality of fixed associations extant at any given time. Rather, they are interested in particular sets of fixed associations, which comprise the so-called *legal system* or *legal order*.

Systematization is primarily achieved in four ways. First, by having some *criteria for membership*, i.e. fixed associations concerning what is – and what is not – to be considered a member of the set of valid laws. These can be called by Hart's appellation: **rules of recognition**.[156] In customary legal systems, the basic systematising rule is: *do as has previously been done*. This source of law might be called **custom**. Ascertaining what this is exactly, however, is notoriously difficult and, *prima facie*, would appear to make such a system resistant to change.[157] Another straightforward rule is: *do as a certain person or group directs*. This might be some legislator; it might be members of the judiciary. Whatever the case, this source of law might be called **proclamation**; it is the most important feature of positive and command theories of law. Custom and

[155] For a discussion of social justice, see, e.g.: David Miller, *Social Justice* (Oxford University Press, 1979). See also: Jenkins, *Social Order and the Limits of Law*, chap. 18.

[156] Hart, *The Concept of Law*, 94–95. Hart's 'rules of recognition' play much the same role as Kelsen's 'authorizing norms'. Hart's terminology is preferable for a couple of reasons. Firstly, the term 'authorize' rather implies some *author*, i.e. some individual or body that has determined or willed that things will be so. This approaches a voluntaristic fallacy. Kelsen does acknowledge that norms can be created by custom and so appears initially to avoid a voluntaristic fallacy, though he does speak of custom bringing about a 'collective will'. Secondly, the term 'norm' is also suspect and wont to mislead, particularly if it is interpreted, as Kelsen would have us interpret it, as being founded in ought-statements. Hart's terminology is more neutral and, for that reason, better. For Kelsen, see: Kelsen, *Pure Theory of Law*, 8–9.

[157] It is worth mentioning another source of law in this connection, which might be called *negative custom*, i.e. *avoid doing whatever was done, presumably with negative consequences, in the past*. Such a system would probably prove unworkable and deleterious.

proclamation are possible rules and constitute possible sources, but neither is the be-all and end-all of law.[158]

Second, systematisation is achieved by what might be called **rules of ordering** or **rules of arrangement and priority**, i.e. laws concerning which associations ought to take precedence in any given situation, particularly where there is potentiality for conflict.[159] In legal systems that recognize both customary and positive sources of law, these rules can prove a bone of contention: Can customary law defeat positive law? Can the Common Law defeat parliamentary or prerogative legislation?[160]

Third, there are, as Hart suggested, **rules of change**,[161] which are rules concerning how and in what ways the system might be altered; how fixed associations might be added, subtracted, or modified; how their form, interpretation, and impact might be changed.

Fourth, there are what might be called **rules of decision**, which are not dissimilar to Hart's *rules of adjudication*.[162] These have to do with (a) who can decide whether or not particular fixed associations are valid within the system, and what their content and

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[158] Kelsen argued that a legal order is "a system of norms whose unity is constituted by the fact that they all have the same reason for the validity; and the reason for the validity of a normative order is a basic norm…from which the validity of all norms of the order are derived". In other words, legal orders are defined by reference to some basic norm or *Grundnorm*, which is the fountainhead, as it were, of the legal order. However, there is no reason why a legal system might not rest on multiple foundations, so long as those foundations are sufficiently compatible and coherent. There might be multiple rules of recognition. If this is the case, rules of ordering are especially important. For Kelsen's discussion on this point, see: Kelsen, *Pure Theory of Law*, 31, 193–217. (Quote at 31)

[159] As Kelsen identified, conflicts might be *partial* or *total*, although the rest of his analysis presupposes his definition of norms, which we have not adopted. We can perhaps distinguish between fundamentally two kinds of conflict. Firstly, there are *contradictions in terms*, whereby certain associations are semantically incompatible; they do not make rational or logical sense together. For example, if one association said "theft is actively and intentionally depriving another of their property" and another association said "theft is the taking of another's property, whether intentionally or unintentionally", then there would be an incompatibility. Without some rule of ordering, it would be difficult to know which to apply in any given situation. Secondly, there is *directive incompatibility*, whereby certain associations direct different and mutually incompatible courses of action. This is particularly true where the directed behaviours are polar opposites. For example, if one association (notably, a sequential association) prescribes a certain behaviour and another proscribes it. Again, without some rules of ordering, and perhaps some additional qualifying associations, it would be difficult to know what one is expected to do in any given situation. For Kelsen, see: Kelsen, *General Theory of Norms*, 123.

[160] There have been many arguments, made through the centuries, that the Common Law is anterior to, and therefore superior to, others sources of law (making it a higher-order law), which theory, if accepted, would naturally give the Courts – and the judges therein – a great deal of power. These arguments are sometimes called forms of *common law constitutionalism*. For some recent critical discussions on this, see, e.g.: Thomas Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism," *Oxford Journal of Legal Studies* 23, no. 3 (2003): 435–54; Thomas Poole, "Questioning Common Law Constitutionalism," *Legal Studies* 25, no. 1 (2005): 142–63; Adrian Vermeule, "Common Law Constitutionalism and the Limits of Reason," *Columbia Law Review* 183 (2007): 1–36; Thomas Poole, "Constitutional Exceptionalism and the Common Law," *International Journal of Constitutional Law* 7, no. 2 (March 16, 2009): 247–74.

[161] Hart, *The Concept of Law*, 95–96.

[162] Hart, *The Concept of Law*, 96–97.

interpretation is to be; and (b) who can make determinations in individual cases. The former we might call the **power of declaration**;[163] the latter, the **power of adjudication**. These help to give systems clarity, coherence, and integrity; further, their reality and strength. Rules of decision are, naturally, of great constitutional importance; they determine who are the interpreters and guarantors of the system.

All of these mean that people can know what to expect at any given time; more specifically, they can have some sense as to whether those expectations are likely to be realized and, indeed, enforced.

The legal system is, of course, but a subset of all of the extant fixed associations. There are some important consequences of this. The first is that some expectations regarding thought and behaviour will not be protected by the legal system; their fulfilment will have to be sought, if not guaranteed, by other means. The second is that, much as Hayek identified, in a changing society the legal system is likely only ever to be able to protect some expectations, but not all.[164] Third, again building on Hayek, there is the fact that, in social groups with competing ideas as to what the laws ought to be, there will almost certainly be some number of people whose expectations are frustrated (perhaps, we might even say, systematically so); it must fall to the lot of judges and legislators to be the sources of this disappointment.[165]

3.16 Species of Law

Whilst the basic structure of law is always the same (i.e. it is a fixed association), there might be said to be a number of different *species* of law, existing on something of a *spectrum*. These we tend to distinguish in a number of ways, for example according to their: (1) gravity and solemnity; (2) consequences attendant to (non-)compliance; (3) investment of time, energy, and resources in their production, promulgation, and enforcement; etc.

Those fixed associations whose frustration is rather considered a minor inconvenience, or that we do not feel ought necessarily to be strictly enforced, we tend to designate with words like “rules”, “conventions”, etc. They tend to be construed as more *advisory* than

[163] Declarative powers are, naturally, closely related to, and heavily reliant upon, the active rules of recognition.
[164] Hayek, *Law, Legislation, and Liberty*, 97.
[165] Hayek, *Law, Legislation, and Liberty*, 98. It should be added that whether or not they are successful in disappointing those expectations will remain to be seen; such disappointment is, of course, contingent on some sufficient number of people heeding what the judge or legislator has declared, which cannot be taken for granted.

compulsory; *encouraged* rather than *exacted*. We tend to reserve 'law' for those at the higher end of the spectrum – particularly for those fixed associations that have been carefully elucidated, enunciated, and systematized.

It can sometimes be extraordinarily difficult to distinguish the different species of law – particularly in societies less reliant on formalized and ordered systems of written law. It can be problematic even in highly literate societies. For example, British constitutional lawyers are familiar with the problem of trying to distinguish so-called *constitutional conventions* from *constitutional laws*.

There are two points to be made. Firstly, *connotations*, rather than *essential structure*, determine which word we use. It is better, for example, to speak of the *rules of etiquette* than the *laws of etiquette*, because the former has greater connotations of informality and triviality. Nevertheless, one might say the *laws* of etiquette and be perfectly well understood. Both rely on fixed associations. Secondly, the word we choose is a *function* of both the *social group* in question, and the *time and place* in question; it is *relative*. Different societies might develop different categories of law.[166] Nevertheless, the precise connotations in particular social groups ought not to distract us from the fact that, ultimately, what is important is the *psychological basis and impact*; the fact that, beneath everything, is a fixed association.

It is largely because I do not want to give the impression that laws are somehow special or exclusive to 'developed' or 'advanced' societies that I have called this theory the Associational Theory of *Law*, rather than, say, *Rules*. I want to make clear that laws are *not* special or exclusive to 'developed' or 'advanced' societies. As constitutional historians, and, indeed, as comparative lawyers, we need to judge each society according to its own idiom, yet never to allow superficial differences to distract us from the fundamental social and psychological principles at work.

3.17 Substantive and Procedural Law

A distinction is often drawn between **substantive** and **procedural law**,[167] which is roughly, though not exactly, equivalent to Hart's distinction between **primary** and

[166] In this respect, then, we can agree with the conventionalist approach to law: "*Law is whatever people identify and treat through their social practices as 'law' (or recht, or droit, etc.)*": Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001), 194. See further: Tamanaha, *A Realistic Theory of Law*, 73–77.

[167] These are sometimes referred to using the German terms of *materielles Recht* and *formelles Recht*.

secondary law.[168] Procedural laws have to do more with the *manner* and *sequence in which* things are done; they have to do with *process*. They set out the steps by which certain outcomes are to be (*properly* and *validly*) achieved. Substantive laws, by contrast, are more orientated towards the *nature*, etc. of the persons, things, or actions they concern.[169]

3.18 Coercion and Morality

Hart asked the following two questions: (1) what distinguishes law from ostensibly non-authoritative coercive orders; and (2) what distinguishes law from morality?[170] These topics – of coercion and morality – can be addressed here.

3.18.1 Coercion

There is a sense in which there is no distinction between 'law', on the one hand, and 'non-authoritative coercive orders' on the other, insofar as they are founded on fixed associations and give rise to fixed expectations. The difference is that we think the former to be legitimate and the latter to be illegitimate, i.e. the coercive orders are 'non-authoritative' precisely because they are not recognized as being valid according to the rules of recognition that we accept. As such, the difference, insofar as there is one, is that, in the case of orders backed by threats given without authority, there is no fixed association between (a) *receiving* and (b) *following* such orders. It might be in one's best interests to do so, but there is no general expectation, *ceteris paribus*, that one will do so.[171] Of course, when there is some level of 'general habitual obedience',[172] then the association between receiving and following will probably begin to solidify.

In the case of non-authoritative coercive orders, there is obviously an incentive to comply or obey, lest the threat behind them be realized. The point is, of course, to make us feel as though we do not really have a choice – at least, not if we value certain things, e.g. our

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[168] Hart, *The Concept of Law*, chap. 5.
[169] This idea that the subjects of law – the subjects of our fixed associations – are either persons, things, or actions can be found in the *Institutes* of Justinian: "*Omne autem jus, quo utimur, vel ad personas pertinet vel ad res vel ad actiones*" – All law pertains either to persons, things, or actions. See: Sanders, *Institutes*, 13 (1.2.12).
[170] Hart, *The Concept of Law*, 13.
[171] In Kelsen's terminology, this is because orders backed by threats given without authority (e.g. commands given by robbers or highwaymen) lack "objective meaning"; it is not recognized as an "objectively valid norm" of the legal system. It would be better to say, as we have said, that there is no shared expectation – for whatever reason – that such instructions ought to be followed; there is no fixed association between the receiving and following of those instructions. Indeed, there will likely often be fixed associations to the contrary, particularly if they are instructing one to undertake 'illegal' acts. For Kelsen, see: Kelsen, *Pure Theory of Law*, 44–45, 47, 50–51.
[172] See: Austin, *The Province of Jurisprudence*, 193–94; Hart, *The Concept of Law*, 23–24.

physical well-being, reputation, relationships, liberty, property, income, etc. The same technique – *threatening or attacking things that we value* – is not only a feature of non-authoritative coercive orders, but also authoritative orders. Indeed, this technique – i.e. coercion – is often associated with law as a general phenomenon and, therefore, we need to think carefully about how they relate to one another. We have already said that there is a *coercive fallacy* – i.e. taking coercion, especially in the form of physical violence, to be essential to law – and this is the place to demonstrate this more fully.[173]

We can begin by returning to the idea of expectations. If our fixed social expectations have been, or look as though they are going to be, frustrated, we often make this known.[174] We do this through 'glances, gestures, words, or actions',[175] which are often imbued with a quality of aggressiveness. These we tend to direct towards those whom we believe to have transgressed, or to be in danger of transgressing, our expectations – or, if not towards them directly, then towards things that they value. This is done, if not merely to vent our emotions and display our disapproval, to encourage, if not enforce, what we deem to be within the realms of acceptable behaviour. If it has already passed that stage, then it is to encourage or enforce some *remedial action* or *sign of contrition* on the part of the offender (or those whom we take to be responsible in some way for them).[176]

Much of the time, this aggression exists only as a potentiality. The fact that the things we value *might* be threatened or attacked *might* be enough to make us think and behave as some person(s) expects. If this *potentiality* is not enough, then it might become a *threat*. If this, again, is not enough, then some *action* might be taken. This might be to enforce the performance of the expectation; it might be to confiscate, damage, or otherwise adversely affect the things that we value – at least, for so long as we fail to fulfil the relevant expectations. This might be done subtly or blatantly, gently or violently. Whatever the case, the point is to make us feel, in some sense and to some degree, *insecure*. This is generally recognized to be an unpleasant experience and is something that most people wish to avoid. There can be little doubt, therefore, that coercion, which

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[173] *Supra*, 3.2.
[174] Whether we feel ourselves to be in a position to demand compliance, in accordance with our fixed associations, depends on a number of things. For example, whether we think our expectations to be *reasonable* and their realization *beneficial*. However, it also depends upon whether or not we think we will be *successful* in obtaining it. Where the disagreeable action in question was undertaken by one's superior, particularly one possessed of strength and power, it might be deemed prudent, if not also appropriate, to hold one's tongue – for risk, perhaps, of losing it. Whether this is a calculation that should need to be made in a civilized society is a question for another time. Cf. Luhmann, *A Sociological Theory of Law*, 53–54.
[175] Luhmann, *A Sociological Theory of Law*, 46.
[176] Cf. Luhmann, *A Sociological Theory of Law*, 46.

is based in aggression, can be an effective tool for compelling people to act in accordance with a particular set of expectations – for what we will later refer to as 'potency'.[177]

However, we must differentiate the *methods* used to give fulfilment to our expectations from the expectations themselves. Coercion is but one method. Explication, persuasion through argumentation, and education are three others.[178] Which of these is the most effective, and which the most legitimate, are questions for another time. What can be said for the moment is that even though coercion is perhaps the most primal method, even though it can be singularly effective in some situations, and even though for many intents and purposes our actions are guided by coercion in some guise, these only serve to *strengthen* fixed associations. It does not transform them; it merely means that they are less easy to ignore and that we might refer to them as being 'guaranteed'.[179] What ultimately defines them is their structure, even if the seriousness with which we regard them is determined by other things.[180]

3.18.2 Morality

Morality has the same essential structure as law; it is based on fixed associations. The thing that characterizes moral propositions is our firmly attaching to them certain affective associations, as well as often imbuing them with a sense of universality and invariability; they might also be characterized by certain modes of enforcement.[181] The

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[177] *Infra,* 4.11.

[178] In other words, people might be brought to fulfil certain fixed expectations, not because they are fearful of some negative consequences attending their non-conformity, but, rather, because they have been intellectually persuaded that it is how they should act or because it is simply how they have been taught to act.

[179] Cf. Weber: "The term 'guaranteed law' shall be understood to mean that there exists a 'coercive apparatus'…, that is, that there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement." Weber, *Economy and Society*, 2013, 1:313. In other words, in Weber's view, a law is 'guaranteed' if there is some person within the group's constitution who has the activity of ensuring compliance with the laws of the group.

[180] Cf. Luhmann, *A Sociological Theory of Law*, 83–90.

[181] Hayek held that law and morality do not necessarily differ in their point of origin; it is not that law is 'deliberately made', as legal positivists might have it, whereas morality is 'spontaneously grown'. Rather, they differ in terms of the expectations as to *how* – and, more importantly, *by whom* – they are to be *enforced*. The enforcement of laws we associate with particular sets of people, whereas the enforcement of morality we associate with everyone. See: Hayek, *Law, Legislation, and Liberty*, 222. As already recognized, there is an extent to which it is true that morality and law can be differentiated on the basis of their modes of enforcement, but this argument can be pushed too far. In many societies, there is little difference between law and morality; the former embodies the latter and, even if they are not thought to be the same thing, they are often thought to be complementary. Instead of being the special task of some persons to enforce the one and not their other, in their official capacity, it is the task of everybody to enforce both, albeit the especial task of some people (e.g. chief, elders, etc.) to ensure that they are both enforced. The difference between them arises when we begin to view 'laws' more dispassionately and without making their goodness/badness (in our estimation) a criterion of their validity; the difference becomes starker when we furthermore entrust the enforcement of 'laws' to some select groups of people, which may or may not

question remains, however, as to the extent to which our affective associations ought to be allowed to determine what we consider to be law.

One of the tenets of legal positivism is the so-called *separability thesis* – the idea that there is no necessary connection between law and morality.[182] The truth of this thesis can be understood in the distinction between validity and affective associations, which *can* exist and operate independently of one another, though they can equally be made dependent on one another. Thus, validity could be assessed purely in a logical and detached manner, probably according to certain procedural tests. Likewise, it could be made subject to some test of compatibility with our affective associations; morality *might be made* a precondition of legality.

Whilst legality and morality are certainly *separable*, whether they should be *kept separate* is a more difficult question.[183] The problem with morality, of course, is that it is largely subjective and opinion-based; to make legality subject to morality is to run the risk of making legality subject to the particular convictions of particular individuals or groups, which convictions may or may not be formed altruistically, and which might be to the detriment of some number of people. It is arguable, therefore, that, whilst morality might inform what substance we give to laws, and whilst it might inform our decisions as to whether or not we follow the law to the letter, morality ought not to be the basis and measure of legal validity. For the constitutional historian, the principal point to recognize is that, whilst law and morality are not necessarily connected, they often have been.

3.19 Conclusions

Laws are psychological phenomena. They are fixed associations, i.e. strongly held – often exclusive – associations between two or more things. These 'things' can be anything of which the mind can conceive – objects, actions, events, ideas, etc. Such associations might have to do with qualities, equivalences, categories, sequences, or evaluations. In all cases, they arise from the associational architecture of the brain and reflect the physical

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be in keeping with our moral sentiments, and the enforcement of 'morality' to social approbation and reproof.

[182] There are some positivists – 'soft' or 'inclusive' positivists, or 'incorporationists' – who allow that "morality can be a condition of legality: that the legality of norms can sometimes depend on their substantive (moral) merits, not just their pedigree or social source". Further: "Incorporationism is the claim that positivism *allows* or *permits* substantive or content tests; it is not the view that positivism advocates, endorses, or requires such tests." Jules L Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis," in *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press, 2001), 100, 128.

[183] Cf. Leslie Green, "Positivism and the Inseparability of Law and Morals," *New York University Law Review* 83 (2008): 1035–36.

structure of the neural network. After all, the brain is really just a set of interconnected neurons; that this gives rise to interconnected ideas should not sound far-fetched. As these associations are often very strong, there arises a strong feeling that they will – or, at least, *should* – hold wherever they are relevant; that they should be followed and obeyed by everyone and everything, insofar as they are applicable and for so long as they are valid.[184]

Our fixed associations follow from processes of (conscious or unconscious) learning, remembering, and forgetting; they are not static, but change and adapt over time. Such change, however, can be difficult, especially if previous associations are strongly held. Furthermore, even in spite of this ability to change, it remains nevertheless true that, at any given time, we will hold a number of fixed associations; this is our working model.

These associations give rise to corresponding expectations about how that world will behave, which, as we have seen, is in no small part informed by how we *want* it to behave. We dislike it when things do not make sense to us, when there is dissonance between the 'inner' and 'outer' worlds,[185] – especially when our strongly held associations appear to have been frustrated.[186] This sense of frustration is amplified when we feel that things could have easily been otherwise; when we feel that we have in some way been betrayed by those upon whom we rely or trust.[187] We are social creatures and find it upsetting when

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[184] There is an interesting metaphor of law as a master and commander, which is found in a passage in Herodotus. In this passage, a Greek defector, Demaratus, and the Persian king, Xerxes, are discussing the immanent Persian invasion of Greece. Xerxes is astonished that, given the enormous size of his army, Demaratus believes the Greeks will resist him. Demaratus replies as follows: "They are free – yes – but not entirely free; for they have a master, and that master is Law, which they fear much more than your subjects fear you. *Whatever this master commands, they do; and his command never varies*: it is never to retreat in battle, however great the odds, but always to stand firm, and to conquer or die." For the Greeks, so thought Demaratus, *there was no other way*; their course of action was *fixed*. See: Herodotus, *The Histories*, ed. John Marincola, trans. Aubrey de Sélincourt, 4th ed. (Penguin Books Ltd, 2003), 450 (7.104)[emph. added].

[185] Cf. Wexler, *Brain and Culture*, 155–82.

[186] Duguit, as noted earlier, made this sense of frustration – repeated across the social group to such a level as to produce action – central to his idea of law. He discussed this in the context of his discussion of the problem of the subordination of the State to law. His aim was to show that the State was not above the law, but rather subject to it, because law was a principle of social organization. If the State frustrated people's expectations, regardless as to whether those expectations had been written or not, then the State might be held to account; there might be a concerted and organized reaction, coercing the State – or, rather, those acting in its name – to behave as it should and enforcing sanctions for deviations therefrom. It should be said that 'frustration' was not a word employed by Duguit. See: Duguit, "The Law and the State," 3–5.

[187] As Stoicism and Buddhism both recognize, the strength of our reactions is largely a function of the *number* of expectations that we have and the *level* at which we set them. If we have a great many high expectations, then we leave ourselves open to greater and deeper disappointment more often. This is only compounded if our expectations are groundless or unreasonable in the first place. However, if our expectations are low and few, then we are more likely to accept things as they are and that things happen as they do. Moreover, if the expectations that we do have are carefully curated, then we will find that the opportunity for disappointment will be less. As many of our expectations relate to how other people behave, it is important, therefore, to understand what *their* expectations are if we are to set ours correctly in relation to them. This ability to better predict how people will behave not only means that we can better protect ourselves from conflict and harm, but also that we have a more solid grounding for cooperation. Indeed, if these expectations can be set mutually, whether implicitly or explicitly, then a great deal of time and energy

our social relations appear to mean less to others than they do to us – if the relationship had meant enough to them, surely they would not have decided to act in a way that would upset us. It is easy to see how our fixed associations and expectations feed into our sense of propriety, justice, and fairness.

Our minds crave regularity, conformity, and simplicity. It means that the body does not have to be on high alert all of the time in case of possible threats; there is a feeling of comfort and security. This does not mean that there is necessarily a sense of complacency – there are still possible unknowns and threats, but, so long as the world generally appears to make sense, we can get by reasonably well. As will be argued in Appendix II, it is this craving for regularity, etc. that underpins the idea of the rule of law. However, we first need to understand more about how people come to hold particular associations. This is the subject of the next chapter.

can be saved. This is perhaps what Luhmann was driving towards when he wrote: "The person who can anticipate others' expectations…can enjoy an environment that is richer in possibilities and still live freer of disappointment. […]. He does not need to express or establish himself verbally,… he saves time… He can reserve the time-consuming and delicate communication processes…for the few important moments of conflict… // Unspoken agreements of this kind are part of the fundamental matter-of-factness in everyday social interaction." Luhmann, *A Sociological Theory of Law*, 26–27.

4 – The Associational Theory of Law (II): Transmission

4.1 Introduction

How do we come to have specific fixed associations? Why do we associate some things and not others? Moreover, if associations are psychological phenomena, how do such things appear to exist in multiple minds? How can different individuals come to hold the same associations? These questions will now be addressed.

4.2 Innate or Instinctive Associations?

There are arguments that some associations and laws are known *innately* or *instinctively*; they are *pre-programmed*.[1] If true, greater credence might be given to Natural Law theories. These arguments, however, are problematic.

We can begin by saying that there is no such thing as 'innate knowledge'. It is a contradiction in terms. Knowledge only exists *a posteriori*, i.e. after experience. Everything theretofore is, at best, merely *belief*; it is not knowledge, because it has not been verified.[2] However, might there be innate *ideas*? Possibly, but there is reason for scepticism – principally because it is practically impossible to identify any such ideas.[3]

Instinct is a more difficult case. Many animals appear to perform complex behaviours instinctively. These are often said to form part of their so-called extended phenotype.[4] When it is remembered that humans developed out of earlier forms of life, there is reason to suppose that early *Homo*, and perhaps even early *Homo sapiens*, law was at least *driven* – if not *determined* – by instinct.[5] However, instinct has a greater degree of contingency and variability than often supposed. Even though genes seemingly code for many

[1] *Innate* applies to ideas or knowledge; *instinctive* applies to behaviours. These are often thought to be hardwired into the brain and independent of experience.

[2] This is a form of *verificationism*, which is the doctrine – closely associated with logical positivism – that only statements that *have been* or, at least, *can be verified* are meaningful. In other words, statements regarding the world and phenomena therein that cannot be said definitively to be either true or false are meaningless. For one of the classical expositions of verificationism, see: Alfred J Ayer, *Language, Truth and Logic* (Penguin Books, 1946).

[3] In the first place, many ideas that *seem* innate probably stem from early – perhaps even pre-natal – experiences. In the second place, everything that we can imagine appears to be composed of elements drawn from experience. It is impossible to imagine something not corresponding to our previous impressions whether in whole or fine, – regardless as to whether we can remember the specific instances from which those impressions came. Consequently, there is little evidence for any such ideas. On the origin of our ideas, see David Hume, *An Enquiry Concerning Human Understanding*, ed. Tom L Beauchamp, Oxford Philosophical Texts (Oxford University Press, 1999), §2.

[4] On this, see: Richard Dawkins, *The Extended Phenotype: The Long Reach of the Gene*, 2nd ed. (Oxford University Press, 2008).

[5] This argument, concerning the role of instinct in early law, was made, for example, by Zane in the 1920s: John Maxcy Zane, *The Story of Law*, ed. Charles J Reid Jr, 2nd ed. (Liberty Fund, Inc., 1998), chaps. 1–2.

behaviours, these often only produce *predispositions* and *tendencies*; their expression, and precise manner thereof, depend upon prevailing environmental conditions, as well as, often, processes of learning. Indeed, through epigenetic changes, the environment can control whether certain genes are activated or deactivated; this is sometimes heritable. As such, instinct tells us less about 'fundamental laws' and more about the conditions in which animals live and have lived; they reveal, rather, what has been theretofore an evolutionarily stable strategy.

There is no guarantee that anything supposedly innate or instinctive is at all useful. Indeed, instinct might equip us with pre-programmed responses to certain kinds of stimuli, but there is nothing to say that they are the *best* or *right* responses. Moreover, if there are any innate or instinctive associations, they must assuredly be in the minority. The content of most – if not all – associations has to do with things in the world; these can only be known *after* experience. Thus, we might not be born entirely *tabula rasa*,[6] but in a very practical sense we are. The vast majority of our fixed associations are – and must be – developed through experience. Indeed, even if there were some element of innateness or instinct involved, this would fail miserably to explain the sheer number and diversity of human modes of thought and action, or, indeed, the details thereof.[7] These must be gained by some other means.

4.3 Memetics: The Background

If an association is not innate or instinctive, then it must in some way have been *learned*. Learning can take place in many ways. For example, through **observation** or **interaction with feedback** (the latter often in the form of trial-and-error). Many of our fixed associations are thus developed – particularly concerning the behaviour of the natural world, i.e. our sense of forces, motion, physical properties, etc. Even concerning these,

[6] Cf. Locke's argument that the mind, which is as "white paper, void of all characters, without any ideas"; it is furnished with content by experience. It is upon experience that "all our knowledge is founded, and from it ultimately derives itself". Locke's is a form of radical empiricism. See: John Locke, "An Essay Concerning Human Understanding [1690]," in *An Essay Concerning Human Understanding with the Second Treatise of Government* (Wordsworth Editions Limited, 2014), 94 (2.1.2).

[7] Ruth Benedict put the point quite categorically: "Not one item of [man's] tribal social organization, of his language, of his local religion, is carried in the germ-cell". To illustrate her point, she took the example of feral children, abandoned in their infancy, who – independent of social contact – do not develop as other children do who grow up amongst others; indeed, they seem distinctly un-human. She also takes the example of children from one part of the world who are brought up in another; their beliefs, actions, etc., and especially their language, seem to be determined by their place of upbringing – and, we might add, those people bringing them up – rather than by any supposed genetic cause. For Benedict, humans are marked by 'plasticity' and there is little foundation for ideas of 'racial purism': "[H]eredity is an affair of family lines. Beyond that it is mythology." Ruth Benedict, *Patterns of Culture* (Houghton Mifflin Company, 1989), 12–16, 23–24, quotes at 12 and 15.

however, we often have need to learn *directly from others*, especially when it comes to the details, which are not immediately obvious, and which often require special equipment and technology to understand (e.g. atomic theory, electromagnetism, etc.). In other words, there needs must be some process of **teaching**. In this context, this is, naturally, the purpose of science education.

Whilst we might, to a certain extent, learn about the physical world independently, most everything else is learned *exclusively* from others; it is acquired through *social learning* – often through symbolic communication.[8] This includes all culture and human law. To understand how this learning process takes place and how this learning is passed on, we need to turn to the field of memetics. Before proceeding, however, it would be worthwhile explaining a little of the origin of the field and the nature of the present contribution.

Memetics is the study of memes,[9] which idea began in Dawkins' *The Selfish Gene*, first published in 1976. The central purpose of this book was to advocate a gene-centric view of evolution, but Dawkins, in a chapter entitled "Memes: The New Replicators", noted some of the similarities between 'genetic' and 'cultural' transmission.[10] Naturally, these ideas were heavily informed by ideas from biology and zoology,[11] and, as genetic transmission has the 'gene' as its unit, Dawkins coined the term 'meme' to stand as the unit of cultural transmission.[12]

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[8] Cf. Mark V Flinn, "Culture and the Evolution of Social Learning," *Evolution and Human Behaviour* 18 (1997): 25.

[9] Or, as Heylighen put it, building on Moritz: "Memetics can then be defined as the theoretical and empirical science that studies the replication, spread and evolution of memes". Francis Heylighen, "What Makes a Meme Successful? Selection Criteria for Cultural Evolution," in *Proc. 15th Int. Congress on Cybernetics*, 1998, 418.

[10] Richard Dawkins, *The Selfish Gene*, 3rd ed. (Oxford University Press, 2006), chap. 11. See further: Dawkins, *The Extended Phenotype*, chap. 6.

[11] Maitland showed great foresight when he said that "I am also very far from denying that every advance of biological science, but more especially any popularization of its results, will supply the historian and the political theorist with new thoughts, and with new phrases which will make old thoughts truer. I can conceive that a century hence political events will be currently described in a language which I could not understand so full will it be of terms borrowed from biology, or, for this also is possible, from some science of which no one has yet laid the first stone." Frederic William Maitland, "The Body Politic," in *The Collected Papers of Frederic William Maitland*, ed. Herbert Albert Laurens Fisher, vol. 3 (Cambridge University Press, 1911), 289.

[12] "We need a name for the new replicator, a noun that conveys the idea of a unit of transmission, or a unit of *imitation*. 'Mimeme' comes from a suitable Greek root, but I want a monosyllable that sounds a bit like 'gene'. I hope my classicist friends will forgive me if I abbreviate mimeme to *meme*. If it is any consolation, it could alternatively be thought of as being related to 'memory', or to the French word *même*. It should be pronounced to rhyme with 'cream'." Dawkins, *The Selfish Gene*, 192. It can be noted that a similar term, *mneme* (after Mneme, the muse of memory in Greek mythology), was employed by Richard Semon (1859-1918) at the start of the twentieth century, which term was similarly connected with brains and evolution – but there the comparison ends. Semon argued that memory – i.e. learning – leaves a physical legacy on the brain, which, insofar as it goes, seems to be correct, but he then continued to argue that such a physical legacy might be inherited (in Lemarckian fashion). See: Richard Semon, *Die Mneme: Als Erhaltendes*

As Dawkins himself noted,[13] he was by no means the first to notice the analogy between genetic and cultural transmission, to offer an explanation for socio-cultural 'evolution'. Indeed, there has been a long history of attempts to apply evolutionary ideas – whether consciously or unconsciously, in those terms or not – outside the realm of biology, i.e. to social, technological, legal, and cultural change. Some of these (e.g. Jones,[14] Comte,[15] Savigny[16]) wrote before the publication of Darwin's seminal work on evolution; others (e.g. Spencer,[17] Maine,[18] Tylor,[19] Morgan,[20] Hobhouse[21]) wrote or, at least, published in its wake,[22] even if these new ideas drawn from biology were not always fully incorporated

Prinzip Im Wechsel Des Organischen Geschehens (Wilhelm Engelmann, 1904); Richard Semon, *The Mneme*, trans. Louis Simon (George Allen and Unwin Ltd., 1921).

[13] Dawkins, *The Selfish Gene*, 190.

[14] The philologist, Sir William Jones (1746-94), was among the early proponents – and one of the most influential, though by no means the first – of the theory that Sanskrit, Greek, and Latin, and possibly other languages besides, all shared a common root, which he called 'Indo-European'. These other languages, therefore, by certain degrees, had evolved out of Indo-European and diverged from one another. Mesoudi has suggested that this philological connection had an influence on Darwin, not only because it had already gained some traction by the 1830s, but also because Darwin's cousin and brother-in-law, Hensleigh Wedgwood, was a prominent philologist – in fact, founder of the Philological Society of London. Indeed, Darwin himself noted the similarities in his *The Descent of Man*. See: Alex Mesoudi, *Cultural Evolution: How Darwinian Theory Can Explain Human Culture and Synthesize the Social Sciences* (University of Chicago Press, 2011), 112–13.

[15] Auguste Comte (1798-1857) is noteworthy for his belief that there was a 'law of three stages', which held that scientific disciplines, and societies in general, must and do pass through the *theological*, then the *metaphysical*, then the *positive* stage: Auguste Comte, *The Positive Philosophy of Auguste Comte*, ed. Harriet Martineau, vol. 1 (George Bell & Sons, 1896).

[16] Friedrich Carl von Savigny (1779-1861), part of the historicist school (see, *supra*, 2.6) argued that laws – and, we might add by extension, constitutions – develop concurrently with nations or peoples; as they become more developed, so do their laws and constitutions. See: Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (Littlewood & Co., 1831).

[17] Herbert Spencer (1820-1903). Spencer began propounding evolutionary ideas before Darwin's *Origin* was published, but he became a staunch defender of Darwinian evolution. See, esp.: Herbert Spencer, *The Evolution of Society: Selections from Herbert Spencer's Principles of Sociology*, ed. Robert Leonard Carneiro (The University of Chicago Press, 1967).

[18] Henry Sumner Maine (1822-88). Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas*, ed. Frederick Pollock, 10th ed. (John Murray, 1909). Maine's *Ancient Law* was first published in 1861, although, as Burrow noted, much of it was based on material from perhaps even as early as the early 1840s onwards, meaning that it would be wrong to assume that it was largely derivative of Darwin's ideas: John Wyon Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge University Press, 1966), 139–40.

[19] Edward Burnett Tylor (1832-1917). Edward Burnett Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art, and Custom*, 6th ed., vol. I & II (John Murray, 1920). See also his earlier work: Edward Burnett Tylor, *Researches into the Early History of Mankind and the Development of Civilization*, 2nd ed. (John Murray, 1870).

[20] Lewis Henry Morgan (1818-81). Lewis Henry Morgan, *Ancient Society, or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization* (Henry Holt and Company, 1877).

[21] Leonard Trelawney Hobhouse (1864-1929). See, esp.: Leonard Trelawney Hobhouse, *Morals in Evolution: A Study in Comparative Ethics*, 5th ed. (Henry Holt and Company, 1925); Leonard Trelawney Hobhouse, *Social Evolution and Political Theory* (Columbia University Press, 1911); Leonard Trelawney Hobhouse, *Social Development: Its Nature and Conditions* (George Allen and Unwin Ltd., 1924).

[22] For the wider context, see: Henry Plotkin, *Darwin Machines and the Nature of Knowledge* (Penguin Books, 1994), esp. chap. 3.

(e.g. Tarde).[23] However, even after Darwin, biological evolution and its exact mechanisms were still poorly understood and, in many respects, these works – largely of the nineteenth and early twentieth centuries – were products of their time. They often argued some form of sociobiology (or, indeed, scientific racism) and were *ethnological* in character;[24] rested on notions of development, which were *linear* (perhaps, even, *unilinear* or *rectilinear*), *sequential*,[25] *stadial,*[26] and *progressive* (i.e. from simple to complex, from primitive to advanced, etc.),[27] – even *orthogenetic*; conceived of social groups and their cultures as organisms or 'organic wholes', which have an existence or reality apart from that of their members, in some cases even denying those members a true and meaningful existence outside of these social organic wholes;[28] and often relied

[23] Gabriel Tarde (1843-1904) argued that social change was driven by a "logical duel" between imitation and innovation. On the relationship between his thought and "the laws of heredity", he had the following to say in the preface to the second edition: "The *laws of heredity* that have been so well studied by naturalists do not contradict in any respect the 'laws of imitation'. On the other hand, they complete them, and there is no concrete sociology that could separate these two orders of consideration. If I separate them here, it is, I repeat, because the proper subject of this work is sociology pure and abstract. Besides, I do not fail to point out what their place is in the biological considerations which I am purposefully ignoring because I am leaving them to more competent hands." Gabriel Tarde, *The Laws of Imitation*, trans. Elsie Clews Parsons (Henry Holt and Company, 1903), quote at xxi-xxii.

[24] In the legal context, see, e.g.: Roscoe Pound, *Interpretations of Legal History* (The Macmillan Company, 1923), chap. 4 ("Ethnological and Biological Interpretations").

[25] E.g., Spencer: "As between infancy and maturity there is no shortcut by which there may be avoided the tedious process of growth and development through insensible increments; so there is no way from the lower forms of social life to the higher, but one passing through small successive modifications." Herbert Spencer, *The Study of Sociology* (Henry S. King and Co., 1873), 402.

[26] The idea of stages of human history is very old. The idea can be seen, for example, in Hesiod's Five Ages of Man in his *Works and Days*, in which humankind passed successively through a Golden Age, Silver Age, Bronze Age, Heroic Age, and, finally, an Iron Age. Unlike the Victorians and Edwardians who saw successive stages representing progress, Hesiod was inclined to see them as representing, on the whole, a process of degeneration and deterioration, 'the gradual increase of evil'. See: Hugh G Evelyn-White, ed., *Hesiod, The Homeric Hymns, and Homerica*, trans. Hugh G Evelyn-White (William Heinemann, 1914), xviii,10-17. There are, of course, parallels here to the idea in Christian theology of the perfection of the 'state of nature', as it existed in the Garden of Eden prior to the Fall of Man, i.e. of a superior age followed by an inferior one; a view of history profoundly nostalgic in tone. However, it can be said that the Fall perhaps represented a momentous downgrading rather than a trend of general decline – though, for some, certainly, there was the idea of the 'noble savage' and the idea that 'civilization' did not necessarily improve Man, but instead fuelled his vice and decadence, such that, as with Hesiod, change did not necessarily herald improvement.

[27] Spencer, at least, can perhaps be exempted from some of these charges: Spencer, *The Evolution of Society: Selections from Herbert Spencer's Principles of Sociology*, xlii–xliii. Insofar as evolution is deemed to be progressive, it would seem that Parsons cannot be exempted from these older modes of thought, see: Talcott Parsons, *The Evolution of Society*, ed. Jackson Toby (Prentice-Hall, Inc., 1977). It is worth noting here the work of Schwartz and Millar, who argued that the evolution of legal systems could be measured according to a Guttman scale of *counsel, mediation,* and *police*; that there was an 'evolutionary sequence' in the 'development of legal institutions': Richard D Schwartz and James C Miller, "Legal Evolution and Societal Complexity," *American Journal of Sociology* 70, no. 2 (1964): 159–69.

[28] This latter was particularly a feature of idealist thought. For example, TH Green stated that "in saying that the human spirit can only realise itself, that the divine idea of man can only be fulfilled, in and through persons, we are not denying but affirming that the realisation and fulfilment can only take place in and through society. *Without society, no persons*…" Similarly, Ritchie wrote that the individual "apart [from his social surroundings] is a mere abstraction – a logical ghost, a metaphysical spectre, which haunts the habitations of those who have derided metaphysics. The individual, apart from all relations to a community, is a negation." Thomas Hill Green, *Prolegomena to Ethics*, ed. AC Bradley, 4th ed. (Oxford University

on ideas of *ontogenesis* (i.e. organic growth, from conception and birth through to maturity and senescence) rather than *descent with modification* (and, therefore, were not true evolutionary theories in the Darwinian sense).[29]

As the twentieth century progressed, and as the fields of anthropology, zoology, etc. developed, these evolutionary theories were replaced by ones that were imbued with a greater sense of indeterminacy, contingency, individualism, and relativism. An excellent, though perhaps underappreciated, example of a work along these lines is Linton's *The Study of Man*, published in 1936.[30] However, on the whole, there remained a lack of sustained systematic, theoretical, and broadly scientific treatment of the subject – again, in no small part due to the fact that the mechanisms of evolution were still being discovered.[31] This situation began to change in the 1970s and 1980s.

Around the same time as Dawkins was writing *The Selfish Gene*, a number of other writers were also starting to apply the new biological discoveries outside the realms of biology. Perhaps most important here are the works of Cavalli-Sforza and Feldman,[32] and Boyd and Richerson,[33] which attempted to develop (rather technical and 'modular'[34]) mathematical models to explain and predict cultural evolution, and together form the foundations of modern cultural evolutionary theory.[35] Naturally, this was a very similar endeavour to the growing field of memetics, which expanded Dawkins' short chapter into

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Press, 1899), 225 [emph. added]; David George Ritchie, *The Principles of State Interference: Four Essays on the Political Philosophy of Mr. Herbert Spencer, J.S. Mill, and T.H. Green*, 4th ed. (Swan Sonnenschein & Co., 1902), 11. See further: Sandra M den Otter, *British Idealism and Social Explanation: A Study in Late Victorian Thought* (Oxford University Press, 1996), 156–60; Avital Simhony, "Idealist Organicism: Beyond Holism and Individualism," *History of Political Thought* 12, no. 3 (1991): 515–35.

[29] It is interesting to note that the ontogenetic approach is largely in keeping with the etymological roots and first application of the word 'evolution', even if not with the modern idea. 'Evolution' comes from the Latin *evolutio* ('to unroll') and was first used in the context of developing foetuses in the womb: Peter J Bowler, *Evolution: The History of an Idea*, 2nd ed. (University of California Press, 1989), 9.

[30] Ralph Linton, *The Study of Man: An Introduction* (Appleton-Century-Crofts, Inc., 1936). See also his *Tree of Culture*, published posthumously in 1955, which followed on from many of the ideas presented in *The Study of Man*: Ralph Linton, *The Tree of Culture*, ed. Adelin Linton (Alfred A Knopf, 1955).

[31] It is worthwhile marking Linton's conclusions to his *Study of Man*: "Those who have read thus far are probably disappointed that they have learned so little about the nature of society and culture and their processes. We have made a few generalizations but have failed to present any neatly formulated laws. In nearly every chapter we have raised more questions than we have been able to answer". Linton, *The Study of Man*, 488.

[32] See, esp.: LL Cavalli-Sforza and MW Feldman, *Cultural Transmission and Evolution: A Quantitative Approach* (Princeton University Press, 1981).

[33] See, esp.: Robert Boyd and Peter J Richerson, *Culture and the Evolutionary Process* (The University of Chicago Press, 1985); Robert Boyd and Peter J Richerson, *The Origin and Evolution of Cultures* (Oxford University Press, 2005); Robert Boyd and Peter J Richerson, *Not By Genes Alone: How Culture Transformed Human Evolution* (The University of Chicago Press, 2008).

[34] Boyd and Richerson, *Orig. Evol. Cult.*, 106.

[35] One of the most important modern representatives of cultural evolutionary theory is the work of Mesoudi. See, esp.: Mesoudi, *Cultural Evolution*.

a field, flourishing in the 1990s and early 2000s.[36] However, the fields of cultural evolutionary theory and memetics have largely run separate courses.[37] This is a pity, because they are to a great extent complementary:[38] cultural evolutionary theories tend to be more *macro* in orientation in that they focus on *patterns of patterns*, whereas memetics tends to be more *micro* in orientation in that it focuses on *individual patterns* (though, as will be seen, memetic analysis can also be carried to patterns of patterns). Indeed, the value of memetics is that it provides the terminology and concepts to describe that micro-level, more so perhaps than cultural evolutionary theories, and does not presuppose the existence of identifiable and delineable overarching patterns of patterns (i.e. 'cultures').

It is true that there have been many works of jurisprudence sympathetic to, or informed by, the evolutionary approach.[39] However, there are a few points to be made. First, those

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[36] See, esp. Susan Blackmore, *The Meme Machine* (Oxford University Press, 1999); Susan Blackmore, "Evolution and Memes: The Human Brain as a Selective Imitation Device," *Cybernetics and Systems: An International Journal* 32, no. 1–2 (2001): 225–55; Kate Distin, *The Selfish Meme* (Cambridge University Press, 2004). Also: Elan Moritz, "Memetic Science: I - General Introduction," *Journal of Ideas* 1, no. 1 (1990): 3–23; Plotkin, *Darwin Machines and the Nature of Knowledge*; Daniel C Dennett, *Darwin's Dangerous Idea: Evolution and the Meanings of Life* (Penguin Books, 1996); Jack M Balkin, *Cultural Software: A Theory Of Ideology* (Yale University Press, 1998); Robert Aunger, *The Electric Meme: A New Theory of How We Think* (The Free Press, 2002); Daniel C Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (Penguin Books, 2007); Richard Brodie, *Virus of the Mind: The Revolutionary New Science of the Meme and How It Can Help You* (Hay House, 2009).

[37] This can be seen in the fact that books on the subject of 'cultural evolution' tend only to make passing and cursory mention of the idea of memes, see e.g.: Cavalli-Sforza and Feldman, *Cultural Transmission and Evolution*, 70; Boyd and Richerson, *Culture and the Evolutionary Process*, 37; Mesoudi, *Cultural Evolution*, 41–42. By a like token, Boyd and Richerson have accused memeticists – not entirely fairly – of being "rather incurious about the existing scholarship on the nature of cultural transmission": Boyd and Richerson, *Orig. Evol. Cult.*, 378. Indeed, Boyd and Richerson, in particular, have been vocal in their doubts as to the value of memetics: Robert Boyd and Peter J Richerson, "Memes: Universal Acid or a Better Mousetrap?," in *Darwinizing Culture: The Status of Memetics as a Science*, ed. Robert Aunger (Oxford University Press, 2001), 143–61; Boyd and Richerson, *Orig. Evol. Cult.*, 377–78; Boyd and Richerson, *Not By Genes Alone*, 6–7, 81–98. (Although, Boyd and Richerson had adopted the meme in their 1997 paper, written with Mulder and Durham, "Are Cultural Phylogenies Possible?", reprinted in: Boyd and Richerson, *Orig. Evol. Cult.*, chap. 16.). These criticisms have been countered by Distin: Distin, *The Selfish Meme*, 108–12.

[38] There is an extent to which the fields of cultural evolution and memetics have been united in the person – if not the work – of Distin, whose *The Selfish Meme* was later followed by her *Cultural Evolution*, although she avoided any discussion of memes in this latter book for fear of "distracting readers who are used to dismissing memes out of hand" (a decision which she later regretted in her foreword to the Chinese edition of *The Selfish Meme* in 2014). See: Kate Distin, *Cultural Evolution* (Cambridge University Press, 2010). The foreword, in English, can be found at Distin's website: https://www.distin.co.uk/kate/pdf/Foreword_Chinese.pdf [Accessed 25 January 2020].

[39] On jurisprudential works in this context, see, *infra*, 5.2.4. Further, e.g.: MBW Sinclair, "The Use of Evolution Theory in Law," *Articles by Maurer Faculty* 2271 (1987); AG Keller, "Law in Evolution," *Yale Law Journal* 28, no. 8 (1919): 769–83; Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980); Robert C Clark, "The Interdisciplinary Study of Legal Evolution," *Yale Law Journal* 90 (1981): 1238–74; Margaret Gruter and Paul Bohannan, eds., *Law, Biology and Culture: The Evolution of Law* (Ross-Erikson, Inc., 1983); E Donald Elliott, "The Evolutionary Tradition in Jurisprudence," *Columbia Law Review* 85 (1985): 38–94; Herbert J Hovenkamp, "Evolutionary Models in Jurisprudence," *Texas Law Review* 64, no. 4 (1985): 645–85; Alan Watson, *The Evolution of Law* (The John Hopkins University Press, 1985); Alan Watson, "The Evolution of Law: Continued," *Law and History Review* 5, no. 2 (1987): 537–70; W Jethro Brown, "Law and Evolution," *Yale Law Journal* 29, no. 4 (1920): 394–400; MBW Sinclair, "Evolution in Law: Second Thoughts," *University of Detroit Mercy Law Review*

works written before the latter decades of the twentieth century could not have benefitted from the insights of cultural evolutionary theory or memetics, or, indeed, the advances in the biosciences upon which those fields are based. Therefore, these earlier theories do not represent the best models. Second, of those written since the mid-1970s, few have drawn specifically on memetics,[40] which means that many have missed out on a very useful intellectual point of focus. Third, few jurisprudential works along these lines, whether written before or after the mid-1970s, have aspired to be sustained theoretical and systematic accounts. Rather, they have typically been content to suggest that there might be some benefits to the evolutionary approach and have suggested a number of specific applications. As interesting as these might be, they do not in themselves provide a solid basis for rebuilding a field such as constitutional history. Indeed, this is compounded by the fact that there have been hardly any attempts to apply memetics to constitutional theory,[41] or constitutional history.

71, no. 1 (1993): 31–58; Owen D Jones, "Law and Evolutionary Biology: Obstacles and Opportunities," *Journal of Contemporary Health Law & Policy* 10, no. 1 (1994): 265–83; Owen D Jones, "Evolutionary Analysis in Law: An Introduction and Application to Child Abuse," *North Carolina Law Review* 75, no. 4 (1997): 1117–1242; Kingsley R Browne, "An Evolutionary Perspective on Sexual Harassment: Seeking Roots in Biology Rather than Ideology," *Journal of Contemporary Legal Issues* 8 (1997): 5–78; Owen D Jones and Timothy H Goldsmith, "Law and Behavioral Biology," *Columbia Law Review* 105, no. 2 (2005): 405–502; Mauro Zamboni, "From 'Evolutionary Theory and Law' to a 'Legal Evolutionary Theory,'" *German Law Journal* 9, no. 4 (2008): 515–46; Simon Deakin, "Law as Evolution, Evolution as Social Order: Common Law Method Reconsidered," *Legal Studies Research Paper Series, Paper No. 43*, 2015; Karrigan S Bork, "An Evolutionary Theory of Administrative Law," *SMU Law Review Article* 72, no. 1 (2019): 81–138. An up-to-date list of selected publications is also currently maintained by The Society for Evolutionary Analysis in Law (SEAL) on their website: https://www.vanderbilt.edu/seal/scholarly-resources/.

[40] See, e.g.: Michael S Fried, "The Evolution of Legal Concepts: The Memetic Perspective," *Jurimetrics* 1, no. 3 (1999): 291–316; Jeffrey Evans Stake, "Are We Buyers or Hosts - A Memetic Approach to the First Amendment," *Alabama Law Review* 52, no. 4 (2001): 1213–68; Jeffrey Evans Stake, "Pushing Evolutionary Analysis of Law or Evolving Law: Design without a Designer," *Florida Law Review* 53 (2001): 875–92; Neal A Gordon, "The Implications of Memetics for the Cultural Defense," *Duke Law Journal* 50, no. 6 (2001): 1809–34; Simon Deakin, "Evolution for Our Time: A Theory of Legal Memetics," *Current Legal Problems* 55, no. 1 (2002): 1–42. There is a certain extent to which one might also count Drout's work here, who discussed the Rule of St Benedict in the context of memetics: Michael David Craig Drout, *How Tradition Works: A Meme-Based Cultural Poetics of the Anglo-Saxon Tenth Century* (Arizona Center for Medieval and Renaissance Studies, 2006).

[41] Almeida provides something of an exception here, although the memetic approach is far from being fully incorporated here: Fábio Portela Lopes de Almeida, "Constitution: The Evolution of a Societal Structure (PhD Thesis)" (Universidade de Brasília, 2016), 38. Almeida's thesis, it should be said, has to do with the emergence and evolution of *constitutionalism* (see esp. pp. 45 and 60), which he argues is both a modern phenomenon and 'an evolutionary adaptation' (p. 298 and chap. 5), rather than with the nature of *constitutions* and *laws* (concerning which Almeida is not terribly clear) as widespread phenomena, and how they change over time, which is our present concern. Indeed, he views constitutions, as a phenomenon, as 'a gradual product of evolution' (p. 368), whereas, in the present view, only *specific* constitutions are – to a greater or lesser extent – the products of evolution. Moreover, his thesis seems largely committed to proving the *value* of constitutionalism – its evolutionary fitness, as it were – and its status as a more advanced form of social organization. His thesis is also not within the approach of methodological reductionism, and, indeed, supports a type of functionalism and group-level selection, which all mark significant points of departure from the present thesis, as does his stress upon the 'radical difference'

The present aim, therefore, is to develop a systematic account, based on cultural evolutionary theory and memetics, which sets out a bank of vocabulary and concepts – an analytical toolkit, as it were – that can be used. Further, it is to show how all of this can be applied to laws and constitutions – indeed, how it can be used to understand not only law and constitutions, but also legal and constitutional *change* as a (natural) process. It is also something of a defence of the value and explanatory power of the memetic approach, which in the last fifteen years has fallen from favour,[42] as well as of evolutionary approaches more generally – at least, in the jurisprudential context.[43]

4.4 Memes as Replicators

A **meme** is a pattern of thought or behaviour, which is capable of being copied through some process of (social) learning.[44] It is, to borrow from genetics, a **replicator** – a thing

between pre-modernity and modern times in terms of the types of political organization extant (see esp. pp. 332 and 385) – they might be different, certainly, but not *radically* so.

[42] The debate about the memetic approach was epitomized in a collection of essays by prominent proponents and critics of the field: Robert Aunger, ed., *Darwinizing Culture: The Status of Memetics as a Science* (Oxford University Press, 2001). There have been few works in the field since the mid-2000s, even in spite of Gers' defence in the latter half of the decade: Matt Gers, "The Case for Memes," *Biological Theory* 3, no. 4 (2008): 305–15.

[43] Hutchinson and Archer, for example, have doubted the value of evolutionary approaches, at least in the context of the common law: "Despite its obvious academic allure and apparent intellectual pedigree, evolutionary theory has little to offer traditional efforts to understand the development and direction of the common law." Allan C Hutchinson and Simon Archer, "Of Bulldogs and Soapy Sams: The Common Law and Evolutionary Theory," *Current Legal Problems* 54 (2001): 31 and 58, quote at 31.

[44] For other definitions of 'meme', see, e.g.: Dawkins, *The Selfish Gene*, 192; Dennett, *Darwin's Dangerous Idea*, 143; Blackmore, *The Meme Machine*, 43; Aunger, *Darwinizing Cult. Status Memet. as a Sci.*, 5–7. All definitions agree that memes are replicators and that they are transferred by non-genetic means. However, whereas these other definitions tend to place the idea of 'units', 'elements', or 'vehicles' (of 'culture' or 'cultural information') at the centre, I have placed the idea of 'patterns' at the centre. Whilst patterns are identifiable, they do not necessarily make memes seem so neatly defined, discrete, and particulate as 'units', etc. might suggest, which has been one of the criticisms levelled against memetics: "In reality, culture simply does not normally divide up into naturally discernible bits". (Maurice Bloch, "A Well-Disposed Social Anthropologist's Problems with Memes," in *Darwinizing Culture: The Status of Memetics as a Science*, ed. Robert Aunger (Oxford University Press, 2001), 194.) The definition suggested here does not attempt to *divide up* culture, but, rather, suggests what might *make up* culture. This definition can be contrasted with the various definitions of 'culture' offered by cultural evolutionary theories. The similarities are plain, for example, to Boyd and Richerson's definition: "We define culture as information – skills, attitudes, beliefs, values – capable of affecting individuals' behaviour, which they acquire from others by teaching, imitation, and other forms of social learning." What are here called 'memes', Boyd and Richerson would call a 'cultural variant': Boyd and Richerson, *Orig. Evol. Cult.*, 105. Indeed, there have been many different names for 'parts' of culture. For example, Linton used the terms 'item', 'trait', 'trait complex', and 'activity': Linton, *The Study of Man*, 397–400. Along these lines, we can also contrast a slightly different approach to culture from zoology: "Cultures are *behavioral variants* induced by social modification [as opposed to phylogenetic or ecological causes], creating individuals who will in turn modify the behavior of others in the same way." Hans Kummer, *Primate Societies: Group Techniques of Ecological Adaptation* (Aldine Atherton Inc., 1971), 13 [emph. added]. The beauty of the term 'meme' is not only the fact that it is economical and specific, and that it encompasses thought as well as behaviour, but also the fact that, unlike terms like 'cultural variants', it does not assume the existence of some wider net to which reference must be had; memes might be part of a wider pattern of patterns, but they need not be defined thereby.

which can be replicated.[45] Whether of thought or behaviour, these always resolve down to *patterns* (i.e. associations) in the brain – the place where they are perceived, encoded, and whence they are later retrieved; this is their fundamental substrate.[46] Let us take the idea, for example, that sheriffs collect taxes. Someone who has never heard of sheriffs or taxation will never have this idea. Even those with both ideas will not necessarily link them together; they might see sheriffs as law-enforcers rather than tax collectors. This bundle of associations needs to be learned from others. In other words, in order to have this idea, we need to *copy* or *assimilate* their associations – if not *perfectly* then, at least, *analogously*. This passing of a pattern or trait from one to another, where the latter is a copy – whether perfectly or imperfectly – of the former and is caused by the former, is equivalent to what biologists call **heredity**.[47]

Like other replicators, successful memes have three qualities: **longevity**, **fecundity**, and **copying-fidelity**.[48] Their *lifespan* and *replication rate* will be such that they have greatest opportunity to be *reproduced accurately and reliably* as many times as possible. Lifespan and reproductive accuracy are largely a function of memory;[49] replication rate a function of opportunity, suitability, and urgency. As we know from experience, not all ideas are especially memorable, remarkable, or survive the copying process well. Not all memes

[45] This is slightly different to Dawkins' definition of 'replicator', which he defined as a thing with the "property of being able to create copies of itself": Dawkins, *The Selfish Gene*, 15. The reason for this difference is that Dawkins' definition implies that the replicator has the intrinsic ability of being able to generate copies of itself; that replicators are *active*. However, all we claim for it is that it is capable of being copied; they are, or can be, *passive*.

[46] As Dawkins has said: "A meme should be regarded as a unit of information residing in the brain… It has a definite structure, realized in whatever physical medium the brain uses for storing information. If the brain stores information as a pattern of synaptic connections, a meme should in principle be visible under a microscope as a definite pattern of synaptic structure. If the brain stores information in a 'distributed' form, the meme would not be localizable on a microscopic slide, but I would still want to regard it as physically residing in the brain." Dawkins, *The Extended Phenotype*, 109. Cf. Plotkin who argued, following Kitcher, that for there to be any *scientific* understanding of culture, there must be some 'psychological' theory underlying it for "culture is, and can only be, a product of human minds": Henry Plotkin, "Culture and Psychological Mechanisms," in *Darwinizing Culture: The Status of Memetics as a Science*, ed. Robert Aunger (Oxford University Press, 2001), 72. Cf. also: Aunger, *The Electric Meme*, esp. chap. 7; Boyd and Richerson, *Not By Genes Alone*, 61ff.

[47] Cf. Aunger, *The Electric Meme*, 3.

[48] Dawkins, *The Selfish Gene*, 16–18, 24.

[49] Samuel Johnson once said that "Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it." Likewise, memory of a meme might be of the meme itself, which is capable of being reproduced unaided, or it might be a memory of where it might be found. James Boswell, *Life of Samuel Johnson, LL.D.: Comprehending an Account of His Studies, and Numerous Works, in Chronological Order; with His Correspondence and Conversations* (Henry Washbourne and Co., 1857), 252.

are successful. Those that are successful, it should be said, do not always help their **carriers** or **hosts**,[50] or, indeed, those around them.[51]

What does it mean to say that memes have been *faithfully* copied? The general answer is that, so long as instantiations are **functionally equivalent** (or **equifunctional**), memes can be said to have been faithfully copied, i.e. even though the underlying patterns might not be identical, they produce the same or, at least, corresponding thought or behaviour.[52] However, given the fact that our brains appear to encode information remarkably similarly, and that our brains have similar regional divisions, there is reason to suppose that it might be possible to measure copying-fidelity accurately by observing brain activity.[53]

However it might be measured, there can be little gainsaying the fact that, at least as compared with other animals, humans possess a remarkable capacity for "high-fidelity social learning"; indeed, a remarkable propensity, especially among children, to "spontaneously and effectively copy others' actions".[54] In other words, not only are humans more predisposed to learn from others, we are also much better at doing so – and in a greater variety of ways – as compared with other animals. This means that humans, more so than any other animal, are better at assimilating and passing on memes. However, in this process of assimilation and transmission, evolution enters the picture.

4.5 Evolutionary Forces

Memes, like other replicators, are subject to the evolutionary forces of **variation** and **selection**.

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[50] Much as Fried has said, "memes, like genes, will succeed if they are good replicators, whether or not they are correct or good for their human carriers." As will be seen, their qualities as good replicators is only partly a determinant of their success. Nevertheless, the fact that they can succeed in spite of their carriers – indeed, perhaps even at their expense – is undoubtedly right. See: Fried, "The Evolution of Legal Concepts: The Memetic Perspective," 298.

[51] On this point, see, e.g.: Robert B Edgerton, *Sick Societies: Challenging the Myth of Primitive Harmony* (The Free Press, 1992); Boyd and Richerson, *Not By Genes Alone*, chap. 5.

[52] Rosaria Conte, "Memes through (Social) Minds," in *Darwinizing Culture: The Status of Memetics as a Science*, ed. Robert Aunger (Oxford University Press, 2001), 97; Aunger, *The Electric Meme*, 152–55, 200–202.

[53] Cf. Plotkin, "Culture and Psychological Mechanisms," 76. Further: Dennett: "It is conceivable, but hardly likely and certainly not necessary, that we will someday discover a striking identity between brain structures storing the same information, allowing us to identify memes syntactically. Even if we encountered such an unlikely blessing, however, we should cling to the more abstract and fundamental concept of memes, since we already know that meme transmission and storage can proceed indefinitely in noncerebral forms – in artefacts of every kind – that do not depend on a shared language of description." Dennett, *Darwin's Dangerous Idea*, 354.

[54] Alex Mesoudi, "Cultural Evolution: Integrating Psychology, Evolution and Culture," *Current Opinion in Psychology* 7 (2016): 17–18.

Variation is always likely to occur because of imperfections in the copying process (i.e. copying-infidelity).[55] Given time and chance, mutations – whether in the form of additions, deletions, recombinations, etc. – are almost inevitable. Even small changes might have a large impact, especially cumulatively.[56] Indeed, memes are generally much more *malleable* than biological replicators (i.e. genes); they are changed and adapted more easily;[57] they have a higher degree of *variability*. Some changes will be intentional (so-called *guided variation*);[58] others unintentional. Some will be inconsequential, often because of *synonymous changes*. Others will be markedly consequential and, as such, will have *beneficial* or *deleterious* effects on the meme's suitability; they might be *adaptive* or *maladaptive*. This impacts its chances of survival and replication in its present form.

We can take again the sheriff example. We might suppose that, either through intentional or unintentional changes, sheriffs come to be regarded as tax-gatherers rather than tax-collectors. This change would probably be inconsequential; the things substituted are synonymous. However, to change the sheriff's activities or modify their level of influence would probably be consequential. Extreme or absurd changes could have deleterious effects on the sheriff-meme; remedying extremities or absurdities might save it from oblivion.[59]

It should be noted that variation operates on certain materials and there is a limit to which those materials can be transformed – at least, in any given number of steps.[60] Thus, much

[55] As Distin has said: "Few copying processes are accurate enough to rule out the possibility of error". Indeed, as Mesoudi has said: "[C]ultural transmission appears to exhibit far more copying error [than genetic transmission]. People tend to copy ideas, beliefs, skills, and knowledge from other people in a rough-and-ready way, often grasping the gist of an idea but filling in the details themselves in ways that change the information, akin to mutation." Distin, *The Selfish Meme*, 48; Mesoudi, *Cultural Evolution*, 62.

[56] One needs only think about the game of Chinese whispers or, more generally, gossip, to see how this might work in terms of the passing of associations from one person to another.

[57] There is an argument to be made that, in many respects, so-called 'cultural evolution' (i.e. evolution involving memes, rather than genes) is 'Lamarckian' – not only inherited but also *acquired characteristics* can be passed on. See, e.g.: Stephen Jay Gould, *Bully for Brontosaurus* (WW Norton and Company, 1991), 65. See further: Mesoudi, *Cultural Evolution*, 43–44.

[58] On the idea of guided variation, see, e.g.: Boyd and Richerson, *Culture and the Evolutionary Process*, 9 and chap. 4.

[59] The pages of constitutional history neatly demonstrate the fact that the associations that people have had with the office of sheriff have changed over time: from its origin in the Anglo-Saxon period and its hey-day in the Norman period, to its decline in the Angevin period and brief resurgence of importance vis-à-vis parliamentary elections in the fourteenth century. Not all of this process was by design, but much of it was. This can be seen, for example, in the aftermath following Henry II's Inquest of Sheriffs (1170), Provisions of Oxford (1258), Sheriffs Act 1887, and Local Government Act 1972, s. 219 (in which the office was renamed High Sheriff). For a brief overview of the changes that attended the office of sheriff, at least to the start of the twentieth century, see: Henry St Clair Feilden, W Gray Etheridge, and DHJ Hartley, *A Short Constitutional History of England*, 4th ed. (Oxford University Press, 1911), 249–52.

[60] Cf. "The mathematical genius can only carry on from the point which mathematical knowledge within his culture has already reached. Thus if Einstein had been born into a primitive tribe which was unable to count beyond three, life-long application to mathematics probably would not have carried him beyond the

as biological variation cannot turn a lion into a gazelle, memetic variation cannot easily turn a meme into something bearing no resemblance at all to its original form – at least, not in a single step.

The second evolutionary force – selection, which relates to the differential survival rates of certain memes – is also practically inevitable. Selection is principally driven in two ways.

Firstly, **environmental pressures** drive selection. Memes flourish better in some environments as opposed to others. For example, sheriff-memes better flourish in feudal, as opposed to anarchistic, societies. Similarly, individuals become more 'susceptible' to 'new formulations' in some situations – particularly in prolonged 'critical situations' (e.g. deprivation, insecurity, or other crisis or upheaval), which prompt, if not force, an increased openness and suggestibility to new memes, naturally accompanied by a devaluation, if not the rejection, of older memes, at least for a time.[61] Selection in these cases is largely a function of *suitability* and *adaptability*, whether *perceived* or *proven*;[62] a function of *fitness*.[63] This is the analogue of *natural selection* in zoology.[64]

development of a decimal system based on fingers and toes. Again, reformers who attempt to devise new systems for society or new religions can only build with the elements with which their culture has made them familiar." Indeed: "The culture not only provides the inventor with the tools which he must use in invention but also controls, to a very large extent, the direction of his interest." Linton, *The Study of Man*, 319, 320.

[61] On this theme, see, e.g.: Muzafer Sherif, *An Outline of Social Psychology* (Harper & Brothers Publishers, 1948), chap. 16.

[62] Suitability has to do with whether or not the environment is conducive to the meme, whether or not it fits. Adaptability, on the other hand, has to do with whether or not the meme can adapt or change to become more suitable.

[63] Cf. Vilfredo Pareto when he said that evolution does not mean that "the institutions of a society are always those best adapted to the circumstances in which it [the society] is placed," for evolution "does not determine the form of institutions; it determines only certain limits which they cannot exceed." Or, to put it as Parsons did when summarizing Pareto: "The conditions of the environment do not completely determine social forms but only set limits to variations in them which are capable of survival." Of course, evolutionary forces do, to an extent, determine what forms and strategies exist, but Pareto was entirely correct in arguing that evolution produces neither perfection nor perfect adaptation to the environment, but, insofar as certain forms and strategies are successful, it produces forms and strategies that are *stable*, i.e. ones that can survive and replicate within the given environment(s). Each environment can normally support numerous forms and strategies (though not necessarily all of them simultaneously). Just because one happens to exist does not mean that it is the only or best form or strategy; it is but one that is *possible*. For Pareto and Parsons, see: Talcott Parsons, *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers*, 2nd ed. (Free Press, 1949), 220.

[64] It can be added that memes might easily be 'appropriated', as it were, and, having originally served one 'function' or 'purpose', it might be found to serve another, which idea is called 'exaptation'. A perfect example of this is the term 'meme' itself, which was originally coined by Richard Dawkins to attempt to describe socio-cultural evolution, but now is primarily used in the context of humorous images shared on the internet and, in particular, across social media. Having started off serving one purpose, it now largely serves another. For the origin of the term 'exaptation', see: Stephen Jay Gould, "Exaptation: A Crucial Tool for an Evolutionary Psychology," *Journal of Social Issues* 47, no. 3 (1991).

Secondly, **appeal and inclination** also drive selection. We are more likely to assimilate those memes that appeal to us and suit our inclinations than those that do not (cf. evaluative associations). Naturally, appeal and inclination are in many respects functions of our predilections, biases, prejudices, etc. – not only as regards the form and content of the memes themselves, but also their sources. They are also functions of our self-interest and self-regard – in what ways and to what extent we think adopting a meme will benefit us, especially in terms of how we think others will view us in light of having adopted it (i.e. as more or less attractive, intelligent, able, etc.).[65] Furthermore, other things like novelty or nostalgia, elegance, utility, etc. all affect the 'attractiveness' of memes.[66] Appeal and inclination are, self-evidently, *relative* and, to a large extent, *comparative*, i.e. they vary as between persons, and are often based on contrasts and comparisons.

Thus, even though sheriff-memes have changed considerably over time, something has given them great staying-power; something has made them sufficiently attractive so as to have been constantly selected. This is by contrast with many roles and positions that have passed out of use, largely because they ceased to be attractive, e.g. the Anglo-Saxon *thegn* and *ceorl*, or the Norman and Plantagenet *justiciar*. For one reason or another, these suffered as inclinations changed. This is the analogue of *sexual selection* in zoology.

An important element in selection is **competition**. Human attention, memory, and lifespan are limited. A person can only copy so many memes – particularly with regard to memes that are time- and resource-intensive to copy. This fact of competition is felt most acutely among those memes that might be considered as being *substitutes* or *alternatives* for one another; they are in *direct competition*. Such memes we might call *alleles* of one another. Those patterns that tend to prevail in such contests we might call

[65] Thus, for example, much akin to the idea of *assortative mating* in biology, we are more likely to seek out and assimilate memes from individuals whom we already deem to be similar to ourselves or to whom we aspire to be more similar – often, our peers and our friends. Similarly, humans have a strong desire to *conform* and, therefore, are often inclined to copy what they deem already to be the mode or fashion, i.e. memes that are already common or seem likely soon to be common. By contrast, there are sometimes cases in which the opposite is true; common memes are actively avoided in a desire to be *non-conformist*, to stand out or stand apart. Similarly, there is often a desire to copy certain individuals, who are deemed to be worthy copying, whether due to their position, charisma, etc.; in other words, to copy that which would gain for oneself some degree of *overt* or *covert prestige*. For a discussion of assortative mating and the various kinds of biases that affect memetic uptake (albeit not in the memetic tradition), see: Mesoudi, *Cultural Evolution*, 62, 64–76.

[66] Cf. Heylighen, "What Makes a Meme Successful? Selection Criteria for Cultural Evolution," under "General Selection Criteria for Memes"; Klaas Chielens and Francis Heylighen, "Operationalization of Meme Selection Criteria: Methodologies to Empirically Test Memetic Predictions," *Proceedings of the Joint Symposium on Socially Inspired Computing*, 2005, §2.

dominant; those that yield, *recessive*. Naturally, dominant alleles are more likely to be fecund than recessive alleles.

By contrast, some memes are not only complementary but, to a greater or lesser degree, mutually reliant. Mutually associated memes are, taken together, called **memeplexes**.[67] In the sheriff example, the memeplex might include ideas about their activities and influence, uniform, place of residence, method of remuneration, etc.

It must be stressed that, whilst evolution is non-random, it is also non-purposeful;[68] evolutionary forces have no 'pre-ordained goal towards which they inexorably work'.[69] They are not an unrelenting march towards progress and perfection, or, indeed, optimality;[70] neither does the process, nor the outcome thereof, necessarily embody reason or rationality;[71] nor is the 'survival of the fittest' (whatever that means[72]) guaranteed. Evolutionary forces simply determine whether or not a thing survives, in what manner, and in what form. In all of this, the vicissitudes of chance cannot be ignored. A meme's ostensible suitability, adaptability, and appeal does not guarantee its survival. It must also not be unfortunate in prevailing environmental conditions and its competition;[73] it must also not be accidentally destroyed.[74] Had some cataclysmic event eradicated the Anglo-Saxons and their language, we would not likely be speaking now of 'sheriffs'.

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[67] This is a shortened version of Dawkins' "meme-complex": Dawkins, *The Selfish Gene*, 197–99.
[68] Jones, "Evolutionary Analysis in Law," 1136ff.
[69] I am here adapting the words of Fried: Fried, "The Evolution of Legal Concepts: The Memetic Perspective," 293.
[70] See: Fried, "The Evolution of Legal Concepts: The Memetic Perspective," 294. So long as a meme is *adequate* or *good enough*, it can survive; in so doing, it might be some considerable distance short of being best or optimally suited; of being perfect. Even the 'survival of the fittest' does not mean that the result will be the best possible thing – only, perhaps, the best given the competition.
[71] Cf. Friedrich August Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge Classics, 2013), esp. 498.
[72] There is often a sense, as Ritchie identified, that the phrase is taken to mean "the fittest or best in every sense or in the highest sense," whereas, in a stricter sense, Ritchie held, following Huxley, it really ought only to mean "those 'best fitted to cope with their circumstances' in order to survive and transmit offspring"; those "most capable of surviving". See: David George Ritchie, *Darwinism and Politics*, 2nd ed. (Swan Sonnenschein & Co., 1891), 12–13, 15. The singular problem with both views, however, is their employment of the superlative adjective: 'fittest', 'best', 'most', etc. This is largely a product of the fact that both Ritchie and Huxley saw evolution in Malthusian terms: as a *struggle* for survival, pitting form against form (however directly or indirectly).
[73] As Spencer wrote in his *Autobiography*, bemoaning, to use his editor's phrase, the 'meagre reception' of one of the volumes of his *Principles of Sociology*: "Beliefs, like creatures, must have fit environments before they can live and grow…" Quoted in: Spencer, *The Evolution of Society: Selections from Herbert Spencer's Principles of Sociology*, xxvii.
[74] Cf. Distin: "A meme's own content may, then, be a fairly arbitrary factor in determining its success: its fortune in the struggle for survival will always be relative to context". Distin, *The Selfish Meme*, 67. Distin also emphasizes the importance of memes capturing our attention, if they are to be successful. To a great extent, this is true; patterns of thought or behaviour that capture our attention are more likely to be copied or to have efforts made by us to copy them. However, this emphasis implies rather too much that memetic transmission is an entirely conscious process. Obviously, for us to copy a meme, we must on some level be

If memes disappear, they become **extinct**.[75] However, this does not mean they are forever doomed. Memes might be rescued from oblivion if they have in some way been **externalized**; there is some trace of them that might be copied. Further, there is always a chance that some **analogue** of an extinct meme might appear. Naturally, the more complex the original meme, the less likely this is.

4.6 Transmission and Assimilation: Expression and Exposure

It is a simple, though important, point that memes must be *expressed* if they are to be copied.[76] Even if memes are faithfully retained, others have no hope of copying them if they are never expressed. It is equally important that there be some other – a *recipient* – who is in some way *exposed* to a meme that has been expressed. Individuals can only copy that with which they have come into contact. As such, there must be both **expression** and **exposure** for a meme to be **transmitted** and, subsequently, **assimilated**. This might be called the **collision theory of memetic transmission**;[77] there must be **touchpoints** for there to be any form of *transference*. Typically, any such transference takes place between conspecifics (i.e. members of the same species).

The basic form of memetic transmission is through imitation, i.e. repeating behaviours first observed in others. This can be differentiated from social facilitation,[78] and emulation.[79] Although it seems second nature to us, imitation is rather a complicated

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aware of it, but this need not necessarily be on the level of conscious attention; it might equally be subconscious.

[75] Cf. "A meme's physical existence depends on a physical embodiment in some medium; if all such physical embodiments are destroyed, that meme is extinguished." Moreover: "Memes, like genes, are potentially immortal, but, like genes, they depend on the existence of a continuous chain of physical vehicles, persisting in the face of the Second Law of Thermodynamics." Dennett, *Darwin's Dangerous Idea*, 348.

[76] Cf. "Culture can be transferred from one individual to another or from one society to another *only through the medium of its overt expressions*. All culture is learned, not biologically inherited, and it is only through the medium of behavior that it can be externalized and made available to new individuals for learning." Linton, *The Study of Man*, 291 [emph. added].

[77] This is after collision theory, which holds that, for chemical reactions to occur, the reactants must collide (i.e. come into contact) with one another.

[78] "Social facilitation synchronizes activities which, as such, could very well be carried out individually and at different times", but "can be observed or expected whenever it is advantageous that every group member take up the activity of the majority", e.g. 'when young eat more when in company, birds flying off in flocks, and humans getting angry or yawning when they see others do so'. Social facilitation provides a *cue* to perform a certain action, but, unlike imitation, that action is not achieved through "close and most probably conscious attention". Kummer, *Primate Societies*, 56, 57.

[79] Emulation is where, rather than an individual copying another individual's actions or behaviour, they (attempt to) copy the *results of their actions or behaviour* – without necessarily copying the precise movements or methods used to achieve it. Tomasello has argued that this is not true cultural transmission, but, rather, a form of opportunism – an individual sees something that they want and realizes that it can be achieved, having observed another gaining it, and then works out for themselves how it might be obtained (probably, through trial and error). Even still, these can be counted as memes: they are patterns of thought or behaviour, which are functionally equivalent and which are a legacy of our interactions with, or, at least, observations of, others. See: Michael Tomasello, "Cultural Transmission in the Tool Use and

thing. It requires an advanced Theory of Mind,[80] i.e. an idea that there are others who are, in some respects, like ourselves; we can understand something of their "thoughts, feelings, desires and intentions".[81] This ability to imagine things from another's perspective is what provides us with the ability to imitate them in a true sense.

The most important vehicle for memes is language, i.e. combinations of signs, symbols, sounds, etc. (i.e. **signifiers**) that are associated with some object or meaning (i.e. **signified**). These combinations are themselves memes, but, in conjunction with one another, help to convey more complex memes. Just as words are memes, so are phrases, witticisms, aphorisms, proverbs, etc.

There are many kinds of language, which can be conveyed via many kinds of media. The type and complexity of the language, as well as the medium through which it is transmitted, all have a bearing on the chances that it will be *faithfully copied* (cf. copying-fidelity), *remembered* (cf. longevity), and *reproduced* (cf. fecundity). A complex assortment of random vocal sounds shouted over a long distance is unlikely to be faithfully remembered and reproduced. On the other hand, a short, simple, and evocative phrase that is written down is much more likely to be faithfully remembered and

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Communicatory Signaling of Chimpanzees ?," in *"Language" and Intelligence in Monkeys and Apes: Comparative Developmental Perspectives*, ed. Sue Taylor Parker and Kathleen Rita Gibson (Cambridge University Press, 1990), 284. One of the most interesting case studies in this regard is that of blue tits learning from one another, if not *how* to open milk bottle tops, then *that it might be done*. See: James Fisher and RA Hinde, "The Opening of Milk Bottles by Birds," *British Birds* 42 (1949): 347–57; James Fisher and RA Hinde, "Further Observations of the Opening of Milk Bottles by Birds," *British Birds* 44, no. 12 (1951): 393–96; Louis Lefebvre, "The Opening of Milk Bottles by Birds: Evidence for Accelerating of Cultural Transmission," *Behavioural Processes* 34 (1995): 43–54; cf. Blackmore, *The Meme Machine*, 47–52; Distin, *The Selfish Meme*, 100–102, 135–39. See further: Andrew Whiten et al., "Emulation, Imitation, Over-Imitation and the Scope of Culture for Child and Chimpanzee," *Phil. Trans. R. Soc. B* 364 (2009): 2417–28.

[80] It might also require, on a neurological level, a set of so-called 'mirror neurons', which fire both when an individual performs an action and when they observe others performing it. However, there have been doubts as to their role in human cognition and facilitation of social learning. Cf.: Marco Iacoboni and John C Mazziotta, "Mirror Neuron System: Basic Findings and Clinical Applications," *Annals of Neurology* 62, no. 3 (2007): 213–18; Marco Iacoboni, "Imitation, Empathy, and Mirror Neurons," *Annu. Rev. Psychol.*, 2009, 653–70; Christian Keysers and Valeria Gazzola, "Towards a Unifying Neural Theory of Social Cognition," *Progress in Brain Research* 156 (2006): 379–401; Bruce E Wexler, *Brain and Culture: Neurobiology, Ideology, and Social Change* (The MIT Press, 2006), 114; Gregory Hickok, *The Myth of Mirror Neurons: The Real Neuroscience of Communication and Cognition* (WW Norton and Company, 2014).

[81] RIM Dunbar, Louise Barrett, and John Lycett, *Evolutionary Psychology* (Oneworld Publications, 2007), 206 et passim. This is closely linked with the idea of *intentionality*, i.e. different levels of belief states that animals might have: Dunbar, Barrett, and Lycett, *Evolutionary Psychology*, 203 et passim; RIM Dunbar, "The Social Brain Hypothesis," *Evolutionary Anthropology*, 1998, 188. See further: Laureano Castro and Miguel a Toro, "The Evolution of Culture: From Primate Social Learning to Human Culture.," *Proceedings of the National Academy of Sciences of the United States of America* 101, no. 27 (2004): 10235–40. For a more recent overview of Theory of Mind, see: Alvin I Goldman, "Oxford Handbooks Online Theory of Mind," in *The Oxford Handbook of Philosophy of Cognitive Science*, ed. Eric Margolis, Richard Samuels, and Stephen P. Stich (Oxford University Press, 2012).

reproduced – especially as its written form can always provide an *aide memoire*. *Variation* seems more likely in the former case than the latter; *selection* is likely to favour the latter.

An important point about media is that it means that we can be exposed to memes, in relation to their originators, either **directly** or **indirectly**. Indeed, depending upon the medium utilized, the person copying the meme might be far-removed from its originator in both time and space. This is particularly true for memes that are committed to writing, although this presupposes that the recipient understands the language in which the thing was written. Similarly, in the case of artefacts and other objects, it is possible that the receiver might have to some extent *reverse engineer* the thoughts or behaviours that must have occurred to produce the artefact or object in question; this, again, would be indirect.

Our genes are inherited from our parents, their parents, and their parents' parents, etc. Excepting the possibility of genetic engineering, genes always move *vertically downwards* and are *biparental*; this is their *pathway*. With memes, the situation is quite different. They might move vertically downwards – from either one or both parents. They might also be said to move *obliquely downwards* (i.e. from more distantly related or unrelated elders), *horizontally* (i.e. from others within one's generation), or, indeed, *vertically* or *obliquely upwards* (i.e. from one's children or their generation).[82] Memes, unlike genes, can come from all sides.

4.7 Memetic Genotype and Phenotype

Any given individual at any particular time holds a finite number of memes (i.e. ideas, etc.) *capable* of being expressed by them and copied by others. This number might be very large and difficult to establish, but is nevertheless finite. This might be called a person's **memetic genotype**. However, many of these do not have a noticeable effect on how we think and behave – particularly those which can only be recalled with great difficulty. As such, a large portion of the memetic genotype is relatively unimportant. Those memes that are influential and actually find expression at any given time might be called a person's **memetic phenotype**. Naturally, these are more flexible than their genetic parallels.

4.8 Memetic Similarity and Dissimilarity

[82] On the ideas of vertical, oblique, and horizontal transmission, see: Cavalli-Sforza and Feldman, *Cultural Transmission and Evolution*, chaps. 2 and 3; Mesoudi, *Cultural Evolution*, 56, 58–61; Boyd and Richerson, *Culture and the Evolutionary Process*, 8, 53–55.

Memetic similarity (i.e. where multiple individuals appear to share the same memes or memeplexes) can come about in two ways: derivation and convergence.

In **derivation**, either one instantiation is derived from another (i.e. they stand in a *parent-child relationship*) or both instantiations are derived, by however many degrees of remove, from some *common ancestor*.[83] Such instantiations are, therefore, similar because they are either *directly or indirectly related* to one another; they are *causally related* in some way. The greater the number of distinctive or unusual features the memes share, and the greater their complexity, the greater the likelihood of derivation being involved; their having arisen independently is statistically improbable, even if not strictly impossible. The test for derivation is, naturally, the identification of touchpoints, i.e. has the individual in question ever been exposed to the meme in question and, therefore, had an opportunity to copy it, whether in gross or fine?[84] If they have been, then this is at least *evidence*, if not proof, that the one has been copied from the other and is, therefore, derived from it.[85]

The corollary of derivation is **divergence**:[86] owing to the cumulative effects of variation and selection, various memetic lineages are likely to become *increasingly dissimilar* to one another over time. This process is a function of (a) the degrees of remove between the lineages in both time and space, and (b) the degree of intermixing, cross-fertilization, or cross-pollination as between populations. In other words, the more times a meme is copied, and the further removed instantiations are in time and space, the greater the likelihood of divergence occurring.

However, divergence does not always necessarily happen. Where memetic lineages remain roughly faithful to their progenitor and, hence, roughly the same as one another,

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[83] In the case of a parent-child relationship, besides being called a *parent* and *child*, the originating instantiation might be called the *ancestor* and its progeny the *descendant*; they might also be called, to use terms from linguistics, the *etymon* and *derivative* respectively. In the case of those derived from common ancestors, they might be described as *siblings* or *cousins*, but they are probably best called, again to borrow from linguistics, *cognates*.

[84] Cf. *supra*, 4.6.

[85] It should be said that obtaining any such evidence and, moreover, proving conclusively that there has been some process of derivation, are notoriously difficult. In part, this is because humans – especially in the modern day – are processing houses of vast quantities of information from a huge variety of sources. It is also because, whether through accident or design, memes assume new forms inside our minds. Moreover, there are often times when even we ourselves are not sure wherefrom – or, indeed, why – we have a particular meme. All of these things contribute towards a situation in which, as Dennett put it, the "lines of descent are hopelessly muddled, and that phenotypes (the 'body designs' of memes) change so fast that there's no keeping track of the natural kinds": Dennett, *Darwin's Dangerous Idea*, 355. See further: Aunger, *Darwinizing Cult. Status Memet. as a Sci.*, 3–4. The consequence of this is that, to a greater or lesser extent, anything that deals in the history of ideas – of whatever kind – will be *speculative*, i.e. based on conjecture, which is to say, they will consist of opinions formed on the basis of incomplete information.

[86] This is after the idea of *divergent* evolution.

we can assume that there are probably some forces staying the roving hands of variation and selection. These we might call **maintenance forces**,[87] e.g. conservative attitudes or sustained environmental pressures. On the other hand, where instantiations of memes *do* change over time, yet do so in a similar manner in spite of their isolation from one another, we can assume that similar **selection pressures** are driving the changes in the same direction. In zoology, this is called **parallel evolution**.

As in biology, the *phylogenetic method* – the creation of evolutionary trees (*stemmata*) – can be adopted with memes to trace the processes of derivation and divergence, i.e. it can be used to understand not only the history of particular memetic lineages, but also to understand the relationships between lineages. Of course, memetic phylogenetic trees, as compared with their genetic parallels, are more likely to look more like thickets than trees – with strands that seem to dive in and out of one another, and weave around in an unruly mess. This is because of the high potential for *lineage-crossing* or *anastomosis* (i.e. the "coming back together" of separated lineages,[88] which is far more easily done by memes than genes).[89] To make matters more complex still, there is every likelihood that the 'archaeological record', as it were, will be far from complete, owing to the fact that a great deal of memetic transmission – if not most – leaves no trace. The upshot is that it is eminently possible for the memetic historian (of whatever focus) to trace certain memes and memeplexes through time – to see where they *seem* to have originated and how they

[87] Drout speaks of practices of 'memetic hygiene', i.e. regularly consulting some standard expression – an exemplum, if you will – so as to prevent divergences therefrom. His example of this was Benedictine monks, a fundamental part of whose lives was "regular and programmed return" to the *Rule of St. Benedict*; monks had to hear it and read it on a regular basis. Behind such practices of memetic hygiene there often lies a *desire to preserve tradition*; this desire can prove a potent maintenance force. For Drout, see: Drout, *How Tradition Works*, chap. 4.

[88] Dennett, *Darwin's Dangerous Idea*, 355.

[89] This point was recognized by Linton almost a century ago: "[Culture] is a continuum existing from the beginning of human existence to the present. As a whole, it represents the social heredity of our species. Particular cultures are strains of social heredity, corresponding in many respects to the divergent strains of biological heredity which constitute different varieties within a species. Like these strains of biological heredity, cultures have crossed and recrossed in the course of their development, fused and divided. The condition is infinitely more complex than that existing in the biological field." Linton, *The Study of Man*, 294–95.

seem to have changed over time,[90] but there can be dangers in drawing overly strong and specific conclusions from such researches.[91]

Besides derivation, similarity can also be caused by **convergence**. This is where variation, selection, and chance drive memes of different origins towards the same form. Instantiations come to bear resemblance to one another not because they are in any way related but, rather, because they are probably a response to the same sorts of things.[92] They develop *independently* of one another and their resemblance is largely *coincidental*.[93]

Memetic similarity, then, is the result of either *derivation* or *convergence*, although *divergence* is likely to create dissimilarity over time as instantiations become increasingly removed from one another and enter different environments. As intellectual property lawyers know, it can be difficult to establish whether or not similarity appears because of some element of derivation or merely due to coincidental convergence.

4.9 Resemblance Principle

[90] In the historical context, and especially in a mediaeval context, a good example of phylogeny is in manuscript evolution – how manuscripts were distributed and altered as they were copied, whether intentionally or unintentionally. Understanding this process can help us to understand a great deal about the manuscripts themselves and their content – for if we understand where they originated, or who made any particular changes and when, then we might better understand any biases or the value of any testimonies contained therein. The topic of manuscript evolution was touched upon by Mesoudi: Mesoudi, *Cultural Evolution*, 119–22, 152–54.

[91] After all, as Fracchia and Lewontin have warned, there is a limit to which such methods can cope with the "labyrinthine pathways, the contingent complexity, the many nuances, and general messiness of history". Indeed: "Transformational theories of cultural evolution have the virtue that they at least provide a framework of generality with which to give human long-term history the semblance of intelligibility. But the search for intelligibility should not be confused with the search for actual process. There is no end of ways to make history seem orderly." It is very easy to create stories about the ways in which things have developed, which stories might even sound entirely plausible, but yet be gross distortions or reality – if not wholly fictitious. Their warning being accepted, Fracchia and Lewontin were too hard on the idea of applying evolutionary ideas to culture, etc., and there is little cause to abandon the whole endeavour. For Fracchia and Lewontin, see: Joseph Fracchia and RC Lewontin, "Does Culture Evolve?," *History and Theory* 38, no. 4 (1999): 78. On this point, see also: Robert Boyd et al., "Are Cultural Phylogenies Possible?," in *The Origin and Evolution of Cultures*, ed. Robert Boyd and Peter J Richerson (Oxford University Press, 2005), 310–36.

[92] Cf. the words of Darwin: "I am inclined to believe that in nearly the same way as two men have sometimes hit upon the very same invention, so natural selection…has sometimes modified in very nearly the same manner two parts in two organic beings, which owe but little of their structure in common to inheritance from the same ancestor." Charles Darwin, *The Origin of Species by Means of Natural Selection or, The Preservation of Favoured Races in the Struggle for Life* (Wordsworth Editions Limited, 1998), 149. In the socio-legal context, this idea can be seen, for an early example, in Hobhouse: "[T]hough we may find certain features of similarity in institutional forms, this similarity may point to no close relationship, to no filiation, to no real affinity between the two societies compared. It is merely what we call – by way of expressing our ignorance – the casual result of a combination of circumstances. […]. The resemblance is analogical. Conditions…have produced a result which is in one respect the same…" Hobhouse, *Social Evolution and Political Theory*, 122–23.

[93] On convergence in 'cultural evolution', see: Mesoudi, *Cultural Evolution*, 36–37.

With the foregoing in mind, a **resemblance principle** can be suggested: any given individual's memetic *genotype* and *phenotype* is likely to resemble the memetic genotypes and phenotypes of those to whom they are most often exposed.[94] More simply: the memes that we have and express are likely to resemble the memes of those around us.

This is a consequence of a couple of things. Firstly, there is the fact that expression and exposure have limited horizons. If you are not in sufficient proximity to a meme's expression, you are unlikely to be exposed to it and, therefore, to assimilate it.[95] Secondly, there is the fact that we are more likely to assimilate those memes to which we are frequently exposed. Naturally, we are most frequently exposed to the memes of those around us. It is well to remember, too, that humans are impressionable, particularly when young; the memes to which we are regularly exposed during our formative years are likely to have a profound and lasting effect on our memetic composition.[96] However, this is far from saying that we can never change: we often adapt our thoughts and behaviours to match new (social) environments, often through a process of *acculturation*.

It is apparent how the resemblance principle explains the development of cultures, i.e. sets of shared ideas, beliefs, and behaviours – including shared ideals, values, mannerisms, practices, and, crucially, laws. After all, we tend to resemble those around us; we consciously and unconsciously adopt and assimilate their ideas, etc. As humans tend to live in groups, each member will come to resemble the other members. When individuals come together anew, there will usually be a degree of harmonization. We do all of this so naturally that these ideas, etc. often seem obvious. It can be difficult to imagine how things could be otherwise – especially if we have been little exposed to other ways of life and points of view. This is compounded if we are taught not to question. It is easy to see how this can lead into absolutism, intolerance, cultural imperialism, etc. We assume our way is best because it is our way.

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[94] Cf. the collision theory of memetic transmission, *supra*, 4.5.

[95] "An individual's range of socialization is limited by the range of his receptivity (his perceptual range) as determined by his actual contact with persons, objects, and situations": Sherif, *An Outline of Social Psychology*, 95.

[96] Cf. Benedict: "The life-history of the individual is first and foremost an accommodation to the patterns and standards traditionally handed down in his community. From the moment of his birth the customs into which he is born shape his experience and behaviour. By the time he can talk, he is a little creature of his culture, and by the time he is grown and able to take part in its activities, its habits are his habits, its beliefs his beliefs, its impossibilities his impossibilities. Every child that is born into his group will share them with him, and no child born into one on the opposite side of the globe can ever achieve the thousandth part." Benedict, *Patterns of Culture*, 2–3. This was originally written in the 1930s, and it can be noticed that Benedict was an anthropologist by training and profession; it was not written in the context of a connected and globalized world. Nevertheless, her essential point holds: we are inordinately affected by those around us – so much so that the limits of their ideas, etc. to a great extent define the limits of our own.

In a sense, modern telecommunications systems and high levels of mobility are eroding the resemblance principle. People nowadays are less likely than their forebears to resemble those in their immediate physical environment. However, the underlying principles remain unaffected. We still resemble those to whom we are most exposed – it is just that these persons might be many miles away.

4.10 Memepools

As every individual has only a finite number of memes, every collection of individuals also possesses between them only a finite number of memes – even if, again, that number is large and difficult to establish. The sum total of the memes extant among a set of social agents – the summation of their memetic genotypes – is called the **memepool**.[97] This consists of all the memes which might be available at any given time for copying. We might also term this the **memetic environment**.

We can introduce two general principles of the memepool, which are of particular importance for constitutional history. The first I call the **variation principle**. This is the idea that, owing to evolutionary forces, the memepool at any given time is likely to be different to that at any other time. The second I call the **accumulation principle**. This is the idea that the number of differences accumulate over time, such that the greater the intervening period of time, the greater the number of differences. Thus, for example, the constitution of a group will probably differ between the fourteenth and fifteenth centuries, yet the constitutions at those times will probably be more similar to one another than to that of the nineteenth century. In the absence of strong maintenance forces, this is practically inevitable.

As a memepool changes over time, there is the possibility for what might be called **phantom memes** – i.e. memes that have themselves disappeared, but which affect other memes almost as if there were still present. To take an example from Linton: "[T]he custom of wearing a sword on the left side was responsible for the custom of mounting horses from the left. The sword-wearing has long since disappeared, but the left-side

[97] An early theory of the memepool, for example, can be seen in Hobhouse: "[T]hough there is no thought except in the mind of the individual thinker, yet the thought of any generation, and indeed of each individual in the generation, is a social product. But we must go further than this. The sum of thought in existence at any time is something more than any thought that exists in the head of any individual; it is something to which many minds contribute, and which yet may be for many purposes a real unity." Hobhouse, *Social Evolution and Political Theory*, 94–95. Linton said a similar thing a quarter of a century later: "Culture…rests on the combined brains of all the individuals who compose a society. While these brains individually develop, stabilize, and die, new brains constantly come forward to take their places." Linton, *The Study of Man*, 293.

mounting remains".[98] The application of this to rites, rituals, etc., whose precise origins are not always known, is not difficult to see.

4.11 Measuring the Memetic Environment

We have already said that memes can be described in terms of longevity, fecundity, and copying-fidelity. If memes are to be successful, then it is important that they display all of these characteristics. However, these terms do not help us much in describing where memes are situated in the memepool. In order to describe this, three further qualities are suggested for study.

The first is **prevalence**, which is the *proportion* of a population with a given meme or memeplex in their memetic genotype.[99] In other words, it concerns *how common* or *frequent* particular memes or memeplexes are within a given group at a given time. In order to be considered prevalent, instantiations must be sufficiently similar to one another; variations should, insofar as possible, be considered separately. Where particular variations appear to be prevalent, we can say that there is some degree of *intersubjective agreement* or *consensus*. Prevalence comes about through a process of *diffusion*,[100] and, naturally, is largely a function of longevity, fecundity, and copying-fidelity.

The second is **potency**, which is the *probability* that particular memes or memeplexes will find expression in thought or behaviour. In other words, it considers the *frequency* with which given memes or memeplexes are *actually expressed*. Potency is of two kinds. A meme has **expressive potency** if it is sufficiently potent so as to find expression. It has

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[98] Linton, *The Study of Man*, 295.

[99] It ought to be noted that, because assessing individuals' genotypes *in toto* is a difficult thing, in practice prevalence usually means looking at a combination of individuals' memetic *phenotypes* (i.e. the memes or memeplexes that they have actually expressed at one time or another) and the memes and memeplexes to which individuals have been exposed.

[100] In other words, memes will begin with an individual or a select group of individuals and, from them, spread outwards to others. On this point, we can compare the words of Darwin, made in the context of biological evolution: "The process of diffusion may often be very slow, being dependent on climatal and geographic changes, *or on strange accidents*, but in the long run the dominant forms [i.e. those that possess some advantage over rival forms] will generally succeed in spreading." Darwin, *The Origin of Species*, 246 [emph. added]. The fact that 'strange accidents', as much as anything else, determine whether or not particular replicators become prevalent is worth highlighting. As Hull has pointed out, genetic replication need not be slow (e.g. in the case of viruses and bacteria) and memetic diffusion need not be quick, but memes – particularly in the context of telecommunications systems and mass media – have huge potentiality for spreading rapidly and, much like infection or contamination rates, might see their diffusion rate increase exponentially. Moreover, again in the context of telecommunications systems and mass media, memes have much greater horizons than their genetic counterparts – they can 'travel' over much greater distances and do so more quickly, and their replication can be almost instantaneous. For Hull, see: David L Hull, "Taking Memetics Seriously: Memetics Will Be What We Make It," in *Darwinizing Culture: The Status of Memetics as a Science*, ed. Robert Aunger (Oxford University Press, 2001), 55; cf. Gould, *Bully for Brontosaurus*, 65; Boyd and Richerson, *Not By Genes Alone*, 42–44. For a discussion of 'cultural diffusion', see: Andrew Whiten, Christine A Caldwell, and Alex Mesoudi, "Cultural Diffusion in Humans and Other Animals," *Current Opinion in Psychology* 8 (2016): 15–21.

directive potency if it can affect our decision-making processes and actions. For example, ideas of mythical creatures might have expressive potency, but are unlikely to have directive potency. We might talk about Medusa, but the Medusa-idea is unlikely to affect how we behave.

Whereas prevalence concerns *existence*, potency concerns *expression*. As might be expected from the resemblance principle, there is a close relationship between these. After all, those memes that are actually expressed (i.e. potent) are most likely to be assimilated by others (i.e. become prevalent); likewise, those memes that have been assimilated by a greater number of individuals (i.e. prevalent) are more likely to find encouragement and support in their expression (i.e. become potent). However, they do not always go hand-in-hand. Many memes are potent, but not prevalent, e.g. religious fundamentalism in the West. Contrariwise, there are many that are prevalent, but not potent, e.g. the idea of a Christian God, whose directive potency is diminishing.

The final quality is **persistency**, which has to do with *how long* given memes or memeplexes remain in the memepool.[101] Obviously, prevalent and potent memes are more likely to persist for longer periods of time. However, memes that are neither prevalent nor potent can still continue to be expressed and copied sufficiently so as to continue to feature in the memepool. We should contrast *persistency* with *longevity*. Whereas longevity has to do with the length of time that memes and memeplexes reside in individuals' minds, persistency has to do with the length of time that they reside, as it were, in the memepool.[102] Thus, for example, there was a time in European history when there was no idea of a Christian God; it was neither prevalent nor potent. However, since the first century, it has remained a consistent feature of the memepool, even if its prevalence and potency have changed.

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[101] Cf. Linton: "Although the ideal patterns are carried in the minds of individuals and can find overt expression only through the medium of individuals, the fact that they are shared by many members of the society gives them a super-individual character. They persist, while those who share them come and go. The death of a particular person may interrupt the exercise of a pattern, but if this exercise is at all necessary to the well-being of the group the interruption will only be temporary." Having said this, Linton then proceeded, in a remarkable passage, to anticipate the memetic approach: "All this indicates that the ideal patterns by which the behavior of a society's members is organized are genuine entities. The exact kind of reality which they possess can be left to the philosophers to determine. It must be of much the same quality as the reality of an often told story. The important thing for us is that the patterns behave like entities, influencing individuals and being in turn influenced by them and persisting while individuals come and go. They even possess a considerable degree of internal organization and are susceptible to objective study and analysis." Linton, *The Study of Man*, 102–3.

[102] This is bearing in mind the fact that much the same can be said of memes as genes: "Only the *characteristics* of organisms, not the organisms themselves, can flow smoothly through time…" Jones, "Evolutionary Analysis in Law," 1133.

Potency is, in many respects, most important. If memes are potent, they are more likely to find expression; if they find expression, they are more likely to be copied and thus become prevalent; if they are both potent and prevalent, there is a greater likelihood that they will continue to be copied as time passes and, therefore, become persistent.[103] But it is important to stress that memes, memeplexes, and, indeed, the memepool as a whole will only become persistent *if they are continuously passed on*. If that chain is broken, they will break down and disappear.[104]

4.12 Memetic Drift

Whilst evolution is not a drive towards any preordained state or end,[105] there might nevertheless be certain observable trends in terms of the relative prevalence and potency of certain memes and memeplexes within the memepool over time – particularly if there are certain sustained selection pressures, for example, which cause a 'shift in a specific,

[103] It would seem that it was prevalence, potency, and persistency, at least within a given social group, was what constituted for Hauriou the 'objective' nature of institutions: "Directing ideas, which are of a comprehensible objectivity since they pass from one mind to another by their own force of attraction without losing their identity, are the vital principle of social institutions." Insofar as this, Hauriou would seem to be moving towards a theory based on social constructionism. However, he continues: "They communicate to institutions a distinctive life, as separable from that of individuals as ideas themselves are separable from our minds and capable of reacting upon them." The fundamental problem here is that Hauriou mistook a metaphor for reality; he should have said, though to do so is misleading, that it *seems as though* or that it *were as if* institutions have a 'distinctive life' proper to them. See: Hauriou, 'The Theory of the Institution and the Foundation: A Study in Social Vitalism' in Albert Broderick, ed., *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T Delos*, trans. Mary Welling (Harvard University Press, 1970), 123. Cf. *supra*, 3.2. Hauriou's supremacist opinion that "certain peoples and races are incapable of possessing institutions because they are too insensitive because they are too insensitive to ideas" is noteworthy: Hauriou, from *Précis de droit constitutionnel*, in Broderick, *The French Institutionalists*, 135. The social constructionist tendencies of institutionalism is perhaps clearest in the work of Georges Renard: "The institution lives only by the life men lend to it. But among these men, there are one or several whose will enchains the will of others for the future and indefinitely, until this institution vanishes. The great mystery is that the will of the founder or founders prevails over the wills of the successive adherents – the will of the living is chained to the will of the dead. This is the great postulate of the institutional theory." Further: "The institution is below the human person, which is the only true person in this world, and below organic life, which is the only true life; but it is higher than brute matter." Renard, 'The Degrees of Institutional Existence', in Broderick, *The French Institutionalists*, 179, 181.

[104] Cf. Linton: "[N]o culture can survive either the dissolution of the society which bore it or the interruption of its expression in behavior for a longer period than the life-span of the last individual trained to it." Further: "It seems the transmission of culture has somewhat the same quality as the apostolic laying-on of hands. Its genuine transfer from individual to individual or from one generation to the next can only be accomplished by personal contacts. The material manifestations of any culture may outlast it for thousands of years and provide the student with a more or less accurate idea of what certain aspects were like, but a culture dies as soon as the direct line of person-to-person transmission is broken. Even the literature of a people cannot convey their fundamental ideas and values in such form that they will become an integral part of the reader's personality." Linton, *The Study of Man*, 291, 292. Linton was largely correct, because that which is preserved will likely only be some *portion* of the totality of the memepool associated with a particular culture and, moreover, that portion will not necessarily represent the diversity of memes that were extant – even prevalent – in that culture. Thus, even if some part remains, its fullness will be gone forever.

[105] *Supra*, 4.5.

non-random direction'.[106] Thus, just as the proportion of black moths might be seen to increase over time as compared with their speckled brethren,[107] certain accents or dialects might come to be spoken by greater and greater numbers of people as compared with any alternatives – such as happened in the case of Received Pronunciation in English, which was for a long time lauded and propagated by the education system and the British Broadcasting Corporation. The directional changes to the genepool or memepool are what we often associate with Darwinian evolution (i.e. evolution by natural selection), particularly when these changes become so numerous or dramatic that we think there to have been a **speciation event**, i.e. the changes are so marked that we think a new species has come into being.

However, chance and accident also play their part. Thus, even though there might still appear to be certain directions of travel, these might be struck upon for no apparent reason except *random sampling*. It just so happened that some varieties became more frequent – perhaps due more to *reproductive opportunity* than to any intrinsic or extrinsic qualities – and, over time, this frequency became compounded, thereby causing a shift in that direction. Such a shift is called *genetic drift* in genetics; in memetics, **memetic drift**.[108] The evolution of the English language taken as a whole – from Old, through Middle, to Modern – perhaps serves as a good example of this.[109]

It should be reiterated that any new forms that appear to emerge from the evolutionary process are neither necessarily better nor worse than their predecessors; they are merely different.

4.13 Memetic Migration

[106] "Both guided variation and the various forms of cultural selection act to shift the frequency of cultural traits in a population in a specific, non-random direction…": Mesoudi, *Cultural Evolution*, 76.
[107] This was the case with the peppered moth (*Biston betularia*) during the course of the industrial revolution in England. The moths were originally a whitish hue with blackish tinges, but, during the course of the industrial revolution, it was noted that they typically lost their whitish colour and became entirely black. The theory as to why this was the case, as proposed by James William Tutt (1858-1911), was that during the revolution there was an increase in smoke and, in particular, an increase in particulate soot, which blackens surfaces upon which it settles; moreover, the pollution also killed off lichens growing on tree bark, which the moth relied upon for camouflage. Therefore, upon these blackened, lichen-less surfaces, the black variety of the moth was better camouflaged – and, as a result, better protected from predation – than the flecked variety. This gave the black variety an advantage and caused a drift over time towards a greater part of the population being comprised of black moths. On this, see: Michael EN Majerus, "Industrial Melanism in the Peppered Moth, Biston Betularia: An Excellent Teaching Example of Darwinian Evolution in Action," *Evolution: Education and Outreach* 2 (2009): 63–74.
[108] For a discussion of the analogous idea of 'cultural drift', see: Mesoudi, *Cultural Evolution*, 76–79.
[109] For a discussion of applications of the idea of 'cultural drift' to the archaeological record, see: Mesoudi, *Cultural Evolution*, 103ff. For histories of the English language, see e.g.: David Crystal, *The Stories of English* (Allen Lane, 2004); Albert C Baugh and Thomas Cable, *A History of the English Language*, 3rd ed. (Routledge & Kegan Paul, 1978).

Just as memes flow within populations, they can also flow between populations.[110] In other words, memes oftentimes appear anew in populations, which memes have been *derived* from instances in other populations.[111] This is analogous to the biological concept of 'gene flow' or 'genetic migration', and can be called **memetic migration** or **meme flow**.[112] For the comparative lawyer, and legal or constitutional historian, the importance of mimetic migration is most important in the context of legal transplantations and receptions, e.g. of Roman law in mediaeval and early modern Europe.[113]

Much as Linton identified, levels of migration are, in many respects, a function of the *proximity* of, and *number of contacts* between, populations,[114] as well as the *translatability* of the memes and the *receptiveness* of the receiving population.[115] Naturally, certain practices can be adopted to reduce or prevent inwards memetic migration, e.g. policies of endogamy or isolationism. The extent to which this can prevent memetic change is doubtful, but, to some extent at least, it might slow it down.

4.14 Directive Potency and Practical Reasoning

Whether particular memes are potent has a great deal to do with the strength of the underlying associations. However, it also has to do with their relative strength as compared with other associations that might be competing for expression. Consequently, whether particular memes are expressed is often the result of some conscious or unconscious **computation**, which weighs **habit**, **feeling**, and **reason**. Of these, reason – in a logical, detached, objective sense – is the weakest. Indeed, reason plays a much lesser role in our decision-making than is often supposed; without feelings and inclinations –

[110] Linton called this 'diffusion' and attributed great importance to it: "The service of diffusion in enriching the content of individual cultures has been of the utmost importance. There is probably no culture extant to-day [bearing in mind that this was written in the early 1930s] which owes more than 10 per cent of its total elements to inventions made by members of its own society." Linton, *The Study of Man*, 325.
[111] See, *supra*, 4.8.
[112] For a discussion of the analogous idea of 'cultural migration', see: Mesoudi, *Cultural Evolution*, 81–82.
[113] See, e.g.: Paul Vinogradoff, *Roman Law In Mediaeval Europe* (Harper & Brothers, 1909); CC Turpin, "The Reception of Roman Law," *Irish Jurist* 3, no. 1 (1968): 162–74; Charles Sumner Lobingier, "The Reception of the Roman Law in Germany," *Michigan Law Review* 14, no. 7 (1916): 562–69; William Searle Holdsworth, "The Reception of Roman Law in the Sixteenth Century I," *Law Quarterly Review* 27 (1911): 387–98; William Searle Holdsworth, "The Reception of Roman Law in the Sixteenth Century II," *Law Quarterly Review* 28 (1912): 39–51; William Searle Holdsworth, "The Reception of Roman Law in the Sixteenth Century III," *Law Quarterly Review* 28 (1912): 131–47; William Searle Holdsworth, "The Reception of Roman Law in the Sixteenth Century IV," *Law Quarterly Review* 28 (1912): 236–54; Theodore FT Plucknett, "The Relations between Roman Law and English Common Law down to the Sixteenth Century: A General Survey," *The University of Toronto Law Journal* 3, no. 1 (1939): 24–50.
[114] This was his first principle of 'diffusion': "other things being equal, elements of culture will be taken up first by societies which are close to their points of origin and later by societies which are more remote or which have less [*sic*] direct contacts". Linton, *The Study of Man*, 328–29.
[115] Linton, *The Study of Man*, 337–39, 340–45.

however arbitrary – we are liable to become paralyzed.[116] We are far from being entirely rational.

However, reason is still important – even though it might not dictate the outcome, the process of reaching that outcome usually includes some form of reasoning. There are different kinds of reasoning, but for the present we can focus on the branch called **practical reasoning**. This is the process by which we decide how to act or behave in any given situation.[117] Naturally, this will heavily rely on the associations that we have with each course of action and with our expectations. In many situations, we weigh the costs and benefits of particular courses of action and then opt for the one that appears to us the most meritorious (or least detrimental). These are called **first-order reasons**; conflicts between them are "resolved by the relative strength of the conflicting reasons".[118] Relative strength is, of course, a subjective standard.

There are also what have been called **second-order reasons**. These act on first-order reasons to make them more or less compelling: "any reason to act for a reason or to refrain from acting for a reason."[119] A particular kind of second-order reason is of the utmost importance: **exclusionary reasons**. These reasons do not strengthen or weaken other considerations *per se*; they make them irrelevant. "An exclusionary reason is a second-order reason to refrain from acting for some reason."[120] Memes that have powerful exclusionary reasons operating in their favour are much more likely to have directive potency. Thus, for example, the laws of a given legal system are much more likely to be effective if there is some idea that they apply regardless of anything else.

Let us take a simple example to elucidate the nature of practical reasoning and its connection with fixed expectations. There is a destitute person who happens to pass a bakery late one evening. A loaf of bread lies unattended on the counter. This person has neither money nor opportunity to earn any quickly; they are unable to pay for the bread. If they are to have the bread, they have to decide whether or not to take, which is to say *steal*, it. A first-order reason in favour of taking the bread might be that they are hungry. A first-order reason against might be that there is a chance of their being caught and

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[116] See: Antonio Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (Vintage Books, 2006); Steven W Kennerley and Mark E Walton, "Decision Making and Reward in Frontal Cortex: Complementary Evidence From Neurophysiological and Neuropsychological Studies," *Behavioral Neuroscience* 125, no. 3 (2011): 297–317.
[117] Cf. Robert Audi, *Practical Reasoning and Ethical Decision* (Routledge, 2006), esp. at 1.
[118] Joseph Raz, *Practical Reason and Norms*, 2nd ed. (Oxford University Press, 1999), 36.
[119] Raz, *Practical Reason and Norms*, 39. See further: 46-47.
[120] Raz, *Practical Reason and Norms*, 39. See further: 46-47.

punished. A second-order reason in favour might be that they have not eaten for days, thereby strengthening the first-order reason that they are hungry; they are not only hungry, but starving. A second-order reason against might be that the punishment for stealing is severe.

None of these are memes; they are practical considerations. However, memes might also be involved. For example, a meme of "everyone for themselves" could be a first-order reason in favour of stealing the bread; a meme "thou shalt not steal" could be a first-order reason against. The relative directive potency of each of these could well swing the balance.

However, the introduction of an exclusionary reason would render this calculus moot. For example, an idea that not only is it against the law to steal, but that the law must be obeyed in all instances, would be an exclusionary reason. Practical considerations and the finer moral points of the matter would be irrelevant. This idea that "the law must always be obeyed without exception" could, of course, be a meme. If the destitute person were raised in an environment in which this idea was both prevalent and potent, they might have developed a strong aversion to theft; regardless of how hungry they are, theft is impermissible. They might attempt to beg for the bread, rather than steal it.

4.15 Laws as Memes

Not everything is a meme.[121] However, the fact that laws can be memes should not be difficult to see.

Memes, it can be remembered, are patterns of thought or behaviour, which are capable of being copied through processes of learning.[122] These, ultimately, must have some physiological/neurological basis. Laws, too, are patterns of thought and behaviour, which also have a physiological/neurological basis, but they are patterns that are *fixed* – or, at least, we *think* or *feel* them to be fixed, to a greater or lesser degree. This sense of fixedness is a product of their being strongly established associations of the kinds outlined in the previous chapter (equivalence, etc.). They operate, then, as codes or instructions, which determine, or at least influence, how we think and behave.

[121] For example, perceptions, emotions, memories, imaginings, etc. are not memes: Blackmore, *The Meme Machine*, 15, 42–46. On the point about emotions, it can be said that, whilst emotions themselves are not memes, ways of *categorizing*, *expressing*, and, perhaps, even *regulating* them might be.
[122] *Supra* 4.4.

Whilst we arrive at some of these independently, a great many of these are learned from, and, indeed, *can only be learned from*, others – especially when it comes to social matters. Some will be taught to us – and, perhaps, *need* to be taught to us, especially when it comes to the details and to laws that apply specifically to us (and therefore cannot be inferred or deduced) – quite explicitly.[123] Others we will arrive at, or get a general sense of, by processes of inference or deduction from others' behaviours.[124] But, whichever is the case, the patterns that we hold in our minds will reflect what we have seen of, or heard from, others, and will be a legacy of our attempting – whether intentionally or unintentionally – to copy what they have said and done.[125] In short, laws are *replicable* units of thought and behaviour, encoded as fixed associations in the mind – they are memes.[126]

This means that we can study laws as we study memes.[127] We can study replication and heredity; variation and selection; longevity, fecundity, and copying-fidelity; the process of expression, exposure, and assimilation; derivation, divergence, and convergence;[128]

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[123] Indeed, much as Sherif has noted, these laws, originating outside of the individual, often appear to 'each individual who first confronts it' to have an 'objective reality'. They *seem* to be facts because they *are presented as if they were* facts; they are simply accepted. Muzafer Sherif, *The Psychology of Social Norms* (Harper & Brothers Publishers, 1936), 125, 131–33.

[124] Here, we can think of the distinction drawn by Timasheff between *imitative uniformities* and *imposed uniformities*. In both of these cases, the uniformities are "causally explained as reproductions of 'original acts', which are considered by men as 'patterns of behaviour'". However, whereas imposed uniformities are *brought about*, it might be said, imitative uniformities *come about*; the former involves active effort by some to determine the behaviour of others, whereas the latter involves individuals conforming to others' behaviours, without necessarily having been forced, directed, or otherwise actively influenced to do so. These, it can be noted, Timasheff contrasted with *natural uniformities* – essentially, similarities of behaviour that arise by chance or circumstance, not primarily through social learning. Nicholas Sergeyevitch Timasheff, *An Introduction to the Sociology of Law* (Harvard University Press, 1939), 5–10, quote at 6.

[125] Cf. "Man is not born into the world with a set of norms. They become part of him as he develops in a social environment. The social environment consists of people with whom he comes into contact as a baby in a family, as a playmate, as a pupil in a school, as a member of a religious group, an economic group, a social group, etc." People incorporate these 'norms or standards' naturally – "[w]hether they wish to or not, whether they are conscious of the fact or not, makes no difference." Sherif, *The Psychology of Social Norms*, 46, 25.

[126] Stake even once went so far – in a passing comment – as to suggest that we might call law-memes "lemes", though this is perhaps not a necessary addition to our vocabulary and it does not appear to have caught on: Jeffrey Evans Stake, "Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities," *Florida State University Law Review* 32 (2005): 403.

[127] We can here compare Fried's saying that "Rules of law, precedents, and legal doctrines can be treated as memes competing to appear in legal reporters." He goes on to argue that "legal opinions are uniquely well-suited to a memetic analysis for several reasons." One of these is that, as legal opinions, decisions, etc. are often written, there is a written trail, which is not unlike a 'fossil record'. Moreover, as these opinions, etc. tend to be recorded in standardized forms and gathered together, there is an extent to which memetic analysis can be undertaken with convenience and ease; it improves memes' traceability immensely. Fried's ideas, it should be said, were clearly developed within the context of common law legal systems and appears to adopt a more formalistic definition of law than the structural definition here adopted. See: Fried, "The Evolution of Legal Concepts: The Memetic Perspective," 307ff.

[128] On this, see, for example, Timasheff's brief discussion on what he termed similarities in legal systems due to 'similarity of conditions' (in our terms, convergence), as opposed to 'imitation' (in our terms,

and prevalence, potency, and persistency. We can study them in the light of the resemblance principle, and, in the case of legal systems, in the light of the variation and accumulation principles, as well as memetic migration.

4.16 Customary Law

With all of this in mind, we can better understand customary law. Customary laws are simply those fixed associations that tend to be prevalent and potent within a social group (cf. the resemblance principle). These are generally considered to have persisted within that group for an extended period of time, although this might as easily be false as true. Moreover, they are generally not associated with having been given by a particular individual or body; if this is so, it is their perceived long use, rather than their having been given, that is thought to underlie their potency.

Customary and positive law are more alike than generally supposed. Besides differences in their respective rules of recognition and format, there is little to tell them apart. Likewise, mere custom is not greatly different either. Indeed, mere custom might easily become customary or positive law; customary or positive law might become mere custom; customary and positive law might easily become the other. Whether something is mere custom, customary law, or is made into positive law is largely dictated by the importance attached to it. Is it sufficiently important to require the dedication of time, energy, and resources so as to elucidate and enforce it? Mere customs tend not to attract this dedication; customary law, more so; positive law, even more so.

4.17 Positive Law and Legal Positivism

We can now properly understand the *voluntarism fallacy* introduced earlier – the idea of law as an exercise of will.[129] Many laws, which we call customary, exist purely as a result of the vicissitudes of the memetic process – particularly in societies that lack durable media for communication (e.g. writing). In other words, they exist not so much because they were decided upon by some person, but, rather, because, through their various evolutions, they have remained sufficiently and persistently prevalent and potent within

derivation). For Timasheff, it was the phenomenon of convergence, as manifested in the "natural similitude of legal structures," that found expression in "the idea of *jus gentium* by the Romans, and in that of natural law by the philosophers of the seventeenth and eighteenth centuries". This may to a large extent be true, but we cannot except the possibility that some of these similarities were due rather to some process or processes of derivation/diffusion. Nevertheless, it remains an interesting point. See: Timasheff, *An Introduction to the Sociology of Law*, 10–12, quote at 11.

[129] See, *supra*, 3.2.

the memepool. People follow and administer them not because they are command of some sovereign individual, but simply because it is their way of life.[130]

However, the fact that laws can be purposefully created and promulgated is self-evident – these are usually termed legislation, ordinances, etc. In other words, an attempt can be made to dictate or otherwise determine what law-memes are prevalent and potent within the memepool. Whether this is successful will greatly hinge upon the creator-promulgator's connections and influence. If they are recognized within the group as having an activity of creating and promulgating laws, then their attempts are more likely to be successful than if they are not. Likewise, there is an argument that their success also hinges somewhat on whether they can compel compliance and punish non-compliance, although this argument can easily be pursued too far. The fact remains, though, that having recognized generators and managers of the laws can make everybody's lives easier. So long as they do not abuse their position or act ineptly, having a single reference point can make things clearer. Indeed, it can help to systematize the laws, thereby making them more coherent and consistent. As such, whilst law need not be positive, a great deal is nowadays and that with good reason.

Whilst the voluntarism fallacy is partially fallacious, the *inherent goodness fallacy* is wholly fallacious. There is no fixed association that is naturally good or bad; they are merely good or bad *in our estimation*. The recognition of this fact is one of the virtues of legal positivism. The upshot of this is that whether something is a law depends on its *form* and not its *content*.

4.18 Objectivity of Law

It has often been claimed that laws, regardless as to their source, are, or must be, in some sense *objective*: they are "detached from the consciousness of those who ought to comply with them, and have acquired their own autonomous existence".[131] This the Associational Theory of Law cannot maintain.

Certainly, laws might *seem* objective, as if they were absolute facts, because they have been ingrained in us, because they have been given written formulation, or because everybody seems to accept them. However, there are two points to be noted. First, a large

[130] Those in the legal positivist tradition, particularly after the manner of Austin, appear, as Pollock said, to err "by elevating what is at most one characteristic of law into its essence" (Frederick Pollock, "Law and Command," *Law Magazine and Review* 1, no. 3 (1872): 191.) Some laws are purposefully made and promulgated, but not all.

[131] Cf. Santi Romano, *The Legal Order*, trans. Mariano Croce (Routledge, 2017), 8-10 [§7], quote at 8.

measure of intersubjective agreement (i.e. prevalence) – at least, amongst those supposed to be knowledgeable about such things – does not in any way make them 'objective'.[132] It only means that people appear to agree about them and accept them.

Second, it is often forgotten that many laws only seem objective because we tacitly accept certain other premises (e.g. their legitimacy, validity, utility, etc.). In other words, to claim that laws are somehow objective is to appeal to these other premises, *which only produces a positive result if we actually accept them*. In effect, there is always an argument to be made that everybody should accept such-and-such as a law, because they must do so if they accept certain premises.

Further, there is always an argument to be made that everybody should interpret a law in such-and-such a way, because they must do so if they accept either (1) certain meanings for certain words, or (2) that the law 'exists' for a particular purpose or end. But everything is contingent upon acceptance, which means that laws are not ultimately *objective* or '*out-there*', as if they were material things, but mental constructs entirely dependent upon us for their metaphorical life-force. The objectivity of law is a mirage – albeit a convincing one – which dissipates upon close inspection.

4.19 Law and Society

It was said earlier that rules, whilst being a common feature of social groups – and almost certainly in those whose members have frequent interactions with one another – are not central or, indeed, intrinsic to the definition of 'social group'.[133] It is worthwhile revisiting this idea in the context of defining law, as there is sometimes an idea that 'there can be no society without law or law without society'.[134]

When we imagine law, we tend to think of those *shared* (i.e. prevalent, as well as presumably potent) expectations that we have – not only those that we have regarding *others'* patterns of thoughts and behaviours, but also those that we believe others have

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[132] Cf. *supra*, 4.11.

[133] See, *supra*, 2.16.

[134] For example, Romano: "First, it [law] must be traced back to the concept of society. […]. What remains in the purely individual sphere, and fails to overstep the individual's life as such, is not law (*ubi ius ibi societas*). Moreover, there is no society, in the proper sense of the word, unless the legal phenomenon manifests itself within it (*ubi societas ibi ius*)." It is important to note how he goes on to define society, which seems to hint at a metaphysical fallacy: "By society I do not mean a simple relationship between individuals, such as e.g. friendship, where no legal elements are to be found. Rather, society is an entity constituting a concrete unity, though formally and extrinsically – one that is distinguished from the individuals who comprise it. And this has to be an effectively constituted unity. To give another example, a class or group of people that is not organized as such, but is only determined by mere affinities between people themselves, is not society proper." Romano, *The Legal Order*, 12 [§10a].

regarding *our own* patterns of thoughts and behaviour. There is often an idea, therefore, that there can be no purely personal law, which law is set by oneself, for oneself, and is enforced only by oneself; law must come 'from society'.[135] There are a few things to be said about this.

First, nothing can come 'from society', as is apparent from the definition of 'social group' given earlier. Society is not an entity which can produce anything; it is a construct. Therefore, laws, in this respect at least, can only come *from other people*, i.e. *other individuals*.

Second, in order to be worthwhile our knowing and, where appropriate, following or enforcing, laws usually must have some sense, if not of general applicability, then at least of applicability to some set of people. Moreover, some sense that other members of the group – if not all of them – are stakeholders in these laws being observed. Thus, we tend to dismiss self-regarding laws, because they are of little interest to us. If a person decides to follow some strict diet (e.g. by becoming a vegan, vegetarian, etc.), according to which they will only eat certain things at certain times, unless this results in markedly antisocial behaviour, it will probably not greatly concern most people and, as a consequence, they will not think it worthwhile investing time, energy, and resources into enforcing that pattern of behaviour. The point is not so much that personal or self-regarding laws are not laws, but, rather, *they are not laws that concern us* – at least, when they are made by and for others. Insofar and so long as this remains the case, and insofar as we think it within individuals' discretion to create such self-regarding laws, these remain a largely unimportant type of law, simply because they are not *socially* important. Nevertheless, their root and structure remains the same as all other laws; they are merely a different species within the same genus.[136]

Third, to ask whether law is necessary to society is to ask something of a loaded question. The word 'society' naturally evokes images of cohesion, which, in some respect at least, seems to require some measure of mutual coordination and adjustment, i.e. law. If people are to live their lives tolerably well, this would seem to require that other people behave in predictable and recognized ways,[137] which ways often become enmeshed with the idea of the group's identity. Insofar as it goes, there is a measure of sense to this, even if a number of problems remain, e.g. how much law must a society have, according to this

[135] *Ibid.*
[136] Cf. *supra*, 3.16.
[137] Cf. Appendix II.

reasoning, in order to qualify as a society?[138] However, this sense notwithstanding, it does not follow that there is an exclusive relationship between law and society.

Law is important for society, but it can exist without, or, indeed, in spite of, so-called 'society'. This can be seen more clearly when one focuses on the less emotive and evocative term 'social group', as we have done in the last three chapters, rather than 'society'. There is too great an implicit bias inherent in the term 'society' in favour of a cohesive and unitary entity, which bias is liable to mislead. Having shared fixed expectations is important for social life and social life is immensely affected thereby, but social life can continue without those fixed expectations (even if not terribly successfully) and those fixed expectations, whilst being to a certain extent moulded by social life, do not necessarily derive from it. In sum, law and society are connected, but not inextricably.

4.20 Summation of the Associational Theory of Law (II)

Laws are psychological phenomena. They are patterns of thought, which can be *expressed* – through our actions, speech, etc. – and thereby *assimilated* by others who are either directly or indirectly *exposed* to them. Accordingly, they can be considered as *memes* and *memeplexes*. As such, successful laws are those that are *prevalent*, *potent*, and *persistent* within certain groups. On a basic level, this means that each instantiation of law-memes needs to last long enough to maximise its chances of being copied (*longevity*) a sufficiently large number of times (*fecundity*), and for each copy to remain as faithful as possible to the original (*fidelity*). There are certain strategies that can be adopted to increase copying-fidelity, including (a) *repetition* and (b) *externalisation*, i.e. the creation of *anchor points*, such as reduction to writing. Indeed, because the written word can be reproduced accurately, inexpensively, and abundantly, it is a particularly powerful tool in encouraging *prevalence*, if not also *potency*.[139]

Memetic similarity is a product either of *derivation* or *convergence*. For legal and constitutional historians, as well as for comparative lawyers, it is important to distinguish instances of derivation (e.g. transplantations, etc.) from instances of convergence. It is only in this way that we can properly understand how they came about. Indeed, where derivation is involved, it is further necessary to investigate whether any changes or

[138] Cf. the problems with cohesion models of social groups, discussed *supra* at 2.10.

[139] The written word is, of course, also stable and durable. Moreover, its *form*, if not its *meaning*, is practically incontrovertible; if its meaning is clear, it is very difficult to gainsay. It is perhaps for this reason that Euripides, through the mouth of Theseus, wrote: "With written laws, the humblest in the state, / Is sure of equal justice with the great". Quoted in: Alfred Eckhard Zimmern, *The Greek Commonwealth: Politics and Economics in Fifth-Century Athens* (Oxford University Press, 1911), 126.

developments that occurred were a result of some continuing connection between the two 'lineages' or whether similar forces pushed them to develop in a *parallel* manner. This helps us to ask the right questions; to better understand why things happened as they did.

Individuals are inordinately influenced by those regularly around them; it is to these individuals and their memes that we are most frequently exposed. As such, I have suggested the *resemblance principle*: individuals are likely to hold memes similar to those with whom they regularly associate. In terms of laws, therefore, we are likely to share the same fixed associations as those around us. Indeed, this resemblance will be increased where it is accompanied by certain fixed associations concerning group membership, i.e. where people make an effort to *educate* those within the same social group as to the fixed associations held by that group. This, as it has been said, is the basis of *customary law*.

There is a propensity towards *systematization*, i.e. the development of certain fixed associations as to, in particular: (1) what is and is not included in the system, which are normally in the form of *categorical associations* and which we might call by Hart's appellation of **rules of recognition**; (2) where those elements included in the system stand in relation to one another in terms of *order* and *priority*, for which we suggested the name **rules of ordering**;[140] (3) how the system might be altered by additions, subtractions, or modifications, which are usually in the form of *sequential associations* and can be called by Hart's name of **rules of change**; and (4)(a) who decides what is within the system and its precise content and (b) who makes determinations in individual cases, which can collectively be called **rules of decision**.[141] These fixed associations exert considerable influence on both selection and potency; they determine which associations we should regard or disregard, and which associations we should look to express and follow.[142] It is

[140] We have also called these *rules of arrangement and priority* (*supra* 3.14).
[141] For Hart's discussion of his three types of rule (rules of recognition, change, and adjudication), see: HLA Hart, *The Concept of Law*, ed. Penelope A Bulloch and Joseph Raz, 2nd ed. (Oxford University Press, 1994), 94–97.
[142] Cf. Almeida: "New social norms, however, are evaluated in light of past norms; only those compatible with previous normative standards are maintained, in such a way that, in proper time, the *cultural accumulation of social norms* produces a matrix of interwoven rules that becomes the background normative assumption for the collective selection of novel social norms. The resulting process is a sophisticated system of interlaced social rules in which one rule presupposes a set of other social norms – but not only *legal* social norms specifically, since there is scarce functional differentiation and, as such, other kinds of norms and values become interwoven in the same cultural memeplex. This is the heart of customary law." Almeida, "Constitution: The Evolution of a Societal Structure (PhD Thesis)," 251.

these that produce the formal basis of a legal system,[143] which might equally be a customary system as one based firmly in the idea of positive law.[144]

Besides the fact that we *naturally develop* fixed associations, we *like* having them. They make the world easier to understand and navigate. It is this that underpins our desire for the so-called *rule of law*.[145] For this to happen on any scale, it is necessary for groups to have fixed associations in common; fixed associations that are prevalent, potent, and relatively persistent within that group. It is towards these ideas that formal theories of the rule of law have been driving. However, as laws are defined by their structure and not by their utility, value, appeal, etc., it is impossible to accept substantive theories of the rule of law.

[143] Holdsworth wrote that "The historian of any legal system must begin his tale in the days before the law courts have made much law. Legal history therefore must always begin with the history of the courts." In the light of the Associational Theory of Law, this can be seen to be not entirely true. In terms of creating a system and giving it coherence, there can be little doubt that places of adjudication and law declaration (i.e. courts, loosely interpreted) are important. Moreover, as Holdsworth recognized, by studying the various sets and types of court, one can appreciate how legal systems are arranged and how various systems and sub-systems interact; one can better appreciate the systems of jurisdiction. For example, to recognize that in England there have been courts of Common Law, Ecclesiastical Law, Admiralty, Equity, etc. is to recognize that, in the very least, the English legal system has been multifaceted. Nevertheless, that we must, as of necessity, begin with the courts is to go too far, especially as it rather assumes that the functions of adjudication and law declaration will be performed by discrete, identifiable, specialized, and institutionalized bodies within social groups. Furthermore, it assumes that the legal system is of ancient provenance and is without an easily identifiable foundation; Holdsworth is clearly very much thinking of England and the Common Law. Consequently, rather than necessarily beginning with the courts, the legal historian ought to begin by identifying social groups with shared associations and expectations, and any things that might make those a system (i.e. rules of recognition, etc.). The system(s) of courts might be a part of this, particularly in respect of rules of decision; they are not an unavoidable beginning. For Holdsworth, see: William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 1 (Little, Brown, and Company, 1922), 1–2, quote at 1.

[144] Kelsen argued that a universal characteristic of legal systems is that they are 'coercive orders'; they specify punishments for behaviours "regarded as undesirable because detrimental to society". Further down, he speaks of laws providing 'collective security', the aim of which is peace; this is presumably achieved through the coercive aspects of the legal system. It is this coercive nature that distinguishes laws from morals, according to Kelsen. Most social groups expect there to be consequences for deviant and undesirable behaviours – especially if such behaviours are considered dangerous or vexing. Often, these consequences are specified in advance. However, a system would be no less a system without this sort of content. It provides incentive to follow the system and thereby helps to make it efficacious, but it is not strictly necessary. Another characteristic identified by Kelsen was that "all social orders designated by the word 'law'" are "orders of human behaviour"; this is broadly correct, insofar as they are human laws, as opposed to physical laws. Another argument made by Kelsen is that laws cannot exist in isolation: "a particular norm may be regarded as a legal norm only as part of such a system [of norms". We cannot wholly agree with this, in the sense that laws are defined by their structure, rather than by their existence as part of some system. Nevertheless, from a juristic standpoint, it makes sense only to recognize as 'legal norms' those that are identified as being a part of the system. For Kelsen's discussion of these points, see: Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (University of California Press, 1967), 33–34, 37, 47, 50–51, 54, 62.

[145] For this and the arguments immediately following, see Appendix I.

Laws exist properly in the mind and only in the mind. They might be written, codified, etc., but such externalization *only has as much value as we attribute thereto*.[146] Indeed, we must be initiated and instructed in the meanings and grammar of the symbols deployed. Cuneiform, hieroglyphics, and other scripts and systems of symbolic representation might appear attractive to the eye, but, unless they have been explained to us, they are all but meaningless. In short: If we attribute no value to the external forms, there are but dead letters. If we are uninitiated, there are but hollow glyphs. They have no power but that which we imagine them to have. The life of the law is in the mind.

Besides *understanding* the external forms, we also need to treat them with *positive regard* if they are to be effective. Naturally, this arises from other fixed associations – often as a result of having been taught to regard them positively or because they appeal to us. However, even if some written law is treated with consistent positive regard, there is no guarantee that its *meaning* or *interpretation* will remain constant – after all, each individual and each generation will bring with them their own interpretative baggage, as it were, which will affect how they view (or *want* to view) the externalized association.[147]

As we have seen, due to the effects of the evolutionary forces of *variation* and *selection*, sets of laws (i.e. fixed associations) are almost certain to change; they are *dynamic*. *Repetition* and *externalization* can to some degree slow these down, as can *maintenance forces*. Nevertheless, due to *time, chance, environmental changes, competition*, *inclinations*, *etc.*, change is practically inevitable (the *variation principle*) and these changes will likely be compounded over time (the *accumulation principle*). Furthermore, according to the *divergence principle*, if legal systems divide, it is highly likely that each child-system will develop its own idiosyncrasies,[148] although *mimetic migration*, *parallel*

[146] Often, the value that we attribute to fixed associations is determined, as Duguit identified, by a perception of the 'social necessity' of conformity thereto. Indeed, thought Duguit, there can be no 'jural principle' (*une règle de droit*) *unless* a fixed association "has so deeply penetrated the conscience of those composing the social group in question that its violation…entails such a profound group reaction that the principle can be socially organized". It is what people believe that matters. As such, "A rule which is at first simply a moral rule can become in time a rule of law, and the change is accomplished when the social reaction produced by the violation of this rule has become energetic enough- and definite enough to receive from custom or from the written law a concreteness more or less complete". Léon Duguit, "The Law and the State," *Harvard Law Review* 31 (1917): 4.

[147] Cf. Drout's argument that: "[E]ven completely textual traditions do change over time because even a fixed text requires interpretation. We need not be orthodox post-modernists and believe in free-floating meaning to recognize that as languages and cultures change, so do meanings recorded in texts. Even if the denotations of words remain the same from generation to generation (which is highly unlikely), the cultural connotations [can vary] from person to person in the same generation. Thus even the most textually bound tradition has some room to adapt and change to fit its current environment." Indeed, "[s]ome freedom of interpretation seems necessary if a tradition is to survive at all"; memes and memeplexes impervious to change might easily find themselves outmoded and unfit. See: Drout, *How Tradition Works*, 32.

[148] The English and American legal systems provide good demonstration of this.

evolution, or *convergence* might produce similarities. All of these facts – particularly the inevitability of change – underlie the Generational Theory of Law, outlined in the next chapter.

All societies have some form of laws,[149] i.e. shared fixed associations.[150] These define acceptable modes of thought and behaviour, as well as, more generally, the courses that thought and behaviour take and ought to take. We can profitably quote Pollock and Maitland:

> "Common knowledge assures us that in every tolerably settled community there are rules by which men are expected to order their conduct. Some of these rules are not expressed in any authentic form, nor declared with authority by any person or body distinct from the community at large, nor enforced by any power constituted for that purpose. Others are declared by some person or body having permanently, or for the time being, public authority for that purpose, and, when so declared, are conceived as binding the members of the community in a special manner."[151]

Moreover:

> "[T]he notion of law does not include of necessity the existence of a distinct profession of lawyers, whether as judges or as advocates. There can-not well be a science of law without such a profession; but justice can be administered according to settled rules by persons taken from the

[149] Cf. Moore: "No society is without law; *ergo*, there is no society outside the purview of the 'legal anthropologist'." And Luhmann whose sentiment, if not his precise formulation, we can agree with: "We are not returning to the popular thesis that there have been societies without law either in the history of mankind or even in the crosscultural comparisons of the present (namely, those which do not have a coercive state apparatus). Rather, our functional concept of law makes it clear that law fulfils a necessary function in every meaningfully constituted society and must therefore always exist." Shapiro was almost certainly incorrect when he stated that: "Anthropologists now believe that humans mostly lived without law for the vast majority of their time on earth" and "it is plausible to suppose that law is a comparatively recent invention, postdating the wheel, language, agriculture, art, and religion." Sally Falk Moore, *Law as Process: An Anthropological Approach* (Routledge & Kegan Paul Ltd., 1978), 215; Niklas Luhmann, *A Sociological Theory of Law*, ed. Martin Albrow, trans. Elizabeth King and Martin Albrow (Routledge & Kegan Paul, 1985), 83; Scott J Shapiro, *Legality* (Harvard University Press, 2011), 35, 36; cf. Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press, 2017), 84ff, 89ff.

[150] Indeed, Timascheff went so far as to say that "the triumph of law [over other forces, e.g. 'divergent individual wills'], i.e. the conformity of human behaviour to legal precepts, is not a postulate, not a desire of well-intentioned individuals, but a fact of social life." For Timascheff, such law "produces similarity or uniformity in the behaviour of individuals within a social group", although, as he said a couple of pages previously to these two sentences already quoted, "[t]he conformity of social life to law is, however, only a tendency, not a complete actuality". Timasheff, *An Introduction to the Sociology of Law*, 6, 4.

[151] Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, ed. SFC Milsom, 2nd ed., vol. 1 (Cambridge University Press, 1968), xciii–xciv.

> general body of citizens for the occasion, or in a small community even by the whole body of qualified citizens…"[152]

Indeed, it would be surprising for any society to be devoid of law:

> "There are always points of accepted faith which even the strongest of despots dares not offend, points of custom he dares not disregard."[153]

Most everything we think and do is informed and hedged about by laws – by fixed associations. Laws, much like constitutions, are all-pervasive.[154]

4.21 Divisions of Law

Laws might be divided in a number of ways, many of which we have already noticed. We might divide them according to **structure** – whether they are *qualitative, equivalence*, etc. We might divide them according to **source**, e.g. whether they are *customary, positive, statute, judge-made*, etc. We might divide them according to **nature**, whether they are, in the first place, *substantive or procedural* and, if substantive, then of what kind – *criminal, property, tort*, etc. However, one of the greatest divisions of law is into **public** and **private**. Public law is generally said to regulate the composition, structure, and administration of the social group, and the relationship between individuals and that social group; private law, on the other hand, regulates the relationships and interactions between those individuals.

Now, if we were to adopt the view of the legal realists and say that laws are "prophecies of what the courts will do in fact",[155] then this leaves us with something of a problem when it comes to public law. Much 'public law' appears to lie beyond, or in the very least lack, "judicial enforcement",[156] even if parts of it have some measure of judicial recognition. From the legal realist perspective, the implication would seem to be that much 'public law' is not, in fact and *stricto sensu*, law. However, whilst the courts are usually the principal interpreters and enforcers of the law, and whilst, in many respects, the only true rights possessed by persons are those that the courts are able and willing to enforce, it does not seem wholly wise to restrict the definition of law solely to bounds drawn by the (current) competencies of the courts. For there are fixed expectations that

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[152] Pollock and Maitland, *History of English Law*, 1:xcvii.
[153] Pollock and Maitland, *History of English Law*, 1:xcvii–xcviii.
[154] Much as Steven Vago in his *Law and Society* (1988): "Law permeates all realms of social behaviour. Its pervasiveness and social significance are felt in all walks of life". Quoted in: Roger Cotterrell, *The Sociology of Law: An Introduction*, 2nd ed. (Butterworths, 1992), 2.
[155] Oliver Wendell Holmes, "The Path of Law," *Harvard Law Review* 10, no. 8 (1897): 461.
[156] Romano, *The Legal Order*, 4.

exist beyond these bounds, which determine and delimit the actions that might be taken by people as representatives of certain offices, institutions, etc., or even as private individuals. These are every bit deserving of the name of 'law', even if the litigant or lawyer might not achieve much in regard to them within the courts systems.

Some divisions of law are more scientific, logical, and absolute, whilst others rather turn upon opinion and convenience. The division between public and private law veers towards the latter. This is in no small part due to the ubiquity and reach of public law – practically everything we do has a social context and, for that reason, the composition and structure of social groups, and our relationship to them, will always be somehow relevant. Nevertheless, it is argued, by combining the Theory of Constitutional Ubiquity and the Associational Theory of Law, we can come to a better understanding of public law, of constitutional laws.

4.22 The Ubiquity and Associational Theories

Constitutions have been defined as the distribution of activities and social influence within social groups. It should be obvious that we have many fixed associations relating to these things: who is included within the group; what sorts of activities should be undertaken, when, how, and by whom; what sorts of social influence are acceptable, when, in what manner, and by whom; etc. The majority of these we learn from, and share with, those around us; they are gained through *social learning*. In short, we have common fixed associations pertaining to the nature, attendant conditions, agency, qualifications, and purpose of activities and social influence, and the distribution thereof, as well as fixed associations pertaining to the nature of the social group. These are, in their most basic sense, constitutional laws.[157]

One might call these fundamental laws or public law. The difference is academic; they concern the same thing. Moreover, they are not inherently different to other kinds of law – in particular, so-called 'ordinary law'. There is often a sense that public law *must* somehow be different or special,[158] but it is only so different or special as we think it to be. We *can* distinguish public law from so-called ordinary law, but there is nothing to say

[157] It is the idea, then, of *distribution* that provides the foundation of public law, rather than, for example, as Loughlin had it, *representation*, although one can see how easy it is to move from one to the other. For Loughlin, see: Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), chap. 4.

[158] This would seem to be Loughlin's main agenda in his *Idea of Public Law* and *Foundations of Public law* – to show that public law is, and must be, an 'autonomous discipline' and that it is, and must be, different from ordinary (i.e. Common Law); to equate public and ordinary law might result in 'judicial supremacism'. See: Loughlin, *The Idea of Public Law*, esp. 1; Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), esp. 6.

that this must *necessarily* be the case. It depends on a willingness to create categorical associations separating them; associating constitutional laws with certain features and 'ordinary' laws with certain other features. Nothing prevents us from putting them in the same category – from thinking of them as being created, administered, and altered in the same ways. Whether this would be wise is another matter. Indeed, as sensible as it is to separate constitutional laws from other laws, to think of constitutional laws or public law as being *essentially* different is to misunderstand the nature of constitutions and laws.

Constitutional laws can be observed also among non-human animals – particularly those species displaying more complex forms of social interaction and organization, e.g. gregarious mammalian species like painted wolves, chimpanzees, and bonobos. It is arguably among such species – whose social lives are 'based on individual recognition, long-term association, a high degree of mutual cooperation',[159] and interdependence – that the need for fixed associations concerning the distribution of activities and influence is greatest; they shape and regulate individuals' actions and interactions; they make social life possible. Such animals clearly discriminate non-randomly between in-group and out-group members; display ideas about social position and status, especially in terms of dominance hierarchies;[160] show awareness that different animals *do*, or *can do*, different things (e.g. leading,[161] mating, child-rearing, etc.); and even appear to follow collective decision-making processes.[162] The precise mechanisms by which such laws arise is a question for another occasion, but it will almost certainly be due to some mixture of genetic, ecological, and social factors.[163]

As constitutions vary in complexity, so do constitutional laws. This is to be expected, given that they might relate to larger social groups with a greater diversity of activities and more nuanced levels of influence, etc. Indeed, as compared with other social animals, humans certainly have greater scope for imagination and communication (via symbolic

[159] Thelma Rowell, *Social Behaviour of Monkeys* (Penguin Books Ltd, 1972), 23.
[160] In particular, the 'superior' positions of alpha male and/or alpha female, which positions often carry both privilege and responsibility.
[161] On this, see esp.: Kummer, *Primate Societies*, 61–68.
[162] It would seem that painted wolves – also known as African wild dogs – have a system by which they decide whether or not to hunt. Whilst this is not yet fully understood, the animals clearly seem to have some sense that hunting takes place only after some condition precedent – in this case, some sufficient demonstration of a desire to hunt by a number of individuals. It would seem that, if the motion to hunt is initiated or supported by dominant individuals, the threshold for sufficiency is reduced; if they are more reticent or unwilling, the motion still might be carried, but the threshold will be higher. On this, see: Reena H Walker et al., "Sneeze to Leave: African Wild Dogs (Lycaon Pictus) Use Variable Quorum Thresholds Facilitated by Sneezes in Collective Decisions," *Proc. R. Soc. B*, 2017, 284: 20170347. On this animals more generally, see: Scott Creel and Nancy Marusha Creel, *The African Wild Dog: Behavior, Ecology, and Conservation* (Princeton University Press, 2002).
[163] Cf. Kummer, *Primate Societies*, esp. chap. 1.

language), meaning that the associations made can be on quite a different order of magnitude. Moreover, humans are more adept at systemizing and thinking critically about what associations should be considered valid and sound. Nevertheless, even though constitutional laws vary considerably depending upon the context, their core remains the same: they are fixed associations concerning constitutional matters, i.e. the distribution of activities and social influence within a social group.

As was earlier argued, it is unlikely that any given individual will be familiar with the totality of the constitution of their group – especially if theirs is a large group. One of the primary reasons for this is the existence of 'differential lines of transmission', much as Linton identified (e.g. only within families or as between members of the same sex).[164] These are reinforced by the fact that not everybody in the group will necessarily interact with one another or, even if they do, there is no necessity that the particular constitutional ideas or behaviours will be expressed when they do. Even if they interact and these things are expressed, it does not follow that they will be perfectly understood or remembered, or that which has been experienced is representative of what others do.[165] It is for these reasons, as previously argued, that an outsider – with the appropriate evidence – might be able to describe a group's constitution better than a given member of that group,[166] especially if they have access to parts of the group to which even some of its members are excluded.

4.23 Constitutional and Legal Pluralism

We have distanced ourselves from the pluralism of the early twentieth century,[167] and we can also distance ourselves from the pluralism of more recent decades,[168] but there is

[164] "The incomplete participation of all individuals in the culture of their societies is reflected in the presence within all societies of differential lines for the transmission of various culture elements. These lines correspond not only to the membership of the social units which carry particular sub-cultures but also to the various socially established categories of individuals within each of the functional social units." Linton, *The Study of Man*, 277.

[165] On this latter point, there is a revealing story from Linton. He had been investigating buckskin making amongst the Comanche. At first, Linton was taught one method – the method which his 'teacher' knew. However, on further investigation, he discovered through his 'informants' that there were (at least) three methods: "Some women were familiar with all three, some with two and some with only one". To have asked the question "How do the Comanche make buckskin?" to any of these three groups of women would probably have returned a different answer, in part because of their ignorance of the other methods and in part because they probably favoured their own above the others. This is much a story of caution about how an outsider should go about describing the constitution of a group as it is about how much stock we ought to invest in any given member's knowledge of their group. For the story, see: Linton, *The Study of Man*, 279.

[166] See *supra*, 2.1 and 2.22.

[167] *Supra*, 2.6.

[168] See esp. John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism* 24 (1986): 1–55. Further, e.g.: Leopold Pospisil, *Anthropology of Law: A Comparative Perspective* (Harper & Row, 1971); Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law,"

clearly a strong sense in which the present theories are pluralistic: There is not one constitution and one legal system, but many; indeed, they are not only many, but also various. An individual, being a member of many groups, will recognize many constitutions; they might also recognize many sources of law, which will vary in relevance and force depending upon who that individual is, where they are and what is happening, what they are doing, and in what capacity or persona they are doing it.[169] It is important to recognize that none of these constitutions, legal systems, etc. are *necessarily* prior or superior to, or reliant upon, any of the others, though we might construct them to be so.

Furthermore, constitutions and legal systems are not necessarily coterminous. Any given social group might have more than one legal system; furthermore, its members might recognize fixed expectations from elsewhere, even to the point that it could be said that the group shares legal systems with other groups.[170] If a group has multiple legal systems in operation, these might work relatively harmoniously or unharmoniously, though the latter is probable to have deleterious effects if it is significant in degree. Naturally, if we are to have clear guidance as to how we should think and behave, it is better for any such legal systems to be clearly limited to certain domains or to align with one another; failing that, for there to be clear rules of ordering,[171] such that the various systems are themselves to some degree systematized.

The theories presented here are not anti-statist, but they are equally not state-centric. Whilst they do not rule out the creation of systems based on the tenets of 'legal

Journal of Law and Society 14, no. 3 (1987): 279–302; Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869–96; Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13 (1991): 1443–62; Gunther Teubner, "'Global Bukowina': Legal Pluralism in the World Society," in *Global Law Without a State*, ed. Gunther Teubner (Dartmouth, 1997), 3–28; Roderick A Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism," *Arizona Journal of International and Comparative Law* 15, no. 1 (1998): 69–92. These tend to see 'law' as a form of 'social control' and has a focus on 'social facts'. This is in contrast to the current approach, which sees 'law' as a psychological and structural phenomenon; it begins, not with society, but with the individual. Thus, even though some of the conclusions are similar, the basis is different. Cf. Brian Z Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 192–217; Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27, no. 2 (2000): 296–321; Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30, no. July (2007): 375–411; Brian Z Tamanaha, "The Promise and Conundrums of Pluralist Jurisprudence," *The Modern Law Review* 82, no. 1 (2019): 159–79.

[169] Cf. "A descriptive theory of legal pluralism deals with the fact that within any given [social] field, law of various provenance may be operative. It is when in a social field more than one source of 'law', more than one 'legal order', is observable, that the social order of that field can be said to exhibit legal pluralism." Griffiths, "What Is Legal Pluralism?," 38.

[170] If so, these groups sharing a legal system will probably form a supergroup.

[171] Cf. *supra*, 3.15 and 4.20.

centralism',[172] they argue that this is not necessarily the natural order of things – most certainly not in any absolutist sense. Thus, State recognition, incorporation, or validation *might* be required in order for social groups, laws, or legal systems to have an *official* and *sanctioned* existence. The State *might* be considered to be first in terms of *priority* and *superiority*.[173] Indeed, there *might* be good reasons for ordering things in this way, viz. having a central, superior authority to solve coordination problems. However, unless the 'State' can assert absolute hegemony over people's minds, there will always be room for other – perhaps even competing – arrangements,[174] particularly in remoter areas where the State has few advocates and representatives, and where 'local' systems have greater effect and appeal.

One final thing to say about the State is that it is important not to commit an ontological fallacy. *To assert that something is so does not make it so* – unless, that is, in the case of constructs, some number of people can be brought to believe it. Thus, even though many things *might* seem to flow logically from the characteristics that we bestow upon the State, *to bestow characteristics upon an idea is not to make that an idea into a reality*;[175] at best,

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[172] "According to what I shall call the ideology of *legal centralism*, law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state." Griffiths, "What Is Legal Pluralism?," 3.

[173] On this and the previous point, cf. Griffiths, "What Is Legal Pluralism?," 12.

[174] Teubner noted the interesting example of Mafia 'tax laws', which are imposed for the provision of 'protection' and the transgression of which would almost certainly result in some negative consequence(s). This system of law – based largely on the principle of *pay or else* – will probably be in stark contrast to the municipal and state laws. The Mafia might be more or less successful in resisting these other sources of law, but the fact that the Mafia's actions will give rise to certain fixed associations and expectations of behaviour cannot be gainsaid; for those with the Mafia's power, these constitute a legal reality – break the Mafia's laws at your peril. Another example is provided by the Islamic Sharia Council (ISC), which is a British organization founded in 1982. Its aim is to apply the principles of Islamic law, at least primarily, to family issues – most especially those relating to marriage, divorce, and inheritance. Ostensibly, this is supposed to complement the UK legal system, though it has proved controversial. The ISC is but one of a number of Sharia Councils. A further interesting example is provided by the *nari adalats*, or women's courts, which 'emerged in India in the mid-1990s to promote women's rights'. In particular, in cases of domestic violence, harassment, divorce, maintenance, property, and child custody. Whilst these have no 'legal authority' (i.e. state-sanctioned remedies), but rather rely largely on 'pressure and shaming', these to a considerable extent provide a complementary legal system to that provided by the State. For Teuber: Teubner, "The Two Faces of Janus," 1451. On Sharia Councils and Sharia law in Britain, see e.g.: Shaheen Sardar Ali, "Authority and Authenticity: Sharia Councils, Muslim Women's Rights, and the English Courts," *Child and Family Law Quarterly* 25 (2013): 113–37; Sebastian Poulter, "The Claim to a Separate Islamic System of Personal Law for British Muslims," in *Islamic Family Law*, ed. Chibli Mallat and Jane Frances Connors (Graham & Trotman, 1990), 147–66; Ihsan Yilmaz, "The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England," *Journal of Ethnic and Migration Studies* 28, no. 2 (2002): 343–54. And on the relationship between religious and State law more generally, see, e.g.: Abdullahi Ahmed An-Nacim, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law," *The Modern Law Review* 73, no. 1 (2010): 1–29. On the *nari adalats*, see: Sally Engle Merry, "Transnational Human Rights and Local: Mapping the Middle," *American Anthropologist* 108, no. 1 (2006): 46–48.

[175] A classic example of an ontological argument is that put forward by Descartes in his *Meditations* in favour of the existence of God. God, it was argued, is a perfect being and, therefore, must exist, because

it sets forth an aspiration. Therefore, simply to assert that the State has absolute sovereignty does not make either the State itself or this supposed quality of absolute sovereignty into a reality, though it certainly might set out a political agenda.

A point to be stressed, once again, is that constitutions, laws, and legal systems are all constructs. They are not 'real' things possessed of concrete and independent existences. They are only what we think them to be. The more people who conceive of them, and conceive of them in particular ways, the more those ideas will seem to be meaningful, because everybody will be acting as if they were. This does not mean that they are an elaborate hoax. They are merely ways in which we construct our personal and social reality based on the premise that we might obtain some advantage or profit thereby, especially through their helping to facilitate more complex systems of cooperation (even if the benefits are not realized in every case).[176]

4.24 *Taxis* and *Cosmos*

How do these constitutions, laws, legal systems, which seem to have some reality for those who live by them, come about? To answer this question, we can turn to the distinction that Hayek drew between *taxis* and *cosmos*.[177]

Both *taxis* and *cosmos* are types of order, which can be defined as an arrangement displaying certain patterns and regularities.[178] *Taxis* is a 'made order',[179] i.e. an order that has been consciously and deliberately designed and implemented. By contrast, *cosmos* is a 'spontaneous order',[180] i.e. an order that arises, not according to some grand design, but through the interaction and mutual adjustment of many parts moving, albeit

non-existence would be a sign of imperfection. This is generally considered to be one of his weaker arguments as to the existence and nature of God. See: René Descartes, *A Discourse on Method, Medications on the First Philosophy, and Principles of Philosophy*, trans. John Veitch (Everyman, 1994), 112ff [Med. V].

[176] For example, there have been many examples in history of people creating constitutional and legal constructs that are to their own advantage, though to the disadvantage of others. Slavery is one example of this, though it perhaps ought to be admitted that the *conditions* of slavery were perhaps the key determinant as to its advantage/disadvantage to the slave. After all, well-kept slaves, who were well-fed and well-treated, probably found that slavery, at least in some degree, suited them. In many respects, they were cared for by their owners and enjoyed some measure of security. This is by no means to defend or advocate slavery. In many, if not the majority of, cases, slavery was maintained to the distinct advantage of the owner and the distinct disadvantage of the slave.

[177] Hayek, *Law, Legislation, and Liberty*, chap. 2.

[178] Cf. Hayek's definition: "By 'order' we shall throughout describe *a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form concrete expectations concerning the rest, or at least expectations which have a good chance of proving correct*." Hayek, *Law, Legislation, and Liberty*, 35.

[179] Hayek, *Law, Legislation, and Liberty*, 36.

[180] Hayek also describes this as a 'grown order', but this perhaps contains a metaphor wont to mislead. Hayek, *Law, Legislation, and Liberty*, 36.

unconsciously, towards some equilibrium or other. Where these parts are sentient social agents, there will, of course, be many actions that are entirely conscious and deliberate, and aimed towards particular ends. However, the order resulting from all of these actions, which actions will often be moving in various and opposite directions, will not be one that was particularly intended or imagined by any given individual. As such, it will be, in Ferguson's words "the result of human action, but not the execution of any human design".[181]

Constitutions and legal systems might be made or spontaneous orders. The distribution of activities and influence might have been consciously and deliberately planned and determined; it might have come about simply through individual agents interacting, and adjusting to one another and the environment over time. Similarly, a legal system (i.e. a set of systematized laws) might be consciously and deliberately created; it might just be that certain associations and expectations have developed over time amongst a population, which things have developed a measure of prevalence, potency, persistency, and systematisation (we can think here especially of customary law).

The second point to note is that made orders, in practice, tend to have their ultimate form determined by the spontaneous order that develops around, and perhaps in spite of, them. Thus, even the most brilliantly conceived plans might find themselves radically altered as soon as they are let loose into the world – where they have to contend with various (and often competing) interests, desires, ideologies, environments, etc. The only guards against this are mechanisms that encourage, if not enforce, prevalence, potency, and persistency regarding the tenets of the made order.

The third is that made and spontaneous orders can coexist side-by-side, which is to say that constitutions and legal systems might have some elements that have been consciously designed and other elements that have not been. Removing the spontaneous element entirely, as per the previous point, seems difficult if not impossible, which means that there is something of a balance to be struck: To what extent, and in what ways, can a made order tolerate spontaneous order, particularly where that spontaneous order tends towards things anathema to that made order (or, more accurately, to those who designed and support it)? The answer to this must be left to political philosophy.

[181] "Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, *which are indeed the result of human action, but not the execution of any human design*." Adam Ferguson, *An Essay on the History of Civil Society*, ed. Duncan Forbes (Edinburgh University Press, 1966), 122 [3.2](emph. added).

Both made and spontaneous orders can be complex, though the latter tends rather more towards complexity. Indeed, the complexity of spontaneous orders can be vast. After all, "[i]ts degree of complexity is not limited to what a human mind can master".[182] Within this complexity, there might be many conflicting and contradictory elements, which can be tolerated within the order insofar as they do not pull the order apart. However, we must be careful not to attach value judgements here: such conflicting and contradictory elements might cause the order to change or cause it to splinter into different orders, but this change or splintering is neither necessarily good nor bad in and of itself.

With the notion of spontaneous order, we can dispense with socio-political arguments by design, i.e. arguments that posit that there *must*, as of necessity, be an ultimate and original creator or creative power; that there *must* be sharply delineated constituent and constituted powers. There need not be any original social contract or founder, and we have no need to posit one. Social groups, constitutions, and legal systems can arise without there being behind them any discernible monolithic creative impulse or force emanating from some person or group. They can arise through many chance occurrences, through manifold decisions and actions taken by individuals, essentially independently and with limited horizons.

The closest that we might come to positing some creative power is to say that, because social groups, etc. are all constructs, and therefore reliant upon our believing in them, *it is those who believe in them that are their true constituent power*. Of course, where there is a disparity between *those who (want to) believe* and *those who do not* (particularly where this results in a non-consensual imposition of certain structures, laws, etc. by those who do on those who do not), this can become a hotly contested issue. In such cases, there might be no easy solution. It is better that the difference be settled by discussion and force of reason; by compromise and agreement. However, there can be little gainsaying that, historically at least, it has often been settled by coercion and force of arms.

4.25 Material and Formal Constitutions

Finally, we can turn to the ideas underlying so-called political/material and legal/formal constitutions.

[182] Indeed, Hayek went further: "Since a spontaneous order results from the individual elements adapting themselves to circumstances which directly affect only some of them, and which in their totality need not be known to anyone, *it may extend to circumstances so complex that no mind can comprehend them all*." Hayek, *Law, Legislation, and Liberty*, 37, 39 [emph. added].

Politics has to do with *action* and *decision*, and, in particular, with *collective* action and decision-making. Within this, it particularly focuses on how these things are informed by individuals' *desires* and *interests*. These certainly produce *potentiality for conflict*, the *resolution* of which and the *manner of that resolution* is an important part of politics. Furthermore, politics has to do with the *balance of influence*, i.e. the ability of individuals to direct action and decision both in regard to themselves and others.[183] It would be wrong to say that interests and desires alone inform action and decision. Fixed associations are just as important, if not more so. They not only help to mould action and decision, but also define the limits thereof; they determine what is to be considered possible.[184] It is this mixture of action and decision, desires and interests, balance of influence, and fixed associations that makes up the **political** or **material constitution**. In many, if not all, respects, the material constitution is a spontaneous order.

This can be contrasted with the **legal** or **formal constitution**, which is much narrower and moves much more in the direction of a made order: it is confined to that specific set of fixed associations that has been systematized in some way.[185] In some cases, this formal constitution might even recognize parts of the material constitution – especially if custom is recognized. However, the formal constitution will always be subservient to the material constitution;[186] it exists only insofar as the material constitution allows it to exist.[187] If nobody were to pay any attention to it, it would – for a time at least – disappear.

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[183] Schmitt's idea that politics is based in a friend-enemy distinction is only a part of the story. Of course, politics is partly predicated on who we like and dislike, and who we think to be in-group and out-group members. However, these things themselves are predicated on our interests and desires. What Schmitt was perhaps driving at was the fact that these interests and desires create a *potentiality for conflict*, which might cause us to distinguish between friends and enemies. Nevertheless, the friend-enemy distinction is far too simplistic and lacks explanatory power. For Schmitt, see: Carl Schmitt, *The Concept of the Political: Expanded Edition*, trans. George Schwab (The University of Chicago Press, 2007), esp. 26ff, 37ff.

[184] Cf. "Politics – in the grounded sense of the affairs of a polity – could not be conceived of without a constitutive legal setting and framework. Yet on the other hand, constitutional law always presupposed some prior political setting – in the double sense of requiring a pre-existing political context for its mobilisation and sustenance and re-imagining that political context… in its narrative of origins." Neil Walker, "The Idea of Constitutional Pluralism," *Modern Law Review* 65, no. 3 (2002): 340–41.

[185] See 3.14, *supra*.

[186] Indeed, there is justification in questioning, as Gough has, whether people – in times of crisis, emergency, or heightened passions – are "any safer with laws, even with fundamental laws and a written constitution". After all, as Cicero wrote: *silent enim leges inter arma* – in times of war, the law falls silent. There is no reason why people would necessarily be safer with such things; they are only safer if such 'fundamental laws' or 'written constitutional documents' are positively regarded, and if that regard has sufficient prevalence and potency so as to ensure that they are followed. For Gough, see: JW Gough, *Fundamental Law in English Constitutional History* (Oxford University Press, 1955), 212. For Cicero, see: Cicero, *Orationes: Pro Milone; Pro Marcello; Pro Ligario; Pro Rege Deiotaro; Philippicae I–XIV*, ed. Albert Curtis Clark, 2nd ed., vol. 2 (Oxford University Press, 1918), 5 [Mil. 4.11].

[187] Indeed, Hayek has argued that there is a limit to which people are capable of designing and implementing, of constructing, a social order deliberately from first principles – a view which he terms 'constructivist rationalism' – because "[t]he basic source of social order…is not a deliberate decision to adopt certain common rules, but the existence among the people of certain opinions of what is right and

It would also disappear if it were supplanted by another set of systematized laws – by another legal system.

Generally speaking, formal constitutions consist of those things that are enforceable or, at least, cognizable by so-called courts of law. They influence the courts' reasoning and might be subject to some directive decision or sanction given thereby. Moreover, they tend to be written, to some extent codified, and recognized only after some deliberate and solemn process by virtue of which they come within the cognizance of the courts. Contrariwise, material constitutions consist of those things that are generally enforceable rather by so-called 'extra-legal' means, e.g. social sanctions, social pressure, etc. They might still be written, but are less likely to have achieved their written form through deliberate and solemn process.

These things are, however, only true generally speaking. The dividing line between formal and material constitutions is often indistinct, especially in systems that positively regard custom and convention. Moreover, formal constitutions are rarely uniform; some parts will often be more formalized than others. Indeed, some elements will appear none too different to the material constitution; others in stark contrast to it. The salient point, however, is that *the lack of a formal constitution does not mean the lack of a constitution*.

When we study non-human social animals, we study their material constitution: how activities and influence are actually distributed; what fixed associations appear to be prevalent and potent. These we have to deduce as best we can from their behaviours. Thus, submissive behaviours regularly practised by a given animal in the vicinity of another would indicate the latter's dominance. Likewise, if groups are regularly observed following a particular individual from place-to-place, then this indicates that that animal has some leadership role.

Similarly, when we study smaller and less technologically-developed human societies, we are again looking primarily at material constitutions, albeit moving closer to the sorts of formal constitution with which we are familiar, i.e. with clear procedures, specialized officials, etc. However, to deny formal constitutions entirely to such societies would be

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wrong". Indeed, "[s]ince all power rests on pre-existing opinions, and last only so long those opinions prevail, there is no real personal source of this power and no deliberate will which has created it": Hayek, *Law, Legislation, and Liberty*, 375. Without wishing to pursue the metaphor too far, there is some truth in the fact that any would-be framer of a formal constitution has to work with certain materials, which is to say their own pre-existing ideas and the pre-existing ideas of those around them (i.e. the contemporary memepool), not to mention the contemporary political situation. Their designs are likely only to be adopted if and insofar as these are favourable and, even if they are adopted, there is every likelihood that the colour and shape of their implementation will appear very different to their designers' intentions or imaginings.

profoundly wrong. After all, formal constitutions can exist as much by tradition as by being specifically created. Even though it might not have been systematized and rationalized to the extent to which we are accustomed, it would be nonsensical to deprive it of the character of a formal constitution. Indeed, there is an extent to which it is doubtful as to whether any constitution – whether material or formal – could ever be perfectly systematized.[188]

Beneath the hyperbole, and beneath the extravagant and elaborate stories we tell ourselves, there is a singular truth about modern laws and legal systems: they are sets of fixed associations. This fact has not changed because, fundamentally, people have not changed. Past societies had constitutions. This cannot be doubted. The question that remains is the extent to which past constitutions are identical with modern constitutions. Do enduring continuities connect past and present?

[188] "No culture, of course, will ever be in a state of perfect integration, i.e. have all its elements in a condition of complete mutual adjustment, as long as change of any sort is under way. Since change of some sort, whether due to invention or diffusion, is always going on, this means that no culture is ever perfectly integrated at any point in its history." Indeed: "Cultures, like personalities, are perfectly capable of including conflicting elements and logical inconsistencies". Linton, *The Study of Man*, 357, 358.

5 – The Generational Theory of Law

"Nothing is permanent but change…"[1]

5.1 Introduction

The Generational Theory of Law is the final component of the framework. It concerns the extent to which one can say that laws and constitutions persist over time, i.e. whether one can meaningfully say that legal systems or constitutions, taken at different times, are the same. The essential argument of the Generational Theory is that one cannot meaningfully say this. There might be similarities, and later systems might be influenced by the legacy of earlier systems, but they are not – nor could they ever be – perfectly identical.

The Theory, then, is a refutation of the continuity thesis. It is a refutation of the idea that laws, legal systems, constitutions, etc. exist over long periods of time. It has been noted how such ideas informed the writings of the earlier constitutional historians. There was an idea that the constitution was connected to some national character; that there was something in the blood or even in the soil that, for example, gave Englishmen an inherent love of liberty and constitutional government. Moreover, there was an idea that this was of ancient provenance – whether through Trojans or Teutons. The fact of the matter is that the continuity thesis does not withstand close scrutiny.

The Theory has two strands – one descriptive and one moral. The argument of the descriptive strand is that every generation has its own set of laws, legal system, and constitution as a matter of fact. This is a natural result of the fact that laws, etc. are memes, as discussed previously. As such, they are subject to the evolutionary forces of variation and selection; change is inevitable. Moreover, even where those things are faithfully copied from one generation to the next, by the act of copying they become the property, as it were, of the most recent generation. To a great extent, the arguments supporting this have already been made in the previous chapter and, therefore, will not be repeated here. However, these can be complemented by a fuller understanding of the philosophical problem of the persistence of identity, as well as some understanding as to what is meant by the term 'generation'. It should be said that, whilst there have been many 'evolutionary

[1] "…nothing constant but death.": Ludwig Börne, quoted in: Kuno Francke and William Guild Howard, eds., *The German Classics of the Nineteenth and Twentieth Centuries*, vol. 6 (The German Publication Society, 1913), 63.

theories of law',[2] which is to say, dynamic theories of law, it is the incorporation of the memetic approach (developed in the previous chapter), and consideration of the persistence of identity and the nature of generations (developed in this chapter) that have largely been lacking from these treatments; it is only with these, it is suggested, that we can fully understand the nature of legal and constitutional change.

The argument of the moral strand is quite straightforward: it is both good and right that each generation should be seen to have its own laws, etc. In other words, it should be within the power of each generation to arrange themselves as they see fit.

5.2 Descriptive Argument

5.2.1 Problems of Identity

There are two fundamental problems of identity: (1) **demarcation** and (2) **persistence**.

The problem of demarcation has to do with (a) what makes a thing itself and (b) what distinguishes it from, or equates it to, other things. These can respectively be called the problems of **description** and **differentiation**. What, for example, makes the UK Constitution the UK Constitution and, furthermore, what separates it from, say, the German Constitution? These problems are not too difficult, because they essentially resolve down to whether or not we associate things together. Consequently, we will not dwell on them.

The problem of the persistence of identity, however, is a much thornier matter: how does the passage of time and change, or lack thereof, affect a thing's identity?

5.2.2 Persistence of Identity: Reconciling Change and Continuity

For how long something remains itself, even in spite of change, is not a new problem. Indeed, it features, in one way or another, in the thought of some of the earliest philosophers whose ideas survive. Heraclitus,[3] for example, appears to have advocated a 'doctrine of perpetual flux'.[4] This is exemplified in the phrase *panta rhei* (πάντα ῥεῖ), which is attributed to him and means 'everything flows'. Plato interpreted Heraclitus'

[2] See, *supra* 4.3 and *infra* 5.2.4.
[3] Lived c.535-c.475BCE.
[4] On Heraclitus' ideas and place in the history of philosophy see: Bertrand Russell, *History of Western Philosophy* (Routledge, 2000), 57–65; quote is at 65. It is worth noting that Heraclitus did see one thing is unchanging and that was that the world is made from fire, which though ever-changing in form was nevertheless the same fire. In other words, the total amount of matter is fixed, although its configuration is constantly changing. As will be seen, there is certainly something in this idea of perpetual flux, even if some of his other philosophy was more arcane.

doctrine as "nothing ever is, everything is becoming";[5] something of the same idea can be seen in Ovid's phrase *omnia mutantur, nihil interit* ('everything changes, nothing perishes').[6] For Heraclitus, permanence was an illusion. He is famous for saying that one cannot step in the same river twice.[7]

If permanence is an illusion, then so too must be the persistence of identity. Perhaps there is something of Heraclitus in the Butterfield's saying that "to the historian the only absolute is change."[8]

The classic paradox concerning the persistence of identity is that of Theseus's Ship.[9] Throughout his journeys, Theseus has need to repair his ship. This ultimately leads to the replacement of every part of the ship, although these replacements are done piecemeal over an extended period. The question is, therefore, whether the ship at the end of his journeys is the same as at the start? Hobbes, building on this paradox, asked a further question: What would be the case if somebody had followed Theseus and built a ship by reassembling all the discarded parts? Who then would be in possession of Theseus's ship?[10] Such questions might be approached in a few different ways.

Descartes addressed the question of identity in his second *Meditation*.[11] He considered a piece of fresh beeswax and noted that its properties changed when heated. It developed some new properties (e.g. softness and malleability) and lost others (e.g. its original scent). Was it nevertheless the same piece of wax? Descartes answered in the affirmative:

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[5] Plato, "Theaetetus," in *Great Books of the Western World, Vol. 7: The Dialogues of Plato*, trans. Benjamin Jowett (William Benton, 1952), 517 (152). Plato also discussed Heraclitus' ideas in Cratylus: Plato, "Cratylus," in *Great Books of the Western World, Vol. 7: The Dialogues of Plato*, trans. Benjamin Jowett (William Benton, 1952), 94 (401-402). Aristotle similarly interprets Heraclitus: "All things are in motion" and "Nothing steadfastly is". Aristotle, "Topics (Topica)," in *Great Books of the Western World, Vol. 8: The Works of Aristotle (I)*, trans. WA Pickard-Cambridge (William Benton, 1952), 148 (104b 23-24); Aristotle, "On the Heavens (De Caelo)," in *Great Books of the Western World, Vol. 8: The Works of Aristotle (I)*, trans. JL Stocks (William Benton, 1952), 390 (298b 30-35). Cf. John Burnet, *Early Greek Philosophy*, 2nd ed. (Adam and Charles Black, 1908), 161–63; Russell, *History of Western Philosophy*, 63.

[6] For the original Latin, see: Ovid, *Metamorphoses*, trans. Frank Justice Miller, vol. 2 (Harvard University Press, 1916), 376 (Liber XV, Ln. 165); cf. Ovid, *Metamorphoses*, trans. AD Melville (Oxford University Press, 1986), 357. This idea very much foreshadows the law of the conservation of energy – that the total energy in a closed system remains constant over time, although the form that the energy takes might change.

[7] See: Heraclitus, *The Art and Thought of Heraclitus: A New Arrangement and Translation of the Fragments with Literary and Philosophical Commentary*, ed. Charles H. Kahn (Cambridge University Press, 1979), 53.

[8] Herbert Butterfield, *The Whig Interpretation of History* (WW Norton and Company, 1965), 58.

[9] This comes from a passage found in Plutarch (c.46-120CE): Plutarch, "Theseus," in *The Rise and Fall of Athens: Nine Greek Lives by Plutarch*, trans. Ian Scott-Kilvert (Penguin Books, 1960), 28–29.

[10] See: Roderick M Chisholm, *Person and Object: A Metaphysical Study* (George Allen and Unwin Ltd., 1976), 89–90. For what it is worth, the most reasonable answer to this problem would seem to be that Theseus's ship is the one in his possession; any ship that might be created from his offcasts might, at best, be described as being *formerly* Theseus's ship.

[11] René Descartes (1596-1650).

even in spite of its transformation, there was some 'intuition of the mind' that led irresistibly to this conclusion.[12]

Locke distinguished between *masses of matter* and *living bodies*.[13] According to Locke, merely rearranging the parts or 'atoms' of masses of matter leaves their overall identity unaffected. However, if one adds or removes parts, then they become something different. One might alter the *structure* without affecting identity, but not the *material*. The case is quite otherwise with living bodies: "an oak growing from a plant to a great tree, and then lopped, is still the same oak; and a colt grown up to a horse, sometimes fat, sometimes, lean, is all the while the same horse".[14] The reason for this difference, Locke suggested, was that living things have "an organization of parts in one coherent body, partaking of one common life"; consequently, "it continues to be the same plant as long as it partakes of the same life…"[15] If we were to apply this to social groups and constitutions, this would either mean that they assume a new identity every time they are recomposed or it would entail treating them analogously to organisms, which would move dangerously into Group Mind territory.

Hume, like Locke, was particularly concerned with personal identity. Hume was a radical empiricist and believed that all knowledge must be based on particular sensory experiences or 'impressions'. However, he argued in his *Treatise on Human Nature* that the "self or person is not any one impression". People are composite; they are collections of perceptions and properties, and nowhere within that is an identifiable thing called the 'self'.[16] This is what has become known as the 'bundle theory'.[17] There is something of Heraclitus in Hume. However, if things change so quickly, wherefrom comes our sense of things remaining the same? Hume suggests the following:

> "As memory alone acquaints us with the continuance and extent of this succession of perceptions, it is to be considered, upon that account chiefly, as

[12] René Descartes, *A Discourse on Method, Medications on the First Philosophy, and Principles of Philosophy*, trans. John Veitch (Everyman, 1994), 84–87.
[13] John Locke (1632-1704): John Locke, "An Essay Concerning Human Understanding [1690]," in *An Essay Concerning Human Understanding with the Second Treatise of Government* (Wordsworth Editions Limited, 2014), 312. (2.27)
[14] Locke, "Essay Concerning Human Understanding," 312. (2.27)
[15] Locke, "Essay Concerning Human Understanding," 312. (2.27). Locke's views conformed to a version of *vitalism*.
[16] David Hume, "A Treatise of Human Nature [1739-40]," in *The Essential Works* (Wordsworth Editions Limited, 2011), 221. (1.4.6)
[17] "…I may venture to affirm of the rest of mankind, that they are nothing but a bundle or collection of different perceptions, which succeed each other with an inconceivable rapidity": Hume, "Treatise of Human Nature," 222. (1.4.6)

> the source of personal identity. Had we no memory, we never should have any notion of causation, nor consequently of that chain of causes and effects, which constitute our self or person. But having once acquired this notion of causation from the memory, we can extend the same chain of causes, and consequently the identity of persons beyond our memory, and can comprehend times, and circumstances, and actions, which we have entirely forgot, but suppose in general to have existed. […].
>
> […]. Identity depends on the relations of ideas; and these relations produce identity, by means of that *easy transition* they occasion. But as the relations, and the easiness of the transition may diminish by insensible degrees, we have no just standard, by which we can decide any dispute concerning the time, when they acquire or lose a title to the name of identity. All the disputes concerning the identity of connected objects are merely verbal, except in so far as the relation of parts gives rise to some fiction or imaginary principle of union…"[18]

In many respects, this is a more refined version of Descartes' 'intuitions of the mind'. The persistence of identity is a construct of the mind, heavily reliant on memory and association; it is a psychological phenomenon. In this, Hume was absolutely correct.

Identity is the perception or idea that something conforms to a particular pattern (i.e. a set of particular properties) or, at least, approximates sufficiently closely to it. There is, as Hume put it, an 'easy transition', or, as Hebb said, a 'spontaneous association'.[19] For this to continue to occur over time, two things must be true: (1) there must be *no perceptible difference that is sufficient to prevent that 'easy transition'* and (2) there must be some *continuous narrative* that helps us to explain away any differences, such that we *modify* our pre-existing associations rather than *developing* new ones. In all of this, the idea of what might be called **sticky membership** is important: even though parts might come and go, the greater part remains at any given time. There is a continuing sense of *coherence* and *unity*, and any changes that occur are within the *level of tolerance*. This means that our impression a thing at T_3 will approximate to that at T_2, which itself approximated to that at T_1. Even though there might not be an easy transition between T_3

[18] Hume, "Treatise of Human Nature," 230 (1.4.6)[emph. added].
[19] DO Hebb, *The Organization of Behavior: A Neuropsychological Theory* (John Wiley & Sons, Inc., 1949), 26.

and T_1, the fact that there was between each intermediary stage is enough to provoke the same neurological response.

The persistence of identity results from the brain attempting to understand and make sense of the world, such that we might respond to things in a targeted and appropriate fashion. One can easily see the evolutionary benefits of such an ability.[20] However, this does not hide the fact that the persistence of identity is, much as Heraclitus said, an illusion. Indeed, the brain often gets things very wrong – as a result of rigidity, imprecision, mistake, forgetfulness, etc. It is particularly prone to being misled where superficial similarities hide considerable changes or where superficial dissimilarities hide considerable similarities.

It is important to remember that humans are 'boundedly rational'.[21] We often do not have the time, energy, resources, and opportunity to obtain perfect information and, more fundamentally, there is only so much that our minds can consciously process.[22] Indeed, our minds rely heavily on approximations, shortcuts, assumptions, generalizations, simplifications, etc.; these are sometimes called *heuristics*. This is not because our brains are necessarily lazy, although it is of course in our best interests for them to conserve energy insofar as possible; rather, it is because the brain only possesses so much processing power. It is amazing and wonderful, but is nevertheless limited and imperfect. People too often take their impressions and ideas for granted; the brain presents these to us so concretely that we do not stop to question them. Indeed, very often the brain focuses only on what confirms the picture that it has developed; it will ignore things that might contradict it (cf. *confirmation bias*). Anything that it cannot ignore, it will attempt to rationalize – perhaps by concluding that the thing in question is exceptional or abnormal. The brain is, in a sense, naturally conservative. Insofar as possible, it will tend to resist making extensive changes – especially those that might entail drastically recalibrating one's worldview.

Ideas of concrete social groups, constitutions, legal systems, etc. are a direct result of this bounded rationality, as are ideas of the concreteness and persistence of identity. They are

[20] For example, being able to remember that a particular plant in a particular place is one that previously was found to be either harmful or beneficial. Alternatively, remembering that a particular animal has responded to us in a certain way in the past, which makes it likely that, were we to cross paths with that animal again, it might treat us similarly.
[21] On bounded rationality, see, e.g.: Gerd Gigerenzer and Reinhard Selten, eds., *Bounded Rationality: The Adaptive Toolbox* (The MIT Press, 2002).
[22] Cf. Owen D Jones and Timothy H Goldsmith, "Law and Behavioral Biology," *Columbia Law Review* 105, no. 2 (2005): 445.

also highly subjective. We have to remember that they are constructs of the mind and that they are, all too often, flawed. We might be able to live passably in spite of such flawed constructs, but this does not make them right. Many people continue to live with the idea that nations are like organisms, which might grow and adapt, but nevertheless remain essentially the same. Indeed, many very successful people continue to live with such ideas. Their success does not demonstrate that they are right, merely that having such an idea does not necessarily adversely affect one's life chances. The fact of the matter is that it is misguided; it fails to appreciate and see individuals as themselves and, moreover, fails to recognize that change is constantly occurring.

None of this means that we should give up ideas of identity and the persistence thereof entirely. Instead, it means that we have to acknowledge them for what they are (i.e. constructs) and acknowledge that they can be flawed. Moreover, it means that we should be prepared to adopt correctives to our mind's shortcomings in this regard. We need to strive to think clearly and exactly; to be discerning; not to be too easily misled by our often hastily made and ill-informed impressions. We must not mistake the *appearance* of continuity for *actual* continuity. For the constitutional historian, this is imperative.

5.2.3 'Generation'

Mannheim, in a classic paper,[23] argued that earlier writers had been of two schools.[24] The Positivist School argued that generations should be assessed *quantitatively* and often attempted to assign a fixed length to generations.[25] This might work if generations are discrete and staggered, but in humans they typically are not. By contrast, the Romantic-Historical School argued that generations should be assessed *qualitatively*.

Mannheim appears to have favoured a more qualitative approach, i.e. generations are differentiated not so much by *time* as *character*; by differences of culture. For Mannheim, this follows from certain fundamental truths concerning generations. Firstly, individuals only participate in groups for limited periods of time; new participants join and older participants leave. In many social groups, this process of *addition* and *subtraction* occurs

[23] Karl Mannheim, "The Problem of Generations," in *Essays on the Sociology of Knowledge*, ed. Paul Kecskemeti (Routledge, 1952), 276–322.
[24] For Mannheim's discussion of the two schools of thought, see: Mannheim, "The Problem of Generations," 276–86.
[25] Some suggested that a generation lasted around 15 years, whereas many others suggested 30 years: Mannheim, "The Problem of Generations," 277–78. Cf. Thomas Jefferson who calculated generations to last for 19 years (see *infra*).

through the "biological rhythm of birth and death".[26] Groups, therefore, undergo "constant rejuvenation".[27] Secondly, ideas – or 'cultural heritage' – are transmitted from each generation to the next. These are absorbed by the newer members and then modified by them; in this process, some things are retained, other things lost.[28] Thirdly, these processes of turnover and transmission are continuous.[29]

This continuous process of turnover and transmission contributes to what Mannheim called differences in *Lagerung* or location. One's socio-historical location, as well as, more generally, one's spatio-temporal location, have a profound impact: "Any given location…excludes a large number of possible modes of thought, experience, feeling, and action, and restricts the range of self-expression open to the individual to certain circumscribed possibilities."[30] In essence, individuals are products of the time and place of their existence; individuals existing in the same place at the same time are more likely to bear a greater resemblance to one another than those removed in space and time. It is to be stressed that the specificity of location is important; generations are not necessarily *homogeneous*.[31] We can summarize Mannheim in his own words:

> "[T]he social phenomenon 'generation' represents nothing more than a particular kind of identity of location, embracing related 'age groups' embedded in a historical-social process. [G]eneration location is determined by the way in which certain patterns of experience and thought tend to be brought into existence by the *natural data* of the transition from one generation to another."[32]

'Generation', in the context of humans, is far from being a scientific term. As the reproductive cycle is continuous, it is practically impossible objectively to distinguish

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[26] In his paper, Mannheim made this into two facts: "(a) new participants in the cultural process are emerging whilst (b) former participants are continually disappearing." Mannheim, "The Problem of Generations," 292–96, quote at 290.
[27] Mannheim, "The Problem of Generations," 296.
[28] In his paper, Mannheim had this as two facts: (c) members of any one generation can participate only in a temporally limited section of the historical process, and (d) it is therefore necessary continually to transmit the accumulated cultural heritage." Mannheim, "The Problem of Generations," 292, 296–301. The importance of forgetting in memory was identified by Mannheim: Mannheim, "The Problem of Generations," 294. Of course, this observation has been made by many others; for its observation by an historian, one might consider, for example: Lesley Ann Coote, "Prophecy, Genealogy, and History in Medieval English Political Discourse," in *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, ed. Raluca L Radulescu and Edward Donald Kennedy (Brepols, 2008), 27–44.
[29] Mannheim, "The Problem of Generations," 292, 301–2.
[30] Mannheim, "The Problem of Generations," 291.
[31] See: Mannheim, "The Problem of Generations," 302–4.
[32] Mannheim, "The Problem of Generations," 292.

generations from another in human populations.[33] It is rather a *term of convenience*, which roughly expresses the idea that groups gain and lose members over time, and that each intake tends to have and develop its own idiosyncrasies. It is possible to construe generations along various lines, e.g. according to perfect displacement of members,[34] average length of membership,[35] average length of active contribution,[36] and average length of reproductive fertility.[37] None of these is necessarily better than the others; in large part, which measure is best depends on the nature of the group in question and the aspects being studied. Whatever measure is adopted, it is merely necessary that the relevant members either *joined around the same time* or were *members at the same time*; they must be *contemporaries*. Generations will seem more distinct in some cases than in others, and there is no necessity that generations be of equal length.

Generations are ultimately constructs. As they are basically groups of individuals that we associate together, this should be unsurprising. It is just that these various groups represent instantiations of a particular group-idea across time, presumably accompanied by some overarching narrative explaining and reconciling the changes that occur.

It is important to remember that the continuous process of turnover and transition affects the memepool: some memes will be faithfully transmitted across generations, whereas others will be modified in the process; new memes will be added, others will be lost; the prevalence and potency of particular memes will change. After all, memes ultimately rely on people and they change as people change. One would expect, *ceteris paribus*, the effects of generational turnover to be more marked in pre-literate societies, in which the memepool is more reliant on human memory alone. The implications for customary law are not difficult to see; it typically relies much more heavily on this 'collective memory'.[38] However, whether this is borne out in fact must remain a topic for future study.

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[33] Earlier in this thesis, the various generations of writers on constitutional history were distinguished roughly on the basis of quarter-centuries. Whilst this possesses a large degree of explanatory power, because there were qualitative differences between the generations, these categorizations were constructs, which in perhaps some finer details do not hold and there is a degree of arbitrariness in their delimitation.

[34] I.e. each generation begins when every single member of the previous generation has departed. In humans, generations could last for upwards of one hundred years by this measure.

[35] I.e. generations last for about the length of time for which the average person is a member. In humans, this could mean that a generation could last for around seventy to eighty years, depending on local life expectancy.

[36] I.e. generations are measured according to the typical length of time for which members are active. In humans, this could vary wildly depending on the type of social group in question; it could mean that generations last anything between one to fifty years – or more.

[37] I.e. generations are measured according to the length of time that individuals are able to generate new members. In humans, this is a figure most likely to be measured in decades.

[38] For a discussion of the transition from being a largely oral culture to a literate one, see: MT Clanchy, *From Memory to Written Record: England 1066-1307*, 3rd ed. (Wiley-Blackwell, 2013).

5.2.4 Ideas of Changing Constitutions

Constitutions, it will be remembered, are constructs. They do *seem* to have some degree of persistence over time. There is often an easy transition in one's mind from one point in time to the next, and, because we are able to develop an overarching narrative, there is a sense in which we are justified in continuing to use a common label. However, it has to be remembered that this impression of persistence is an illusion. Constitutions are constantly changing – whether through natural processes or through conscious and deliberate changes being made. They are, metaphorically speaking, dynamic and fluid; they are in perpetual flux. This applies equally to legal systems.

This idea, as it relates to constitutions and legal systems, is not new. It can be found underlying many jurists' and theorists' writings from many different backgrounds and schools. We might think of: Bagehot's 'living reality';[39] Kohler's neo-Hegelian idea of law being an intrinsic aspect of ongoing process of development of culture (*Kultur*) and psychic life (*Seelenleben*);[40] Stammler's neo-Kantian 'natural law with variable content';[41] Adams' idea of law being 'the resultant of the [ongoing] conflict of forces', conforming to the will of the then 'dominant class';[42] Duguit's doctrine of perpetual legal

[39] "But an observer who looks at the living reality [of the English constitution] will wonder at the contrast to the paper description. He will see in the life much of which is not in the books; and he will not find in the rough practice many refinements of the literary theory." Moreover: "Language is the tradition of nations; each generation describes what it sees, but it uses words transmitted from the past. When a great entity like the British Constitution has continued in connected outward sameness, but hidden inner change, for many ages, every generation inherits a series of inapt words – of maxims once true, but of which the truth is ceasing or has ceased. […]. Or, if I may say so, an ancient and ever-altering constitution is like an old man who still wears with attached fondness clothes in the fashion of his youth: what you see of him is the same; what you do not see is wholly altered.": Walter Bagehot, *The English Constitution*, 2nd ed. (Little, Brown, and Company, 1873), 67–68, see also 3-5.

[40] See esp.: Josef Kohler, *Philosophy of Law*, trans. Adalbert Albrecht (The Boston Book Company, 1914). On Kohler, see further: Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence. II.," *Harvard Law Review* 25, no. 2 (1911): 155–58.

[41] Stammler spoke of a 'Theory of Just Law', in which law was *objectively*, though not *absolutely*, just. In effect, what is just in one time and place, and in one situation, might not be so in another. Consequently, in order to be just, law *must* change. See: Rudolf Stammler, *The Theory of Justice*, trans. Isaac Husik (The Macmillan Company, 1925). Further: George H Sabine, "Rudolf Stammler's Critical Philosophy of Law," *Cornell Law Quarterly* 18, no. 3 (1933): 321–50.

[42] Melville M Bigelow and Brooks Adams, *Centralization and the Law: Scientific Legal Education* (Little, Brown, and Company, 1906), 23, 63–64. For Adams in context, see: Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence. III.," *Harvard Law Review* 25, no. 6 (1912): 489–516.

change;[43] Ehrlich's 'living law' (*lebendes Recht*);[44] Sherif's 'norms as survivals';[45] Holmes' 'transformations',[46] Pound's 'law-in-action',[47] Llewellyn's idea of constitutions as 'living institutions built around particular documents',[48] as well as the works of other American legal realists, including Cardozo and Corbin;[49] Petrazycki's 'unofficial law';[50]

[43] "Law, like every social phenomenon, is subject to perpetual change…": Léon Duguit, *Law in the Modern State*, trans. Frida Laski and Harold Laski (BW Huebsch, 1919), xxxv.

[44] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L Moll (Harvard Library Law School, 1936). This is different from the 'living law' of antiquity and the medieval period, i.e. the idea that the monarch or judge was a living law (*nomos empsychos, lex animata, lex loquens*). Ehrlich's idea was that law was shaped by, and equitable to, what happened in practice, whereas the classical idea was that the monarch was the mouthpiece of the law, either in the sense of merely *declaring* it (e.g. after consideration of the eternal natural law) or *creating* it. This was often linked with ideas of equity, that the monarch (or judge) could soften the impact of the law where it would otherwise be overly harsh. On this topic, see e.g.: John Procopé, "Greek and Roman Political Theory," in *The Cambridge History of Medieval Political Thought, c.350-c.1450*, ed. JH Burns (Cambridge University Press, 1988), 26–27.

[45] Muzafer Sherif, *The Psychology of Social Norms* (Harper & Brothers Publishers, 1936), 198–203. Cf. William Halse Rivers Rivers, "Survival in Sociology," *The Sociological Review* 6, no. 4 (1913): 293–305.

[46] See, esp.: Oliver Wendell Holmes, "Law in Science and Science in Law," *Harvard Law Review* 12, no. 7 (1899): 443–63. And also: Oliver Wendell Holmes, "The Path of Law," *Harvard Law Review* 10, no. 8 (1897): 457–78; Oliver Wendell Holmes, *The Common Law* (Little, Brown, and Company, 1923). For a discussion of Holmes as an evolutionary theorist, see: E Donald Elliott, "The Evolutionary Tradition in Jurisprudence," *Columbia Law Review* 85 (1985): 51–55. It is an interesting point to note that Holmes, by his own admission, never read Darwin (or Spencer): Herbert J Hovenkamp, "Evolutionary Models in Jurisprudence," *Texas Law Review* 64, no. 4 (1985): 660.

[47] See: Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 44 (1910): 12–36.

[48] KN Llewellyn, "The Constitution as an Institution," *Columbia Law Review* 34, no. 1 (1934): esp. at 3.

[49] For Benjamin N Cardozo, see esp.: Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921); Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1924). For/on Arthur Linton Corbin, see, e.g.: Arthur Linton Corbin, "Principles of Law the Their Evolution," *Yale Law Journal* 64, no. 2 (1954): 161–63; Elliott, "The Evolutionary Tradition in Jurisprudence," 55–59. It is noteworthy that the American realists warmly received Ehrlich's work: Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press, 2017), 23, 26. On legal realism more generally, see, e.g.: Brian Z Tamanaha, "Understanding Legal Realism," *Texas Law Review* 87, no. 4 (2009): 731–86.

[50] This was as opposed to 'official law'. On Petrazicky, see: Jan Gorecki, ed., *Sociology and Jurisprudence of Leon Petrażycki* (University of Illinois Press, 1975); Krzystof Motyka, "Law and Sociology: The Petrażyckian Perspective," in *Law and Sociology*, ed. Michael Freeman (Oxford University Press, 2006); Roger Cotterrell, "Leon Petrazycki and Contemporary Socio-Legal Studies," *International Journal of Law in Context* 11 (2015): 1–16.

Hayek's 'evolutionary approach to law';[51] McBain's 'living constitutions';[52] Dworkin's 'chain novel';[53] and Jouanjan's 'second life'.[54] It can also be seen in the ideas of the Scandinavian legal realists,[55] and the following passage by Olivecrona is worth quoting at length:

> "The legal system is never static. The formation and transformation of rules continue. Innumerable agencies are at work proposing new rules or modifications to old ones, making propaganda their views, pushing texts through the legislative machinery, pronouncing decisions in courts of law, laying down statutes associations, concluding contracts, and so on.
>
> Each generation takes over a body of rules from the preceding one and leaves it in a more or less different states to the next generation. Some rules are formally abrogated, others are modified, still others fall into oblivion, new rules are produced through legislation in several forms and through imitation; and an altered body of rules is left to the next generation to be changed in similar ways. There is no single 'will' behind

[51] See, in particular: Friedrich August Hayek, *The Constitution of Liberty* (Routledge Classics, 2006); Friedrich August Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge Classics, 2013). It is worthwhile quoting the context within which Hayek overtly identified his approach as an evolutionary one: "The evolutionary approach to law (and all other social institutions) which is here defended has thus as little to do with the rationalist theories of natural law as with legal positivism. It rejects both the interpretation of law as the construct of a supernatural force and its interpretation as the deliberate construct of any human mind. It does not stand in any sense between legal positivism and most natural law theories, but differs from either in a dimension different from that in which they differ from each other": Hayek, *Law, Legislation, and Liberty*, 224. For an assessment of Hayek's evolutionary approach, see esp.: Ulrich Witt, "The Theory of Societal Evolution: Hayek's Unfinished Legacy," in *Hayek, Co-Ordination and Evolution: His Legacy in Philosophy, Politics, Economics, and the History of Ideas*, ed. Jack Birner and Rudy van Zijp (Routledge, 1994), 178–89; Paul H Rubin and Evelyn Gick, "Hayek and Modern Evolutionary Theory," *Advances in Austrian Economics* 7 (2004): 79–100; Guilherme Vasconcelos Vilaça, "From Hayek's Spontaneous Orders to Luhmann's Autopoietic Systems," *Studies in Emergent Order* 3 (2010): 50–81. It is noteworthy that Hayek believed – as regards both biological and cultural evolution – that selection occurred on the *group* level: Friedrich August Hayek, "The Rules of Morality Are Not the Conclusions of Our Reason," *Twelfth International Conference on the Unity of the Sciences, The Chicago Marriott Hotel*, November 25, 1983.

[52] Howard Lee McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* (The Macmillan Company, 1941).

[53] See: Ronald M Dworkin, *Law's Empire* (FontanaPress, 1986), 228–38.

[54] "If we accept that constitutions do not lie quietly and lazily within their texts, but have a wild life in the imagination of those who are submitted to it (a kind of virtual 'second life', which is often more exciting than the life one is really living), then the exploration of these imaginary constructions, their dynamics, their failures, their coherence, and their conflicts, becomes a central issue for constitutional history. What I have in mind is the establishment of a kind of *Begriffsgeschichte*, a history of concepts, though not a conceptual one, but much more a conflictual one. And I am convinced that among concepts there are many metaphors to be found.": Olivier Jouanjan, "What Is a Constitution? What Is Constitutional History?," in *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, ed. Kelly L Grotke and Markus J Prutsch (Oxford University Press, 2014), 331.

[55] On Scandinavian legal realism, see, e.g.: Johan Strang, "Two Generations of Scandinavian Legal Realists," *Retfærd Årgang* 32, no. 1/124 (2009): 62–82.

> all this activity. It results from the efforts, struggles, and cooperation of millions of people.
>
> Thus it appears that the formation of rules is a continuous process. Acts of legislation are only its most conspicuous parts. Less perceptible changes are always going on as in the living organism."[56]

Indeed, as Cohen has stressed, the legal profession plays a prominent role in this:

> "But the sober fact is that law, as an actual and continuously changing social institution, is governed by the professional activity of lawyers, judges, administrators and jurists who must make the law in the guise of finding, interpreting and applying it."[57]

The trajectory, if not the full force, of these ideas can also be found underlying the arguments of the likes of King or Bogdanor that the UK constitution is currently undergoing a phase of change.[58] They were absolutely right and could have gone much further than they did.[59] It also underlies Ackerman's arguments, in relation to the US Constitution, that it has had three 'regimes' or eras;[60] even codified constitutions are not static and unchanging documents, impervious to concurrent developments.[61]

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[56] Karl Olivecrona, *Law as Fact*, 2nd ed. (Stevens & Sons, 1971), 111–12. On this book and Scandinavian Realism more generally, see: Geoffrey MacCormack, "Law as Fact," *ARSP: Archiv Für Rechts- Und Sozialphilosophie/Archives for Philosophy of Law* 69, no. 4 (1974): 484–503; Geoffrey MacCormack, "Scandinavian Realism," *The Juridical Review* 15 (1970): 33–55.

[57] Morris Raphael Cohen, "Positivism and the Limits of Idealism in the Law," *Columbia Law Review* 27, no. 3 (1927): 238.

[58] See: Anthony King, *The British Constitution* (Oxford University Press, 2007); Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009). Indeed, particularly important in this regard is Bogdanor's saying that: to enact a British constitution, therefore, would be to seek to capture the essence of a tradition that was in the process of being altered while it was being described. The problem for the British constitution-maker is that of deciding which elements of a fully functioning system of government ought to be selected as being of such special significance that they should be included in the constitution whilst the system of government is itself changing, and perhaps changing at a particularly rapid rate.": Bogdanor, *The New British Constitution*, 218.

[59] They only argued that the constitution was moving away from its historic position prior to the Second World War.

[60] Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1991), 58–80.

[61] With regard to the US Constitution, see further, e.g.: Jack M Balkin, "How Social Movements Change (Or Fail To Change) the Constitution: The Case of the New Departure," *Suffolk University Law Library* 39 (2005): 27–65; Reva B Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA," *California Law Review* 94 (2006): 1323–1420; Jack M Balkin, "Framework Originalism and the Living Constitution," *Northwestern University Law Review* 103, no. 2 (2009): 549–614; Cass R Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* (Princeton University Press, 2009); David A Strauss, "Do We Have a Living Constitution?," *Drake Law Review* 59 (2011): 973–84; Jack M Balkin, "The Roots of the Living Constitution," *Boston University Law Review* 92 (2012): 1129–60.

The ideas underlying the Generational Theory have also found some acceptance in judicial pronouncements. In Canada, there is the 'living tree doctrine',[62] which relates to the interpretation of the Canadian Constitution: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits".[63] There is a similar doctrine of progressive interpretation to be found in the judgment of the European Court of Human Rights that the European Convention on Human Rights is a "living instrument which…must be interpreted in the light of present-day conditions".[64]

In the UK, one might consider Lords Wilberforce's and Diplock's statements in *British Railways Board v Herrington*;[65] Lord Diplock's remarks in *Fleet Street Casuals*;[66] Lord Keith in *R v R*;[67] or Lord Roskill's favourable citation of Maitland in the *GCHQ* case,[68] which he followed by saying that: "[I]t is our legal history which has enabled the present

[62] In French: "*théorie de l'arbre vivant*".
[63] These are the words of Viscount Sankey in the so-called *Persons Case*, which provided the basis of the doctrine: *Edwards v Canada (Attorney General)* [1930] A.C. 124 at 136.
[64] These words come from the judgment in *Tyrer v United Kingdom* (1979-80) 2 EHRR 1 at 10. For a comparison of the Canadian 'living tree' and European 'living instrument' metaphors, with some reference to English law besides, see Baroness Hale's speech: Brenda Hale, "Beanstalk or Living Instrument? How Tall Can the ECHR Grow?," *UK Supreme Court*, June 16, 2011.
[65] "But the common law is a developing entity as the judges develop it, and so long as we follow the well tried method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do." (Per Lord Wilberforce); "It [the decision of the court in this case] takes account, as this House is the final expositor of the common law should always do, of changes in social attitudes and circumstances and gives effect to the general public sentiment of what is 'reckless' conduct as it has expanded over the forty years which have elapsed since the decision [in the earlier case which went the other way]." (Per Lord Diplock). *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL. These were quoted in: Antony Allott, *The Limits of Law* (Butterworth & Co (Publishers) Ltd, 1980), 102–3.
[66] "The rules as to 'standing' for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges, by judges they can be changed; and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities, that have been taking place continuously, sometimes slowly, sometimes swiftly, since the rules were originally propounded. Those changes have been particularly rapid since World War II. Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today.": *R v IRC ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, per Lord Diplock at 639-640
[67] "The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable." *R v R (rape: marital exemption)* [1991] 3 WLR 767 (HL) per Lord Keith at 616. This case concerned whether or not it was possible for a husband to rape his wife; the court concluded that this was both possible and criminal.
[68] This was from a letter sent by Maitland to Dicey in 1896 in which Maitland said: "The only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law".

generation to shape the development of our administrative law by building upon but unhampered by our legal history."[69] There are other statements of similar ideas to be found in the case-law,[70] all of which are founded on ideas of the responsiveness of legal systems to socio-economic changes.

Of course, judges must be wary of taking the Generational Theory too much to heart – especially in jurisdictions where a judge's role (i.e. their assigned activities) is to judge according to the fixed associations, as identified by certain rules of recognition, and to do no more than that.[71] It is not an excuse for them to fashion themselves into law-makers. Nevertheless, judges ought also to be wary of enforcing outdated laws ill-suited to the modern-day, especially where these severely frustrate people's fixed associations. As such, there is a delicate balance to be struck. There are some uncontentious alterations that can probably be made, especially if these modify previous judicial pronouncements; indeed, this happens all the time through the interpretation and reinterpretation of laws. However, other alterations, which are more contentious, ought rather to be referred to the social group – either as a whole, through its representative bodies, or through its leadership.

It would be incorrect to think that all of these ideas and theories mentioned in this section are one and the same. However, what can hopefully be seen is that they all drive very much towards the same point: *Tempora mutantur, nos et mutamur in illis*.[72] As such, the Generational Theory can act as something of a unifying force, bringing all of the aforementioned ideas together.

5.2.5 Momentary Systems

[69] *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 (HL)('GCHQ' case) per Lord Roskill at 417.
[70] For example, *Dyson Holdings Ltd v Fox* [1976] QB 503, which case is discussed in: Allott, *The Limits of Law*, 103ff.
[71] Cf. Lord Ellenborough in *Ashford v Thornton* (1818) 106 ER 149, which concerned whether a wager of battle (i.e. a challenge of trial by battle) was still permissible – subject to certain qualifications of age, infirmity, or sex – in cases where a strong presumption of guilt appears to arrive, though that guilt could neither be proved nor disproved by ordinary means: "[I]t is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices therefore may justly exist against this mode of trial, still as it is the law of the land, the Court must pronounce judgment for it." [460]. The judges unanimously concluded that wagers of battle remained permissible, though, in this case, the offer of battle was refused by the defendant. Trial by battle was – somewhat hastily – abolished as a mode of trial in the following year: Appeal of Murder, etc. Act 1819 (59 Geo. III, c. 46).
[72] The times change, and we change with them.

We can follow Raz's distinction of *systems* and *momentary systems*.[73] A **momentary system** is the system as it is thought to exist at a given time; it is the set of all its properties, qualities, etc. at that time. For a legal system, this would include all laws "valid at a certain moment";[74] all of the fixed associations that fulfil the recognition criteria. For a constitution, it would include a detailed description of the distribution of activities and influence, and an explanation as to the nature of those things. Obviously, actually quantifying these systems could be exceedingly difficult, if not impossible. They are likely to be incomplete and inconsistent; there will be significant grey areas. Nevertheless, in theory, it would be possible to quantify such systems and, to a workable extent, we actually can.

A **system**, by contrast, is the general idea – the construct – that we have in our minds. It is the impression that we have of some common identity across various momentary systems; the impression of the persistence of that identity. Usually, this idea will revolve around certain properties, qualities, etc. that the mind deems to be significant; for two momentary systems to have these properties, etc. in common is enough to evoke the same neurological response. These defining features, as it were, can change over time, but so long as there is an *easy transition* and *overarching narrative*, the mind can feel comfortable in associating each instance with the others. In a sense, then, the system is an idea of something greater than a momentary system; it includes not only all properties as they pertain at a given time, but all properties at all times. For legal systems, as Raz noted, two laws enacted at different times might well belong to the same *system*, though they belong to different *momentary systems*.[75]

There is no preordained unit of time with which to measure the duration of momentary systems. Some might be considered to exist for a matter of seconds, others for many years. To a great extent, it depends on some perception of there being an appreciable and sufficiently significant difference; in a word, judgement. It is unnecessary to categorize every momentary system; indeed, it is probably unwise. The salient point about momentary systems is that any given system as it exists at T_1 is probably going to be somewhat different to that at T_2; each manifestation, as it were, of the system lasts but a

[73] Raz actually drew his distinction between *legal* systems and momentary *legal* systems, but the general distinction applies to all systems: Joseph Raz, *The Concept of a Legal System*, 2nd ed. (Oxford University Press, 1980), 34. For a comparison of Raz's ideas concerning the continuity of legal systems with those of Kelsen, and their explanatory power with regards to Australian law in the eyes of one theorist, who sees merit in both, see: Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing, 2015).
[74] Raz, *The Concept of a Legal System*, 34.
[75] Raz, *The Concept of a Legal System*, 34.

moment. As Raz said of legal systems: "Two different momentary systems which are subclasses of one legal system may overlap or even be identical in their laws, or they may have no law in common."[76]

In many respects, then, it is the task of the constitutional historian to study the series of momentary systems (both constitutional and legal), to attempt to describe each change as it occurs, and, moreover, to offer some explanation as to why each occurred.

5.3 Moral Argument

The upshot of the first strand is that any given generation is only truly bound by previous generations to the extent that it *feels* bound, although generations might make certain things easier or more difficult for subsequent generations in practical terms. However, there remains the question as to whether generations ought to be able to bind succeeding generations? Should later generations feel bound thereby? The answer should be in the negative.

Jefferson, writing to Madison in September 1789, argued that new written constitutions ought to be forged at regular intervals:

> "[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished then, in their natural course, with those whose will gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right."[77]

Jefferson's term of nineteen years is artificial; the idea of reviewing the constitution periodically, a heavy imposition, which would be wrong to impose on subsequent generations. However, the idea that constitutions belong to the living, and that the dead

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[76] Raz, *The Concept of a Legal System*, 35.

[77] Thomas Jefferson, "Letter to James Madison (Paris, 6 September 1789)," in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 6 (GP Putnam's Sons, 1904), 8–9. Jefferson settled on a period of nineteen years as this is what he calculated to be the average length of generations. It is interesting to note that this *Positivist* account was written whilst Jefferson was in France, given that Mannheim associated the Positivist approach most closely with French authors: Mannheim, "The Problem of Generations," 278.

should have "neither powers nor rights" over future generations,[78] is entirely correct both in fact and as of right. Paine put the point rather more forcefully in 1791:

> "Every age and generation must be as free to act for itself, *in all cases*, as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies."[79]

Furthermore, as Holmes said in 1897:

> "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[80]

Holmes would certainly have agreed with the proverb: custom without reason is but ancient error.[81] Webster, similarly, counselled against 'perpetual constitutions', especially in light of the "unceasing change of circumstances";[82] "time makes ancient good uncouth".[83] None of this is especially novel. Epictetus, for example, spoke of the "wretched laws of dead men" two millennia ago.[84]

We should only do things for which there is good reason. Mere reference to some past decision, practice, etc. does *not* constitute a good reason. Though we cannot escape the legacy of the past and must necessarily work within the situations in which we find

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[78] Jefferson, "Letter to James Madison (Paris, 6 September 1789)," 4.
[79] Thomas Paine, "Rights of Man (1791)," in *Rights of Man, Common Sense and Other Political Writings*, ed. Mark Philp (Oxford University Press, 1995), 91–92.
[80] Holmes, "The Path of Law," 469. One might think particularly here of the decision in *R v R*, quoted above. As Allison noted, legal history can, of course, help us immensely in this regard; it can help us identify the historical context of legal provisions and demonstrate "how that context has disappeared or otherwise changed, rendering the text or institution obsolete or unsuitable." In this way, legal history can 'liberate', to use Allison's word, us from the past: JWF Allison, "History To Understand, and History To Reform, English Public Law," *The Cambridge Law Journal* 72, no. 3 (2013): 541.
[81] Wolfgang Mieder, ed., *The Prentice-Hall Encyclopedia of World Proverbs: A Treasury of Wit and Wisdom Through the Ages* (Prentice-Hall, Inc., 1986), 95. It is perhaps interesting to note that Matthew Hale, in the seventeenth century, said that custom, effectively, was "commonly called the mistriss of Fooles"; Hale himself disagreed strongly with this assessment: William Searle Holdsworth, *A History of English Law*, 2nd ed., vol. 5 (Methuen & Co. Ltd., 1945), 505.
[82] Noah Webster, "Bills of Rights (1788)," in *A Collection of Essays and Fugitiv Writings on Moral, Historical, Political, and Literary Subjects* (Thomas and Andrews, 1790), 47–48.
[83] This comes from the final stanza of Lowell's poem *The Present Crisis*: "New occasions teach new duties; Time makes ancient good uncouth; / They must upward still, and onward, who would keep abreast of Truth; / Lo, before us gleam her camp-fires! we ourselves must Pilgrims be, / Launch our Mayflower, and steer boldly through the desperate winter sea, / Nor attempt the Future's portal with the Past's blood-rusted key." James Russell Lowell, *Poems of James Russell Lowell* (Oxford University Press, 1912), 98.
[84] Epictetus, *The Moral Discourses of Epictetus*, trans. Elizabeth Carter (JM Dent & Sons Limited, 1910), 32 (1.13).

ourselves, we should never feel honour-bound or otherwise compelled to follow what went before *simply because it went before*.[85] Just because things might have worked tolerably in the past, there is no guarantee of their being fitting or profitable now or in the future.[86]

Furthermore, we must not idolize or reverence the past or historical persons. They were neither all-seeing nor all-knowing; they were flawed, and often biased and prejudiced. They were human. It is difficult to see why they should have a greater right to affect how others live simply by virtue of their having lived first. Have we not the same right to alter things as they themselves had? It is a matter of distributive justice. As we are essentially the same as them, and as one ought to treat like cases alike, we should have what they had; those after us should have the same. It is right to learn, but it is wrong follow blindly.[87]

It is also important to have critical self-awareness. Often those things that we regard as being fundamental and sacred – which it is sacrilegious, heretical, or treasonous to question – are "but the oracles of the nursery".[88] It is inculcation, indoctrination, and insularity that produce our love of them, not their merit. It is simple chance that we come to love them; a function of the time and place of our birth and upbringing. To receive these things unexamined and uncritically would be great folly.

Whereas the descriptive argument rests on what *is*, the moral argument rests on what is *right* and *good*: it is both *right* and *good* that each generation should be able to determine for itself how it lives; it would be both *wrong* and *bad* for the case to be otherwise.

5.4 Problems and Challenges

[85] There is something, as Zane said, of an "ineradicable tendency of human beings…to continue social habits long after reasons for a change have arisen". Indeed, "[w]e should expect to find customs in full force long after they should have been changed, and this is the history of law. That history may be summed up by saying that men cling to their customs." The desire to do so is understandable, but it is not necessarily the right course of action; reasons for change ought to occasion change, unless there is very good reason for resisting it. For Zane: John Maxcy Zane, *The Story of Law*, ed. Charles J Reid Jr, 2nd ed. (Liberty Fund, Inc., 1998), quotes at 37 and 36 respectively.

[86] In this context, we might think of the words from the Repeal of Statutes as to Treasons, etc. (1 Edw. VI, c. 12, 1547): "But as in Tempest or Winter, one Course and Garment is convenient, in calm or warm weather a more liberal case [*sic*] or lighter Garment both may and ought to be followed and used; so we have seen divers strait and sore laws made in one Parliament (the Time so requiring) in a more calm and quiet Reign of another Prince, by the like Authority and Parliament, repealed and taken away…" Quoted in: AF Pollard, *England under Protector Somerset* (Kegan Paul, Trench, Trübner & Co. Ltd., 1900), 61.

[87] In this context, we might bear in mind Holdsworth's words: "But it is obvious that such a disregard of the teachings of history is as foolish as a blind and literal following of all the solutions of particular problems which may be extracted from those teachings." William Searle Holdsworth, *Some Lessons from Our Legal History* (The Macmillan Company, 1928), 7–8.

[88] These are the words of John Locke from one of his minor works, *Of Study*. Quoted in: David Resnick, "Locke and the Rejection of the Ancient Constitution," *Political Theory* 12, no. 1 (1984): 108.

5.4.1 Desuetude

For how long laws ought to be considered valid is a difficult question. Some are made explicitly with the intention that they should expire after a fixed term;[89] others on a particular basis, the withdrawal or disappearance of which deprives them of their metaphorical life-force. However, many are laid down as though to last perpetually. How does the Theory respond to these?

Laws that continue to be prevalent and potent are unlikely to be contentious. There is no compulsion to maintain them forever, but there is little cause to think that they become invalid simply because of the passing of time. There is no need to discard them simply because they were introduced by a previous generation. However, the question is more difficult when it comes to those associations that have ceased to be prevalent and potent – especially if a long period of time has elapsed since they were last so. Should present generations pay these any mind?

Generally speaking, the position should be this: laws properly made should be considered valid and binding until declared otherwise. If there is some movement so to declare, it would be wise first to consider why any such laws were originally introduced, as well as what their merits were and remain.[90] As indicated above,[91] judges are particularly important in all of this, even if there are limits to what they can do without overstepping their bounds.

Judges often have a *power of decision*,[92] i.e. some power *to decide what the law is*. After all, if they are to apply the law, they must first decide what it is and make declarations to

[89] These are often called 'sunset clauses', which are not an uncommon phenomenon – particularly in controversial areas like counter-terrorism measures. On this latter point, see, e.g.: John E Finn, "Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation," *Columbia Journal of Transnational Law* 48, no. 3 (2010): 442–502.

[90] There is perhaps a danger, as Blackstone identified, that certain laws might be dispensed with out of hand, whose "reason could not be remembered or discerned", but the "wisdom" of which is revealed by the "inconveniences that have followed the innovation". He continues: "The doctrine of law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration". William Blackstone, *Commentaries on the Laws of England. Book I: Of the Rights of Persons*, ed. David Lemmings, vol. 1 (Oxford University Press, 2016), 53 [70]. The point that we can return to is that we should only maintain in force that for which there is good reason. Whilst we should not presume – perhaps as Blackstone does – that those who went before were possessed of some higher wisdom, we should also not presume that they were stupid or primitive. Whatever they determined and maintained in force was probably not without some reason, and it makes sense to attempt to discover what that reason might have been; whether it remains a good reason, or whether there is some other good reason, is for us to decide. In effect, we ought to be *cautious* and show a sense of *humility*, but, nevertheless, to feel it to be within our power to shape our lives as we see fit.

[91] *Supra*, 5.2.4.

[92] This might be considered as a more proactive and extensive *power of declaration*. See: 3.14, *supra*.

that effect. If there is some *rule of ordering* that newer laws take priority over older laws,[93] judges can often easily dispense with older laws. This is because newer laws tend to modify or supersede older laws – if not expressly, then impliedly. Consequently, they cease to be valid; if not wholly, then partially. Insofar as they are invalid, they can be disregarded.[94]

In principle, judges ought to *decide what the law is* and *apply it* – cautiously and discerningly.[95] Any creativity employed ought to be *minimal*, *interstitial* (i.e. designed to gap-fill),[96] and *designed so as to fulfil people's expectations*, especially where they might otherwise have been frustrated. To go further and become active lawmakers would probably introduce uncertainty into the system and undermine the rule of law.[97] Nothing

[93] This is sometimes expressed in the Latin phrase, which means much the same thing: *leges posteriores priores contrarias abrogant* [later laws abrogate earlier contrary laws].

[94] Admittedly, matters are not always so straightforward. It is not always clear whether there is some newer law overriding the earlier, especially if any such contenders are ostensibly of lesser legal authority, i.e. there is reason to suspect that they themselves are invalid, because they did not emanate from sources sufficiently high enough to override the older law. If they did not and were accepted, it would *prima facie* frustrate our expectations concerning the rules of ordering. It is worth adding that matters might be further complicated if the rules of ordering themselves have also changed.

[95] Cf. Sir James Parke: "Our common law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency and certainty, we must apply those rules when they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them in those which they have not yet been judicially applied, because we think the rules are not as convenient and reasonable as we ourselves could have devised." *Mirehouse v Rennell* (1833) 1 Cl. & F. 527, 546.

[96] See: Cardozo, *The Nature of the Judicial Process*, 68ff.

[97] We might consider Matthew Hale's argument made in response to a work by Hobbes, which must have been written sometime before Hale's death in 1675. Hale's concern was what would be the basis of judicial reasoning if that reasoning went beyond the letter of the law; presumably, it would involve some appeal to reason, but people often disagreed as to what reason dictated. Hale wrote as follows: "Though a certaine and determinate Law may have some mischiefes in relation to particulars, w[hich] cannot all by any humane Prudence att first be foreseen and provided for, yet [it] is p[re]ferrable before that Arbitrary and uncertaine rule w[hich] Men miscall [the] Law of reason." It would perhaps be an act of arrogance for a judge to assume that they of all people know best. Indeed, one can certainly foresee problems if all judges were to adopt such an attitude; they might be found to be constantly correcting one another's pronouncements – or, at least, attempting to do so. Insofar as this, Hale's argument is strong and sound. However, judges ought not to take as their maxim Tennyson's words: 'Ours not to reason why, ours but to do and die'. Were they to do so, it might cause a great deal of senseless harm. It is also wrong to assume, as Hale seemed to, that laws, seemingly of long standing, must necessarily be imbued with wisdom, which is discoverable through careful consideration: "Againe it is a reason for me to preferre a Law by w[hich] a Kingdome hath been happily governed four or five hund[red] yeares then to adventure the happiness and Peace of a Kingdome upon Some new Theory of my owne tho' I am better acquainted w[ith] the reasonableness of my owne Theory then w[ith] that Law. Againe I have reason to assure myselfe that Long Experience makes more discoveries touching conveniences or Inconveniences of Laws then is possible for the wisest Councill of Men att first to foresee. And that those amendm[ents] and Supplem[ents] that through the various Experiences of wise and knowing men have been applyed to any Law must needs be better suited to the Convenience of Laws, then the best Invention of the most pregnant witts not ayded by Such a Series and tract of Experience." It is right to show humility; it is wrong to show unthinking deference. Hale's treatise is printed in: Holdsworth, *A History of English Law*, 5:499–513, quotes at 503 and 504 respectively. The line is adapted from Tennyson's poem, *The Charge of the Light Brigade*, Stanza II: "Theirs not to make reply, / Theirs not to reason why, / Theirs but to do and die." See: Alfred Lord Tennyson, *Poems and Plays*, ed. T Herbert Warren and Frederick Page (Oxford University Press, 1971), 206.

in this, of course, prevents judges from expressing their *opinions* in the course of their judgments (e.g. concerning the merits or demerits of some law), even if their rulings must in the event be at odds with those opinions.[98]

Where the application of a law might lead to absurdity or grossly frustrate people's legitimate expectations, there ought perhaps to be some facility for interim relief or the correction of any mischief caused by its application. The principal method of doing this would be to suspend its application pending its confirmation. Rather than undermining the rule of law, this would uphold it. After all, if people could not reasonably have expected such an outcome – especially if there is some uncertainty as to whether the law itself is valid – it would be unreasonable and unfair to hold them to it, particularly if resulting in some radical curtailment of their liberties. In this, there is also some role for judges. If judges find themselves powerless, then retroactive legislation might be the answer, if justice is to be done.

The point is that laws, once considered valid, should not be disregarded except with due process. They do not cease to be valid and fall into desuetude simply with the passing of time, unless there is some specific expectation to that effect. After all, dispensing with anything that is ostensibly valid would frustrate our expectations and undermine our sense of the rule of law. However, as Holdsworth said:

> "We must not suppose that, because we find a rule or an idea in a Year Book or in an old writer, we must accept the law as so stated without comment and without criticism. Legal history used in this way becomes merely…unintelligent conservatism…"[99]

There has to be a balance and, ultimately, whether to accept or reject the older law should be within the decision of the present generation; it should make that decision using due

[98] Whether judges ought to refuse to decide particular cases or, indeed, resign their positions, whether out of a sense of honour, duty, or integrity, and especially if they are in profound disagreement with the current legislative regime, are exceedingly difficult questions. In terms of symbolism, it can be dramatic and impactful, but, especially in the case of resignation, there is always the possibility that the judge in question might be better able and willing to mitigate the ill-effects of the 'evil' laws than any person who might replace them on the bench. Indeed, again particularly in the case of resignations, it might be better to concede some battles, such that others might be won. In this context might be considered the cases of countries occupied during the Second World War by Nazi Germany and the extent to which their respective judiciaries collaborated with the occupying power. In this context, there are some forthcoming essays of great interest, to be edited in a volume by Martin Löhnig. The cases of the Norwegian and Dutch courts are especially interesting: See: Hans Petter Graver, *Sacrificing the Pig in the Temple – The Supreme Court in Occupied Norway* and Derk Venema, *The Netherlands: The Hoge Raad* (both forthcoming in the aforementioned volume).

[99] Holdsworth, *Some Lessons from Our Legal History*, 7.

process.[100] The fact that circumstances have changed is often a good reason for dispensing with it.

5.4.2 Primacy

A similar problem – and one already touched upon – is that of primacy, i.e. whether fixed associations of *earlier* or *later provenance* ought to have priority. The basic position under the Generational Theory is that more recent associations ought to have priority, unless there is a specific expectation to the contrary. This brings us to one final issue: the validity of eternity clauses.

5.4.3 Eternity Clauses

Eternity clauses or *Ewigkeitsklauseln* are provisions claiming to make certain fixed associations immortal and immutable – they are to remain in force forever unchanged.[101] This obviously links to the issue of primacy – if a fixed association benefits from the protection of an eternity clause, it would seem impossible for later associations inconsistent with it to take priority.

The view of the Generational Theory is simple: eternity clauses are only ever persuasively binding. They are rhetorical devices, nothing more. Special procedures might be necessary to override, amend, or repeal them, but they are never invulnerable. It would be arrogant and wrong to think otherwise. To this end, we might quote Rousseau:

[100] It is worthwhile remarking that the need for due process in these cases is largely justified by the simple fact that generations often overlap. Even though newer members have joined, there might still exist older members for whom these fixed associations are prevalent and potent. They still form a part of their system of expectations; to disregard these without due process would be very much to frustrate their expectations. Their expectations must be adjusted in the proper fashion. They might not agree with the change in principle, but, it is enough if they can agree that the change was properly made.

[101] An example of eternity clauses is to be found in the German Basic Law or *Grundgesetz*, Art. 79(3), which protects certain other provisions in the *Grundgesetz* against amendment. There is a sense in which, of course, this is not a true eternity clause, bearing in mind Art. 146 pertaining to the duration of the *Grundgesetz*. Art. 146 says that the *Grundgesetz* will remain effective until replaced by a new constitution. Consequently, the amendments made unconstitutional by Art. 79 can ultimately be made, *but only by replacing the constitution in its entirety*. In effect, what Art. 79(3) really says, then, is that certain other provisions in the *Grundgesetz* are protected forever or, failing that, until a new constitution is devised. In this context, one might also consider the French Constitution of the Fifth Republic, Art. 89, which provides wide powers of amendment excepting that "The republican form of government shall not be the object of any amendment". The French Constitution contains no provision corresponding to Art. 146 in the *Grundgesetz*, although there is a sense in which Art. 3 of the French Constitution approximates to it. This provision vests 'national sovereignty' in the people, albeit through their representatives and by means of referendum.

> "[T]here is not in the state any fundamental law which may not be revoked, not even the social pact; for if all the citizens assemble to end this pact by a common accord, one cannot doubt that it is very legitimately ended."[102]

5.4.4 Sociobiology and Evolutionary Analysis

Should at least some, if not all, laws be informed, if not determined, by principles of sociobiology and the insights of evolutionary analysis?[103] Ought legal systems and constitutions to have some 'minimum content', which is derived from facts about human nature (e.g. narrow altruism and bounded rationality[104])?[105] Ought they to represent certain 'human universals'?[106] Are there some fundamental ideals that humans have evolved to desire and which help to shape law?[107] Is there some basis to Natural Law?[108] More to the point: Ought each generation to be limited in the extent to which it can shape its constitution and legal system, because there are certain fundamentals that must always be recognized?

These questions are too large to address fully here and, in any case, to answer them would stray too far into political philosophy. However, three points need to be stressed. First: supposed 'empirical observations' and 'descriptive premises' should not be turned into 'normative conclusions';[109] to do so is to commit the naturalistic fallacy of turning an '*is*'

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[102] Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (Penguin Books, 2004), 121 [3.18].

[103] On the possible benefits of evolutionary analysis to law, see, e.g.: Owen D Jones, "Evolutionary Analysis in Law: An Introduction and Application to Child Abuse," *North Carolina Law Review* 75, no. 4 (1997): 1117–1242; Jeffrey Evans Stake, "Pushing Evolutionary Analysis of Law or Evolving Law: Design without a Designer," *Florida Law Review* 53 (2001): 884–90; Jones and Goldsmith, "Law and Behavioral Biology." But compare: Roger D Masters, "Comment on Article by Professor McGinnis," *Journal of Contemporary Legal Issues* 8 (1997): 241–48; Brian Leiter and Michael Weisberg, "Why Evolutionary Biology Is (So Far) Irrelevant to Legal Regulation," *Law and Philosophy* 29, no. 1 (2010): 31–74.

[104] See, e.g.: Wojciech Zaluski, *Evolutionary Theory and Legal Philosophy* (Edward Elgar Publishing Limited, 2009), chap. 1.

[105] Cf. John O McGinnis, "The Original Constitution and Our Origins," *Harvard Journal of Law & Public Policy* 19, no. 2 (1996): 251–62; John O McGinnis, "The Human Constitution and Constitutive Law: A Prolegomenon," *Journal of Contemporary Legal Issues* 8 (1997): 211–40.

[106] On the idea of human universals, see: Donald E Brown, *Human Universals* (McGraw-Hill Education, 1991).

[107] Cf. "Our law instinct is deeply entrenched in epigenetic rules like reciprocity, justice, fairness, loyalty, authority, liberty, and sanctity. While culture molds these rules, genetics preserves their universality and spreads them from one generation to the next. Such revisable survival codes standardize and stabilize the law even as it changes and diversifies." Alan Calnan, "Beyond Jurisprudence," *Southern California Interdisciplinary Law Journal* 27, no. 1 (2017): 58. 'Equality' might also be added to the list. Perhaps, too, a natural 'scorn and abhorrence', as noted by Adam Smith (though it is doubtful that this is entirely original to him), that is felt towards acts of '[f]raud, falsehood, brutality, and violence': Quoted in Tamanaha, *A Realistic Theory of Law*, 5.

[108] Cf. Fábio Portela Lopes de Almeida, "Constitution: The Evolution of a Societal Structure (PhD Thesis)" (Universidade de Brasília, 2016), 261ff.

[109] Cf. Nils-Frederic Wagner and Georg Northoff, "A Fallacious Jar? The Peculiar Relation between Descriptive Premises and Normative Conclusions in Neuroethics," *Theoretical Medicine and Bioethics* 36,

into an '*ought*'. Second: even if there does appear to be some tendency, predisposition, etc. towards or away from some specific behaviour, this does not mean that it will – or must – be *realized* or, indeed, *realized in all cases*. Third: even if something has been true in the past, it does not mean that it will be true or, indeed, *has* to be true, for all time. Even so-called 'human nature' can change.[110]

5.5 Conclusions

The Generational Theory of Law concerns *change* and *ownership*. With regards to the former, it says that human constructs – including laws, institutions, etc. – are constantly changing, because the people from whom they stem are constantly changing (not to mention the circumstances in which they live). Thus, even though momentary constitutional and legal systems might appear similar, they are never exactly the same. Indeed, even in spite of the best of efforts to the contrary, such things will probably continue to change 'organically' and become 'the unintended products of historical development',[111] for no constructed system can last forever in any given form.

With regards to the latter, it says that each generation has ownership of its constitutional and legal system as a matter of fact; it should thereby feel empowered to shape it. It should say: 'these are ours, to do with as we think best'. Laws and constitutions are proper to each generation; it is up to current members to decide their form and content.[112] There is an extent to which each generation is limited in what it can do and achieve, taking into account its socio-economic, ecological, and spatio-temporal context,[113] the philosophical problem of free will, and the difficulties often experienced in trying to achieve our

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no. 3 (2015): 215–35; Jones and Goldsmith, "Law and Behavioral Biology," 484–85; Todd J Zywicki, "Evolutionary Psychology and the Social Sciences," *Law and Economics Working Paper 00-35 (George Mason University)*, 2000, 2.

[110] Cf. *supra*, 4.2.

[111] In Menger's view, this being the 'unintended product of historical development' is the only sense in which there is a valid analogy between social phenomena and natural organisms: Carl Menger, *Problems of Economics and Sociology*, ed. Louis Schneider, trans. Francis J Nock (University of Illinois Press, 1963), Bk. III, esp. 129–34.

[112] Cf. Cole: "If once the principle of consent is established as the basis of the State, it is impossible to set limits on the operation of the principle. If the members consent to despotism, well and good; but as soon as they desire to assume a more active co-operation in the affairs of State, they clearly have a right to do so." GDH Cole, *Social Theory*, 3rd ed. (Methuen & Co. Ltd., 1923), 92. For 'consent', we might substitute 'belief'.

[113] Cf. Cohen: "The law, at any given time, is administered and expounded by men who cannot help taking for granted the prevalent ideas and attitudes of the community in which they live. Even if it were logically, it would certainly not be psychically, possible for any man to think out an absolutely new system of jural relations. The law reformer who urges the most radical change, can justify his proposal only by appealing to some actually prevailing idea as to what is desirable; and the history of the law shows how comparatively small is the addition or subtraction to the system of jural concepts and ideas that the most creative judges and jurists have been able to bring about." Morris Raphael Cohen, "The Place of Logic in the Law," *Harvard Law Review* 29, no. 6 (1916): 630–31.

designs.[114] However, insofar as it is able, each generation should be free to decide for itself how it lives.

The Theory is not an argument that reference can, or should, never be had to the past.[115] Moreover, it does not justify everybody in doing whatever they like, arguing that it is their right to do so. This would be inconsistent with our desire for order and predictability. It is also not an argument in favour of revolution.[116] Indeed, it favours gradual and incremental change where possible, such that people might have the time properly to adjust their fixed associations and corresponding expectations.[117] Yet, it equally does not preclude revolution where generations find that they simply cannot live according to the ideas of their predecessors. Nevertheless, any changes ought to be made in a clear and orderly fashion; preferably, too, democratically and peaceably.[118]

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[114] This is both in view of the limits of individuals' abilities to influence others (and thus make them conform to their designs), as well as *unforeseen* (perhaps, even, *unforeseeable*) circumstances and *unintended consequences*. Hayek, in particular, was sceptical as to people's abilities to 'plan' or 'design' social institutions and, indeed, societies themselves. He was very much convinced by Ferguson's observation quoted above. For Hayek in this context see, e.g.: Friedrich August Hayek, *The Counter-Revolution of Science* (The Free Press, 1955), chaps. 8-10; Friedrich August Hayek, *Individualism and Economic Order* (The University of Chicago Press, 1948), chap. 4; Friedrich August Hayek, *The Fatal Conceit: The Errors of Socialism*, ed. WW Bartley III (The University of Chicago Press, 1989).

[115] In fact, it would be impossible to avoid reference to the past. It is with reference to the past that we tend to set our associations and expectations; sometimes with reference to specific decisions, declarations, etc., other times to perceived common practices, etc., and other times still to discourses, disquisitions, etc. These points of reference might be in the very recent past; they might be in a remote past. They are sometimes real; other times imagined, distorted, or misunderstood. The point is that – unless we are making new associations – we have to set our associations and expectations *by something* and that *something* must necessarily be in the past; the past is all we have ever known. If we are to have settled and stable lives, then there have to be points to which we can have constant recourse. The argument of the Generational Theory, therefore, is not that we should disregard the past. Rather, its argument is that we should not feel *inextricably bound* by, or to, it. It should be added that there is, almost naturally, a tendency towards the development of 'traditions'. These are often based, as Krygier has identified, on notions of *antiquity*, *presence*, and *constancy* (these are my labels): traditions are often thought to have originated in some distant time, from which they derive much of their authority; they are thought not merely to be antiquities, but possessed of continuing relevance; and they are thought to have been passed down through an unbroken chain. Indeed, there is a sense in which Krygier was right to say that "[l]aw is a profoundly traditional social practice, and it must be". What the Theory teaches, however, is that older is not necessarily better; the past, at least properly understood, is often not as relevant as it is thought to be; and that the idea of unbroken, unerring, and uncontested chains rarely accords with reality. For Kyrgier, see: Martin Krygier, "Law as Tradition," *Law and Philosophy* 5 (1986): 237–62, quote at 239.

[116] We cannot say with Voltaire, for example, that "if you want good laws, burn those you have and make new ones". Quoted in: Hayek, *Law, Legislation, and Liberty*, 25.

[117] To this might be added the limitations of utopian planning. Cf. Popper: "In all matters, we can only learn by trial and error, by making mistakes and improvements… Accordingly, *it is not reasonable to assume that a complete reconstructions of our social world would lead at once to a workable system*. Rather we should expect that, owing to lack of experience, many mistakes would be made which could be eliminated only by a long and laborious process of small adjustments; in other words, by that rational method of piecemeal engineering whose application we advocate." Karl Popper, *The Open Society and Its Enemies. Volume One - The Spell of Plato* (Routledge Classics, 2003), 177.

[118] Hayek, seemingly following Burke in this regard, argued that: "*[A]ll progress must be based on tradition*. We must build on tradition and can only tinker with its products." Hayek, *Law, Legislation, and Liberty*, 499; Edmund Burke, *Reflections on the Revolution in France*, ed. Conor Cruise O'Brien (Penguin Books, 2004), passim. We must respectfully disagree. We have but one life and that life, in the grand

The Theory illustrates something of the fragility of constitutional and legal systems. They rely on human memory, attentiveness, constancy, and will; on a sustained belief in their existence, tenets, and merits.[119] Where these fail, they fail. Often conflicts arise, too, which undermine these systems as previously understood. There might be conflicts as to social identity – for example, where one group wishes to assert its independence. There might equally be conflicts as to the ways in which affairs ought to be conducted. As soon as there is a sufficient shift in the prevalence and potency of ideas, the old systems fall. It matters but little how beautifully they had been imagined and with what care they had been constructed. It does not matter if they had been written, codified, and entrenched for, as soon as attitudes and ideas change, they become but dead letters. No constitutional settlement can be fixed for all time.[120]

It is incumbent on each of us to participate in the ongoing dialogue concerning our constitutional and legal settlements – to argue for changes and to defend the current settlement where we think fit. We must take ownership of our constitutional and legal systems. There are probably some who think this freedom dangerous. This might stem from a pessimistic view of human nature: unless we adhere to the wise standards of our forebears as laid out, for example, in a definitive document, chaos and injustice will ensue. People – especially governments – simply cannot be trusted to do the right thing. This is nonsense. It does, however, highlight the importance of ensuring comprehensive and open education, such that each generation is possessed of the fullest and best knowledge that it can possibly have.[121]

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scheme of things, is relatively short. It is no use for evils to persist and mar that life, when the remedy is at hand, simply because we fear changes that happen apace. As a general policy, then, gradual and incremental change seems best, but, in the specific circumstance, there might be good reason for overriding that general policy. However, this is not to say that sweeping changes ought to be made without caution or pause for sober reflection; without an examination of the merits and demerits of the present settlement, and the reasons and arguments therefor; without remembering that change, if it is to have any measure of success and permanence, often does take time and, therefore, requires some measure of patience; without reining in our idealism, eagerness, and enthusiasm; without checking our confidence in our ability; without remembering the fact that, in spite of many of the greatest intentions, utopias remain more or less an idle fantasy.

[119] Cf. "All social phenomena are, directly or indirectly, *human* creations. A lump of matter may exist which no one has perceived, but not a price which no one has charged, or a disciplinary code to which no one refers, or a tool which no one would dream of using." JWN Watkins, "Ideal Types and Historical Explanation," *The British Journal for the Philosophy of Science* 3, no. 9 (1952): 28.

[120] There are similarities here to what Loughlin has said when he said that constitutions have a 'dynamic quality' and that "there can be no fixed constitutional settlements". The basis of Loughlin's argument is somewhat different, as his appears to be based largely on an ever-changing relationship between constituent and constituted powers, as well as ever-changing political circumstances. In this, there is only partial truth. Nevertheless, the ultimate recognition of ongoing change is fundamentally correct. See Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 12.

[121] As Paine observed: "a long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defence of custom. But the tumult soon subsides. Time makes

Those most likely to oppose the Theory are those who fear change,[122] and who largely agree – for whatever reason – with the settlement of their day. They wish to give it as much authority as they can by bestowing upon it an eternal or everlasting aspect. However, this clouds their judgement. It is egocentric and myopic, and quite simply does not accord with reality. One might agree with liberal values, but this does not mean that constitutions are necessarily there to protect them; likewise, one might agree with certain religious values, but that does not mean that constitutions are there to express them. Constitutions express our values, whatever they are. Where there are certain values that we think ought to be encouraged or discouraged, it is once again incumbent upon us to enter into an open discourse. One would hope that a constitution would facilitate such open discourse, but it would not be any less a constitution if it did not.

As constitutional historians, we must be aware that there is a very real danger of not seeing things as they are and as themselves, which danger can only be averted by attention to detail and properly understanding things in their context.[123] We must be alive to the fact that things are constantly changing; that the impression of continuities and the persistence of identity is an illusion produced by the mind. We can disregard any form of continuity thesis, particularly essential continuity theses based on metaphysical notions. We might note repetitions and similarities,[124] but not continuities – especially over long periods of time when the idea of there being a continuity becomes increasingly tenuous.[125] Past

more converts than reason": Thomas Paine, "Common Sense (1776)," in *Rights of Man, Common Sense and Other Political Writings*, ed. Mark Philp (Oxford University Press, 2005), 3. In other words, people might at first be unwilling to depart from what they believe to have the authority of long usage, but, in time, and as people become accustomed to the new way of things, fears and doubts tend to subside.

[122] As Benedict argued, such fear of, and resistance to, change is often misplaced: "Change, we must remember, with all its difficulties, is inescapable. Our fears over even very minor shifts in custom are usually quite beside the point. Civilizations might change far more radically than any human authority has ever had the will or the imagination to change them, and still be completely workable. The minor changes that occasion so much denunciation today, such as the increase of divorce, the growing secularization in our cities, the prevalence of the petting party, and many more, could be taken up quite readily into a slightly different pattern of culture. Becoming traditional, they would be given the same richness of content, the same importance and value, that older patterns had in other generations." Ruth Benedict, *Patterns of Culture* (Houghton Mifflin Company, 1989), 36–37.

[123] This, in many ways, follows the advice of the Swiss historian and economist Simonde de Sismondi when he wrote in 1837: "I am convinced that one falls into serious error in wishing always to generalize everything connected with the social sciences. It is on the contrary essential to study human conditions in detail. One must get hold now of a period, now of a country, now of a profession, in order to see clearly what a man is and how institutions act upon him." Quoted in: W Richard Scott, *Institutions and Organizations: Ideas, Interests, and Identities*, 4th ed. (SAGE Publications, 2014), 262.

[124] After all, even though the *patterns* might be old, each *instantiation* of it is nevertheless new. Thus, it might be said that laws, etc., which seem to have a measure of persistency, are *tam antiqua et tam nova* ('ever ancient and ever new'). The phrase is from Augustine: Augustine of Hippo, *Confessions, Volume II: Books 9-13*, trans. William Watts (Harvard University Press, 1912), 146-147 (X.XXVII).

[125] We cannot say of constitutions and legal systems, like the refrain of Tennyson's brook, "For men may come and men may go, / But I go on for ever." Lord Tennyson, Alfred, *The Brook: An Idyl* in John Wain, ed., *The Oxford Library of English Poetry*, vol. 3 (Guild Publishing London, 1990), 97–103.

societies had their constitutional and legal systems as we have our constitutional and legal systems; they were themselves and we are ourselves. Whilst we might live with their legacy, it does not mean that we are their extension. They might have made things politically, economically, and even physically difficult for us, but, once they are gone, they are gone – and, with them, their power.

6 – The Tripartite Theory of Succession

> "…the *Advocates* of *Both sides* pretend equally to support themselves upon Arguments drawn from *Nature*, *Scripture*, *Law, History, Custom,* and *Political Expedience*… Now as it is utterly impossible for a *Contradiction*, to be *Both ways* in the *Right*; so the Difficulty will not be much less, for a Common man, in a Proposition of this Nicety, to distinguish betwixt the *Truth*, and the *Paradox*; and to determine, upon which side *Reason* lies."[1]

6.1 Introduction

We have discussed the nature of constitutions, laws, and constitutional and legal change. Before proceeding from the theoretical to the historical part of this thesis, it would be well to discuss the theory behind the idea of succession, which idea, naturally, underpins the *laws* of succession. This will be of benefit later when discussing the mediaeval laws of succession.

The laws of succession are important for any social group. They are a major determinant of *how* activities and influence *come to be distributed*; they play a significant role in the *ongoing process of (re-)distribution*. They are also important because, to a considerable extent, a group's stability relies upon them. If the laws surrounding succession are unclear, or if they are otherwise insufficiently prevalent and potent, then there is risk of division and infighting – particularly in respect of lucrative positions, e.g. the headship of the group.[2] Such internecine conflict might result in the weakening, fragmentation, or

[1] This comes from a particularly colourful pamphlet written by Sir Roger L'Estrange during the Exclusion Crisis; it concerned the prospect of the succession to the thrones of England and Scotland by the then D. York (who later became James II). L'Estrange's pamphlet demonstrates rather neatly that there were a number of different prevailing ideas in his time concerning the laws of succession; indeed, a great deal of confusion and division was caused by this fact: Roger L'Estrange, *The Case Put Concerning the Succession of His Royal Highness the Duke of York* (London: M. Clark, 1679), 1–2. For L'Estrange's part, he sought something rather more lasting than history or custom as a base. He thought that they ought to be "*Sacred* and *Inviolable Resolutions*, that are founded upon *Equity*, and the *Common Good*"; indeed, "[t]he Foundations of *Government* should be like Those of the *Earth*; *not to be moved*". In this light, his distrust of historical examples and precedent is unsurprising: L'Estrange, *Concerning the Succession of the D. York*, see esp. for these points and quotations 2-3, 6, 16. It is worthwhile noting that L'Estrange clearly thought that there was a constitution that operated according to certain laws (i.e. activities and influence were distributed in accordance with certain fixed associations); as to the substance of those laws, he took a rather conservative view.

[2] Cf. Wormald's argument that "Violence and chicanery were always inherent in early English regnal succession, and were to remain so long after the Norman Conquest, *perhaps so long as the office of sovereign was still worth fighting for*. The principles that were supposed to operate can be summarized in the formula: election from the blood royal of a candidate of suitable maturity. Unfortunately, each of the three elements in this formula is ambiguous": James Campbell, Eric John, and Patrick Wormald, *The Anglo-Saxons*, ed. James Campbell (Phaidon Press Limited, 1982), 115-116 (emph. added). Furthermore, Dumville's earlier argument that, "in England in the eleventh century, as in the sixth, the eventual arbiter

even destruction of the group. Yet, in spite of the obviousness of this fact, the pages of history are replete with examples of contested successions, as well as instances of succession that appear to be inconsistent with one another (i.e. which seem to have operated on different principles). Contested successions do not mean that there were not considered to be operational laws of succession; they certainly do not indicate the lack of a constitution. As will be seen both in the present chapter and later on, nothing could be further from the truth.

Studying instances of succession goes a long way towards demonstrating the theories set out in the previous chapters. Any social group with established roles or positions – which is most – will almost certainly possess some fixed expectations concerning succession to those things. The ubiquity of ideas surrounding the succession helps to demonstrate the Theory of Constitutional Ubiquity. Moreover, even for societies for which we possess very little information, we are often possessed of information regarding who was chief, king, emperor, etc. and who their successors were. As such, succession is a lens through which we can study practically all societies in recorded history – through which we can see that they all had constitutions.

With regard to the Associational Theory of Law, studying the succession often brings us face-to-face with that great rival of constitutions and law: politics. It confronts us with the (vested and often competing) interests and desires of various individuals and groups, which create an incentive to subvert the laws of succession; to aspire to positions of wealth and influence regardless as to the means by which they are attained. However, we often find that, even in such cases, they are hedged about by fixed associations. Indeed, even when they are being subverted, they are often dressed in the garb of *conforming* to shared fixed associations. They also generate discussion as to what the fixed associations are and what they should be; they provoke, as it were, negotiations. In such negotiations, one can quite clearly see the prevalence and potency of certain fixed associations; over time, one can study their persistency.

Finally, with regard to the Generational Theory of Law, succession makes for good study in two respects. Firstly, we return to the fact of evidence: succession, especially to prominent positions within social groups, can be studied across the pages of recorded history. It can, therefore, be studied in a way in which things like the detailed, day-to-day

in matters of succession was the sword": David N. Dumville, "The Ætheling: A Study in Anglo-Saxon Constitutional History," *Anglo-Saxon England* 8 (1979): 33.

organisation of government cannot. We can study how the ideas surrounding the succession changed over long periods. Secondly, succession is an event that happens regularly. In cases like that of kingship, it tends to happen once per generation. Consequently, it is a good way in which to see how each generation takes ownership of the laws of succession and turns them to their purposes; how each generation takes ownership of its constitution.

6.2 Windows into Associations: Beliefs and Behaviours

As has been said, the succession makes for good study as it is often an event for which we possess evidence. Even still, a significant problem remains: understanding *why* events happened as they did and, moreover, understanding precisely *what was going on in individuals' minds* – what *motivated* them. In some cases, we have direct evidence of people's beliefs; in other cases, we have to work backwards from their actions.[3] Let us explore this in more detail.

The most direct evidence we have for people's beliefs is what they *say* their beliefs are or *report* them to be. These are, we might say, **professed beliefs**.[4] Such professions might be **explicit** or **implicit**. They might be expressed in different ways and in different places; they might be found in prose, poetry, orations, etc. The most important source, however, are supposedly authoritative statements, which claim to contain those beliefs that ought to be both prevalent and potent, e.g. legislation and judicial pronouncements. These are considered to express not just some personal opinion, but, rather, are designed so as to be shared by all within the group. They act, we might say, as **anchors**. A danger for constitutional and legal historians is to study these in isolation; to assume that they were indeed authoritative. Many were dead letters or stillborn; others forgotten with the passage of time. They might help us to understand the formal constitution to a greater or lesser extent, but they can fall short of explaining the constitution as it actually was. For this, we must be prepared to take into account all evidence – all beliefs, professed or otherwise.

Studying professed beliefs gets us only so far. This is in no small part due to the facts that: (a) for a great many people, if evidence of their professed beliefs ever existed, that

[3] Indeed, in many ways, everything that we 'know' of others' thoughts must be derived ultimately from their behaviours. As Hebb once said: "All one can know about another's feelings and awarenesses is an inference from what he *does*…" DO Hebb, *The Organization of Behavior: A Neuropsychological Theory* (John Wiley & Sons, Inc., 1949), xiii.

[4] For our purposes, it matters not whether these are professed privately or publicly, except insofar as the latter are more likely to survive in the historical record.

evidence has not survived; (b) *what people say* and *what people really think* are two quite different matters; and, moreover, (c) *what people say* and *what people do* are also quite different. We ought to judge others by their actions, so says the proverb. It is true here. It is by studying people's *behaviours* that we can gain some understanding of their: (a) **unconscious beliefs**, i.e. beliefs of which they are not (wholly) conscious or aware, but are nevertheless apparent – these often take the form of assumptions, prejudices, and biases, and have much to do with predispositions and inclinations; (b) **unarticulated beliefs**, i.e. beliefs that people never cared to put into words or otherwise communicate, except through their actions; and (c) **concealed beliefs**, i.e. beliefs that people have purposefully attempted to keep hidden – at least, from public view.

More fundamentally, however, studying people's behaviours helps us to understand how any such beliefs *translate into practice* – how they fare in processes of practical reasoning and, in particular, when faced by competing interests and environmental influences. Indeed, when people act in a contrary manner to their *direct and immediate interests and desires*, and in a manner that means the *temporary, indefinite,* or even *permanent deferment of gratification*, then there is a strong indication that people's beliefs – i.e. their fixed associations about how they should behave – are the guiding force.

Behaviour can tell us much. However, it has its limitations. Behavioural studies often have to be based on inference, the exact processes of reasoning and motives being shrouded. To know *how* somebody acted is not necessarily to know *why* they acted so. Nevertheless, we can offer our best guess on the balance of probabilities, taking into account all that we know; in truth, this is sometimes the best evidence that can be mustered and, for lack of it, we would have no evidence whatsoever.

6.3 Succession Events

As with any event, succession events – and the beliefs and behaviours relating thereto – can be considered at three points in time: (1) **before**, (2) **during**, and (3) **after**.

In terms of beliefs, we are particularly interested in what might be called **alignment**, i.e. the extent to which beliefs at each stage agree. Where they align, there is a great deal to be said for their *potency* – even if, in the event, they were somewhat ineffectual. For example, if a person maintained that somebody was the rightful claimant to a position both before, during, and after the event, then that would speak volumes as to the potency of that belief, even if that claimant was not actually successful. Where there is a lack of

alignment, it is interesting to see how people *justify* – one might say *rationalise* – that; whether and how they seek to *reconcile* their former and later beliefs.

In terms of behaviours, those before an event we might call **preparatory behaviours**. There are two kinds of particular interest. On the one hand, there are what might be termed **anticipatory behaviours**, i.e. actions undertaken in the belief that certain eventualities seem probable – undertaken, as it were, in *anticipation*. Such behaviours tell us much about people's *assumptions*, especially where these seem to be so strong that the outcome is taken as a foregone conclusion. On the other hand, there are what might be termed **constructive behaviours**, which are actions undertaken to affect the outcome of an event, whether through: (a) **facilitation**, i.e. creating a favourable environment for the given eventuality, (b) **promotion**, i.e. actively attempting to bring about that eventuality, or (c) **prevention**, i.e. actively working against it. As such, there are attempts to *construct* the course of events.

Let us take the example of a king who is old and near to death. If people think that his successor is beyond doubt, life will probably continue as normal. However, if people think his successor unclear, then we are more likely to see people making preparations for a contested succession – either by preparing themselves for such an eventuality (e.g. fleeing abroad) or beginning to make manoeuvres to affect the outcome. There are here both anticipatory and constructive behaviours.

Next, we must consider behaviours *during* the event and the *outcome* thereof. Behaviours during the event, which attempt to affect the outcome, we might call **executive behaviours**.[5] It is by looking at these and the outcome that we can truly appreciate the prevalence and potency of particular beliefs – or, indeed, lack thereof. Where these executive behaviours appear to be uncontested and align with people's professed beliefs (especially as expressed in so-called authoritative statements), we can deduce with relative safety that the outcome was broadly in alignment with people's beliefs. However, where we see a number of executive behaviours working in different directions (i.e. a contested succession), the situation becomes more nebulous.

Finally, we must consider the *aftermath*. There are two aspects of particular importance. On the one hand, we can study the amount of *time, effort,* and *resources* that the principal actors have to invest to cement the outcome. These we might call **consolidating**

[5] These are, admittedly, very alike to constructive behaviours; the distinction we draw is that these are not so much made *in preparation*, but, rather, with real and immediate intent.

behaviours. On the other hand, we can look at the wider social group to see how the outcome was *received*; what the *reaction* was. These we might call **receptive behaviours**. Where an outcome was contested, where much was invested to consolidate that outcome, where the general reaction was one of shock or hostility – in these cases we can conclude that people's fixed associations concerning the succession were probably somehow *frustrated*. Alternatively, where the outcome appears uncontested, where little effort was made to consolidate the outcome, and where the reception appears to have been favourable – in these cases we can conclude that people's fixed associations were probably *fulfilled*. We can, then, make corresponding conclusions as to the prevalence and potency of those associations.

6.4 Nature and Types of Succession

In order to understand the laws of succession, one must understand what 'succession' means. We define 'succession' in the following manner:

> Where one thing follows (on from), or comes after, another thing either spatially or temporally.[6]

This contains four elements:

(1) **Non-identity element** ('one thing', 'another thing');
(2) **Spatial element** ('spatially');
(3) **Temporal element** ('temporally'); and
(4) **Sequential** or **lineal element** ('follows (on from), or comes after').[7]

The first three are variables; the fourth is a constant. As such, succession has to do with how two or more things sit with regard to one another in time or space; there needs to be some impression of some order or pattern that might be imagined as a *line, sequence,* or *procession*. In this latter respect, we must have regard to both *order* and *timing*.

[6] It is worthwhile noting that the "or" in "spatially or temporally" is an inclusive, not exclusive, "or".
[7] It is perhaps interesting to note here the etymology of 'succession', which is derived from the Latin *sub* + *cedere*, the latter part of which means, amongst other things, 'to yield' or 'to give way'; as in, one thing yields, or gives way, to another. See: "cedo, cessi, cessum, v." CDN Costa and Mary Herberg, eds., *Langenscheidt's Universal Dictionary: Latin-English, English-Latin* (Langenscheidt/Hodder and Stoughton, 1966); "cedo, cedere, cessi, cessum." Sir William Smith and JF Lockwood, eds., *A Smaller Latin-English Dictionary*, 3rd ed. (John Murray, 1933), 103; "cedo, cessi, cessum, 3, v." James Morwood, ed., *Pocket Oxford Latin Dictionary*, 3rd ed. (Oxford University Press, 2005), 29.

By modifying the spatial and temporal elements, we can venture three fundamental types of succession: (1) **avenue-like**;[8] (2) **wave-like**;[9] and (3) **occupational succession**. The latter is of greatest interest to us presently and, therefore, will be our focus. However, it is worthwhile stressing the importance of **proximity** in all three types – the things in question must be seen to be near in either time or space for there to be some impression in our minds of succession. If they are insufficiently proximate, then we are unlikely to think of them as following on from, or coming after, one another; we would regard them as separate, unrelated incidents. For longer chains of succession, this means that *each and every link in the chain* needs to be sufficiently close to its neighbours for there to be an impression of there being any chain at all.

Occupational succession occurs where the *same space* is occupied *at different times* by *non-identical things*. It might be that the original occupier has undergone some *transformation*; this we can call **metamorphosis**.[10] Alternatively, it might be that the original occupant has been *displaced* by some new occupant; this we can call **displacement**. The latter lays claim to our present attention.

We can speak of displacements occurring within either **physical and literal spaces**, or **figurative and metaphorical spaces**. Thus, we might say that Jane, Jemima, and Lucie all successively occupied the same armchair during the course of an evening. The armchair is a *physical and literal space*, which they all occupied at different times; it is tangible, real, and geographical. Alternatively, we might say that they each successively occupied the same position in the art-world as Picasso did during his lifetime. This space is *figurative and metaphysical*; it is *not* a real, tangible, and geographical place, but, rather, one reliant more on the imagination; their physical location perhaps matters little.

Whether one is speaking about a physical-literal or figurative-metaphorical space, the important thing is **relative position**, i.e. where things are situated in relation to one

[8] This occurs where the things in question are both *contemporaneous* and *contiguous*, i.e. they exist *at the same time*, but in *different spaces*. The salient factor here is that those different spaces form some sort of lineal sequence, i.e. they form a line or row. Thus, one might say that a road is lined by a *succession of trees*, which is to say that they formed an avenue (hence, 'avenue-type' succession). This type of succession is very much *static*; it is probably the least common in common usage.

[9] This occurs where the things in question are *non-contemporaneous* and *contiguous*; they occupy *different spaces at different times*, but the *order* of those spaces and the *timing* of their occupation gives one the impression of a lineal or sequential pattern. One might thing, for example, of a Mexican wave, in which each section of a crowd stands up and waves their arms *in succession*. This type of succession gives us the impression of *movement*; it feels as though something is moving, like the crest of a wave.

[10] One might say, for example, that a butterfly was successively an egg, a larva (i.e. caterpillar), a pupa (i.e. chrysalis), and then a butterfly. Whilst we might think of it being the same animal, it has changed its state several times such that each state is non-identical to the states that both proceeded and succeeded it. In other words, each state *follows on from or comes after* the other.

another and other things. For literal-physical spaces, that space is measured relative to other physical spaces and, in particular, certain objects or landmarks within those spaces. For figurative-metaphorical spaces, it is measured, as it were, with reference to whatever thing is pertinent. In the art-world example, other artists are the points of reference.

In this context of displacements, we can introduce the terminology of **predecessor**, **incumbent**, and **successor** – the former, current, and next occupant respectively. Thus, when Jemima was incumbent in the armchair, her predecessor was Jane and her successor was Lucie; when they succeeded to Picasso's position in the art-world, Picasso was their predecessor and they his successors. It is only in this context that we can properly speak of these things.

6.5 Succession: A Construct

Succession is, in the final analysis, a mental construct. It is the *impression* of a particular kind of relationship between things. Certainly, the natural world provides us with much material for these impressions, but it is only observers who can associate the things in question with one another and perceive some linear or sequential pattern.

The fact and importance of succession as a mental construct is magnified when one considers less tangible forms of succession – in particular, cases of occupational succession as regards displacements in figurative-metaphorical spaces. This is especially the case if it takes place over long periods of time, because that requires an ability to remember the 'successive' events and an impression of their being somehow connected.

Succession could not be anything other than a mental construct. We have already discussed how identity is a construct. Identity is foundational to succession. Succession is rooted in ideas of difference and change, which requires an ability to conceive of different things and of things changing over time. If one cannot conceive of differences and changes, of things with different identities, then one cannot conceive of succession. Indeed, this ability to conceive of differences and change is, if we follow Hume, crucial for our ability to conceive of time. For Hume, time is change;[11] things that do not change appear timeless. The idea of time is crucial to most forms of succession, because it requires an ability to develop a chronology – to be able to think of events in terms of having an order and timing.

[11] See: Jon Charles Miller, "Hume's Impression of Succession (Time)," *Dialogue* 47, no. 3–4 (2008): 603–17.

The fact that succession is a mental construct means that it is open to perspective and interpretation; some feel there to be a pattern when others do not. Further, it means that succession is open to creative effort; one might even say manipulation and abuse. If one can create a narrative of events tying together earlier and later events in some way, then one might engineer or discover – depending upon one's perspective – a succession. This can be particularly powerful when one considers the power of associations in the mind. If one can show that something is in some way connected to some other thing, then one might profit from the feelings and ideas associated with that other thing; in the right circumstances, it can lend an aura of legitimacy.[12]

6.6 Modes of Relation-Transmission

In order to understand succession more fully, it would be well to compare it with other similar ideas, i.e. descent and inheritance.[13]

Descent, inheritance, and succession are all what might be termed **modes of relation-transmission**. In each case, it is a *relationship* that is being transmitted, transferred, or transposed from one person to another. In the case of descent, it is the relationship to some form of *social identity*, i.e. one's membership of a particular group, class (e.g. labouring, bourgeois, etc.), category (e.g. caste, free or unfree, etc.), race, religion, etc.[14] This one derives almost exclusively from one's family members and, in particular, one's

[12] We can take the example of the Holy Roman Empire. Its history and development is complicated, but the salient point is that it was supposed in some way to be the successor of the classical Roman Empire. Given that a number of centuries lapsed between the proverbial fall of the Roman Empire and the supposed foundation of the Holy Roman Empire in Charlemagne's investiture, there is already cause to think that the one is insufficiently proximate to the other. Furthermore, there are many reasons for thinking that being emperor of the Roman Empire (or, at least, its western half) was quite unlike being emperor of the Holy Roman Empire – whether in its Carolingian beginnings (at which time it was not called the Holy Roman Empire) or at the time of its dissolution in 1806. It is easy to be sympathetic to this view. As Voltaire wryly remarked, the Holy Roman Empire was 'neither holy, nor roman, nor an empire' ('ni saint, ni romain, ni empire'). Nevertheless, one can see why there was an attempt to connect the former and latter bodies; the former potentially had much to offer. Whether or not one sees the Holy Roman Empire as the successor of the Roman Empire is a matter of belief. It depends upon creating a sufficiently convincing narrative connecting the two together in such a way that the latter follows the former. For Voltaire, see: Voltaire, *Essai Sur Les Mœurs et l'esprit Des Nations*, ed. Par M Beuchot, vol. 2 (Werdet & Lequien fils, 1829), chap. 70, para 12. See also Loughlin, who quotes this, although without its original attribution, saying that the HRE appears "To modern eyes…a strange edifice": Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 28.

[13] Cf. anthropologist WHR Rivers' definitions of these terms: "[D]escent applies only to the mode of determining membership of a social group; inheritance refers solely to the transmission of property; and succession denotes the mode of determining who shall succeed to rank or office of any kind, and especially to chieftainship." William Halse Rivers Rivers, *The History of Melanesian Society*, vol. 2 (Cambridge University Press, 1914), 90.

[14] In the constitutional histories, the discussion of descent is often integrated into a discussion of 'ranks' and 'status', see, e.g.: William Stubbs, *The Constitutional History of England in Its Origin and Development*, 6th ed., vol. 1 (Clarendon Press, 1903), 21–27; William Stubbs, *The Constitutional History of England in Its Origin and Development*, 4th ed., vol. 2 (Clarendon Press, 1896), 171–76, 184–86.

parents.[15] In the case of inheritance, it is the relationship to some form of *property*, whether tangible or intangible; in particular, it is relationships of *ownership* and *benefit* (and possibly *liability*) that are being transferred, normally upon the death of the previous owner or benefactor. In the case of succession, it is the relationship to some *particular and pre-existing social standing or position within a social group*. Sometimes this will involve redefining certain individuals' relationship to a particular physical and literal space. For example, a successor might occupy the same physical spaces occupied by their predecessors, e.g. their throne or abode. However, what is most important is the redefinition of their relationship to a more figurative and metaphorical space: their relationship to the other members of the social group; redefinition of their position within the network.[16]

To a great extent, one's social standing or position will be *affected* by the types and quantity of resources to which one has access. However, **social standing or position within a social group** is *defined* by the activities and influence with which one is associated. Oftentimes, these are neatly bundled together to form recognisable groupings. These groupings take various names, e.g. *role, status, office, rank, title*, etc.[17] It is the transmission of these **bundles** from one person to the next that constitutes the kind of succession in which we are especially interested as constitutional theorists and historians.

There are two important principles of succession that require mention. The first is the **principle of exclusivity**: each instantiation of a social position can only be held by one individual at any given time; in order for one person to succeed another, the first in time must vacate the position before their successor can succeed to it. It is only in this manner that the successor can be said to *follow on from, or come after*, their predecessor. There needs to be some sense of *replacement* or *supersession*. The second is the **principle of**

[15] For example, in the mediaeval context, one was a member of the nobility, for the most part, by virtue of one's parents, just as one was a serf, villein, or slave by the same token.

[16] Thus, for example, the Prime Minister of the United Kingdom and the President of the United States move into 10 Downing Street, Westminster and the White House, Washington DC respectively at the start of their tenures of office. They physically displace their predecessors who previously lived in those places. However, in the grand scheme of things, it is not so important that they live where their predecessors lived, but that they perform – or can perform – the same sorts of activities and influence as their predecessors did (especially in relation to, and as compared with, others). Indeed, it is possible to refuse to live either at 10 Downing Street or the White House and yet retain precisely the same activities and influence – though no Prime Minister since the Marquess of Salisbury has refused to live at 10 Downing Street and no American President since the White House was built has lived anywhere other than the White House – which indicates the symbolic importance of those places.

[17] Cf. Luhmann's definition of 'roles' as "bundles of expectation". This is fundamentally correct, although he was not perfectly clear as to the question: *expectations about what?* We can be clear here: they are expectations as to activities and influence. See: Niklas Luhmann, *A Sociological Theory of Law*, ed. Martin Albrow, trans. Elizabeth King and Martin Albrow (Routledge & Kegan Paul, 1985), 67.

sufficient similarity: the social position need not have exactly the same qualities for both predecessor and successor, but it needs to be sufficiently similar for there to be some impression that they are occupying, roughly speaking, the same position.[18] If they are not sufficiently similar, we could not say that the one succeeded to the place of the other; the place is different.

The principle of exclusivity is fundamental to both succession and inheritance, as one must relinquish either the social standing or property in question in order for it to be passed on. We must think, therefore, in terms of **translation** or **transposition**. By contrast, in cases of descent we must think much more in terms of **reproduction** or **duplication**: when one passes on one's social identity, which might include one's social position, one rather *copies* it and passes it on, whilst retaining, as it were, a copy for oneself.

Underlying descent, inheritance, and succession is a strong vein of **intergenerationality**, i.e. things are typically passed from generation to generation, *vertically* as opposed to *horizontally*. Thus, one's descent and inheritance are often derived from one's parents; one's social standing, if not derived from one's parents, is typically derived from one's parents' generation. In other words, one is more likely to succeed to positions held by one's elders than positions held by one's juniors. It is not universally the case, but it is the case more often than not – particularly when it comes to more 'senior' social positions.

There is significant interplay between descent, inheritance, and succession. For example, one's descent can affect the types of property that one can inherit, as well as the types of social position to which one can succeed. If one were a mediaeval villein, there would be a limit to what one could inherit and the social positions to which one might aspire; the field was much more open to the mediaeval nobility.

Descent, inheritance, and succession often run together – especially the latter two.[19] For example, the inheritance of certain property was often associated with the holding of a

[18] Sometimes only some of the activities and influence previously associated with a position are passed to the successor; the rest is withheld or abolished. As such, the social standing is only *partially* transmitted. Much of the time, however, the bundle passes through the transmission process *whole* or *complete*. Indeed, in some cases it might even be *enhanced* or *augmented* along the way; in other cases, *reduced* or *diminished*. These are important to bear in mind in the context of the Generational Theory of Law. Whether social standing changes or remains the same, it says a great deal concerning people's willingness to preserve or change their constitutional environment; whether changeovers are seen as an opportunity for reform.

[19] Indeed, in modern times, 'succession' and 'inheritance' are often used interchangeably, as in the use of the phrase 'the law of succession' where we might more strictly call it the 'law of inheritance'. For example, take the following textbook, which deals with inheritance: Roger Kerridge and AHR Brierley, *Parry & Kerridge: The Law of Succession*, 12th ed. (Sweet & Maxwell, 2009).

particular social position.[20] One can see evidence of this connection in a phrase that was profligate throughout mediaeval charters, edicts, law-codes, treaties, etc.: 'heirs and successors' (*heres et successores*). Thus, when a lord died and held his land in fee-tail, his eldest son (if he had one) would both *inherit* the land and *succeed* to his father's position as lord (bringing with it all the attendant privileges and responsibilities), even if he had to pay dues upon entry (i.e. a relief, *relevium*). Insofar as possible, however, it is important to attempt to distinguish carefully instances of inheritance and succession.

Inheritance, like succession, can be **partial** or **complete**, which is to say that either *some* or *all* of the property or social standing are transferred. Indeed, the transfer is sometimes thought to be so complete that, besides their personal identity, there is thought to be (legally) no difference between former and current possessors. This means embracing not only what the former possessed, but also any debts and obligations they had incurred or to which they themselves had succeeded.[21] Ideas that inheritance or succession must be complete are often accompanied by ideas of **indivisibility** and **inalienability**.

Descent and inheritance are, of course, not the only ways in which one might come by a certain social identity or property. For example, slaves might be manumitted or enterprising merchants might scale the social ladder. These, too, can affect the types of social position to which one might succeed and hold. Indeed, in the modern day, these other sources of social identity and property are perhaps far more important than descent or inheritance. However, historically and in more 'traditional' societies, this was not the case. As constitutional historians, this must be kept in mind. There were very many fixed associations about what sorts of person could do what that have to be navigated; in this respect, their constitutions were much more complex than our own.

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[20] Even though in the modern-day United Kingdom the concepts of descent, inheritance, and succession are largely distinct, there is still an on-going and slow-burning process of separating them in some quarters. One might take, for example, reform of the House of Lords. Historically, it was the case that when a peer of the realm died his heir would be entitled to *inherit* his father's estate and to *succeed* to his place in the House of Lords – this is no longer the case. This position was of course amended by the House of Lords Act 1999, which set out that no person could sit as a member of the House of Lords by virtue of hereditary peerage (s. 1) with the exception of 90-92 members (s. 2(2)) who are excepted by a Standing Order of the House (s. 2(1)). The first hereditary peers to sit after the Act were elected from the body of hereditary peers theretofore entitled to sit and, upon the death of any current hereditary peer, their seat will not pass to their next of kin but, rather, under s. 2(4) will be the subject of a by-election. To be eligible to stand in a by-election, one must be on the Register of Hereditary Peers, which is maintained and published yearly by the Clerk of the Parliaments in accordance with Standing Order 10 of the House of Lords (26 July 1999). Thus, whilst there is still an hereditary element, it is merely *necessary* and not *sufficient* to hold an hereditary peerage and, of course, the majority of the members of the present House of Lords hold their peerage on the basis of appointment and not heredity.

[21] Cf. the *principle of universal succession* in Roman law, by virtue of which heirs inherited not only the property but debts and obligations of their forebears. See: Paul du Plessis, *Borkowski's Textbook on Roman Law*, 4th ed. (Oxford University Press, 2010), 205, 226–27.

It is also worthwhile mentioning that there are also types of social identity that one cannot gain through descent; they are *non-transferable*. For example, one's sex,[22] level of education, marital status, age, etc.[23] are not obtained through descent nor can they be passed on. Nevertheless, they can substantially affect one's social position, including one's eligibility for various social positions. For example, one might only be able to succeed to given positions if one is biologically male or of a certain age.

6.7 Bundles of Activities and Influence

It has been said that there are bundles of activities and influence, and that these bundles are often given names such as *role, status, office, rank, title,* etc. To give each of these neat, analytically distinct definitions would be nigh impossible. However, it would be remiss not to distinguish them somewhat.

Role is the broadest and can be deployed in most situations where there is some feeling of *obligation* to perform some activity or to exercise some influence; it is also particularly overshadowed with a sense of *telos* or purpose, i.e. of some *function* needing to be performed. **Status** and **title** (as well as, perhaps, **estate**) are more of an account at any given time what activities or influence to which a given individual is *entitled* or *obligated* to perform; they are particularly associated with ideas of *prestige* and *privilege*.[24] **Rank** is particularly focused on the idea of levels or *strata* of influence – of who commands and who obeys; it is concerned with *seniority* and *inferiority*.

Office is not only the most important, but it is also, in many ways, a combination of the ideas underlying the other terms. In it, there is a sense of *function* and *obligation*,[25] as

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[22] One's biological sex is, of course, derived from one's biological parents. Nevertheless, the resulting social identity that one has is derived through descent; rather, one might have it *because* of one's parents, but not *by virtue of them*.

[23] Cf. Hollingshead's 'four factor index of social status' of education, occupation, sex, and marital status: August B Hollingshead, "Four Factor Index of Social Status (Unpublished Working Paper, 1975)," *Yale Journal of Sociology* 8 (2011): 21–52.

[24] 'Status' and 'role' were famously defined by Linton as follows: "A *status*, in the abstract is a position in a particular pattern. It is thus quite correct to speak of each individual as having many statuses, since each individual participates in the expression of a number of patterns. […]. A status, as distinct from the individual who may occupy it, is simply a collection of rights and duties." By contrast: "A *rôle* represents the dynamic aspect of a status. […]. When [a person] puts the rights and duties which constitute the status into effect, he is performing a rôle. Rôle and status are quite inseparable… There are no rôles without statuses and no statuses without rôles." Ralph Linton, *The Study of Man: An Introduction* (Appleton-Century-Crofts, Inc., 1936), 113–14. Linton's definition of 'status' is very close to the present definition of 'social standing or position' (which makes sense, seeing as 'status' derives from the Latin for 'standing'), but, because 'social standing/position' is freer from associations with prestige and privilege, it is here preferred as the general descriptor.

[25] Indeed, the idea of obligation is, etymologically, very much connected with the word office, which comes from the Latin *officium* – often translated with the word 'duty'. See, e.g.: "officium, (i)i, nt." Morwood, *Pocket Oxford Latin Dictionary*, 128; "officium, i, n." Smith and Lockwood, *A Smaller Latin-English Dictionary*, 489.

well as a sense of *prestige* and *privilege*; likewise, there is a sense of *seniority* or *inferiority*. Furthermore, office is often associated with ideas of *formality* – of the observance of certain processes and forms. These might have, to use Bagehot's language, more of a *dignified* or *efficient* aspect:[26] they might be saturated with symbolism, such as in certain accoutrements, ceremonies, rites, rituals, etc.; they might be thoroughly useless and outmoded. Nevertheless, there is a sense that not only will certain activities and influence be performed, but they will be performed in specific ways. There is further a sense of *publicness* or *openness*; an office is something that is held in respect to a social group at large; it is, as it were, *public facing*.

In modern, meritocratic societies, social standing tends to be something that is *acquired* – or, perhaps, *earned* – through some act or acts. Thus, beyond a basic egalitarian social standing that everyone shares, if one wants to have a particular role, status, title, office, etc., then one must gain it based on recognition of past, or promise of future, success. This has not been universally the case. There is also an idea that there are differentiated social standings that are somehow *inherent* in – or, to use Linton's term, *ascribed* to,[27] – individuals, often by virtue of descent or social identity. Thus, a person might have a particular status, title, or rank because their parents held (and continued to hold) that social standing (e.g. being a member of the aristocracy) or because of some biological fact (e.g. one's sex, age, familial relationships[28]). It is important to distinguish between an *inherent general social standing held by virtue of one's social identity* and an *inherent right to succeed to a particular social standing*. Both of these can be gained by descent, but the latter social standing *can only be realized through an act of succession* (i.e. transposition).

6.8 Implications of Proximity

It was said earlier that *proximity* is particularly important; where proximity is lacking, to describe things as succeeding one another is often strenuous. It is worthwhile considering the implications of this with regard to offices, roles, etc.

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[26] The 'dignified' parts of the constitution are those "which excite and preserve the reverence of the population"; the 'efficient' parts are those "by which it, in fact, works and rules". Every constitution, if they are to be successful, says Bagehot, 'must attain' these: "every constitution must first *gain* authority, and then *use* authority, it must first win the loyalty and confidence of mankind, and then employ that homage in the work of government". Walter Bagehot, *The English Constitution*, 2nd ed., 1873, 70.
[27] Linton, *The Study of Man*, 115.
[28] See, e.g. Linton, *The Study of Man*, 116–28.

Between the end of one tenancy, as it were, and the start of another, there is often a period of *vacancy*. This might occur for a number of reasons, e.g. the successor is yet to be selected or inaugurated. However, if this vacancy becomes chronic and a long period of time elapses, there is a question as to whether the latter really succeeds to the same social standing (or one sufficiently similar). After all, prevailing conditions might have changed so much that it would be nonsensical to think of the so-called successor as performing the same activities and exercising the same kinds of influence as were performed and exercised formerly. There is, then, a thin line between *abeyance* and *extinction*. If a certain social standing has fallen into abeyance but is then filled, then one might say that it is *revived*;[29] if the connection would be too tenuous, it is better to speak of *new creation*.

6.9 Monarchy as Social Standing and Office

The historical part of this thesis has to do with *royal* minorities. It would be well, therefore, to apply the foregoing to ideas of royalty and monarchy.

Monarchy – in whatever form – is a type of social standing. There are certain kinds of activities that we typically associate with monarchs. They are war leaders (*dux belli*), lawmakers and lawgivers, fountainheads (*fons et origo*) and guarantors of peace and justice, figureheads, administrators, decision-makers, etc.; they declare war or make peace, grant or rescind liberties, etc.[30] The precise nature of their activities is often ill-

[29] Sir Bernard Burke published in 1866 a list of all of the former peerages that had existed the time of writing his book: Bernard Burke, *A Genealogical History of the Dormant, Abeyant, Forfeited, and Extinct Peerages of the British Empire* (Harrison, 1886). In referring to the peerages as "dormant" and "abeyant" he is expressing his belief that they may one day be revived and, indeed, at page ix he says that there may be descendants of peerages thought extinct living abroad who are entitled to that peerage.

[30] Many languages possess many words associated with various positions and types of leadership, the precise meanings and connotations of which often change over time. Many of these words have ancient roots and have cognates in other languages (cf. Sanskrit *raj-*, Latin *rex-*, and Celtic *rig-*, which all appear to derive from a PIE root, **reg-*, meaning 'to straighten out or rule'; the German *Reich* and Old English *rice* both appear to derive from the same root, although perhaps not from PIE through the Germanic Parent Language (GPL), but, rather, as a later Celtic borrowing). Even though the ultimate and exact origins of many of these words are lost – to a greater or lesser extent – to obscurity (cf. the Ancient Greek *anax* (ἄναξ), with its female equivalent of *anassa* (ἄνασσα), and *basileus* (βασιλεύς)), many contain, reveal, and reflect some of the ideas about the nature of the positions that they denote. For example, 'monarch', from the Ancient Greek *monarkhes* (μονάρχης) is a compound of *monos* (μόνος), meaning 'sole' or 'only', and *arkhos* (ἀρχός), meaning 'leader'; *arkhos* itself appears to be derived from *arkhein* (ἄρχειν), which means 'to be first' or 'to begin', which can be seen in the Ancient Greek office of *archon* (ἄρχων), as well as in the English prefix *arch-* (e.g. archbishop and archangel); hierarch and hierarchy are also connected with *arkhos* and, in this case, they are formed from *hieros* (ἱερός), meaning 'holy', and *arhko* (ἄρχω), meaning 'rule'. In these roots, then, can be seen ideas of *directorship* and *primacy*; a person who *directs* and a person who is *first*. The Germanic languages, as opposed to other Proto-Indo European languages, appear to favour a slightly different idea. The English *king* (German: *König*) derives from the Old English, *cyning*, which is itself derived from *cyn-* or *cynn*, from which comes our 'kin', and *–ing*, which means something like 'son of', 'descended from', or 'belonging to'. The exact meaning of *cyn-/cynn* is difficult to identify, though it appears to derive from the same root, for example, as the Latin *gens* and *genus*, and the Ancient Greek *genos* (γένος); they all derive from PIE **ǵenh₁-*, which meant 'to produce, beget, give birth'. It is easy to see, therefore, how *cyn-/cynn* and 'kin' are surrounded by ideas of family, people, race, etc. It was once

defined,[31] but their general association with the monarch is the salient point. No ordinary person could do these things without special permission. Furthermore, there is a certain kind of influence that tends to be associated with monarchs, which might be called a **plenitude of influence**: the monarch commands all and is commanded by no-one.[32]

These activities and influence are bundled together and it would not be inappropriate to apply the label of 'office' to the monarchy. After all, there are usually associations of obligation and purpose, prestige and privilege, seniority, formality, and publicness. Furthermore, monarchy is an office capable of entertaining succession. It is an office considered to be both exclusive and transferable. Successors often succeed to both physical-literal spaces occupied by previous monarchs (e.g. fortifications, palaces, etc.), as well as figurative-metaphorical spaces (e.g. in the government, army, etc.).

6.10 Tripartite Theory of Succession

The process by which succession occurs can be divided into three stages: (1) **decoupling**, i.e. the process by which the previous incumbent ceases to hold the position, bearing in mind the principle of exclusivity; (2) **transmission**, i.e. the process by which the position is transferred or the successor is selected; and (3) **coupling**, i.e. the process by which the

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thought that *cyning* originated from an idea of being 'father of the race or family'; it would rather seem, however, that it originated from an idea of being 'one or the son or the product of the people, race, tribe, etc.', though, if it did come to signify the inheritor of the headship of the family, it is easy to see how it might become enmeshed with ideas of fatherhood. This could, theoretically, be a purely hereditary thing and the *–ing*, in this case, might refer to some specific *noble* or otherwise *special* family, etc. In this sense, the *cyning* was the (or perhaps *a*) representative of some noble family. It could, also, indicate some elective element – as in, the one *chosen* or *given* by the tribe or people. This would certainly tie in with many people's ideas about ancient Germanic liberties, but we should be careful in drawing any conclusions from mere speculation. Whatever the case, the fundamental idea appears to be that of *family* – and, perhaps, some *special place* therein or *with some special care* therefor. It is possible that this family was defined according to genetic relatedness or, perhaps, much in line with Fustel de Coulanges ideas, it might have had something to do with being united by a common and sacred worship – by being united by common rites and ceremonies, deities, and objects of fear and devotion. From all of these ideas, it is easy to see how functions, such as *sacerdotal*, *military*, and *pastoral*, might arise. It is interesting to note, by contrast to king, the origin of the word *queen*. This comes from OE *cwen*, denoting 'woman' or 'wife', and seems to indicate the subsidiary importance of the position – as the *king's consort*, i.e. the *king's woman or wife*. On these points, see, e.g.: Thomas G Palaima, "The Nature of the Mycenaean Wanax: Non-Indo-European Origins and Priestly Functions," *Aegaeum* 11 (1995): 119–39; Lothar Willms, "On the IE Etymology of Greek (w)Anax," *Glotta* 86 (2010): 232–71; Herwig Wolfram, "The Shaping of the Early Medieval Kingdom," *Viator: Medieval and Renaissance Studies* 1 (1971): 4; CT Onions, GWS Friedrichsen, and RW Burchfield, eds., *The Oxford Dictionary of English Etymology* (Oxford University Press, 1966), 47, 506: "arch-", "king"; Stubbs, *Constitutional History*, 1903, 1:158; Numa Denis Fustel de Coulanges, *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome*, trans. Willard Small (Doubleday Anchor Books, 1956); *A Lexicon Abridged from Liddell and Scott's Greek-English Lexicon* (Oxford University Press, 1891); Eric Partridge, *Origins: A Short Etymological Dictionary of Modern English*, 4th ed. (Routledge & Kegan Paul, 1966), 872: "-arch, etc."

[31] This often allows the monarch large amounts of discretion and liberty, often paraded under the banner of the *royal prerogative*.

[32] At least, this is true in more absolutist systems, although in many systems the influence of the monarch is either qualified or much reduced.

new incumbent is installed in their new position. For any given social position, each of these stages will be attended by various fixed associations. It is these patterns of fixed associations that constitute the laws of succession.

Each stage will be considered in turn with particular reference to monarchical succession.

6.11 Decoupling

Individuals might be decoupled from social positions in a number of ways, principally:

(1) **Expiration**: the term of the position comes to an end after a given length of time or event. It has, as it were, a natural or predetermined lifespan.
(2) **Resignation**: the holder gives up the social position (ostensibly willingly).
(3) **Removal**: the holder is ejected from their social position (perhaps forcibly).
(4) **Arrogation**: the activities and influence associated with the social position are assumed by another; the implication is that their gain is the original holder's loss (cf. *removal*).
(5) **Forfeiture**: the holder has violated the terms of their holding so grossly that their term is deemed to cease automatically (cf. *expiration*).
(6) **Nullification**: it is deemed that the holder was never, in fact, the proper holder – usually because of some *defect* or *deficiency* in their claim to the position or the process by which they came by it. In a word, there was some *irregularity*, which frustrates certain fixed associations.[33]

Let us discuss these with reference to monarchy.

As the monarchical office is normally held for life, the most commonly associated mode of decoupling is expiration, i.e. the monarch's term of office ends with their *death* – whether natural or otherwise.[34] Historically, it was unusual for a successor to reign during the lifetime of their predecessor;[35] indeed, the persistence in life of a predecessor was often problematic for their successors, because there were often still those who regarded

[33] This can perhaps only be loosely described as 'decoupling'; it is rather a *declaration* that the individual was at no time *properly coupled* with the position.
[34] For some illustrations of the deaths of kings in mediaeval England, see: Michael Evans, *The Death of Kings: Royal Deaths in Medieval England* (Hambledon Continuum, 2003).
[35] There are, however, some examples of this occurring, for example, in earlier Anglo-Saxon England. Indeed, it was not especially uncommon. We might think of Sigebehrt of East Anglia, who abdicated in in the mid-630s to become a monk; we might think of Centwine of Wessex in the late seventh century who abdicated to become a monk or his successor, Caedwalla, who abdicated and went to Rome. Alternatively, we might think of Æthelred and Coelred of Mercia, who vacated their thrones respectively in 704 and 709 to become monks and go on pilgrimage to Rome.

(for whatever reason) the former as the legitimate (and only) monarch.[36] This was a problem that often required solving.[37] For the most part, however, there was only ever one person alive that had been monarch and the expectation was that it would remain thus until they died. Indeed, there was a very potent, prevalent, and persistent idea that the monarch's death ought not to be in any way hastened or brought forward. Many laws attest to this expectation.[38] In particular, the various laws of treason, e.g. Alfred, c. 4;[39] V Æthelred, c. 30;[40] II Cnut, c. 57;[41] and Edward III's *Statute of Treasons*,[42] which was much broader than its predecessors and laid the foundations for the modern law.[43]

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[36] We might think of Shakespeare's lines from Richard II (Act 3, Scene 2): "Not all the water in the rough rude sea / Can wash the balm off from an anointed king."

[37] Between the unification of England in the tenth century and the death of George VI in 1952, only Æthelred II managed to survive the reign of his (arguable) successor, Swein Forkbeard (d. 1014). It is true that James II (d. 1701) survived one half of the pair that succeeded him, Mary II (d. 1694), but he died of natural causes before the other, and arguably more important person, William III (d. 1701) died. However, their feats of survival, such as they were, were largely achieved by their going into exile and thus removing themselves from the clutches of their erstwhile competitors. Those monarchs who remained or were caught (i.e. Edward II, Richard II, Henry VI, and Edward V) were all kept in confinement and died or disappeared in somewhat mysterious circumstances – at times that were, rather conveniently, politically expedient. For, so long as they lived, they posed a potential threat; there were still those who regarded them as the rightful and legitimate monarch. As to whether Æthelred or James would have met an untimely end had they remained in the country, one can only speculate. Whether one might also count Edgar the Ætheling and the Empress Matilda in this category of survivors is something of a moot point. If one accepts Edgar's 'election' in 1066, then he did, indeed, manage to outlive two of his successors (William I and William II). Similarly, in the case of the Empress Matilda, there is a case that she was the legitimate heir to the English throne following the death of her father (Henry I). However, as she was never crowned, she can properly be said to have only remained a contender; nevertheless, she did outlive her main rival (K. Stephen). Yet, when the time came, she deferred to her son (Henry II). There is also the tricky matter of Charles II, who survived the Commonwealth and Protectorate after his father's (i.e. Charles I's) execution. Technically, Charles did not survive his successor because, during the interregnum, there was no successor *per se*. Nevertheless, Charles, like Æthelred, Matilda, Edgar, and, later, James, survived largely by virtue of his living abroad. It is interesting to note that, Edward VIII, who abdicated the throne in 1936, managed not only to see out the entirety of the sixteen-year reign of his brother, George VI, but also the first twenty years of the reign of his niece, Elizabeth II. That he did this in self-imposed exile is noteworthy. It is also important to remember that, by this time, the monarch was no longer the principal operant in government.

[38] For example, there is perhaps something of this sort of motivation behind the provisions in the Laws of Æthelbehrt (c. 5) and Ine (c. 6), which provide penalties for killing and fighting in the king's house respectively. These provisions were largely concerned with maintaining the integrity of the lord's *mund* or protection in his own lands, not to mention his honour. After all, if a king could not keep peace in his own lands and household, how could he keep peace in the kingdom? However, it is possible that these provisions were also motivated by a desire to keep the king safe – for fighting in his presence could result in his being harmed, albeit accidentally and collaterally. For these provisions, see: FL Attenborough, ed., *The Laws of the Earliest English Kings* (Cambridge University Press, 1922), 4–5, 38–39.

[39] "If anyone plots against the life of the king, either on his own account, or by harbouring outlaws, or men belonging to [the king] himself, he shall forfeit his life and all he possesses.": Attenborough, *The Laws of the Earliest English Kings*, 64–65.

[40] "And if anyone plots against the king, he shall forfeit his life…": AJ Robertson, ed., *The Laws of the Kings of England from Edmund to Henry I* (Cambridge University Press, 1925), 86–87.

[41] "If anyone plots against the king or his own lord, he shall forfeit his life and all that he possesses…": Robertson, *The Laws of the Kings of England from Edmund to Henry I*, 204–5.

[42] 25 Edw. III, st. 5, c. 2 (1352).

[43] Of course, these acts of lawmaking were not all that constituted the law of treason and, indeed, the act of Edward III was in part a reaction to the shape that the law of treason was taking in the absence of a legislative enactment, see: Dudley Julius Medley, *A Student's Manual of Constitutional History*, 6th ed. (Oxford University Press, 1925), 92–93; Theodore FT Plucknett, *Taswell-Langmead's English*

It was not universally the case that the end of a monarch's term of office coincided with their death. There were times when the monarch was, for whatever reason, deemed to resign their office, i.e. they *abdicated*. Some appear to have done this largely of their own volition.[44] However, there were others whose abdications were only effected after considerable pressure had been brought to bear upon them. We might think of Edward II,[45] Richard II,[46] and Edward VIII,[47] who all made formal declarations of abdication; we might also think of James II, whose abdication was assumed from his 'withdrawing from the kingdom' in the face of William of Orange.[48]

Closely related to the above incidents of abdication under duress is the removal of the monarch, i.e. *deposition*.[49] In English history, deposition has occurred most clearly in the cases of Richard II and Charles I. Richard's abdication appears to have already been secured,[50] when his contemporaries took the additional step of deposing him.[51] As such, Richard could then neither argue that his abdication was invalid nor could he rescind it; his deposition would stand regardless. It would seem that both abdication and deposition were in themselves thought sufficient to decouple Richard from the throne; it fell vacant and was claimed by Henry [IV]. Charles I, unlike Richard, never abdicated; he was

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Constitutional History: From the Teutonic Conquest to the Present Time, 11th ed. (Sweet & Maxwell, Ltd., 1960), 512ff.

[44] In the English context, we might again think of Æthelred and Coelred of Mercia who vacated their thrones in the early eighth-century, seemingly voluntarily, to devote themselves to religious life

[45] Edward II's abdication was extracted from him, by a delegation of whose composition we are not entirely certain, at Kenilworth in mid-January 1327. He was threatened that, if he did not resign the throne, his son, Edward [III], would also be deprived of an opportunity to hold it. See further below.

[46] Richard II's abdication was extracted from him in late September 1399, whilst he was imprisoned in the Tower of London. See: Nigel Saul, *Richard II* (Yale University Press, 1999), 420–21.

[47] Edward VIII came to the throne in January 1936. He wished to marry an American divorcee, Wallis Simpson, but he faced considerable opposition, particularly from the Prime Minister Stanley Baldwin and the leader of the opposition, Clement Attlee. It appeared to be a choice between remaining king and being able to marry Ms. Simpson. Edward opted for the latter and, on 10 December 1936, he signed the instrument of abdication.

[48] See: Henry Hallam, *Constitutional History of England: Henry VII to George II*, vol. 3 (JM Dent & Sons Limited, n.d.), 84. It is the crown's vacancy by virtue of abdication that is mentioned in the Bill of Rights 1689: WC Costin and J Steven Watson, eds., *The Law and Working of the Constitution: Documents 1660-1914*, vol. 1 (Adam and Charles Black, 1952), 69.

[49] On deposition in English history, see, *inter alia*: William Huse Dunham Jr. and Charles T Wood, "The Right to Rule in England: Depositions and the Kingdom's Authority , 1327-1485," *The American Historical Review* 81, no. 4 (1976): 738–61; Claire Valente, "The Deposition and Abdication of Edward II," *The English Historical Review* 113, no. 453 (1998): 852–81; Maude V Clarke and VH Galbraith, "The Deposition of Richard II," *Bulletin of the John Rylands Library* 14, no. 1 (1930): 125–81; Bertram Wilkinson, "The Deposition of Richard II and the Accession of Henry IV," *English Historical Review* 54, no. 214 (1939): 215–39.

[50] This was, in fact, the date on which his reign was deemed to have ended: Saul, *Richard II*, 423.

[51] See: Saul, *Richard II*, 422; Thomas Walsingham, *The St Albans Chronicle: The Chronica Maiora of Thomas Walsingham II 1394-1422*, ed. and trans. John Taylor, Wendy R Childs, and Leslie Watkins (Oxford University Press, 2011), 200–203; Adam Usk, *The Chronicle of Adam Usk, 1377-1421*, ed. and trans. Chris Given-Wilson (Oxford University Press, 1997), 68–69; AR Myers, ed., *English Historical Documents*, vol. 4 (Eyre and Spottiswoode, 1969), 180–84.

deposed after a trial of dubious validity.[52] Also unlike Richard, who was initially suffered to live, Charles' fate was clear from the moment of deposition; he was executed three days after his condemnation.

The so-called deposition of Edward II requires more attention. In most histories, it is taken for granted that Edward II was deposed, which is little surprise as the chapters and papers on the subject describe it as a 'deposition'.[53] Certainly, there appears to have been some discussion of deposing Edward,[54] and the *Articles of Accusation* are testament to the fact that people thought there were good reasons for his removal.[55] Indeed, it is possible that a statute was drawn up, which, according to Knighton, was shown to Richard II in 1386; if true, it was probably later destroyed.[56] However, it is difficult to share Valente's conviction that Edward was indeed deposed.[57] Everything that happened prior to the sending of the delegation to Edward II at Kenilworth, rather than being interpreted as a discussion as to whether or not to depose Edward, could as easily be interpreted as a discussion as to whether Edward should be called upon to abdicate – a discussion that resulted in an affirmative. The order of events is also revealing. If Edward had already been deposed, there would have been little need to send a delegation to Kenilworth asking him to relinquish the throne.[58] The only possible reason might have been that Edward, aside from relinquishing the office of kingship, might also have needed to relinquish his lands and wealth to his son, which, being personal property, he could not be deprived of without his consent. Yet there is no mention of this as a reason in contemporary accounts. Further, whether or not the group that sent the delegation to Kenilworth and received Edward's answer had the power to depose him is arguable. The fact of the matter is that,

[52] There is an argument to be made that Charles I, like James II, was not *deposed* so much as had *forfeited* his right to the throne through his subversion of the fundamental laws and constitution of the country. See: the sentence of the High Court upon Charles I and the House of Commons' resolution on 28 January 1689 after James II's flight, printed in, respectively: Samuel Rawson Gardiner, ed., *The Constitutional Documents of the Puritan Revolution, 1625-60*, 3rd ed., 1906, 377–80; John Miller, "The Glorious Revolution: 'Contract' and 'Abdication' Reconsidered," *The Historical Journal* 25, no. 3 (1982): 541.

[53] See, e.g.: Bertram Wilkinson, *The Constitutional History of England, 1216-1399: Politics and the Constitution, 1307-1399*, vol. 2 (Longmans, Green and Co., 1952), 157-176 ('The Deposition of Edward II'); Maude Violet Clarke, *Medieval Representation and Consent: A Study of Early Parliaments in England with Special Reference to the Modus Tenendi Parliamentum* (Longmans, Green and Co., 1936), 173-195 ('Committees of Estates and the Deposition of Edward II').

[54] See: Valente, "The Deposition and Abdication of Edward II," 855–57.

[55] For these, see: George Burton Adams and H Morse Stephens, eds., *Select Documents of English Constitutional History* (The Macmillan Company, 1901), 99.

[56] Clarke, *Medieval Representation and Consent*, 177.

[57] Valente, "The Deposition and Abdication of Edward II," esp. at 862.

[58] The fact that later in the century Richard II was required to abdicate prior to any attempt to depose him is important; the order, there, was reversed.

on the evidence we possess, it would seem better to say only that Edward *abdicated* the throne; whether he was formally *deposed* we will perhaps never know.

We will not enter here into a detailed discussion of arrogation (which is closely related to the idea of *usurpation*),[59] forfeiture,[60] and nullification[61] with regards to the monarchy. It is sufficient to say that, whereas resignation, removal, and arrogation require agency to bring them about, expiration, forfeiture, and nullification happen, as it were, automatically.

6.11.1 Complete and Partial Decoupling

It has thus far been assumed that decoupling applies to the social standing in question *in toto*, i.e. the successor completely replaces their predecessor in their activities and influence. It is at this point that we must add a qualification to the principle of exclusivity: it is possible for a person to succeed *only to some portion* of their predecessor's activities and influence. Yet, it must be emphasised, that this person can only be said to be the other's successor *in respect of these*. As such, we can distinguish between **complete** and **partial decoupling**.

6.12 Eligibility and Candidature

In order to succeed to a given social position, a person needs to be both **eligible** and a **candidate**. Any **deficiency** or **irregularity** in either of these could be fatal to that person's claim; it would frustrate people's fixed associations.

Eligibility is a matter of both *having the right qualifications or qualities* and *not being disqualified*. In other words, a person must have everything deemed necessary in order to stand without having anything that would bar them from standing. Age, nationality, social

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[59] In such cases, the person is, against their will and without the formalities associated with resignation and removal, ejected from their position and replaced by another. In other words, the process of decoupling follows no set pattern of expectations, which has often led to a residual belief that the former occupant was still, by rights, incumbent. In English history, there have been many plots in order to dethrone a usurper and restore the supposedly rightful holder for, although they might have been *de facto* decoupled from their position, they were never *de jure* decoupled. We might think of Edmund, E. Kent who, in March 1330, was executed for having intrigued for the release from prison of Edward II, whom he thought to still be alive and, presumably, still the rightful king. (For a record of this event, see: Myers, *English Historical Documents*, 4:50–51. See also: May McKisack, *The Fourteenth Century, 1307-1399* (Oxford University Press, 1959), 100.). Alternatively, one might think of the Windsor Plot of January 1400, in which a group of disgruntled earls planned to arrogation Henry IV and his progeny at Windsor and restore Richard II.[59] Indeed, it was this event that probably accelerated Richard's death.

[60] There has been no clear-cut case of forfeiture in English history, although the accusations levelled against the negligence, ineptitude, tyranny, and malice of Edward II, Richard II, Charles I, and James II all approximate it somewhat.

[61] Nullification often becomes a prominent issue in the case of a usurpation, because, so it is argued, the usurper's title was null and void *ab initio*.

class, personal income, etc. might all affect one's ability to stand for a given position. It is worthwhile noting the categorical association here: persons qualified-and-not-disqualified form a set of 'eligible' persons. Anybody outside this set cannot be rightfully countenanced as succeeding to the position – for them to do so would frustrate our fixed associations.

In the context of monarchy, eligibility is sometimes called *throneworthiness*. Those throneworthy were usually a small and select group, i.e. the monarch's close relatives. Those of lower social status are unlikely to have ever been thought eligible to succeed to the throne. Similarly, being born abroad, even if of 'royal blood', might have made one ineligible,[62] as would being – or marrying somebody – of a proscribed faith.[63]

It is not enough to be eligible. In order to stand any chance of actually succeeding, one must be *considered* at the right time with regard to the position. In other words, they must be *brought to the attention of others*; one must be a *candidate*.

Candidates need to show (or have shown for them) that there are *good reasons* why the social position is, or ought to be, theirs. Moreover, they need to advance those reasons *in the proper manner*. In other words, they must conform with others' expectations as regards to both **substance** and **form** when advancing their candidature. Failure regarding either of these might frustrate others' expectations and invalidate one's candidature.

Candidature is normally based on claims of either **title or right**, on the one hand, or **merit**, on the other. A person claiming according to title is claiming that the social position is somehow *theirs by right* or, in the very least, that they *have a right to be considered*. There are some fixed associations, the force and effect of which identify the given person as the successor. This in itself is considered to be a sufficiently good reason.[64] By contrast,

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[62] For example, *De Natis Ultra Mare* or *A Statute for those who are born in Parts beyond the Sea* (25 Edw. III, c. 3, 1350) declared that the Lord King, "willing that all Doubts and Ambiguities should be put away, and the Law in this Case declared and put in a Certainty", had caused the matter to be discussed in Parliament and it was settled that "the Law of the Crown of England is, and always hath been such, that the Children of the Kings of England, in whatsoever Parts they be born, in England or elsewhere, be able and ought to bear the Inheritance after the death of their Ancestors." This Act was made particularly in view of the fact that John of Gaunt had been born abroad – in Ghent, hence his epithet.

[63] The Bill of Rights 1688/9 (1 Will. and Mar. Sess. 2, c. 2), for example, excluded Catholics from the succession to the throne of England, Scotland, etc. for "it hath beene found by Experience that it is inconsistent with the Safety and Welfaire of this Protestant Kingdome to be governed by a Popish Prince". This prohibition was rehearsed in the Act of Settlement 1701 (12 and 13 Will. III c. 2), in which it was added, at II, that those who married Catholics would also be excluded.

[64] Cf. Hobhouse: "Generically, therefore, a right is a kind of expectation; but it is not only an expectation, but an expectation held to be justified… [I]t may be a legal right, and the justification then lies in an appeal to law. But, in addition, there are, or there may be, rights which the law does not recognize and which the moral consciousness holds ought to be recognized. The older thinkers spoke of them as 'natural rights', but to this phrase, if uncritically used, there is the grave objection that it suggests that such rights are

those claiming on merit are claiming that they are the *most* or *best* qualified candidate. The position ought to be theirs either as (1) a reward for, or recognition of, past actions (i.e. they *deserve* it), or (2) in view of their abilities and likely future performance (i.e. they have the greatest *potential*).

Title and merit are not mutually exclusive. Indeed, they are often complementary. Nevertheless, there is usually felt to be a great deal more discretion allowed in cases of merit as opposed to cases of title. Even so, establishing some form of title is not necessarily enough to secure the position. That title might be **defeasible**; it might be vulnerable to a superior (i.e. better) claim.[65]

A person might be advanced for candidature either by themselves or by some third party. The process of advancement goes under many different names, e.g. nomination, petition, application, claim, etc. It is possible, of course, for a person to succeed to a social position without having been eligible or a *bona fide* candidate; however, they must have these things if they are to be generally considered *legitimate* and *rightful* holders.

6.13 Transmission

6.13.1 Pushing and Pulling Forces

It will be recalled that social standing is a set of associated activities and influence; a bundle, which might be given a collective name or label. Even though this bundle is ultimately a cognitive construct, we can imagine it as though it were an object with a real, physical existence. We can imagine it being passed from person to person; being lost by one and acquired by another; being given and taken. Indeed, we often invest certain physical artefacts with ideas of this bundle (e.g. certain insignia or paraphernalia of

independent of society, whereas, if our arguments hold, there is no moral order independent of society and therefore no rights which, apart from the social consciousness, would be recognized at all. Our analysis of the term 'right' goes to show that a right is nothing but an expectation which will appeal to an impartial person." Leonard Trelawney Hobhouse, *Social Evolution and Political Theory* (Columbia University Press, 1911), 197. As Hobhouse himself recognized on the previous page, rights are often correlated with corresponding duties – whether a positive duty to actively realize and uphold the right, or a negative duty to respect it (i.e. not infringe it). In terms of the succession, a recognized title might put create a duty in some to take certain actions to ensure that title is realized (e.g. in the archbishop to crown the next in line) or to prevent pretenders to the title from taking it (e.g. by waging war against them); indeed, it would create a duty in would-be pretenders not to aspire to the position, for they have a duty to respect the rightful holder's title.

[65] For example, we might draw a distinction between an 'heir apparent' and an 'heir presumptive'. The former has indefeasible title (i.e. no title could be better than theirs), the latter has defeasible title (i.e. a closer heir might appear).

office),[66] such that *their* transfer *signifies* the transference of the social position itself.[67] This physical analogy helps us to conceptualise and understand the different ways in which social standing is transmitted.

For social standing to be transferred, there needs to be some form of movement. The movement of an object requires the application of some *force*. This might be a **pushing force**, or, alternatively, a **pulling force**. Consequently, a bundle of social standing might be conceived of as either being *pushed* or *pulled towards* a given person (i.e. the successor). With the addition of **agency** to this picture, one can elegantly categorise the various ways in which social standing can be said to move.

First, there are pushing and pulling forces involving some human or personified agency. Thus, one might be *given* or *presented* a social position by somebody else. In this case, we can imagine the bundle being *pushed towards* the recipient by that agent. This we can call **presentation**. Alternatively, one might *take* the social position for oneself, perhaps by force. In this case we can imagine either the person *pulling* the bundle towards themselves. This we can call **appropriation**.[68] In presentation, the active agent is some third party; in appropriation, the would-be successor themselves. Each of these has a number of sub-categories, which are discussed further down.

Second, there are impersonal forces; there appears to be no agent. Here, the bundle of social standing moves *as if of its own volition*; it moves *independently* and *automatically*; rather than being given or taken, it *falls naturally*. Whether this is imagined as a push- or pull-force is academic; the salient point is that it moves. There are a number of different analogies that one might adopt here. For example, one might imagine the bundle moving according to some principle of *magnetism*. However, the analogy we will adopt is one of gravity – there is something about the recipient that makes the bundle *gravitate* towards them; there is something about them that *draws* or *attracts* it. For this reason, we will call this category **gravitation**. It is under this head that the importance of fixed associations is perhaps most apparent.

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[66] One might here think of the various symbols of royal authority, e.g. crown, sceptre, orb, throne, etc. Alternatively, we might think, for example, of the woolsack – the seat of the Lord Speaker of the House of Lords, which practice originated in the time of Edward III.

[67] It is worthwhile remembering the words of Hobhouse here: "[E]ven though social institutions may in a sense be actually incorporated in material things, in buildings, in books, in coronation robes, or in flags, still it need not be said that these things are nothing but for the continuity of thought which maintains and develops their significance." Hobhouse, *Social Evolution and Political Theory*, 34.

[68] The word 'appropriation' is fitting, for the person involves make it such that the thing in question is considered 'proper' to themselves; in other words, they establish their ownership over it by creating this impression in people's minds that it belongs to them, even if it was ill-gotten.

These three categories – presentation, appropriation, and gravitation – constitute the main heads of transmission. Even though succession is our present concern, it is worthwhile mentioning that these three can be applied to the transfer of any kind of social standing, regardless as to whether or not there was some former holder. It should also be said that they are not necessarily mutually exclusive; they often run parallel to, complement, and reinforce one another. Where this is the case, matters can become quite complex, especially where it is unclear as to which of these is the predominant force.

We will now consider each in turn.

6.13.2 Presentation

Presentation is initiated by some person *other than the recipient*. There are fundamentally two kinds of agent who might do this: (1) a **predecessor** (i.e. some previous holder of the same position) or (2) some **third-party** (i.e. anybody else). In order to do this legitimately, the predecessor or third-party must have some **power of disposition**, i.e. a power to make a determination upon the question of the succession. There must be some association in people's minds between this predecessor or third-party and the power to dispose of the succession. Where this association is absent, the attempt to dispose of the succession by this person or persons would probably *frustrate* our fixed associations; it would be illegal.

Where a predecessor attempts to stipulate their successor, we tend to call this **designation**. Where a third-party attempts to stipulate who is to be the successor, we tend to refer to this as being the result of either **appointment** or **election**.[69]

It was previously said that agency might be *personified*. The reason for this can now be made clear. It has not always been the case that third-parties were considered to be human. Historically, many saw the hands of supernatural or divine beings at work, whose wills were demonstrated, for example, through omens, miracles, or revelation. As such, one might have been thought of as being appointed by God, rather than any fellow human-being. In societies pregnant with superstition and faith, such supposed sources cannot be underestimated.

[69] Distinguishing *appointment* and *election* can be difficult, but the difference seems to lie in the method and transparency of the decision-making process. If there is an open and transparent vote, then we would probably call this an election; if there is no apparent vote or if the detail of any vote is hidden from view, then we might be more inclined to call it an appointment.

A final point might be made about the psychological impact of the act of presentation upon the respective parties, which is much akin to gift-giving. For the recipient, it often prompts feelings of *indebtedness*. For the donor, there is often some expectation that the recipient will show *gratitude* and, where appropriate, will *reciprocate* in some way; there is also a feeling that the recipient is somehow *beholden* to them. Furthermore, the donor often retains some residual feeling that the thing in question is somehow *theirs*. This produces within them the desire to continue to control it even after it was given – especially if they think it is being neglected or abused. In the history of monarchical succession, these respective feelings and the resultant relationship between the office-holder and those who supposed themselves to be the givers of that office were of fundamental importance.

6.13.3 Appropriation

In the cases of presentation and gravitation, the recipient is largely *passive*. However, in the case of appropriation, the recipient is very much the active agent: the social standing is something they *take* or *seize* – often forcibly. This might be directly from their processor or from some third-party who, for a time, had control over it.

Under appropriation, there are broadly three subcategories: (1) outright appropriation; (2) appropriation by adverse possession; and (3) occupation of *terra nullius***.**

Outright appropriation is perhaps the most commonly occurring of these and often takes the form of **conquest**, **annexation**, or **coup d'états**.[70] The salient feature is that the position is achieved through use of real influence, often underpinned with the threat and

[70] Annexation occurs where the position gained is added to, or subsumed within, some other position; conquest, by contrast, occurs where the position retains its separate identity. A *coup d'état* is mostly associated with depriving the predecessor only of their social standing; conquest implies that their life and possessions are potentially also forfeit.

use of force. The accessions of Swein Forkbeard (1013-4),[71] Cnut (1016),[72] William I (1066),[73] Edward IV (1461 and 1471),[74] and Henry VII (1485),[75] can all be understood in this context. Their claims of presentation or gravitation are somewhat dubious; the fact of succession was determined, as much as anything, by their military backing.

Appropriation by adverse possession is similar, except that it occurs over longer periods of time. Indeed, it is the passing of time that strengthens the new holder's title,

[71] Swein had invaded – or, at least, raided – England on a number of occasions prior to this. It seems that he participated in Olaf Tryggvason's raid on England in the 994, but the first major expedition that he led was in 1003-5. The precise reasons for Swein's invasion are unclear, as are his initial intentions and objectives, but it is generally agreed that it was driven or, at least, justified partly by revenge for the St. Brice's Day massacre of 1002 (in which some of his relatives were possibly killed). The nature of Swein's involvement in the subsequent raids over the following decade are also unclear, but he once again invaded in 1013. Again, revenge – in this case, for the defection of Thorkell the Tall – probably loomed large in his reasoning; it is possible that he already had designs on the English throne. Æthelred II put up some resistance to Swein, but was driven into exile. Swein died not long afterwards, on 3 February 1014. Besides the fact of his conquest, Swein appears to have had little right to the English throne. See: FM Stenton, *Anglo-Saxon England*, 3rd ed. (Oxford University Press, 1971), 378, 380, 384–86; Peter Hunter Blair, *An Introduction to Anglo-Saxon England*, 2nd ed. (Cambridge University Press, 1977), 91, 93–95, 98; Campbell, John, and Wormald, *The Anglo-Saxons*, 174, 194, 198–99; Levi Roach, *Æthelred the Unready* (Yale University Press, 2016), chap. 6.

[72] Cnut was Swein Forkbeard's son and appears to have claimed the English throne principally on this basis. However, Æthelred II had returned to England and so Cnut had to fight with him; Æthelred died of apparently natural causes during this conflict, but it was maintained under his son, Edmund Ironside. After a series of battles, Cnut and Edmund came to terms, dividing England between themselves. Edmund's death shortly thereafter enabled Cnut to claim hegemony. The important point is that, but for his campaigns in 1015-6, Cnut is unlikely to have been in a position to succeed to the English throne. See: MK Lawson, *Cnut: England's Viking King, 1016-35*, 2nd ed. (The History Press, 2011), chap. 1; Roach, *Æthelred the Unready*, chap. 6; Stenton, *Anglo. Sax. Engl.*, 386–93.

[73] William's claim to the English throne was not based on conquest, but it was vindicated thereby. It was through force of arms that he unseated his rival, Harold II, and suppressed risings and reduced to the country to obedience. The need for the aggressive programme of castle-building is also indicative of the insecurity felt by William and his barons. See: Stenton, *Anglo. Sax. Engl.*, chap. 16; David C Douglas, *William the Conqueror* (Methuen & Co. Ltd., 1969), chaps. 8–10, 14.

[74] Edward's father, Richard, D. York, had claimed the English throne by right, alleging that he – not Henry VI – was the true heir to Edward III. Richard was killed at the Battle of Wakefield on 28 December 1460, but Edward assumed his father's claim. He defeated the Lancastrians at Mortimer's Cross on 3 February 1461 and, again, at the Battle of Towton on 29 March 1461. Edward was crowned shortly thereafter. Further attempts were made by the Lancastrians to unseat Edward, but, in 1464, Henry VI himself was captured and sequestered in the Tower of London. In 1470, however, the E. Warwick (the 'Kingmaker') turned on Edward and drove him from the kingdom; Henry VI was restored (the 'Readeption'). A matter of months later, Edward returned; defeated Warwick at Barnet (14 April 1471); defeated Henry's wife, Margaret, and killed their son, Edward of Westminster, at Tewkesbury (4 May 1471); and, very likely, had Henry murdered shortly thereafter. It was through violence that Edward secured the throne from his rivals; indeed, given the scale and death-toll at Towton alone, Edward's accession can be considered one of the most violent. See: Charles Ross, *Edward IV* (Eyre Methuen, 1974), chaps. 1–3, 6–7; Bertram Wolffe, *Henry VI* (Eyre Methuen, 1981), chaps. 15–17; Ralph A Griffiths, *The Reign of King Henry VI*, 2nd ed. (Sutton Publishing, 1998), chaps. 23–25.

[75] Henry Tudor's claims were somewhat tenuous. In any case, his path to the throne was blocked by an incumbent, Richard III. Henry brought Richard to battle at Bosworth on 22 August 1485. The former was victorious; the latter, slain. After the battle, Henry claimed his right was based on only on his supposed hereditary right, but also on the "true judgment of God" – to borrow a phrase from Chinese history, Henry believed that his act of conquest had demonstrated the 'Mandate of Heaven'. Notwithstanding these claims, Henry made sure to have his title confirmed in, if not granted by, Parliament. See: Kenneth Pickthorn, *Early Tudor Government: Henry VII* (Cambridge University Press, 1934), 4–5; Stanley Bertram Chrimes, *Henry VII* (Methuen, 1977), chaps. 1–3; Charles Ross, *Richard III* (Methuen, 1988), chap. 11.

even if they originally had none. This can, in a number of respects, be related to the labour theory of ownership, most famously associated with Locke.[76] The longer one possesses something, and the more one invests in it, the more it appears to belong to one as of right. The same is true of social standing.

Finally, there is **occupation of *terra nullius***. In *outright appropriation* and *appropriation by adverse possession*, there would appear to be somebody who is deprived in order to make way for the aggressor. In other words, a position is taken that was not actually vacant. This can be contrasted with *occupation of terra nullius*, in which the position taken was, at the time, vacant. The successor, in this case, is likely to have been highly opportunistic. One might take Henry IV's accession in 1399 to be an instance of an occupation of *terra nullius*; the throne, having fallen vacant owing to Richard II's abdication and deposition, was there for the taking.

An undertone of appropriation is that *might makes right*. However, few conquerors base their claims on naked power. Usually, their claims are intermixed with forms of presentation or gravitation. These serve not only to make their conquest seem more legitimate, but, moreover, to make that conquest seem rather to be a *vindication* of some pre-existing title than an unadulterated power grab – especially if that conquest was seen as demonstrating the will or favour of God, who always favours the righteous.

Appropriation highlights some of the weaknesses of niceties in the face of practicality. Often, people will accept the outcome of some event, a *fait accompli*, if that acceptance helps to restore a modicum of normality – and if there is little other alternative but to accept it. The maxim *factum valet* perhaps to a certain extent encapsulates the idea of retrospective acceptance;[77] after all, *what is done, is done* and *things, being done, cannot be undone*.

6.13.4 Exchange

[76] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge University Press, 1988), 287ff (II.27ff).

[77] *Factum valet quod fieri non debuit* [or *debet*] – that which ought not to be done, but, being done, shall be valid. It is probable, based on the early glosses, that the maxim of *factum valet* was originally intended to apply only to actions that *at some point in time, or in some circumstance, would have been valid, but for some minor obstruction*. Thus, an appeal, which should have been made within a number of days, might still be upheld, even if, by a technicality, it was 'wrongfully' accepted after that period. As such, it might be held valid, though its validity was not assured; though not irredeemably void, it was nevertheless *voidable*. Whether the maxim also extends to actions that *at no time, and under no circumstances, would be valid* – e.g. usurping the throne – is debateable. It is quite possible that it was never intended to apply to categorically prohibited acts; these, with no possibility or hope of ever being valid, remain null and void. For a discussion of the history of *factum valet*, see: J. Duncan M. Derrett, "Factum Valet: The Adventures of a Maxim," *The International and Comparative Law Quarterly* 7, no. 2 (1958): 280–302.

There are times when social standing is thought of not as having been merely given or taken, but, rather, as having been given or taken *in exchange for something else*; there is some *understanding* or *bargain* – one might even say, *contract*. In the context of monarchy, many thrones have been given in exchange for something else – often money or support.[78] It was not always the case that all parties were entirely willing participants in this exchange. It is important not to confuse things *actually given in exchange* with *mere goodwill gestures*.[79]

6.13.5 Gravitation

Whereas presentation and appropriation are *agency-based*, gravitation is *rule-based*; it is based on patterns of fixed associations. The successor is such because they fulfil some criteria, which do not necessarily provide for them by name. As such, the successor is not selected by an *agent* but, rather, by an *algorithm* or *formula*. This gives the impression of the social standing being transmitted 'automatically'.

There are many possible rules or algorithms for selecting successors, but, historically, perhaps the most important is **heredity**. If one can establish some familial connection or kinship to some former holder and, furthermore, establish that one's claim is neither deficient nor defeasible, then one can be said to possess a **hereditary right**. Hereditary right can be divided into two kinds: (1) **congenital right**, which is a kinship tie present from, and by virtue of, one's birth; and (2) **acquired right**, which is a kinship tie developed later in life, e.g. through marriage (e.g. *jure uxoris*) or adoption. Congenital right is generally considered to be the stronger.

There are many algorithms for determining hereditary succession. The one with which we are today most familiar is that of **primogeniture**, which favours firstborns and can

[78] One might think, for example, of Henry III's attempt to secure the kingdoms of Sicily and Apulia for his younger son, Edmund. He attempted to do this by making an agreement with Pope Innocent IV such that, in exchange for Edmund's investiture by the Bp. Romania on behalf of the pope in 1255, Henry would transfer over to the pope a large sum of money, as well as send a military expedition to unseat the pretender Manfred of Sicily. It is noteworthy that, in addition to this exchange, there is also potentially an element here of appropriation, for the crown had still to be wrested in practice from Manfred. In the event, however, Henry neither managed to raise the money nor send the expedition, and Edmund's claim collapsed. For this event, see: Matthew Paris, *Matthew Paris's English History from the Year 1235 to 1273*, trans. JA Giles, vol. 3 (Henry G Bohn, 1854), 137–38.

[79] Admittedly, deciding in practice what is given in exchange and what is a goodwill gesture is difficult. A case in point is the Coronation Charter of Henry I. Was it, on the one hand, part of an (implicit) agreement with the nobility that he should be allowed the throne only under certain conditions or, on the other hand, was it completely unconnected with his title to the throne and merely a gesture of goodwill and gratitude on his part? Whatever the case, finding there to be an exchange can have profound consequences because it implies that, if there is a breach on the one side, the other can take action to either enforce or revoke the agreement: he who giveth, taketh away.

take a number of forms, e.g. absolute,[80] male-preference,[81] agnatic/patrilineal,[82] and uterine/matrilineal.[83] There is also **ultimogeniture**/**postremogeniture**, which favours the youngest child; this, too, has its equivalent variations with respect to which sex or gender is favoured or excluded. There are also systems of **partible succession**, in which the position is divided and split into distinct parts.[84]

Hereditary right demonstrates how closely succession and inheritance can be intertwined – certain social positions are often associated with certain forms of property, which things are passed on in tandem. It is unsurprising, therefore, that there has often been a close connection between the laws of succession, on the one hand, and the laws of property and inheritance on the other. Similarly, there is a close connection between hereditary right and descent, for descent largely determines one's eligibility, if not one's actual title.[85]

The connection between hereditary right and presentation is also noteworthy. Often, hereditary right is thought to be rooted in some original act of presentation – whether by some assembly, deity, etc. The extent to which this is merely a historic fact varies. In some cases, they are thought merely to be a **founder** or **prime mover**; after their initial act of presentation, their input ceases and successors are chosen according to some formula. In other cases, their influence – and ability to present – might continue for longer, however directly or indirectly.[86]

Besides hereditary right, there are some rarer forms of gravitation, in which some condition precedent is fulfilled, e.g. the **completion of some trial or quest,** or **fulfilment of some prophecy**.[87] To take an un-historical example, the legends in which Arthur draws a sword from a stone are based on an idea that whoever draws the aforementioned sword

[80] This favours the eldest child irrespective of their sex or gender. Following the Succession to the Crown Act 2013 (c. 20), this is now the system used respecting the British crown.
[81] This favours the eldest male child or, failing male children, the eldest female child.
[82] This favours the eldest male child and completely excludes females from consideration.
[83] This is the opposite of agnatic/patrilineal primogeniture; it favours the eldest female child and completely excludes males.
[84] Such a system was common, at least with regard to land holdings, in Wales and Ireland prior to the incursions of outside (especially English) influence.
[85] Cf. phrases such as 'princes of the blood' or the Old English 'ætheling', which, at least in later Anglo-Saxon England, meant much the same thing as the first phrase. On 'ætheling', see: Dumville, "The Ætheling: A Study in Anglo-Saxon Constitutional History."
[86] This can perhaps be seen somewhat in the mediaeval idea that "only God can make an heir," for "[t]he birth of an heir is the judgment of God, and has the same sanctity attached to it, as the ordeal or the lot": John Neville Figgis, *The Divine Right of Kings*, 2nd ed. (Cambridge University Press, 1914), 36.
[87] On the subject of prophecy and the succession, see esp.: Paul Strohm, *England's Empty Throne: Usurpation and the Language of Legitimation, 1399-1422* (Yale University Press, 1998), chap. 1.

(condition precedent) will be king (consequent); Arthur achieved the former and, by so doing, became king.

There is one other form of gravitation that bears mention. It is possible that some social standing has been divided into distinct and corresponding parts, and thereafter shared; there is some form of power-sharing. When one or more of these persons are decoupled, their bundle might be deemed to transfer automatically to their colleague(s). This can be called **survivorship**; it is the 'survivor' who succeeds.

Most forms of gravitation stem from some original act of presentation or appropriation. Often, it is this that provides an overarching sense of legitimacy or illegitimacy, as the case might be (although in the latter case, time might be a redeeming feature). In the context of modern UK law, this is important: the Crown is most certainly hereditary, but it is such by determination of Parliament. Even though successors are directly chosen by some algorithm,[88] they are indirectly chosen by Parliament who, theoretically, might decide to change, or create exceptions to, that algorithm.

6.13.6 Transmission and Coupling

The act of transmission is sometimes thought sufficient in itself to install a person in their newfound position. Nothing more need be done once the act of transmission is complete; the act itself *couples* the person with the position.[89] However, there is often some further stage that needs to be completed. The act of transmission has created, as it were, a *presumption in favour* of a particular candidate, but they must yet be *confirmed* or *installed*. As such, it is important to recognise that the processes of transmission and coupling are analytically distinct.

6.14 Coupling

The importance of the process of coupling is fourfold: (1) it provides *confirmation* and establishes the new position-holder as the *(sole) occupant*;[90] (2) it provides *public*

[88] I.e. being the eldest child, irrespective of sex or gender, of the previous incumbent.
[89] For example, Louis Servin (1555-1626) had, in his *Vindiciae* (1592), in the words of Figgis: "a lengthy argument to prove that coronation and unction are mere ceremonies and no essential part of the regality, and that the coronation oath gives the people no rights against him. It is a pious custom only; it will not affect Henry[IV of France]'s authority, though the Archbishop of Rheims refuse to crown him, as a heretic". Figgis, *The Divine Right of Kings*, 122–23.
[90] In this context, the Latin phrase *qui prior est tempore potior est jure* (the person earlier in time is stronger in law) comes to mind.

demonstration and recognition; (3) it often acts as a *commencement condition*;[91] and (4) it can, in some circumstances, be thought to bring about a *transformation* in the individual, particularly if some sacred ritual is involved. The speed with which many mediaeval monarchs were crowned, whose title was perhaps somewhat uncertain, neatly demonstrates the coupling's importance.[92]

Coupling can take a number of forms, which often involve some form of ceremony or ritual. Some of the most important forms of coupling include: **acclamation, ratification, investiture**, **consecration**, and **oath-taking**. Acclamation and ratification are similar in that they both involve seeking the approval or blessing of some person or body. Likewise, investiture and consecration are also similar in that they both involve certain rites and ritual, which, when performed, secure the person in their position. Finally, oath-taking involves the making of certain promises, which, if broken, might constitute grounds for initiating a process of decoupling.

6.14.1 Coupling and Decoupling

There is an intimate connection between the manner of coupling and the corresponding possible modes of decoupling. Coupling creates a *bond*, as it were, between the person and the position, which bond might be *dissolvable* or *breakable* only in specific ways. For example, there was some idea in the mediaeval period that monarchs, when they acceded, concluded a marriage with their kingdom.[93] Marriages might be nullified on rare occasions, but the idea of divorce did not yet have great prevalence and potency. As such, the idea of *marriage* carried with it very much the idea of *until death do us part*;[94] marriages between monarchs and kingdoms might only be broken by the former's death.

6.15 Prime and Ordinary Succession

There was an idea in the mediaeval Catholic Church that the Pope was not the successor of the "preceding holder of the papal office," but, rather, "the immediate successor of

[91] There might also be certain qualifications imposed if the person in question is permitted to exercise any of their activities/influence before the point of coupling; the act of coupling therefore removes these qualifications. On commencement conditions and qualifications, see, *supra,* 2.18.

[92] For example, the coronations of Henry I, Stephen, and Henry III were all an attempt to vindicate their claims, exclude their rivals, and transforming themselves in the eyes of God. In effect, this meant that their rivals then either had to show that their titles were null and void, that their coupling was completely irregular, or they had to take the throne by brute force. Either way, it was considerably more difficult after they had been crowned than before.

[93] See: Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, 3rd ed. (Methuen & Co. Ltd., 1974), 181–82.

[94] It is recognized that the phrase "till death do us part" is from the marriage litany of the Book of Common Prayer, which originated in the 1540s and 1550s. Nevertheless, the idea is of much older provenance.

Peter [the Apostle]."[95] There was something of an artifice about this. It were almost as though the office reverted to Peter at the end of each tenancy, as though there had been no other Popes in the intervening period. This was of great consequence, particularly in light of the adoption of the principle of universal succession *vis-à-vis* the papal office.[96] It was undergirded by a desire to ensure that the activities and influence attributed to the Pope descended intact or, at least, undiminished as compared with how they supposedly stood in Peter's day. As such, popes could not be bound by their predecessors' decisions.[97]

This idea that position-holders are deemed directly to succeed some original or emblematic position-holder, rather than some intermediary, we might call **prime succession**. Such succession is always a fiction, but one with important repercussions. It can be contrasted with what might be called **ordinary succession**, in which successors replace their immediate predecessors in the normal, lineal fashion. Royal succession normally follows this pattern.

6.16 Laws of Succession

The laws of succession pertain to our fixed associations regarding the circumstances and ways in which social standing is transferred from one person to another; it concerns the ways in which we cease to associate a certain set of activities and influence with one person and come to associate them with another. In effect, we redefine an equivalence association such that we go from equating *Person A* with the position to *Person B*. Thenceforward, if any other than B attempted to exercise the activities and influence attached to that position, it would frustrate our fixed associations – even if that person were A.

This process of transference, as has been said, generally begins with the position being vacated; we have called this *decoupling*. For most positions, there exist specific laws (i.e. fixed expectations) as to how this decoupling might and must take place; decoupling by any other means would frustrate our expectations. If the decoupling is not rightly done, then, by commutative principle, there would probably be a feeling that the position is not rightly held by the successor. This would be compounded if there were thought to be irregularities in the processes of transmission or coupling. Within all of this is a sequential

[95] See: Ullmann, *Principles of Government and Politics in the Middle Ages*, 39.
[96] Ullmann, *Principles of Government and Politics in the Middle Ages*, 37–38.
[97] On this point, see: Ullmann, *Principles of Government and Politics in the Middle Ages*, 72.

association.[98] The position is not vacated until that event. In royal succession, this was normally death.

Once the former holder has been decoupled, the question arises as to the selection of their successor, which process we have called *transmission*. There are many fixed associations that are associated with this process, but, as has been said, these can be categorized under three principal headings: *presentation*, *appropriation*, and *gravitation*. Once again, there are sequential associations present: If the transmission is conducted properly, then the position is deemed to have been transferred. If improperly, then not.

Finally, it is often the case that merely selecting a successor is not enough. Some additional process needs to be undertaken in order to bind them firmly with that position; to create an equivalence association in our minds between them and the holding of that position. We have called this *coupling*. This is normally done through some form of public ceremony or ritual, which impresses upon us the connection between the person and their new position. The form of coupling most associated with royalty is *coronation*; there is an argument that no person is properly monarch until they have passed through this ceremony. The absence of such a ceremony might well frustrate expectations, as would a ceremony ill-performed.

The fixed associations concerning decoupling, transmission, and coupling to certain social positions are usually shared amongst members of the relevant social group – even if the extent to which they were shared (i.e. prevalence) and their actual impact on people's behaviour (i.e. potency) changes across time. Indeed, many groups have gone to great lengths to make authoritative declarations of these fixed associations, which declarations are themselves often made in accordance with some formal process; they become laws in the classical sense.

Yet, they are not the be-all-and-end-all of the laws of succession; they are but a part, which holds only as much sway as people allow. If people are unwilling to be complicit in such declarations and prefer other fixed associations, then the declarations will probably fail. Any alternative might not be lawyers' law, fully systematised according to some supposed rule of recognition. Nevertheless, its basis and effects are precisely the same: it shapes people's thoughts and behaviours. This is apparent in societies that have not made formal, written declarations of their laws, which fact affects their social life but little: there are still social positions that might be passed on – and only in certain ways.

[98] $Event(x) \rightarrow [Position = vacated]$

For the anthropologist or the constitutional historian, there is no impediment to study but lack of evidence.

The laws of succession and succession events make for good study for the constitutional historian. In the first place, by understanding *the way in which* a person comes by a position, we can understand much about the *terms under which they hold it*. Moreover, it is often here that people's fixed associations come into conflict with their desire for gratification, i.e. of succeeding to certain positions, even if with little right. As such, the potency of those fixed associations in the face of counteracting interests and desires can be studied. Their impotency in some cases would not necessarily mean that there were no fixed associations. Indeed, what is interesting about such events is often how hard individuals strive to shoehorn their interests and desires into generally recognised constitutional forms. In the case of monarchy, how hard they try to justify their accession and how they attempt to ensure that all formalities (especially those of coupling) are followed. Moreover, even though some of our expectations might be frustrated, others will be fulfilled – e.g. those relating to what the holding of that position entails. The frustration of any particular fixed association does not suddenly mean that there is no constitution, etc. It is just that there is some challenge to some parts of it.

Part II:
The Framework and Mediaeval Thought

7 – Constitutions and Mediaeval Thought

"Vast chain of being, which from God began,
Natures æthereal, human, angel, man,
Beast, bird, fish, insect! what no eye can see,
No glass can reach! from Infinite to thee."[1]

7.1 Introduction

This short chapter serves as a bridge between the theoretically-orientated earlier chapters and the historically-orientated later chapters. It seeks to show that constitutional ideas (i.e. ideas relating to social groups and the distribution therein of activities and influence) were prevalent throughout the mediaeval period. In part, this is to demonstrate the Theory of Constitutional Ubiquity – especially in the sense that people are predisposed to thinking in constitutional terms. In part, it is also to provide some background to the later chapters; it helps to draw out some of the 'premisses and bases' upon which mediaeval governance rested – without this, as Ullmann said, "one cannot successfully penetrate into the texture of the medieval scene."[2]

Due to the scope of the topic and limitations of space, there will be no attempt here fully to expound constitutional ideas as they existed during the mediaeval period. Instead, I will merely illustrate some of the types of idea that existed and were relatively prevalent in mediaeval writing. In many respects, the *structure* of this chapter is the most important thing. It provides a blueprint for a much larger study, which blueprint is based upon the framework, and would provide for a study that is perhaps at once more methodical and enlightening than previous studies have been.

7.2 Social Groups in Mediaeval Thought

7.2.1 Humans as Social Animals

The fact that humans are gregarious social animals did not escape ancient and mediaeval writers. Whether 'Man' was held to be inherently good or bad, he was nevertheless held to be social. It is part of his nature to form into 'political' society – to coalesce into social

[1] Alexander Pope, *The Poetical Works of Alexander Pope*, ed. Adolphus William Ward (Macmillan & Co., 1871), 199 [Essay on Man, Epistle I, 237-240].
[2] Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, 3rd ed. (Methuen & Co. Ltd., 1974), 16.

groups.[3] There is here, in fact, a qualitative fixed association – mediaeval people associated the idea of Man with the quality of being social;[4] it was a law of nature.

The most famous statement of this idea is perhaps in Aristotle's *Politics*: "Hence it is evident that the state is a creation of nature, and that by nature man is a political animal."[5] From the twelfth century onwards, Aristotle's influence was felt forcefully in western Europe.[6] Aquinas,[7] who drew heavily on Aristotle, also espoused this idea of political naturalism. He opens his *De regimine principum* by arguing that "man is by nature a social and political animal, who lives in a community: more so, indeed, than all other animals; and natural necessity shows why this is so."[8]

There was some idea that human sociality proceeds from our inherent inadequacy; our inability to survive unaided. Aquinas, like Aristotle, argued that no individual could provide for all of their needs by themselves, which fact forced people into communities; indeed, why has humankind language, unless it was designed for cooperation?[9] Cicero, by contrast, thought that communities were founded "not so much [because of] weakness as a sort of innate desire on the part of human beings to form communities".[10] An individual might be able to provide for themselves, but nevertheless humans yearn for something more. Indeed, for Cicero, the *civitas* or *res publica* was a natural union for humans, along with the family, which idea continued throughout the mediaeval period.[11]

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[3] See, e.g.: RW Carlyle and AJ Carlyle, *A History of Mediaeval Political Theory in the West*, vol. 1 (William Blackwood & Sons Ltd., 1962), passim.

[4] $\forall x(Human(x) \rightarrow social(x))$

[5] Aristotle, *The Politics and The Constitution of Athens*, ed. Stephen Everson, trans. Jonathan Barnes and JM Moore, 2nd ed. (Cambridge University Press, 1996), 13 [1.2.1253a 2-3] and see further 70 [3.6.1278b 16ff]. This is similar to what Aristotle had said in his *Nicomachean Ethics* when he said that"…man is by nature a social being": Aristotle, *Nicomachaen Ethics*, trans. Harris Rackham, Loeb Classical Library 73 (Harvard University Press, 1926), 28-29 [1.7.1097b 11]. In footnote [a] Rackman noted that a more literal rendering would be that 'man is a political thing', the idea of being a political *animal* being added in the *Politics*. Cf. David Ross translated this part of the *NE* as "since man is born for citizenship": Aristotle, *The Nicomachean Ethics*, ed. Lesley Brown, trans. David Ross (Oxford University Press, 2009), 11 [1.7.1097b 11-12]. In the accompanying notes (p. 207) it is said that an alternative translation is "is a political creature". JAK Thomson, on the other hand, translates this line as "For man is a social animal": Aristotle, *The Ethics of Aristotle*, trans. JAK Thomson (Penguin Books, 1953), 37 [1.7].

[6] SJ Curtis, *A Short History of Western Philosophy in the Middle Ages* (MacDonald & Co. Ltd., 1950), 115; Thomas Aquinas, *St Thomas Aquinas: Political Writings*, ed. and trans. RW Dyson (Cambridge University Press, 2002), xxiii. Indeed, Thomson is somewhat justified in saying that Aristotle's authority was 'absolute': Aristotle, *The Ethics of Aristotle*, 16.

[7] Thomas Aquinas (1225-1274).

[8] Aquinas, *Political Writings*, 5-6 (De Reg. Pri., 1.1). See also the following where he references Aristotle, or 'the Philosopher': Aquinas, *Political Writings*, 135 (Sum. Th., I-II 95.4, res.).

[9] See: Aristotle, *The Politics and The Constitution of Athens*, 11-14 (Pol. 1.1-2); Aquinas, *Political Writings*, 5-8 (De Reg. Pri., 1.1); Antony Black, *Political Thought in Europe, 1250-1450* (Cambridge University Press, 1992), 22–23.

[10] Cicero, "The Republic," in *The Republic and The Laws*, trans. Niall Rudd (Oxford University Press, 1998), 19 (1.39).

[11] See: Black, *Political Thought in Europe, 1250-1450*, 20.

7.2.2 Types of Social Group

That mediaeval people conceived of a wide variety of different kinds of social group can hardly be doubted. Indeed, "[m]ost people belonged to several groups with overlapping functions – family, guild, village, town, domain, church, realm – giving intersecting or concentric allegiances."[12] These various kinds of social group can be classified in many ways,[13] but some might be classified along the following lines:

(1) **Interrelatedness**,[14] e.g. family (*familia*), household (*domus*), race or nation (*gens* or *natio*),[15] clan, tribe, etc.;

(2) **Residence**,[16] which provided the basis of administrative divisions, including (a) **secular divisions** (e.g. village, town,[17] borough, city, *municipia*, hundred and *wapentake*, the shire, and the county or *comitatus*, region, province; the kingdom, *regnum*, *rice*, or *Reich*; the fatherland, etc., *patria*;[18] we might also include here the people or *populus*,[19] *polis, civitas*,[20] and *res publica*) and (b) **ecclesiastical divisions** (e.g. parish, diocese, bishopric, archbishopric, etc.);

(3) **Allegiance to, or dependence upon, some individual**,[21] e.g. the honour, affinity, following, etc.;

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[12] Black, *Political Thought in Europe, 1250-1450*, 5.

[13] As Poplin has said, "there are literally hundreds of variables which could be used to differentiate between types of communities"; to create a definitive list of community types would probably be, again following Poplin, "an impossible task". Dennis E Poplin, *Communities: A Survey of Theories and Methods of Research* (The Macmillan Company, 1972), 29–30.

[14] $Group = \{a \in G: related\ in\ a\ specified\ way\ to\ someone\ either\ living\ or\ dead\}$

[15] For an example of mediaeval definitions of these four terms, see: Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. Stephen A Barney et al. (Cambridge University Press, 2010), 202 [9.4.1].

[16] $Group = \{a \in G: lives\ in\ a\ given\ area\}$

[17] On the idea of villages and towns as self-governing communities in the Middle Ages, see: Ullmann, *Principles of Government and Politics in the Middle Ages*, 217–20.

[18] For an interesting discussion of the place of *patria* in mediaeval thought, particularly respecting the extent to which one should lay one's life on the line for it, see: Ernst H Kantorowicz, "Pro Patria Mori in Medieval Political Thought," *The American Historical Review* 56, no. 3 (1951): 472–92; Gaines Post, "Two Notes on Nationalism in the Middle Ages," *Traditio* 9 (1953): 281–320.

[19] "Some people think that by the word people is meant the common people…, but this is not the case… [It is] the union of all men together, those of superior, middle, and inferior rank…; for all are necessary, and none can be excepted, for the reason that they are obliged to assist one another in order to live properly and be protected and supported." Robert I Burns, ed., *Las Siete Partidas - Medieval Government: The World of Kings and Warriors*, trans. Samuel Parsons Scott, vol. 2 (University of Pennsylvania Press, 2001), 332 (Part. II, Tit. X, Law I).

[20] It is interesting to note that Henry of Ghent, writing in 1279, thought that the *civitas* was "the appropriate condition for men living in civil partnership and community (*societate et communitate civili*)" and that, for people to live together harmoniously, it was necessary that the *civitas* was "bound together by the deepest friendship, by which each person is regarded by each other as another self…, and by the deepest charity, in which each of them loves the other as himself, and by the highest benevolence, by which each wills for the other what he wills for himself". This is quoted in: Antony Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (Methuen & Co. Ltd., 1984), 78. There is perhaps something of a cohesion model underlying what Henry says.

[21] $Group = \{a \in G: has\ allegiance\ to, or\ is\ dependent\ upon, some\ particular\ individual\}$. This is often associated with ideas of *homage*, *fealty*, and tenure.

(4) **Worldliness**,[22] e.g. whether one is a layperson or in holy orders;

(5) **Faith/belief/religion**,[23] e.g. Christian, Jew, Muslim, heretic, non-conformist, etc.;

(6) **Occupation**,[24] e.g. businesses, partnerships, guilds (e.g. craft, trade, merchant, policing, religious, etc.),[25] *collegia*, *commenda,*[26] *societas*, *universitas*, etc.;

(7) **Military service**,[27] e.g. the *fyrd*, militia, army, navy, etc.; and

(8) **Social status**,[28] e.g. commonalty, gentry, nobility, etc.[29]

Some of these groups were more definite, others less definite; some more ephemeral, others less so. The important point is that mediaeval people were accustomed to ideas of social identity – to thinking of people in terms of being members of groups. For considerations of space, we will not here go into any of these in detail. However, it is worthwhile spending a few words on the idea of *communitas*.

Like its modern counterpart (i.e. community), *communitas* was a versatile word, which could be applied to many different kinds of group. There is, for example, reference to a *communitas bacheleriae Angliae* in the Annals of Burton under 1259.[30] Whether this was in any sense a formal and cohesive body with self-identifying individuals, or, rather, a loose collection of individuals lumped together by the annalist is difficult to tell. Stubbs was certainly of the former opinion,[31] though modern opinion follows Tout in favouring the latter.[32] Then there is the idea of the *communitas regni*, which is a perhaps somewhat more concrete group, although still vague around the periphery.[33] In many respects, it is a group identical with the *gens* and *natio*, although it is a more inclusive term in that it is

[22] $Group = \{a \in G: has\ or\ has\ not\ been\ ordained, is\ or\ is\ not\ concerned\ with\ spiritual\ matters\}$
[23] $Group = \{a \in G: maintains\ certain\ beliefs, doctrines, dogmas, etc.\}$
[24] $Group = \{a \in G: undertakes\ some\ business, activity, etc.\}$
[25] On guilds, see esp.: Black, *Guilds and Civil Society*; Steven A Epstein, *Wage Labor and Guilds in Medieval Europe* (The University of North Carolina Press, 1991).
[26] This was a partnership in which there was, in effect, a sleeping partner; it was more common on the Continent than in England. See: CA Cooke, *Corporation, Trust, and Company: An Essay in Legal History* (Manchester University Press, 1950), 45–47.
[27] $Group = \{a \in G: has\ military\ responsibilities\}$
[28] $Group = \{a \in G: has\ the\ features, which\ makes\ them\ a\ part\ of\ a\ particular\ social\ class\}$
[29] For another list demonstrating the "enormous diversity of expressions for units of government" used throughout the mediaeval period, see: Black, *Political Thought in Europe, 1250-1450*, 14–15.
[30] See: William Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First*, ed. HWC Davis, 9th ed. (Oxford University Press, 1913), 331.
[31] William Stubbs, *The Constitutional History of England in Its Origin and Development*, 4th ed., vol. 2 (Clarendon Press, 1896), 83.
[32] Thomas Frederick Tout, "The 'Communitas Bacheleriae Angliae,'" *English Historical Review* 17, no. 65 (1902): 89–95.
[33] On the emergence and use of *communitas regni* in thirteenth century England, see: Ullmann, *Principles of Government and Politics in the Middle Ages*, 175.

potentially also open to those of foreign-birth; in many respects, however, it is a much more restricted group, in that it encompasses only, as it were, the political classes.[34]

Then there is the more encompassing *communitas fidelium* – the community of the Christian faithful, of all Christendom – or, indeed, the *universitas fidelium* or *Christianitas*.[35] It was to this idea, for example, that Popes appealed, not only when attempting to assert their authority, but also when attempting to coax the Christian West into fighting crusades – especially in the Holy Land.[36] Finally, there is the all-encompassing *tota communitas universi*, *humana civilitas*, *humana universitas*, *humanitas*, or *universitas humani* – an idea that everybody in the universe lives as a community under one God and one Law.[37] These two ideas – *humanitas* and *Christianitas* – built into the idea of *duplex ordo* or two orders, i.e. society naturally divided into secular and ecclesiastical divisions, each which might have a separate structure and rules.[38] Dualist or Gelasian doctrine held these two orders to be mutually supportive – the one providing temporal guidance and the other spiritual.[39]

Each of these groups had its own constitution – even if, in many respects, these were derivative, and existed within the framework, of the constitutions of more encompassing groups. Thus, within the *familia* there was a head of the family, whose task it was to ensure the survival and advancement of the family, and who must, within reason, be obeyed; similarly, there were various grades throughout the rest of the family group, which, in mediaeval Europe, tended to favour older males, whose responsibility and authority was greater than their younger and female relatives. Similarly, within the *affinity* the lord was at the apex, who had unequalled – though not uncontrolled – power and authority within the group. Likewise, within groups like the county (*comitatus*) we find officials charged with overseeing things like tax-collection, convening the county court,

[34] On *communitas regni*, see, e.g.: Black, *Political Thought in Europe, 1250-1450*, 15.
[35] The idea of a *universitas fidelium* was particularly prominent in Marsiglio of Padua's thought. See: Otto Gierke, *Political Theories of the Middle Age*, trans. Frederic William Maitland (Cambridge University Press, 1922), 58–59. There was a similar phrase, *congregatio omnium fidelium*, for which, see: Frederic William Maitland, "The Corporation Sole," *Law Quarterly Review* 16 (1900): 344.
[36] See: Norman Housley, "The Crusades and Islam Norman," *Medieval Encounters* 13 (2007): 195–96.
[37] See: Black, *Political Thought in Europe, 1250-1450*, 38; Ullmann, *Principles of Government and Politics in the Middle Ages*, 258–59. Indeed, as Gierke has said, there was a distinct and widespread system of thought "which culminated in the idea of a Community which God Himself had constituted and which comprised All Mankind": Gierke, *Political Theories of the Middle Age*, 4.
[38] On the idea of *duplex ordo* in Aquinas' and Dante's thought, see: Ullmann, *Principles of Government and Politics in the Middle Ages*, 247ff, 258ff.
[39] Black, *Political Thought in Europe, 1250-1450*, 44.

and raising the local militia – for much of the mediaeval period in England, these were tasks associated with the sheriff. For every social group, there was a constitution.

7.2.3 Nature of Social Groups

The approach to social groups throughout the mediaeval period is probably much more similar to that of the nineteenth century than today. It was saturated with metaphysical ideas and ideas of the inescapability of identity; ideas that wholes are greater than their sums;[40] ideas and feelings of nationalism and patriotism, of indebtedness and loyalty to some enduring group.[41] We do not have to look far to find the Group Mind.[42]

We can find echoes of commonality theories and the Historical School of Law, for example, in Engelbert of Admont,[43] when he defined the *gens tota* (whole nation or race) as "a community united by language, fatherland, customs and laws"; moreover, when he argued that peace is better maintained with fewer, rather than more, foreigners of different fatherlands, languages, customs, and laws.[44] Such ideas were hardly peculiar to Engelbert. One might take John Buridan,[45] for example, when he says that:

> "One polity is suitable for one people and another for another, as [Aristotle] says.[46] For it is appropriate that the positive laws and

[40] This can be seen, for example, in Aquinas where he says that the *common good* is distinct from the *individual good* and, moreover, that social groups, like the state and family, have a "unity of organisation (ordinis) only, so that [they are] not one in a simple way". For this, see: Black, *Political Thought in Europe, 1250-1450*, 32–33.

[41] "The idea of fatherland (*patria*) was ingrained in medieval culture, and one may assume that it was not absent from popular consciousness, as an ideal entity which it was a good, free man's duty to serve and die for." Black, *Political Thought in Europe, 1250-1450*, 108. Moreover: "It is commonly thought and partially true that *national* divisions became sharper during the later Middle Ages. The European peoples had always kept their own languages, laws and customs; and many of them had a distinct consciousness of themselves as political units under their own king, to be governed by their own native traditions. Many people, as individuals and communities, were aware of national identity and regarded it as a significant social fact about themselves: English, Franks or Frenchmen, Spaniards, Magyars and so on. In the later Middle Ages there were trends towards a more articulate self-consciousness of nationhood." Black, *Political Thought in Europe, 1250-1450*, 109–10.

[42] It is worthwhile pointing out that it was certainly *not* the case that all mediaeval writers succumbed to the Group Mind or like fallacies. For example, Baldus took umbrage with the idea that the Holy Roman Empire might delegate acts, for, as Gierke reports Baldus' argument, "the Will which is expressed in the act of delegation is the Emperor's, not the Empire's, for the Empire has no Mind and therefore no Will, since Will is mental. (*Imperium non habet animum, ergo non habet velle nec nolle, quia animi sunt*)." Gierke, *Political Theories of the Middle Age*, 69–70.

[43] Sometimes known as Engelbert of Volkersdorf (c. 1250-1331).

[44] Black, *Political Thought in Europe, 1250-1450*, 112.

[45] Lived c. 1300 – c. 1358/61.

[46] *Politics* VII.7, 1327b.

> governments of people should differ according to the diversity of their regions, complexions, inclinations and habits."[47]

As will be seen further down, it was common throughout the mediaeval period, as well as antiquity, to draw comparisons between social groups, on the one hand, and organisms and their parts, on the other. It can be recalled how easily ideas of social groups as organisms lead into ideas of the Group Mind. It can be seen clearly, for example, in Fortescue. He begins by saying that it is a people that wills itself into becoming a kingdom; as a body grows from an embryo, so a kingdom grows from a people. This body has a head, heart, blood, and sinews, although it is a "body mystical", as opposed to an organic body. He then adopts the Trojan originary myth and says that the kingdom of England "blossomed forth into a political and royal dominion" from Brutus and his band.[48] Throughout Fortescue there is a distinctive sense that kingdoms, particularly England, are more than the mere sum of their parts; that there is an overarching and irreducible metaphysical entity.

Ideas of purpose or *telos* were also common in mediaeval thought, particularly in the context of political communities: "Some such purposes were at once moral and utilitarian; peace, unity, and common good were advantages which it was assumed to be one's duty to strive for. Others were distinctively moral: defence of defenceless and provision for the needy were based on religious teaching; the good or sufficient life was emphasised after the recovery of Aristotle."[49] The *summum bonum* or common good was a recurrent theme.[50]

There was some dislike of corporations, especially when it came to holding land. The problem was that these lands would often become *mortmain*.[51] As corporations do not die, gifts to them remain with them in perpetuity; they would never be subject to periodical dues upon inheritance or entry. In effect, it was a permanent alienation over which the lord – in particular, the crown – lost all control and from which they ceased to benefit. This dislike was not because mediaeval people disliked corporations *per se*. Rather, they disliked corporations that they thought *artificial* or *unnatural*; more to the point, those they thought *unhealthy* to the body politic. Corporations that engorged land

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[47] *Aristotle's 'Politics'* (*Livre de 'Politiques' d'Aristote*) 7.10, 291b-294a, quoted in Black, *Political Thought in Europe, 1250-1450*, 112.
[48] John Fortescue, "In Praise of the Laws of England," in *On the Laws and Governance of England*, ed. Shelley Lockwood (Cambridge University Press, 1997), 20-23 (13).
[49] Black, *Political Thought in Europe, 1250-1450*, 24.
[50] See: Black, *Political Thought in Europe, 1250-1450*, 24ff.
[51] Literally, 'dead hand' from the Latin *manus mortua*.

were like tumours consuming society's resources, which is to say *depriving* people of what they thought to be *theirs*.

It has been common in the past to stress particular aspects of mediaeval political thought, e.g. corporatist, communal, collectivist aspects, etc.[52] It tends to say more about the agenda and inclinations of the writer than about mediaeval life and thought. It would be foolish and foolhardy to make sweeping generalizations about mediaeval beliefs and behaviour,[53] particularly if they build into overly simplistic narratives of stages of development.

7.3 Ideas Concerning the Distribution of Differentiated Activities and Social Influence

The fact that people throughout history have conceived of people in society having various functions is easy to demonstrate. One might think of Plato's basic division of society into those who work and those who fight.[54] Similarly, one might think of the idea of the three orders of society in mediaeval thought: those who work (*laboratores*), fight (*bellatores*), and pray (*oratores*).[55] It would be impossible here to discuss all of the various possible types of activity and influence that people during the mediaeval period thought existed. However, it would be profitable to discuss some of the ideas that mediaeval people had, which lent themselves to the notion that order was an intrinsic part of social existence, i.e. that there was a reason why people performed different activities and had different levels of influence.

In so doing, we will focus on three broad ideas: (1) that **social order is ordained by design**, either because it is willed by heaven or because earthly society reflects heavenly society; (2) that **social order is ordained by nature**, i.e. there is something intrinsic in the universe that means that it would be unnatural for unordered social groups to exist; and (3) that **social order is ordained by reason or necessity**, i.e. the nature of reality

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[52] Black, *Political Thought in Europe, 1250-1450*, 12.

[53] "It is amazing that the Middle Ages is still subject to the kind of generalisations that would be laughed at by specialists in other fields. […]. European political thought from 1250 to 1450 was not essentially feudal, hierocratic or authoritarian, nor was it essentially comradely or civic. It is a copse containing many different species." Black, *Political Thought in Europe, 1250-1450*, 12–13.

[54] This was first put forward in Plato, *The Republic*, trans. Robin Waterfield (Oxford University Press, 1993). Plato later summarised his arguments in Timaeus, see: Plato, *Timaeus. Critias. Cleitophon. Menexenus. Epistles*, trans. RG Bury (Harvard University Press, 1929), 19.

[55] For the reception of this idea in Anglo-Saxon England, for example, see: Timothy E Powell, "The 'Three Orders' of Society in Anglo-Saxon England," *Anglo-Saxon England* 23 (1994): 103–32. More generally, see: Georges Duby, *The Three Orders: Feudal Society Imagined*, trans. Arthur Goldhammer (The University of Chicago Press, 1980).

means that order is a precondition for surviving and flourishing. Each will be discussed in turn.

7.3.1 Order Ordained by Design: Divine Will, *Imago Caeli*, and Cosmic Order

In Christian theology, God created everything (except, perhaps, Himself).[56] As such, everything is as it is because God made it so. Even if a thing has free will – an ability to shape its own destiny – it is unable to change its essence; it cannot make itself into what it is not. Furthermore, as embodied by the teleological argument for the existence of God, there is a clear idea that God did not create a chaotic universe; He created an ordered one. It is a universe in which each thing has its place and in which things are not necessarily one another's equals.

Thus, God set humans (being made in His image[57]) over the rest of Creation,[58] man over woman,[59] the Pope over the *communitas fidelium* (i.e. Christendom),[60] kings over peoples,[61] etc. In effect, God *willed* that different people should do different things and that, moreover, different people should be more or less powerful than others. As such, social order is the product of **divine will** or, perhaps even, some **divine plan**.[62] To upset this order would be to defy the will of God.[63]

There is also the idea in Christian theology of what we might call *imago caeli* (image of heaven): "On earth, as it is in heaven", so says the gospel of Matthew.[64] Earthly society is a **reflection of heavenly society**.[65] As there is but one God, there is but one king or emperor, or pope – one person with such activities and influence. We find this idea, for

[56] Genesis 1:1-31, Colossians 1:16
[57] Genesis 1:26
[58] Genesis 1:28-30
[59] This point, in the English context, was famously argued by Fortescue. See: John Fortescue, "De Natura Legis Naturae," in *The Works of Sir John Fortescue, Knight, Chief Justice of England and Lord Chancellor to King Henry the Sixth*, ed. Thomas Fortescue, trans. Chichester Fortescue, vol. 1 (Chiswick Press, 1869), 322-323 (2.59).
[60] See *infra.*
[61] See *infra*.
[62] As Gierke wrote: "Now the Constitutive Principle of the Universe is in the first place Unity. God, the absolutely One, is before and above all the World's Plurality, and is the one source and one goal of every Being. Divine Reason as an Ordinance for the Universe (*lex aeterna*) permeates all apparent plurality. Divine Will is ever and always active in the uniform government of the World, and is directing all that is manifold to one only end"; "Unity is the root of All, and therefore of all social existence". Gierke, *Political Theories of the Middle Age*, 9, 10.
[63] Romans 13:1-7; 1 Peter 2: 13-19.
[64] Matthew 6:10
[65] There was a similar idea identified, for example, by Gierke, in which each 'microcosm' was a reflection of the 'macrocosm'; each microcosm "is a diminished copy of the World"; it is a *reflection of some greater ordering or structure*. See: Gierke, *Political Theories of the Middle Age*, 7–8.

example, in Eusebius,[66] although such notions were not by any means confined to Christian theology. We find a similar idea in Themistius, who saw parallels between the kingship of Zeus and human kingship.[67]

Earthly society also reflects heavenly society in another way, according to mediaeval Christian theology. As there are many orders among the angels (i.e. angels with different tasks and levels of authority), there are also many orders among humankind. One can see this idea, for example, in the preamble to a letter sent by Pope Gregory the Great in August 595:

> "Providence has established various degrees [*gradus*] and distinct orders [*ordines*]… Indeed, the community [*universitas*] could not subsist at all if the total order [*magnus ordo*] of disparity [*differentia*] did not preserve it. That creation cannot be governed in equality is taught us by the example of the heavenly hosts; there are angels and there are archangels, which are clearly not equals, differing from one another in power [*potestas*] and order [*ordo*]."[68]

One can also see this argued forcefully by Fortescue in the fifteenth century, who used the idea to show – as he thought – that men were set over women by God: Higher angels were set over lower angels and given greater dignity, power, and office by reason of their greater virtue; likewise, man was set above woman, whom he should rule, by reason of his virtue. [69]

As Ullmann observed regarding the idea of angelic hierarchies in the *Pseudo-Dionysius*, it was often the case that the ecclesiastical hierarchy, *inter alia*, was regarded not merely as a *copy* of the celestial hierarchy, but a *continuation* thereof.[70] This builds into the idea of **cosmic order** in Christian theology, i.e. an order encompassing the entirety of Creation and which is often called the **Great Chain of Being**.[71] This was thought to begin with

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[66] DM Nicol, "Byzantine Political Thought," in *The Cambridge History of Medieval Political Thought, c.350-c.1450*, ed. JH Burns (Cambridge University Press, 1988), 52–53. Eusebius lived c.263-c.339.
[67] Nicol, "Byzantine Political Thought," 51. Themistius lived 317-c.390.
[68] Quoted in: Duby, *The Three Orders*, 3–4.
[69] Fortescue, "De Natura," 324 (2.61). Sir Robert Filmer (c.1588-1653) later made similar arguments: "[he] claimed biblical proof that God had ordained a social order of gradations in which fathers were placed over sons, men over women, elders over the young, and kings above everyone." Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000), 163.
[70] Ullmann, *Principles of Government and Politics in the Middle Ages*, 46. See also: FC Copleston, *A History of Medieval Philosophy* (Methuen & Co. Ltd., 1972), 53. For Pseudo-Dionysius' works, see: Pseudo-Dionysius, *The Complete Works*, trans. Colm Luibheid and Paul Rorem (Paulist Press, 1987).
[71] On this, see: Arthur O Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (Harvard University Press, 1936). See also: Loughlin, *Sword and Scales*, 114–16.

God or Christ,[72] and run consecutively through the orders of angels, humankind, and right down through all fauna and flora of Creation:

> "The whole universe appeared as planned by God in a wonderful hierarchy of ranks and orders, in which each member had its appropriate niche, contributing in its own special way to the beauty and order of the whole. This concept was developed elaborately in patristic thought, and above all by Augustine."[73]

7.3.2 Order Ordained by Nature (I): Corporeal Analogies

It was also common throughout the mediaeval period to draw comparisons between human society and the natural world.

One of the commonest comparisons drawn was one between the structure of social groups and the structure of the body.[74] This idea was very far from being new by the mediaeval period. Perhaps the oldest evidence for such a comparison comes from the *Rigveda*, a set sacred Hindu hymns. These have been dated to around 1400-1000BCE,[75] although the relevant passage was probably composed towards the latter date.[76] The passage is a creation myth in the vein of the dismemberment of a 'world parent';[77] in this case, a gigantic cosmic being named Purusha. From Purusha's separation came, *inter alia*, the four *varnas* (the elements of the Indian caste system[78]): the priestly class (*Brahmins*) from the mouth; the ruling class (*Rajanyas* or *Kshatriyas*) from the arms; the farming and trading class (*Vaishyas*) from the thighs; and the labouring class (*Shudras*) from the feet.[79]

Around the same time in Egypt, there is evidence of the beginning of a tradition that would carry right through classical antiquity to the mediaeval period. An inscription,

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[72] For example: Colossians 1:15-18, Ephesians 1:18-23, Romans 13:1-5. Indeed, within the *Sayings of Candidus about the Image of God*, attributed to a certain monk of Fulda from the early ninth century, "there is an argument for the existence of God, based on the idea that the hierarchy of being demands the existence of an infinite divine intelligence": Copleston, *A History of Medieval Philosophy*, 59.

[73] Ewart Lewis, ed., *Medieval Political Ideas*, vol. 1 (Cooper Square Publishers Inc., 1974), 196–97.

[74] On this, see, e.g.: Black, *Political Thought in Europe, 1250-1450*, 15–16; Gierke, *Political Theories of the Middle Age*, chap. 4.

[75] Stephanie W Jamison and Joel P Brereton, trans., *The Rigveda: The Earliest Religious Poetry of India*, vol. 1 (Oxford University Press, 2014), 5, 15–17.

[76] Vivekanand Jha, "Social Stratification in Ancient India: Some Reflections," *Social Scientist* 19, no. 3 (1991): 22.

[77] On this type of creation myth, see: David Adams Leeming, *Creation Myths of the World: An Encyclopedia*, 2nd ed., vol. 1 (ABC Clio, 2010), 16–21.

[78] It should be noted that these were not called *varnas* in the passage; indeed, it appears to have a use in the *Rigveda* distinct from the meaning it was later to acquire: Jha, "Social Stratification in Ancient India: Some Reflections," 24–25.

[79] Stephanie W Jamison and Joel P Brereton, trans., *The Rigveda: The Earliest Religious Poetry of India*, vol. 3 (Oxford University Press, 2014), 1540 (10.90.12).

dating to c.1000BCE, depicts a court battle between head and stomach, in which the head puts forward its case for being the better part; unfortunately, the stomach's repost and the verdict are missing.[80] It is this ancient Egyptian tradition, however, which is regarded as providing the basis of the Graeco-Roman tradition of the fable of 'the Belly and the Members'.[81] This tale tells of how various parts of the body, envying the fact that the stomach sat reposed amongst them enjoying the fruits of their labour but seemingly undertaking little work of its own, decide to go on strike; they soon discover, however, that the stomach was not as idle as it seemed. In some versions, order is restored;[82] in others, the tale ends in the body's demise.[83] The moral of the story, of course, was that each has their own functions, which are essential to the maintenance of the wider system; were some part of that system to cease to work, there would be serious repercussions for the system in its entirety.

This fable, as we know it, is usually attributed to either Aesop,[84] or the Roman consul Menenius Agrippa.[85] Whether Aesop or Menenius had any knowledge of the fable and, if so, whether one was drawing from the other is difficult to tell, not least because all extant attributions post-date them considerably.[86] The evidence would appear to point

[80] See: Lewis Spence, *Myths and Legends of Ancient Egypt* (David D Nickerson & Company, 1910), 194–95. See also: Francisco Rodríguez Adrados, *History of the Graeco-Latin Fable*, trans. Leslie A Ray, vol. 1 (Brill, 1999), 329–30. This may be the same thing as Joseph Jacobs refers to having been discovered by Gaston Maspero, which he dates 250 years earlier; otherwise, this represents another object with a similar theme that is potentially earlier: Aesop, *The Fables of Æsop: Selected, Told Anew, and Their History Traced*, ed. Joseph Jacobs (Macmillan & Co. Ltd., 1922), 207.

[81] See: Francisco Rodríguez Adrados, *History of the Graeco-Latin Fable: The Fable during the Roman Empire and in the Middle Ages*, trans. Leslie A. Ray, vol. 2 (Brill, 2000), 106–7, 199.

[82] Livy, *History of Rome*, trans. BO Foster, vol. 1, Loeb Classical Library 114 (Harvard University Press, 1919), 355-325 (Bk 2, XXXII, 9ff).

[83] For example, Romulus Vulgaris. See: David G Hale, "Intestine Sedition: The Fable of the Belly," *Comparative Literature Studies* 5, no. 4 (1968): 379. A tragic ending appears to have been common in the mediaeval Latin versions of the fable: Aesop, *Aesop's Fables*, trans. Laura Gibbs (Oxford University Press, 2002), 35.

[84] It is now part of the Aesopic canon, and is number 130 in the Perry Index. Interestingly, Laura Gibbs arranged this fable under the theme 'Fables About Solidarity' (Fable 66): Aesop, *Aesop's Fables*, 35. Aesop lived c.620-564BCE.

[85] Menenius is reported to have died in 493BCE; he is recorded telling the fable in 494BCE. His telling of the fable is first recorded by Livy (64/59BCE-17CE) and Dionysius (c.60BCE-a.7BCE), and later by Plutarch (c.46-120): Livy, *History of Rome*, 1:355-325 (Bk 2, XXXII, 9ff); Dionysius of Halicarnassus, *Roman Antiquities*, trans. Earnest Cary and Edward Spelman, vol. 4, Loeb Classical Library 364 (Harvard University Press, 1943), 98-117 (Book VI, 83-87); Plutarch, *Makers of Rome - Nine Lives*, trans. Ian Scott-Kilvert (Penguin Books Ltd, 1965), 19-20 (Cariolanus, 6).

[86] Livy records simply that Menenius related the fable in a quaint or antiquated style (*prisco*, from *priscus,-a, -um*), which might indicate that he was quoting from an older source; Dionysius says that Menenius composed the fable himself, albeit after the manner of Aesop; Plutarch merely notes that the fable was well-known, again indicating an opinion that the fable pre-dated Menenius. The divergence between Livy and Dionysius is interesting, as they appear to have both been drawing from the same (now lost) source, Quintus Aelius Tubero (b.74BCE, notably not much closer to the events recorded): Wilhelm Nestle, "Die Fabel Des Menenius Agrippa," *Klio - Beiträge Zur Alten Geschichte* 21, no. 21 (1927): 350. As for Aesop, this fable is not featured in the early collections, such as Phaedrus or Babrius, so the evidence would appear to indicate that it was a later attribution.

towards a common, widespread tradition. This is not only testified by the possible Egyptian connection, but also by the proliferation of corporeal-anatomical comparisons from at least the fifth century BCE onwards. One can think of Xenophon's story about how brothers are made in the same way that the hands, feet, and eyes were made, i.e. for 'mutual help';[87] of the curious work *On Sevens*,[88] attributed to Hippocrates,[89] which takes as its central thesis the idea that the number seven is a pervasive directing number of the universe – the body reflects the seven parts of the world and the topography of the Mediterranean reflects the seven parts of the body.[90]

Fables were known in England, at least after the Norman Conquest. The Bayeux Tapestry is embroidered with a number of fables and two of the most important collections of mediaeval fables are supposed to have been made by Englishmen in the twelfth century. These are the collections of 'Walter of England' (*Gualterus Anglicus*) and Alfred of England. It is noteworthy that Walter's collection, which was one of the most popular in Europe,[91] included the fable of the Belly and the Members. John of Salisbury's and John of Sheppey's works also contain fables.[92] Indeed, John of Salisbury attributes a long speech to Pope Adrian IV – interestingly, the only Englishman to have sat upon the papal throne – in which he recounts a version of the Belly and the Members and consequently links it directly to society.[93]

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[87] Xenophon, *Memorabilia. Oeconomicus. Symposium. Apology.*, trans. EC Marchant and OJ Todd, Loeb Classical Library 168 (Harvard University Press, 2013), 132-133 (Memorobilia, 2.3.18ff). Xenophon lived c.430-354CE.

[88] The Ancient Greek title is: περι έβδομάδων. In Latin: *De hebdomadibus*.

[89] This is the Hippocrates of the eponymous Hippocratic oath. He lived c.460-c.370BCE.

[90] Interestingly, these seven parts were different from those previously listed. For the text (in Latin and German), see: Wilhelm Heinrich Roscher, *Die Hippokratische Schrift Von Der Siebenzahl in Ihrer Vierfachen Überlieferung* (Ferdinand Schöningh, 1913), 10–11, 15-16 (ch. 7 and 11). For commentary and discussion, see: Elizabeth M Craik, *The "Hippocratic Corpus": Content and Context* (Routledge, 2015); Wilhelm Heinrich Roscher, *Über Alter, Ursprung Und Bedeutung Der Hippokratischen Schrift von Der Siebenzahl: Ein Beitrag Zur Geschichte Der Ältesten Griechischen Philosophie Und Prosaliteratur*, Abhandlungen Der Philologisch-Historischen Klasse Der Königl. Sächsischen Gesellschaft Der Wissenschaften; Bd. 28, n. 5 (B. G. Teubner, 1911); Wilhelm Heinrich Roscher, "Das Alter Der Weltkarte in 'Hippokrates' Περί Εβδομάδων Und Die Reichskarte Des Darius Hystaspis," *Philologus - Zeitschrift Für Antike Literatur Und Ihre Rezeption* 70, no. 1–4 (1911): 529–538; ML West, "The Cosmology of 'Hippocrates', De Hebdomadibus," *The Classical Quarterly* 21, no. 2 (1971): 365–88. According to Craik, the dating is 'problematic', although it could well date to the fifth century BCE, i.e. during Hippocrates' lifetime, although arguments have been made that it could have been written as late as the first century CE: Craik, *The "Hippocratic Corpus": Content and Context*, 128.

[91] Hale, "Intestine Sedition: The Fable of the Belly," 379.

[92] See: Aesop, *The Fables of Æsop: Selected, Told Anew, and Their History Traced*, xviii–xix; John Edwin Wells, *A Manual of the Writings in Middle English, 1050-1400* (Yale University Press, 1916), 180–82. John of Salisbury died in 1180 and John of Sheppey in 1360.

[93] John of Salisbury, *Policraticus*, ed. and trans. Cary J Nederman (Cambridge University Press, 1990), 135-136 (6.24). Pope Adrian's version ends with reason, as advocated by the heart, prevailing and order restored. Adrian is also reported as having mentioned the *Liber Medicinalia* of Quintus Serenus, which was a verse medical treatise, in which Serenus affirms the truth that the stomach is "the king of the whole body"

In 1337, John Grandisson, Bp. Exeter, said that the king represented the head, whereas peers the members of the body politic.[94] Later, Henry Beaufort, Bp. Winchester and Chancellor, opened Parliament with a sermon in which he drew a comparison between the kingdom and the body;[95] likewise, it seems that Bp. Russell, later the same century, had prepared a similar sermon for Edward V's first Parliament.[96] Fortescue thought that an acephalous body politic was not properly a body and could not function; body politics grow, as an embryo, through the will of the people; common interest flows amongst the people, as though it were blood; laws, which are like sinews, bind them together; furthermore, just as the head cannot change the body, the king cannot change the body politic.[97] These are but a few examples. Other like comparisons might be found in Aquinas,[98] Dante,[99] and Nicholas of Cusa.[100]

Besides the ideas of *differentiated activities* and *interdependence* embodied in these ideas,[101] there was also the idea of *common pathology*. As can be plainly seen in 1 Corinthians 12:12-26, there was an idea that God created the body and provided each part so that it might help its fellow parts; if one part suffers, all suffer. This idea is found, *inter alia*, in Aquinas,[102] and Marsiglio of Padua.[103] Similarly, deformities were thought to be repulsive, if not deleterious: just as Fortescue thought an acephalous body politic dangerous, Pope Boniface VIII, in his bull *Unam Sanctum* (1302), said it was monstrous

(*regem totius corporis esse*): Quintus Serenus, *Liber Medicinalis*, ed. Friedrich Vollmer, Corpus Medicorum Latinorum II (B. G. Teubner, 1916), 17 (XVII, lns. 300-306); Plinio Prioreschi, *A History of Medicine*, vol. 3 (Horatius Press, 1996), 509–10. See also: DE Luscombe and GR Evans, "The Twelfth-Century Renaissance," in *The Cambridge History of Medieval Political Thought, c.350-c.1450*, ed. JH Burns (Cambridge University Press, 1988), 326. Pope Adrian lived c.1100-1159.

[94] Ullmann, *Principles of Government and Politics in the Middle Ages*, 179.

[95] See: Gerald Harriss, *Cardinal Beaufort: A Study of Lancastrian Ascendancy and Decline* (Oxford University Press, 1988), 30–31.

[96] See: Stanley Bertram Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge University Press, 1936), 175, 178.

[97] Fortescue, "In Praise of the Laws of England," 20-21 (13).

[98] Lewis, *Medieval Political Ideas*, 1:226.

[99] Durante degli Alighieri or Dante Alighieri (c.1265-1321). See: Lewis, *Medieval Political Ideas*, 1:213.

[100] Nicholas of Cusa (1401-1464). See: Lewis, *Medieval Political Ideas*, 1:315. Other examples, besides, include: Alvarius Pelagius, Ptolomaeus of Lucca, Aegidius Colonna, Engelbert of Volkersdorf, Marsilius of Padua, William Ockham, John of Paris, Jean Gerson, Pierre d'Ailly, and Peter of Andlau. On these, see: Gierke, *Political Theories of the Middle Age*, 25–26.

[101] Regarding the point about interdependence, it is worthwhile stressing the importance of the ideas of unity (*unitas*) and cohesion (*cohaerentia*) in mediaeval thought. See: Gierke, *Political Theories of the Middle Age*, 25.

[102] Thomas Aquinas, "'De Regimine Principum' or 'De Regno,'" in *St Thomas Aquinas: Political Writings*, ed. and trans. RW Dyson (Cambridge University Press, 2002), 7-8 [1.1].

[103] Marsiglio or Marsilius of Padua (c.1275-1342). See: Marsilius of Padua, *The Defender of the Peace*, ed. and trans. Annabel Brett (Cambridge University Press, 2005), 12-13 [1.2.3].

for a body to have two heads.[104] Pathological comparisons, it can be said, have an ancient pedigree. Plato, for example, speaks of 'inflamed' or 'feverish' communities – embodying an idea that communities suffer as a body might.[105]

There was, furthermore, the idea of *hierarchy* among parts, which idea was at least implicit in most of the ideas already mentioned. A curious example of this idea is to be found in Arnulf of Lisieux's speech to the Council of Tours (1163), in which he said, *inter alia*, that, as power flowed from the head to the beard and thenceforward, so power flowed from Christ downwards.[106]

We are today little more innocent of drawing comparisons between the body and other things. We speak of the: 'backs', 'arms', 'legs', and 'feet' of chairs; 'hands' and 'faces' of clocks; 'heads' of families;[107] 'Members' of Parliament;[108] 'limbs' and 'organs' of State.[109] It would seem a very natural comparison; its antiquity should not surprise us.

7.3.3 Order Ordained by Nature (II): Analogies with Other Social Animals

Besides comparisons between the body and society, there was also often a comparison drawn between human society and the societies of other social animals. We find this, for example, in Ambrose, who drew a comparison between republics and cranes, as well as between bees and monarchy.[110] Indeed, bees were a particular favourite of mediaeval writers. For example, we find Aquinas comparing kingship in humans with that of bees. He appears to have thought that in bees this was primarily the result of God-given instinct, whereas in Man it was the product of reason;[111] yet, it must not be forgotten that reason was deemed to be embodied in the natural order, meaning that the difference, for Aquinas, was really rooted in the matter of freewill – bees act in such a manner because they cannot

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[104] "Therefore there is one body of the one and only Church, and one head, not two heads, as if the Church were a monster." Frederic Austin Ogg, ed., *A Source Book of Mediæval History* (American Book Company, 1907), 386.
[105] Plato, *The Republic*, 64 (II 372e); Cf. Nestle, "Die Fabel Des Menenius Agrippa," 355.
[106] See: Ullmann, *Principles of Government and Politics in the Middle Ages*, 53–54.
[107] Albeit, admittedly, in a somewhat antiquated manner.
[108] 'Member' comes from the Latin *membrum*, meaning 'limb': CT Onions, GWS Friedrichsen, and RW Burchfield, eds., *The Oxford Dictionary of English Etymology* (Oxford University Press, 1966), 568; Sir William Smith and JF Lockwood, eds., *A Smaller Latin-English Dictionary*, 3rd ed. (John Murray, 1933), 429. The term was first used in the fifteenth century: AF Pollard, *The Evolution of Parliament*, 2nd ed. (Longmans, Green and Co. Ltd., 1926), 160–61.
[109] Other examples include: the 'legs' of a table; we talk of things being at the 'bottom' or 'foot' of the bed; roads have 'shoulders'; we thread a needle through its 'eye'; things can lie at the 'heart' of the matter; and we speak of the long 'arm' of the law. Undoubtedly, the list continues. An alternative manner of speaking of the 'organs' of State is to speak of the 'branches' of the state, which maps a comparison from the domain of plants, rather than animals.
[110] RA Markus, "The Latin Fathers," in *The Cambridge History of Medieval Political Thought, c.350-c.1450*, ed. JH Burns (Cambridge University Press, 1988), 98–99. Ambrose lived c.340-397.
[111] Aquinas, "De Regimine," 36-37 [1.13].

act otherwise, whereas we act in such a manner because it is best by virtue of its being in accordance with nature. Perhaps one of the best passages in this vein, however, is to be found in John of Salisbury. Drawing on Plato and Cicero, he firmly held that "civil life should imitate nature" and took bees as an exemplum for social living.[112]

7.3.4 Order Ordained by Reason or Necessity

Besides ideas that social order is somehow preordained or natural, there is also the idea that social order is in some way *rational* or *necessary*, i.e. unless people know their place and fulfil its duties, society will disintegrate and everybody will suffer;[113] obedience is a virtue.[114]

One metaphor employed in this context was the idea of the monarch, etc. as being a **ship's helmsman**,[115] or, as an anonymous poem written following Edward III's death had it, a **ship's rudder**.[116] This draws on the idea that there must be a clear leader who can, for better or worse, provide the 'ship of state'[117] with unity and direction.[118] In the words of Aquinas:

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[112] John of Salisbury, *Policraticus*, 126–29.

[113] We might think of what Shakespeare wrote: "O, when degree is shak'd, / Which is the ladder of all high designs, / The enterprise is sick! How could communities, / Degrees in schools, and brotherhoods in cities, / Peaceful commerce from dividable shores, / The primogenity and due of birth, / Prerogative of age, crowns, sceptres, laurels, / But by degree, stand in authentic place? / Take but degree away, untune that string, / And hark what discord follows!" William Shakespeare, *Troilus and Cressida*, Act 1, Scene 3.

[114] Thomas à Kempis (c. 1380-1471), for example, said: "It is an excellent thing to live under obedience to a superior and not to be one's own master. It is much safer to obey than to rule." Thomas à Kempis, *The Imitation of Christ*, trans. Leo Sherley-Price (Penguin Books, 1952), 36 [1.9].

[115] For example Wipo or Wippo of Burgunday (d. post 1046), in the eleventh century, "vividly described a kingdom during an interregnum as a ship that had no steersman and that could not therefore be navigated": Ullmann, *Principles of Government and Politics in the Middle Ages*, 133.

[116] This was the poem, *Death of Edward III*, presumably written in 1377 or shortly thereafter. It says that there was a figurative "Englis schip", in which: Edward of Woodstock (the Black Prince, s. Edward III) had been the helm; Henry of Grosmont, D. Lancaster a "swifte barge"; and the "gode comunes [Commons]" the mast. Most importantly, however, Edward III had been the rudder of this ship, which steered it safely on its course; his death and, by implication, Richard II's minority, left England somewhat *rudderless*. For this poem in the original Middle English, see: Thomas Wright, ed., *Political Poems and Songs Relating to English History, Composed during the Period from the Accession of Edw. III to That of Ric. III*, vol. 1 (Longman, Green, Longman, and Roberts, 1859), 215–18. See also, with notes: Celia Sisam and Kenneth Sisam, eds., *The Oxford Book of Medieval English Verse* (Oxford University Press, 1970), 342–47.

[117] The metaphor of a 'ship of state' is to be found in, and was certainly popularized by, Plato in his *Republic*: Plato, *The Republic*, 208-210 [488a-489d]. There are earlier examples of the metaphor to be found, for example, in Alcaeus, Sophocles, and Aeschylus, see: Roger Brock, *Greek Political Imagery from Homer to Aristotle* (Bloomsbury Academic, 2013), chap. 4.

[118] There was a common idea that "every Social Body needs a Governing Part (*pars principans*) which can be pictured as its Head or its Heart or its Soul. Often from the comparison of Ruler to Head an inference was at once drawn that Nature demanded Monarchy, since there could be but one head…": Gierke, *Political Theories of the Middle Age*, 28. In this context, one might think of the *Siete Partidas*, a Castilian law-code of the thirteenth century. It says that humans, as compared with most animals, are naturally somewhat helpless and defenceless. For this reason, humans need must work together: "But man has nothing of all this for himself, except through the aid of many persons, who seek for, and bring together, those things which are suitable for him. The collection of these cannot be made without justice, which cannot be done

> "Now it is manifest that what is itself one can more effectively bring about unity than can a plurality… Therefore, the government of one man is more useful than the government of many. Further, it is manifest that a plurality of men disagreeing about everything would not preserve the unity of a multitude at all. For there has to be a certain union among the many if they are to be able to rule at all, even as many helmsmen, unless they agree in some way, cannot bring a ship to one harbour; now a plurality is said to be united as it approximates unity. Therefore, one man rules better than a plurality, because of the approximation to unity. And again, things are at their best when they most resemble nature; for in each individual case nature does what is best…"[119]

There was a constant strain in mediaeval thought towards **social harmony**.[120] This is found in the idea of *concordia* (lit. *together-heartedness*).[121] Another mode of expressing this idea was through the idea of *polyphony*: each has their own song to sing, as it were, each of which interweaves with the others to make an altogether more impressive piece. This would only be possible, however, if each kept to their brief and, moreover, if they performed with synchronicity. As such, society could only be like a well-oiled machine

except by superiors, whom others are obliged to obey. And, as these are many in number, it is unavoidable that sometimes they should disagree… For this reason it is necessary, for the sake of just authority, that there should be one person who should act as their head, by means of whose wisdom they should agree and be guided, as all the members of the body are guided and commanded by the head. Wherefore it was proper that there should be kings, and men accepted them as lords." It then continues to say that another reason for having kings is the fact that God needs an agent in each place – presumably, following the previous argument that multitudes tend to disagree, only the one agent in each place. Burns, *Siete Partidas*, 2:272–73, quote at 273 (Part. II, Tit. I, Law VII).

[119] Aquinas, *De Regimine Principum* in Lewis, *Medieval Political Ideas*, 1:285. Cf. Aquinas, *St Thomas Aquinas Polit. Writings*, 5-8 (De Reg. Pri., 1.1). A similar idea is found, for example, in Dante, which Gierke summarized thus: "[H]e argued that the unifying principle of Bodies Politic is Will, and that, for the purpose of presenting a Unity of Wills (*unitas in voluntatibus*) the governing and regulating Will of some one man (*voluntas una et regulatrix*) is plainly the aptest mean." Gierke, *Political Theories of the Middle Age*, 32.

[120] An interesting line of thought is to be found in Augustine, who thought that the State was necessitated by the Fall. As Coplestone wrote of Augustine's argument: "Human beings would, of course, have lived a social life [had there been no Fall]. But there would have been no need of the coercive and punitive power which we call the State". In other words, social order within human social groups is *necessary* because of humankind's fall from grace and because of the existence of (and, perhaps, humankind's predilection to) sin. If society is to exist harmoniously, there need must be a State. See: Copleston, *A History of Medieval Philosophy*, 44–45, quote at 45.

[121] As Gierke identified, there was an idea that, for example, the spiritual and temporal powers were vital co-ordinate parts of the social order; "the fulness of Life was only attained by their 'harmonious concord' and by their mutually supplementing co-operation in the task that is set before Mankind". See: Gierke, *Political Theories of the Middle Age*, 17–18. We might note, further, the anatomical analogy in the idea of *concordia*. See: Black, *Political Thought in Europe, 1250-1450*, 120. For the idea of *ordinata concordia* in Augustine, see: Thomas F Martin, "Augustine and the Politics of Monasticism," in *Augustine and Politics*, ed. John Doody, Kevin L Hughes, and Kim Paffenroth (Lexington Books, 2005), 177.

if each performed their assigned roles and did so with regard to those around them. As with the organic metaphor, this was to the benefit of all.[122]

7.3.5 Differentiated Social Standing

Regardless as to the basis of social order, it is clear that people throughout the mediaeval period thought that there were discrete roles in society that might be performed. There were bundles of activities and influence, which might be – and were – defined, labelled, and distributed. This, in itself, should be sufficient to indicate the existence of constitutions. Certainly, some positions were considered more necessary and consequential than others – especially senior secular and ecclesiastical leadership positions. Most mediaeval people would have found it difficult to contemplate purely anarchistic societies in which there was no king or emperor,[123] no pope or bishop. Indeed, many would have been horrified by such a prospect; they would have thought such ideas dangerous and subversive.

It would be impossible to list all of the positions that existed during the mediaeval period, although some of the most prevalent and important have already been mentioned (i.e. king, emperor, pope, bishop, etc.). However, it is worthwhile remarking some general terms that were used to denote differentiated social standing, particularly such standing that carry connotations of public service and which we might today call an 'office'. In the earlier mediaeval period, a number of terms were used roughly interchangeably: *officium, dignitas, honor, ministerium,* and *actio*. As time wore on, usage preferred *officium* in the context of duties and public service.[124] It is an important fact that many such offices were thought to be established features of social life within particular groups; they persisted across time, even in spite of changes in personnel.

There was also a very clear idea of *stratification* and *hierarchy*. It is unsurprising that "[m]edieval language abounded in words for rank: *status, honor, ordo, gradus, dignitas*, and so on."[125] Words such as *auctoritas*, *gubernaculum*, *dominium*, and *majestas* all attest to differentiated influence. There were some set above others, with more important activities; others were set below, with *less* important – though perhaps not necessarily

[122] "Another message of the organic metaphor was social harmony: society and polity are by nature intrinsically harmonious; strife, rebellion and tyranny are manifestations of sin, pride and greed. All members of society should avoid quarrels and live in friendship with one another.": Black, *Political Thought in Europe, 1250-1450*, 17–18.
[123] Cf. "Belief in the rightness of kingship was a deep-seated conviction seldom contested outside the Italian city-republics." Black, *Political Thought in Europe, 1250-1450*, 136.
[124] Ullmann, *Principles of Government and Politics in the Middle Ages*, 136.
[125] Black, *Political Thought in Europe, 1250-1450*, 16.

*un*important – activities. Even if there were some respects in which people were seen to be equal, the idea of equality was neither so prevalent, potent, nor all-pervasive so as to pose serious challenge to the idea of a stratified society.

None of this is to say that mediaeval thought was devoid of ideas about liberty; it was often highly prized, particularly in the need for obtaining consent in various cases.[126] It was just that such liberty was largely derived from one's social identity and position, was circumscribed thereby, and was not accompanied by pervasive notions of equality. Even if one's social identity and position were relatively inflexible, one might still possess a modicum of liberty and self-determination. Moreover, even if *individuals* did not possess extensive liberty themselves, the *groups* to which they belong might, e.g. a freedom or right to govern themselves. Regardless, this all fitted into a larger framework of differentiated activities and influence.

7.4 Role of Law

The importance of social order is emphasized by the introduction of laws (i.e. fixed associations) that reflected and reinforced it. We might take, for example, the *wergild* or man-price, which was to be paid upon the causing the death of another; the level of payment was contingent upon the status of the person killed. Whether the *wergild* system was supposed to represent particularly some *intrinsic*, *instrumental*, or *invested value* is difficult to ascertain,[127] but it clearly entrenched the idea that not all in society were of equal worth. We might also take the example of sumptuary legislation,[128] which, once again, drew strong distinctions between different classes of person; indeed, its very point was to ensure that people dressed and acted in a manner appropriate to their social position – that they did not attempt to arrogate the privileges of their superiors.[129] It was a symbolic embodiment of social order.

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[126] For ideas of liberty in mediaeval thought, see, e.g.: Black, *Political Thought in Europe, 1250-1450*, 28–33.

[127] *Intrinsic value* would mean that some people had an inherent value higher or lower than others; *instrumental value* would mean that some people were worth more to society than others; *invested value* would mean that some people were the product of greater economic investment and, as such, were more valuable.

[128] On the sumptuary law from 1363, for example, see: Stubbs, *Constitutional History*, 2:434.

[129] Beyond the sumptuary law, there was also social pressure to ensure that people wore clothing fitting to their station. This can be seen, for example, in Caxton's *Book of Curtesye*, a guide on etiquette and manners aimed at children: "Euery garment / that ye shal on were / Awayte wel / that it be so syttynge / As to your degre / semeth acordynge / Thenne wil men saye / forsoth this childe is he / That is wel taught / and louyth honeste." That the wearing of suitable clothing is attached with the idea of being praised is a point worth marking; it is a behaviour that is positively encouraged and received. Frederick J Furnivall, ed., *Caxton's Book of Curtesye, Printed at Westminster about 1477-8 AD and Now Reprinted with Two MS Copies of the Same Treatise* (Early English Text Society, 1868), 26 (lns. 52-56).

There was also a very strong idea that laws not only *defined*, but also *constrained* what governments – and, in particular, kings – could do.[130] There was little notion that kings could rule absolutely, arbitrarily, or without counsel or consent; they could not be purely autocratic,[131] although extraordinary circumstances might permit extraordinary measures.[132] Kings might be restrained by the *lex terrae*, common law, or fundamental law, which things often had contractual (especially feudal),[133] immemorial usage, or just-so underpinnings.[134] Even if the king were above the laws of the community, he was nevertheless subject to the laws of Nature and God.[135] Moreover, all of those beneath him, at whatever degree of remove, were very much subject to the laws of the community from whatever source they came. If they were to flout these, the community would come

[130] For example, we find the following famous passage in Bracton: "The king must not be under man but under God and under the law, because law makes the king [*Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem*], [Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power.] for there is no rex where will rules rather than lex. Since he is the vicar of God, [And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption of the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice. Thus he willed himself to be 11under the law that he might redeem those who live under it. For He did not wish to use force but judgment. And in that same way the Blessed Mother of God, the Virgin Mary, Mother of our Lord, who by an extraordinary privilege was above law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established laws. Let the king, therefore, do the same, lest his power remain unbridled.]" Henry de Bracton, *De Legibus Et Consuetudinibus Angliæ (Bracton on the Laws and Customs of England)*, ed. George Woodbine, trans. Samuel E Thorne (Harvard Law School Library, 2003), 2:33, http://bracton.law.harvard.edu/.

[131] On this, see: Black, *Political Thought in Europe, 1250-1450*, chap. 5. This is, of course, in spite of the stock phrases: the ruler as *lex anima* (a living law/spirit of the law); *quod principi placuit legis habit vigorem* (what pleases the prince has the force of law); *princeps legibus solutus est* (the prince is exempt from, or above, the law); and *omnia iura habet princeps in pectore suo* (the prince has all law in his breast). For these, see Gierke, *Political Theories of the Middle Age*, 77–78.

[132] "A king…can demand and take from a kingdom, not only what other kings who preceded him were accustomed to do, but even more, when he has such great need of it for the common benefit of the country that he could not avoid doing so just as other men, in times of distress, have recourse to what is their own by inheritance." Burns, *Siete Partidas*, 2:273 (Part. II, Tit. I, Law VIII). The proviso that this must be 'for the common benefit' is an important point to stress; kings could not augment their powers or rights arbitrarily, but only with good reason, i.e. for the *summum bonum*. Cf. the section on tyranny (2:274-275, Part. II, Tit. I, Law X) and, in particular, the section 'A King Should Not Desire to Do Anything Contrary to Law' (2:293, Part. II, Tit. V, Law XIV), which says that kings ought to obey the precepts of nature, justice, propriety, and moderation, as well as avoid covetousness.

[133] Within feudal kingship, kings were bound by law because they were a party to its creation and were unable to change it unilaterally. On this point, within the context of Bracton, see: Ullmann, *Principles of Government and Politics in the Middle Ages*, 176–77.

[134] For example, on King John's and Richard's attempts to rule autocratically, on the tensions between *theocratic* and *feudal kingship* in England, see: Ullmann, *Principles of Government and Politics in the Middle Ages*, 164ff, 182ff.

[135] Whether people could do anything about a king who strayed from the path of righteousness, and what they could do, was a contentious issue throughout the mediaeval period. There were some who thought that there was little to be done; it was up to God, as the judge of all, to do as He saw fit as and when He saw fit to do it. There were others who thought that the Church, especially the Pope, might be able to intervene to correct or even to depose the offending monarch. There were others still, far more radical, who thought that there was some right of resistance; that the people might resist a tyrant. On all of these points, see, e.g. Black, *Political Thought in Europe, 1250-1450*, passim.

undone; to remove the sinews, to take Fortescue's analogy, would be to destabilize the community.

Mediaeval ideas were permeated by a sense of Natural Law – an idea that which naturally is ought to be. Social order formed a part of this Natural Law – different types of people fulfil different roles in society. As Black has said, "[m]any believed that some set of institutions – whatever it might be – was intrinsically right and valid for all time."[136] Society had a natural constitution; to adhere to that was best. Law kept everybody in their place. It ensured that everything ran smoothly and effectively. Questioning this natural order, or the laws sustaining it, might be considered dangerous; life would be much better if all accepted their preordained places. Of course, each society might arrange themselves to their liking, but their constitutions – in the mediaeval theory – were *derivative* of a universal constitution.

There were not really any concerted efforts to reduce constitutions to writing, at least in any extended and detailed sense. There were not written and codified constitutions, although there some constitutional provisions did find their way into writing and into formally recognized sources of law.[137] However, this lack of written and codified constitutions should not be overemphasized. It simply indicates that, whereas most people today would appeal to written documents, mediaeval people appealed to custom and notions of right reason;[138] they drew on the various analogies that have been outlined. They still had strongly fixed expectations as to how society should look and operate; they still thought that society should operate according to law.[139] In this sense, they are no different to us. Of course, none of this should be surprising. As discussed in the Associational Theory of Law and Appendix II, the desire for law is a natural human trait.

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[136] Black, *Political Thought in Europe, 1250-1450*, 3.

[137] Perhaps the most famous example of such a provision is Magna Carta 1297, Cl. 29 (one of the survivors of the 1215 version and, indeed, one of the three provisions still current law), which provides that: "No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right."

[138] Custom, it should be said, was not necessarily regarded by mediaeval people as something that ought to last forever. Indeed, there was certainly a view that custom might be quickly altered, at least in England: JW Gough, *Fundamental Law in English Constitutional History* (Oxford University Press, 1955), 14.

[139] As Holdsworth discussed, the idea that "law should govern the state was held by English lawyers and many other mediaeval thinkers": William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 2 (Methuen & Co. Ltd., 1923), 252–54, 435; quote at 441. This is not to say, as Holdsworth himself – and later Gough – argued, that there was necessarily a widespread belief in an immutable 'fundamental law': Holdsworth, *A History of English Law*, 1923, 2:441ff; William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 4 (Methuen & Co. Ltd., 1945), 183ff; Gough, *Fundamental Law in English Constitutional History*, 5–6.

7.5 Monarchy and Royal Minorities

As the latter part of this thesis will be concerned with royal minorities, it would be worthwhile briefly to consider some of the ideas associated with monarchy and how children might pose problems thereto.

Royal minorities posed theoretical as well as practical problems for their contemporaries. For example, children cannot readily dispense justice, which James of Viterbo (ca. 1255 – 1308) saw as the "principal and special act of royal authority";[140] Bracton also saw the king's primary task as the administration of justice.[141] Such an idea was established Christian tradition.[142] To this idea of doing justice might also be attached the idea of granting grace.[143] The problem is that, if all human laws are derivative of the natural law and discoverable through reason, children can hardly be thought to possess the sufficient "natural clear reason, wisdom, and foresight" to deduce what those laws were and act as a lawgiver.[144] A similar argument is to be found in Aegidius, who thought that societies were better ruled by the best kings, rather than laws, because human laws were often defective in the light of natural justice; these required the correction of a king, through the exercise of right reason.[145] Once again, it doubtful whether a child could do this.

Indeed, the etymology of the Latin word for king, *rex*, was not lost on writers like Aegidius,[146] and Bracton. As Bracton says, "For a king (*rex*) is so called from ruling (*regendo*) well and not from reigning, because when he rules well he is a king, but he is a tyrant when he oppresses with violent domination the people entrusted to him."[147] A child might *reign*, but it seems unlikely that they would be able to *rule* well, especially if they were only an infant who could, in truth, do very little. By Bracton's logic, child kings were not kings at all.

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[140] James of Viterbo, *De Regimine Christiano*, quoted in: Lewis, *Medieval Political Ideas*, 1:182.
[141] Bracton, *De Legibus* quoted in Lewis, *Medieval Political Ideas*, 1:282–83.
[142] As Jeremiah 23:5 says: "Behold, the days come, saith the Lord, that I will raise unto David a righteous Branch, and a King shall reign and prosper, and shall execute judgment and justice in the earth."
[143] Billing J in *Bagot's Case* said: "It pertains to every king, by reason of his office, to do justice and grace: justice in executing the laws, and grace in granting pardon to felons". Quoted in: Chrimes, *English Constitutional Ideas in the Fifteenth Century*, 16.
[144] The quote is from Nicholas of Cusa, *De Concordantia Catholica* in Lewis, *Medieval Political Ideas*, 1:192.
[145] Giles of Rome, *De Regimine Principum* in Lewis, *Medieval Political Ideas*, 1:290–91.
[146] See: Giles of Rome, *De Regimine Principum* in Lewis, *Medieval Political Ideas*, 1:290–91.
[147] The rest of this passage is of interest: "Therefore, let him temper his power by law, which is the bridle of power, that he may live according to the laws, since a human law has stated that laws bind the lawgiver himself, and elsewhere in the same source, 'It is a saying worthy of the majesty of rulers that the prince profess himself bound by the laws' [Codex, I, 14, 4]." Bracton, *De Legibus* quoted in Lewis, *Medieval Political Ideas*, 1:283.

Fortescue saw the tasks of kingship being twofold: "Lo! To fight and judge are the office of a king."[148] As a child lacks the cognitive maturity to judge, they also lack the physical maturity to fight, which once again seems to make children signally inadequate to the tasks of kingship. Nevertheless, as will be seen, child kings existed.

7.6 Secularization and Public Law

It is sometimes said that modern public law was created through a process of secularization,[149] in which external supernatural sources were substituted for profane, human sources. Indeed, some have argued public law was rather created by the *conversion* of theological concepts into secular ones.[150] To an extent, both viewpoints (substitution and conversion) have merit – theology has now largely been displaced in academic work and it seems probable that there has been a degree of borrowing from theology. However, it would be wrong to press these arguments too far.

In the first place, even though politico-constitutional thought has become increasingly less religious in tone since the Middle Ages, there is every reason to believe that this has much to do with *who was writing* as with some fundamental rejection of religious arguments. After all, earlier in the Middle Ages, writers were likely to be ecclesiastics; with the spread of literacy, education, and the means to write, by the early modern period even those not well-versed in scripture could write on such matters. Moreover, it is possible that the idea of conversion has confused somewhat the chain of causation. If one agrees with Feuerbach that theology is itself a reflection of human society,[151] then public law ceases to be founded in *secularized theological concepts* but *concepts* that have been applied in both secular and theological contexts – each borrowing at a time from the other.

7.7 Conclusions

Whether drawn from notions of design, nature, or reason, there appears a strong strain in mediaeval thought that it was natural and, indeed, advisable, for individuals within social

[148] Fortescue, *De Natura* quoted in Chrimes, *English Constitutional Ideas in the Fifteenth Century*, 14.
[149] Loughlin, for example, has argued that it was the secularization – alongside rationalization and positivization – of the mediaeval concept of 'fundamental law' that led to the development of modern public law: Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 2, 6–7.
[150] See, for example: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (The MIT Press, 1988).
[151] For Feuerbach, see: Ludwig Feuerbach, *The Essence of Christianity*, trans. George Eliot (Dover Publications, Inc., 2008). Especially at 152 (1.18), where he says that: "We have reduced the supermundane, supernatural, and superhuman nature of God to the elements of human nature as its fundamental elements. Our process of analysis has brought us again to the position with which we set out. The beginning, middle and end of religion is MAN."

groups to perform different activities and exercise different levels of authority. Moreover, there was clearly a desire that these be regulated by laws, such that each knew their place and what was expected of them.[152] Any society not adhering to these precepts was either damned or doomed. Without order, there would be chaos. As such, mediaeval people were primed to think in *constitutional terms*: in terms of social groups, and the distribution therein of differentiated activities and social influence. It is an important point, however, that mediaeval writers, when speaking of constitutional matters, were often not so concerned with expounding the details of constitutions in their entirety. The thing with which they were most concerned was leadership. Indeed, for many writers, without government (i.e. without leadership), there could be no society.[153]

None of this is to say that there was not profound conflict throughout the mediaeval period as to the roles of social groups and of individuals therein. In fact, for much of the period, there was a preoccupation with discussing how two social groups intersected and interacted: the ecclesiastical and secular polities.[154] Some argued for the supremacy of the former;[155] others for that of the latter.[156] Some advocated a closer union between them;

[152] Cf. the following lines from Ælfric's *Grammar*, written towards the end of the tenth century: "'Whether you are a priest or a monk, a layman or a soldier, apply yourself to that and be what you are; as it is a shame for a man not to be what he is and what he ought to be". Quoted in: LF Salzman, *English Life in the Middle Ages* (Oxford University Press, 1926), 141.

[153] See: Black, *Political Thought in Europe, 1250-1450*, 23.

[154] These might alternatively be referred to as the *spiritual* and *temporal* polities respectively. We might mark here what Gierke said: "along with this idea of a single Community comprehensive of Mankind, the severance of this Community between two organized Orders of Life, the spiritual and the temporal, is accepted by the Middle Age as an eternal counsel of God." Gierke, *Political Theories of the Middle Age*, 10. See further, e.g.: John Neville Figgis, *The Divine Right of Kings*, 2nd ed. (Cambridge University Press, 1914), chaps. 3-5.

[155] There were a number of popes and ecclesiastical commentators who argued vociferously for the supremacy of the Church and, more particularly, of the Papacy over secular powers. After all, there was an argument that the Pope "could judge all and be judged of none (*sedes apostolica omnes iudicat et a nemine iudicatur*)". Indeed, not only were secular powers subject to the papal power, they were also beholden to it. This latter idea was particularly expressed through the idea of the 'two swords', which were supposedly both given to the papacy through being given to Peter. The spiritual sword was retained by the papacy and the temporal sword was within their gift; the spiritual sword bestowed upon the papacy a supervisory role, through which the use of the temporal sword was monitored, directed, and corrected where necessary. On these things, see esp.: Ullmann, *Principles of Government and Politics in the Middle Ages*, pt. 1; Gierke, *Political Theories of the Middle Age*, chaps. 3, quote at 49.

[156] These were often driven either by ideas of theocratic kingship or populist sentiments in which the secular power was independent of the ecclesiastical powers. On this, see esp.: Ullmann, *Principles of Government and Politics in the Middle Ages*, pts. 2 and 3. Gierke was perhaps not too far from the mark when he said that "Lonely in the Middle Age was Marsilius of Padua when he taught as a principle the complete absorption of Church in State": Gierke, *Political Theories of the Middle Age*, 16.

others a greater separation;[157] others still some 'middle way'.[158] Religious arguments were found to support all sides. There were those who argued that, as God and His Law ruled over everything, it was only natural that the Church, as His representatives and interpreters, should have supremacy.[159] There were others, particularly as one moves towards the end of the period, who saw religion as being rather a personal matter and a matter of conscience; this was often conjoined with a distrust of institutionalized religion. As such, the Church's role should be rather smaller. Besides and in conjunction with this debate was an ongoing debate as to the ultimate source of political authority, i.e. as to whether social groups operated on *descending* or *ascending* principles of government;[160] the extent to which the commonalty had a hand and say in government. These were complemented by debates on *participation* and *representation*.[161]

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[157] William of Ockham, for example, thought that the Church and Papacy ought to have no claims to temporal possessions or jurisdiction, which argument he based on the idea that Christ refused such things. See: Black, *Political Thought in Europe, 1250-1450*, 74. More radical ideas in this direction were expressed by the likes of Wyclif, who rather sought to deny institutionalized religion. See: Black, *Political Thought in Europe, 1250-1450*, esp. 79-80.

[158] Juan de Torquemada is perhaps a good example of this, who argued that there was a balance to be struck between secular and ecclesiastical powers such that each might – in some matters – be directed by the other. See: Black, *Political Thought in Europe, 1250-1450*, 82–84. In theories such as this, the ecclesiastical and secular polities were rather regarded as 'co-ordinate powers', i.e. so-called *sacerdotium* and *imperium* were "two independent spheres instituted by God himself"; neither was reliant on the other for their authority. Nevertheless, it tended to be admitted that "when compared with the State, the Church, having the sublime aim, might rightly claim, not only a higher intrinsic value, but also a loftier external rank": Gierke, *Political Theories of the Middle Age*, 16–17.

[159] Who within the Church was the principal agency was a matter of some debate. In the earlier mediaeval period, the Papacy was generally recognized as being in the ascendant. However, towards the end of the mediaeval period, a substantial conciliar school developed: "For d'Ailly, Gerson, Zabarella, Andreas Randuf, Dietrich of Niem and some of their contemporaries, the whole Constitution of the Church was based on the thought that the plenitude of ecclesiastical power was in substance indivisible and inalienable, and was vested in the Universal Church represented by the Council, while the exercise of that power belonged to the Pope and the Council in common." Gierke, *Political Theories of the Middle Age*, 52–53. Conciliarism was particularly prominent – and, indeed, triumphant – at the Councils of Constance (1414-18) and Basel (1431-49), but was not ultimately successful.

[160] Descending theories of government were typically theocratic in nature (i.e. political power and authority are derived from God). Such theories equally fuelled ideas of *papal monarchy* or *hierocratic government* as *theocratic kingship*, in which popes and monarchs respectively were held to be directly beholden to God and His grace for their powers; these were given through or by some *act of concession*. Ascending theories, by contrast, tended to be more populist in nature (i.e. political power and authority are derived from the People; this is the doctrine of *popular sovereignty*), but also supported *feudal kingship* (i.e. political power and authority are derived from some covenant or contract between rulers and ruled). On descending and ascending theories of government, see: Ullmann, *Principles of Government and Politics in the Middle Ages*, passim. On the doctrine of popular sovereignty, see, e.g.: Gierke, *Political Theories of the Middle Age*, chap. 6.

[161] See, e.g.: Black, *Political Thought in Europe, 1250-1450*, chap. 6; Gierke, *Political Theories of the Middle Age*, chap. 7. In the context of England, see esp. Maude Violet Clarke, *Medieval Representation and Consent: A Study of Early Parliaments in England with Special Reference to the Modus Tenendi Parliamentum* (Longmans, Green and Co., 1936). Whatever their general position, there does appear to have been a widespread opinion – which is unsurprising – that, in the words of Gierke: "the consent of the Whole Community was requisite for the validation of any acts of the Ruler which were prejudicial to the rights of the Whole…": Gierke, *Political Theories of the Middle Age*, 44.

It is only in more recent times that the prevalence and potency of the classical and mediaeval ideas have begun to be worn away. With modern liberal, egalitarian, and naturalistic beliefs, people are less inclined to believe in any natural social order,[162] especially one necessarily putting some above others.[163] Those who have historically advocated forms of equality have tended not to do so absolutely and also tended rather to be revolutionary and cultish. We might think of the Pythagoreans in the ancient world,[164] or a number of movements during the mediaeval period, many of which were inspired by an immanent second coming of Christ.[165] To see how far we have come, we might consider the following sentence: "The social system is not an unchangeable order beyond human control but a pattern of human action."[166] A sentence such as this would have been almost unthinkable prior to the modern period.

It would be wrong to in any way paint ancient and mediaeval ideas as homogeneous. To speak of a singular "mediaeval idea" would be as ridiculous as fallacious. However, what we can clearly see is that there were some ideas that had a greater prevalence, potency, and persistency throughout the mediaeval period, as compared, for example, with today.

In particular, one might reflect on the declining potency of the ideas touted by the mediaeval Church – up to and including the existence of God. The decline of this idea has profoundly affected how we conceptualize and approach constitutions. No longer are they seen as products of some divine or natural order; rather, they are seen as things almost entirely within our power to shape and craft. Nevertheless, when one reads medieval writers, one is struck by the fact that they talk about many of the same things that we do, as well as by the sophistication of their writing and their systems. The fact of the matter is that they attempted to describe and rationalise much the same phenomena as we do today and there has been a great mistake in the scholarship in thinking that there was a time at which the 'modern idea' of the 'State' or what-have-you was 'discovered' or 'invented'. We can very much agree with Lovejoy that:

> "The seeming novelty of many a system is due solely to the novelty of the application or arrangement of the old elements which enter into it.

[162] Cf. "As the unity of the medieval world disintegrated, the belief that humans occupied a fixed place within a universal order was placed in question." Loughlin, *Sword and Scales*, 161.
[163] Indeed, as Black has said: "the idea of an organic division of labour was, in pre-modern times, the antithesis of the idea of equality." Black, *Political Thought in Europe, 1250-1450*, 17.
[164] On the Pythagoreans, see, e.g.: Bertrand Russell, *History of Western Philosophy* (Routledge, 2000), 49–56.
[165] See: Black, *Political Thought in Europe, 1250-1450*, 17.
[166] John Rawls, *A Theory of Justice*, 2nd ed. (Oxford University Press, 1999), 88.

> When this is realized, the history as a whole should look a much more manageable thing. I do not, of course, mean to maintain that essentially novel conceptions, new problems and new modes of reasoning about them, do not from time to time emerge in the history of thought. But such increments of absolute novelty seem to me a good deal rarer than is sometimes supposed."[167]

If anything, perhaps the true difference between modern and pre-modern ideas is not so much that we talk about different things, but rather, that we approach them with a different set of assumptions. Even still, we owe much to our mediaeval forebears.[168]

[167] Lovejoy, *Great Chain of Being*, 4.

[168] "Yet some of the main configurations of political thought in modern Europe were laid down before 1450: the authority of the state and its separation from the church, the rule of law, the legitimacy of lesser associations; absolute monarchy, popular consent, parliamentary representation. Justice, liberty, peace, the common good remained dominant social norms. Similarly, there was underlying continuity in the evolution of territorial states, legal systems, monarchies and, in some cases, parliaments. The truly epochal shifts in European thought occurred in the eleventh and eighteenth centuries: in between was essentially a single epoch.": Black, *Political Thought in Europe, 1250-1450*, 191.

Part III:
The Framework and Mediaeval Practice –
The Royal Minorities of England

8 – Introduction to the Case Studies

8.1 Introduction

The purpose of this brief introduction is to set out in greater detail the reasons for pursuing the case studies presented in this Part,[1] as well to emphasize their relation to the framework set out in Part I.

8.2 Purpose Rehearsed and Expanded

It is to be remembered that there have been doubts as to the compatibility of constitutional history and mediaeval history; the former has been thought to be meaningless in the context of the latter for lack of an object.[2] These two studies, with the aid of the interpretative framework set out in Part I, are intended to be the first steps towards showing that this is not the case. Obviously, if the aim had been merely to demonstrate the Theory of Constitutional Ubiquity, almost any time or social group could have been selected – arguably, the more remote and obscure the better. However, *the aim here is to revive constitutional history*. Therefore, considering the fact that the obstacle to this is largely the current opposition to *mediaeval* constitutional history, especially as it applies to England, it makes sense to begin in the mediaeval period and to do so in England.

There are a few reasons for focusing on the central government, which is but one small part of the overall constitution (albeit arguably the most important). First, the availability of evidence and material in general: it is easier to form a more detailed and comprehensive picture about this than in many other cases. Second, constitutional history, whilst comprised of many branches and sub-disciplines, is always likely to have as its mainstay the history of the activities and influence held and exercised at the centre of the social group, i.e. in large social groups, the history of the central government – its offices, institutions, etc. Third, these studies are intended, as already said, to be *first steps*; to have taken a social group or aspect thereof that was too far removed from the mainstay of constitutional history would have probably defeated the purpose.

In the time and space provided, some narrower focus was necessary. For focusing on the royal minorities, there are several reasons. Firstly, the royal minorities, as a subject of study unto themselves, have not received a great deal of attention and therefore provide an opportunity for

[1] Cf. *supra*, 1.1.
[2] Cf. *supra*, 1.3.

fresh analysis. Secondly, there is a sense in which they seem to defy the central assumption of mediaeval government: that it was the monarch who ruled, whether alone or in conjunction with others. Indeed, given that the fifteenth century (the context of Henry VI's minority), for example, has often been viewed as a time in which people were driven predominantly by private interests, and given the fact that a royal minority might be seen as a departure from the norm, it is interesting to consider the extent to which the royal minorities came about and were conducted according to fixed – even predetermined – ideas, i.e. according to what was thought to be law, which law was, by its nature, constitutional. Thirdly, the possibility or realization of a royal minority is an event that occurs several times over the course of the mediaeval period, which makes them peculiarly suited to discussing changes over time, especially in the context of the Generational Theory of Law. Fourthly, there is an argument that the royal minorities, taken individually or collectively, had an important and lasting impact on the nature of the changes that occurred to the successive instantiations of the English constitution.[3] Finally, there is the fact that they possess greater and more general interest than perhaps that possessed by drier and more recondite aspects of the constitution.

In terms of choosing the succession and administration of government in the context of the royal minorities, the reasons are straightforward. The former explains how they came about and the latter how they were managed.

8.3 Connection with the Framework

Constitutions have been defined as the distribution of activities and influence; laws as fixed associations, which give rise to fixed expectations; and constitutional laws as fixed associations concerning the distribution of activities and influence, such that there are potent – and to some degree prevalent and persistent – ideas as to *what* that distribution should look like in a given social group, *how* and *by whom* it can be made, etc.

Today, we would expect for many of these expectations to have been formally declared, recorded, etc. and, consequently, would more likely regard anything not so declared, recorded, etc. as something not to be incorporated into our processes of theoretical and practical reasoning. In the mediaeval period, we cannot expect to find such formal declarations, records,

[3] For example, Carpenter argued that the Paper Constitution of 1244, the measures of 1258, and the Ordinances of 1311, which together represent the "high watermark of medieval constitutional reform," found their origins in Henry III's minority – not to mention the entrenchment of Magna Carta and "the genesis of the constitutional programme over which king and country were still fighting in the seventeenth century". David A Carpenter, *The Minority of Henry III* (University of California Press, 1990), 412.

etc., but that does not mean that there were not prevalent and potent fixed expectations about who could do what (i.e. exercise certain activities), who could cause others to think or behave in given ways (i.e. exercise certain influence), or how individuals might become possessed of such activities and influence.

Thus, whenever we are talking about the distribution of activities and influence, and the prevalence, potency, and persistency of ideas and fixed associations relating thereto, we are employing the framework to analyse the constitution as it existed at each point of time.

9 – Succession and the Minorities: A Study in Transmission

9.1 Introduction

There is a strong argument that it is better to have a clear, albeit somewhat defective, rule – in this case, of succession – than invite faction and disorder in its absence.[1] A child-king might be inconvenient, but is preferable to civil war.

Yet a child's accession could be deeply dissatisfactory.[2] It might confound people's expectations of both *government* and *good government*. "Woe to thee, O land," runs the oft-quoted biblical passage, "when thy king is a child".[3] Without a proper head, government might become paralysed. Discord could ripple outwards. The consequence: private war,[4] private justice, and public disorder – perhaps leaving the social group divided, weak, and vulnerable. In constitutional systems heavily reliant on the person of the monarch, the threat was perhaps considerable.

Even if strong government were maintained, its manner might frustrate people's expectations. Might the monarch's being a child invite tyranny in their name? Might their being young and impressionable result in their being unduly influenced? Even if they

[1] "It is inconuenient…to be gouerned by a king, who is defectiue in body or in minde: but it is a greater inconuenience, by making a breache in this high point of state, to open an entrance for all disorders, wherein ambition and insolencie may range at large." John Hayward, *An ansvver to the first part of a certaine conference, concerning succession* (1603), sigs A2r and A3r quoted in Martin Loughlin, "The State, the Crown and the Law," in *The Nature of the Crown: A Legal and Political Analysis*, ed. Maurice Sunkin and Sebastian Payne (Oxford University Press, 1999), 53.

[2] It was not uncommon for the "leitmotifs of youth and bad counsel" to make their appearance during royal minorities: Emily Joan Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250" (University of Cambridge, 2018), 217.

[3] "…and thy princes eat in the morning!", runs the rest of the sentence: Ecclesiastes 10:16 (KJB). There was also biblical authority for an idea that royal minorities were not necessarily bad, even if perhaps suboptimal as compared with competent and just adult kings. As Ælred of Rievaulx noted in the twelfth century, it would appear that Judah was better ruled during Jehoash's minority – when it was ruled by Jehoash in conjunction with the high priest and chieftains – than it was during his adulthood when he ruled alone: Ælred of Rievaulx, *Aelred of Rievaulx: The Historical Works*, ed. Marsha L. Dutton, trans. Jane Patricia Freeland (Cistercian Publications, 2005), 61. Ælred's authority was 2 Kings 12:1-19. Indeed, there was biblical authority for an idea that, contrary to Jehoash's example, minor kings might grow up to become righteous rulers and, therefore, minorities were not necessarily to be feared. Josiah is a good example of such a ruler. See: 2 Chronicles 34-35; 2 Kings 22-23. It is important to note that "In thirteenth-century France, Louis IX's hagiographers emphasised a comparable affinity between the young king and the biblical Josiah": Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," 162.

[4] This is a particular danger in heavily-armed societies. Private war was often waged, and regarded as a public evil, throughout the mediaeval period in Europe. For a discussion of internecine conflict amongst the nobility in the late Middle Ages, see, e.g.: Howard Kaminsky, "The Noble Feud in the Later Middle Ages," *Past & Present* 177 (2002): 55–83. Kaminsky warns against the use of the phrase 'private war' as being a non-contemporaneous term, but we can reasonably well employ the phrase without fear of anachronism; we know perfectly well what is, and what is not, imported by the term. Indeed, as compared with Kaminsky's suggested alternative, "feud", there is a sense in which it is preferable. 'Feud' tends to imply a *prolonged* and *especially bitter* dispute, whereas 'private war' is more neutral; it merely denotes that multiple parties are in a state of aggression *vis-à-vis* one another without colouring it with ideas of length or height of feeling.

were able to exert their own personality on government, there is every reason to suspect that they would lack the knowledge, experience, and advanced faculties of decision-making to govern well. They might maintain some semblance of government in the short-term, but this might merely sow seeds of future disorder – especially if they were to make unwise concessions, etc.[5]

Consequently, even though there is incentive for adopting a strict rule of hereditary right (i.e. a fixed expectation that some identified relative of the deceased monarch will be their successor, regardless of their supposed merits, etc.),[6] there is disincentive also. A strong rule of succession does not necessarily guarantee good government; it does not guarantee order, peace, and prosperity.[7] Indeed, a rigid rule, by its very rigidity, might bring about those things its rigidity was purposed to avoid.[8]

However, royal minorities were not universally unwelcome. A minor's innocence might help warring factions to put aside their differences. Indeed, there was opportunity: to put wrongs aright;[9] to mould the minor into a model monarch. Thus, royal minorities might be times of optimism and hope; like springtime after winter, even if summer remained distant.[10]

There was also danger in passing over a royal minor, which follows from the connection between landholding and monarchy. Ideally, monarchs were the greatest landholders in their realms. Much of their pre-eminence was derived from this fact. Moreover, in the absence of regular general taxation, they often had to rely on their own resources in the course of their duties. Enthroning anybody else but the heir to these lands presented a considerable problem. Either some lesser landholder would become monarch, which held dangers,[11] or the minor would have to be disinherited, which not only threatened to

[5] Henry VI's profligacy in the exercise of his powers of patronage during his youth, for example, appears to have caused some consternation amongst his contemporaries. See: John Watts, *Henry VI and the Politics of Kingship* (Cambridge University Press, 1999), 133, 154–55. There was also a very real danger that the Crown might concede powers – e.g. concerning its prerogative – thereby weakening its future position and, indeed, efficacy.

[6] See Chapter 6, esp. 6.12 and 6.13.

[7] Cf. Marsiglio of Padua: "Whence, it seems, we can properly infer that an elected ruler, without hereditary succession, is greatly preferable for a polity to those who are not elected or those who are established with dynastic succession.": Marsiglio of Padua, *Defensor Pacis* quoted in Ewart Lewis, ed., *Medieval Political Ideas*, vol. 1 (Cooper Square Publishers Inc., 1974), 189.

[8] Cf. the arguments made concerning the limits of the rule of law in Appendix I.

[9] For example, if previous monarchs had wrongfully arrogated unto themselves certain activities and influence, then a minority provided an opportunity to disassociate those things from the idea of the monarch and, where appropriate, associate or, indeed, re-associate, those things with those deemed proper.

[10] As we will later see, the accession of Henry III particularly comes to mind in this context, in the wake of his father, King John.

[11] For example, they might have insufficient resources to do what was expected of them, meaning that either they would fail to do what they were supposed to do or they would have to raise taxes more regularly and

frustrate expectations,[12] but also opened the possibility for future internecine conflict if the minor were ever to seek to recover their patrimony.

Nevertheless, in spite of some redeeming features, there is no glossing over the difficulties and challenges posed by royal minorities – especially lengthy ones.[13] It is unsurprising, therefore, that royal minors were sometimes passed over and other times allowed. Whatever the case, it says interesting things about the contemporary constitution and generation.

This chapter considers the succession in the context of the avoided and allowed English royal minorities between the accession of Alfred the Great (April 871) and the battle of Culloden (April 1746).[14] In view of shortness of space, the focus will be on the most important element of succession: *transmission*. In this way, we can begin to see how the laws of succession were seen by each generation, and how those views changed or persisted over time.

Through this study, we will be able to see several things. First, in one important respect at least, the constitution changed but little during the period covered – there was a prevalent, potent, and persistent idea that there should be a king or queen in England, excepting in the middle decades of the seventeenth century when the opposite was true

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at a higher level; taxation being, of course, often unpopular. Furthermore, if there were landholders of approximately equal holdings or, even, landholders of greater holdings, then the monarch would be less able to stand over and above them; there was greater risk that they would become the puppet of others or just simply ineffectual.

[12] After all, there was a persistent, prevalent, and potent fixed association throughout the period, following the pattern of a sequential association, that – at least, for land held in fee tail – the death of the parent would be followed, as a matter of course, by the entrance of the child into their inheritance. Henry [IV]'s return from exile, before challenging Richard II for the throne, was, at least ostensibly, undertaken on this basis – Henry felt that he had been wronged by Richard, who had attempted to disinherit Henry of his lands after the death of Henry's father, John of Gaunt.

[13] For a discussion of some of the challenges potentially posed by permitting the accession of a minor king, see: Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," chap. 8.

[14] This timeframe has been chosen for the following reasons. Alfred's accession recommends itself in two ways as the starting-point. First, prior to the reigns of Alfred's brothers and himself, and prior to the Danish invasions, there were a number of different Anglo-Saxon kingdoms (i.e. social groups) – each of which with its own rules of succession. However, the movement towards the unification of England began in Alfred's reign – the movement towards a social group existing in a geographical area now roughly coextensive with modern-day England and calling itself by such a name. As this was done under the auspices of the House of Wessex, the traditions of that House were naturally important in defining the kingship of England; Alfred was part of that tradition. However, the principal reason for beginning with Alfred's reign is not so much to do with its wider significance, which is often overstated, but, rather, to do with the fact that Alfred could very well have succeeded to the exclusion of a minor: his nephew, Æthelwold. As an end-point, the battle of Culloden recommends itself in two ways, although it has little to do with royal minorities *per se*. Firstly, England and Scotland had already formally come together in the United Kingdom of Great Britain and we are here principally interested in *English* rather than *British* constitutional history, albeit without drawing too many conclusions about the distinction between the two. Secondly, it was at the battle of Culloden where it was pretty much definitively decided that the succession was in Parliament's power and that Parliament could do with it largely what it willed.

(although such republican ideas were obviously, in the long run, less potent and persistent than monarchical ideas).

Second, there was a prevalent, potent, and persistent idea that the transmission of the crown was based on principles of heredity (i.e. *gravitation*), although, towards the end of the period, there emerges a prevalent and potent idea that the *ultimate* basis of the succession was not heredity, but gift of parliament (i.e. *presentation*), even if it still operated according to hereditary principles.

Third, there does not appear to have been a prevalent, potent, and persistent idea that the monarch absolutely had to be an adult. There are indications that, at least in the earlier part of the period, there was an idea that it was permissible to overlook a potential successor if they were a minor, but this idea seems to have disappeared by the thirteenth century, from which time the prevalent, potent, and persistent idea appears to have been that the person identified by the hereditary formula would succeed *even if they were a minor*. In effect, minority was no bar to a person's taking over – at least nominally – the bundle of activities and influence associated with the title of King or Queen of England. Nevertheless, not being disqualified on one ground does not guarantee being accepted or, indeed, not being disqualified, on another.

9.2 Æthelhelm/Æthelwold (871) – Avoided

Æthelred, K. Wessex, died sometime after 15 April 871.[15] Although Æthelred was survived by two sons,[16] it was his younger brother, Alfred, who succeeded him. We do not know when Æthelred's sons were born, but they were probably minors in 871. This raises the question: *but for their minority, would Alfred have become king*?

To answer this, some background is required. In the early 820s, Mercia was in the ascendant, and controlled East Anglia and Kent. However, in 825, Egbert, K. Wessex, defeated the Mercian forces at Ellandun, which victory was promptly followed by the expulsion of the Mercian sub-king from Kent. Egbert's son, Æthelwulf, was then installed

[15] Michael Swanton, trans., *The Anglo-Saxon Chronicles*, 2nd ed., 2000, 72–73; Simon Keynes and Michael Lapidge, trans., *Alfred the Great: Asser's Life of King Alfred and Other Contemporary Sources* (Penguin Books, 1983), 80–81. It is possible that it was on 23 April of that year: John of Worcester, *The Chronicle of Florence of Worcester with Two Continuations*, ed. and trans. Thomas Forester (Henry G Bohn, 1854), 64.

[16] These were called Æthelhelm and Æthelwold and are both mentioned in Alfred's will, which was made sometime after Æthelred's death. Æthelhelm is mentioned first and is given more properties. This would indicate that he was the elder of the two. This is the only mention of him, so it seems probable that he predeceased Alfred; he was probably living, though, in the 880s when the will was made: Keynes and Lapidge, *Asser's Life and Other Sources*, 177, 313, 321.

as sub-king in Kent under his father's authority.[17] Things continued roughly in this vein until Egbert's death in 839, when Æthelwulf became the first West Saxon king directly to succeed his father for almost two centuries.

Æthelwulf appears to have had five or six children.[18] On Æthelwulf's promotion to the West Saxon throne, the eldest, Æthelstan, became K. Kent, much as his father before him. There was being established an idea that the K. Kent would be (a) son of the K. Wessex and (b) successor to the West Saxon throne. Æthelstan's installation in Kent, therefore, can be seen both as an *anticipatory* and a *constructive* behaviour,[19] – undertaken with the expectation of his eventual succession to the West Saxon throne, but also attempting to create such an expectation. However, Æthelstan predeceased his father, dying around 852.

In 855, Æthelwulf set out on pilgrimage to Rome, having already sent his younger sons, Æthelred and Alfred, ahead of him. During his absence, his territories were cared for by his living adult sons: Æthelbald had the care of Wessex and Æthelbehrt was installed as K. Kent. There are some points to be made here. First, Æthelwulf's pilgrimage was rather unusual. It seems probable that, had he remained in Wessex, Æthelbald, like his elder brother, would have been given Kent and Æthelbehrt would have remained without. Second, we do not know if Æthelbald ever had children, but one wonders if Æthelbehrt would have been installed as K. Kent in 855 if Æthelbald had had a living, adult son at that time. Third, following the previous point, in the absence of any children, Æthelbehrt was – under a system of male-preference primogeniture – next in line in the succession, meaning that this arrangement still represents a clear ordering of successors. It still associates the kingship of Wessex with the eldest son. Finally, there never appears to have been a thought given in this connection to Æthelswith – Æthelwulf's daughter and seemingly then his eldest surviving child; there remained a strong association between *the throne* and *being male*. As such, this situation was somewhat *unusual*, particularly in

[17] We might note the succession through *appropriation* here.
[18] These were, in order of birth: Æthelstan, Æthelswith (his only known daughter), Æthelbald, Æthelbehrt, Æthelred, and Alfred. The D, E, and F versions of the Anglo-Saxon Chronicle had Æthelstan as Æthelwulf's brother, rather than his son. However, the A, B, and C versions, along with Æthelweard's *Chronicle* all have Æthelstan as his son. There has been some contemporary opinion in favour of the idea of Æthelstan being a brother, not a son (cf. Williams), but generally opinion appears to be weighted towards the idea that Æthelstan was, indeed, Æthelwulf's son (cf. Stenton, Yorke, and Kirby): FM Stenton, *Anglo-Saxon England*, 3rd ed. (Oxford University Press, 1971), 236 n. 1; Barbara Yorke, *Kings and Kingdoms of Early Anglo-Saxon England* (Routledge, 1990), 148; DP Kirby, *The Earliest English Kings*, 2nd ed. (Routledge, 2000), 160; Ann Williams, "Some Notes and Considerations on Problems Connected with the English Royal Succession, 860-1066," in *Proceedings of the Battle Conference on Anglo-Norman Studies*, ed. R Allen Brown (The Boydell Press, 1978), 145, 225 n. 10.
[19] See, *supra*, 6.3.

the sense that a younger brother was a king whilst the elder was not, but it does not really frustrate the expectations of succession: the elder brother remained associated with the greater social standing; the younger with the lesser.

Æthelwulf possibly did not anticipate returning from his pilgrimage, but both he and his younger sons did. During their stay in Rome, it seems that Æthelred and Alfred were invested with the consulship of Rome – the reasons behind, and significance of, this are unclear.[20] On their return, Æthelbald appears to have been unwilling to relinquish the activities and influence he had exercised back into his father's hands. We do not know precisely what arrangement was struck, but it appears that Æthelwulf conceded some of his authority to Æthelbald, which might also have resulted in the downgrading of Æthelbehrt's status as K. Kent.

In any case, after Æthelwulf's death in early 858, something of the *status quo ante* was restored: Æthelbald became indisputably K. Wessex and Æthelbehrt remained K. Kent. This situation lasted until late 860 when Æthelbald also died. In the apparent absence of surviving children, Æthelbehrt succeeded his brother to the West Saxon throne. For the five years of his reign, Æthelbehrt seems to have united Wessex and Kent under one headship; he appointed no sub-king, which might have been partly due to the fact that Æthelred and Alfred were still young.[21] Æthelbehrt, like his elder brothers, does not appear to have had surviving children at the time of his death in 865. The throne passed to the next surviving brother, Æthelred.

Like Æthelbehrt, Æthelred appears to have kept the Kentish throne vacant.[22] Unlike his elder brothers, however, Æthelred had at least two sons: Æthelhelm and Æthelwold. We do not know when these were born, possibly not until after his accession in 866;[23] they appear to have been young when Æthelred died in 871. Æthelred might have kept the Kentish throne vacant as he was waiting until one of his sons was old enough to occupy it; whilst he had living offspring, he could not install his younger and only surviving brother, Alfred, in Kent. Nevertheless, these children were passed over on Æthelred's

[20] On this, see, e.g.: Janet L Nelson, "The Problem of King Alfred's Royal Anointing," *Journal of Ecclesiastical History* XVIII, no. 2 (1967): 145–63.
[21] Williams, "Some Notes and Considerations on Problems Connected with the English Royal Succession, 860-1066," 146.
[22] Quite possibly, with Alfred's consent: Charles Plummer, *The Life and Times of Alfred the Great* (Oxford University Press, 1902), 89.
[23] Plummer, *The Life and Times of Alfred the Great*, 91.

death in favour of Alfred. Whether they were passed over *because they were children* is the point in question.

Asser says that, prior to his accession in 871, Alfred had been *secundarius*. There are three possible interpretations of this term: (1) Alfred was *heir-apparent* to Æthelred; (2) Alfred was in some sense Æthelred's *deputy*; or (3) Alfred had been, up until that point, merely *of secondary importance*.

The first interpretation was favoured by Plummer, who even thought it might have belied some Celtic influence.[24] Keynes and Lapidge, in a similar vein, qualifiedly translated *secundarius* with 'heir apparent'.[25] The second interpretation appears to have been favoured by Smyth, following WH Stevenson and Niermeyer, who argued that it rather meant *viceroy* or *joint-king*;[26] this is plausible in light of the precedents of power-sharing.[27] Whilst we cannot wholly agree with him that "[a]part from the *Life* of Alfred,

[24] Plummer, *The Life and Times of Alfred the Great*, 40, 89–91. Cf. David N. Dumville, "The Ætheling: A Study in Anglo-Saxon Constitutional History," *Anglo-Saxon England* 8 (1979): 1–3.
[25] Keynes and Lapidge, *Asser's Life and Other Sources*, 77, 79, 80, 240.
[26] See: Alfred P Smyth, *King Alfred the Great* (Oxford University Press, 1995), 190; William Henry Stevenson, ed., *Asser's Life of King Alfred: Together with the Annals of Saint Neots Erroneously Ascribed to Asser* (Oxford University Press, 1904), 227; "secundarius" JF Niermeyer and C van de Kieft, eds., *Mediae Latinitatis Lexicon Minus* (EJ Brill, 1976), 951. Stevenson dismisses Freeman's suggestion of *subregulus*, but this interpretation is none too different and can be included in this category.
[27] Whilst regnal lists tend only to list sole kings – or, at least, kings *as if* they ruled alone – there are a number of indications of power-sharing arrangements from the *adventus Saxonum* onwards. Kent, for example, was supposedly founded by the legendary brothers Hengest and Horsa. The extent to which this was actually a joint venture is uncertain, as is whether or not either of them were kings. Hengest always appears the more prominent of the two and Horsa arguably died before either of them could be said to have a kingdom over which to rule. Hengest was certainly described as being in the possession of a kingdom (*rice*), but he is not described as king (*cyning*). In any case, after Horsa's death, Hengest might have shared power with his son, Æsc or Oisc. Considering that the people of Kent came to be called *oiscingas*, it is possible that it was actually Oisc, rather than his father or uncle, who was the true founder of Kent; there is certainly less cause to doubt his kingly status – he is described as *cyning*. This is all provided, of course, that these figures did exist and that what is written of them – we have only later accounts – is accurate. In late seventh century Kent, there is the curious example of uncle and nephew, Hlothere and Eadric; notably, there is a law code in their joint names. Whether they actually ruled together is uncertain. Similarly, in Wessex, there is, to begin with, the example of the founder, Cerdic, and his son, Cynric, who, in 519, undertook or assumed (*ofengun*) the rule or kingdom (*rice*) of the West Saxons. There is later, perhaps, also Cynegils and Cwichelm; at least, according to Malmesbury, who thought them brothers; this is supported, albeit somewhat indirectly, in Bede; less so by the ASC. The precise nature of any of these arrangements, such as they were, is unclear, e.g. whether a relationship of joint kings, high and sub-kings, senior and junior kings, nominal and actual kings, etc. Nevertheless, it is possible that power-sharing arrangements continued until much later; the use of sub-kings, as in Æthelwulf's case, etc., is testament to this. On the reasons why regnal lists listed sole kings – perhaps because joint arrangements were more complicated to record or because of ecclesiastical opposition, see: Frederick M Biggs, "Edgar's Path to the Throne," in *Edgar, King of the English 959-975*, ed. Donald Scragg (Boydell & Brewer, 2008), 124–39. On Hengest, Horsa, and Æsc, see: JA Giles, ed., *Six Old English Chronicles* (Henry G Bohn, 1848), 399-400 (§37), 405 (§45); Bede, *The Ecclesiastical History of the English People*, ed. and trans. Judith McClure and Roger Collins (Oxford University Press, 1999), 27 (1.15); Swanton, *The Anglo-Saxon Chronicles*, 12-13 (A, E). On the term *rice*, in the context of the above, see: Swanton, *The Anglo-Saxon Chronicles*, xxxii, 14, 15. On Hlothere and Eadric, and their law code, see: FL Attenborough, ed., *The Laws of the Earliest English Kings* (Cambridge University Press, 1922), 2; Lisi Oliver, *The Beginnings of English Law* (University of Toronto Press, 2002), 119–20. On the term *ofengun*, which has been translated in a number of different ways, see:

there is no evidence whatever to suggest that the office of heir apparent had emerged in a recognizable or institutionalized form within the West Saxon dynasty at any time in the pre-Conquest period," we can share his scepticism that *secundarius* imported some notion of being heir-apparent – particularly if to the exclusion of Æthelred's sons, whatever their age.[28] Giles and J Stevenson appear to lie somewhere between the second and third interpretations. They translated the term variously as: 'subordinate station', 'secondary rank', 'subordinate authority', and 'second-in-command'.[29] In some ways, these seem nearer to the classical Latin (i.e. the third interpretation), where *secundarius* meant rather *second-rate* or *inferior*.[30] It seems unlikely that Asser would have talked in such disparaging terms of Alfred, but he might have used the term for dramatic effect: *until Æthelred's death, Alfred was only of secondary importance, but, afterwards, he was second to no-one*.

The truth seems to lie somewhere between the second and third interpretations; most likely, with the second. This seems the most natural interpretation, which is nowhere ill-suited. Whether it constituted a recognized contemporary title or office, however, is difficult to tell. Certainly, in one instance, it is used in the context of a battle, which could indicate that the term had military import and meant *second-in-command*.[31] Indeed, it could have been conveyed as an act of appeasement – given *in lieu* of the kingship of Kent, which Alfred might otherwise have expected based on the examples of his father and brothers. It would also give him more concrete authority – not necessarily a bad thing in face of the Viking aggressions.

Swanton, *The Anglo-Saxon Chronicles*, 16–17; Dorothy Whitelock, ed., *English Historical Documents, c. 500-1042*, 2nd ed., vol. 1 (Oxford University Press, 1979), 155; JA Giles, ed., *The Anglo-Saxon Chronicle*, trans. James Ingram (JM Dent & Sons Limited, 1912), 28–29; Bruce Mitchell and Fred C Robinson, *A Guide to Old English*, 5th ed. (Blackwell Publishing, 1994), 343; Mark Atherton, *Complete Old English (Anglo-Saxon)* (Teach Yourself, 2010), 332; Henry Sweet and Norman Davis, *Sweet's Anglo-Saxon Primer*, 9th ed. (Oxford University Press, 1980), 109. On power-sharing in Kent, see further: Barbara Yorke, "Joint Kingship in Kent c. 560 to 785," *Archaeologia Cantiana*, 1983; Yorke, *Kings and Kingdoms of Early Anglo-Saxon England*, 32–34. On Cynegils and Cwichelm, see: William of Malmesbury, *Chronicle of the Kings of England from the Earliest Period to the Reign of Stephen*, trans. JA Giles (George Bell & Sons, 1904), 19–20; Bede, *The Ecclesiastical History of the English People*, 85; Swanton, *The Anglo-Saxon Chronicles*, 22–25.

[28] Smyth, *King Alfred the Great*, 190. This is because, as we have seen, certain persons were very definitely associated with succession to the throne such that there was a very strong presumption in favour of their succession. This might not have been accorded with a neat label, but that does not detract from the underlying fact of the presumption.

[29] Giles, *Six Old English Chronicles*, 53, 55, 56; Joseph Stevenson, ed., *The Church Historians of England*, vol. 2.2 (Seeleys, 1854), 451, 453, 454.

[30] "secundarius" Sir William Smith and JF Lockwood, eds., *A Smaller Latin-English Dictionary*, 3rd ed. (John Murray, 1933), 670.

[31] This was the battle of Ashdown, which took place in January 871. See: Keynes and Lapidge, *Asser's Life and Other Sources*, 79 (38).

Such a preeminent position might have made Alfred a natural successor to his brother, but it did not predestine him to be such. It did not create a direct association between *being secundarius* and *being next in the line of succession*, though it probably made it easier to countenance Alfred as his brother's successor. This was perhaps not unintentional on Æthelred's part; in this, we might see something of a constructive behaviour planning for the succession if it were to happen sooner, rather than later.[32]

More curious are the arrangements by which Æthelred 'virtually disinherited' his sons.[33] There can be little doubt that, by so doing, Æthelred effectively designated Alfred as his successor – for with land comes wealth and, with wealth, power. This was clearly a constructive behaviour.[34] The pertinent question is whether the situation would have been the same had Æthelred died when his sons were full-grown. One would suspect that it would not have been. It was, rather, an arrangement designed to meet immediate needs. Had Æthelred lived longer, he probably would have rewritten his will; this solution was simplest at the time it was made. In sum, Alfred probably became king *only because Æthelred's sons were minors*; his kingship was allowed to avoid a minority in a time of crisis.

That this arrangement was allowed shows the Generational Theory of Law at work; the people of the time were willing to modify their associations to best suit. However, it still generally conformed to people's expectations regarding the succession and was largely conservative: Alfred was of the House of Wessex, male, and next in line after Æthelred's sons. Nevertheless, some expectations were frustrated by this – particularly, Æthelwold's (Æthelred's son). Æthelwold, though seemingly quiet during Alfred's reign, rebelled when Alfred's son, Edward the Elder, acceded. Æthelwold almost certainly saw himself as the rightful successor – being the eldest son of the eldest son who had had children. Although he does not appear to have gained overwhelming support in Wessex, his support across the country indicates perhaps the prevalence of this frustration – that he was right to feel aggrieved, because, according to gravitational principles, he was the rightful heir.[35]

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[32] It is worthwhile noting that, if *secundarius* did mean in some sense joint-king, Alfred might have claimed the kingship by virtue of survivorship; this scenario seems unlikely.
[33] Williams, "Some Notes and Considerations on Problems Connected with the English Royal Succession, 860-1066," 147.
[34] See, *supra*, 6.3
[35] It would be wrong, of course, to entirely discount the possibility of opportunism here – Æthelwold might have found support around the country because those other parts were fearful of the power of Wessex and, indeed, perhaps because they thought that Æthelwold might make a more pliable king than Edward, especially if he had been raised to the kingship of Wessex with their support.

In any case, his death in battle ended his claim.[36] It is noteworthy that Edward the Elder later followed his uncle's example of settling the succession by will.[37]

9.3 Eadwig/Eadgar (946) – Avoided

Eadred acceded in 946 to the exclusion of his nephews, Eadwig and Eadgar (sons of his older brother and predecessor, Edmund). As with all succession events, it can only be properly understood in its context: the unification of England.

Under Edward the Elder, West Saxon influence had spread across the English and Danish territories. Edward had been succeeded by his son, Æthelstan, whose accession was by no means guaranteed, although the fact that he was Edward's *eldest surviving* son probably counted for much, even in spite of other factors;[38] the hereditary principle was probably prevalent and potent. Even still, not everybody was convinced: a rebellion under one Alfred had to be put down in Winchester; Æthelstan's half-brother, Edwin, possibly conspired for the throne.[39] Æthelstan does not appear to have had any surviving male children. When he died, the crown passed to his half-brother, Edmund, whose reign, like Æthelstan's, was short.[40] Eadwig, Edmund's eldest son, was probably no older than six when his father died.

Edmund, like his half-brother and father, had spent much of his reign fighting. West Saxon dominance was widespread, but not yet entrenched. There was a choice between Eadred (Edward's youngest son and Edmund's full-brother), who appears to have been of poor health, and Edmund's sons who, as aforesaid, were children. In this case, the children were overlooked in favour of Eadred. Though the hereditary principle was bent, it was not broken: Eadred was next in line after them and, as things turned out, they succeeded each in turn after him – still as minors.

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[36] On Æthelwold's rebellion, see: James Campbell, "What Is Not Known about the Reign of Edward the Elder," in *Edward the Elder, 899-924*, ed. NJ Higham and DH Hill (Routledge, 2001), 21–23; Stenton, *Anglo. Sax. Engl.*, 321–22.

[37] This is according to Malmesbury: "Æthelstan, as his father [Edward the Elder] had commanded in his will, was then hailed king, recommended by his years – for he was now thirty – and the maturity of his wisdom": William of Malmesbury, *Chronicle of the Kings of England*, 131.

[38] There is some indication that Æthelstan was favoured by his grandfather, Alfred the Great – in which we can see elements of designation and constructive behaviours. Moreover, his popularity in Mercia – where he was raised – probably also counted for much. On these, see: Sarah Foot, *Æthelstan: The First King of England* (Yale University Press, 2011), 11; Stenton, *Anglo. Sax. Engl.*, 339. There is also a later tradition – to be found in Malmesbury – that prophecy played some role. See: William of Malmesbury, *Chronicle of the Kings of England*, 139.

[39] See: Foot, *Æthelstan*, 40–43.

[40] He reigned for around six and a half years before he was murdered in an affray by one Liofa/Leofa in 946. For this event, see: William of Malmesbury, *Chronicle of the Kings of England*, 143; Swanton, *The Anglo-Saxon Chronicles*, 112 (D); John of Worcester, *Chronicle*, 99.

9.4 Eadwig (955) and Eadgar (959) – Minorities

Eadred was the last of Edward the Elder's sons; Edward the Elder's brother, Æthelweard, was long deceased. Besides Eadwig and Eadgar, there were no living sons of a former West Saxon monarch. If the hereditary principle were to be maintained, there was little choice but to accept one of Edmund's sons. The fascinating thing about Eadwig and Eadgar is not so much the *fact* of their accession as minors, but, rather, the *manner* thereof.

Eadwig, the elder of the two, appears at first to have succeeded to all of his uncle's dominions. However, he proved unpopular and fell out with prominent ecclesiasts. The North rejected him in favour of his younger brother, Eadgar. That they turned to Eadgar and not some other is noteworthy. After Eadwig, Eadgar was the most throneworthy – who better to challenge the throne than the next in line? After a period of conflict, it was settled that Eadwig would have Wessex; Eadgar would have the rest. Eadwig's death ended this arrangement and Eadgar incorporated Wessex into his dominions. He was thereafter undisputed king. Nowhere appears any doubts as to the suitability of minors for kingship.

9.5 Edward the Martyr (975) and Æthelred II (978) – Minorities

Eadgar had at least four children by three women. It is uncertain as to whether he married the first two of these, whose children were Edward and Eadgyth respectively;[41] their legitimacy, therefore, is doubtful,[42] and, consequently, their eligibility to succeed to the throne.[43] Eadgar was certainly married to the third, Ælfthryth, who was mother to Edmund and Æthelred;[44] she was also certainly invested as queen.[45] As such, Ælfthryth's children arguably had better claim to the throne, being legitimate and doubly royal. Eadgar probably intended that the eldest of these succeed him and undertook constructive behaviours towards this end,[46] amounting perhaps to an act of presentation; originally, this was to Edmund's benefit, but, after his death,[47] it fell to Æthelred.[48]

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[41] Eadgyth is sometimes known as Edith 'of Wilton'.
[42] Levi Roach, *Æthelred the Unready* (Yale University Press, 2016), 43–45.
[43] Eadgyth, being female, was, of course, perhaps also considered ineligible because of her sex. See, *supra*, 6.12.
[44] Roach, *Æthelred the Unready*, 48ff.
[45] Stafford, Pauline, "Ælfthryth" in Michael Lapidge et al., eds., *The Wiley Blackwell Encyclopedia of Anglo-Saxon England*, 2nd ed. (John Wiley & Sons, Ltd, 2014), 11.
[46] Miller, Sean, "Edgar" in Lapidge et al., *The Wiley Blackwell Encyclopedia of Anglo-Saxon England*, 164; NJ Higham, *The Death of Anglo-Saxon England* (Sutton Publishing, 1997), 6–7.
[47] This occurred c. 971.
[48] Higham, *The Death of Anglo-Saxon England*, 7.

Both Edward and Æthelred were children when Eadgar died – the problem does not appear to have been *whether* one of them would succeed but, rather, *which* of them. In spite of Eadgar's apparent intentions, it was Edward – his eldest son by any pairing – who succeeded. There can be little doubt that politics played a significant role in this – especially the support given him by prominent churchmen.[49] However, the associational environment in which this took place cannot be ignored. Both Edward and Æthelred were, in a sense, Eadgar's eldest surviving sons. Each arguably had a claim to the throne. Their status as minors appears to have been unimportant. That the factions rallied around these and no others is the salient point. There might have been a succession crisis of sorts, but this was largely due to *complications* rather than *lack of rules*.

Edward died prematurely in 978 – probably at the hands, or orders, of his step-mother, Ælfthryth. If so, this can be interpreted as opportunism, but it can also be seen in the light of Ælfthryth's expectations having been frustrated. To her mind, *her* son was not only most throneworthy, but also designate of Eadgar (i.e. he had both gravitational and presentational claims); Edward should never have been king, which fact justified his early demise. Æthelred was still only around twelve years old when his succeeded his half-brother. He was now Eadgar's sole surviving son by any coupling; his accession appears to have been unopposed. Though some might have been upset with the manner of his accession, there could be little gainsaying the fact that he was, as things stood, the rightful heir according to the principles of hereditary right – and regardless of his age.

9.6 Edmund Ætheling/Edward the Exile (1016) – Avoided

On the face of it, the avoided minorities of Edmund Ætheling and Edward the Exile (Edmund Ironside's sons) resulted from act of outright appropriation by the Danish invader, Cnut.[50] However, there is a great deal more to it than this.

In the years 1014-6, Cnut waged war against Æthelred II and his son, Edmund Ironside.[51] The hereditary principle is to be found here. Cnut's father, Swein Forkbeard (K. Denmark), had successfully invaded England, driven out Æthelred II, and been crowned in late 1013 – only to die a few weeks later. As such, Cnut was not so much a barefaced conqueror as successor to his father's English claim.[52] Indeed, neither Swein's nor Cnut's claims were entirely capricious. In the eyes of some, Æthelred, through his misrule, had

[49] See: Higham, *The Death of Anglo-Saxon England*, 7ff.
[50] On 'outright appropriation', see, *supra*, 6.13.3.
[51] See: MK Lawson, *Cnut: England's Viking King, 1016-35*, 2nd ed. (The History Press, 2011), 25–52.
[52] His brother, Harald, succeeded Swein in Denmark.

forfeited his right to the throne, which forfeiture might extend to his descendants; though accepted back after Swein's death, in his initial displacement, the damage had been done.

After Æthelred's death in 1016, Ironside and Cnut agreed to divide the kingdom; following Ironside's death shortly thereafter, Cnut was accepted as king to the exclusion of any claimant of the House of Wessex.[53] His claim was far from indefeasible. Ironside left two infant sons, Edmund Ætheling and Edward the Exile; he also had a full brother, Eadwig, and two half-brothers by Æthelred's Norman wife, Emma, named Alfred and Edward.[54] However, there appears to have been little appetite for their claims, especially after Emma wedded Cnut with the stipulation that it would be *their* children who would be Cnut's successors.

There appears, therefore, to have been some idea that the fixed expectations might be altered by agreement, which seems to be in accordance with the Generational Theory. However, there also appears to have been some recognition that old fixed expectations often do not simply disappear. The ejection from England of prominent surviving members of the House of Wessex, including Edmund and Edward, as well as Edmund's brother and half-brothers, speaks volumes.[55] Their claims were potentially superior to Cnut's and their presence might act as a reminder of the irregularities of Cnut's accession. Yet, if they were out of sight, they might more likely be out of mind – if people are not thinking of them, they will not think about how their expectations have been frustrated.

Any fixed associations in favour of Edmund's infant sons, or, indeed, Æthelred's other sons, were clearly not so potent as to have created virulent opposition to Cnut. The fact of Cnut's raw power and influence cannot be disregarded,[56] but there is the sense that there were attempts to justify and rationalize his kingship; to attempt to reconcile it with people's expectations. His security on the throne shows that this was largely successful;

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[53] Lawson, *Cnut*, 82.

[54] This latter was to become Edward the Confessor.

[55] As Cnut married Alfred and Edward's mother, Emma of Normandy, these two probably had a measure of personal safety, so long as they remained outside of England. It is possible, however, that Cnut had exiled Edmund Ironside's sons, Edmund and Edward the Exile, *with the intention* of having them murdered outside of England; it was perhaps only the generosity or pity of Olaf, K. Sweden and Cnut's half-brother, to whom they had been sent, that saved them. Their onward journey to Hungary certainly seems wise; they were a great deal safer there, at least as regards Cnut and his line. Cnut might have had similar designs on the head of Edmund Ironside's brother, Eadwig. In any event, he, too, was exiled, but, unlike his half-brothers and nephews, soon returned; he was killed or executed shortly thereafter (1017). See: Lawson, *Cnut*, 84–85.

[56] The addition of sweeteners and other incentives also cannot be discounted, which must be weighed beside this. Much as the *The Student's Hume* says, Cnut, "partly by promises and partly by intimidation, was elected king": David Hume and JS Brewer, *The Student's Hume: A History of England, Based on the History of David Hume, Incorporating the Researches of Recent Historians*, 13th ed. (John Murray, 1889), 58.

expectations might be settled to a great extent by victory and acceptance.[57] Nevertheless, even though the laws of succession might be sometimes overridden, it does not mean that they could be entirely disregarded. There was clearly an expectation following Cnut's death that it should be *one of his sons* who succeeded; the hereditary principle had not been destroyed, but merely transferred.

9.7 Eadgar the Ætheling (1066) – Avoided

Cnut died in 1035. He was succeeded by his sons Harold and Harthacnut in turn, neither of whom had surviving children. The throne then returned to the House of Wessex with Edward the Confessor, which fact demonstrates an anxiousness for there to be an orderly succession and preferably one based on hereditary right. The Danish claim had displaced the Wessex claim, but, the former having dissipated, the Wessex claim once more resumed its place.

Edward died in 1066 and a succession crisis followed. There were arguably four claimants: First, Edward's first-cousin-one-removed, William, D. Normandy, who argued that Edward had promised him the throne in 1051;[58] moreover, that the Anglo-Dane,[59] Harold Godwinson, E. Wessex, had promised to support his claim in 1064;[60] and, besides, he had some hereditary right.[61] Second, Harold himself, Edward's brother-in-law, who argued that Edward had bequeathed him the throne *in extremis*.[62] Third, Harald Hardrada, K. Norway, whose tenuous claim rested on an agreement of 1036.[63] Finally, Eadgar the

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[57] The maxim *factum valet* might be recalled here. See: *supra,* 6.13.3.

[58] See: David C Douglas, *William the Conqueror* (Methuen & Co. Ltd., 1969), 169, 252.

[59] "Harold's mother, Gytha, was the daughter of Thorgil Sprakling, a Dane. Her brother, Ulf, married Estrid Svendsdatter, the sister of King Cnut. This meant that Cnut was brother to Harold's mother's sister-in-law": Stephen Gates, "The Nature and Identity of the Constitution during the Minority of Henry III (1216-1227)" (University of Exeter, 2014), 29.

[60] The precise circumstances of this event are debated, but there is every reason to think that Harold's promise, if he made one, was not freely given: See: Douglas, *William the Conqueror*, 175–78.

[61] See: Douglas, *William the Conqueror*, 250–51.

[62] See: Douglas, *William the Conqueror*, 181–82, 252. Whether Edward was at liberty to dispose of the kingdom by designation is debateable, as is whether he could change his mind having done so. There was perhaps some difference here between English and Norman customs, as Beckerman has discussed. Beckerman argued that, in English testamentary custom, *verba novissima* (the 'newest' or most recent expression) had priority, whereas, in Normandy, earlier promises were irrevocable and unbreakable. These conclusions have been questioned by Tabuteau. Nevertheless, William does not have appeared to deny that Edward could change his mind; the matter was quite otherwise with the English magnates who had promised to support his claim. See: John S Beckerman, "Succession in Normandy, 1087, and in England, 1066: The Role of Testamentary Custom," *Speculum* 47, no. 2 (April 1972): 258–60; Emily Zack Tabuteau, "The Role of Law in the Succession to Normandy and England, 1087," *Haskins Society Journal* 3 (1991): 141–69; George Garnett, *Conquered England: Kingship, Succession, and Tenure 1066-1166* (Oxford University Press, 2007); Gates, "The Nature and Identity of the Constitution during the Minority of Henry III (1216-1227)."

[63] This agreement was made between Magnus Magnusson and Harthacnut, in which they agreed to be one another's successors; they made each to the other the "rightful heir as if he were his brother born". Whether – on Harthacnut's side – this agreement was supposed to include only Denmark or also to extend to England

Ætheling, son of Edward the Exile, grandson of Edmund Ironside, and great-grandson of Æthelred II.

Eadgar possessed the strongest dynastic claim, but he was young and the various promise-makings had created strong competition. Eadgar was initially passed over and Harold made king.[64] Harold defeated Hardrada,[65] but failed to defeat William and died so attempting.[66] It was at this point that Eadgar was chosen as successor, although his claim was quickly abandoned in the face of a belligerent William.

These events demonstrate the power of *presentation*, especially *designation*; the power that *giving* and *promising-to-give* have in creating expectations. Harold, Hardrada, and William all thought that they were the rightful heir because – directly or indirectly – they had been *given* the kingdom by a former king. It also demonstrates that hereditary right can be eroded. Eadgar was merely the grandson of someone who had merely been K. Wessex for a short while. He was perhaps too far removed from an indisputable king to give rise to a strong and indefeasible expectation that he should succeed. Nevertheless, his being touted as successor demonstrates the continuing power of heredity – especially given his youth and inexperience, and William's presence nearby with a considerable force.[67]

(of which he was not then in possession), is uncertain. When Harthacnut died without children in 1042, Magnus attempted to press his claims pursuant to the agreement. He took Denmark, but stopped short of invading England, where Edward the Confessor had already been installed. From his actions, it would appear that Hardrada thought England included in the agreement. See: Alison Finlay, ed., *Fagrskinna, a Catalogue of the Kings of Norway: A Translation with Introduction and Notes* (Koninklijke Brill NV, 2004), 171; Gates, "The Nature and Identity of the Constitution during the Minority of Henry III (1216-1227)," 28–29.

[64] Freeman, for example, thought that Harold was elected by "the Witan, not of this or that shire or ancient Kingdom, but of the whole realm of England"; indeed, he was "freely offered the Crown". The strength of the evidence for Freeman's claims, however, have been questioned by Round. Cf. Edward Augustus Freeman, *The History of the Norman Conquest of England: Its Causes and Its Results*, vol. 3 (Oxford University Press, 1869), chap. 11 (quotes at 21, 24); J. Horace Round, *Geoffrey de Mandeville: A Study of the Anarchy* (Longmans, Green and Co., 1892), 8–9, 437–38.

[65] This was at the battle of Stamford Bridge, 25 September 1066. This was the last time that the Danish claim to the English throne was prosecuted – certainly, with any real intent. In 1075, Cnut (son of the late Swein Estrithson and brother to the then K. Denmark, Harold) sailed to England with 200 ships after an appeal from a group of rebel barons. The Danes arrived too late, however, and contented themselves with raids on the coast and York. In 1081, Cnut – now K. Denmark himself – appears to have seriously contemplated prosecuting the Danish claim and made significant preparations therefor. William I was sufficiently concerned so as to have readied the coasts for invasion by stripping them of supplies; he also brought a number of mercenaries from the continent. However, the threat never materialized due to infighting in the Scandinavian camp; Cnut was murdered the following year. On these events, see: Stenton, *Anglo. Sax. Engl.*, 611, 617; Douglas, *William the Conqueror*, 232–33, 346–47, 356.

[66] This was at the battle of Hastings, 14 October 1066. For which, see: Douglas, *William the Conqueror*, 198–204.

[67] Of course, the fact that he was a 'native' (i.e. English) claimant might also have worked in his favour, as opposed to the foreigner William of Normandy. Nevertheless, Eadgar was not chosen at random from the Anglo-Saxon population; his selection was methodical and deliberate, albeit transitory.

The 1066 succession was largely settled by force of arms and chance of battle – by conquest. Nevertheless, there is a sense in which that conquest vindicated William's right. Was it not a sign of God's favour?[68] Indeed, of God's *disfavour* towards Harold and the English?[69] In any case, it is clear that no claim was wanton – each argued that they had *some right because of some reason, which reason was sufficient*. There was no singularly prevalent and potent expectation, but there were clearly strongly held expectations, which followed certain fixed associations.

9.8 Henry FitzEmpress (1135) – Avoided

Henry I had two legitimate children.[70] His son, William Adelin, died in 1120,[71] leaving only a daughter, the Empress Matilda. As Malmesbury noted, she had excellent pedigree, being descended from William I in the paternal line and from the West Saxon kings in the maternal line.[72] Her sex, however, posed a problem. Except for perhaps Seaxburh,[73] there had never been a regnant queen in an English kingdom; there had been queen regents, but none reigning *suo jure*.[74] Naturally, this led people to wonder whether such

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[68] There is a strong indication that William's adherents, if not William himself, thought his accession a sign of God's favour, if not God's command. See: Douglas, *William the Conqueror*, 253.

[69] This was the view, for example, of Adam of Bremen and Hariulf. See: Elisabeth van Houts, "The Norman Conquest through European Eyes," *The English Historical Review* 110, no. 438 (1995): esp. 836, 845.

[70] This was besides a number of illegitimate children. See: Chris Given-Wilson and Alice Curteis, *The Royal Bastards of Medieval England* (Routledge and Kegan Paul, 1984), chaps. 4–5.

[71] His name, Adelin, was, interestingly, a Latinization of *Ætheling*. He died in the *White Ship* disaster, when the ship in which he was sailing sank, seemingly due to sailing at night-time with an inebriated crew.

[72] William of Malmesbury, *Chronicle of the Kings of England*, 482.

[73] Seaxburh of Wessex (d. ca. 674) was the wife of Cenwalh. It is possible that she was sole ruler of Wessex for one or two years after her husband's death, although the fact of her reign is by no means certain. Bede neither mentions her by name nor her accession; rather, he records that Cenwalh's kingdom was divided after his death among a number of under-kings. The Anglo-Saxon Chronicle merely notes the occurrence of her reign; Æthelweard's treatment is similar. John of Worcester, later, records the difference of opinion between the Chronicle and Bede, but does not decide one way or the other. Malmesbury, however, follows the Chronicle's story and elaborates somewhat. According to Malmesbury, Seaxburh had been entrusted with the rule of the kingdom (*regni arbitrium…delegandum putavit*) by Cenwalh. It is entirely possible that, rather than being queen regnant, Seaxburh was, in fact, a regent for some child who presumably did not survive. This was the only reason Sir Charles Oman could imagine to explain this episode. It would explain much. See: Bede, *The Ecclesiastical History of the English People*, 190-191 (4.12); A Campbell, ed., *The Chronicle of Æthelweard* (Thomas Nelson and Sons Ltd, 1962), 19–20; John of Worcester, *Chronicle*, 23; William of Malmesbury, *Chronicle of the Kings of England*, 30; William of Malmesbury, *Gesta Regum Anglorum*, ed. Thomas Duffus Hardy, vol. 1 (Sumptibus Societatis, 1840), 45 (§32); Charles Oman, *A History of England before the Norman Conquest*, 6th ed. (Methuen & Co., 1924), 288. Given the relatively advanced status of women in Anglo-Saxon society, it is perhaps surprising that there were not more queens regnant. There is a curious story from ninth-century Mercia concerning Cwenthryth and Cynehelm (St. Kenhelm). According to Malmesbury, Cynehelm was entrusted to his sister, Cwenthryth, "for the purpose of education". She, however, "entertaining hopes of the kingdom for herself", had him murdered. Whether this story is based in historical reality is far from clear. See: William of Malmesbury, *Chronicle of the Kings of England*, 238–39. Whether Æthelflæd, Lady of the Mercians (dau. Alfred the Great, d. June 918), was an invested queen is doubtful, although she was clearly viewed as such in some quarters: Lapidge et al., *The Wiley Blackwell Encyclopedia of Anglo-Saxon England*, 16; Stenton, *Anglo. Sax. Engl.*, 324.

[74] That is, in her own right.

a thing were possible – could one seriously associate in one's mind the crown with a woman?

Henry apparently believed one could. He was anxious, at least initially, that Matilda should be his successor. Undoubtedly, he thought it hers by hereditary right, being his sole surviving *legitimate* issue.[75] However, he seems to have doubted whether others would agree; that this hereditary right would be so potent in people's minds once gender entered the equation. Henry, therefore, adopted a means of impressing on people's minds that Matilda was to be his successor. He had the nobility swear oaths recognizing her as his successor (London, 1127). It appears that, in the first instance, they did so happily.[76]

Henry miscalculated in subsequently marrying Matilda to Geoffrey of Anjou (1129), seemingly without consultation. Many of those who had sworn oaths now considered them set aside.[77] To put the matter beyond doubt, Henry had the nobility renew their oaths at Northampton (1131).[78] On 4 March 1133, Matilda gave birth to a son, Henry.[79] That he was named Henry, after his grandfather, is no insignificant fact; it created an association in people's mind between grandfather and grandson; *a family name for a family claim*. In 1134, according to Hoveden, Henry once again had his barons swear an oath – this time both to his daughter and her son.[80]

In his final months, Henry's relationship with his daughter and son-in-law appears to have soured. It is rumoured that, on his deathbed, he disinherited Matilda and designated his nephew, Stephen,[81] as his successor.[82] If true, this would provide a fascinating insight into Henry's mind. It would indicate that he thought he had such a power (i.e. of disposition)[83] and, moreover, that it could set aside hereditary right.

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[75] It is noteworthy that none of Henry's legitimate sons, though male, were ever considered as possible successors to Henry.
[76] See: C Warren Hollister, *Henry I* (Yale University Press, 2001), 317–18; Edmund King, *King Stephen* (Yale University Press, 2010), 30–31. There appears to have been some contention as to who would swear the oath first – Robert, E. Gloucester (Matilda's illegitimate half-brother) or Stephen of Blois.
[77] William of Malmesbury, *Chronicle of the Kings of England*, 483.
[78] See: Hollister, *Henry I*, 463; King, *King Stephen*, 36. King has argued that Stephen of Blois – Matilda's future contender – was not present at this second oath-making ceremony.
[79] Wilfred Lewis Warren, *Henry II* (Methuen, 1977), 11.
[80] Roger of Hoveden, *Cronica Magistri Rogeri de Houedene*, ed. William Stubbs, vol. 1 (Longmans, Green, Reader, and Dyer, 1868), 187; see also William Stubbs, *The Constitutional History of England in Its Origin and Development*, 6th ed., vol. 1 (Clarendon Press, 1903), 369. It is not clear whether this oath was intended such that Matilda was to succeed her father and then her son to succeed her, or whether her son was supposed to directly succeed his grandfather, bypassing Matilda (albeit, perhaps, creating her regent).
[81] This was the son of Henry's sister, Adela.
[82] See: Hollister, *Henry I*, 477ff, cf. 308–11; King, *King Stephen*, 48–49.
[83] See *supra*, 6.13.2.

Henry I died in 1135 and Stephen seized the throne, in a manner not dissimilar to Henry himself: through proximity and promptitude. His popularity in London was also a considerable factor. There followed a bitter dispute between Matilda and Stephen. That Stephen's coronation excluded Matilda says much for the potency of the idea of the coronation (i.e. *coupling*) in people's minds; perhaps Stephen had less right, but he was still the anointed monarch. For present purposes, the important point is that, throughout the majority of the dispute, Matilda appears to be fighting *primarily on her own behalf and not directly on her son's*. However, there is an argument that this was an avoided minority. If Matilda had been ineligible and her son eligible, then Stephen's accession prevented a royal minority.

To a certain extent, this episode demonstrates a weakness in the hereditary principle. However, it seems unlikely that any such situation would have arisen had William Adelin lived or had Matilda been male. The principles of heredity still had the greatest force in people's minds; only the novelty of the situation created uncertainty. It was unclear whether women could succeed or transmit any right to their offspring. This does not mean that the laws of succession were generally unclear or non-existent; they were merely unclear *in this scenario*.

9.9 Henry the Young King

Henry II had five legitimate sons of which we know.[84] His firstborn son died in infancy, leaving Henry's namesake as the eldest. In June 1170, Henry II had this Young Henry – then aged fifteen – crowned. Power-sharing arrangements were not uncommon in Anglo-Saxon England; [85] crowning one's successor during one's lifetime (*anticipatory association*) was not uncommon in France.[86] However, in late twelfth-century England, it was decidedly uncommon. It is worthwhile considering this, especially given that the Young Henry was still arguably a minor when accorded kingly status.

In 1152, K. Stephen attempted to have his son, Eustace, crowned as junior king; the Church refused him.[87] This episode is interesting in a number of respects. Firstly, in the course of their arguments, a claim was made that Matilda was the result of a bigamous

[84] These were: William (b. 1153), Henry (b. 1155), Richard (b. 1157), Geoffrey (b. 1158), and John (b. 1166)
[85] *Supra*, n. 23.
[86] Andrew W Lewis, "Anticipatory Association of the Heir in Early Capetian France," *The American Historical Review* 83, no. 4 (1978): 906–27.
[87] Henry of Huntingdon, *The History of the English People 1000-1154*, trans. Diana Greenway (Oxford University Press, 2002), 88; John of Salisbury, *Historia Pontificalis*, ed. and trans. Marjorie Chibnall (Thomas Nelson and Sons Ltd, 1956), 83–86.

union.[88] She was, therefore, illegitimate. That this line of argument was pursued demonstrates the power of heredity in contemporary thought; to defeat Matilda's claim on this score would be to all but destroy her claim. That Stephen's own hereditary claim was weak – given that he had older brothers[89] – appears not to have detracted from the supposed weakness of Matilda's claim. He could build his own claim, if only he could destroy Matilda's first.

Secondly, it is interesting because Stephen argued that his oath to support Matilda had been given under duress. Beneath this argument is a fixed association: oaths need only be honoured if given voluntarily. Stephen's oath was involuntarily given and, therefore, not binding. In any case, Stephen argued that his oath, such as it was, was only to an *heir presumptive*;[90] further, it was conditional on Henry's not designating some other heir. The implication of the former is that Stephen would have respected the right of a legitimate male heir born to Henry by his second wife; once again, the potency of the idea of heredity rears its head. The matter of designation requires more consideration.

According to Stephen's advocates, Henry I had changed his mind on his deathbed and designated Stephen as his successor.[91] His quarrels with his daughter and son-in-law shortly before his death make this plausible. The scope of his supposed power of designation is not revealed. Might he appoint his successor only in the absence of legitimate heirs, or might he appoint them even to the exclusion of legitimate heirs? Stephen's later agreement with Henry FitzEmpress to the exclusion of his own son favours the latter;[92] Stephen's attempts to assail Matilda's legitimacy rather favours the

[88] Salisbury uses the term "incestis" in reference to the marriage, which Chibnall translated with "incestuous". However, this was not an incestuous union; Henry and his wife, Matilda of Scotland, were not closely related. The term would be better translated with "impure", "unclean", or "unholy": John of Salisbury, *Historia Pontificalis*, 83; Cf. "incestus, a, um" Smith and Lockwood, *A Smaller Latin-English Dictionary*, 336; "incestus, a, um" James Morwood, ed., *Pocket Oxford Latin Dictionary*, 3rd ed. (Oxford University Press, 2005), 91. It was supposedly bigamous because Matilda had reportedly been a nun, though she denied it; the marriage had been approved at the time by Anselm and an ecclesiastical council. Indeed, Anselm himself officiated at the marriage, though it is possible that he had lingering doubts as to its validity. For this episode, see: Lois L. Huneycutt, *Matilda of Scotland: A Study in Medieval Queenship* (Boydell Press, 2003), 28–30.

[89] It is possible that one of these, William the Simple, had some form of learning disorder or other cognitive impairment, hence his epithet.

[90] After the death of Henry I's first wife and mother to his legitimate children (i.e. William Adelin and the Empress Matilda), Henry I remarried – this time, Adeliza of Louvain. Had that union resulted in male offspring, Matilda would have been displaced in the line of succession.

[91] John of Salisbury, *Historia Pontificalis*, 84.

[92] It would appear that a peace, brokered between Stephen and Henry in July 1153, excluded Eustace from the throne. By his reaction, it would appear that Eustace's expectations had been severely frustrated, though he died in mid-August – about the time that Henry's first child, a son, was born. In the autumn, the terms of the peace appear to have been worked out still further on the basis of the earlier agreement; it was ratified at Winchester in November. Stephen still had a living son, William. It is important to note that part of the method by which Henry's succession was achieved is that Stephen is supposed to have *adopted* Henry as

former. In all likelihood, it was decidedly ambiguous. That designation – in whatever form – might create strong expectations concerning the succession demonstrates its potency as an idea, even to rival heredity.

The Church's reasoning when refusing to crown Eustace is important. Though Stephen and Eustace were not on best terms with the Church,[93] it is important to notice that the Church was at pains to offer a reasoned decision. It could not crown Eustace because it regarded Stephen's oath to uphold Matilda's claim as binding. Stephen was a usurper; he could not pass the throne to his son.[94] Whether the Church would have found some other reason to refuse had Stephen not sworn the oath is difficult to tell. Nevertheless, its being taken as a potent reason is the salient point – as is the fact that it did not deny Stephen on the basis that, in England, there could be no such thing as a junior king.

This episode also highlights the power of coronation as a form of coupling. Stephen desired his son's coronation because, once accomplished, it could not be undone; weak title might be perfected by the fact of anointing. There was such a fixed and potent association between *coronation* and *being king* that it defeated anything that might pretend to gainsay it (e.g. lack of title). Stephen hoped to draw on the strength of this association; its strength was not lost Henry II. In having the Young Henry crowned, Henry effectively confirmed him as his successor.

Henry might have been emulating French examples; he might have thought his dynasty insecure. Whether anticipatory association demonstrates the strength or weakness of the hereditary principle is debateable, as is whether it is more an anticipatory or constructive behaviour. In any case, Young Henry's coronation was unique in mediaeval England. Things might have been otherwise had Young Henry lived to become sole king and have children of his own, or had his brothers lived and seen their children approach maturity. As it was, this practice was probably largely forgotten; consequently, its prevalence decreased. It would also have been interesting whether Young Henry – had he lived – would have required a further coronation, especially given the ceremonial irregularities

his son and Henry taken Stephen as a father (Henry's father, Geoffrey, C. Anjou, having died in 1151). William was probably a few years younger than Henry and, as such, Henry became the eldest of Stephen's surviving sons. There was a clear attempt, therefore, to track as closely as possible to people's ordinary expectations concerning the succession, i.e. that it should proceed on an hereditary principle. On these events, see: King, *King Stephen*, 277ff.

[93] See, e.g. Huntingdon, *History of the English People*, 88, 92.

[94] For this argument, see Huntingdon, *History of the English People*, 88.

of the first (e.g. being crowned by the Abp. York, rather than Abp. Canterbury – at that time, Becket). If so, it would say much about concurrent ideas regarding coupling.

9.10 Arthur of Brittany (1199) – Avoided

Arthur was the posthumous son of Geoffrey Plantagenet and grandson of Henry II. He was recently twelve when his uncle, Richard I, died in April 1199. The question was whether the throne should pass to Arthur, whose father, Geoffrey, would have been the next in line but for his premature death, or, alternatively, to John, who was Richard and Geoffrey's younger brother. John had been the son and brother of kings; Arthur only a nephew and grandson.

Henry II might have intended for a while to make John his heir and refused demands to name Richard; it was only through duress and weariness that he relented, and allowed his barons to swear fealty to Richard.[95] Richard appears to have initially been reticent as to his heir; he refused to designate either John or Arthur when he left on Crusade in 1190.[96] However, *en route* to the Holy Land, he made a treaty with Tancred of Sicily in which he named Arthur his heir.[97] Richard appears to have later changed his mind; on his deathbed he designated John.[98]

Both Arthur and John had hereditary claims; both had been designated by Richard. There is little evidence that either Arthur or John relied upon Richard's designation; they probably rather interpreted it as a *confirmation* of their pre-existing hereditary right. In claiming the throne in 1199, for example, John relied only on hereditary right, divine mercy, and general acceptance.[99]

Arthur's claim raised the issue of *representation*, i.e. whether C, as heir or successor to B, might represent B's claim as heir or successor to A, to the exclusion of some D, where B would have inherited or succeeded but for some fact. For example, if B were subject to some bar or disqualification, e.g. on account of their gender.[100] Alternatively, if B had

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[95] Warren, *Henry II*, 617ff; Wilfred Lewis Warren, *King John* (Peregrine Books, 1966), 37–38; John Gillingham, *Richard I* (Yale University Press, 1999), 94–100.
[96] Sidney Painter, *William Marshal: Knight-Errant, Baron, and Regent of England* (John Hopkins Press, 1966), 85.
[97] Gillingham, *Richard I*, 136–37.
[98] This is, at least, according to Hoveden: Roger of Hoveden, *The Annals of Roger de Hoveden Comprising the History of England and of Other Countries of Europe From AD 732 to 1201*, ed. Henry T Riley, vol. 2 (Henry G Bohn, 1853), 453.
[99] David A Carpenter, *The Struggle for Mastery – The Penguin History of Britain 1066 – 1271* (Penguin, 2003), 296.
[100] Thus, might a son represent his mother in a claim to his grandfather's lands and titles? There are here the examples of Henry II (who claimed through his mother, the Empress Matilda, dau. Henry I) and Edward III (who claimed the French throne through his mother Isabella, dau. Philip IV of France).

predeceased A, raising the question as to whether B's children might inherit or succeed directly from A. Thus was Arthur's case: might he represent his father's claims to the English throne, even though his father had never himself held it? Or did John have the better claim, not having to rely on some intermediary?

In deciding the matter, there were obviously other factors, e.g. Arthur's being based primarily in Brittany versus John's greater connections with England. There was also the fact that, in this case, John prevailed militarily. Nevertheless, it clearly demonstrates that people had certain expectations. There was some disagreement as to these, but, even still, there was broad agreement that the choice was between Arthur and John. Had anybody else claimed the throne, it would probably have frustrated *everybody's* expectations, rather than just *some*.

These events also illustrate the danger that lone paternal uncles might pose to royal minors – uncles with no surviving brothers to check them in their designs. This is a pattern often seen. Nevertheless, it is important to note that John did not claim the throne *because Arthur was a minor*; he claimed it arguing superior right. As such, Arthur's minority perhaps made his claim more vulnerable, but it did not invalidate it.

9.11 Henry III (1216) – Minority

After Arthur's disappearance, John was relatively secure on the English throne until his disputes with Pope and barons. When he died in October 1216, England was in the throes of civil war. A pretender, Louis [VIII] of France, waged war in the kingdom. John's eldest son, Henry, had only recently turned nine.

John appears to have undertaken a number of preparatory behaviours, which indicate that he expected and desired Henry to succeed him.[101] He gave Henry a name strongly associated with the Plantagenet family and kingship.[102] He possibly had the freemen of Marlborough swear fidelity to Henry as his heir;[103] he might have had Falkes de Breauté

[101] It seems clear that John's basic presumption was that, all things being equal, his eldest son – Henry – ought to be his heir and that was the natural way of things. This is demonstrated somewhat in a letter he wrote to the pope in his final days. Failing divine and papal assistance, he despaired of securing 'our perpetual hereditary succession' (*successionem nostram haereditariam perpetuam*): Nicholas Vincent, ed., *The Letters and Charters of Cardinal Guala Bicchieri, Papal Legate in England, 1216-1218*, vol. lxxxiii (Canterbury and York Society, 1996), 105. Cf. David A Carpenter, *The Minority of Henry III* (University of California Press, 1990), 12. Not only does this indicate what John desired (i.e. to found a dynasty), but also that he felt that this is what he could reasonably have expected – but for the outbreak of civil war.

[102] Henry was, of course, the name borne by John's father (Henry II) and great-grandfather (Henry I).

[103] In 1209, when Henry was a few years old, John is recorded as having commanded the freemen of Marlborough – all those aged fifteen and over – to swear fealty to both himself and his heir (*regis haeredi*): "Convenerunt autum ex praecepto regis apud Merleberge omnes Angliae viri divites et pauperes et mediocres, ab annis xv et supra, ibique tam regi quam filio suo Henrico parvulo trienni, utpote regis haeredi,

swear an oath to keep Henry's castles until he was of age;[104] he appears to have had William, K. Scots, and his son, Alexander, swear to support Henry, in event of his death;[105] he had the mayor of Angoulême swear "fidelity to Henry, saving fidelity to John himself 'as long as I should live'";[106] and he appears to have taken steps on his deathbed to secure the succession.[107] In all of this, his actions appear to be directed towards *securing* Henry's claim, not *creating* it; he did not *designate* Henry.[108] Whether he could have done more is a moot point.[109]

Henry's claim was by hereditary right; Louis' by presentation, having been chosen by the rebel barons. In settling the dispute, the chance of battle, and the growing unpopularity of Louis and his troops, both played their parts. Moreover, the Plantagenet loyalists certainly had vested interests in supporting Henry.[110] Had his interests been diametrically opposed to their own, they might have abandoned him. Yet, only a thoroughbred cynic would believe that the loyalists supported Henry simply because it suited them,[111] and that

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juraverunt fidelitatem." Gervase of Canterbury, *The Historical Works of Gervase of Canterbury*, ed. William Stubbs, vol. 2 (Longmans and Co., 1880), 104. It is possible that John did this at other times in other places, but that those occasions were not recorded. On this, see also: Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," 36, 80.

[104] "donec iste rex legitimae foret aetatis". This implies that John expected that Henry would succeed him. This is recorded in the so-called Barnwell chronicle: William Stubbs, ed., *Memoriale Fratris Walteri de Coventria*, vol. 2 (Longman & Co., 1873), 260.

[105] On this, see: Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," 81–82.

[106] Quoted in: Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," 82.

[107] In his will, probably made during his final illness, John provides that some portion of his goods were to provide "support to my sons towards obtaining and defending their inheritance" ('*sustentacione prestanda filiis meis pro hereditate sua perquirenda et defenda*'): SD Church, "King John's Testament and the Last Days of His Reign," *The English Historical Review* CXXV, no. 514 (2010): 505–28. Moreover, Wendover reports that John, having confessed to the Abbot of Croxton, "appointed (*constituere*) his eldest son Henry his heir, and made his kingdom swear allegiance to him; he also sent letters under his own seal to all the sheriffs and castellans of the kingdom, ordering them one and all to obey his said son": Roger of Wendover, *Flowers of History*, ed. JA Giles, vol. 2 (Henry G Bohn, 1864), 378; Roger of Wendover, *Flores Historiarum* (Sumptibus Societatis, 1861), 385. John's expectation and desire to have Henry succeed him is also represented in the following lines from the *History of William Marshal* (written sometime later from a biased perspective, it should be added): "…for my son will never *govern* these lands of mind / with the help of anyone but the Marshal": AJ Holden, S Gregory, and David Crouch, eds., *History of William Marshal*, vol. 2 (Anglo-Norman Text Society, 2004), ln. 15189-15190 (emph. added).

[108] I am here disagreeing with my earlier opinion: Gates, "The Nature and Identity of the Constitution during the Minority of Henry III (1216-1227)," 26–27.

[109] For example, had not attempted to associate Henry in the kingship, as John's father, Henry II, had done with his brother, the Young Henry. Perhaps he recognized the troubles this had caused his father; perhaps Henry [III] had been too young; perhaps John simply did not think it necessary.

[110] See Carpenter, *The Struggle for Mastery*, 300.

[111] There is an interesting story concerning Hubert de Burgh. Louis had been besieging Dover Castle and Hubert had been defending it. News reached Louis that John had died, upon which he is said to have said the following to Hubert: "Your lord, King John, is dead; it is useless for you to hold this castle longer against me…; surrender the castle and come into my fealty, and I will enrich you with great honours and you shall be great among my counsellors." Hubert is said to have made the following reply: "If my lord be dead, *he has sons and daughters who ought to succeed him*; as to surrendering the castle, I would fain speak with my comrades of the garrison." Hubert was justiciar of England and, therefore, had a strong interest in the Plantagenet family (for it was they who had made him), but that family's prospects were at this time

people returned to Plantagenet loyalty only because of Louis' failure. The rebellion had been against *John*; his son was innocent of his crimes – a fact which the loyalists were at pains to stress.[112] With John no longer around to frustrate people's expectations through his ill-governance, people must have asked themselves – consciously or unconsciously – what would I *normally expect*, in accordance with the fixed associations I hold, to happen after the king's death? The answer, was, of course, that his eldest son would become king after him – not some foreign pretender. Rebellion against the Plantagenets had lost its reason; its legitimacy.

The facts that Henry was a minor and that there had been no minor king in England since Æthelred II appear not to have mattered. Henry's age was no bar, though the lack of viable alternatives must have reinforced Henry's claim.[113] Even in spite of difficulties later in Henry's reign, it is from this time that the potency of the hereditary principle appears to reach new heights. It was sufficient to enable Edward I to succeed Henry, even though he was abroad.

9.12 Edward III (1327) – Minority

The fact of Edward III's accession is less remarkable than the manner of his predecessor's decoupling: the abdication/deposition of his father, Edward II. Indeed, insofar as the transmission of the throne goes, Edward's accession simply demonstrates the potency of hereditary right – Edward III became king when his father ceased to be such.[114] Of course, that Edward [III] was the figurehead of the rebellion against his father is important; the most legitimate opposition could only be offered by those who expected – and were expected by others – one day to be king. Once again, his youth does not seem to have mattered in this regard.

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poor. It certainly could have been in Hubert's interests to have switched allegiance, but he was quite clear that there was a fixed expectation that prevented him from doing so: *if a king has died and left living children, then it is they who should succeed and no other whilst they live*. The speech above is from Roger of Wendover, quoted in: Kate Norgate, *The Minority of Henry the Third* (Macmillan & Co. Ltd., 1912), 16 [emph. added].

[112] An open letter declared: "We hear that a quarrel arose between our father and certain nobles of our kingdom, whether with justification or not we do not know. We wish to remove it for ever since it has nothing to do with us." Quoted in: Carpenter, *The Minority of Henry III*, 22.

[113] "Henry's claim, although not ideal owing to his youth, was the only viable alternative to Louis: all the others were too old and childless, too young, their claims too tenuous or politically unsustainable or simply too far away." See: Gates, "The Nature and Identity of the Constitution during the Minority of Henry III (1216-1227)," 43–49, quote at 49.

[114] It is noteworthy, however, that Edward I does not appear, at least in 1272, to have taken the succession after his death for granted, for he provided for it in his testament made whilst in Acre on 18 June of that year: JR Studd, *A Catalogue of the Acts of the Lord Edward, 1254-1272* (PhD Thesis: University of Leeds, 1971), 731–32.

9.13 Richard II (1377) – Minority

In some respects, Richard II's accession is less straightforward than that of Henry III and Edward III; they had directly succeeded their fathers. Richard's father, Edward of Woodstock ('the Black Prince'), had died in June 1376, predeceasing his own father, Edward III, by approximately a year. Woodstock had been heir apparent as his father's eldest son,[115] but had never been king. The question of representation arises once more, which question was all the more important seeing as Richard had living paternal uncles.

Richard was not Woodstock's firstborn son. This explains why Richard did not bear the dynastic name of Edward; this had been his elder brother's name. That child, however, had died young.[116] On his deathbed, Woodstock appears to have entrusted his wife and son into the hands of his father (Edward III) and brother (John of Gaunt, D. Lancaster), who both promised to comfort Richard and uphold him in his right.[117] This looks very much like Woodstock attempting to entrench in people's minds the idea that Richard was his heir and, consequently, heir to everything to which he himself had been. That he saw this as Richard's right reveals an underlying fixed association.

To an extent, Richard's importance had already been illustrated some years earlier when he had been appointed *custos regni*.[118] However, following Woodstock's death, there appears to have been some anxiety to have Richard confirmed as Edward III's successor-in-waiting. Edward immediately invested Richard with the earldom of Chester, but this was not enough.[119] Parliament requested that Richard be brought before them, so that they could honour him as the new heir apparent. Further, they asked that he be made P. Wales – evidence of a developing association between the principality and being heir apparent; they were told that such a grant was only in the hands of the king. There might have been some thought on the part of the Commons of bringing forward Richard's inauguration by

[115] See: W Mark Ormrod, *Edward III* (Yale University Press, 2011), 558.
[116] He was apparently seven years old when he died, according to his tombstone: John Weever, *Antient Funeral Monuments, of Great Britain, Ireland, and the Islands Adjacent* (W. Tooke, 1767), 204. Saul states that he was six when he died: Nigel Saul, *Richard II* (Yale University Press, 1999), 12.
[117] "Then he called the King, his father, and the Duke of Lancaster, his brother; he commended to them his wife, and his son, whom he greatly loved, and straightaway entreated them so that each was willing to give his aid. Each swore upon the book and promised him at once that they would comfort his child and maintain him in his right. All the princes and barons swore all round to this, and the noble Prince of fame gave them a hundred thousand thanks…": Chandos Herald, *The Life & Feats of Arms of Edward the Black Prince*, ed. and trans. Francisque Michel (J.G. Fotheringham, 1883), 283–84.
[118] See, *infra*, 9.6.1.
[119] Ormrod, *Edward III*, 558–59.

dethroning Edward III, but nothing came of this. After some delay, Richard became the third Plantagenet P. Wales in November 1376.[120]

The anxiety to have Richard confirmed as heir apparent demonstrates the strength, rather than the weakness, of the hereditary principle at this time. It speaks to a perception that the situation was somewhat unusual (in the sense that the intermediate heir, Woodstock, had died) and to a perception that the succession might be perverted (particularly in view of Gaunt's supposed pretensions). However, it speaks most of all to people's anxiety *to have confirmed that which they expected*. A failure to recognize Richard as Edward III's heir would have caused serious consternation; it would have frustrated people's expectations. This is particularly likely in view of people's enthusiasm for Richard;[121] a boy who was as yet young and untested, a boy about whom little would have been known, but a boy who represented an idea – the idea of a future king. People's expectations were clear, as perhaps were their hopes.[122]

There was clearly a prevalent and potent idea that the throne should be passed, where possible, along the senior male line. As Simon Sudbury, Abp. Canterbury, stressed in the first parliament of Richard's reign: Richard was king, not by virtue of election, but by right.[123] Indeed, there is something of a natural law theory running beneath Sudbury's words. He indicated that a higher law and natural order stemming from God were at work. This is a fixed, eternal, and immutable part of the constitution of the kingdom of England, which it would be folly to gainsay. Sudbury is clear that Richard's succession was in no

[120] This title had been created for Edward II. It had not been given to Edward III, but he had given it to his son, Edward of Woodstock: Ormrod, *Edward III*, 254, 565 (see also n. 49 on this page); Saul, *Richard II*, 17.
[121] See: Saul, *Richard II*, 21–22.
[122] For indications of these hopes, see the poem *Death of Edward III*: Thomas Wright, ed., *Political Poems and Songs Relating to English History, Composed during the Period from the Accession of Edw. III to That of Ric. III*, vol. 1 (Longman, Green, Longman, and Roberts, 1859), 215–18. See also, with notes: Celia Sisam and Kenneth Sisam, eds., *The Oxford Book of Medieval English Verse* (Oxford University Press, 1970), 342–47.
[123] The Abp. Canterbury's speech ran as follows: "Namely, to rejoice with you over the noble grace which God has granted you in the person who is your natural and rightful liege-lord, as has been said, not by election nor by any other such a way, but solely by rightful succession to an inheritance: wherefore you are by nature the more fully obliged to love him completely, and obey him humbly; and also to thank God, from whom all grace and good proceeds, in particular because he has given you so noble a lord as your king and governor.": 'Richard II: October 1377', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1377 [accessed 7 May 2019] at Item 4. See: Saul, *Richard II*, 26–27.

way surprising, for, since Woodstock's death, Richard had "occupied a special place in the kingdom" – he was heir-apparent.[124]

Sudbury's comments and the smoothness of his accession notwithstanding, Richard's claim to the throne might have not been completely undisputed. There was apparently some "suspicion that [Gaunt] might subvert the succession" during the summer of Richard's accession, although this suspicion largely dissipated.[125] Gaunt's speech in Richard's first parliament professing his innocence is interesting from a constitutional viewpoint: "For he said that although he was unworthy, he was a king's son, and one of the great lords of the realm after the king…"[126] Gaunt saw himself as pre-eminent within the English political hierarchy.

These themes continued throughout Richard's reign. We see hereditary right raised in respect of the French throne: In the Parliament of February 1383, France was said to be Richard's "rightful inheritance"; later, Sir James Pickering, representing the Commons, said that Richard "had a true right to the crown of France".[127] In the second Parliament of that year, held in October, Michael de la Pole stated that the government needed a grant of taxes to fight the "burdensome wars" begun before Richard's time and had descended to him "just as the honourable crown of England has descended to him by the succession of rightful inheritance".[128] The theme of Gaunt's desires for the throne also resurfaced in the 'affair of the Carmelite friar' in the late spring of 1384. The Westminster chronicler said that, in an act of rashness, Richard ordered Gaunt's execution, although this is not corroborated by other chroniclers and "in any case the king seems to have been rapidly

[124] 'Richard II: October 1377', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1377 [accessed 7 May 2019] at Item 4.
[125] 'Richard II: October 1377', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1377 [accessed 7 May 2019] at Editors' Introduction.
[126] 'Richard II: October 1377', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1377 [accessed 7 May 2019] at Item 13.
[127] 'Richard II: February 1383', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/february-1383 [accessed 7 May 2019] at Items 3 and 9.
[128] 'Richard II: October 1383', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1383 [accessed 7 May 2019] at Item 5.

dissuaded from such an intemperate course of action."[129] Gaunt does not appear to have had designs on the throne in his final years.

9.14 Edmund Mortimer, 5.E. March (1399) – Avoided

Like Edward II, hereditary right might have been sufficient to enthrone Richard II; it was not enough for him to remain so enthroned. After Richard's fall, the throne was claimed by Henry Bolingbroke, D. Lancaster. If the throne travelled *exclusively*, rather than *preferentially*, in the senior male, then, given Richard's lack of issue, Henry was Richard's rightful heir. He was Richard's closest relative in a male line, being the son of Edward III's third son, John of Gaunt.[130] However, Gaunt had had an older brother, Lionel of Antwerp, who had had issue, Philippa. She had had a son, Roger, who had died, but he had also had a son, Edmund. There was again the issue of representation – whether Edmund might represent the claims that his great-grandfather and father might have had were they alive; that his grandmother might have had were she male.

There had been attempts in Edward III's final year to establish that the throne could not pass through Philippa whilst there existed a viable male line; these had failed.[131] Excluding Philippa would have been something of an embarrassment for the English crown – not least because its claim to France rested principally in the idea that women might carry the baton in the succession.

Philippa's son, Roger, E. March, had possibly been proclaimed by Richard as heir presumptive in October 1385; whether this would have been an act of *recognition* (following some principle of *gravitation*) or *designation* is unclear. There is every indication that Edmund – Richard's first-cousin-twice-removed – was recognized as Richard's heir following Roger's death. However, he was not quite eight years old when Richard was dethroned in September 1399 – hardly able to press his claim. He was not passed over because he was a minor, but his minority made his claim more vulnerable.

9.15 Henry VI (1422) – Minority

[129] 'Richard II: April 1384', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/april-1384 [accessed 7 May 2019] at Editors' Introduction.
[130] As such, Bolingbroke was Richard's first cousin and similar in age.
[131] See: Ormrod, *Edward III*, 564–65.

Henry VI remains the youngest king ever to sit on the English throne,[132] which he gained when he was eight months and twenty-five or twenty-six days old.[133]

9.15.1 Lancastrian Title

Anybody claiming on the basis of hereditary right must show two things: **family title** and **personal title**. They must show that the succession runs in their family and, moreover, that it identifies them individually. The basis of the Lancastrians' family title was somewhat different to that of their predecessors. It was beginning to look as though family title might be conferred and controlled by Parliament.

This association begins with the assembly that dethroned Richard II in 1399 and recognized Henry IV as his successor; Henry having claimed the throne "in right of descent vindicated by conquest", as well as by Richard's designation.[134] This assembly was not formally a Parliament,[135] but it had a parliamentary aspect.[136] Its actions were effectively confirmed in Henry's first parliament; it made Henry's son, Henry [V], P. Wales, whom it also declared heir apparent.[137]

This association developed in January 1404 and June 1406, when Parliament was involved in clarifying the order of succession after Henry's death. Parliament was not in

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[132] Henry VI is not, however, the youngest *British* monarch: Mary, Queen of Scots (b. 8 Dec. 1542) became monarch of Scotland aged only six days old on the death of her father, James V, on 14 Dec. 1452. The youngest monarchs, however, are the posthumous kings who were born sometime after their fathers' deaths and, therefore, have been deemed king from the moment of birth. Among the posthumous kings we find Alexander IV of Macedon (b. 323 BCE), John I of France (b. 1316), Ladislas of Hungary, Croatia, and Bohemia (b. 1440), and Alfonso XIII of Spain (b. 1886). Other notable posthumous children – at least as far as English political history is concerned – include Arthur I, D. Brittany (b. 1187), Henry Tudor [VII] (b. 1457), and William III (b. 1650). It is worth adding, however, that John I of France, for example, was not referred to as 'king' until the sixteenth century when the principle of hereditary right was becoming the dominant law of succession in France: Lisa Hopkins, *Drama and the Succession to the Crown, 1561-1633* (Ashgate, 2011), 45.

[133] There appears to be some disagreement as to whether Henry became king on the moment of his father's death or the following day.

[134] Gaillard Lapsley, "The Parliamentary Title of Henry IV," *The English Historical Review* 49, no. 195 (1934): 423–49. Walsingham has Henry say: "I, Henry of Lancaster, lay claim to this kingdom, with its crown and all other parts belonging to it. I make claim through the royal blood which comes down to me from King Henry and through the just cause which God of his grace has sent me for recovering the kingdom with the help of my kinsmen and friends. This kingdom was on the point of destruction, owing to the failure of its government and the violation of its laws.": Thomas Walsingham, *The Chronica Maiora of Thomas Walsingham (1376-1422)*, ed. James Clark, trans. David Preest (The Boydell Press, 2005), 311.

[135] Lapsley, "The Parliamentary Title of Henry IV."

[136] Indeed, those persons present were those who had been summoned for a meeting of Parliament. On this episode, see in particular: Lapsley, "The Parliamentary Title of Henry IV"; Gaillard Lapsley, "The Parliamentary Title of Henry IV (Continued)," *The English Historical Review* 49, no. 196 (1934): 577–606.

[137] "During the parliament the king with the consent of all the estates of the realm created his eldest son Henry [of Monmouth] prince of Wales, adding to his lands the duchy of Cornwall and the county of Chester. Later in the same parliament he made him duke of Aquitaine and the next heir to the kingdom of England.": Walsingham, *Chronica Maiora*, 312; see also Theodore FT Plucknett, *Taswell-Langmead's English Constitutional History: From the Teutonic Conquest to the Present Time*, 11th ed. (Sweet & Maxwell, Ltd., 1960), 494.

full control at this point, but it was becoming clear that Parliament was an appropriate place to discuss and confirm points on such issues. In December 1406, changes were again made – this time in the form of a statute.[138] The association with Parliament thereby grew stronger, contributing to a developing fixed expectation that, in any similar circumstances, Parliament would be involved.

As for the propriety of Henry IV's and Henry V's titles, it would appear that at least some people's expectations had been frustrated by the Lancastrian possession of the throne.[139] Yet, if Wavrin is to be believed, it would seem that Henry V was in little doubt that he would be his father's successor, even if Henry IV expressed late doubts as to his own title.[140] If Richard had had surviving children, the Lancastrian position would have been much weaker. However, in view of the absence of a clear oppositional claim, the increasing length of Lancastrian rule, and Henry V's (perceived) strength and successes, it is unsurprising that there was little doubt as to Henry VI's claim; the Parliamentary Roll for November 1422 declares: "the inheritance of both of the realm and the crown of France and of the realm and the crown of England have now descended by right [*descenduz droiturelment*]" to Henry VI.[141]

The Lancastrian family claim, deviating somewhat from people's fixed associations, needed time (and success) to gain a fuller sense of legitimacy. People's evaluative expectations probably played a major role in this. They came to associate ideas of Lancastrian monarchy with ideas or feelings of goodness; it was a Good Thing.[142] It also has a great deal to do with habit: people became used to the idea of a Lancastrian monarch and, as those who had lived through Richard's reign began to fade, there were increasingly fewer people who had known any different.

9.15.2 Catherine de Valois's Pregnancy

[138] For discussion of these, see: Plucknett, *Taswell-Langmead's Constitutional History*, 494–95.
[139] The failed Epiphany Rising (1400) and Southampton Plot (1415) demonstrate as much. On the Epiphany Rising, see: Chris Given-Wilson, *Henry IV* (Yale University Press, 2016), 160–64. On the Southampton Plot, see: Christopher Allmand, *Henry V*, 2nd ed. (Yale University Press, 1997), 74–78.
[140] John de Wavrin, *A Collection of the Chronicles and Ancient Histories of Great Britain, Now Called England*, trans. William Hardy and Edward LCP Hardy, vol. 4 (Eyre and Spottiswoode, 1887), 166–67.
[141] 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 7 May 2019] at Item 15.
[142] As Carpenter has said: "Once Henry IV had shown himself able to survive his first few shaky years, and the exploits of his son, Henry V, had set an almost irremovable gloss on the dynasty, the Lancastrians had no need to prove their worth in order to remain kings." Christine Carpenter, *The Wars of the Roses: Politics and the Constitution in England, c.1437-1509* (Cambridge University Press, 1997), 20.

Henry V married Catherine de Valois in May 1420 in France. In February 1421, they arrived in England. Ostensibly, this was to introduce Catherine to the country and to make certain pilgrimages, but Henry's ulterior motive was almost certainly to secure additional funds for his campaigns.[143]

It does not appear to have been Henry's intention to remain for longer than necessary;[144] news of the defeat at Baugé could only have reinforced this resolution.[145] On 10 June 1421, he arrived at Calais. Catherine, however, remained in England until late May 1422.[146] There are two decisions here: first, that Catherine should stay behind in June 1421 and, second, that Catherine should go to France in May 1422. The exact motives and reasoning behind these decisions are obscure, but the fact that her stay in England coincides with her first pregnancy suggests an element of dynastic regard. If this is the case, these decisions reflect contemporary attitudes to the succession. To assess whether dynastic regard had a role, it is necessary to consider whether it could have plausibly been an operating consideration and, if so, what influence it could have had.

To have been an operating consideration in June 1421, somebody must have known that Catherine was pregnant. It has often been assumed that Henry knew that she was pregnant when he set sail;[147] this is possible, but unverifiable.[148] Even if Catherine suspected that she was pregnant when she said farewell to her husband sometime in the week or so before his embarkation,[149] there can be no guarantee that it featured in the decision-

[143] Desmond Seward, *Henry V: The Scourge of God* (Viking, 1988), 173.
[144] Charles Lethbridge Kingsford, *Henry V: The Typical Medieval Hero* (GP Putnam's Sons, 1901), 348; Seward, *Henry V: The Scourge of God*, 181. It should be noted that this has not always been the opinion of historians of the period: J. Endell Tyler, *Henry of Monmouth: Or, Memoirs of the Life and Character of Henry the Fifth, as Prince of Wales and King of England*, vol. 2 (Richard Bentley, 1838), 296.
[145] Henry was probably in northern England on progress with his newly-crowned queen-consort when he received the news of the defeat of the English forces at the Battle of Baugé on 22 March 1421, in which his brother, Thomas, D. Clarence, had been killed and other important figures in the English camp either also killed or captured: Tyler, *Memoirs of the Life and Character of Henry V*, 2:290, 295; Wavrin, *Wavrin's Chronicle, 1399-1422*, 4:361.
[146] Catherine departed on the 22 May 1422, although she was undoubtedly preparing her departure sometime before this. According to Christie these preparations were being made "[e]arly in 1422" and according to Tyler preparations for her departure were being made as early as 26 January 1422: Mabel E Christie, *Henry VI* (Constable and Company Ltd., 1922), 2; Tyler, *Memoirs of the Life and Character of Henry V*, 2:302. Cf. Ralph A Griffiths, *The Reign of King Henry VI*, 2nd ed. (Sutton Publishing, 1998), 15.
[147] See, e.g.: Griffiths, *The Reign of King Henry VI*; Patrick Strong and Felicity Strong, "The Last Will and Codicils of Henry V," *The English Historical Review* 96, no. 378 (January 1981): 79–102.
[148] Wolffe pointed to the fact that Elizabeth Ryman – one of Catherine's ladies and later entrusted with the "care of the child from its birth" – was given "[t]he unusually generous gift of the manor of Old Shoreham for life, made at Canterbury when he was organizing his departure" as an indication that Henry knew of Catherine's pregnancy before his departure. This is possible, but it is circumstantial. The fact that Henry made no explicit provisions for his heir in his last will, which he made a short time later, certainly would seem to speak against the hypothesis that Henry knew, though, of course, does not rule it out. Bertram Wolffe, *Henry VI* (Eyre Methuen, 1981), 28.
[149] Their child, Henry [VI], was born on 6 December 1421, which means he was probably conceived in mid- to late-March. Indeed, if Henry was carried to full term, he probably would have been conceived

making process. Indeed, even if she had her suspicions, she might as yet still have been cautious about conveying these.[150] On balance, we can lean towards Wolffe's cautious statement that "Henry V had probably known, or at the least must have had grounds for hope," at the time of his departure.[151]

If they were unaware of the pregnancy in June, it would soon have become apparent and clearly the decision was made that Catherine remain in England. Perhaps the most significant piece of evidence that that decision was made on the basis of Catherine's pregnancy was the rapidity of her return to France – less than six months after giving birth.[152] This indicates that Catherine might never have intended to remain in England; it was precisely because of her pregnancy that she had.

There are various reasons why the pregnancy might have prevented her journeying to France. There were the dangers presented to the health of the mother and foetus – both in the sea crossing and within France, which was then in an unsettled state. Indeed, there was the problem about where in France they would be safe. If Catherine were to accompany her husband and the army, manifold dangers presented themselves, e.g. disease and attack. Indeed, as the pregnancy reached its latter stages, especially the

towards the middle of March. This would accord with our knowledge of Henry V's and Catherine's movements at that time. In late February, Henry V left Catherine at Westminster, whilst he went out on a tour of the country. They do not appear to have seen one another until she joined him at Leicester on the eve of Palm Sunday (15 March). The next couple of weeks they appear to have spent together, moving through Nottingham and Pontefract and then onto York. It must almost certainly have been during this time that Henry [VI] was conceived (assuming, of course, that Henry [VI] was legitimate). Henry left York alone to make "pilgrimages to the shrines at Beverley and Bridlington", but was interrupted by the news of his brother's death at the start of April: Christopher Allmand, *Henry V* (Methuen, 1992), 158. Consequently, in mid-June she would have been around twelve weeks' pregnant. She probably would have noticed some signs of pregnancy (e.g. morning sickness, missed periods, tiredness, backache, etc.), but we cannot be certain that she would have known their true cause; it is unlikely that it would have been outwardly apparent at this stage, although it would soon begin to be so.

[150] The chances that she would miscarry would have been relatively low by June, although up until that point there may have been a 20%-25% chance that she would miscarry according to some estimates of the likelihood of medieval miscarriages - a figure that has to be treated with a great degree of caution: Fiona Harris-Stoertz, "Pregnancy and Childbirth in Twelfth- and Thirteenth-Century French and English Law," *Journal of the History of Sexuality* 21, no. 2 (2012): 270.

[151] Wolffe, *Henry VI*, 28.

[152] Henry [VI] was born on 6 December 1421 and Catherine returned to the Continent in late May 1422, though she was undoubtedly preparing her departure sometime before this. According to Christie these preparations were being made "[e]arly in 1422" and according to Tyler preparations for her departure were being made as early as 26 January 1422: Christie, *Henry VI*, 2; Tyler, *Memoirs of the Life and Character of Henry V*, 2:302. Cf. Griffiths, *The Reign of King Henry VI*, 15. Given the absence of any mention of Henry [VI] accompanying her, we can assume that he remained in England. See: Wavrin, *Wavrin's Chronicle, 1399-1422*, 4:376; Christie, *Henry VI*, 2–3.

confinement stage,[153] Catherine's mobility would have been severely reduced.[154] If she were with the army, this would have reduced their mobility; if she were elsewhere, she might have been a target and thereby a distraction to Henry. Catherine was safest in England.[155]

Moreover, Catherine *qua* queen-mother and the unborn child *qua* Henry's heir were important assets to Henry. Catherine, in particular, as the K. France's daughter, was a central element to the legitimacy of his claim to France. If she were to die, Henry's claim would have been considerably weakened. Henry and his advisers might therefore have deemed it prudent not to take any undue risks with the means and end to the continuation of the House of Lancaster, as well as its grip on the thrones of both England and France. Such dynastic regard would cross from the ordinary regard that parents have for the promulgation of their genes to a *special dynastic regard specifically with a view to the succession*.

There might also have been a conscious decision that the child should not be *aubaine*, i.e. born abroad. Even if it had been made clear in the middle previous century that an *aubaine* could inherit in England,[156] it might have been felt appropriate that a King of England should be born in England.[157]

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[153] If Matthew Paris is correct in his dates, then Henry III's wife, Eleanor, remained in confinement for two months in 1242 when pregnant with their daughter Beatrice. This was between the Assumption of the Blessed Virgin (25 March) and the Nativity of St John the Baptist (24 June): Matthew Paris, *Matthew Paris's English History from the Year 1235 to 1273*, trans. JA Giles, vol. 1 (George Bell & Sons, 1852), 431.

[154] Indeed, Kingsford attributed her stay in England precisely to the expectation that Catherine would soon begin her confinement: Kingsford, *Henry V: The Typical Medieval Hero*, 351.

[155] There are a number of recorded incidents where prospective mothers stayed put until their children were born. Henry III delayed his return from the Continent in 1243 "as the queen was great either with child or some other infirmity"; Harris-Stoertz also lists the examples of Simon de Montfort's wife and Matilda, D. Saxony. Matthew Paris, *English History*, 1:447; Harris-Stoertz, "Pregnancy and Childbirth in Twelfth- and Thirteenth-Century French and English Law," 273.

[156] "That the Law of the Crown of England is, and always hath been such, that the Children of the Kings of England, in whatsoever Parts they be born, in England or elsewhere, be able and ought to bear the Inheritance after the death of their Ancestors; which Law our said Lord King, the said Prelates, Earls, Barons, and other great Men, and all the Commons assembled in this Parliament, do approve and affirm for ever." *De Natis Ultra Mare* (25 Edw. III, 1350).

[157] Henry's child also stood to gain the kingdom of France, of course, and this may have presented itself as an opportunity for Henry to give his child greater legitimacy there. However: (a) Henry's child was the immediate heir in England, whereas in France there was an intermediate heir (i.e. Henry V until the death of Charles VI); and (b) Henry, his advisers, and his followers were principally English and thus it may have been felt the more popular decision to have Henry's heir born in England (and thus be 'English') rather than France (and thus be 'French'). Such reasoning again would indicate a strong dynastic regard with a view to the succession.

Catherine's motives for quickly returning to France after Henry [VI]'s birth are also obscure. There might have been a lack of affection for the new-born Prince;[158] her responsibility towards, or love for, her native country, husband,[159] or ailing father might have outweighed that which she felt for Henry [VI]. The fact that she travelled with a large contingent, accompanied by Henry's brother, John (D. Bedford), provides one clue for the timing.[160] It is also possible that she might have been driven to France by Henry's illness, although whether this would have been present – and she known of it – early enough to prompt her crossing to France is doubtful.[161] However, once again, it is possible that her movements were dictated by dynastic regard: not only might her presence besides Henry help to legitimate his ongoing battle against her younger brother, Charles, but it also meant that Henry might have more heirs in the nearer, rather than more distant, future.

There are, of course, also reasons why Catherine might have remained without any reference to her pregnancy,[162] and much is conjecture, but it is distinctly possible that it was dynastic motives that kept Catherine in England and then took her to France. Beneath

[158] It would be wrong to make the assumption that there was a lack of affection simply because it was supposedly typical of the mediaeval mindset. For a discussion on emotional attitudes of people in late medieval to industrial England, see: Will Coster, *Family and Kinship in England, 1450-1800* (Pearson Education Ltd., 2001), chap. 2, esp. at 19.

[159] The extent of affection between Henry V and Catherine de Valois has been the matter of some debate. The fact, for example, that she was not at Henry V's deathbed, although staying only a few miles away, was interpreted by Seward a demonstrating the lack of romantic attachment between them: Seward, *Henry V: The Scourge of God*, 210. This is, of course, not the only possible interpretation of events: Henry may not have wished Catherine to see him in the throes of death or, if he thought that it might be contagious in any way, he may have thought it better for her to remain at a safe distance. The possibility can also not be discounted that she did actually visit Henry and that it simply was not recorded.

[160] After all, it might have been some time before another contingent went with which she could safely travel. See: Wavrin, *Wavrin's Chronicle, 1399-1422*, 4:376.

[161] Walsingham recorded that, prior to his death, Henry had "been ill for a long time owing to his excessive, unceasing labours." However, it is difficult to establish the precise chronology of Henry's decline. Henry had overwintered in France to sustain the siege on Meaux, which lasted from October 1421 to March 1422; as with many such sieges, sickness spread. Allmand suggested that it might have been during this period that Henry's health began to be affected, before the illness became more noticeable – and terminal – in June at Senlis, where Wavrin records that he was "suffering a good deal from illness". By Christie's reckoning, Henry was bedridden by July. Hardyng, however, does not record that Henry had "toke sickenes" until August. It is possible, therefore, that Catherine could have known that her husband was suffering from some ailment, even if it was suspected to be a passing one. Whether she would have known early enough and whether it would have been sufficient cause for her crossing to France seems doubtful. Walsingham, *Chronica Maiora*, 445; Allmand, *Henry V*, 1992, 162; Wavrin, *Wavrin's Chronicle, 1399-1422*, 4:384; Christie, *Henry VI*, 3; John Hardyng, *The Chronicle of John Hardyng*, ed. Henry Ellis (London, 1812), 386.

[162] For example, to acquaint herself with, and accustom herself to, her new kingdom; a role in governing England might have been imagined for her; or she simply might have been reluctant to leave on the appointed day, e.g. because of illness or superstition. If a role was imagined for her, it was not the leading role, which went to the D. Bedford and, after his departure in early May 1422, this role was taken by the D. Gloucester, see: Walsingham, *Chronica Maiora*, 444 at n. 5.

all of this was an assumption based on a fixed expectation: her children by Henry would be Henry's successors and, for this reason, both needed to be protected.

9.15.3 Henry [VI]'s Name

At Henry's baptism,[163] according to Wavrin, he was named 'Henry' at his father's behest.[164] In this can be seen a preparatory behaviour.

Names build identity. They affect our personal and social identity; they simultaneously *distinguish* us from others and *situate* us within our social environment.[165] The choice of name can be incredibly significant. We typically carry them throughout our lives; they are statements of our personal history.[166] They also conjure numerous associations. For those who have died, naming somebody after them is also a way of preserving their memory. Indeed, whilst giving a name is an opportunity to mark a child's individuality, it is also an opportunity to publically demonstrate which social connections are special,[167] as well as bestowing on the child some shared identity;[168] it might even be said that naming practices or patterns reveal much about a "family's conception of itself".[169]

Naming children after their fathers is not necessarily an act of vanity. Whereas women have certitude of parenthood, men have not historically possessed that same certainty. By naming children after themselves, men can recognize them as theirs; they can legitimize them and associate them with themselves. Naming Henry [VI] in this way created a natural association between him and his father, making it easier to countenance the younger as the elder's successor.[170]

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[163] Henry [VI] was born on 6 December 1422 at Windsor castle, seemingly around four in the afternoon: Walsingham, *Chronica Maiora*, 444 at n. 2.

[164] Wavrin, *Wavrin's Chronicle, 1399-1422*, 4:361.

[165] "Naming [is] a quintessentially social act...naming acts as a critical element in processes of social incorporation and the constitution personhood.": S Benson (2006) 'Injurious Naming: Naming, Disavowal and Recuperation in the Contexts of Slavery and Emancipation', in G. vom Bruck and B. Bodenhorn (eds) An Anthropology of Names and Naming (Cambridge University Press) pp. 178-94, quoted in: Janet Finch, "Naming Names: Kinship, Individuality and Personal Names," *Sociology* 42, no. 4 (2008): 711.

[166] "Given that most people retain the same forename's throughout their lives, the process of naming a child therefore roots the very statement of a person's individuality within family relationships.": Finch, "Naming Names: Kinship, Individuality and Personal Names," 721.

[167] On this point, see Finch, who particularly sees this with regard to naming people after family members: Finch, "Naming Names: Kinship, Individuality and Personal Names," 720.

[168] "More subtly, and on a much wider scale, names can act as a connector which locks an individual into a cross-generational history which stretches into both the past and the future. A surname tracks an individual's history by indicating a child's parentage. Forenames and surnames both are bestowed by parents upon their children. They represent a permanent, cross-generational link." Finch, "Naming Names: Kinship, Individuality and Personal Names," 721.

[169] Andrew W Lewis, *Royal Succession in Capetian France: Studies on Familial Order and the State* (Harvard University Press, 1981), 2.

[170] Cf. "If the chief is to be recognized as a chief he must, like the ghost of Patroclus, 'be exceedingly like unto himself'. He must live in the same house, wear the same clothes, and do the same things year by year;

In many ways, Henry was a fitting name for a successor to the English throne; it was the most common name of English kings, followed closely by Edward.[171] Even though there was an element of fortune as to which names had become the most prevalent in the roll of English kings, the fact of their commonness is no coincidence.[172] Their recurrence shows a clear regard for using patronyms – particularly with elder children. Giving Henry a family name associated him with the family claim. It was clearly conveyed with dynastic regard.

9.15.4 Reception of Henry [VI]'s Birth

The news of Henry's birth was received joyfully both in England and in the English camp in France.[173] Indeed, according to Wavrin, there had been "more perfect joy displayed" in England "than there had been seen for a long time about any other royal infant".[174]

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and his successor must imitate him." Graham Wallas, *Human Nature in Politics*, 3rd ed. (Constable and Company Ltd., 1927). Having the same name is a good start in this regard.

[171] To a certain extent, the prevalence of the name 'Henry' was due to people consistently giving their elder sons that name, but there was also a great degree of fortune. Had William Adelin outlived his father (incidentally the first king of England by the name of Henry), then 'William' might have become the favourite royal name. Likewise, had Edward the Black Prince (the firstborn son of Edward III) and his own firstborn son, also named Edward, outlived their respective fathers, then there might have been at least five consecutive monarchs by the name of Edward. Had this been the case, it can be easily seen how 'Edward' might have become synonymous with the monarchy as 'Louis' did in France. Indeed, had Henry IV's firstborn son, Edward, survived, then 'Edward' may have continued as a name of considerable pre-eminence even in spite of the Lancastrian advent. That said, had Henry II's firstborn son, Henry the Young King, or Edward I's, also called Henry, then 'Henry' may still have been the most popular name for English kings by the start of the fifteenth century, although the family tree would look quite different.

[172] It can be noted, however, that the Henry VI derived the name 'Henry', through his father, from his grandfather, Henry IV. However, Henry IV's name was not patronymic, but, rather, matronymic. His father, John of Gaunt, had had three principal partnerships: Blanche of Lancaster, Constance of Castile, and Katherine Swynford. In each of them, his firstborn son was called 'John', although only one of these (John, E. Somerset) survived to adulthood. It is possible, of course, that the two latter born sons called John were not called John *after their father*, but, rather, *after their deceased half-brothers*, and, therefore, were *necronyms*, rather than *patronyms*. However, the more likely conclusion remains that they were patronyms. Henry [IV] was born to Gaunt by his first wife, Blanche of Lancaster and, having named his firstborn in a patronymic fashion, it was probably seen fitting to honour Blanche's father, Henry Grosmont, the "Good Duke" of Lancaster, from whom Gaunt had derived his vast estates *jure uxoris*. Grosmont himself was the son of Henry, 3.E. Lancaster. This Henry was the son of Edmund Crouchback and thus the grandson of Henry III. Consequently, Henry VI bore the name 'Henry' largely because it was a Lancastrian tradition, which had begun as a *matronym* (being derived through Blanche of Lancaster), even if that tradition was ultimately traceable back to Henry III. It is interesting to note that Henry IV had not named his firstborn son after himself – who instead was called Edward – but that child died after only a matter of days. However, his second-born son, and eldest at the time of his birth, he named 'Henry' in the typical patronymic fashion. Sydney Armitage-Smith, *John of Gaunt: King of Castile and Leon; Duke of Aquitaine and Lancaster; Earl of Derby, Lincoln, and Leicester; Seneschal of England* (Archibald Constable & Co. Ltd., 1905), 94; Marjorie Anderson, "Blanche, Duchess of Lancaster," *Modern Philology* 45, no. 3 (1948): 156.

[173] Christie, *Henry VI*, 1; Wolffe, *Henry VI*, 28.

[174] Wavrin, *Wavrin's Chronicle, 1399-1422*, 4:361. Whether it is true that Henry's birth had been received more joyfully than other royal births is difficult to assess quantitatively. Wavrin himself was born around 1394 and, therefore, his own memory probably only stretched back to around the turn of the century: Antonia Gransden, *Historical Writing in England*, vol. 2 (Routledge and Kegan Paul, 1982), 288. Richard II, who had abdicated/been deposed in 1399 had not had any children and all of Henry IV's children had been born before he ascended the throne (and probably all before Wavrin was born); thus no child was born of a reigning monarch during Wavrin's living memory – or, indeed, during his lifetime. In fact, the last time

Here is an indication that Henry was no ordinary infant.[175] It is uncertain how people would have reacted had Henry been female, but we can conjecture that the rapturous response to Henry's birth was not only on account of his birth, but also on account of his sex. In all likelihood, this behaviour demonstrates a widely held expectation that Henry would one day be king (because he was the eldest son of the regnant monarch); it was an anticipatory behaviour and a vindication of his hereditary right.

A further piece of evidence as to the reception of Henry's birth is provided by Hardyng, who notes the burgeoning of Henry V's support in France shortly thereafter.[176] Whilst Hardyng himself does not comment on whether this was directly connected to Henry's birth, Allmand believed there to be connection: the prospect of a Lancastrian dynasty was now more real; waverers now might throw their lot in with Henry.[177] If the two events were related, this speaks volumes for Henry as his father's successor in both England *and* France.

9.15.5 Henry V's Testament

Henry V was certainly concerned about the state of affairs following his death. He made a series of wills,[178] the 'third' and final of which, so far as we are aware, was made on 10 June 1421, just before his final embarkation for the Continent.[179] Henry also made a number of codicils: one dated 9 June 1421 in his own hand, the day before the making of his third will; another dated 26 August 1422, made at Bois de Vincennes shortly before his death.[180]

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a reigning monarch had a (legitimate) child was when Thomas of Woodstock (later D. Gloucester) was born in 1355 to Edward III and Philippa of Hainault; and the last time that a first son had been born to a reigning monarch was back in 1330, when Edward the Black Prince (also a son of Edward III and Philippa of Hainault) was born – the better part of a century before Henry [VI]'s birth.

[175] Cf. "[B]y examining the ceremonials and the literary productions that attended the birth of the Dauphin in the seventeenth and eighteenth centuries, it is very clear that the public understood that a veritable king had been born, not just a potential heir": Ralph E Giesey, "The Juristic Basis of Dynastic Right To the French Throne," *Transactions of the American Philosophical Society* 51, no. 5 (1961): 3–47.

[176] "Saynt Dionis then, and castell Boys Vynccent, / Corbell, Pount Melanke, and full great parte of Fraunce, / Burgoyne, Artoys, and Pycardy [to] hym sent / To bone his men without contraryaunce, / And eche cytee, to hym sworne in in substaunce, / Walled townes and castelles euery chone, / As hye regent of Fraunce [by hym one.]": Hardyng, *The Chronicle of John Hardyng*, 386. (Bracketed text by the editor).

[177] Allmand, *Henry V*, 1992, 167.

[178] A document dated 24 July 1415 is generally considered to be Henry V's first will. This was followed by a document dated 21 July 1417, which is known as his second will, although it has been suggested that it was rather in the nature of a letter of wishes than an actual will: Strong and Strong, "The Last Will and Codicils of Henry V," 80. A text of this document can be found in: John Nichols, ed., *A Collection of All the Wills Now Known to Be Extant of the Kings and Queen of England et Al. from the Reign of William the Conqueror to That of Henry the Seventh Etc.* (John Nichols, 1780), 236–43.

[179] This "was clearly intended to supersede the 1415 will": Strong and Strong, "The Last Will and Codicils of Henry V," 83.

[180] Strong and Strong, "The Last Will and Codicils of Henry V," 84.

It has been argued that Henry might have known that Catherine was pregnant when he left for France, which was also the time of the making of the third will. The fact that there are "no specific provisions" therein for his future heir speaks against this hypothesis, but does not necessarily defeat it.[181] If he knew, he might have wanted to avoid 'tempting God';[182] he might also have been undecided as to how to provide for his child, which decision would be contingent upon the sex of the child, number of children, and state of France and England. Furthermore, the possibility of writing a codicil – or even rewriting the will – remained open; there was still opportunity to make more specific provisions. Nevertheless, in his final attempts, there is a clear assumption that Henry [VI] will be his successor; the fact that this is an assumption and there is no act of designation is significant. Also significant is the fact that Henry [VI] had been made P. Wales and D. Cornwall – both of which were traditionally associated with the eldest son of the king. In any case, Henry might not have seen it as being the appropriate place for such matters.[183]

9.15.6 Conclusions

There are a number of anticipatory behaviours apparent prior to Henry V's death in Henry VI's favour. Nevertheless, there does not seem to have been any sustained campaign of constructive behaviours to secure Henry VI's accession in England during Henry V's reign, which rather demonstrates that it was taken for granted. The idea that Henry would succeed was clearly so prevalent and potent that there was no perceived need especially to reinforce it. The fact that the matter had some degree of parliamentary approval is significant.[184]

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[181] Strong and Strong, "The Last Will and Codicils of Henry V." Strong & Strong in fact assert that "by June 1421 Henry knew that the queen was pregnant".

[182] The idea of tempting God, heaven, providence, etc. being untoward appears to have found its way into written English in the fourteenth century (tempting 'fate' or 'fortune' was a slightly later development): "tempt, v.". OED Online. March 2019. Oxford University Press. http://www.oed.com/view/Entry/198973?rskey=qkrzw8&result=2&isAdvanced=false (accessed May 07, 2019) at meanings 2a and 2b. One such example is to be found in Richard Rolle's *Psalter* at Psalm 77:21 in his translation of the line *Et temptauerunt deum in cordibus suis: vt peterent escas animabus suis*, which he translated as: "And thai temptid god in thaire hertis; that thai aske mete till thaire saules": Richard Rolle of Hampole, *The Psalter of Psalms of David and Certain Canticles with a Translation and Exposition in English*, ed. HR Bramley (Clarendon Press, 1884), 280. Rolle was one of the most widely read writers during the fifteenth century, so it is possible that Henry V would have even knew of this line, though, of course, we cannot therefore infer that he ever thought or agreed with the sentiment: Nicholas Watson, *Richard Rolle and the Invention of Authority* (Cambridge University Press, 1991), 31. The sentiment, of course, had its basis in biblical passages, see: Exodus 17:2 and Deuteronomy 6:16.

[183] "If from ROYAL we turn our eyes to NOBLE teſtaments, we ſhall find them conceived in nearly the ſame ſentiments. The care of ſepulture, debts, legacies, and charitable foundations, fill up the common outline." Nichols, *Royal Wills*, iv.

[184] It can be noted that the situation was rather different for his claim to France. We are not here concerned with the French throne; it falls within the constitution of another social group. However, it is worth

9.16 Edward V (1483) – Ambiguous

Edward V is traditionally included in the canon of English monarchs. Whether he ought to be is debateable, given that he was never crowned. Indeed, his inclusion in English regnal lists is perhaps rather a Tudor legacy. By portraying Edward as a legitimate and rightful king of England, Henry VII's seizure of the throne from the 'usurper' Richard III seems more justified.

Both Edward V's family and personal claims were doubtful. Edward's family claim had been derived from his grandfather, Richard, D. York. Richard was descended in the paternal line from Edward III's fourth son, Edmund of Langley, and in the maternal line from Edward III's second son, Lionel of Antwerp. Insofar as the paternal line was concerned, Richard's claim was inferior to that of the Lancastrians; they descended in the paternal line from Edward III's *third* son, John of Gaunt. However, if the maternal line was any matter, then there was an argument that Richard's claim was superior, being derived from Edward III's *second* son. In effect, Richard attempted to revive the Mortimer claim; once again sex and representation came into issue.

Whether Richard, D. York's designs on the throne, and their continuation by his son, Edward [IV], against the Lancastrians were originally justified, after the deaths of Henry VI and his son, there was little gainsaying the Yorkist paternal claim; with the descendants of Henry IV in the male line all dead, the Yorkist line now represented the most senior unbroken male line from Edward III. This was the situation at the time of Edward IV's death. As things stood, Edward V's family claim would then appear to have been strongest, excepting perhaps the fact that this situation had been brought about by nefarious means, which might have been thought to have invalidated their claim.

There is every reason to think that Edward IV thought that his descendants would hold the English throne, particularly once he had an heir and had dispensed with his Lancastrian rivals. He called his eldest son Edward, after himself; it looked as though a new dynasty was to be founded. Unluckily for Edward [V], his father's death left him with a lone paternal uncle (Richard [III], D. Gloucester) – an uncle who was somewhat at odds with his sister-in-law and her family, the Woodvilles. There was every reason to

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remarking that Henry's claim was based upon the Treaty of Troyes; an agreement by which the Lancastrians became the successors to the Valois claim to the French throne, i.e. through *presentation*. This claim was hotly contested; the Dauphin, Charles [VII], argued that it was his by hereditary right. In the end, Charles prevailed. Once again, chance and other factors were involved – not least the fact that he was a 'native' claimant. However, there was a clear narrative among Charles' supporters – not least from Jeanne d'Arc – that Charles was the rightful king; a right of which he could not be deprived.

suspect that there would be a struggle for power. This struggle Richard [III] justified by attacking Edward V's personal claim, i.e. his title. He claimed that Edward V was illegitimate, being born of a bigamous union as his father had been pre-contracted to Eleanor Talbot.[185]

There is something to be made for the argument that Edward was avoided so that a royal minority might be avoided. However, there is little contemporary evidence for this. Indeed, even though minorities had been avoided in the past, everything points to the fact that there was now a very strong presumption in their favour. There was a prevalent and potent idea of hereditary right, which idea worked as an *exclusionary reason*.[186] As with royal minors before him, it was his *vulnerability*, not his *minority*, which was Edward's undoing. In many respects, Richard III's frustration of people's expectations by supplanting his nephews contributed to his undoing.

9.17 Edward VI (1547) – Minority

Henry VII had something of a hereditary claim to the throne through his Beaufort heritage, but this was tenuous.[187] Nevertheless, it appears to have been sufficient for him

[185] "On Sunday, June 22nd, a certain Doctor Shaw was put up to preach at Paul's Cross 'the Kyng Edwarde's children wer not ryghtful enheritours unto the crowne, but that the Duke of Glowcetir's title was bettir than thers'." Kenneth H Vickers, *England in the Later Middle Ages*, 7th ed. (Aberdeen University Press, 1950), 489.

[186] See, *supra*, 4.14.

[187] He was descended, through his mother Margaret Beaufort, from John of Gaunt (s. Edward III) and his mistress – and, later, wife – Katherine Swynford. The children of this pairing had been legitimized by Richard II in the Parliament of January 1397, theoretically with full rights. The succession had been discussed in the Henry IV's parliaments of 1404 and 1406 – in the latter parliament, it was discussed twice. The ultimate effect of these was to settle the throne on Henry's sons and their heirs general – male or female (interestingly, that the female descendants of Henry's sons might succeed was a point upon which parliament specifically insisted). The line of succession beyond these was left unsettled. Henry had sisters, as well as half-siblings; his half-brothers were all Beauforts. The implication was that these might be excluded from the succession. In February 1407, John Beaufort, E. Somerset, sought confirmation from Henry IV of the Beauforts' legitimation; Henry duly confirmed this, but, in so doing, introduced a provision *specifically excluding* the Beauforts from the succession. On the parliamentary discussions involving the succession, see: Chris Given-Wilson, "Designation and Succession to the Throne in Fourteenth-Century England," in *Building Legitimacy: Political Discourses and Forms of Legitimation in Medieval Societies*, ed. Isabel Alfonso, Hugh Kennedy, and Julio Escalona (Brill, 2004), 102–4. On the Beauforts' exclusion, see: Gerald Harriss, *Cardinal Beaufort: A Study of Lancastrian Ascendancy and Decline* (Oxford University Press, 1988), 40. Henry's father, Edmund Tudor, was, it should be added, Henry VI's half-brother; they shared the same mother, Catherine of Valois, who had firstly been married to Henry V. Descent from a dowager queen who married into the English royal family, however, could not constitute grounds for a claim to succeed on hereditary grounds. Indeed, even if Henry had some hereditary right, it was by no means the strongest: Edward Plantagenet, E. Warwick (s. George, D. Clarence and hence nephew to both Edward IV and Richard III) arguably had the best claim; Henry appears to have recognized this and had him installed in the Tower of London: GR Elton, *England under the Tudors* (Methuen & Co. Ltd., 1962), 19–20. After having himself crowned, Henry married Elizabeth of York (dau. Edward IV), not only to help heal divisions, but also surely to buttress his claim by incorporating something of her hereditary right into his own – not to mention, preventing her from marrying another and thereby creating some new claim. His claim to the throne thereafter was partly *jure uxoris* – by right of his wife.

to lead the challenge to Richard III, whom he supplanted after defeating at Bosworth. In November 1485, Henry declared: "that his coming to the right and crown of England *was as much* by lawful title of inheritance as by the true judgment of God in giving him victory over his enemy in battle…"[188] Heredity might have helped to engineer a claim, but it was incomplete – conquest (i.e. *appropriation*) completed, if not perfected, it.

Both Henry VII and his son, Henry VIII, experienced some vulnerability concerning the legitimacy of their title.[189] However, by the mid-sixteenth century, there was little doubt that the English throne was a Tudor possession. In part, this was due to the dispersal of contenders, but it was also due to the fact that measures had been taken during Henry VIII's reign to secure his family's title; in particular, through the three *Acts of Succession* passed in Parliament.[190] There were no prevalent and potent ideas as of yet that Parliament had exclusive control over the succession, but there was a clear impression being formed in people's minds that Parliament was an appropriate place not only to *discuss* the succession but also to *settle* it – whether directly or, as in this case, indirectly by granting Henry VIII the right to settle the succession by testament.

As such, Edward VI succeeded by a mixture of hereditary right (it almost certainly would have frustrated people's expectations had he been overlooked), and the designation of his father, which designation was made according to parliamentary grant.[191] Edward VI's age appears to have been no impediment. Given that he had no paternal uncles who might rival his claim or any legitimate royal half-brothers, Edward's claim was relatively secure.

9.18 Jane Grey (1553) – Ambiguous

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[188] 'Henry VII: November 1485, Part 1', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1485-pt-1 [accessed 8 May 2019] at Item 3. As Elton has said, Henry appears to have left the details of his supposed hereditary right "studiously vague": Elton, *England under the Tudors*, 19.

[189] In the former case, the conspiracy to place Perkin Warbeck on the throne – who argued that he was Richard of Shrewsbury, Edward IV's second son – stands out. In the latter case, there was Edward Stafford, D. Buckingham, who Henry VIII so distrusted – especially given his Plantagenet heritage – as to have him executed.

[190] These were the *First Succession Act* (25 Hen. VIII, c. 22, 1533), *Second Succession Act* (28 Hen. VIII c.7, 1536), and *Third Succession Act* (35 Hen. VIII, c. 1, 1543). These established the immediate order of succession and allowed that Henry VIII might dispose of Crown by letters patent or testament with such conditions as he thought fit. This right Henry exercised in his testament – the validity, and, indeed, authenticity of which has been doubted. See: AF Pollard, *England under Protector Somerset* (Kegan Paul, Trench, Trübner & Co. Ltd., 1900), 3ff; Jennifer Loach, *Edward VI*, ed. George Bernard and Penry Williams (Yale University Press, 2002), 21–25; Suzannah Lipscomb, *The King Is Dead: The Last Will and Testament of Henry VIII* (Head of Zeus, 2015).

[191] It was determined that the Abp. Canterbury should say at Edward VI's coronation that: "Syrs; here I present King Edwarde, rightfull and undoubted enheritour *by the lawes of God and man* to the Royal Dignitie and Crowne Imperiall off this realme…" John Roche Dasent, ed., *Acts of the Privy Council of England*, vol. 2 (London, 1890), 30 (Sunday, 13 February 1547)[emph. added].

Lady Jane Grey, Edward VI's first-cousin-once-removed,[192] was probably fifteen or sixteen when Edward died. According to the terms of the *Third Succession Act* and Henry VIII's will, Jane stood in the line of succession, though she was behind Henry VIII's daughters, Mary and Elizabeth.[193] Edward VI and his government sought to set aside Mary and Elizabeth's claims, not least for fear that they might overturn the new protestant settlement – especially the Catholic Mary. To this end, Edward made a 'Devise' sometime in 1552 or early 1553, settling the succession on Jane's male descendants. When it became apparent in the early summer of 1553 that Edward's health was failing, the 'Devise' was amended to settle the succession on Jane herself.[194]

Edward sought to convene a Parliament to approve this settlement. Indeed, Edward Montagu "claimed that without such an act the attempt to reorganize the succession would be treasonable".[195] Henry VIII might settle the succession by will; this right had not extended automatically to his son. Letters patent had been issued and accepted, but this was not enough, seemingly, to overcome the expectation that, seeing as Parliament had made the previous settlement, only Parliament could make the next. It was not to have the opportunity to do so before Edward died in July 1553.

In under a fortnight, Mary was queen. The objection to Jane does not appear to have had anything to do with her age. Rather, it had everything to do with her title and the rightfulness thereof.[196] As with Edward V, her age was almost largely irrelevant; it only worked to her disfavour by making her more vulnerable. Had Edward had his Devise approved by Parliament, the matter could have been quite otherwise. As it was, Jane's succession appears to have more greatly frustrated people's expectations than Mary's Catholicism.

9.19 Epilogue: Elizabeth I to Culloden

[192] She was descended from Henry VIII's younger sister, Mary, and her eldest daughter, Frances.
[193] It is worth noting that, for some reason, both Jane's mother, Frances, and the descendants of Henry VIII's elder sister, Margaret, were excluded from the succession.
[194] See: Paulina Kewes, "The 1553 Succession Crisis Reconsidered," *Historical Research* 90, no. 249 (2017): 468.
[195] Kewes, "The 1553 Succession Crisis Reconsidered," 468.
[196] It was Lady Jane Grey's argument that, though Mary and Elizabeth had been appointed to the succession by Act of Parliament, their claims had been invalidated: Mary's by the annulment of her mother's marriage to Henry VIII and Elizabeth's by her mother's divorce from Henry VIII on grounds of treason. They were, therefore, "clearly disabled, to ask, claim, or challenge the said imperial crown, or any other of the honours, castles, manours, lordships, lands, tenements, or other hereditaments as heir or heirs to our said late cousin Edward the 6th…" In her own favour, besides Edward VI's designation, she also mentioned her "being naturally born here, within the realm". Quoted in: Guy Carleton Lee, *Leading Documents of English History* (George Bell & Sons, 1900), 282, 283.

The Elizabethan succession question is a topic too large to enter into here.[197] However, it is worthwhile noting a few points: (1) there was much uncertainty as to who Elizabeth's successor would be if she died childless, which underlines the importance of heredity; (2) many attempts were made to have the matter deliberated upon and approved by Parliament, which indicates Parliament's importance;[198] and (3) that, in the event, James I's accession was surprisingly smooth, which indicates that matters might be settled by common agreement.

The Stuarts moved away from any reliance on parliamentary title towards hereditary right,[199] which idea found judicial approval in *Calvin's Case*:[200] the court declared that the Crown was James' by descent and, moreover, that he was king without "any essential, ceremony or act to be done *ex post facto*: for coronation is but a Royal ornament and solemnization of the Royal descent, but no part of the title."[201] Charles I's downfall appeared for a time to have disposed of this right,[202] but the Restoration under Charles II in 1660 seemed to have resurrected it. This changed under Charles II's unpopular brother, James II.

Having ejected James II in the 'Glorious Revolution', Parliament took it upon itself to settle the succession. It did this, first, in the *Bill of Rights* (1689);[203] later, in the *Act of Settlement* (1701)[204] and the *Articles of Union* (1706), as recognized by the *Acts of Union*

[197] This includes doubts not only as to Elizabeth's successor, but also as to her own succession. On the Elizabethan 'Succession Question', see esp.: Mortimer Levine, *The Early Elizabethan Succession Question, 1558-1568* (Stanford University Press, 1966); Susan Doran and Paulina Kewes, eds., *Doubtful and Dangerous: The Question of Succession in Late Elizabethan England* (Manchester University Press, 2014).
[198] Indeed, 13 Eliz. I, c. 1, §IV (1571) made it high treason to question the right of Parliament, with royal assent, to direct the succession. This is printed in: GW Prothero, ed., *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I* (Oxford University Press, 1913), 59. See further: John Neville Figgis, *The Divine Right of Kings*, 2nd ed. (Cambridge University Press, 1914), 87–88.
[199] This is undoubtedly in no small part, much as Figgis identified, to the fact that James I's claim to the English throne largely rested upon hereditary right, which right was notably confirmed in statutory form in James' first English Parliament (1 Jac. I, c. 1 (1604)): Figgis, *The Divine Right of Kings*, 137, 138. The Act is printed in: Prothero, *Statutes and Other Constitutional Documents 1558-1*, 250–51.
[200] *Calvin's Case* (1608) Co. Rep. 1a
[201] Edward Coke, *The Reports of Sir Edward Coke, Knt.*, ed. John Henry Thomas and John Farquhar Fraser, vol. 4 (Joseph Butterworth and Son; J. Cooke, 1826), 18 (VII 10b).
[202] There is an interesting letter written during the Cromwellian Protectorate, which seems simultaneously to say that Parliament is empowered to interfere with, and, indeed, control the succession, whilst also being largely bound to accept the *de facto* ruler: Anon., *A Copy of a Letter Written to an Officer of the Army by a True Commonwealths-Man, and No Courtier, Concerning the Right and Settlement of Our Present Government and Governors* (London: Thomas Newcombe, 1656), 1. For some discussion on this letter, see: Jonathan Fitzgibbons, "Hereditary Succession and the Cromwellian Protectorate: The Offer of the Crown Reconsidered," *English Historical Review* 128, no. 534 (2013): 1121–24.
[203] 1 Will. & Mar., Sess. 2, c. 2
[204] 12 & 13 Will. III, c. 2

(1707).[205] In one sense, these were by no means revolutionary. Their provisions maintained the ancient hereditary pattern in which descent and succession were intertwined. The novelty was the fact that the trajectory and conditions of the succession were subject to parliamentary grant. English and, shortly thereafter, British, monarchs were only such because Parliament made them so. Succession came to rest ultimately on a basis not of *gravitation*, but *presentation*.

Nevertheless, it was some while before this idea was fully prevalent and potent. James II and his successors continued to press their claims by hereditary – and, indeed, divine – right. In the Jacobites, they found many who agreed. This argument, however, died at Culloden on 16 April 1746, when the Jacobites were defeated by the Hanoverian forces. The death of Charles Edward Stuart in 1788 put the matter entirely beyond doubt. The succession lay in Parliament's gift.

9.20 Conclusions

England was a monarchy for almost the entirety the period covered.[206] Furthermore, the throne tended to admit of only one monarch at any given time.[207] Interregna and divided power were viewed with distrust. Thus, there were prevalent, potent, and persistent fixed expectations that (1) **the country should be ruled by a monarch**; (2) **there ought always to be a monarch**; and (3) **there should be but one monarch**. In other words, within the social group, roughly defined as those permanently resident in England, there ought always to be one person to whom is assigned the bundle of activities and influence associated with the title of king or queen regnant of England. Excepting the middle decades of the seventeenth century, there appears to have been little idea that the English social group should or could be arranged otherwise. In this respect, the constitution was fixed.

Generally speaking, there was also a fixed expectation, particularly in the central part of our period, that: (4) **the monarch ought to be male**. Something of the *principle of implied*

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[205] For the text of Article II, see 6 Anne, c. 11: John Selden, *Titles of Honor*, 3rd ed. (E. Tyler and R. Holt, for Thomas Dring, 1672), 494. The *Acts of Union* were two acts: First, of the English Parliament (Union with Scotland Act 1706, 6 Ann., c. 11) and, second, of the Scottish Parliament (Union with England Act 1707).

[206] This is excepting, of course, the brief period of the Commonwealth and Protectorate.

[207] As we have seen, Stephen failed to have his son, Eustace, crowned during his lifetime. It should be noted that Stephen was not told that such a thing was altogether impossible; it was merely impossible in his case given his oath-breaking. Henry II and his son, the Young Henry, are the notable exceptions in English history to this idea of the absolute exclusivity of the throne. It is to be remembered that Edward IV regarded Henry VI as having been deposed; Henry VI might have formerly been a king, but he had been stripped of his position. For the most part, it was seen necessary first to topple a king if one wanted to be king oneself; rebellion did not follow anointing, anointing followed successful rebellion.

exclusion can be seen here.[208] It does not seem to have ever been the case that women were *absolutely and expressly excluded* from the throne. However, because people tended to associate the throne with males, women were thereby impliedly excluded. Matilda, for example, challenged this. Whilst her ultimate failure cannot be solely attributable to her sex,[209] it seems unlikely there would have been a disputed succession but for her being female.

From the mid-sixteenth century, the idea of regnant queens was more seriously entertained: Lady Jane Grey, Mary I, and Elizabeth I all contributed strongly to the idea of its possibility.[210] Of course, society and monarchy were changing at this time. Warfare, too, was changing. With the advent of firearms, bodily size and strength became less important; with changes to military tactics, there was less of an expectation that monarchs command troops personally.[211] Even though there are famous examples of female warriors and commanders, for the most part there had been a firm association between these and their being men's activities. The diminution in importance of this side of the role – the disassociation of this activity from monarchy – removed a potential bar to women succeeding. Nevertheless, the old idea persisted, if in a modified form: **the monarch ought *preferably* to be male**. It was only recently that this position changed.[212]

There was also a well-established fixed expectation that (5) **the throne was the monarch's to enjoy for their lifetime**. The early retirement of a monarch – for whatever reason – was an extraordinary event, which extraordinary nature had potential to upset

[208] See, *supra*, 3.11.
[209] Her personality and affinities certainly also played their respective parts.
[210] It is notable, though, that, as seen above, Edward VI's 'Devise', whilst naming Jane's male heirs as his successors, originally passed over Jane herself. Her sons, grandsons, etc. might *represent* her in the succession, but she – being female – was not initially countenanced for the throne. Until that point, there had been no regnant English queen, not least since Anglo-Saxon days. Whilst Matilda had come close in the twelfth century and whilst queen consorts had often acted as regents, the idea of a regnant queen was still somewhat strange and foreign – even if the prospect of it had become much more real with Henry VIII's stipulations in his will. Ultimately, it was necessity that moved Edward and his advisors to name Jane herself. There simply was not the time to wait for her to have male heirs; by this time, Edward would be long dead.
[211] The last British monarch personally to command troops in battle was George II in the Battle of Dettingen (27 June 1743). This battle, interestingly, took place in the context of the War of the Austrian Succession (1740-48), which was fought over the question as to whether a woman might succeed to, or convey, the Habsburg Monarchy – and, if so, which woman was to be preferred. Britain, alongside others, supported the claim of Maria Theresa, the eldest daughter of the last monarch, Charles VI (who had had no sons). This was to be contrasted with the claims of the daughters of Charles VI's older brother – Joseph I – and their spouses. In the event, Maria Theresa and her husband, Francis Stephen (who became Francis I), prevailed.
[212] The Succession to the Crown Act 2013 (c. 20). See also: Neil Parpworth, "The Succession to the Crown Act 2013: Modernising the Monarchy," *The Modern Law Review* 76, no. 6 (2013): 1071–72.

and frustrate the generally held expectations as to how and when the throne should be transmitted.

These things clearly indicate that people, throughout the period, held certain fixed expectations about how activities and influence were to be distributed within the group and, more particularly, how such activities and influence were to be transferred. The fact that they did not commit these to writing in any coordinated manner does not detract from their prevalence or potency. Indeed, many took these things for granted and never thought seriously to question them. Whilst there was some disagreement as to what exactly the fixed expectations entailed, and whilst the prevalence and potency of specific expectations varied over time (as one would expect from the Generational Theory of Law), it must be stressed that there is a world of difference between not having an absolutely settled and comprehensive rule (i.e. a singularly potent, prevalent, and persistent fixed association that covered each and every possible scenario) and not having any rules at all.[213]

As we have seen, there were many recurrent ideas that arose concerning the transmission of the crown. The most prominent of these was that of heredity – particularly according to male-preference primogeniture. One could go so far as to say that this appears to have been, for the entirety of the period, the basic presumption. In other words, there was a fixed sequential expectation that the death of the king be followed by the coronation of their eldest son or, failing that, their nearest male relative. In the earlier part of this period, this was drawn largely from supposed custom and natural law; in the latter part, from parliamentary approval and disposal. In effect, over time the hereditary principle went from one based solely in *gravitation* to one of *gravitation by virtue of presentation*.

Indeed, problems only tended to arise with the hereditary principle where:

(i) There were familial complications;[214]

[213] As Wormald has said: "Principles did exist, even if they were distorted in practice". Wormald was talking here about Anglo-Saxon England, but the same is true for the rest of the mediaeval period, except we would perhaps do well to modify it slightly to say that such principles were *sometimes* distorted in practice. See: James Campbell, Eric John, and Patrick Wormald, *The Anglo-Saxons*, ed. James Campbell (Phaidon Press Limited, 1982), 116.

[214] For example: (a) premature death of heirs (e.g. William Adelin in 1120), sometimes raising the issue of representation (e.g. in the cases of Geoffrey, D. Brittany in 1186 and Edward of Woodstock in 1376, whose heirs were Arthur of Brittany and Richard [II] respectively); (b) failure of legitimate and eligible issue, e.g. Edward the Confessor's lack of children, or the fact that Henry I, though he was survived by a number of sons, left no *legitimate* male issue, resulting in the contest between his daughter, Matilda (notably supported by her half-brother Robert, E. Gloucester), and his nephew, Stephen of Blois; and (c) remarriage, especially where it resulted in new royal children, e.g. Eadgar, who appears to have had four children by three women, left behind him the question as to whether it should be his eldest natural son, Edward the Martyr, or his

(ii) The heir was absent from the kingdom;[215]

(iii) There was an ongoing challenge to the predecessor's regime;[216]

(iv) The previous monarch had been dethroned or had otherwise proved unpopular;[217] or

(v) The heir was a child, i.e. a minor.[218]

In terms of royal minors, there were three situations in which they were particularly vulnerable, in which their ostensible hereditary right was most likely to be subverted:

(i) A surviving lone paternal uncle (*patruus*);[219]

(ii) A step-mother with her own royal children, i.e. legitimate, royal half-siblings;[220] or

(iii) Some ongoing threat, necessitating an adult leader.[221]

That the greatest threats to a minor's title tended to come from *within* their family both demonstrates the strengths and weaknesses of hereditary right. Most people would never have countenanced the idea of their own accession. A family connection was necessary

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eldest son by his most recent pairing, Æthelred [II], who should succeed, which question was eventually settled by the former's death.

[215] This is especially if they were absent for an extended period. For example, Harthacnut appears to have lost out on the English throne, at least initially, through his long period of absence following Cnut's (i.e. his father's) death. It is interesting to note that Edward I, who was also absent for a considerable period following the death of his father, Henry III, appears to have faced a challenge to his title.

[216] This challenge might be considered to be inherited by their supposed successor. For example, Henry III's right to the English throne was contested by Louis [VIII] of France, who had initially been fighting against Henry's father, King John.

[217] This raised the question as to whether the ordinary rules ought to be followed in extraordinary circumstances. Again, this can be seen in the case of Henry III in the context of the First Barons' War and Louis [VIII]'s invasion.

[218] This we have seen above: Æthelhelm and Æthelwold (871); Eadwig and Eadgar (946); Edmund Ætheling and Edward the Exile (1016); Eadgar the Ætheling (1066, twice); Henry FitzEmpress (1135); and Arthur of Brittany (1199).

[219] For example: Æthelwold who was passed over in favour of his sole-surviving paternal uncle, Alfred the Great; Eadwig and Eadgar, sons of Edmund I, who were initially passed over in favour of their sole-surviving paternal uncle, Eadred; Arthur of Brittany who had to face his sole-surviving paternal uncle, [King] John; and Edward [V], who was faced with his sole-surviving paternal uncle, Richard [III]. Whilst Æthelwold, Eadwig, and Eadgar appear to have at least been tolerated by their respective uncles, Arthur and Edward appear to have met untimely fates quite possibly at the connivance of theirs. Indeed, it was perhaps this distrust of the *patruus*, who stood to gain from their nephew's (or, indeed, niece's) displacement, that made Parliament wary, during the minority of Henry VI, of conveying an over-powerful role upon the younger of Henry's uncles, Humphrey (D. Gloucester). After all, as Fortescue put it, to place a person in the care of one who would benefit most from their demise was "*quasi agnum committere lupo ad devorandum*" (like committing a lamb to a wolf to be devoured): JS Roskell, "The Office and Dignity of Protector of England, with Special Reference to Its Origins," *The English Historical Review* 68, no. 267 (1953): 253.

[220] For example, Edward the Martyr appears to have been killed, if not by, then on the orders or with the complicity of, his step-mother, Ælfthryth – whose son, Æthelred, stood to benefit from Edward's death.

[221] For example, it might be for this reason that Alfred, rather than his nephews, Æthelhelm and Æthelwold, succeeded in 871, given the Viking aggressions. This might also have played a role in the initial avoidance of Eadwig and Eadgar in 946.

to establish eligibility, if not title; claims without this – however tenuous – could not be taken seriously. Indeed, there is an extent to which everybody consistently agreed with a single rule: (6) **the most senior representative of the predecessor's surviving family ought to be their successor**. The real question was what constituted the 'most senior representative'?[222]

In the earlier part of the period, it was more easily argued that this might designate the king's eldest surviving brother, even if the king left infant children; in the latter part of the period, it was almost universally taken to designate the monarch's eldest surviving son or, failing sons, daughter – regardless of their age. There was seemingly no fixed expectation that was prevalent and potent after the Norman Conquest that the monarch absolutely had to be an adult. Indeed, the prevalent and potent idea appears to have been that a candidate's minority did not disqualify them or otherwise make them ineligible to succeed.[223] As we have seen, Richard III attacked Edward V's eligibility, not on the grounds of the latter's minority, but on the grounds of the latter's supposed illegitimacy. Purely in terms of the succession, a candidate's minority was not thought to be a relevant or significant consideration.

Across the centuries, we see a number of preparatory behaviours – both anticipatory and constructive – connected with hereditary right.[224] For example:

(i) Selection of birthplace;[225]

(ii) Naming practices, especially the giving of dynastic names;[226] and

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[222] This might be interpreted according to various criteria, e.g. age, experience (often conflated with age), sex/gender, ability (particularly in warfare, cf. *heretoga*), wealth (which can be both converted into military power and distributed as patronage), and influence (including the size of their following and the overall confidence they could command).

[223] Cf. *supra*, 6.12.

[224] For a discussion of how mediaeval royal children in western Europe were prepared for kingship, which naturally involved a number of *preparatory behaviours*, see: Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," chaps. 1–2.

[225] There is every reason to think that the place of birth of future English monarchs was important – but not decisive. After all, if it had been, Richard [II] of Bordeaux would never have become king. Nevertheless, pains quite possibly appear to have been taken to ensure that future heirs to the kingdom were born in the right place. Of particular importance is the story about Edward I sending his wife, Q. Eleanor, to Caernarfon Castle in Wales so that their child – in this case, a son, Edward [II] – could be born in Wales, so that the Welsh might have a Prince 'free from all blemishes on his honour' and 'unable to speak a word of English': Roger L'Estrange, *The Case Put Concerning the Succession of His Royal Highness the Duke of York* (London: M. Clark, 1679), 2. It is worthwhile noting also the statute, *De Natis Ultra Mare* (25 Ed III, 1350), which clarified that the birthplace of heirs to the throne did not have a bearing upon their eligibility to succeed. As such, birthplace might be chosen for political gain.

[226] These names were designed to invoke the memory of previous holders of the office – in other words, to associate the newborn with their predecessors in others' minds. It was also a way for a father to show that he acknowledged the child, as, after all, whereas maternity is always certain, paternity is less so; giving a son their father's name shows that the father accepts the child as theirs. That there is, for example, a string of Edwards who were kings of England, then, is little surprise. Indeed, had Edward of Woodstock ascended

(iii) Investing titles, especially that of P. Wales in later mediaeval England.[227]

However, in spite of these and in spite of the general presumption in its favour, hereditary right, whilst potent, was not indefeasible. There were other ways in which an expectation might be planted in people's minds that somebody might become king. In particular, there were the various forms of presentation.[228] Nevertheless, this was unlikely to be potent in the face of a clear hereditary right.

There has been some notion that the English throne, particularly during the Anglo-Saxon period, was essentially elective. Heredity might make one a candidate and create a presumption in one's favour, but it was election that made one monarch. To address this fully would be beyond the scope of this thesis. However, it can be suggested that, in matter of fact, many instances of so-called 'election' might be better construed as instances of 'adjudication'. In other words, people did not gather to choose their *preferred candidate*, but, rather, to decide – according to certain fixed associations – who had the *greatest right*. Rather than having the character of *presentation* implicit in the idea of election, then, this would rather give an impression of *gravitation* being the predominating factor.

In these six respects, then, the basic constitution in England changed but little during the period covered. These were ideas that were not only *prevalent* and *potent*, but also *persistent*. Nevertheless, there are detectable fluctuations both in terms of what ideas were present, and in terms of the extent to which they were prevalent and potent. It is true that there were general tendencies, which gives the sense of there being 'developments', but one also constantly sees certain ideas gaining ground, being checked, and losing ground; the extent of conciliar or parliamentary involvement, and the extent to which the throne was supposedly elective, are cases in point. The succession, then, is a lesson vitiating Whig narratives.

Of especial interest in the context of the Generational Theory of Law is the extent to which each generation appears to have thought that it might settle the succession by common agreement, though the extent to which it would be prepared to depart from what would normally have been expected was usually conservative. Indeed, in these instances, there are parallels with *Verfassungdurchbrechungen* or 'exceptive laws'; there is an

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the throne and had his firstborn son survived, there would have been two further Edwards, likely as not before the turn of the fifteenth century.

[227] Such titles arguably straddle ideas of hereditary right and right by designation. It resolves down to a matter of causation: is the title given because of right, or is the right created because the title is given?

[228] After all, if somebody, ostensibly with power and influence, says "You shall be king" (and this is a thing that you want), then it is easy for an expectation to arise that this should be the case.

admission that normally the case would be otherwise, but, given extraordinary or exceptional circumstances, people's ordinary fixed associations might set aside. There is a tangible note of *specificity*; the general rule (i.e. people's normal expectations) remains valid and is still the guiding principle *except in this particular case*.

Even today, in the age of Parliamentary Sovereignty, it is questionable as to whether Parliament might radically alter the constitution by disposing of the monarchy or drastically changing the terms of succession thereto of its own accord.[229] Most people would probably expect that there would have to be at least general election with manifesto pledges or referenda beforehand. Were Parliament to proceed without this, it is doubtful whether the formal constitution, as it stands, would permit the courts to intervene; nevertheless, within the wider material constitution, there is every reason to suspect that a great many people's expectations would be frustrated and a constitutional crisis would ensue.

[229] Particularly in view of the fact that one of the central doctrines of the present constitution is "Whatever the Crown in Parliament enacts is law". In other words, under present arrangements, the monarch would theoretically have to agree to any change wrought by Parliament to abolish the monarchy. If the monarch were to do so only under considerable pressure – under *duress* – or if it were done without the goodwill of those in line to the throne, then there could well be reason to believe that the abolition was improperly done. Indeed, it would be an act of injustice – for those who would be monarch would be deprived of that which we would expect them to have and receive, i.e. the crown. Of course, there is reason to doubt whether the monarch would be able to refuse any such move – both politically and constitutionally. After all, there is the convention that monarchs will not refuse the royal assent to any bill duly passed in Parliament. Even though we might still countenance the possibility of their doing so, there is every reason to believe that their doing so would frustrate many an expectation – their role is to do Parliament's bidding, not to frustrate the will of Parliament (which is the imputed will of the people – or, at least, of the active members of the electorate). Howsoever any such change is wrought, there can be little doubt that, if things continue much as they are, the transition to a republican form of government will be a change of great moment – and, quite likely, great contention. This might be cushioned by having a longer, rather than a shorter transitional period, thereby giving people time to adjust their expectations. For a discussion of the place of the monarchy in the constitution and the possibility of moving to a republican constitution, as well as the implication thereof, see, e.g.: Richard A Edwards, "Republican Britain - The Constitutional Implications," *Cambrian Law Review* 31, no. 1 (2000): 1–20.

10 – Government and the Minorities: A Study in Provision

10.1 Introduction

Periods of *royal minority* are often associated with periods of *regency*,[1] i.e. arrangements made to compensate for a royal's inability to rule effectively – in this case, because of the monarch's youth.[2] Unless children are especially revered or the monarchy is largely symbolic, such arrangements are a practical necessity. Without them, much would go undone or be improperly done – with potentially far-reaching consequences for law and order.

Arrangements for royal minorities tended to have two effects on the distribution of activities and influence. First, there was a process of *disassociation* whereby the royal minor was disassociated, at least for a time, from the exercise of some, if not all, of the activities/influence ostensibly attached to their position. Second, there was a process of *redistribution* whereby some, if not all, of those things were thenceforward, albeit perhaps with certain restrictions, to be associated with, and exercised, by others (usually a 'regent' or 'regency council').[3]

The advent of a royal minority did not necessitate radical or extensive changes to the existing constitutional arrangements (i.e. the existing distribution of activities and influence). To a large extent, the fact of their minority might be accommodated within

[1] On the concepts of regency and minority, and for an explanation of some of the terminology employed in this chapter, see Appendix III.

[2] Ward has discussed the mediaeval use of the term 'regent', as well similar and potentially alternative contemporary terms. In terms of how *we* ought to describe such situations, Ward expressed preference for the term 'vice-regal guardianship' over that of 'regent'. However, these rather seem to import the same thing; the former might well be the definition of the latter. As such, it is not necessarily profitable to invent new terms, especially when they result in somewhat clumsier and more roundabout phrases. The better thing is to ensure that we deploy vocabulary carefully and appropriately, adding qualification where necessary. Furthermore, it is important that we distinguish between *internal* and *external perspectives* (see *supra* 2.22). From our perspective, it is often appropriate to employ the terminology of regency, because it is the terminology – objectively speaking – that makes the most sense for us to use. However, we must balance this with the internal perspective, particularly as expressed through the specific vocabulary employed and the connotations that that appears to have had (assuming, of course, that there *was* specific vocabulary employed, rather than circumlocutions or avoidance). We ought to discuss the terminology that they used and, where we lack an equivalent term, it is appropriate to say that it is *like* something with which we are familiar; perhaps to say that the thing in question is a *kind* of the thing with which we are familiar, rather than saying that it *is* that thing. Consequently, we might say that a mediaeval person held a position *assimilating to* that of regency, as we would understand it; alternatively, that that mediaeval person was a *kind* of regent, as we would understand it. If appropriate, we might give these specific forms specific names. This seems to me to be the most sensible approach. It preserves nuance without making matters over complex or convoluted. For Ward, see: Emily Joan Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250" (University of Cambridge, 2018), 40ff, 51–52.

[3] To this might also be added a process of *creation* whereby, in response to the extraordinary nature of the situation, new activities/influence might be invented, which were either attached to pre-existing positions or formed the basis of new ones.

the existing framework. Some pre-existing positions, institutions, etc. might find their importance and scope increase somewhat, but most people could continue as before. Indeed, there was an extent to which the changes that did occur could be masked. Thus, for example, orders might be issued *as if they were produced by the minor themselves*, even though they were actually produced by others; the minor might serve as the mouthpiece of government, if not the voice. Whilst this might seem somewhat disingenuous, it might help to foster a sense of normality. Consequently, the changes made in response to a royal minority might be *conservative* and, to a greater or lesser extent, *obscured* – but that does not mean that they were not there.

There are six royal minors considered in this study, i.e. those after the Norman Conquest. None of them were suffered to rule from the beginning as if they were an adult. In each and every case, alternative arrangements were made. In some cases, these were made overtly and deliberately; clear expectations were laid down as to how activities and influence were to be distributed and exercised for the duration of the minority. In such cases, we might think much more along the lines of made orders and formal constitutions.[4] By contrast, in other cases, changes were made with far less transparency, clarity, and general agreement. In such cases, we will have to think more along the lines of spontaneous orders and material constitutions.

There is not the space here to consider the arrangements that were made in their entireties. Instead, the focus is on a narrower aspect: the **matter of provision**, i.e. *how* and *by whom* was the distribution of activities and influence during the minorities decided? Who was associated with the act of deciding as to which arrangements were to be made? Throughout the period, there were, broadly speaking, three candidates who could – whether reasonably or not – claim that the **power of provision** lay with them, i.e. the power to decide upon the distribution. These were: (1) the minor's predecessor; (2) the Church; and (3) 'representative' bodies.

The role of each of these with respect to the six royal minors will be considered in turn. As will be seen, the influence of each of these changed from generation to generation. It will also be seen that each minority was far from anarchy. In each case, those involved worked according to, and within a framework of, certain fixed associations and expectations.

10.2 Henry III

[4] See, *supra*, 4.24 and 4.25.

10.2.1 Henry's Predecessor

Henry III's father, King John, died in the midst of a crisis. Many of the barons were in open rebellion and, moreover, had invited the French Dauphin, Louis [VIII], to challenge for the English throne. However, John was still possessed of a loyal following and, at least until his final days and hours when he was beset by illness, his mental capacity. Thus, even in spite of the questions about his accession,[5] loss of continental lands, and accusations of misrule, John was regarded by many as King until the end.[6] As such, any steps that he might have taken to provide for his son's government might have been accepted as authoritative and binding. Whether he took any such steps is debateable.

Given his relatively advanced age when Henry was born,[7] family history,[8] and disturbances of his reign (viz. the conflicts with the K. France and the Barons' War), it was distinctly possible that John might die before his eldest son came of age. However, there is no evidence that, prior to his final days, John took steps to provide for his son's government should he die prematurely. Whether he thought he *could* so provide or, indeed, whether he *needed* to do so, is uncertain, though some of his actions in his final days provide us with some insights.

We can begin with his testament. A reasonable reading of Rymer's transcription of John's testament would indicate that John thought that he *did not* have a power to provide for the government after his death. There are strong overtones of conciliar government: John was dependent upon his *fideles* (faithful, loyal men); he could only rule through them and with their help.[9] However, Rymer omitted two crucial words, which fundamentally alter the sense.[10] John merely said that he relied upon them *for the execution of his testament*. In itself, it tells us little about John's views on government or ability to provide for his

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[5] See, *supra*, 9.10.
[6] In effect, there were many who still regarded the association between John and the kingship with positive regard (cf. *supra* 4.20) – which positive regard gave it its potency.
[7] John was thirty-three when he married the young Isabella of Angoulême (August 1200) and approaching forty-one when his first son, Henry [III], was born (October 1207).
[8] His father (Henry II) had been fifty-nine when he died, his paternal grandfather (Geoffrey Plantagenet, Ct. Anjou) only thirty-eight; his brothers Henry the Younger, Richard, and Geoffrey had died aged twenty-eight, forty-one, and twenty-seven respectively. Richard, of course, had died as a result of violence, rather than ill health, and so therefore could have expected to live longer. Nevertheless, John would have been quite familiar with the idea of mortality.
[9] Thomas Rymer, *Foedera, Conventiones, Litterae et Cujuscunque Generis Acta Publica Inter Reges Angliae et Alios Quosuis*, ed. Adamo Clarke and Frederick Holbrooke, vol. 1 (London, 1816), 22. For a translation of John's will based on this text, see: Wilfred Lewis Warren, *King John* (Peregrine Books, 1966), 275–76. For the conciliar overtones, see: SD Church, "King John's Testament and the Last Days of His Reign," *The English Historical Review* CXXV, no. 514 (2010): 505–28.
[10] Church, "King John's Testament and the Last Days of His Reign."

son's government. What is clear is that he made no such provision in his testament.[11] This is unsurprising given that his testament appears to have been (a) made *in extremis*, and (b) largely concerned with his soul's salvation.[12]

Next, there is a letter that, according to Wendover, John sent from his deathbed to all sheriffs and castellans. In it, he ordered them "one and all to obey his said son".[13] A literal interpretation of this would argue that John had no notion that there would be a minority government. He did not say "obey my son's protectors," etc.; he merely said to obey his son. As such, John possibly thought it needless to make special provisions for a minority government; the current constitutional system could facilitate Henry's youth without an overt, albeit temporary, redistribution of activities/influence. This does not mean that he thought Henry able to rule without considerable aid and counsel – simply that John had not envisaged special, formalized arrangements for a minority government.

There is also a letter that John sent on 15 October 1216 (three days before his death) to Pope Innocent III, in which he commended "his kingdom and his heirs to the protection of the pope."[14] England had been a papal fief since May 1213,[15] which theoretically gave

[11] Church suggested that the thirteen 'arbiters' listed at the end of the document might have been intended to form a minority government. These thirteen were: Guala, papal legate; Peter des Roches, Bp. Winchester; Richard Poer, Bp. Chichester; Silvester, Bp. Worcester; Aimery de St-Maur, master of the Temple; William Marshal, E. Pembroke; Ranulf, E. Chester; William de Ferrers, E. Derby; William Brewer; Walter de Lacy; John of Monmouth; Savaric de Mauléon; and Falkes de Bréauté. However, whilst these individuals were certainly important during Henry's minority, there appears to be little evidence that they ever acted as a group, which indicates that John never intended them to (except insofar as his testament was concerned). The fact that John probably did not intend this is reinforced by the omissions of Hubert de Burgh (the justiciar) and Richard Marsh (the chancellor). See: Church, "King John's Testament and the Last Days of His Reign," 14, 15ff.

[12] Church, "King John's Testament and the Last Days of His Reign," 15ff.

[13] Roger of Wendover, *Flowers of History*, ed. JA Giles, vol. 2 (Henry G Bohn, 1864), 378; Roger of Wendover, *Flores Historiarum* (Sumptibus Societatis, 1861), 385.

[14] Nicholas Vincent, ed., *The Letters and Charters of Cardinal Guala Bicchieri, Papal Legate in England, 1216-1218*, vol. lxxxiii (Canterbury and York Society, 1996), n. 140b.

[15] In 1205, following the death of Hubert Walter (Abp. Canterbury), John fell out with Pope Innocent III over the question of provision to the see of Canterbury. In theory, the right of electing a bishop belonged to the chapter of the cathedral. However, seeing as the Abp. Canterbury was no mere provincial bishop, the king's nominee had normally been accepted. This did not happen in this case. John was unwilling to accept their candidate (Reginald, a sub-prior) and they were unwilling to accept John's candidate (John de Grey, Bp. Norwich). The matter was referred to Innocent, who found both candidates unworthy. Instead, he proposed a candidate of his own – Stephen Langton. However, Langton was unacceptable to John and an impasse was reached. In 1208, Innocent placed England under interdict; in 1209, he excommunicated John; and in 1212, he threatened to deprive John of his throne and invited Philip II, K. France, to invade England. The very real threat of invasion worried John and he sought to make peace with Innocent – who would only consider it if John conceded on every point. John, in despair, did so, and on 15 May 1213 England became a papal fief. John gave homage and fealty to the Pope, and promised that England would pay an annual tribute to Rome. This was not the first time that England had, at least in theory, been the vassal of a foreign power. During Richard I's captivity under the Holy Roman Emperor (Heinrich VI), England had been promised as a fief of the Empire as a condition of Richard's release. This promise appears to have been quickly forgotten; the papacy's claims on England, by contrast, were somewhat longer lived. Given England's need of the papacy's support, this fact is none too surprising. See: Warren, *King John*, esp. chap.

the Pope some oversight over English affairs as suzerain and, indeed, now made the Pope the guardian of John's children (and they his wards). Consequently, the letter could be seen as John exercising some power of provision in favour of the Pope. However, the opposite conclusion seems more convincing: *John thought that he had no such power, because that power – that activity – resided, not in him, but in the Pope*. The letter, then, was a recognition of this and, if anything, symbolized a handover of power.

Finally, there is the account presented in the *History of William Marshal*.[16] According to the *History*, John asked those by his deathbed "to see that he [William Marshal, E. Pembroke] takes charge of my son and always keeps him under his care, for my son will never govern these lands of mine with the help of anyone but the Marshal".[17] Certainly, the impression that one gets form this is that John wanted to create an association in people's minds between William, on the one hand, and caring for and advising Henry III, on the other. However, whether John thought that this necessitated a formal disassociation, as well as redistribution and/or creation, of activities/influence is unclear – as is whether this was rather after the manner of a 'letter of wishes' than a strict command.

10.2.2 The Church

The letter that John had sent to Innocent III was, in fact, received by Innocent's successor, Honorius III. Upon receiving the letter, Honorius immediately appointed Guala Bicchieri as papal legate with "full power without appeal to do what he thought expedient for the king and the kingdom".[18] This was reinforced by the further grant of extensive powers in April 1217.[19]

The initial letter did not reach England for some weeks, but Guala, who had been in England when John died,[20] was already playing a significant role in England as the Pope's representative. It was probably he who accepted Henry's homage to the papacy at Henry's

5; HWC Davis, *England under the Normans and Angevins, 1066-1272*, 10th ed. (Methuen & Co. Ltd., 1930), 319, 353–69.

[16] The *History* was certainly biased and written sometime later than many of the events it describes. It is possible that this scene was extrapolated from later events: David Crouch, *William Marshal: Knighthood, War and Chivalry*, 2nd ed. (Pearson Education Ltd., 2002), 124.

[17] AJ Holden, S Gregory, and David Crouch, eds., *History of William Marshal*, vol. 2 (Anglo-Norman Text Society, 2004), ln. 15167-15191.

[18] Carpenter, *The Minority of Henry III*, 13.

[19] GJ Turner, "The Minority of Henry III. Part I," *Transactions of the Royal Historical Society* 18 (1904): 256.

[20] He had been in England for around fifteen months at the time of John's death: Kate Norgate, *The Minority of Henry the Third* (Macmillan & Co. Ltd., 1912), 62.

coronation on 28 October 1216 in Gloucester,[21] and he played a prominent role in the assembly that took place the following day, which appointed William to the leading position in the government.[22]

Whilst it is clear that William was appointed *during* the Gloucester assembly, precisely *by whom* he was appointed is rather less clear.

The testimony of the *History* has William at least being *nominated* by the assembly, although the actual *appointment* itself was perhaps made by Guala;[23] in the very least, it was Guala who formally invested him.[24] Superficially, the Barnwell Chronicle's narrative is somewhat different. It reported that William, Guala, and Peter des Roches (Bp. Winchester) were jointly "entrusted with the king and the kingdom 'by the common counsel' of the magnates."[25] All three would, therefore, seem to have owed their authority *to the assembly*, rather than, for example, the assembly and William owing theirs *to Guala*. It would also mean that Peter, who became Henry's tutor, held his position by virtue of the assembly and, consequently, was not beholden in this regard to William or Guala. Certainly, the Barnwell narrative supports Peter's later protestation, recorded in

[21] Norgate, *The Minority of Henry the Third*, 4.

[22] William was originally styled as 'justiciar', which, over the course of a couple of weeks, was used at least on four to six occasions. This title had much to recommend it. In the past, justiciars had been much the king's *alter ego* and had often acted as regent in cases of absence. However, there was a problem. There was already a justiciar: Hubert de Burgh. Hubert had, until that point, been engaged in the defence of Dover castle, and it was probably because of him that the practice of referring to William by the title was brought to an end. There had been dual justiciars in the past (e.g. Robert of Leicester and Richard de Luci in 1159, and Hugh de Puiset of Durham and William de Mandeville in September 1189), but it was usually a singular office. Moreover, there was seemingly a fixed expectation that *justiciars were appointed by monarchs*. John had not removed Hubert and Henry was too young to do so; the justiciarship, therefore, could be neither made nor unmade. Some other title would have to be found for William. From mid-November 1216, William was styled *rector noster et regni nostri* ('guardian of ourselves and our kingdom'). This title was unprecedented and disappeared when William retired in April 1219. Exactly what it imported is unclear, though it implies sweeping powers, i.e. a wide range of activities and a high level of influence. It can be noted that Ward was of the opinion that the element 'rector' in the title, whilst "implying a leader or governor", also had "connotations of a more tutorial role, such as master or instructor". On the use of the title 'justiciar', see: FM Powicke, *King Henry III and the Lord Edward: The Community of the Realm in the Thirteenth Century* (Oxford University Press, 1966), 7; Turner, "The Minority of Henry III. Part I," 246; Norgate, *The Minority of Henry the Third*, 70; Crouch, *William Marshal: Knighthood, War and Chivalry*, 127. On the justiciarship: Francis West, *The Justiciarship in England 1066-1232* (Cambridge University Press, 1966), passim, and, for the examples of dual justiciarships, 35 and 65. For Ward: Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," 44.

[23] After having been suggested for the regency, William appears to have been reluctant to accept. He only did so after Guala had offered him spiritual rewards. Whether this was an offer 'too tempting to be refused', as Painter thought, or whether Guala added it as a sweetener whilst 'requiring' William to accept the role, as Norgate thought, remains unclear. Sidney Painter, *William Marshal: Knight-Errant, Baron, and Regent of England* (John Hopkins Press, 1966), 196; Norgate, *The Minority of Henry the Third*, 7.

[24] "Thereupon, as was his duty, the legate handed everything over, / And the worthy Marshal took into his care / Both the King and the realm.": Holden, Gregory, and Crouch, *History of William Marshal*, 2004, 2:ln. 15558-15561.

[25] Crouch, *William Marshal: Knighthood, War and Chivalry*, 124; Carpenter, *The Minority of Henry III*, 17.

the *History*, that William had only been entrusted with the kingdom – not the king. William, however, appears to have thought this false. He had been entrusted with both; Peter's authority was beholden to his.[26]

William appears to have been given some power of provision with regards to appointments. For example, the *History* says that Guala – notably exercising a controlling influence – was quite specific that it was William, not the magnates, who should decide on the matter of who should be entrusted with Henry's person.[27] However, the magnates, too, appear to have had some powers over appointments.[28] Yet, when, in mid-1217, a number of magnates petitioned that Ranulf (E. Chester) should be William's *coadjutor*, in view of William's advanced age, this petition was made neither to William nor the other magnates, but to Honorius – who refused it.[29] This would indicate that there was some prevalent and potent – if not universal and absolute – fixed association between the papacy and the ultimate power of provision. William's powers were controlled by the Pope and, if anybody wanted to change the structure of government, it was to the Pope, not some native officer, that they must appeal.

The question of provision arose again in early 1219, when it became clear that William was dying. In April, he called a council to his bedside.[30] It appears from the *History* that William initially intended that the magnates elect a direct successor, if it pleased Henry.[31] This would indicate, of course, that William thought they had such a power – even if not in 1216, then now in 1219. However, after Peter's protestation, William appears to have taken the decision into his own hands.[32] The following day, he entrusted Henry "to the care of God, the pope, and the papal legate"; indeed, he seemed to be of the opinion that only the Pope could keep England safe.[33] Henry was then, despite Peter's further protestations, publically given over to the care of the legate (now Pandulf).[34] This can be seen in two ways. On the one hand, it might demonstrate that it was accepted that William

[26] See Carpenter, *The Minority of Henry III*, 106.
[27] Holden, Gregory, and Crouch, *History of William Marshal*, 2004, 2:ln. 15581-15610.
[28] For example, in November 1218, Ralph de Neville was appointed by a Great Council as keeper of the king's seal; he later argued that, as he had been appointed by a Great Council, only a Great Council could dismiss him: Carpenter, *The Minority of Henry III*, 94–95.
[29] AJ Holden, S Gregory, and David Crouch, eds., *History of William Marshal*, vol. 3 (Anglo-Norman Text Society, 2006), 165; James W Alexander, *Ranulf of Chester: A Relic of Conquest* (The University of Georgia Press, 1983), 76–77.
[30] Carpenter, *The Minority of Henry III*, 103–4; Crouch, *William Marshal: Knighthood, War and Chivalry*, 139; Painter, *William Marshal*, 277.
[31] Holden, Gregory, and Crouch, *History of William Marshal*, 2004, 2:ln. 17987-17988.
[32] Holden, Gregory, and Crouch, *History of William Marshal*, 2004, 2:ln. 18025-18028.
[33] Holden, Gregory, and Crouch, *History of William Marshal*, 2004, 2:ln. 18050-18060.
[34] Holden, Gregory, and Crouch, *History of William Marshal*, 2004, 2:ln. 18091-18114.

had the power to determine his successor, besides by those in Peter's camp.[35] On the other hand, it might be seen as William defaulting on making a choice – in the absence of an internal appointment, Henry's care fell back to his overlord, i.e. the Pope.[36] There is every reason to suspect that both interpretations had contemporary support.

William's position was allowed to lapse upon his death and there followed a period (1219-21) in which the government was directed by a triumvirate: Pandulf (papal legate), Hubert de Burgh (justiciar), and Peter des Roches (Bp. Winchester and king's guardian). These worked relatively harmoniously on a number of occasions, particularly in the earlier part of this period. However, there was also a significant amount of jostling for position. On the one hand, this pitted Pandulf against Hubert and Peter; on the other hand, it pitted Hubert and Peter against one another. By and large, it was Hubert who came out the better. As time wore on, his influence increased significantly, such that he was found to be increasingly acting without either Pandulf or Peter, though in conjunction with the King's Council – indeed, there appears to have been some expectation that the latter be involved in making decisions.[37]

The basis of these arrangements is far less clear than in the case of William. To a great extent, it can be seen as a fall-back position, in which each of those involved relied largely on their own natural authority – Hubert as the justiciar, Peter as Henry's guardian, Pandulf as the papal legate, and the Council as representative body of the magnates. Nevertheless, papal oversight remained. By April 1220, consent had been obtained from the Pope for a second coronation;[38] in May 1220, Pandulf secured permission from the Pope to, in effect, "change the king's governor", which heralded the end of Peter's guardianship;[39] and, in July 1221, Pandulf himself was recalled on papal authority.[40] Indeed, in April 1223, it looked as though the Pope was about to bring the minority to an end – i.e. collapse the minority government – as he had sent letters ordering the members of the government to deliver to Henry "the free and undisturbed disposition of his kingdom".[41] The Pope

[35] See, e.g.: Turner, "The Minority of Henry III. Part I," 293–94.
[36] See, e.g.: Painter, *William Marshal*, 279.
[37] Such a view can be seen most clearly in the dispute concerning the decision over Harbottle Castle. Vieuxpont and the E. Salisbury both challenged the government on this decision on the basis that it had been made by a clique, rather than the council proper. In effect, the government had acted with improper authority: Carpenter, *The Minority of Henry III*, 209–10, 236.
[38] Carpenter, *The Minority of Henry III*, 187.
[39] Carpenter, *The Minority of Henry III*, 243.
[40] This was upon the petition of Stephen Langton (Abp. Canterbury) – largely on the basis that Pandulf's position as legate conflicted with Langton's position as primate, although it was also something of a reflection of the increasing strength of the government: Carpenter, *The Minority of Henry III*, 254.
[41] Carpenter, *The Minority of Henry III*, 301.

clearly thought that this, which would fundamentally change the basis of the government, was within his discretion.

In the event, these letters were not enforced – at least, not immediately. In the summer, the government formally wrote to the Pope asking that he withdraw the letters. He refused to do so, being reluctant to rescind what he had granted, although he qualified them by granting discretion to Henry as to when they would come into force. The delay of the letters' implementation shows that the Pope's influence was not so great as to compel those in England to obey whatever. Nevertheless, the referral back to the Pope shows a willingness to be ruled by him. Had Honorius refused to bend, it would have been interesting to see whose will prevailed. In the event, something of a compromise was reached – the creation of an *option*.

That there was an association between the papacy and the power of provision during Henry III's minority can little be doubted, even if the precise nature of this association is less clear. It does not seem that the Pope himself made any detailed provisions for Henry's government. He was too far removed to do so. Instead, he entrusted his legates to act as they thought appropriate, seemingly within a wide ambit. Not only was the Pope associated with this power, therefore, but it was deemed that it could be delegated. It was perhaps his representatives' willingness to cooperate with the English magnates and proceed by consent that makes it less clear as to the boundaries of the Pope's powers of provision – including whether the association between the Pope and the power of provision might operate to the exclusion of other parties, viz. the magnates.

10.2.3 'Representative' Bodies

As has been seen, the role of the magnates in determining the structure of the government is somewhat unclear. They were clearly prominent in the Gloucester assembly of 28 October 1216 where William was appointed. Both the *History* and the Barnwell Chronicle have them playing an instrumental role in the process, though it is only the latter that paints them in a more dominant light. Indeed, even though, as has been seen, the magnates, when gathered in Great Councils, appear to have had some powers of appointment, and even though William appears to have mooted the idea of their electing his successor, there can be little gainsaying that it was to the papal legates and the Pope that appeals were made when any major changes were to be made. Moreover, even though Hubert appears to have been supported by the magnates through various councils throughout the period of his ascendency, he owed his position, not to them, but to the

natural authority derived from his status as justiciar and in the absence of some superior officer appointed by the Pope.

Even though there does not appear to have been a prevalent and potent idea that the ultimate power of provision lay in the magnates, there nevertheless appears to have been some idea that they should be consulted.

10.2.4 Interim Conclusions

John, whether or not he thought that he might have some power of provision extending after his death, does not appear to have exercised it. After his death, there appears to have been some desire to proceed on the basis of consensus, if not consent. Given the problems during his reign and its aftermath, this is understandable. Nevertheless, it seems that the power of provision was largely identified with the Pope and his legates. Whether the Pope's exercise of this power would have been accepted had he (or his representatives) chosen a structure or personnel that the magnates found profoundly disagreeable is something of a moot point, as is whether the magnates themselves could have made provision without the Pope's express permission or approval.

Indeed, however these parties – the papacy and the magnates – worked out the details of government, that the power of provision was associated with these, and these alone, is abundantly clear. The exercise of such a power was not within the remit of any private individual; it was not associated with some foreign prince, such as the K. France or the Holy Roman Emperor; it was not associated with the 'Commons', which, as yet, had little by way of direct representation. If any of these had tried to make provision, it is unlikely that it would have been accepted (at least, *readily* and *without recourse to violence*), because there was no notion – i.e. fixed association giving rise to fixed expectations – that these were persons associated with such an activity.

10.3 Edward III

10.3.1 Edward's Predecessor

Edward III, like Henry III, came to the throne following a crisis in his father's reign. However, Edward's father, Edward II, had been defeated, discredited, and dethroned – unlike Henry's father who had died whilst still in possession of his throne and a significant backing, not least from the papacy. There is no evidence that Edward II made any attempt to influence the structure or personnel of his son's government. Given the fact of his unpopularity and downfall, this is unsurprising. He had forfeited his right to rule – and,

with it, any claim that he might have had to determine what happened during Edward III's first years on the throne. None of the activities or influence associated with the kingship were now associated with Edward II, this included.

10.3.2 The Church

One of the greatest differences between Henry III's minority and all subsequent minorities – including Edward III's – was the papacy's role. It had claimed powers during Henry III's minority unparalleled in any of the others.

The papacy was not yet unimportant in Edward's time, but its influence over secular matters had begun to decline.[42] Both Edward I of England and Philip IV of France, for example, had successfully asserted themselves *vis-à-vis* the Church.[43] In theory, England was still under papal overlordship, but the potency of this idea was waning. In 1334, England would make the last of its intermittent financial contributions as a papal fiefdom; in 1343, would make it illegal for anybody to carry letters from the papacy in Avignon that might be prejudicial to the interests or rights of the King;[44] and, in 1366, would repudiate papal overlordship altogether.[45] The papacy was still influential in its way, but there was no pretence that the Pope had any direct role in the orchestration of English government. The fact that it had only recently transferred to Avignon and was more concerned with its relations with the continental powers also probably played a role; it was in little position to assert overlordship of England.

Of course, the Church was not yet without influence. There were still the ecclesiastical members of Parliament – Archbishops, Bishops, Abbots, and Priors. Indeed, on some occasions, these outnumbered the lay members,[46] even if the lower clergy preferred to absent themselves where they could.[47] Thus, the Church might exert a large degree of influence through Parliament, but only *through* Parliament and as an *element* thereof. Neither individual members of the Church (whether Pope, Archbishops, etc.) nor the Church as a distinct social group (e.g. when sat in convocation) had any especial claim to

[42] CW Previté-Orton, *A History of Europe from 1198-1378*, 3rd ed. (Methuen & Co. Ltd., 1951), chaps. 11–12.
[43] CW Previté-Orton, *Outlines of Medieval History*, 2nd ed. (Cambridge University Press, 1933), 352ff; Previté-Orton, *A History of Europe from 1198-1378*, esp. 228-286.
[44] Goldwin Smith, *A Constitutional and Legal History of England* (Charles Scribner's Sons, 1955), 201.
[45] Geoffrey Barraclough, *The Medieval Papacy* (Thames and Hudson, 1968), 161.
[46] For example, in 1295 there were 90 spiritual peers as opposed to 45 lay peers; in 1509, the numbers were 48 and 36 respectively: Henry St Clair Feilden, W Gray Etheridge, and DHJ Hartley, *A Short Constitutional History of England*, 4th ed. (Oxford University Press, 1911), 124.
[47] Luke Owen Pike, *Constitutional History of the House of Lords* (Macmillan & Co., 1894), 156–57.

determine the distribution of activities and influence within the secular government.[48] Had they tried, they probably would have failed; such was not an activity associated with them *qua* ecclesiastics.

10.3.3 'Representative' Bodies

It is unclear as to whether Edward III was deemed incapable of ruling by virtue of immaturity and, therefore, in need of some form of regency government.[49] After all, he had already been Keeper of the Realm (i.e. regent).[50] Moreover, Edward, being two months above fourteen, was somewhat older than Henry III had been at the time of accession;[51] he had greater experience and, as has just been mentioned, had already held high office, even if only nominally.[52] Nevertheless, it is clear that, for the first three years

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[48] Indeed, many of the prelates sat in Parliament, not because of their spiritual status, but rather *per baroniam* – because they held land from the Crown. In many respects, therefore, they were, like their lay peers, essentially there for secular reasons; their being prelates was something of a coincidence.

[49] Indeed, whether or not this ought to be designated as a period of 'minority' or, perhaps, rather, as a period of 'tutelage' is something of a contested point. For those terming the period a minority, see, e.g.: Kenneth H Vickers, *England in the Later Middle Ages*, 7th ed. (Aberdeen University Press, 1950), 139; Bertram Wilkinson, *The Later Middle Ages in England, 1216-1485* (Longman, 1969), 132. 'Tutelage' was the term employed by Stubbs (at least, the compiler of the contents page) and, more recently, Ormrod: William Stubbs, *The Constitutional History of England in Its Origin and Development*, 5th ed., vol. 3 (Clarendon Press, 1896), vi; W Mark Ormrod, *Edward III* (Yale University Press, 2011), chap. 3.

[50] When Edward II fed England in the face of Isabella and Mortimer's invasion, it was deemed that the situation had become one in which the king was able, but not present. In other words, an absentee regency was triggered (see App. II). As Edward had made no provision for the government in his absence, so it was argued, Isabella (Edward [III]'s mother) and her supporters appointed Edward [III] as Keeper of the realm, ostensibly with the consent of the community of the realm. Edward was thirteen years old at the time. (It can be noted that Edward had also been appointed Keeper of the Realm in August of the previous year, in view of Edward II's imminent departure for France, though, in the event, it was Edward [III] who went and, therefore, although appointed previously, did not hold the position until 1326). That this was an attempt to arrogate power to Isabella's party cannot be doubted. Moreover, whether anybody but the king had a right to appoint a regent in his absence is questionable. Nevertheless, there was clearly an effort to maintain a sense of normalcy: the King was outside the realm and, therefore, people expected that there would be some regent acting in his stead. It is unsurprising, therefore, that Edward [III]'s keepership lapsed when Edward II re-entered the realm, albeit as a prisoner. After all, the keepership was only valid and legitimate by virtue of Edward II's absence and only for so long as he remained absent. See: Ormrod, *Edward III*, 33, 44–45, 47.

[51] Although it is clear that Henry III did not achieve his majority upon turning fourteen (though it was deemed that he no longer required a guardian from this time, even if this was something of a pretext for removing Peter des Roches), there were French precedents for fourteen being the threshold for majority: Norgate, *The Minority of Henry the Third*, 73. There were also the earlier examples of Otto III (Holy Roman Emperor) and Frederick I (K. Sicily and later Holy Roman Emperor). Indeed, under Roman law, fourteen marked the transition from childhood to adolescence: Fritz Schulz, *Classical Roman Law* (Oxford University Press, 1954), 164–65.

[52] Whether this spoke against the need for a regency during Edward III's 'minority' turns on the comparability of absentee regencies and regencies by virtue of immaturity. There are good reasons for treating them differently. A youthful regent for an absent monarch might be tolerated because that monarch could exercise oversight. As such, a *youthful regent* need not have a great deal of actual power. By contrast, a *youthful monarch* would have full powers and, moreover, would lack a superior power to direct and control their actions. The experience and abilities of a youthful monarch mattered much more than those of a youthful regent. Therefore, the fact that Edward had already held the keepership did not necessarily preclude a period of regency in view of his minority. The keepership was a lesser position than the kingship; holding the former did not mean holding the latter without restrictions.

of his reign, Edward played little role in the government. This was largely due to the *de facto* regency of his mother, Isabella of France, and her partner, Roger Mortimer. However, there does appear to have been a movement at the start of Edward's reign towards instituting a formal regency council, if not also a regent, for the period of his minority.

Just as in the case of Henry III, there appears to have been some idea that such matters ought to be settled through communal deliberation. In Henry's case, by the magnates in Great Council; in Edward's, by Parliament. The fact that a council – of whatever nature – was appointed in the Parliament of January 1327 is significant, even if its membership might have been decided beforehand.[53] It indicates that there was a perception that Edward was as yet unable to choose his own counsellors. More importantly, it is an indication that there was some idea that Parliament was an appropriate place for discussing and deciding such matters. Indeed, given the *Statute of York* (1322),[54] there was probably a growing *expectation* – both in terms of prevalence and potency – that it *would* be consulted in such matters.

Henry, E. Lancaster, appears to have headed this council. Indeed, he is described as having been made *custos* at Edward's coronation,[55] which title implies some form of regency. Whilst Edward was probably considered too old to require a personal guardian,[56] the Council's and Lancaster's appointments seem to indicate an intention to institute a regency government. Edward was young and unproved;[57] there was a desire to put arrangements into place to ensure effective rule.

However, the Council quickly became a nonentity. Instead, Isabella and Mortimer – most especially the latter – ruled in Edward's name. Yet, there are indications that, in subverting the power of the Council, Isabella and Mortimer frustrated people's

[53] Indeed, its membership had possibly been decided even before Edward's coronation. Leland, a somewhat 'dubious' source, lists the members of the council and suggests that it was instituted owing to Edward's 'tender age'. See: James F Willard and William A Morris, eds., *The English Government at Work, 1327-1336*, vol. 1 (The Mediaeval Academy of America, 1940), 132. The appointed members were: Abp. Canterbury; Abp. York; Bp. Winchester; Bp. Hereford; Henry, E. Lancaster; E. Marchal; E. Kent; E. Warrene; Sir Thomas Wake; Sir Henry Percy; Sir Oliver of Ingham; and John of Roos.

[54] This enacted that the consent – of prelates, earls, barons, and the community of the realm – was required for the enactment of legislation. This built on earlier ideas, e.g. the expectation in clauses 12 and 14 of Magna Carta that the greater personages in the kingdom be consulted – particularly when financing was involved.

[55] William Stubbs, *The Constitutional History of England in Its Origin and Development*, 4th ed., vol. 2 (Clarendon Press, 1896), 387.

[56] Ormrod, *Edward III*, 58.

[57] There was a recognition that Edward was not yet of full age, e.g. in respect to the Forest Charter: Ormrod, *Edward III*, 58.

expectations – not only of *good* government, but also of *legitimate* government. Thus, for example, in October 1328, Lancaster refused to attend the Salisbury Parliament until the Council's power was restored; he also issued a list of charges against Isabella and Mortimer's government. After some military manoeuvring, Lancaster stood down on the promise that his grievances would be addressed in the next Parliament; he paid £11,000 to secure pardon.[58] Furthermore, this might be seen in the development of rumours concerning Edward II's survival – one of which ensnared his brother, Edmund of Kent.[59] Mortimer had frustrated people's expectations as to *who* could rule and *how* such a position might be achieved – even to the point of people wanting to restore one considered to be a bad king (viz. Edward II).

In January 1328, Edward married Philippa of Hainault; in June 1330, she gave birth to their first child – a son. In October 1330, when a Great Council met at Nottingham, Edward was just shy of eighteen. Edward appears to have thought himself sufficiently mature; it would be intolerable for things to continue as they were for much longer. He should be king in deed as well as name – this is what he and others expected. Consequently, Edward surprised and arrested Mortimer during the night at Nottingham. He declared that, henceforth, he would govern.[60]

Mortimer was subsequently tried and found guilty; he was executed on 29 November 1330. There is a distinct sense amongst his contemporaries that Mortimer had acted above his station; he had arrogated powers to himself of which he was undeserving and to which he was not entitled. One of the principal charges made against him was that he had set aside the Council.[61] He had frustrated people's expectations of right and good governance; he had broken the law and undermined the constitution. For that, he deserved – in their eyes – to die.

Thus, even though the idea that a Council appointed by Parliament should be inviolable was not yet sufficiently prevalent and potent to have prevented Isabella and Mortimer from seizing power, there is clearly a sense that the frustration of its existence and operation by Isabella and Mortimer frustrated people's expectations.

10.4 Richard II

10.4.1 Richard's Predecessor

[58] Vickers, *England in the Later Middle Ages*, 143.
[59] This cost Edmund his life; he was executed in March 1330.
[60] Vickers, *England in the Later Middle Ages*, 145.
[61] Vickers, *England in the Later Middle Ages*, 145.

Richard II was ten years and five months when he succeeded his grandfather, Edward III, in 1377. Richard's father, Edward of Woodstock ('the Black Prince'), had died in the June of the previous year, leaving the nine-year-old Richard as heir apparent to Edward III, then on the cusp of turning sixty-three. Woodstock, though Richard's father, had never been king himself and so it is unsurprising,[62] especially given the fact that the incumbent was still alive, that Woodstock did not make – or, indeed, *try* to make – provisions for his son's minority government.[63]

King John and Edward II, given the circumstances of their ends, can perhaps be forgiven for not attempting to make provisions for their successors' governments. However, Edward III was clearly elderly and in ill-health. It would not have required a great deal of foresight to see that he might die before Richard came of age. Indeed, the anxiety to have Richard confirmed as Edward's successor is unsurprising in this light.[64]

People were obviously thinking ahead to the future and, under these circumstances, it might have been sensible to consider how the country would be governed if that future was rather closer than further. However, there was certainly no initiative on Edward III's part to make any such provisions. This could be explained by his poor health and the fact that the government was largely at this time controlled by his eldest surviving son, John of Gaunt. It is difficult to give credence to ideas that Gaunt planned to murder Richard and take the throne for himself (at least, at this stage),[65] but Gaunt might well have not considered it in his interests to make especial effort to plan his nephew's government before it was an established fact. In any case, he had greater problems with which to contend.

10.4.2 The Church

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[62] Though, there was a precedent for the heir-apparent making provision for the succession and government in the event of their and their predecessor's dying before the next heir came of age. This is to be found in the will made by Edward I on 18 June 1272 at Acre whilst he was on crusade. There had recently been an attempt on his life and so the impetus for making the will is understandable. Cf. JR Studd, *A Catalogue of the Acts of the Lord Edward, 1254-1272* (PhD Thesis: University of Leeds, 1971), 731–32; JS Roskell, "The Office and Dignity of Protector of England, with Special Reference to Its Origins," *The English Historical Review* 68, no. 267 (1953): 217 (n.1).

[63] He had seemingly taken the measure of entrusting Richard into the care of his father (Edward III) and brother (John of Gaunt, D. Lancaster): "Then he called the King, his father, and the Duke of Lancaster, his brother; he commended to them his wife, and his son, whom he greatly loved, and straightaway entreated them so that each was willing to give his aid. Each swore upon the book and promised him at once that they would comfort his child and maintain him in his right. All the princes and barons swore all round to this, and the noble Prince of fame gave them a hundred thousand thanks…": Chandos Herald, *The Life & Feats of Arms of Edward the Black Prince*, ed. and trans. Francisque Michel (J.G. Fotheringham, 1883), 283–84.

[64] See, *supra*, 9.13.

[65] See Vickers, *England in the Later Middle Ages*, 240.

Throughout Edward III's reign,[66] and, indeed, the fourteenth century as a whole, the papacy's standing decreased markedly;[67] England no longer considered itself a papal fiefdom. Indeed, there was a growing body of antipapal literature.[68] There was also an increasing body of anticlerical sentiment – particularly among the followers of Wycliffe and Hus, who had support in England (not necessarily for unselfish purposes) from the likes of Gaunt. The depredations of the Avignon papacy, especially under Clement VI, had not helped the papacy's cause; the English *Statute of Provisors* (1351) is readily understood in this context.[69] This antipapal sentiment was plain in the January of the year in which Richard acceded when the crown's intention of resisting papal usurpations was declared.[70] That the papacy was also on the verge of entering into the Great Schism at the time of Richard's accession is also a point that should not be forgotten.

Any idea that the papacy should be able to interfere directly in English affairs was becoming increasingly impotent; the idea that the Pope was overlord of England, all but forgotten. Spiritual peers continued to sit in Parliament, but, as before, there was no notion that any member or body of the Church outside of Parliament had any right or power to determine the structure of the English government.

10.4.3 'Representative' Bodies

The first years of Richard's reign are characterized by a series of continual councils. These were in form and function, if not in name, essentially regency councils – they were there recipients of the redistributed activities/influence.[71]

Why a regency was not formally declared is difficult now to say. It might have something to do with associations between *regencies* and *senior members of the monarch's family*.[72]

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[66] See, *supra*, 10.3.2.
[67] Previté-Orton, *A History of Europe from 1198-1378*, 225ff.
[68] There had been some French pamphlets drawn up at the end of the thirteenth century to counter the claims made by Boniface VIII: Previté-Orton, *A History of Europe from 1198-1378*, 231.
[69] 25 Edw. III, c. 4. See: Barraclough, *The Medieval Papacy*, esp. 152-154.
[70] May McKisack, *The Fourteenth Century, 1307-1399* (Oxford University Press, 1959), 395.
[71] NB Lewis, "The 'Continual Council' in the Early Years of Richard II, 1377-80," *English Historical Review* 41, no. CLXII (1926): 246–47; James Fosdick Baldwin, *The King's Council in England during the Middle Ages* (Oxford University Press, 1913), 115; Thomas Frederick Tout, *Chapters in the Administrative History of Mediaeval England*, vol. 3 (Longmans, Green and Co., 1928), 323, 326.
[72] Cf. Ward's argument that, looking across western Europe during the central mediaeval period, "direct kinship with the child king was not as important for potential guardian(s) [of king and kingdom] in the central Middle Ages as the predecessor's nomination or recognition by the kingdom's magnates": Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," 153. The idea that close relatives had a right to the regency was certainly neither universally prevalent nor potent; it also appears to have been defeasible. Moreover, as Ward recognized, a much more prevalent and potent idea was that the monarch's relatives – most particularly, their senior male paternal relatives – ought to have some significant role in advising the monarch; that they had a right to provide counsel, which ought not only to be heard but also heeded; in the very least, to be given due consideration. These latter ideas had a greater sense of

After all, if there is a *regency*, should there not be a *regent*? And should not that regent be a close relative of the king? In Richard's case, this would probably mean the empowerment of one of his uncles – most likely, Gaunt, who remained a divisive figure.[73] Consequently, it might have been calculated that *not declaring a regency* would frustrate people's expectations less than *declaring one* and *depriving Gaunt of some preeminent position within it*; at least, it was less likely to provoke conflict. Alternatively, a formal regency was simply thought unnecessary;[74] Richard's youth might be accommodated without ceremony.

There was something of a pretence that Richard was "fully competent to govern".[75] However, the appointment of a continual council in July 1377, shortly after Richard's coronation, was clear recognition that, in the very least, he needed help – more so than an able and trusted monarch. Whilst there was a strong expectation that monarchs would have counsellors to advise them, it was largely within their discretion as to how, when, and by whom such advice was given.[76] The council, such as it was, tended to be an indefinite and fluid body. Only in perceived times of crisis was there typically movement to give it and its workings greater definition: to fix its membership; to clarify its members' duties, powers, and objectives; to clarify the mode, method, and level of remuneration of

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fixedness to them than the former; the former appeared far more contingent. Nevertheless, it cannot be denied that the latter ideas lend themselves easily to the former: as the monarch's natural counsellors and as persons whose interests might be said to greatly coincide with that of the monarch's, would it not be sensible for them to act as regent? In sum, it is difficult to deny that there was some association between regency and kinship; the nature and strength of that association varied with time and place. For Ward's recognition of the role of kin as counsellors, see: Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," 155.

[73] McKisack notes the antipathy towards him from the higher clergy, the London capitalists, and the Commons: McKisack, *The Fourteenth Century*, 399–400. It is also important to remember that there were rumours around this time that Gaunt had designs on the throne himself. See: Nigel Saul, *Richard II* (Yale University Press, 1999), 27–28.

[74] Cf. Baldwin's argument that, even though it was "certain that the council would be the ruling power in the state for the time", "[n]o special law or definition of a regency was considered to be necessary, as the government was conducted *under the usual forms* by authority of the king and council." For Baldwin, the real question was not *whether or not there would be a regency*, but, rather, *to what extent should the council be defined, by whom, and with what powers of oversight*? See: Baldwin, *The King's Council in England during the Middle Ages*, 120 (emph. added).

[75] Saul, *Richard II*, 28. See also: Tout, *Chapters*, 3:323–24.

[76] Preferably, this would be a trusted, wise, experienced, and representative group whose advice – both individually and collectively – the monarch acknowledged and heeded, if not always followed. Monarchs who failed to seek and take good advice in the right manner from the right people tended to be poorly regarded – perhaps to their ruin. Edward II's failure to seek and take good advice from the right people or, rather, a broad and inclusive group of people, explains much of his downfall. His over-reliance on, first, Piers Gaveston, and, later, the Despensers, to the exclusion of most everyone else frustrated a lot of people's expectations – particularly seeing as Gaveston's and the Despensers' advice was thought to be partial and unwise. They were not trustworthy, considerate advisors. Richard II, too, would later frustrate many people's expectations in this way in his reference to, and reliance on, a select and exclusive group – especially on Robert de Vere.

councillors; to improve its transparency and accountability, particularly by removing the powers of provision and oversight from the crown to other bodies, e.g. parliament.

The fact that the Good Parliament, in the previous year and in view of Edward III's senility, had already attempted – and failed – to give the council greater definition and form cannot be discounted.[77] In many respects, the reforms of 1377 were a renewal of the previous year's attempts.[78] Nevertheless, they were still ultimately a response to a situation in which the monarch was not deemed fully able – except, rather than Edward's dotage, that situation was now Richard's minority. People desired greater clarity as to the distribution of activities and influence; they wanted to know *what* to expect and *from whom* to expect it; they wanted to facilitate and encourage, if not ensure, good governance.[79] That they decided to build upon an existing institution – the council – is unsurprising. Rather than developing new associations, they had only to modify pre-existing ones.

The first continual council was appointed by a Great Council, i.e. a gathering of magnates. It was charged with aiding the Chancellor and Treasurer, who were members of the Council *ex officio*,[80] as well as ensuring the defence of the realm.[81] As in the cases of Henry III and Edward III, we see a broader, somewhat representative body involved in structuring the new government. Whether or not this body felt *compelled* to involve itself, it clearly thought itself *competent* to do so; it was an activity that might be associated with them. It is unclear whether the Commons felt aggrieved by not being included at this time – whether their expectations were thereby frustrated. As will be seen, they seized upon the opportunity to modify the council later in the year, which certainly indicates that they, too, felt that this was an activity in which they might participate.[82] It should be noted, however, that the extent of parliamentary involvement in governmental appointments had already been, and would continue to be, a bone of contention – a fact that goes towards demonstrating the Generational Theory of Law. However, the period from just before the

[77] In great part, its failure was due to John of Gaunt's lack of position – or, at least, influence – on the council. On this, see: Baldwin, *The King's Council in England during the Middle Ages*, 116–20.
[78] "With the death of Edward III and the accession of Richard II there came a natural attempt on the part of the popular party to reassert itself against the Gaunt dictatorship": Lewis, "The 'Continual Council' in the Early Years of Richard II, 1377-80," 249.
[79] There was, it seems, a desire to enhance the rule of law. Cf. Appendix I.
[80] As was, it should be added, the Keeper of the Privy Seal.
[81] Tout, *Chapters*, 3:326.
[82] It is possible that, rather than being aggrieved at their not having been involved, the Commons might have been aggrieved by their interests and views being insufficiently considered and represented on the Council. For something of this point of view, see: Lewis, "The 'Continual Council' in the Early Years of Richard II, 1377-80," 249.

start of Richard's minority in 1377 to the end of Henry VI's minority in 1437 was a period in which the council "was most under parliamentary pressure"; when Parliament had greatest claim to influence, if not control, the executive body.[83] That this was bookended by royal minorities is notable.

The first Council lasted until Parliament convened in October 1377. Its personnel was there adjusted more to the Commons' liking; its powers remained unaltered. This Council sat a year's term, i.e. until October 1378. Owing to the circumstances of this Gloucester Parliament, the names of the new councillors were not then announced, but a new council appears to have been decided upon nevertheless – again with unaltered powers.[84] This council, too, served a year's term. Indeed, a little more, as the next Parliament convened in January 1380. Here, it met with a poor reception and was disbanded. The Commons demanded that "only the five great officers be chosen in parliament".[85] Part of the reason stated for this was that Richard, recently turned thirteen, was "now of great discretion and handsome stature".[86]

Parliament clearly thought itself able to involve itself in provision to, and oversight of, Richard's government *in the absence of Richard's being able to do this himself*. There is no sign of any regard for Edward III's wishes or for any outside power (e.g. the Pope). It is equally clear that the continual councils were to fit into the existing structure; they were principally to support the existing officers of state in exercising the activities and influence already allotted to them.

It is curious that neither Gaunt nor his brothers were named as members of these councils. What this represents is unclear. Their involvement in government might have been assumed or otherwise expected; there was no need to name them.[87] It is also possible that this was an attempt to exclude them from power somewhat, even if they were granted some degree of oversight,[88] and were not wholly unrepresented on the councils. Either way, it says interesting things about the sorts of ideas people had concerning the

[83] Baldwin, *The King's Council in England during the Middle Ages*, 116.
[84] Baldwin, *The King's Council in England during the Middle Ages*, 122–24.
[85] Baldwin, *The King's Council in England during the Middle Ages*, 124.
[86] 'Richard II: January 1380', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/january-1380 [accessed 8 May 2019] at Item 12.
[87] They were part of a group of so-called 'natural counsellors' – able and expected to advise and guide the monarch by virtue of their lineage. The continual council appointed in the Good Parliament of 1376, for example, had been specifically charged to work with Edward III's sons, John and Edmund: Ormrod, *Edward III*, 554.
[88] Saul, *Richard II*, 28.

distribution of activities and influence – both as to *who* might possess them and *how people might be excluded from* possessing them. Another possibility is that Richard's uncles did not want to be on the council – maybe they felt that the time was not right or that theirs would not be the preponderating influence.[89]

Whilst in the period 1377-80 there was something approaching a regency government, the period 1381-89 is more ambiguous. Richard seems to grow in importance during these years. The reluctance to allow Richard or his uncles (especially Gaunt) to leave the country to campaign abroad in 1382-83 is testament to this.[90] In view of concerns over the continuing disturbed state of domestic affairs, the persons exercising the central and greatest activities and influence could not be spared.

Nevertheless, there are clear indications that Richard was not deemed trustworthy or capable of directing the government independently. In the Parliament of November 1381, Richard FitzAlan (E. Arundel) and Sir Michael de la Pole were appointed "to attend the king in his household and to counsel and govern his person".[91] This had followed a demand for a commission led by Gaunt to investigate the state of the household and "'the estate and governance' of the king's person".[92] Clearly, there was a perception that Richard could not yet sufficiently manage his own affairs without substantial guidance, let alone the activities and influence associated with kingship.

Much as was the case with Edward III, it was Richard II who brought his 'minority' to a conclusion. In May 1389, he asked the Council how old he was and, once he had established that he was of age, being twenty-three, he declared his intention to manage the government himself.[93] The way in which Richard went about this is important; he relied on fixed associations to achieve the desired result. He pointed to the fact that an adult king could expect to exercise their full powers without constraint; as he was now clearly an adult, it was neither right nor fitting that others should continue to govern in his stead. To do so would frustrate a legitimate expectation. Once the dissonance inherent in the situation was exposed, it was difficult to argue that Richard was in the wrong.[94]

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[89] See: Lewis, "The 'Continual Council' in the Early Years of Richard II, 1377-80," 249–50; McKisack, *The Fourteenth Century*, 400; Saul, *Richard II*, 28–29.
[90] McKisack, *The Fourteenth Century*, 428–30.
[91] McKisack, *The Fourteenth Century*, 426.
[92] McKisack, *The Fourteenth Century*, 426.
[93] Saul, *Richard II*, 203.
[94] Whether May 1389 is the appropriate date to assign to the end of Richard's minority is a difficult question. There is every reason to suspect that Richard thought it had ended earlier; he simply had not relied upon it until then. As such, May 1389 was the time at which his majority was fully realized, though the threshold probably was reached earlier.

Parliament, especially in the first years of Richard's reign, appears to have been deemed the appropriate place to discuss and determine the structure and personnel of Richard's government. Whilst Parliament was not yet sovereign in these matters, the sense is that many people's expectations would have been frustrated if Parliament had not at least been *consulted*. Thus, rather than a fixed expectation that Parliament would determine the structure and personnel of the government, it was probably rather a fixed expectation that the matter be brought to them for discussion. In the event, that led to the appointment of councillors and, ultimately, the disbanding of the Council.

10.5 Henry VI

10.5.1 Henry's Predecessor

At nine months old, Henry VI was markedly younger than any other English king at the time of accession. He could neither walk nor talk, let alone rule in any meaningful sense. Henry III, Edward III, and Richard II had all been able to repeat and swear their coronation oaths (presumably with some degree of understanding); Henry VI could not. It would in fact be many years before he was crowned. Furthermore, the earlier minors might have acted, if needed, as mouthpieces for their advisers; they could have been the face, if not the driving force, of government; there might have been some pretence of normality. With Henry VI, there could be no such pretence. The conclusion was unavoidable: there had to be some form of regency government by reason of immaturity.[95] Henry was present, but entirely incapable of fulfilling the expectations of kingship.

Henry VI's father, Henry V – unlike John, Edward II, and Edward III – was at the height of his powers when he died. Moreover, unlike John and Edward II, he had seemingly been ill for some time.[96] Consequently, not only was it more likely that any attempt that he might make to settle his son's government would be successful, but he perhaps also had greater opportunity to do so. Nevertheless, the extent to which Henry V attempted to provide for his son's minority government is unclear.

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[95] See Appendix III, 14.1.2.

[96] Walsingham recorded that, prior to his death, Henry had "been ill for a long time owing to his excessive, unceasing labours." However, it is difficult to establish the precise chronology of Henry's decline. Henry had overwintered in France to sustain the siege on Meaux, which lasted from October 1421 to March 1422; as with many such sieges, sickness spread. Allmand suggested that it might have been during this period that Henry's health began to be affected, before the illness became more noticeable – and terminal – in June at Senlis, where Wavrin records that he was "suffering a good deal from illness". By Christie's reckoning, Henry was bedridden by July. Hardyng, however, does not record that Henry had "toke sickenes" until August. Walsingham, *Chronica Maiora*, 445; Allmand, *Henry V*, 1992, 162; Wavrin, *Wavrin's Chronicle, 1399-1422*, 4:384; Christie, *Henry VI*, 3; John Hardyng, *The Chronicle of John Hardyng*, ed. Henry Ellis (London, 1812), 386.

Henry made no provision in his will of 10 June 1421; given that Henry [VI] had not yet been born, this is unsurprising. The will, as it was, was largely concerned with the salvation of Henry's soul, distribution of his private property, and settlement of his debts. However, when it was apparent that he might die, codicils were drawn up on 26 August 1421, in which he made a number of provisions for his son. Henry especially identified Humphrey, D. Gloucester,[97] and Thomas Beaufort, D. Exeter,[98] as Henry [VI]'s guardians and protectors. Humphrey was entrusted with the care of Henry [VI]'s affairs, whereas Thomas was entrusted with his "upbringing and education".[99]

However, Henry V does not appear to have made explicit and incontrovertible written provision for his son's government.[100] It is possible that he intended the government to be included in Humphrey's remit, although this appears merely by implication. Likewise, it is possible that he disposed of the government orally. This might indicate that he felt on shakier ground disposing of the government of the kingdom, as opposed to that of his son's person and personal affairs. It might also indicate that he did not want to dictate the structure of government, even if he was not afraid to express his thoughts, opinions, and wishes thereon. It might simply indicate that Henry saw his testament as an inappropriate place to deal with affairs of state.

Henry V's precise intentions remain obscure, but the fact that he did not plainly and unambiguously dispose of the governments of England – or, if he did, that this was obscured by his contemporaries – is significant.[101] It indicates that there was no clear expectation that Henry could, or should, do this.

Indeed, in December 1422, the Lords, in response to a petition that Henry VI's uncle, Humphrey (D. Gloucester), had made in the Parliament of the previous month, were firmly of the opinion that Henry V had not been possessed of any such power of provision.

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[97] To Humprey was given the *tutelam et defensionem nostri carissimi filii principales*: Patrick Strong and Felicity Strong, "The Last Will and Codicils of Henry V," *The English Historical Review* 96, no. 378 (January 1981): 84.

[98] To Thomas was given *persone sue regimen et gubernationem ac servitorum suorum circa personam suam electionem et assumptione*; in this he was to be assisted by Henry FitzHugh and Walter Hungerford, who were to attend the Henry [VI]'s person. Strong and Strong, "The Last Will and Codicils of Henry V," 84–85.

[99] Strong and Strong, "The Last Will and Codicils of Henry V," 85.

[100] "What the 1422 codicils do not contain are any direct, indisputably clear provisions for the government of England and France during a prospectively long royal minority": Strong and Strong, "The Last Will and Codicils of Henry V," 85.

[101] It seems that Bedford had been entrusted by Henry V with the defence, and by implication governance, of Normandy, if not France, for the duration of Henry VI's minority; it was perhaps the D. Burgundy who Henry V intended to have the regency of France, if he would accept it: Bertram Wolffe, *Henry VI*, Yale English Monarchs (Yale University Press, 2001), 30; Roskell, "The Office and Dignity of Protector of England," 200.

Humphrey had argued that the regency should be his – not only as the eldest representative of the royal house in England, but also as the *designate* of Henry V.[102] Importantly, he argued that he was supported in this matter by precedent. In effect, he argued that there was some *fixed association*, which supported his claim. The Lords did not take this claim lightly. They

> "had greet and long deliberation and advis, serched precydentes of the governaill of the land in tyme and cas semblable…toke also information of the lawes of the land of suche persones as be notably lerned therynne…"[103]

On 5 December 1422, they dismissed Gloucester's claim and concluded, in Vickers' words: "that no precedent or law admitted of the hereditary title, and that *the late King could not dispose of the government of the kingdom after his death save with the consent of the Estates*."[104] Gloucester's expectations had clearly been frustrated, but, so the Lords argued, his expectations had been badly founded. This could be demonstrated by reference to past events.[105]

Both Henry III and Edward I appear to have made some provisions in their testaments for the governance of the kingdom during the minority of their respective heirs, although these turned out to be unnecessary.[106] However, such provisions were by no means

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[102] Roskell, "The Office and Dignity of Protector of England," 210. There was also the fact, of course, that Gloucester had been *custos Anglie* until Henry V's death and might have expected, therefore, a role of that nature to continue to vest in him afterwards.

[103] The full portion of the relevant text, in modern English, is as follows: "whereupon the lords spiritual and temporal assembled there in parliament, among whom were you, my lords your uncles, the present bishop of Winchester, and the duke of Exeter, and your cousin, the late earl of March, and the earl of Warwick, and a great number of others who are still alive, had great and long deliberation and advice, searched precedents for the governance of the realm in similar times and situations when kings of this realm have been under age, taking also information concerning the laws of the realm from such persons who are most learned thereon, and finally found your said desire not based or grounded in precedent, nor in the law of the realm, which the deceased king did not have the power to alter, change or propose in his lifetime or by his will or otherwise without the assent of the three estates, nor to commit or grant the governance or rule of this realm to any person after his lifetime: but that on that matter, the said lords found your said desire to be not in accordance with the laws of this realm and against the rights and freedom of the estates of the same realm." 'Henry VI: October 1427', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1427 [accessed 10 May 2019] at Item 25.

[104] Vickers, *England in the Later Middle Ages*, 387 [emph. added]. Or, as the Lords originally put it: "the Kyng that ded ys, in his lyf ne migzt by his last will nor otherwyse altre, change nor abroge [abrogate] with oute thassent of the thre Estates, nor committe or graunte to any persone, governaunce or rule of this land lenger thanne he lyved". Quoted in: Roskell, "The Office and Dignity of Protector of England," 210.

[105] For example, in 1377, John of Gaunt, who was in a comparable position to his grandson, Humphrey, had not been appointed regent in respect of his nephew, Richard II.

[106] Henry's was written in 1253 before he left for Gascony; Edward's was written in 1272 whilst he was in the Holy Land and, in matter of fact, before his father, Henry III, had died. Henry III was succeeded by

routinely made and, as has been seen, none of the monarchs discussed so far made clear and extensive provisions for their successor's government. Whether they would have succeeded if they had tried and, if so, to what extent, is difficult to say. However, the impression that one gets in November/December 1422 is that, in spite of Humphrey's protestations, there was no prevalent or potent idea that the monarch had a power of provision extending after their death. Indeed, the Lords were firmly of the opinion that the government *after* the monarch's death was entirely beyond their sphere of influence; it was an activity not associated with their role.[107] A monarch might express their wishes, but nothing more.

10.5.2 The Church

As we have seen, the idea of the papacy's feudal overlordship over England had been categorically rejected in the 1360s, having already been a hollow claim for some time. The Avignon Captivity had weakened the strength of the papacy considerably and the Western Schism had only recently been repaired. Indeed, this latter event had led to an increase in the prevalence and potency of ideas of Conciliarism, i.e. the idea that supreme authority in the Church lay not with the Pope, but, rather, in an ecumenical council. The Pope and the Church were no longer the force they once were.

Antipapal, anticlerical, and nonconformist sentiments had continued to grow in England. This is evidenced by the renewal of the statutes of *Provisors* and *Praemunire* in the 1380s-90s,[108] and by the persistence and growth of Lollardy. The Abp. Canterbury and the other bishops still held preeminent positions within English society; they still commanded

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Edward I and Edward I by Edward II; both Edward I and Edward II were adults when they acceded. See: Roskell, "The Office and Dignity of Protector of England," 217 (n. 1); Studd, *A Catalogue of the Acts of the Lord Edward, 1254-1272*, 731–32.

[107] Roskell thought this to be a new constitutional principle, although it is possible that it was only fully articulated some time into Henry's minority. Whether it was entirely new is difficult to tell, seeing as this was the first time that it was properly tested. It might have been *extant* and *prevalent* before, but it had not come into issue. However, what can be said with certainty is that the *potency* of the principle was undoubtedly proved during Henry's minority. See: Roskell, "The Office and Dignity of Protector of England," 217–18.

[108] Enforcement of the Statute of Provisors Act (13 Ric. II, c. 2, 2: 1389-90), which recited the effect of the Statute of Provisors (25 Edw. III, c. 4, 1351); Statute of Praemunire (16 Ric. II, c. 5: 1392), which followed the Statute of Praemunire (27 Edw. III, st. 1, 1353). On the Statutes of Provisors and Praemunire, see: Cecily Davies, "The Statute of Provisors of 1351," *History* 38, no. 133 (1953): 116–33; Fredric Cheyette, "Kings, Courts, Cures, and Sinecures: The Statute of Provisors and the Common Law," *Traditio* 19, no. 1963 (1963): 295–349; EB Graves, "The Legal Significance of the Statute of Praemunire of 1353," in *Anniversary Essays in Medieval History by Students of Charles Homer Haskins* (Houghton Mifflin, 1929), 57–80; WT Waugh, "The Great Statute of Praemunire," *The English Historical Review* 37, no. 146 (April 1922): 173–205; WT Waugh, "The Great Statute of Praemunire," *History* 8, no. 32 (1924): 289–92; Daniel Frederick Gosling, "Church, State, and Reformation: The Use and Interpretation of Praemunire from Its Creation to the English Break with Rome (PhD Thesis)" (The University of Leeds, 2016).

deference and respect; they still expected to counsel the monarch. However, there never appears to have been any notion that either the English or international Church had any say over how Henry's government was to be structured. This was a secular matter for secular bodies – even if those secular bodies happened to include prelates. It is true that one of the major figures during the minority was Henry Beaufort, Bp. Winchester, but this was largely due to his familial connections,[109] wealth, and offices that he held (viz. the chancellorship), rather than his status as a churchman.

10.5.3 Parliament

Henry V died on 31 August 1422 in Vincennes, France. His death seems not to have been known in England before 10 September,[110] and, given that many of the magnates were then in France, it was only a small group who met at Windsor on 28 September. Having sworn homage and fealty to Henry VI, they decided to convene Parliament. On the following day, they issued summons for 9 November.[111] By the time this Parliament met, Charles VI of France was also dead. Henry VI was now – in theory, at least – king of both England and France.[112]

This Parliament was under no illusions as to the reasons for its being summoned. In his opening address, the Abp. Canterbury made plain that the assembly's *raison d'être* was "la tendre age nostre soverain" – the tender age of the king.[113] As it says further down the

[109] Beaufort was one of John of Gaunt's sons and, therefore, a half-brother to Henry IV, uncle to Henry V, and great-uncle to Henry VI.
[110] Roskell, "The Office and Dignity of Protector of England," 194.
[111] "Parliamentary sanction for whatever constitutional form government was to assume under the infant king was evidently then considered necessary. And on Michaelmas day the parliamentary writs of individual summons and the writs authorizing the elections of knights of the shire, citizens, and burgesses, were dated at Windsor. Parliament was to meet on the first possible day after the lapse of the customary minimum period of forty days between summons and assembly, namely, on 9 November." Roskell, "The Office and Dignity of Protector of England," 195.
[112] The Parliament Roll presents the Parliament as having been called by the king "because of important and urgent business" and being held on his authority, though "on account of certain reasons" he could not attend in person, thereby entrusting Gloucester with the presidency of the Parliament. Obviously, this was a fiction. Henry VI himself played no active part in convening this Parliament; he had no idea what a parliament was. What this demonstrates is the potency and inflexibility of the idea that it was the king who called parliaments, and that parliaments were held under their authority and at their discretion. This was a powerful fixed association. If the Council or anybody else had convened parliament in their own name, it would have frustrated people's expectations; indeed, such an assembly could not be called a parliament. For the reasons for calling Parliament, see: 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Item 1.
[113] 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Item 5. There are many other references to Henry's youth throughout the entries for this session.

Roll, they had assembled "because of the immediate need for governance…, as much for the keeping of the peace and the administration of justice, as for the exercise of the offices pertaining to the king"; moreover, it convened "so that, by the common assembly of all the estates of the realm, and by their wise counsel and discretions, *the better governance might be provided*".[114] They had assembled because Henry VI's immaturity had rendered him *unable*, though *present*, to perform his duties; it was for them, assembled together as a body, to determine what was to be done – to make the necessary arrangements and appointments.

As has been seen, Parliament forcefully asserted itself and its rights vis-à-vis both Henry V and Humphrey.[115] Indeed, that Humphrey was due the regency on account of his birth, Parliament deemed "ayenst the rigzt and fredome of thestates of the…land".[116] The structure and personnel of a minority government was not to be determined by some formula or by grant of the late king, *but by grant of Parliament*. Indeed, they appear to have been wary of allowing Humphrey a title such as *rector regni* or *tutela*, as those implied powers (i.e. activities and influence) that would not be subject to parliamentary control; they would make Humphrey responsible only to Henry VI and only then, of course, once Henry had come of age – a dozen or more years down the line.[117] Parliament, as they asserted in January 1427, was the repository of the exercise of royal authority in the absence of a present and able monarch.[118]

Whilst Parliament was content to accept the "king's nominations" for the officers of state (i.e. chancellor, treasurer, etc.),[119] it took a more proactive role with regard to those who

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[114] 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Item 12 [emph. added].

[115] Interestingly, summons were issued to Humphrey, D. Gloucester, who had been *custos Angliae* (i.e. regent by virtue of Henry V's absence). Neither he nor his brother, John (D. Bedford), had previously received summons as regents. It would appear, therefore, that the meeting of 28 September considered Humphrey's position as *custos Angliae* to have been either destroyed by Henry V's death or suspended pending confirmation. The fact that Gloucester's commission was deemed to cease at his brother's death says something interesting. There was obviously a perception that he was regent for Henry V and by virtue of his absence; when Henry V died, the reason for Gloucester's commission evaporated. Gloucester's expectations were clearly frustrated. He made so much known to the Council on 6 November. That he was to open and dissolve Parliament 'by assent of the Council' was, he argued, "a departure from precedent and prejudicial to his rights". The Council stood firm; official documents were now subscribed *Teste Rege*, rather than *Teste Custode*: Vickers, *England in the Later Middle Ages*, 386–87.

[116] Roskell, "The Office and Dignity of Protector of England," 210.

[117] Roskell, "The Office and Dignity of Protector of England," 213ff.

[118] Cf. Roskell, "The Office and Dignity of Protector of England," 220. It is also interesting that Parliament clearly thought that it could only provide for the government of *England*; the *war* in France might be a part of their concern, but the *governance* of France was not.

[119] 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge,

would support those officers. In view of the fact that Henry, being so young, could not "attend personally to the protection and defence of his realm",[120] Parliament found it necessary to appoint a Protector and Defender of the Realm.[121] For this purpose, it appointed, in the first place, the eldest of Henry V's surviving brothers, John (D. Bedford), and, in his absence, Humphrey (with which, as has been seen, Humphrey was not entirely pleased).[122] This position was not so much that of a regent *per se*, but, rather, one tasked more specifically with maintaining the integrity and peace of the realm,[123] and organizing the defence thereof. To this was appended the role of king's chief counsellor and various other minor powers.[124]

Parliament proceeded to elect a continual council and define some of its powers.[125] There are echoes of 1327 and 1377. Whilst it was clear that anything of importance could not be done by this Council in the absence of either John or Humphrey, it was equally clear that these latter were to govern through the Council. In effect, they were presidents of the Council with special powers; they could not act simply of their own accord or as they pleased.

By and large, the arrangements set out at the start of the minority persisted for the duration of the Protectorate. In the following Parliament of October 1423, further clarifications

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2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Item 16.

[120] 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Item 24.

[121] 'protectour et defensour de roialme'; 'protectore et defensore regni Anglie': 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Items 19 and 24 respectively, et passim.

[122] Bedford was at this time still in France and so this effectively made Gloucester Protector. 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Item 24. Cf. 'Henry VI: October 1427', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1427 [accessed 10 May 2019] at Item 26.

[123] It is somewhat interesting to note that the realm and the church are mentioned separately.

[124] For example, regarding appointments. See: 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Item 25.

[125] 'Henry VI: November 1422', in Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/november-1422 [accessed 10 May 2019] at Items 26-33.

were made as to the powers of the Council, but the general plan was maintained. When Humphrey travelled to the Low Countries in late 1424, meaning that both he and John were abroad, Beaufort served in their stead. This appears largely to be a consequence of his being Chancellor, the preeminent office of the day.

After Humphrey's return, his relationship with Beaufort soured. John returned to mediate and, in the 'Parliament of Bats' (Leicester, February 1426), a reconciliation was achieved, although it resulted in Beaufort's resignation as chancellor. The same Parliament once again asserted the primacy of Parliament and, when not in session, the Council *vis-à-vis* the Protector.[126] Indeed, it had both John and Humphrey agree to be "advised, demened and reuled" by the Council,[127] – emphasising the limits of their discretion.[128]

The Protectorship lasted until Henry's English coronation on 6 November 1429, from which point John and Humphrey were styled 'principal councillors'.[129] Nevertheless, Henry remained some time away from exercising real and extensive influence; the conciliar form of government was, therefore, maintained. Indeed, when Humphrey, in November 1434, attempted to move power away from the Council towards Henry (i.e. to *redistribute* it) – so that Henry might exercise it under Gloucester's influence – he found himself blocked; Henry was not yet deemed capable of shouldering the government.[130] Indeed, it was not until October 1435 that he appears to have attended a council meeting.[131]

In the years 1436-37, Henry appears – at least superficially – to assume greater responsibility. In July 1436, he took the important step of starting to exercise his powers of grace. Bedford had died in September 1435, the government was in financial difficulty, and control over France was loosening. There is an argument, therefore, that "the moment had come when a unanimous recognition of royal power was both necessary and possible".[132] Nevertheless, this was by no means a comprehensive assumption of power – not only was it not until the spring of 1437 that life grants began to be made, [133] but

[126] They did this through the new Chancellor, John Kemp, Abp. York, who declared: "the responsibility for the good governance of the kingdom lay with the Lords Spiritual and Temporal assembled in Parliament, or when it was not sitting with the Council, except in so far as Parliament had given definite and special powers to the Protector". Vickers, *England in the Later Middle Ages*, 393.
[127] Vickers, *England in the Later Middle Ages*, 393.
[128] Cf. *supra*, 3.11.4.
[129] Wolffe, *Henry VI*, 2001, 65.
[130] John Watts, *Henry VI and the Politics of Kingship* (Cambridge University Press, 1999), 121–22.
[131] Watts, *Henry VI and the Politics of Kingship*, 126.
[132] Watts, *Henry VI and the Politics of Kingship*, 122.
[133] Watts, *Henry VI and the Politics of Kingship*, 130.

dispensing grace was still some distance short of managing affairs of state. In any case, such a move can only have been countenanced and permitted in view of Henry's impending fourteenth birthday.

In the summer of 1437, Henry undertook an "extended tour" of England,[134] and, at a Great Council in November, his relationship with the Council was formally redrawn.[135] Henceforward, Henry was to be far more prominent and pivotal, although the Council was to be retained. Indeed, its new form was based on a precedent of 1406, which indicates a willingness to return to a more traditional relationship between King and Council. Whether this marks the minority's end is debateable. Henry was only recently sixteen and there remained questions as to whether he could as yet carry the burden of government. Indeed, not a great deal changed following this readjustment.[136] It was not until 1439, when Henry was eighteen, that the Council began to wane as the primary institution of government.[137]

Thus, there was clearly a prevalent and potent fixed expectation throughout Henry's minority that the government of England was to be conducted by the Council and that it did so on Parliament's authority. As has been seen, this was not a universal belief – Humphrey and, to a lesser extent, John both appear to have thought themselves to have some rights that existed independently of, and could not be contravened by, Parliament. They appear to have been sincere in this belief, but Parliament – at least insofar as the right of regency was concerned – was firm. Humphrey's expectations, were badly founded: he had misunderstood the law; he had misunderstood the constitution.

10.6 Edward V

10.6.1 Edward's Predecessor

During Henry VI's reign, the monarchy's prestige had decreased; Edward IV had forcefully reasserted it. Parliament, which had assumed a greater role under the later Plantagenets and Lancastrians, was largely subservient to Edward IV. In many respects, therefore, Edward IV was in a better position than many of his predecessors to provide for his son's government. However, whether he did so is unclear. He possibly appointed his brother, Richard (D. Gloucester), as Protector and there was possibly a codicil made

[134] Ralph A Griffiths, *The Reign of King Henry VI*, 2nd ed. (Sutton Publishing, 1998), 237–38.
[135] On the events surrounding, and implications of, the November meeting, see: Bertram Wolffe, *Henry VI* (Eyre Methuen, 1981), 90–92; Griffiths, *The Reign of King Henry VI*, 238, 275–78; Watts, *Henry VI and the Politics of Kingship*, 132–35.
[136] Watts, *Henry VI and the Politics of Kingship*, 135.
[137] See: Watts, *Henry VI and the Politics of Kingship*, 140–41.

to his testament, but there is no definite evidence of either.[138] Given what had passed half a century earlier, one would suspect any provision made by Edward might have carried weight, but would have been in itself insufficient.

10.6.2 The Church and 'Representative' Bodies

As in the previous minorities, the first occurrence was the convention of a council; this possibly took place even before Edward IV's funeral.[139] As previously, this was a place in which people's initial expectations might be tested – and tested they appear to have been. The decision appears to have been made to crown Edward [V] immediately, thereby obviating the need for a Protectorate (and averting a contest to possess it).[140] Richard was not present at this meeting and whether he knew of its decisions when he took matters into his own hands on 30 April – by seizing Edward's person at Stony Stratford – is unclear.[141]

Another council was convened on 10 May, in which the coronation was postponed and Richard named as Protector.[142] In some respects, Richard's actions are reminiscent of those of Humphrey, Henry VI's uncle.[143] Whilst Humphrey did not take such drastic measures as Richard, both appear to have seen themselves as holding a special position by virtue of their being the king's paternal uncle – a special relationship entitling them to the pre-eminent position in the kingdom. Nevertheless, Richard did not try to make himself into an all-powerful regent, to which Humphrey had aspired. He acted in concert with a council, albeit one shorn largely of the influence of the king's mother's family.

The adoption of the protectorate model, including the fact that it would last only until Edward's coronation, demonstrates an unwillingness to make radical innovations. This model had precedent. The protectorate of Henry VI's uncles, for example, had ended upon Henry's coronation. It was, therefore, a position associated with the period between the old monarch's death and the new monarch's coronation, where the latter was a child; by virtue of this association, this move would have been concordant with people's expectations. There is some evidence that Richard considered extending the Protectorate

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[138] AJ Pollard, *Late Medieval England, 1399-1509* (Pearson Education Ltd., 2000), 325.
[139] Pollard, *Late Medieval England*, 324.
[140] This, of course, relied on the fixed association between there being an anointed monarch present within the kingdom and there *not* being a Protector, which latter role was deemed unnecessary in such circumstances.
[141] Pollard, *Late Medieval England*, 327.
[142] Pollard, *Late Medieval England*, 327.
[143] It is noteworthy that Richard, like Humphrey, was D. Gloucester, though Richard was not Humphrey's descendant.

beyond Edward's coronation, notably with parliamentary approval, but this plan was dropped.[144] It is possible that Richard's seizure of the throne was influenced by the improbability of securing parliamentary approval for such a plan. After all, to extend it beyond Edward's coronation would be an innovation; it would be harder to secure agreement.

Richard's full reasons for seizing the throne are unclear. He might have genuinely thought himself his brother's rightful heir, but there is every reason to suspect other motives besides – not least loss of power to the Woodvilles. Whatever the case, planning for Edward's minority ceased. Everything that had been decided theretofore had only ever been designed as an interim solution; the permanent solution looked set to be decided in Parliament. The Church, besides complying with the arrangements made and participating through the Lords Spiritual, looked set to have no role whatsoever; certainly, the Pope was in no position to dictate anything.

10.7 Edward VI

10.7.1 Edward's Predecessor

Besides settling the succession in his testament,[145] Henry VIII also sought to provide for his son's minority government. Henry, therefore, was the first monarch to make clear provision for their successor's minority government. However, he did this, not under his own authority, but under the authority of Parliament. It had granted him this power in the *Second Succession Act* (1536), which also provided that any effort to undermine Henry's settlement would be High Treason.[146]

According to the will, his executors were to act as Edward's Privy Council, and were entrusted with the government of the king and kingdom until Edward turned eighteen.[147] This was a broadly representative body, albeit preponderantly Protestant and excluded the most ardent Catholics;[148] it largely reflected the politics of the end of Henry VIII's

[144] Charles Ross, *Richard III* (Methuen, 1988), 75.
[145] See, *supra*, 9.17.
[146] 28 Hen. VIII, c. 7, XIV. This provision had presumably not been affected by the Third Succession Act (35 Hen. VIII, c. 1: 1543), which did not touch upon this matter. In this same year, an act was passed determining that *The King at Twenty-Four may repeal Acts of Parliament passed during his Minority* (28 Hen. VIII, c. 17), also in view of the fact that Henry might die before his heir was of age.
[147] For the will, see: Carl Stephenson and Frederick George Marcham, eds., *Sources of English Constitutional History*, trans. Carl Stephenson and Frederick George Marcham, 2nd ed., vol. 1 (Harper & Row, 1972), 323–24. For further discussion of the will, including its authenticity, see: Suzannah Lipscomb, *The King Is Dead: The Last Will and Testament of Henry VIII* (Head of Zeus, 2015).
[148] James A Williamson, *The Tudor Age*, 3rd ed. (Longman Group Ltd., 1979), 195; GR Elton, *England under the Tudors* (Methuen & Co. Ltd., 1962), 203.

reign.[149] Henry made no indication that any of these councillors were to have any especial powers over and above their peers.

Theoretically, Henry's settlement was effective – except insofar as it lasted only three days.[150] On 31 January 1547, the executors elected Edward Seymour (Edward VI's maternal uncle) as Lord Protector,[151] for which act Edward VI's consent was obtained the following day.[152] At the beginning of March, Thomas Wriothesley was dismissed from his position,[153] which probably made easier the strengthening of Seymour's position shortly thereafter,[154] on 13 March.[155] He was effectively empowered to do whatever was

[149] Jennifer Loach, *Edward VI*, ed. George Bernard and Penry Williams (Yale University Press, 2002), 18–25.

[150] During which time Henry VIII's death had been kept a secret: Penry Williams, *The Later Tudors: England, 1547-1603* (Oxford University Press, 1995), 34.

[151] John Roche Dasent, ed., *Acts of the Privy Council of England*, vol. 2 (London, 1890), 4-6 (Mon., 31 January 1547). William Paget would appear to have been instrumental in orchestrating Somerset's appointment – perhaps not just for love of Somerset, but also because of the influence he might gain thereby. After all, according to a letter of 7 July 1549, Somerset had apparently promised, prior to Henry VIII's death, to heed Paget's advice more than any other's: John Strype, *Ecclesiastical Memorials: Relating Chiefly to Religion, and Its Reformation Under the Reigns of King Henry VIII, King Edward VI, and Queen Mary the First; with the Appendixes Containing the Original Papers, Records, Etc*, vol. 2.2 (Oxford University Press, 1822), 430 (App. HH); Williams, *The Later Tudors: England, 1547-1603*, 34; Loach, *Edward VI*, 26.

[152] Dasent, *Acts of the Privy Council of England*, 2:7-8 (Tues., 1 February 1547). Edward was crowned on 20 February 1547. This does not seem to have precluded a protectorship and is, therefore, something of a departure from precedent, although Richard, D. York's protectorship during the infirmity of Henry VI might be taken as one.

[153] Wriothesley, who had recently been made E. Southampton, was Lord Chancellor; as one of the executors of Henry VIII's will, he had also sat on the regency council. He had provided the greatest opposition to Somerset's elevation to his position as Lord Protector. Wriothesley was undone by a situation of his own making, though whether it absolutely entailed his dismissal is debatable. With Wriothesley gone, Somerset's authority on – and over – the Council was more absolute, even if Wriothesley was readmitted to the Council later that year (and, notably, later still, helped to engineer Somerset's fall). For the charge against Wriothesley and his degradation, see: Dasent, *Acts of the Privy Council of England*, 2:48-57 (Sat., 5 March 1547, Westminster), 58-59 (Mon., 7 March 1547, Westminster). For questions about the motives behind Wriothsley's dismissal, see: Loach, *Edward VI*, 25–26.

[154] See: AF Pollard, *England under Protector Somerset* (Kegan Paul, Trench, Trübner & Co. Ltd., 1900), 33–35.

[155] On 13 March, we find a record in the Acts of the Privy Council confirming Somerset's and the Council's authority "[t]o thintent therefore they might with more ample autorite procede in all matters which they shuld determyne to be doone for his Majestes honour and the surety of his estate, and also for their discharge anempste his Hieghnes in case it shuld please the same hereafter to call them or any of htem to accompte for any thing which they shuld do apon foundacion or grounde of their afforesaide charge…": Dasent, *Acts of the Privy Council of England*, 2:63–64, quote at 63 (Sun. 13 March, Westminster). This was followed, on Monday 19 March, by a *verbatim* entry of the commission of the 13 March: "…thintent that during the tyme of our minorite the greate and waightie causes of our realmes and domynions may be sett furthe, conducted, passed, applied and ordred in suche sorte as shalbe moste to the glorie of God, our suretie and honour, and for the weale, benefight and commodite of us, our saide realmes and domynions, and of all our loving subjectes of the same, have advised us to nomina appoincte and authorise *some oone mete and trusty personage above all others to take the special cure and charge of the same for us and in our name and behaulf, without the which the things before remembred could nat be doone so well as apperteigneth*; We therefore…did heretofore assigne and appoincte our dear and welbiloved uncle Edwarde, now Duke of Somserset, Governour of our persone and Protectour of our saide realmes and domynions and of our subjectes and people of the same. Which thing albeit we have already declared heretofore, and our pleasure therein published by wourde of our mowthe in the presence of our saide Counseill, nobles and prelates of our saide realme Inglande, and nat by any wryting sett furthe under our Seal for that only purpose; yet for

necessary; he had the Council to aid him, but he was also given power to choose councillors. He was also by this time D. Somerset. It is notable that the Parliament that had been sitting at the time of Henry VIII's death was dissolved,[156] as was deemed proper; it was not involved in drawing up the new settlement, even if a predecessor Parliament had provided the ultimate basis therefor.

The chain appears thus: Parliament had empowered Henry VIII; he had empowered his executors; they had empowered Somerset. The powers that Henry had given his executors were certainly extensive, but whether they extended to reconstituting the government is debateable.[157] That there appears to have been some planning and cajoling to bring this

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a more parfecte and manifest knowledge and further corroboracion and understanding of our determynacion in that behaulf, and considring that no manner of persone is so mete to have and occupie the saide charge and administracion, and to do us service in the same, as is our saide uncle Edwarde, Duke of Somserset, eldest brother to our natural moste gracious late mother, Quene Jane, *aswell for the proximity of bludde, whereby he is the more stirred to have special eye and regard to our suretye and good educacion in this our saide minorite*, as well as for the long and greate experience which our saide uncle hath had in the lief tyme of our saide dear father in thaffayres of our saide realmes and domynions, both in tyme of peace and warre, whereby he is more hable to order and rule our saide realmes, dominions and subjectes in the same; and for the speciall confidence and truste that we have in our saide uncle, awell with thadvise and consent of our Counseill and other our nobles and prelates, as also divers discrete and sage men that served our saide late father in his Counseill and waightie affayres; […]. We for a full and perfect declaracion of the auctorite to our said uncle geven and appoincted…do nominate, appoincte and ordeigne our said uncle Governour of our saide persone and Protectour of our saide realms and dominions and of the subjectes of the same, untyl suche tyme as we shall have by the sufferance of God accomplished the age of eighteen yeares. And We do also graunte to our saide uncle, by theis presentes full powre and autorite from tyme to tyme, untill suche tyme as we shall have accomplished the saide age of xviij[ten] yeares, to do, procure and execute, and cause to be doone, procured and executed, all and every suche thing and thinges, acte and actes, whch a Governour of the Kinges persone of this realme during his minorite and a Protectour of his realmes ought to do, procure, execute, or cause to be done, procured and executed; and also all and every other thing and thinges which thoffice of a Governour of a King of this realme during his minoritie and of a Protectour of his realmes, dominions and subjectes in any wise apperteighneth or belongeth… [Moreover, to do or cause to be done] all and every thing and thinges, acte and actes of what nature, qualite or effecte soever they be or shalbe concerning our affayres, doinges and procedinges, both private and publike, as well as in owtewarde and foraine causes and matters, as also concerning our affayres, doings and procedinges within our saide realmes and dominions, or in any of them, or concerning any maner causes or matters of any our subjectes of the same, *in suche like maner and fourme thought as shalbe thought by his wisedome and discrecion to be for the honour, suretie, prosperitie, good order, wealth or comodite of us, or of any of our saide realmes and dominions, or of the subjectes of any the same*. And to thentent our saide uncle shuld be furnished with men qualified in witte, knowlege and experience for his ayde and assistance in the mayning and accomplishement of our saide affayres, We have by thadvise and consent of our saide uncle and others the nobles, prelates and wise men of our saide realme of Englande, chosen, taken and acceptid, and by theis presentes do chose, take, accepte and ordeigne to be our Counsaillours and of our Counsail [the names of the councillors are then listed]." Somerset is further given the power to appoint councillors, and he and the Council are granted legal immunity respecting any acts done in the course of their duties. Dasent, *Acts of the Privy Council of England*, 2:67-74 (Mon., 21 March 1547, Westminster), quote at 67-71 [emph. added].

[156] Williamson, *The Tudor Age*, 196.

[157] It is also debateable whether even Henry VIII himself, taking into account the wording of the Act, would have been able to constitute the government in such a way, i.e. institute a Protectorate. See: Pollard, *England under Protector Somerset*, 27–28. Penry thought it was not, "strictly speaking", in contravention of Henry's will and, as Lockyer pointed out, whilst "Henry made no provision for a protectorate," he did not "specifically exclude" it either: Williams, *The Later Tudors: England, 1547-1603*, 34; Roger Lockyer, *Tudor and Stuart Britain* (Longmans, Green and Co., 1964), 108. It is worthwhile noting that the legality of Henry VIII's will was reviewed – at least in respect of the grants of property made thereby. See: Dasent,

reconstitution to fruition provides us with reason to be sceptical, although there is some evidence it was concordant with Henry's intentions.[158] Nevertheless, there was some discomfort surrounding the use of a dead sovereign's authority for present purposes;[159] for this reason, Edward was made complicit in arrangements.[160]

Thus, Henry VIII clearly had a power of provision extending after his death. However, not only was this a power conferred on him by Parliament, but there was some uneasiness about following the commands of a person now dead. Henry's powers were, therefore, patently thought to be limited.

10.7.2 The Church

During Henry VIII's reign, the relationship between the English social group and the Church – and, more specifically, the Papacy – changed markedly. The Reformation had occurred. The Papacy no longer had any prevalent or potent claims to influence English

Acts of the Privy Council of England, 2:41-43 (24 February, Westminster). If the legality or illegality of the arrangements made, as being made contrary to the terms or spirit of the will, had been truly questionable, this would have been an ideal time for them to be called into question.

[158] See: Loach, *Edward VI*, 26–28.

[159] In particular, the K. France, with whom the English government was then treating, expressed concerns as to the legitimacy and validity of their acts, and, moreover, as to their ability to enter into binding and irrevocable agreements – into agreements that could not simply be discarded by Edward upon reaching his majority. See: Pollard, *England under Protector Somerset*, 33–34. Similar reasons probably prompted the repeal of the statute of 28 Hen. VIII, c. 17, which had empowered Edward, upon reaching the age of twenty-four, to unilaterally revoke acts of Parliament passed during his nonage; this was repealed by 1 Edw. VI, c. 11. See: Frederic William Maitland, *The Constitutional History of England*, ed. Herbert Albert Laurens Fisher (Cambridge University Press, 1908), 253–54.

[160] If the theory expressed by Plowden in the *Case of the Duchy of Lancaster* in 1561 (i.e. *circa* fourteen years later) is accepted, then Edward was perfectly able to be involved in such acts. The case concerned whether Elizabeth I was bound by a grant made by Edward VI, considering his minority at the time of said grant. The court replied that "by the common Law no Act which the King does as King shall be defeated by his nonage". This was because "the King has in him two Bodies, viz. a Body natural, and a Body politic" and, even though the king's natural body might suffer from defects, deficiencies, etc., his body politic was not so vulnerable: "what the King does in his Body politic cannot be invalidated or frustrated by any Disability in his natural Body". Indeed, "to this natural Body is conjoined his Body politic, which contains his royal Estate and Dignity, and the Body politic includes the Body natural, but the Body natural is the lesser, and with this the Body politic is consolidated." This means that "he has a Body natural adorned and invested with the Estate and Dignity royal, and he has not a Body natural distinct and divided by itself from the Office and Dignity royal, but a Body natural and a Body politic together indivisible, and these two Bodies are incorporated in one Person, and make one Body and not divers, that is the Body corporate in the Body natural, *et e contra* the Body natural in the Body corporate." In effect, though Edward *had a natural body*, by virtue of his coronation it became practically indistinguishable from his body politic; this latter body perfected – in the sense of *resolved* – any defects, etc. in the former body. Edmund Plowden, *Les Commentaries, Ou Reports de Edmund Plowden* (London, 1588), 213–14. For an English transcription (from which the above text is taken), see: Edmund Plowden, *The Commentaries, or Reports of Edmund Plowden … : Containing Divers Cases upon Matters of Law, Argued and Adjudged in the Several Reigns of King Edward VI, Queen Mary, King and Queen Philip and Mary, and Queen Elizabeth*, ed. and trans. Broomly [incertum] (London, 1761), 212–23. As the report itself acknowledged, there was some historical basis for this opinion, though there was some reason to doubt that it had always been the case that there had been thought to be such a union between the body natural and politic of the monarch. See: William Searle Holdsworth, *A History of English Law*, 3rd ed., vol. 4 (Methuen & Co. Ltd., 1945), 464ff.

affairs. According to the *Act of Supremacy*, the English monarch was now master of the English Church; the Church could little be master of them.

Of course, the persistence of Catholicism – not least in Edward's elder sister, Mary [I] – showed that the new view of the Catholic Church was not yet universally prevalent and potent. There were some who still thought that the Pope should be heeded. Nevertheless, there is no indication that there was a generally prevalent and potent idea even among Catholics that the Pope might dispose of the government of England as he saw fit. Certainly, when Mary claimed the throne, she made no appeal to papal authority; rather, she appealed to human (i.e. domestic) and divine law.[161]

10.7.3 'Representative' Bodies

The title of Lord Protector was not new, but Somerset's powers were more far-reaching than his predecessors.[162] Indeed, his position strengthened in the months after his appointment. However, over the following two and a half years, estimations of Somerset decreased, particularly among his fellow nobles and the gentry; in John Dudley, E. Warwick, he found a rival. Realizing that the Council was opposed to him, Somerset fled with Edward to Windsor. By 10 October 1549, it was clear his cause was hopeless and he surrendered.[163]

The Council, as it had made the Lord Protector, unmade him. Dudley had a position comparable to Somerset's. He, like Somerset, could choose the Council. However, the title of Lord Protector had come to represent a form of autocracy; Dudley wished to avoid such connotations and, consequently, adopted the title of Lord President of the Council. In October 1551, he was elevated to D. Northumberland. Dudley's power lasted until Edward's death.

Whilst Parliament theoretically provided the basis for these arrangements, it played a far less active role than that played by equivalent bodies in the earlier minorities. Indeed, for the first years of Edward's reign, at least, it appears to have largely accepted the Council's policies and not questioned the way in which the government was constructed. In no small part, this was undoubtedly due to the fact that "the gentry who controlled the Council were also the dominant force in Parliament".[164] It was arguable, based on precedent, that

[161] John Edwards, *Mary I: England's Catholic Queen* (Yale University Press, 2011), 90.
[162] Henry VI's uncles, Bedford and Gloucester, for example, had not been empowered to choose the Council's membership.
[163] Somerset was eventually executed on 22 January 1552.
[164] RK Gilkes, *The Tudor Parliament* (University of London Press Ltd., 1969), 124.

Parliament had the power – and, indeed, the right – to determine the structure and personnel of government. However, in the event, that idea, even if it was prevalent, was not sufficiently potent to come to the fore. Unlike in the case of Henry VI, there does not appear to have been an idea that the matter of provision *must* be determined in Parliament, but whether the Members of Parliament and others thought that they might have an *option* we will probably never know. If so, they apparently either saw no need to exercise it or the will to exercise it was lacking; or, perhaps, they thought the authority of the earlier Parliament conjoined with Henry VIII's will was enough.

10.8 Conclusions

Children were not revered in mediaeval England. Although there might have been an association between childhood and innocence, this did not amount to a belief in some inherent and unerring childish wisdom. A child might make a figurehead, but not a governor. In England, immaturity was a valid reason to vary the governmental structure – for there to be some process of disassociation and redistribution of activities and influence.

It is remarkable, though unsurprising, how quickly after monarchs' deaths contemporaries set about trying to ensure that everybody knew who was to perform what *activities* and who was to have what *influence*. Amongst this, one thing is abundantly clear: It was not the case that just anybody could decide on the structure and personnel of government. No ordinary individual could have determined this – or, at least, done so with any success. There was no prevalent and potent association between ordinary individuals and the activity of provision. This activity could only be undertaken by particular people under particular guises. For example, an ecclesiastic – such as an Archbishop – could not provide for the structure or personnel of the government *qua* ecclesiastic, although, as we have seen, at times there clearly was an idea that they might do so *as a member of Parliament*.

Insofar as most people were concerned, there was, at times at least, probably some *level of tolerance* regarding by whom the decision was to be made.[165] Whilst it was clear that no ordinary villein, serjeant, burgess, guildsman, etc. could make the decision, so long as there was some measure of agreement amongst the 'great personages' of the realm, the arrangement made might generally be regarded as having been well-made.[166] In other

[165] See *supra*, 3.9.
[166] Cf. evaluative associations and, more specifically, validity associations: *supra*, 3.11.5.

words, inasmuch as good government was provided, people were largely content to accept whatever arrangement was made and however it was made. Thus, insofar as most were concerned, whilst this expectation might be easily frustrated (e.g. by some villein attempting to exercise a power of provision), it might also easily be fulfilled.

The expectations of those more closely associated with the government, however, were probably somewhat narrower. For them, some general measure of agreement was insufficient. The decision had to be made by particular individuals or groups of individuals, namely either by the minor's predecessor, the Church, or some 'representative' body.

As a monarch themselves and as a concerned relative (if not parent or grandparent), it was arguable that a minor's predecessor had a power, if not a right, to determine how that minor's government would be structured – what positions there were to be, who would fill them, and what that would mean for the royal minor themselves. It was arguably not dissimilar to situations in which the monarch embarked on an extended period of absence abroad, as if they were waging a war in some far-off place.[167] In such cases, it was generally admitted that the monarch could structure the government in their absence. The only difference was that, in this case, the monarch's absence was absolute and permanent.

However, as has been seen, there never appears to have been a prevalent and potent idea that it was a part of the natural authority of the monarch to determine the structure of government *after* their death; it was not part of the royal prerogative. Indeed, the Lords during Henry VI's minority were very clear on this matter in their response to Humphrey, D. Gloucester. Even Henry VIII could only make such provision after having been given the power by Parliament and, even then, Edward VI had to be made complicit in the arrangements so as to allay any fears of their illegitimacy – the government was to be based on *his* authority, *not* his late father's.[168]

The Church, in the person of the Pope and through his appointed representatives, had a very strong claim at the start of our period as regards the power of provision. Whilst it is unclear as to how far this claim could have been pressed in the face of opposition, the fact that it was potent in people's minds is evident from the close involvement of the papal

[167] Cf. App. III, 14.1.1.
[168] Had Henry III's or Edward I's provisions in their wills for a minority government needed to be used, it is possible that the argument that the power of provision extending after the monarch's death lay within the prerogative, but, as it was, these attempts were never tested and the idea that appears to have generally persisted is that it was not.

legates and the fact that matters were referred to the Pope himself. These ideas, however, did not persist. In theory, the Pope might have asserted rights to the same powers, as exercised during Henry III's minority, during the minority of Edward III. However, there existed no prevalent or potent association to this effect. Indeed, for the rest of the period, the only formal influence the Church had in this matter was through its representation in Parliament – even if many of those were there, not so much as churchmen, but as feudal lords.

In each of the minorities, a 'representative' body of sorts played a significant role – 'representative', of course, in the sense that they represented the views at least of the nobility, if not the population as a whole. The Gloucester assembly was instrumental in William Marshal's appointment; Parliament played an especially active role in the minorities of Richard II and Henry VI, during which time the potency of its association with the power of provision appears to have been strongest; Parliament laid the basis of the arrangements for Edward VI's government.[169] Parliament's will was perhaps frustrated in the case of Edward III and there was not time for it to assert itself in the case of Edward V. Both of these examples indicate the importance of the material constitution – the fact that theoretical niceties might be overridden or set aside by those with actual power (viz. Isabella and Mortimer, and Richard [III]), although, as subsequent events show, such arrogations of power were not without their repercussions.[170]

The material constitution shows itself in other ways. For example, had Hubert de Burgh not have asserted himself at the start of Henry III's minority, it seems probable that William Marshal would have continued as 'justiciar', rather than having some new position created for him. Similarly, the importance of trust and personalities, as well as

[169] It can be noted that, in 1788, Pitt argued that precedent showed that it was Parliament's prerogative and duty to provide 'for the exercise of the royal authority'; it was for Parliament to choose how power was to be exercised and by whom; regency did not fall naturally upon the heir apparent by virtue of some inherent right, as was contested by Fox and others. In terms of precedents, Pitt drew on events during the reigns of Edward III, Richard II, and Henry VI; he said that precedents subsequent to Henry VI's reign showed, apparently, that "no one instance could be found of any persons having exercised the royal authority, during the infancy of the King, but by the grant of the two Houses of Parliament, excepting only where a previous provision had been made…". It is interesting to note Fox's dislike of the invocation of mediaeval precedents, which spoke to a more barbarous time; it is also interesting to note Burke's equal dislike, though his objection was rather on the ground that the occurrence of some *constitutional event* did not necessarily provide a basis for a *legal precedent*. These debates had been brought about by a severe mental disturbance suffered by George III in 1788; he recovered in 1789 and the debates ended – for a time, at least. John W Derry, *The Regency Crisis and the Whigs, 1788-9* (Cambridge University Press, 1963), 94ff, 158, et passim; quotes at 95.

[170] Mortimer, as we have seen, was forcibly removed from his ascendency executed (10.3.3); Richard III found that many turned against him and, ultimately, lost his crown to Henry Tudor at the Battle of Bosworth, which act was supported by the fact that there was a perception that Richard had upset the English constitution – he was a usurper.

practical considerations, is also demonstrated. Thus, the Lords' opposition to Humphrey, D. Gloucester's assuming the regency during Henry VI's minority was probably motivated in large part, not only by their preference for his brother, John (D. Bedford), and not only by their wariness of him, but also by the fact that, as *patruus*, Humphrey might have an agenda to serve, which agenda might not be capable of being fully addressed until Henry VI came of age – if Henry even made it that far.

Nevertheless, in spite of these other influences and considerations, the fact is that there were almost always attempts to *rationalize* these things and situate them within the context of the web of fixed associations. Thus, the Lords' opposition to Humphrey was not framed in terms of personalities, etc., but, rather, in terms of the facts that: *Humphrey's position as* custos *was destroyed on Henry V's death; Henry V had no power to appoint Humphrey as regent after his death;* and *it was up to Parliament to decide how the government was to be structured and operated or, in its absence, the Council*. Thus, *Humphrey had no right to the regency* or, indeed, *right to any especial power in the government except that which Parliament or the Council gave him*. According to the fixed associations of the time, Humphrey could legitimately expect nothing more than this.

It can also be said that a monarch's death, leaving a minor successor, did not precipitate a revolution in government. Adaptation was conservative and, insofar as possible, clothed in familiar garments; there was a desire to conform as closely as possible to people's pre-existing expectations. Thus, even though there were some special roles creates (*rector* for William Marshal, Protector for Humphrey, etc.), for the most part, the same offices and bodies continued. There was still a justiciar,[171] chancellor, *curia regis*, Parliament, etc. The minorities were accommodated within the pre-existing frameworks. Indeed, it can be said that, in many respects, the best way in which a monarch could provide for the government of their successor, particularly if they were a minor, was to leave behind them a well-ordered system of government – a system in which everybody was clear as to what activities are expected of them and where they stand in terms of their influence *vis-à-vis* others.

What this study on the matter of provision shows is that there were clearly prevalent and potent, even if not persistent, ideas throughout the period covered concerning who was able to decide as to how activities and influence were to be distributed during a royal minority. Sometimes these were contested; sometimes they were frustrated (even if a

[171] That is, before the disappearance of the office later in Henry III's reign.

remedy were later found, e.g. in the case of Mortimer). Nevertheless, the facts remain that there was some distribution of activities and influence (i.e. constitution) and, moreover, some fixed expectations about how that distribution should be made and look (i.e. constitutional laws), even if these things were not universally prevalent and potent, and even if they changed over time. In these things, then, we can see the Theory of Constitutional Ubiquity, the Associational Theory of Law, and the Generational Theory of Law. There was a constitution, which could and did change.

Part IV:
Conclusions

11 – The Future of Constitutional History

"What men have done and said, and
above all what they have thought – that is history."[1]

11.1 The Framework

Griffith wrote:

> "The constitution of the United Kingdom lives on, changing from day to day, for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also."[2]

It is not, of course, literally true that *every* event or non-event is constitutional – meteorological patterns, geological processes, etc. have nothing directly to do with constitutions. However, every event or non-event *involving social animals* reveals something about the structure of the groups to which they might be thought to belong. In other words, *every event or non-event regarding social animals has a constitutional bearing*. With this qualification in mind, Griffith was absolutely right – about each and every imaginable constitution. This means, as Marshall said, "no *easy* logical limit can be set to the labour of the constitutional lawyer," for, "any branch of the law…may throw up constitutional questions."[3] Constitutions permeate and influence everything we do; they change as we change.

It will be remembered that the framework consists principally of three theories: the Theory of Constitutional Ubiquity; the Associational Theory of Law; and the Generational Theory of Law.

The Theory of Constitutional Ubiquity postulates that every imaginable social group has a constitution of some kind, i.e. some distribution of activities and influence as between its members. This applies to all social animals, but most especially to human groups. Humans, more so than other animals, have the self-awareness and advanced cognitive abilities to perceive, understand, and shape the constitutions of the groups to which they belong. It is second nature to us. There can be little doubt that this has been the case for

[1] This is a quote by FW Maitland and was quoted in: HDH, "Review: English Constitutional Ideas in the Fifteenth Century, SB Chrimes," *The Cambridge Law Journal* 6, no. 2 (1937): 265.
[2] JAG Griffith, "The Political Constitution," *The Modern Law Review* 42, no. 1 (January 1979): 1–21.
[3] Geoffrey Marshall, *Constitutional Theory* (Oxford University Press, 1971), 6. [Emph. added]

at least tens of thousands of years.[4] There is, then, no point in human history that cannot be subjected to constitutional analysis. This is not to say that all constitutions are of the same type. We can differentiate them on many grounds. This is also not to say that many so-called constitutional principles that we take for granted have always been prevalent and potent; there has not always been a clear separation of clearly defined powers, for example. But we must not confuse *constitutions* with *good constitutions*, which mistake is too often made. A constitution is such whether we think it good or bad, and each and every social group has one.

Of course, the fact that constitutions permeate the social world does not mean that they are some kind of mystical æther, which cannot be isolated and studied. The subject-matter of constitutional study is sets of social agents, and the distribution as between those agents of specific kinds of activities and influence. More specifically, it is where *particular patterns* of these things seem apparent, which seem to have *some level of significance* – to us and, more importantly, for the agents themselves.[5] This is the heart of constitutional study and, to lead into the next point, it can be said that many of the aforementioned patterns, particularly those felt to be particularly significant to the social agents involved, have a habit of hardening into fixed expectations so strong that they are deserving of the name 'law'.

The Associational Theory of Law theorizes that laws are defined by their structure and, moreover, that they are essentially psychological phenomena – they are associations in the mind so strong that they appear to be fixed. These arise from the neurological architecture of our brains; they are produced by our propensity to identify and create patterns; they are an attempt to make sense of, and navigate, the world around us – not to mention, control it. These associations give rise to corresponding expectations, which might be either fulfilled or frustrated. We do not like it when our associations are frustrated. It is from this that we derive our desire for the so-called rule of law,[6] as well as our sense of justice.

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[4] After all, though *beliefs* and *customs* might change, we are – by and large – *physiologically* and *psychologically* the same as our ancient ancestors.

[5] Indeed, it can be said that the more time and effort that is expended by the agents concerned upon settling the distribution of activities and influence within the group, making provision for the resources necessary for the realization of those activities and influence, and setting clear expectations about what can and cannot be done, the greater will be the impression of the group and its constitution. These will appear to us with greater forcefulness and, more to the point, will be of greater consequence.

[6] For more on this point, see Appendix II.

Jurists might formalize and systematize these associations, but in so doing they do not change the basic fact that they are only going to be effective if they are sufficiently prevalent, potent, and persistent in individuals' minds. Moreover, it does not change the basic reality that, perhaps even in spite of juristic specification, there will be fixed associations that *are* prevalent, potent, and persistent.

As constitutions permeate every part of social life, there will be a great many fixed associations – specific ideas that people have – pertaining to the distribution of activities and influence. In other words, there will be things that, to all intents and purposes, are constitutional laws. Once again, this is true regardless of time or place, although this does not mean that the content, generation, structure, enforcement, etc. of these laws is the same. Any differences, however, should not mislead us. It all resolves down to the same thing: different kinds of fixed association existing in people's minds. The majority of these we learn directly from others.

The Generational Theory of Law has two parts. The argument of its descriptive part is that constitutions and laws are constantly changing. This is because the people involved are constantly changing, as well as the ideas that they hold and the situations in which they find themselves. They will imperfectly copy the ideas of previous generations; they will forget ideas or aspects of those that they held; they will adapt their ideas to present challenges; the prevalence and potency of various ideas will fluctuate over time. Such changes are not necessarily good or bad, for better or worse. They do not necessarily represent 'progression' or 'development'. Evolution – whether biological or social – is neither, as of necessity, linear nor goal-orientated, passing through certain successive and unavoidable 'stages' towards a greater or higher 'end', or, indeed, towards 'perfection'.[7] Certainly, we might identify certain trends and trajectories, and, moreover, we can certainly have our opinions on the changes that have happened, but we must careful not to oversimply matters or commit many of the numerous fallacies that threaten. Each generation must be treated on its own terms; we must be wary of grand, idealized narratives or, indeed, meta-narratives.

[7] Such ideas were common in the nineteenth century. For example, they are to be found in Auguste Comte's 'law of three stages': Auguste Comte, *The Positive Philosophy of Auguste Comte*, ed. Harriet Martineau, vol. 1 (George Bell & Sons, 1896), 1ff. It can also be found in Hegel and Marx, on which, see, e.g.: Howard Williams, "The End of History in Hegel and Marx," *The European Legacy* 2, no. 3 (1997): 557–66. It is particularly strong in the work of Spencer, see esp.: Herbert Spencer, *The Evolution of Society: Selections from Herbert Spencer's Principles of Sociology*, ed. Robert Leonard Carneiro (The University of Chicago Press, 1967). See further: Alex Mesoudi, *Cultural Evolution: How Darwinian Theory Can Explain Human Culture and Synthesize the Social Sciences* (University of Chicago Press, 2011), 37–40.

The argument of the moral part of the Generational Theory of Law is that no generation should *feel bound* to accept blindly and uncritically the constitutions and laws of its predecessors. This is not an argument that every generation ought to make a concerted effort to overhaul and depart from previous constitutions and laws; merely that each generation ought to do what it thinks good and right without such conceptions being disproportionately influenced by perceived past practice. It is for each generation to decide for itself how to live.

We can reject, then, the Natural Law and rationalist claims that, to borrow words from Savigny, "there is a practical law of nature or reason, an ideal legislation for all times and all circumstances, which we have only to discover".[8] We can also reject historicist claims that laws and constitutions are determined by, and limited to, historical and socio-biological processes, revolving around the some 'organic connection' to the 'character of the people' or 'life of the nation', etc.[9] However, we need not go so far as pure legal positivism in believing that legislation is the totality of law, for law – even if not necessarily for the strict purposes of the practising doctrinal lawyer – is clearly more pervasive than this. It can – and, indeed, *does* – exist and develop outside of deliberate enactments by bodies constituted specifically for that purpose.

Yet, whilst we need not surrender to fate or the uncontrollable facts of one's nature, as perhaps the historicists might have us do, we also need not surrender to the perceived uncontrollability of evolutionary forces, as Hayek might have us do. Thus, we need not surrender to a belief, almost, that nature, for better or worse,[10] through the adoption of *laissez faire* social policies, ought to be allowed to run its course, as if guided by some Smithian 'invisible hand' – not least because this belief leads easily into social Darwinism and notions of the 'survival of the fittest'.[11] As sentient and intelligent creatures, there is no reason why we should not feel able to make deliberate and concerted efforts to improve our lives – including by shaping laws and constitutions in ways that we see fit. This might mean preserving what we think to be tradition; it might mean departing from it. But,

[8] Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (Littlewood & Co., 1831), 23.
[9] See, esp.: Savigny, *Vocation of Our Age*, 27.
[10] Cf. Ritchie: "From natural selection there have resulted wonderful adaptations, but how much of suffering by the way, how much of horrid cruelty in these adaptations themselves?" David George Ritchie, *Darwinism and Politics*, 2nd ed. (Swan Sonnenschein & Co., 1891), 4.
[11] For Hayek, see: Friedrich August Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge Classics, 2013), esp. Pt. (or "Volume") 1. The mutual antagonism and incompatibility between what Hayek called 'evolutionary rationalism' and 'constructivist rationalism' has been questioned, for example, by Jenkins: Iredell Jenkins, *Social Order and the Limits of Law* (Princeton University Press, 1980), 15ff.

whatever we choose, we will probably find that, to a greater or lesser extent, change happens anyway – often in ways that we cannot foresee. In keeping, then, with the spirit of sociological theories of law, we can adopt a view towards laws and constitutions that is at once both descriptive-dynamic and creative. We can describe how they are manifested in people's behaviours and how they change over time, and we can play some active part in this.

Parts II-III sought to show the applicability and explanatory power of this framework – at least, in its descriptive and analytical aspects.

It was evident in Chapter 7 – on mediaeval constitutional ideas – that, throughout the mediaeval period, there were certain fixed associations and corresponding expectations relating to the distribution of activities and influence within various social groups. In particular, whether the product of design, nature, or reason, there was thought to be a natural order to society – a natural distribution of activities and influence (which, it can be added, largely conformed to ideas of monarchy and patriarchy).

Chapters 8 and 9 looked more specifically at the issues of succession and provision – both of which relate to *how* and *by whom* activities and influence come to be/are distributed – in the context of the English royal minorities. It was clearly not the case that *anybody* could succeed to the throne or that *anybody* could determine the structure of the government – only *particular individuals* could do this, whether alone or in a body, and do so at *particular times* and in *particular ways*. In other words, there were prevalent and potent ideas about who could succeed and how, and who could determine the structure of government and how. These might not have been absolutely universal; these might have had grey areas; these might not always have been the only consideration. But this does not detract from the facts that: there were various fixed expectations; people mostly did attempt, at least, to act in accordance with them; their frustration was met antagonistically; and generally workable arrangements were made in which certain expectations guided action (even if these expectations shifted and changed from time-to-time).

The fact that the minorities were generally accommodated within existing structures and practices, and that the vast majority of these went unchanged during the minorities, is testament to the fact that there was a relatively stable distribution of activities and influence, supported by a set of prevalent, potent, and persistent fixed associations whose

frustration would – and did – result in confusion, outrage, and demands for justice.[12] Whether these would fall within the purview of a class of jurists is a different – and, indeed, interesting – question, but, for the constitutional historian, what really matters is how people ultimately behave and the thought processes underlying that behaviour.[13]

11.2 Aim, Tasks, and Approach of the Constitutional Historian

The aim, tasks, and approach of the constitutional historian should be clearly stated.

11.2.1 Aim

The aim of constitutional history is simple: to describe and analyse, insofar as possible, the constitutions of social groups as they existed in the past.

11.2.2 Tasks

In order to achieve the above aim, the constitutional historian must study the:

(1) Various social groupings in past human populations (particularly those that seem to have had some measure of meaning and reality for their ostensible members);
(2) Distribution of activities and social influence as between the members thereof;
(3) Extant fixed associations therein, with consideration given to the prevalence, potency, and persistence of those associations;
(4) Effect of those fixed associations on the distribution of activities and social influence;
(5) Complexity, externalization, and systematization of these arrangements;
(6) Changes to these arrangements over time and causes thereof; and
(7) All the while, to ensure that the focus remains on people – on their beliefs and their behaviours.[14]

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[12] As has been seen, Roger Mortimer ultimately lost his life because he frustrated the fixed expectations of his contemporaries as to who should wield power and how they should come by it. Alternatively, Richard III's tenure on the throne was probably in no small part ill-fated because he frustrated his contemporaries' fixed expectations concerning the succession to the throne. See, *supra*, 10.3.3 and 9.16.

[13] For the constitutional historian, this might mean distinguishing 'black-letter' from 'living' law; separating 'positive' from 'customary' law. The constitutional historian must be alive to the weightings given to each of these in different periods and places, and must also be alive to which would be countenanced and accepted in recognized courts of law. However, the constitutional historian must not arrogantly assume that one is better or more valuable than the other.

[14] As McFarlane once wrote, it is a misconception to believe "that it is possible and desirable to write the history of institutions apart from the men who worked them. Institutions sometimes seem to have a life of their own, but this is only an appearance. They are born, develop, change, and decay by human agencies. Their life is the life of the men who make them. Constitutional history is concerned with men." KB McFarlane, *The Nobility of Later Medieval England* (Oxford University Press, 1973), 280.

Through these, we can better understand the constitutions of societies in times past. Indeed, by following these things down to the current time, we can better understand why the world is as it is today.

11.2.3 Approach

The constitutional historian ought to have recourse to all available evidence, drawing on multiple types where possible;[15] each piece of evidence ought to be carefully evaluated as to its reliability and the insight it provides; each piece ought to be considered within its context; one ought only to rely on evidence that is credible, convincing, consistent, and pertinent; evidence ought not to be excluded or ignored because it is somehow inconvenient. To paraphrase Russell, one should ask only 'what are the *facts* and what is the *truth* that the facts bear out'; one should not let oneself be 'diverted either by what one wishes to believe or what one thinks would be good if it were believed'.[16] Where the evidence does not support our opinions, we must change our opinions.

All conclusions ought only to be as strong as the evidence. Caution must be exercised when employing inference, extrapolation, and speculation. In particular, one must not assume uniformity across time and localities; just because something might have been true of one group in one area at one time, it does not follow that it was likewise true elsewhere or at other times.[17] Similarly, caution ought to be exercised when employing assumptions. These ought always to be interrogated; they ought to be explained and

[15] For the constitutional historian, this means, in particular, not relying solely on documentary evidence, particularly on 'legal' codes. Without knowing anything of the circumstances and manner of their creation, and their subsequent use and interpretation, we are not only likely to fail to understand the documents themselves, but to fail to appreciate the wider picture or, even worse, be misled into believing a past that never happened. Just because something has been written does not mean that it was widely accepted or effectual; the intentions behind it might be quite different to what we might at first guess.

[16] This wording is adapted from what Bertrand Russell said at the end of his *Face to Face* interview, broadcast on the BBC in 1959: "When you are studying any matter, or considering any philosophy, ask yourself only: what are the facts and what is the truth that the facts bear out? Never let yourself be diverted by what you wish to believe, or by what you think would have beneficent social effects if it were believed. But look only, and solely, at what are the facts." In particular, we have to be wary of our *confirmation bias* – our predisposition to pay greater attention to, and believe more readily, those things that confirm or otherwise attune with our prior beliefs, prejudices, etc., which danger is all the more real if one approaches any matter with an agenda.

[17] As Andrews has said, it is also important to bear in mind, *inter alia*, that, even though there might be some overarching cooperation between various groups, it does not follow that those groups are similarly structured or operate on the same lines: "[it is] necessary to remember that constitutional growth and centralization do not presuppose local uniformity, and that the local conditions are not everywhere the same, cannot be everywhere traced to the same causes, or be the result of like influences." Charles McLean Andrews, *The Old English Manor: A Study in English Economic History* (The John Hopkins Press, 1892), 31.

justified;[18] any reliance thereon ought to be minimal and anything based upon them regarded as, at least in some degree, hypothetical.

Constitutional history ought to be devoid of metaphysical ideas and entities. Everything that has been said and done has been the result of the actions of real individuals. These occurred in specific places at specific times; they happened, and happened as they did, because of specific reasons. One ought to be sceptical of anything that seems to have appeared spontaneously and without identifiable cause.

The constitutional historian ought to avoid moralizing; constitutional history should inform, not preach. Likewise, one ought to avoid ethnocentrism and, indeed, snobbery – measuring other societies, whether past or present, against one's own, often with a belief in the superiority of one's own.[19] Furthermore, one must always steer clear of notions of destiny or fate; of notions of preordained stages of society through which each social group must pass, each of which represents some improvement upon the last.[20] One ought also to avoid grand, sweeping narratives, especially where these pretend to outline the 'growth' or 'development' of the institutions, etc. of a nation, etc., or, indeed, where they draw from some idea of permanent features or enduring characteristics. Similarly, whilst one ought not to embark on a crusade to purge the past of things resembling the present, one ought to be cautious in identifying too closely with the past and, in particular, with historical persons. Indeed, one must also be cautious in attributing motives, ideas, and ideals to historical persons, especially where the actual evidence for these is meagre, untrustworthy, or biased. It is particularly important that we do not use historical persons for our own ends.

One of the downfalls of the Victorian constitutional historians was their propensity to draw the lines of battle along lines of great constitutional principle – that the one side represented, for example, 'constitutionalism' and the other 'absolutism'. In some cases,

[18] Of course, being assumptions, they need not be *proved* if proof cannot be achieved with sufficient ease or significant diversion. Justification is merely required to show that any assumptions have not been adopted carelessly or capriciously. Naturally, the more consequential the assumption, the greater the justification that is required; if the assumption is of critical importance, then it really ought to be fully justified – to such an extent that it is difficult to treat it as an assumption any longer.

[19] See: William Graham Sumner, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals* (Ginn and Company, 1906), 13–15; Ruth Benedict, *Patterns of Culture* (Houghton Mifflin Company, 1989), 3–4.

[20] One must be wary, too, of concluding that certain 'primitive' societies (e.g. Australian aborigines), as exist in the modern day, exhibit some 'primordial form' of social organization, which form preceded other more advanced forms: "Since we are forced to believe that the race of man is one species, it follows that man everywhere has an equally long history behind him. Some primitive tribes may have held relatively closer to primordial forms of behaviour than civilized man, but this can only be relative and our guesses are as likely to be wrong as right." Benedict, *Patterns of Culture*, 18.

they can perhaps be forgiven; historical figures sometimes distinguished themselves on similar grounds. However, chance events, vested interests, biases, and prejudices often played as much, if not a more powerful, role. Even where the historical actors themselves argued that their quarrel regarded constitutional principle, this was often those matters of self-interest, etc. clothed in principle. Their outward aim might seem admirable; their motives, dubious. In writing history rather than chronicles – to take McFarlane's distinction[21] – Victorian writers tended to impose too strong a meta-narrative upon the events they were describing. In other words, they found purpose and meaning in events that were only dimly connected; the products of chance rather than providence; the products of flawed and fickle human beings rather than rational, consistent agents with grand ideals. Their writings were compelling and remain so. However, modern constitutional historians must avoid their mistakes. We must not invest ourselves in the past and historical persons; we must not overgeneralize or oversimplify the past; we must not take pride in developments or accomplishments in which we had no part.

Thus, the constitutional historian ought to adopt an approach that is methodical, open-minded, empirical, grounded, objective, detached, critical, discerning, and cautious. In short, the constitutional historian ought to be as any other historian.[22]

11.3 Constitutional and Political History

The study of politics helps us to explain much of what happened in the past. The royal minorities are no exception. As is evident from what has been said, events surrounding the royal minorities were often driven by personal interests and desires. Moreover, they were in large part a function of who was possessed of the greater resources and charisma at any given time – not to mention 'luck'.

However, if one were to look at these things alone, one would fall considerably short of explaining why things happened precisely as they did. In fact, one would fail miserably. This is because the royal minorities, as with all events in human history, can only be properly understood by also taking into account people's fixed associations and corresponding expectations – particularly regarding the distribution of activities and social influence as between the members of the social group. These define for people

[21] KB McFarlane, *Lancastrian Kings and Lollard Knights*, ed. GL Harriss and JRL Highfield (Oxford University Press, 1972), 6.
[22] Much as Plucknett said in his discussion of Maitland: "Once the professor of law embarks upon history he has become a historian, the legal history is not law, but history". Theodore FT Plucknett, "Maitland's View of Law and History," *Law Quarterly Review* 67 (1951): 190.

what is possible. They inform their basic assumptions about what social life *does* or *should* look like. They dictate to a large extent both the manner and direction of their actions. These associations and expectations might change; they might be frustrated; they might be the subject of considerable disagreement. Nevertheless, they have a very real and tangible effect on how people think and behave. As such, there is everything required by the constitutional historian to undertake their work.

Certainly, in some periods of history the task of the constitutional historian will be more difficult than others – particularly if they are primarily focusing on identifying something more after the nature of a legal or formal constitution. Yet, to focus solely on trying to find a legal or formal constitution would as greatly mislead one as by solely focusing on 'politics'; it would not entirely explain how people *actually* thought and behaved.[23] For this, one must look to the wider political or material constitution – to the actual prevalence, potency, and persistence of particular constitutional ideas, as affected perhaps by ulterior motives. These cannot be ignored. So-called legal or formal constitutions are not only often a product of these, but are also largely contingent upon them.[24]

11.4 Humanizing Spirit of the Framework

The writing of history has changed in recent centuries. It has become more rigorous and objective; it has come to recognize the complexity and contingency of events. However, there often seems to be an assumption that things in the past *were* – and *must have been* – different. Indeed, there is something of an obsession with trying to show just how different it was. This attitude requires modification.

We have noted in the Generational Theory of Law the variation and accumulation principles. However, it does not follow from either that everything in the past need, as of

[23] "That the historical process in the Middle Ages was overwhelmingly determined and conditioned by the law is now more and more recognized. It is the close interlacing of law and history in the Middle Ages which makes it impossible to see the true nature of the historical conflicts in the Middle Ages without at the same time also recognizing that they primarily concerned the law. Whether it is the Investiture Contest, or the dramatic conflicts between popes and emperors, or the quarrel between king and barons in thirteenth-century England, or the councils disputing the authority of the pope, and so forth, the theme underlying these and so many other medieval conflicts was that of the law and of jurisdiction. […]. Government and law were at all times so intimately linked with each other that they appear as one and the same thing, seen from different angles. As Maitland once said, 'in the Middle Ages the law was the point where life and logic met'." Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, 3rd ed. (Methuen & Co. Ltd., 1974), 19–20.

[24] As Loughlin has said, for contemporary lawyers, "[h]aving grown up under the influence of positivism, there is a danger of forgetting that the foundations of legal order are political." Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 133.

necessity, be radically different to the present. There is, as it were, a **modernity fallacy**; an idea that modernity is qualitatively and categorically different to the past.

When we begin to understand the humanity of historical persons, we see that they were not all that different to us. Their basic concerns and preoccupations were the same, as was their general physiological and psychological composition.[25] Indeed, when we begin to understand their humanity properly, as well as our own (i.e. to see them and ourselves as living creatures), we begin to see that we are not all that different to other animals – particularly those more closely related to us. Thus, we begin to realize that many of the differences we thought to exist are, actually, rather superficial. Indeed, often these supposed differences begin to look as though they were invented by people obsessed with creating differences. We might praise their ingenuity, creativity, and imagination, but we cannot praise their wisdom.

It is vital that historical study is infused with an understanding of humanity. For the constitutional historian, this is imperative. It is hoped that the proposed framework will help in this regard. In the first place, it seeks to place the emphasis not on abstractions, as if they were divorced from people,[26] but, rather, on ideas as held by living, breathing people. In the second place, it encourages us to focus on the constitutions of groups of *people*. The fact that they happened to live in another time and place is incidental. We cannot ignore or undervalue their historical position, but we should not allow this to obscure their humanity, as though living some centuries or millennia ago made them fundamentally different.[27]

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[25] Cf. "There is a general tendency to think of medieval men and women as if they were such saints or devils as we see on churches, carved in stone; but the more we study them the more we realize that they were flesh and blood, *most remarkably like us*." Though: "But if human nature was much the same, the conditions of life were very different, and if we are to understand our ancestors we must try and look at the facts of their lives from their own points of view." LF Salzman, *English Life in the Middle Ages* (Oxford University Press, 1926), 21 [emph. added], 22.

[26] For example, it is common for purportedly 'pure' theories of law, such as Kelsen's, practically to forget people altogether, as though somehow extraneous or irrelevant. This is a grave error and must be remedied. See: Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (University of California Press, 1967). His aim, as he outlines it on page 1, is to develop a 'pure theory of law' and, in so doing, "to eliminate from the object of this description everything that is not strictly law". Indeed, he appeared to be of the belief that the 'science of law' had been 'adulterated' by being "uncritically…mixed with elements of psychology, sociology, ethics, and political theory". Naturally, we ought not to *uncritically* approach any matter, but, to a great extent, these things cannot be avoided.

[27] Of course, if we begin to speak in tens of thousands of years, or even hundreds of thousands of years, then the picture will be somewhat different. The tracing of human evolution remains an ongoing project; there is much that is still unclear and tentative. Nevertheless, we can assert with reasonable certainty that there was some time in the past when there were creatures that, though they might resemble us in some respects, did not think and behave like us. For this reason, we would perhaps have to treat them rather as we would other non-human animals, when it comes to the matter of analysis, rather than as we treat humans. For most constitutional historians, however, this will be of no concern; we are here speaking of a time

11.5 The Framework's Future

The chief merit of the framework is its explanatory and corrective power; it will hopefully go some way towards ensuring that constitutional history is henceforward written with the right object and in the right tone. It will not render everything heretofore written as redundant or worthless. Quite the contrary. We owe a great deal to the constitutional historians of the past – especially those of the Victorian period. However, constitutional history has certainly suffered from its association with the latter.[28] It has become synonymous with them; when their approach was rejected, constitutional history as a whole went too. This was rather like throwing out the proverbial baby with the bathwater. Constitutional history, properly understood and undertaken, is a perfectly valid and valuable pursuit, and one that can stand in its own right. We can profitably use the works of earlier constitutional historians, but these were, of course, products of their time and must be approached with that in mind.

The framework will hopefully also provide a bridge between fields and subjects that have become separated – in particular, history, public law, legal history, and, of course, constitutional history. These are, in many respects, complementary endeavours; each can benefit from the other.[29] This is not to encourage *argumenta ad antiquitatem*, i.e. appeals to history or tradition. It is simply that their fusion helps us to better understand both how things were and why they are now as they are.

The framework is not yet perfected. It can certainly be further developed and refined; the full extent of its applications worked out. However, its general outline and argument are unlikely to change. Hopefully, then, the framework as here presented can provide a solid basis for future work – and act as a corrective to the approaches that preceded it.

It has a great deal to contribute to debates on living constitutions, originalism, as well as political versus legal constitutionalism. It also has a great deal to contribute to debates on

period long before any with which the typical constitutional historian will be concerned. For all intents and purposes, taking into account some degree of variation, we can reasonably assume that people have changed but little – physiologically and psychologically – in the last few thousand years.

[28] See *supra*, Chaps. 1 and 2.

[29] Cf. Allison's argument, for example, that "Howsoever most legal historians lost interest in English public law and/or most English public lawyers lost interest in legal history, that diminution and paucity rendered English public law less intelligible and its basic features and development more obscure": JWF Allison, "History To Understand, and History To Reform, English Public Law," *The Cambridge Law Journal* 72, no. 3 (2013): 531.

stare decisis,[30] customary law, and international law.[31] The greatest problems that it faces are how to deal with ideas of collective responsibility and intergenerational justice, i.e. how much one group and one generation can be held accountable for the actions of those that preceded them. After all, if some wrong has been done, there is an expectation that it be corrected – that justice be done. If this is not done by the supposed perpetrators, then should it be up to some others – their successors – to make amends, particularly if they have in some way benefitted from the misdeeds of their forebears? Furthermore, if there is to be some form of responsibility, then for how long should it last and how far should it go? Should the twentieth generation be as responsible as the second?

These questions cannot be tackled at length here, but the answer probably lies along the following lines. Subsequent generations are not responsible for the actions of previous generations; it would be wrong to punish them for the crimes of others. However, each generation must recognize its own good fortune and the misfortunes of others. It should seek, therefore, to aid and assist those of lesser fortune, not out of some sense of guilt or shame, but out of a sense of humanity. The matter is slightly different when it comes to agreements, but the principle is the same. If one generation has made an agreement, then subsequent generations should not feel absolutely bound by its terms. Nevertheless, it should seek insofar as possible to honour them, because they have given rise to expectations on the parts of others. Not to honour those terms would be to frustrate others' expectations, and would probably lead to resentment and retaliation – especially if there has been a heavy reliance on the fulfilment of these expectations. As such, each generation should feel free to renegotiate terms and agreements, but it should never seek to dispense with them out of hand. Naturally, the fact that generations tend to overlap somewhat makes the idea of honouring previously made agreements more tolerable.

[30] Frankfurter J in *Helvering v Hallock* 309 US 106 (1940) at 119 said something of the greatest interest on this topic, and one can see readily how it might be understood using the tools from the proposed framework: "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy, and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

[31] For a lengthy discussion of the concept of constitutions in the context of international law, see: Bardo Fassbender, "The United Nations Charter As Constitution of The International Community," *Columbia Journal of Transnational Law* 36 (1998): 529–619. Fassbender correctly argued that the international community has a constitution and that the UN Charter plays a significant part in giving that constitution definition. However, the idea that it is *the* constitution of the international community – or, at least, the international *legal* community – is perhaps too bold.

Besides questions of justice between past and present generations, there is also the question of justice as between present and future generations. Can any given generation do whatever it likes without any regard to the well-being of future generations? Is there any requirement that each generation lives sustainably? Can any generation remove the safeguards from which it has benefited?[32] Again, this is neither the time nor place for extended discussion, but the answer will probably come back to that idea of humanity. If we remember the humanity of those that will come after us and imagine how they might think and feel, then it can hardly be doubted that each generation should have a care for those that will come after it.

Every social group, then, has a constitution – a distribution of activities and influence, – which its members are free to shape as they will, though the merits of past arrangements should be considered and a care had for those yet to come. It is the ultimate task of constitutional historians to study the arrangements of each social group and, in particular, to study the fixed associations permeating those arrangements. In so doing, regard should be had both to supposedly formal and authoritative declarations, and to people's actual beliefs and behaviours. All should be done in the right way, in light of the theories here suggested. In this way, constitutional history might be revived and prosper once more.

[32] For some ideas on this, see: John Rawls, *A Theory of Justice*, 2nd ed. (Oxford University Press, 1999), 251-258 (§44).

Appendices

Appendix I: Corporations, States, and the Theory of Constitutional Ubiquity

12.1 Introduction

The purpose of this appendix is to consider corporations and, most especially, States in the context of the Theory of Constitutional Ubiquity.

12.2 Corporations

Can social groups be regarded in law as corporations; as bearers of rights, duties, and liabilities distinct from those of their members? To a great extent, this is for each legal system to decide. However, in principle, it is possible to *assign* rights, duties, and liabilities to social groups. However, corporations are not as natural persons. Much as Maitland said,[1] everything must be done by and through real individuals; every right, duty, and liability held on behalf of, or in respect to, identifiable individuals. They place the benefit or burden on the group collectively; how it is actually enjoyed or discharged is for them to decide. The corporation, being a construct and a fiction, does nothing.

It is also up to each legal system to decide the extent to which individuals are protected from the duties and liabilities incurred by the group; the extent to which they might be held individually and personally responsible.[2] It would seem sensible to hold individuals responsible for any wrongs they commit, though in the rectification of that wrong the group might assume some vicarious liability – especially if that wrong was done whilst in the service of that group and if justice might not otherwise be done.

The nature and length of any rights, duties, and liabilities assigned to corporations must be carefully considered; furthermore, the time at which any such corporation is deemed to perish. There is a great danger, for example, of permanently alienating rights to corporations, whose existence is but a façade, thereby depriving real people of their enjoyment. For example, it would be senseless to have land 'owned' by a corporation when there is nobody to have the

[1] "[A state] is capable of proprietary rights; but it is incapable of knowing, intending, willing, acting… [It] does no act, speaks no word, thinks no thought, appoints no agent." Translator's Introduction to Gierke: Otto Gierke, *Political Theories of the Middle Age*, trans. Frederic William Maitland (Cambridge University Press, 1922), xx–xxi.

[2] Naturally, there is some economic sense in limiting liability, especially in profit-making enterprises, as this will encourage people to take greater risks, knowing that the personal risk involved is minimized.

use and benefit of it. There is also risk of engorgement;[3] the accumulation of rights in corporations,[4] especially those not subject to ordinary duties and liabilities.

12.3 Nature of the State

States are often thought of as being largely – if not exclusively – modern phenomena and, moreover, their rise in the early modern period is often associated with the advent of constitutions and public law.[5] There is an argument, therefore, that there could not have been such a thing as a constitution during the mediaeval period because there was then no such thing as a State. According to the Theory of Constitutional Ubiquity, this argument does not hold, because constitutions are not tied exclusively to States. There would have existed constitutions regardless as to the existence of any such States. However, whether there was – or could have been – such a thing as a State during the mediaeval period still bears consideration.

12.3.1 States as Social Groups

The first point to be made is that the State – whatever else it is exactly – is a type of social group. This is amply demonstrated by its reliance on the presence of social agents. In the absence of social agents (i.e. people), it disappears; without anybody to act 'on its behalf', it disappears; without anybody to imagine it, it disappears. States can always be reduced to sets

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[3] This was a particular concern during the Middle Ages. The donation of land in *mortmain* (from *manus mortua*, 'dead hand') was a matter of contention between crown and church, bearing in mind the context of a feudal society: "Because the church never died, never married, and never had children, none of the incidents of tenure [aids, fines, reliefs, escheats, dues, wardship, marriage, etc.] could apply to this land." Bryce Dale Lyon, *A Constitutional and Legal History of Medieval England*, 2nd ed. (WW Norton and Company, 1980), 459. See further: John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford University Press, 2019), 262–63; Theodore Ft Plucknett, *A Concise History of the Common Law*, 5th ed. (Butterworth & Co (Publishers) Ltd, 1956), 541–42. Besides the fact that corporations do not have the natural lifecycles and life-events of people, there was also the risk that they would be free of – or immune to – obligations that would otherwise be expected. In particular, in feudal society, the performance of services. This, in theory, places a greater burden on everybody else, as they have to make up the shortfall. It should be added that the mediaeval objection was not to the church holding land *per se*, but, rather, to its holding large amounts of land and, moreover, the fact that it was being used purposefully to avoid the feudal incidents – essentially, a 'loophole' being exploited to the frustration of others' expectations. Their answer was not to ban gifts of land to the church. Instead, it was to regulate it; in particular, the Statutes of Mortmain 1279 and 1290.

[4] As Geldart and his editors said with regard to *mortmain* in 1959: "The original reason for the rule disappeared with the disappearance of the incidents of tenure. But the rule is [or, rather, was] still a part of the law because it was found useful for another reason. It prevents the accumulation of land in the hands of bodies who have not got the same free powers of alienation as natural persons." William Geldart, *Elements of English Law*, ed. William Searle Holdsworth and HG Hanbury (Oxford University Press, 1959), 82. All mortmain legislation was repealed the following year by the Charities Act 1960. For a history of mortmain legislation, see: AH Oosterhoff, "The Law of Mortmain: An Historical and Comparative Review," *The University of Toronto Law Journal* 27, no. 3 (1977): 257–334.

[5] Take, for example, Loughlin's argument that public law emerged and developed alongside modern states, which both emerged in the early modern period, albeit drawing on mediaeval ideas: Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 2, 17ff.

of individuals exhibiting certain sets of beliefs and behaviours; they are not metaphysical, overarching entities.[6] This is no different to any other social group.

Some have happily accepted that the State is a form of social group.[7] Others appear more reluctant to categorize it so; if it must be a social group, then it is such *sui generis*.[8] From a juristic viewpoint, this might hold; from an anthropological viewpoint, it cannot. It is obviously true that States have peculiar features that justify us in giving them a distinct label.[9] However, it does not follow that they must be something so entirely different so as to be *sui generis* – at least, any more than other types of social group are *sui generis*. We like to think of States as being special, but they are not.[10]

The question remains, therefore, as to whether this specific kind of social group could have existed during the mediaeval period. To answer this, we must know what is meant by 'State' – if, indeed, it can be said to mean anything at all.[11]

12.3.2 Definition of States

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[6] A metaphysical theory of the state was proposed, for example, by Bosanquet, who built heavily on Hegel and Thomas Hill Green *inter alia*. It was Bosanquet's theories that were the especial object of Hobhouse's criticism of idealistic (i.e. metaphysical) theories of the state, which he characterised as follows: "The root of this conception is the common self. It is the notion that one mind, one will vastly greater than yours or mine, constitutes the life and directs the course of each organized society". Naturally, Hobhouse thought this to be badly founded. There is a passage of his worth particular mention: "The actual institutions of a society are not the imperfect expression of a real will, which is essentially good and harmonious, but the result into which the never-ceasing clash of wills has settled down with some degree of permanency, and that result may embody much less of justice, morality and rationality than the explicit ideas of many an individual mind". Cf. Bernard Bosanquet, *The Philosophical Theory of the State*, 4th ed. (Macmillan & Co. Ltd., 1923); Leonard Trelawney Hobhouse, *The Metaphysical Theory of the State: A Criticism* (George Allen and Unwin Ltd., 1918), quotes at 87 and 86 respectively.

[7] For example: Nick W Barber, *The Constitutional State* (Oxford University Press, 2010), xi, 25–33, et passim.

[8] For example: Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 5–6, 59–60.

[9] Cf. Maitland: "For, when all is said, there seems to be a genus of which State and Corporation are species. They seem to be group-units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units. Let it be allowed that the State is a highly peculiar group-unit; still it may be asked whether we ourselves are not the slaves of a jurist's theory and a little behind the age of Darwin if between the State and an immeasurable gulf and ask ourselves no questions about the origin of species." Gierke, *Political Theories of the Middle Age*, ix [translator's introduction].

[10] Cf. Pound: "I do not think the thoughtful lawyer believes in 'the necessary and a priori pre-eminence of the state over other groups'. If he has given any attention to legal history he cannot. But he cannot fail to observe that we are, and have been since the sixteenth century, in an era of paramountcy of political organization of society and that the social control with which he has to do is exercised through that organization and presupposes that organization for its efficiency. For his purposes he assumes that de facto pre-eminence without needing to postulate it as a necessary or universal proposition to be accepted by those who look at the phenomena of social control from other standpoints and for other purposes." Roscoe Pound in the Preface to Georges Gurvitch, *Sociology of Law* (Kegan Paul, Trench, Trübner & Co. Ltd., 1947), xii–xiii.

[11] The difficulties of defining the term 'State' have been recognized by many, but see, e.g.: Christopher Pierson, *The Modern State*, 2nd ed. (Routledge, 2004), chap. 1.

Theories of statehood abound, although two types of theory appear most prominent. On the one hand, **declarative theories** argue that there is a *set of criteria*, the fulfilment of which is sufficient for statehood. On the other hand, **constitutive theories** argue that *recognition of statehood*, most especially by other States, is both necessary and sufficient.[12] In this view, statehood is a sort of exclusive club. From an ontological perspective, this view is somewhat problematic and runs the risk of resulting in strained language: some entities might be recognised as states, though bearing little resemblance to the common idea of a state, whereas others might not be recognized, even though to all intents and purposes they look very much like one. In this light, the declarative theory appears the more sensible.

What, then, could be said to characterize States? Indeed, are there any essential qualities that States must have in order to be considered States? To answer these questions, we can begin by setting out a list of features often associated with States today:

- Sizeable and relatively stable population;[13]
- Occupation of a (large) consolidated geographical area;
- Few, coordinate centres of recognized authority;[14]
- Paramountcy, supremacy, hegemony, etc. within its area;
- Tangible degree of independence from 'foreign' influence and interference;[15]
- Represent their populations in external relations (e.g. trade, diplomacy, etc.);

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[12] See: Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford University Press, 2003), 86–88; Eva Erman, "The Recognitive Practices of Declaring and Constituting Statehood," *International Theory* 5, no. 1 (2013): 129–50.

[13] At least for the so-called 'nation state', this is population is taken to be coextensive with the 'nation'. Cf. Gianfranco Poggi, *The State: Its Nature, Development, and Prospects* (Polity Press, 1990), 26–27.

[14] These first three criteria are roughly equivalent to the first three criteria of statehood, for the purposes of international law, as laid out in the Montevideo Convention 1933, Art. 1: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Indeed, this Convention very firmly adopts a declarative theory of statehood, for, in Art. 3, it is stated: "The political existence of the State is independent of recognition by the other States."

[15] This and the previous criterion are often taken together to mean 'sovereignty'. Whether it is necessary that there be (absolute and general) sovereignty is debateable, as is where that sovereignty is ultimately said to reside, but it is worth marking Hinsley's definition of sovereignty: "the idea that there is a final and absolute political authority in the political community…*and no final and absolute authority exists elsewhere*". Francis Harry Hinsley, *Sovereignty*, 2nd ed. (Cambridge University Press, 1986), 26. This is reflected in Jackson's distinction between 'positive' and 'negative' sovereignty: Robert H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press, 1991), 26–31. That sovereignty ought to be absolute and general, excepting some rights that cannot be surrendered, even in the social contract, and last for so long as it can be maintained, was famously argued by Hobbes: Thomas Hobbes, *Leviathan (1651)*, ed. JCA Gaskin (Oxford University Press, 1996), esp. 115-122 [XVIII], 139-148 [XXI].

- Bodies performing legislative,[16] and executive functions;
- Classes of professional, salaried administrators;[17]
- Developed systems of taxation;[18]
- Developed systems of law and jurisdiction,[19] including systems of criminal law with public enforcement systems;[20]
- Hierarchies of specialised and general courts for legal determination, clarification, and dispute resolution;
- Classes of professional, salaried, independent judges;
- Monopoly on the legitimate use of force/violence;[21]
- Professional, salaried police forces;[22]
- Professional standing armies, navies, and, since the early twentieth century, air-forces;[23]
- Professional, salaried intelligence agencies;
- Welfare systems, encompassing health, housing, financial assistance, etc.;
- Comprehensive and open education systems;

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[16] Kelsen, for example, thought that states are necessarily legal orders of some description (though not all legal orders are states). Indeed, "[a] state not governed by law is unthinkable". According to Kelsen, there must be 'established organs' who "in the manner of the division of labour, create and apply the norms that constitute the legal order; it must display a certain degree of centralization". In short: "The state is a relatively centralized legal order." We must bear in mind that Kelsen thought that legal orders must necessarily include some coercive element, meaning that states, by implication, must also possess some coercive quality; they are coercive orders. See: Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (University of California Press, 1967), 286, 312, 318–19.

[17] Cohen, for example, attributed to 'bureaucracy' (i.e. "a set of officials, priests, nobles, slaves, eunuchs, and their sub-organizations") the 'primary task of maintaining continuity in early states': Ronald Cohen, "State Origins: A Reappraisal," in *The Early State*, ed. Henri JM Claessen and Peter Skalnik (Mouton Publishers, 1978), 35.

[18] After all, in many respects it is taxation that makes the rest possible. Cf. Friedrich Engels, *The Origin of the Family, Private Property, and the State*, trans. Ernest Untermann (Charles H Kerr & Company, 1902), 206; Pierson, *The Modern State*, 23–26.

[19] On this point, it is worthwhile marking the words of Pollock and Maitland: "Different and more or less competing systems of jurisdiction, in one and the same region, are compatible with a high state of civilization, with a strong government, and with an administration of justice well enough liked and sufficiently understood by those who are concerned." Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, ed. SFC Milsom, 2nd ed., vol. 1 (Cambridge University Press, 1968), xcv.

[20] These public enforcement systems stand in contrast to systems of self-help, which are wont to lead to internecine conflict and blood feuds.

[21] Cf. Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, ed. Guenther Roth and Claus Wittich, vol. 1 (University of California Press, 2013), 54–56.

[22] Manchester Liberalism, according to Oppenheimer, went so far as to argue that the State should "exercise only needful police functions": Franz Oppenheimer, *The State*, trans. John Gitterman (Free Life Editions, 1975), 3. On Manchester Liberalism, see, e.g.: Elisabeth Wallace, "The Political Ideas of the Manchester School," *University of Toronto Quarterly* 29, no. 2 (1960): 122–38; Gregory Bresiger, "Laissez Faire and Little Englanderism: The Rise, Fall, Rise, and Fall of the Manchester School," *Journal of Libertarian Studies* 13, no. 1 (1997): 45–79.

[23] Indeed, states, in the view of Lenin, are "bodies of armed men". Quoted in: Poggi, *The State*, 73.

- A written and codified constitution;
- A separation of powers;
- Generally recognised as a State.

To these might be added certain functional attributions or obligations,[24] i.e. States exist to:

- Concentrate power;
- Monopolize the legitimate use of force/violence;
- Defend against external aggression;[25]
- Guarantee law and order;[26]
- Protect and promote life, liberty, health, and property;[27]
- Enforce contracts and rights;
- Control the factors of production;
- Manage the economy;[28]
- Facilitate and promote the welfare of its citizens, subjects, population, etc.;[29]
- Facilitate and promote progress;
- Embody and execute the will of the people, or general will;[30]
- Promote, uphold, instil, etc. certain values, morality, and religion;

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[24] Cf. Donisthorpe: "These two fundamental questions, 'What is the State?' and 'What does the State?' though standing clearly apart, are usually confounded and treated together. Now, although they may be equally vital, that is no reason for assuming that those who agree upon the one point must necessarily hold identical views on the other." Wordsworth Donisthorpe, *Individualism: A System of Politics* (Macmillan & Co., 1889), 60. Indeed, Weber was firmly of the opinion that States cannot be defined by their functions: "It is not possible to define a political organization, including the state, in terms of the end to which its action is devoted. [T]here is no conceivable end which *some* political association has not at some time pursued." Weber then went onto argue that States can only defined by their *means*, i.e. a monopoly on the legitimate use of force. Weber, *Economy and Society*, 1:54–56, quote at 55.

[25] Cf. Donisthorpe, *Individualism*, 63–64.

[26] Cf. Donisthorpe, *Individualism*, 64.

[27] These were the *raison d'être* of the State for Locke, on which see: JB Bury, *A History of Freedom of Thought* (Williams and Norgate, 1913), 101. See further, e.g., Spinoza: "[T]he ultimate aim of government is…to free every man from fear, that he may live in all possible security; in other words, to strengthen his natural right to exist and work without injury to himself or others. […]. In fact, the true aim of government is liberty." Benedict de Spinoza, *A Theological-Political Treatise and A Political Treatise*, trans. RHM Elwes (Dover Publications, Inc., 2004), 258-259 [Theo.-Pol. Tr., XX].

[28] Cf. "To-day, almost every developed State is ceaselessly active in economic affairs." GDH Cole, *Social Theory*, 3rd ed. (Methuen & Co. Ltd., 1923), 83.

[29] For example, through more basic mechanisms such as sanitation and waste management (cf. Donisthorpe, *Individualism*, 66.), or provision of healthcare and education, or through more extensive measures, such as systems of wealth redistribution and control of the factors of production.

[30] Cf. Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (Penguin Books, 2004).

- Establish and maintain class domination, or prevent inter-class conflict.[31]

Whether any of these are necessary or sufficient remains to be seen, as does whether, with regard to functions, they merely represent things that States *have done* or *can do* – or, indeed, things that States must do with a modicum of success to qualify as States.[32] However, it is clear that, if some number of the above criteria, taken as they are, are to be the measure of a State, then it seems unlikely that States could have existed during the mediaeval period, even if there were mediaeval parallels.

The argument here is as follows: A State is the set of more or less defined (political) institutions,[33] though it is not any one of these in particular,[34] which coordinate and direct the lives of a particular group of people in a particular area, and which institutions, or some subset thereof, represent that group in external affairs.[35] These institutions are social groups in themselves, as distinct from, even if to some degree coextensive with, the wider social group that they regulate.[36] The more that the institutions and their geographical jurisdiction are defined, the greater and wider their coordinating and directing powers, and the greater recourse

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[31] Engels, for example, thought that the State originally came about to promote peace among classes, but, naturally, the economically powerful class gained the ascendency and then used the State to reinforce their dominance. Oppenheimer, by contrast, was more radical: "The State, completely in its genesis, essentially and almost completely during the first stages of its existence, is a social institution, *forced by a victorious group of men on a defeated group*, *with the sole purpose of regulating the domination of the victorious group over the vanquished*, and securing itself against revolt from within and attacks from abroad. Teleologically, this domination had no other purpose than the economic exploitation of the vanquished by the victors." Engels, *The Origin of the Family, Private Property, and the State*, 208–12; Oppenheimer, *The State*, 8. These can be contrasted with the ideas of Elman Service, for example, who argued that, rather than the State being instituted to *defend* inequality, it was the State itself that *created* that inequality. See: Cohen, "State Origins," 33.

[32] Thus, for example, Jackson has argued that many developing countries have (or had at the time when he wrote) 'quasi-states', which are ineffective, inefficient, illegitimate, and unstable, and, therefore, not true States: Jackson, *Quasi-States*.

[33] Institution, in this sense, can be understood to mean a social group, which does have a specific purpose or function, viz. one that is legislative, executive, judicial, or administrative.

[34] For example, the State ought not to be taken to mean the government or the Crown. Even though these might be the primary directive power within the State, to treat them as being the State *in toto* tends towards being dissatisfactory. Louis XIV was incorrect, therefore, when he declared – or, at least, is reported to have declared – that "l'état, c'est moi" ('the state, it is I'); governments and monarchs (whether in their natural or juristic bodies) constitute a *part* of a state, not its totality. On this, see, e.g.: Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials*, 7th ed. (Cambridge University Press, 2011), 16–19. Cf. Martin Loughlin, "The State, the Crown and the Law," in *The Nature of the Crown: A Legal and Political Analysis*, ed. Maurice Sunkin and Sebastian Payne (Oxford University Press, 1999), 33–76. That Louis XIV made the reported statement has been doubted, see, e.g.: John Neville Figgis, *Churches in the Modern State* (Longmans, Green and Co., 1913), 150.

[35] Cf. Ralph Miliband's definition of a state as "a number of particular institutions which, together, constitute its reality, and which interact as parts of what may be called the state system." Ralph Miliband, "The State in Capitalist Society" (1969), quoted in Turpin and Tomkins, *British Government and the Constitution*, 16.

[36] Cf. Cohen, "State Origins," 32.

that is had to them in interactions with other groups, the greater justification there is for using the term 'State'.

If this definition is broadly accepted, then there seems little reason to doubt that there could be States in times and places other than our own, even if it might sometimes be difficult to differentiate them from other types of social group (e.g. bands, tribes, clans, chieftaincies, etc., though it can be said that the levels of centralization, coordination, direction, and cohesion,[37] tend to be lower in these than that which we associate with States). Indeed, as it would be surprising for the *modern* State to appear as if from nothing, it is often possible to see elements that we associate with modern States – e.g. systems of taxation, salaried administrators, standing military forces, etc. – to a greater or lesser degree in historical formations. The modern State, therefore, should not be considered the be-all-and-end-all of a State and, instead, it is better to proceed by way of *qualification*. So long as it is remembered that historical and modern States have their differences,[38] just as individual States have their differences,[39] there is little need to deny historical formations the title of 'State'.

Of course, none of this is to say that the modern State is necessarily the best form of social organization, or, indeed, a good one; neither is it to say that the modern State ought to be an aspiration for all societies nor that other systems of social organization might not be equally valid, especially given different socio-economic and environmental conditions. To make such judgements is the task of the political philosopher, not the constitutional historian. Indeed, whether the State is thought to be 'big' or 'small', 'strong' or weak', etc., it is not the purpose of the Theory of Constitutional Ubiquity to judge, but merely to describe and understand.

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[37] Cf. Cohen, "State Origins," 35.

[38] As Pierson has said, modern states have far greater capacity and scope than historical states: "New forms of administration, new techniques for record-keeping, new technologies for the transmission and processing of both people and information gave the modern state powers to govern which were simply unavailable to more traditional states." Pierson, *The Modern State*, 13. There is also the fact that modern States, at least in the West and as a civil power, unlike their mediaeval counterparts, do not have to contend with a rival ecclesiastical and spiritual power; the declining power of the Pope and religion in general, and the concomitant rise in secularism, naturally opened the way for the State to claim far more wide-ranging competencies and powers than ever before. For one view of this development, see e.g.: John Neville Figgis, *The Divine Right of Kings*, 2nd ed. (Cambridge University Press, 1914); John Neville Figgis, *Studies of Political Thought from Gerson to Grotius, 1414-1625*, 2nd ed. (Cambridge University Press, 1916).

[39] This is as true historically as it is today. Indeed, historical States have been classified in many different ways, e.g. city-states, maritime states, imperial states, territorial states, feudal states, theocratic states, absolutist states, industrial states, nation states, etc. Cf., e.g.: Pierson, *The Modern State*, chap. 2; Oppenheimer, *The State*; David Held, "The Development of the Modern State," in *Formations of Modernity*, ed. Stuart Hall and Bram Gieben (The Open University, 1992), 71–126; Charles Tilly, *Coercion, Capital, and European States, AD 990-1992*, 2nd ed. (Blackwell Publishers, 1992), chap. 1.

12.3.3 The State and Other Social Groups

Something ought to be said briefly about the relationship between the State and other social groups under the framework.

Firstly, as to *existence*: It can certainly be said that State recognition might bring with it certain rights and privileges, albeit accompanied by certain liabilities, for certain social groups and types thereof. Likewise, State non-approval or disapproval might prove to be a severe disadvantage, if not fatal, to a group-idea. However, there is no *necessary* connection between States, on the one hand, and the formation and maintenance of social groups, on the other. The officials representing the State might wish, to a greater or lesser extent, to attempt to *control* the types, number, etc. of social groups extant within its jurisdiction, as well as what members of those groups *qua* members might do, and introduce measures (i.e. laws) to that effect. But the extent to which this is effective will greatly depend on the extent to which people believe in this control and act accordingly. Ultimately, however, the existence of social groups, insofar as they constitute a reality for their members and stakeholders, depends not on the State, but on individuals.

Secondly, as to *loyalties*: It is usually the case that the State confers compulsory membership on those normally resident within their borders, most especially those either born within that State's territory or to parents with membership of that State. 'Aliens', whether resident or visiting, especially for extended periods of time, are normally required to register their presence, and perhaps also their activities, with the State. Subject to certain qualifications, such aliens might at some time and in some way become members (i.e. citizens). Thus, almost everybody within a State has a relationship to, if not membership of, that State. The question arises from this as to whether *any other social group* or, indeed, our *conscience* can assert a superior claim on us to the exclusion of the State,[40] and, if so, in what circumstances and to what extent? The Theory of Constitutional Ubiquity provides no answers to these questions; it says only that there is a possibility for contingency in these matters and that, whichever arrangement there is, it can be described by the theory.

12.3.4 The State and Mediaeval England

[40] Cf. GC Field, *Political Theory* (Methuen & Co. Ltd., 1956), 190.

With the foregoing in mind, and in view of the case studies in Part III, we can quickly discuss whether mediaeval England can be said to be possessed of a State. Naturally, the mediaeval period is a long one, but, at least from the period of unification in the tenth century, England – as a social group, or, rather, a series of social groups – exhibited many of the features that we associate with States.

It had, for its time, a relatively large population, which lived in a relatively consolidated area, even if the borderlands were sometimes contested. There were coordinated centres of authority, which came increasingly under the control of a central government ranged around the monarch and various departments (e.g. the Chancery, Chamber, Exchequer, etc.). There were systems of taxation, which tended to become more regular and complex. England was largely independent of other authorities; the Roman Church laid some claims to ultimate control, but, for the most part, this did not change the fact that England was ruled mostly from within. There was an executive in the form of the monarch and their officials; as the period wore on, a distinct legislature took shape. There was a system of criminal law, which tended to strengthen as time went on; local remedies and self-help became increasingly obsolete. There came to be a class of salaried and professional administrators – at first, largely provided from the ranks of the clergy, then, later, from secular backgrounds.[41] There came to be a class of professional and salaried judges; their independence was at times doubtful, as was their integrity, but their existence is the salient point. England did not really possess a standing army, although there were local and feudal levies (complemented by systems of conscription and impressment), as well as systems to provide for the hiring of mercenaries (e.g. scutage); in other words, there were systems in place to facilitate the raising of a military force, as well as systems of requisitioning to obtain the necessary vehicles (e.g. ships), supplies, etc. Likewise, there was no standing police force, although there were systems in place for policing, e.g. sheriffs, coroners, and the tithing system.

There was no general system of welfare support, state-sponsored education system, or a written and codified constitution. In these respects, the constitution of the mediaeval English state differs markedly from many modern constitutions. Indeed, we can see that what is referred to changes over the course of the period, especially as socio-economic and technological changes took place. Yet, as can be seen from this brief overview, there is good justification for saying

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[41] From the late fourteenth century, for example, councillors were paid salaries. See CW Prosser and Margaret Sharp, *A Short Constitutional History of England* (Longmans, Green and Co., 1938), 93.

that mediaeval England was possessed of a State. Mediaeval political thought was not devoid of theories of the State.[42] Indeed, in many ways, their terminology was not that far removed from ours, except that where we say 'State', they might have said *civitas*.[43] It might have been a State unlike many modern states, but to say that it had a State would be neither ahistorical nor anachronistic.

[42] Thomas Aquinas (1225-1274), for example, has been said to have made the "first exposition of the theory of the State", which he did with "enviable clarity". See: Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, 3rd ed. (Methuen & Co. Ltd., 1974), 248ff. More generally, see: Antony Black, *Political Thought in Europe, 1250-1450* (Cambridge University Press, 1992), chap. 7.
[43] Black, *Political Thought in Europe, 1250-1450*, 22; Ullmann, *Principles of Government and Politics in the Middle Ages*, 285.

Appendix II – The Rule of Law[1]

13.1 The Rule of Law: Its Nature and *Raison d'Être*

In order to understand the rule of law, one needs only to answer four questions: (1) *what is law*, (2) *what does it mean to say that law* '*rules*', (3) *why ought law to rule*, and (4) *how might law be made to rule*, i.e. *how might the rule of law be achieved*? The first three of these questions can be answered simply and quickly in the light of the framework.

Laws, as set out in the Associational and Generational Theories of Law, are fixed associations. To say that laws – fixed associations – 'rule' is to say that those associations are *actually fixed in practice*: they describe, correspond to, and are fulfilled by objects and events in the real world; things exist and happen in accordance with them, and not otherwise.

Our desire for this to be the case – for law to rule – stems from our basic psychological needs *to understand* and, more fundamentally, *to feel safe and secure*. We desire the rule of law because we desire for things to exist and happen according to fixed, discernible patterns; it helps to create a sense of there being *order, regularity, predictability,* and *stability*; it (ostensibly) makes things *simpler*; it provides for *consistency of action*; it helps us to live and act with a degree of *confidence*, as we can make decisions and investments today with a fairly good idea of what the future will hold. Whilst in some respects the rule of law limits what we may do,[2] it makes deciding what we are to do *easier* and, indeed, might even *protect* and *empower* us (although, these latter rely on the qualities of the laws themselves, rather than the rule of law directly).

The point is that if things are irregular and unpredictable, and if we are rarely sure as to what we ought to do or what the consequences of our actions will be, then we are more likely to exist in a state of heightened vigilance and tension; our sympathetic nervous system, which is central to our stress-response (i.e. preparing us for flight, fright, or

[1] This was originally a section within chapter four, i.e. on the transmission of associations. Whilst it does explore some of the implications of the Associational Theory of Law, it was not quite in the direct line of argument; it was for this reason that it has been moved to an appendix. In moving it to the appendix, I have taken the opportunity to develop, expand, and rearrange it.

[2] Cf. "[Codes of conduct] are a restriction on what we may do without upsetting an order on whose existence we all count in deciding our actions": Friedrich August Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge Classics, 2013), 179.

freeze), is more likely to be activated at a higher level for longer. Over time, not only does this affect our day-to-day quality of life, but also our health.[3]

When we speak of the 'rule of law', we are obviously speaking only of those laws – of those fixed associations – over which we, as humans, have control; those which we can shape and determine within the confines of the natural world. We are not speaking of the laws of physics; these rule whether we like it or not. In practical terms, then, we are dealing only with those steps that we can take to make the world – particularly in its *social aspect* – easier to understand and navigate, more orderly and predictable. This does not mean that there cannot be complexity. It means only that any such complexity is not beyond comprehension, whether in theory or in practice; even if one might not understand the why and wherefore of some law or laws, at least one will be able to understand how one ought to think and what one ought to do.

Of course, the rule of law does not in itself completely fulfil our need to feel safe and secure. This depends heavily on other things, especially: (1) *social factors*, e.g. whether we feel loved unconditionally by others and feel included within our social groups; (2) *economic factors*, e.g. whether we think that we have the materials and resources to survive, both now and in the foreseeable future; and (3) *environmental factors*, e.g. whether or not we think there to be real, consequential, and imminent threats to ourselves and our property, or to our friends, allies, relations, associates, suppliers, providers, dependents, etc. and their property. It also very much depends upon (4) the *tenor and force of the laws*. Draconian and oppressive laws with disproportionate adverse consequences attending breaches thereof are less likely to fulfil our need to feel safe and secure; we will constantly be in fear that a minor indiscretion might result in serious repercussions.

What the rule of law does provide, however, is a sense of safety and security by, in the very least, *helping us to feel that we understand how the world around us operates*. We might not like what is coming, but at least we can know – with a reasonable degree of certainty – what is likely to happen. After all, it is easier to prepare – both physically and mentally – for a known thing than an unknown thing. If it is a bad thing that is coming, then we might take steps to avoid or defeat it, or mitigate its ill-effects. The central point is that we need not constantly be on high alert, and our stress-response constantly induced,

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[3] On the physiology of the human stress response and its effects on health, see esp.: Robert M Sapolsky, *Why Zebras Don't Get Ulcers*, 3rd ed. (St. Martin's Griffin, 2004).

ready to respond at a second's notice to any and every potential threat: we know what the likely threats are, when they are likely to occur, and how they might best be avoided, defeated, or mitigated, etc. In other words, it provides us with a measure of control; it also gives us the opportunity to make our peace with things.[4]

It is almost needless to say that the rule of law has been infamous for its indefinability.[5] However, in the context of the framework, it is eminently simple. It boils down to the following: The rule of law describes a situation in which, generally speaking, everybody thinks and acts in accordance with some set or sets of shared fixed associations and not otherwise; a situation in which we know, generally speaking, what to expect of others and others know what to expect of us. The question arises, therefore, how might this situation be achieved – how might law be made to rule?

13.2 Requirements and Enhancements

It is important to differentiate between those things (1) that are *necessary for the rule of law* and (2) those things that *make the rule of law better* or, rather, *make for a rule of law worth having*. We can differentiate, therefore, between things that are *required* for the rule of law and things that *enhance* it; between *requirements* and *enhancements*. This distinction is not always sufficiently recognized.

There are two fundamental requirements for the rule of law. These are **prevalence** and **potency**. In other words, for law to rule – for it to be *successful* – there must exist some number of fixed associations, which are both *prevalent* and *potent*; for law to rule in a meaningful sense, this number ought to be significant, if not substantial. It is, then, their *conjunction* and their being *generally true* that creates a sense of there being the rule of law. Thus, if there is a sufficiently large set of laws that are both prevalent and potent, if

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[4] Cf. Cohen: "That the law should be readily knowable is, thus, essential to its usefulness. So far is this true that there are many inconveniences or injustices in the law which men would rather suffer than be paralyzed in their action by uncertainty." Morris Raphael Cohen, "The Place of Logic in the Law," *Harvard Law Review* 29, no. 6 (1916): 624. Indeed, the overriding desire for certainty was expressed by Lord Mansfield: "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon." *Vallejo v Wheeler* (1774) 1 Cowp. 143 at 153.

[5] Barnett, for example, has called it an "elusive" concept, capable of "different interpretations by different people". Similarly, Kirchheimer has said that the rule of law represents "a mixture of implied promise and convenient vagueness" and Walker went further and said that it is "concept of the utmost importance but having no defined, nor readily definable, content". Indeed, Shklar even once (in)famously argued that the rule of law has essentially become meaningless "thanks to ideological abuse and general over-use."Hilaire Barnett, *Constitutional and Administrative Law*, 10th ed. (Routledge, 2013), 44; Judith N Shklar, "Political Theory and the Rule of Law," in *Political Thought and Political Thinkers*, ed. Stanley Hoffmann (University of Chicago Press, 1998), 21; Kirchheimer and Walker are quoted in Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press, 1997), 160.

everyone knows what they are and abides by them, then there can be said to exist the rule of law. These things must be true if the rule of law is to be said to exist at any given time. For the rule of law to exist over time, there must also be a measure of **persistence**, but this is of secondary importance to prevalence and potency.

If prevalence and potency are to be achieved, then there are five other requirements – or, one might rather say, *preconditions* – that must be fulfilled. These are **existence, expression, exposure, assimilation,** and **compulsion**. These make a framework through which the rule of law can be understood and against which it can be measured. The achievement of these things is the achievement of the rule of law. However, it is important to stress that the achievement of these things *is not necessarily* the achievement of the *best rule of law* or, indeed, of the *rule of the best law*. As said above, there is a difference between *establishing* the rule of law and *enhancing* it; there is also, as just indicated, a difference between the *rule of law* and the *rule of good law* – or, at least, what we *think* to be 'good' law.

For the most part, the rule of law can be enhanced by improving the *modes and means* of existence, expression, exposure, assimilation, and compulsion; by making them more *efficacious*, *efficient*, and *reliable*. In many respects, which enhancements are appropriate will depend on the social groups, legal systems, and circumstances in question. Smaller, more informal, homogeneous groups do not likely require a developed system of courts, even if they nevertheless require some means of settling cases of doubt, dispute, and deviancy; larger, more formal, heterogeneous groups are more likely to require such a developed system if a rule of law that is worthwhile having is to be established.

Whilst there is a difference between establishing and enhancing the rule of law, it remains possible to discuss the two things together, because they both have to do with prevalence and potency; this is their test and measure. The one has to do with *whether* prevalence and potency have been achieved, the other with *how well* they have been achieved. Any discussion, however, of some so-called 'rule of *good* law' belongs in some other place. It cannot be prescribed in the manner that establishing and enhancing the rule of law can be prescribed; the latter have only to do with *form*, whereas the former has to do with *content* or *substance*. This is a subject to which we will return.

The framework and the principles that flow from it will be discussed imminently. This will be couched in terms of *qualities* that laws must have if they are to become prevalent and potent. It is perhaps worthwhile stating beforehand, however, that they all drive

towards the same things: *individuals must know what the laws are*, *those laws must be able to shape how those individuals think and behave*, and *individuals must feel some compulsion to follow them*.[6]

13.3 Existence

13.3.1 Existent

It seems almost too obvious to need stating, but, in order for there to be fixed associations that are both prevalent and potent, there must first be some fixed associations in existence. There cannot be the rule of law without any laws.

Laws, as has been discussed under the Associational and Generational Theories of Law, can be created in a number of ways. Some arise through 'natural' or 'organic' processes, i.e. without any deliberate and coordinate action. These are often labelled with terms like customs, customary laws, conventions, folkways, mores, etc. Others arise through more deliberate and concerted actions – usually through formal processes and by formal declarations. These can take many forms, e.g. proclamations, edicts, statutes, etc.

Fundamentally, it does not matter, for the purposes of the rule of law, which form laws take or from which source they emanate. If there are laws in existence – of whatever form or provenance – that are prevalent and potent, then there is a foundation upon which the rule of law might exist.

13.4 Expression

13.4.1 Expressed

It is all very well to exist. However, if fixed associations are to become prevalent, if they are to be assimilated by a number of individuals, they must first be *expressed*, e.g. in words or actions, orally or in writing. Only then is there the possibility that other individuals might come to know them, and think and act according to them. Unexpressed laws cannot be followed.

In a great many respects, written forms are superior to oral forms. They are more stable and enduring; they leave less room for doubt, ambiguity, and uncertainty – especially when drafted diligently; they rely less on human memory, the products of which might be perverted as much by time as by will; they are harder to ignore; they are, in many

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[6] Cf. Raz: "It [the rule of law] has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it." Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), 213.

respects, less open to exploitation and abuse (though imprudently, unwisely, or iniquitously drafted provisions might be greatly exploited and abused). It was somewhat for these reasons that Andrew Horne was prompted to write his *Mirror of Justices* in the fourteenth century. He spoke of those who would 'never consent to having the right usages put into writing', because 'power might thereby be taken from them to pervert judgment', which, until that time, had been informed by great regard to the advancement of themselves, their friends, and their lords.[7]

However, there is an extent to which precise written forms are less important than perhaps often assumed as "[h]uman behavior must conform to laws and contracts without constant reference to explicit documents";[8] in many respects, the more important thing, at least in everyday practice, is the *impression* (the 'gist') that they create.[9]

13.5 Exposure

13.5.1 Disseminated

Mere expression is not enough; there must also be *exposure*. This means that laws must be *expressed in the presence of others* – whether *directly* or *indirectly*, through *formal* or *informal* channels, through their *application* or *explication*. Laws must be made known if they are to be prevalent. In practice, this means that they need to be *disseminated* or *promulgated*.

Dissemination or promulgation to a certain extent happen naturally. People observe and imitate how others around them behave; we can here recall the *resemblance principle*.[10] However, if laws are to be disseminated *widely* and *faithfully*, and, indeed, if they are to become in any measure *persistent*, then more time and energy will probably need to be invested into the process of dissemination.

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[7] Andrew Horne, *Mirror of Justices*, ed. William Joseph Whittaker (Selden Society, 1895), 1–4; Andrew Horne, *The Mirrour of Justices: Written Originally in the Old French, Long Before the Conquest; and Many Things Added [Trans. 1646]*, trans. William Hughes (John Byrne & Co., 1903), 12–15. Horne's mistrust of unwritten traditions, however, was perhaps also driven not only by his personal experiences (see Maitland's introduction to Whittaker's translation, at xxii), but also by the fact that unwritten traditions tend to have lesser regard for written sources, and Horne was anxious that one written source – the Scriptures – ought to be given primacy. As such, his agenda was to bring the Common Law – or, rather, the 'false judges' thereof – within the precepts of what he regarded to be the dictates of God. All things considered, the *Mirror* was not a particularly accurate book, neither was it successful in its time. Nevertheless, at least some of his motives for writing a law book are understandable.

[8] Valerie F Reyna and Charles J Brainerd, "Comment on Article by Professor Wohlmuth," *Journal of Contemporary Legal Issues* 8 (1997): 288.

[9] Cf. Paul C Wohlmuth, "Jurisprudence and Memory Research," *Journal of Contemporary Legal Issues* 8 (1997): 249–86; Reyna and Brainerd, "Comment on Article by Professor Wohlmuth."

[10] *Supra*, 4.9.

There are more direct methods of dissemination, such as formal or informal systems of instruction and education. Formal systems are typified by their greater structure and planning. They are more likely to involve time spent in a classroom; to involve theoretical and abstract discussion. Informal systems, on the other hand, are typified by their piecemeal and *ad hoc* nature; the 'content' is acquired primarily through accumulated experience. This, naturally, is likely to involve more time, as it were, in the field; to involve a period of apprenticeship; to be practical and hands-on. Such direct methods are exemplified by the systems of legal education provided by the Inns of Court in England during the mediaeval and early modern periods – at least in regards to the English common law. There was some formal content delivery, e.g. readings (i.e. lectures) given by learned members on certain subjects, as well as the study of certain texts and treatises. However, a greater part of the student's education was derived from attending court proceedings, and observing and participating in the legal process.

Indirect methods typically involve expression through some medium – in particular, through the written word. This might be in the form of official publications, which profess to contain authoritative and incontrovertible statements of the law; it might be in the form of unofficial publications, expressing private opinions on, or interpretations or experiences of, the law. Thus, law might be published as statutes, codes, constitutions, ordinances, law reports, etc.; it might be found in glosses, commentaries, textbooks, etc.

Ideally, laws ought to be disseminated in such a way that individuals might be exposed to them on multiple occasions, preferably according to their need and at their convenience. In other words, laws ought to be deposited – figuratively or literally – in well-known and readily-accessible places, such that people might come into contact with, and consult, them.[11] Undoubtedly, as Lord Woolf has said, the existence of law libraries

[11] This is particularly in view of the fact that there is the prevalent – and largely sensible idea – that *ignorantia juris non excusat* (ignorance of the law does not excuse). After all, what use would a law be if it might be avoided by wilful – or feigned – ignorance? Moreover, much as Holmes argued, the application of law and delivery of justice might be viewed as public goods and, for this reason, "[p]ublic policy sacrifices the individual to the general good"; it might seem unfair to enforce a law against a person who knew not of it, but it is a greater evil to deprive the community at large of the rule of law: Oliver Wendell Holmes, *The Common Law* (Little, Brown, and Company, 1923), 48. Nevertheless, there ought to be a reasonable chance of knowing the law. This does not mean that everyone need be familiar with the totality of laws, but merely with those concerning activities in which they might or do participate. Where these activities are of a specialist nature, there will usually be an expectation that the persons concerned first familiarize themselves with the relevant laws before undertaking the activities. However – and this must be stressed – they can only do so *if there is some place where, or some person from whom, they might discover and learn them*, preferably without having to go to extensive or unreasonable lengths there to obtain.

– 'treasuries' and 'warehouses' of law – is important in this regard;[12] in the modern age, digitization and publication online in recognized places is equally important.

13.6 Assimilation

Mere existence, expression, and exposure are insufficient. For laws to meaningfully affect people's thoughts and behaviours, they need to be *assimilated*. In order to achieve and expedite this, there are a number of qualities that laws ought to have.

13.6.1 Intelligible

If laws are to be assimilated, they must first be expressed in a form such that they are understandable or comprehensible; they must be accessible to the intellect. Laws that are in a foreign language, or that are convoluted or complex are less likely to be incorporated and retained successfully and faithfully. If they are not so incorporated and retained, they are unlikely to become prevalent and potent.

In an ideal world, every law would be comprehensible to everyone without any especial training; they would be readily intelligible by all. However, given variations in situational complexity and individual ability, as well as the fact that not all laws will be relevant to everybody, a more realistic aim is for laws to be intelligible to those for whom they have some relevance – preferably with a minimum of effort. In practice, this means that laws that affect everybody ought to be readily understandable by everybody, whereas those affecting a smaller number might be suffered to be more abstruse. If a law is important, though more difficult to comprehend, then effort ought to be made to explain it.

In any complex and comprehensive legal system, there will likely always need to be those learned in the law – those who have devoted considerable time and effort to the study thereof, people to whom others might have recourse when wishing to understand the law and its implications. In part, this is because, as has already been said, some situations will almost certainly be more complex than others and, moreover, not everybody will have the same intellectual ability. Moreover, there is the fact that even though individual laws might be readily comprehensible, *systems of laws* will require more effort to understand. As such, it is more convenient to have recourse to individuals that have expended that effort, rather than requiring everybody so to expend. Nevertheless, such systems of law ought to be intelligible when they are explained. Thus, even though not everybody might

[12] Lord Woolf, "The Rule of Law and a Change in the Constitution," *The Cambridge Law Journal* 63, no. 2 (2004): 317ff.

be their own lawyer, they should still be able to understand the operation and effects of the law and the legal process.[13]

It ought to be stressed that clarity, precision, and concision are ever virtues; laws ought always to be drafted as clearly, precisely, and concisely as possible. In a word, laws ought to be expressed elegantly.

13.6.2 Stable[14]

Laws should not purposefully be changed too often; radical changes should be avoided where possible. Changing laws too often or too radically affects our ability to assimilate them faithfully and successfully; it would also probably frustrate our desire for constancy and consistency; it would make us feel insecure.

There is a limit to what individuals can learn within a given timeframe, especially with other demands upon their time. If changes to the law are made too frequently, people are far more likely to struggle both to *understand* them in their entirety, and to *assimilate* them faithfully and successfully. Indeed, confusion is likely to result – especially where changes are not effectively communicated.

If radical changes need to be made, these ought to be made with a recognition that individuals require *time to assimilate* anything new, particularly if it is especially alien to them, as well as *time to adjust*. As such, radical changes should be made clearly and methodically. An extended *notice period* ought to be considered, during which time especial effort is made to disseminate the new law, ensuring that it will be both prevalent and potent upon its coming into effect. Consideration might also be given to introducing the changes *incrementally*, such that people have additional time to adjust and might adjust to each part in turn. Furthermore, a *grace period* might also merit consideration, such that the full force and rigour of the changes will not be immediately felt. Besides providing more time for adjustment, it also recognizes that mistakes, misinterpretations,

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[13] Cf. "Those who ask that the law be made so plain that every man may be his own lawyer, and who ask that the courts be filled with men who know less law and more justice, are simply quarrelling with the constitution of the human mind. One might just as well ask that every man be his own engineer or every man his own doctor." John Maxcy Zane, *The Story of Law*, ed. Charles J Reid Jr, 2nd ed. (Liberty Fund, Inc., 1998), 331.

[14] It is interesting to reflect on Pound's remark concerning that which Cardozo called "the great antinomy": "Law must be stable and yet it cannot stand still". Roscoe Pound, *Interpretations of Legal History* (The Macmillan Company, 1923), 1; Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1924), 2.

etc. are more likely in the early stages of implementation; it would be a more compassionate, forgiving, and understanding approach.

It should also be recognized that attempting to change too many laws, especially if done so often and radically, is in many respects futile. After all, in order for these attempts to have any measure of success, one needs to change how people think, which means altering the ponderous and unwieldy mass of prevalent and potent fixed associations extant within the given population. Even though some individuals might be able to *influence* this, it is not really within their power to change it;[15] that relies on the willingness of the population to cooperate or, perhaps, obey – if they can. Naturally, certain measures might be adopted to incentivise absorption, as it were, but humans are not like machines with switches and replaceable memory; change (i.e. new learning) requires both time and effort, and perhaps some level of investment also.

13.6.3 Identified

There needs to be some selection criteria by which we can identify those laws that are *supposed* to be prevalent and potent, such that we know which of them we are supposed to assimilate and follow, and which of them we should ignore. In this way, aspiration can be made reality.

The rule of law, therefore, requires some *rules of recognition*.[16] These might require us to discriminate on the basis of the *sources* from which fixed associations emanate; they might require us to discriminate on the basis of their *content*. Thus, we might only accept as law those fixed associations issued by particular persons or groups, or those that meet certain other requirements, e.g. conforming to certain standards. In general principle, it is better for rules of recognition to focus primarily on identifying the legitimate sources of law; their content can then be judged according to what these sources have to say.

13.7 Compulsion

Whereas expression, exposure, and assimilation have more to do with prevalence, compulsion has more to do with potency. Potency can only be achieved if we feel some

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[15] Cf. "[A]ll moral (and legal) rules serve an existing factual order which no individual has the power to change fundamentally; because such change would require changes in the rules which other members of the society obey, in part unconsciously or out of sheer habit, and which, if a viable society of a different type were to be created, would have to be replaced by other rules which nobody has the power to make effective." Hayek, *Law, Legislation, and Liberty*, 193.
[16] See: *supra*, 3.15.

irresistible force or urge that *compels* us to think or act in accordance with certain fixed associations and not others.

Compulsion might be **internal** or **external**. In other words, we might feel compelled to think or act in accordance with certain fixed associations either through some intrinsic feeling that we must so think or act, or because some outside agent or circumstance is compelling us to so think or act. Compulsion might also be **voluntary** or **involuntary**. In other words, we might be compelled to think or act in accordance with certain fixed associations after a process of positive and definite decision, as a matter of choice; alternatively, we might so think or act, not as a matter of choice, but as a matter of internal or external compulsion.

Compulsion might be achieved in a number of different ways. Internal and voluntary compulsion can both be encouraged and achieved primarily through **education**. In other words, we feel compelled to think and act in accordance with certain fixed associations because that is how we have *learned* – perhaps, how we have been *taught* – to so think and act. Similarly, compulsion can be encouraged by having and making plain the *rationale* behind laws or their implementation – for if we can agree, on a rational and intellectual level, that there is good reason for the law, we are more likely to follow it, even if we are not entirely comfortable with it.

Compulsion can also, of course, be encouraged through the use of **incentives and disincentives**; put another way, **rewards and punishments**. Incentives or rewards, of course, will be made to encourage thought and behaviour in accordance with the 'right' fixed associations; disincentives or punishments to discourage thought and behaviour divergent from or contrary to those fixed associations, or, indeed, any thought and behaviour in accordance with any 'wrong' fixed association. Whilst the role of education is perhaps the more important, the role of positive and negative consequences tends to receive more attention.[17]

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[17] There is a sense in which *education* and *systems of reward and punishment* are connected. For example, Clark has argued that: "The motive to obedience…under what men have understood by *law*, has been, I believe, always in some manner connected with the *extraneous* approval or disapproval of *other* beings, either human or, if superhuman, capable of understanding human conduct and motives." Edwin Charles Clark, *Practical Jurisprudence, a Comment on Austin* (Cambridge University Press, 1883), 125. Naturally, expressions of approval or disapproval are important in the teaching and learning process, because, as social animals, we tend to modulate our thoughts and behaviours towards those for which we receive *positive feedback* and away from those for which we receive *negative feedback*; we want to conform because we want to be accepted. Naturally, to reinforce any such approval or disapproval, there can be attached certain rewards and punishments – often ones that take material form. However, whilst this *encourages* compliance

Compulsion – and, of course, potency – has also a great deal to do with how *competing* – and, perhaps, *conflicting* – thoughts and courses of action are settled. In this respect, there are overlaps with assimilation, as there is a limit to which competing and conflicting fixed associations can be faithfully and successfully assimilated – at least, in the long-term. There are some qualities, therefore, that have been included here under compulsion, but which might easily also find a home under assimilation.

13.7.1 Accepted

It is not enough for laws merely to be known and applicable; they must also, in some measure, be accepted or acknowledged as establishing fixed relationships – albeit perhaps grudgingly, and against one's will and better judgment. No law could be prevalent and potent – at least, not for long – without some measure of general recognition.[18]

13.7.2 Followed

Laws ought to be consistently used and applied where appropriate, and only where appropriate;[19] this should be done in a timely fashion, such that there is less cause to doubt that they are actually being followed. This means not only that they are *actually prevalent and potent*, but that they *appear to be so*. This appearance is important, not only because it helps to increase their prevalence, but also because it further encourages their potency. It is almost a truism that potency breeds potency and that impotency breeds impotency.[20]

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and whilst *for some* it might provide a motive to conform, there is a great deal to be said for the argument that many 'obey' the law, not because they are afraid of how others might react if they do not, but purely and simply because they are convinced that it is the way that things should be. Perhaps the receipt of approval and disapproval helped them to form this view, but, once formed, the motive to obey becomes entirely a matter of internal compulsion.

[18] "No rule of law was ever successful or ever endured unless it received practical general acceptance among the whole body of the people, for the simple reason that a rule of law not accepted by any considerable portion of the people can never be enforced. The history of law is strewn and will continue to be strewn by just such palpable wrecks of law not enforced and not enforceable. […]. Acceptance by the community is needed to breathe life into the edict of the harshest despot." Zane, *The Story of Law*, 249.

[19] As Bingham has said, there ought to be, where appropriate, "law not discretion"; in other words, "Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion": Tom Bingham, "The Rule of Law" (Penguin Books, 2010), 48ff. This also means, as Dicey, for example, identified, that there ideally ought to be no punishment or penalty except following a breach of law (*nulla poena sine lege* – no punishment without law) and as determined by due process of law: Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, ed. ECS Wade, 10th ed. (MacMillan Education Ltd, 1959), 188.

[20] Kelsen suggested that, for legal norms to be valid, they must have a "minimum of effectiveness", i.e. "A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm." This is not to say that he thought that validity and effectiveness were the same thing. As he identified, whether something is "actually applied and obeyed" is a different thing to whether it "*ought* to be obeyed and applied"; efficacy is a condition of validity, not validity itself. Kelsen later transferred the idea of efficacy to the legal system as a whole: "[A] legal order does not lose its validity when a single norm loses its effectiveness. A legal order is regarded as valid, if its

There are a number of things that help to ensure that laws are being consistently used and applied in their appropriate contexts.[21]

The first is effective systems of reinforcement, i.e. systems that *remind* people of the expectations that exist regarding their thoughts and behaviours. This might be achieved, for example, through signs, messages, and notices sent or posted at appropriate times or in appropriate places. Training programmes and, more especially, refresher courses also work to the same end.

The second is effective systems of adjudication. This means that there are recognized individuals within the social group tasked with deciding upon cases of *doubt, dispute*, and *deviancy*, particularly where some *harm* or *damage* seems apparent or foreseeable. In other words, individuals entrusted with: declaring what the law is where it is unclear, settling who is in the right in specific cases according to law, and identifying cases in which the laws have not been followed as they ought to have been followed. It is sensible that individuals so entrusted have some power (or, rather, influence) to take actions upon their findings – to resolve, remedy, protect, punish, etc. It is perhaps worthwhile adding here that justice ought not to be summary, but only executed after due process, and with due diligence and care; it should be quick, though not hasty.

The third is effective systems of enforcement, which (a) encourage and ensure compliance with the law, and (b) prevent, detect, and correct non-compliance, i.e. deviancy. A large element of enforcement is, of course, systems of incentives and disincentives, of rewards and punishment, of sanctions.[22] It is best if the tasks of enforcement are entrusted to

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norms are *by and large* effective (that is, actually applied and obeyed)." One can understand his reasoning under the Associational Theory of Law. For something to be *considered* valid, there really needs to be some *impression* that it is actually valid; this is greatly facilitated by its acceptance, and its use and application. However, it would be wrong to make validity ultimately and necessarily dependent upon efficacy. Validity is based on whether or not one accepts the premises of something, at least in theory; whether people endorse and actually follow the thing in question is another matter. For Kelsen, see: Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (University of California Press, 1967), 10–11, 212–13.

[21] Much as Pollock has said: "It is hardly conceivable that any community should recognise such rules [binding on themselves], as distinct from rules binding on mankind in general, without having some way of administering them; but that is a secondary point." Having mechanisms, etc. to administer, enforce, reinforce, etc. laws is likely to be beneficial to the social group at large, and such mechanisms might help to determine – according to certain rules of recognition – which laws ought to be prevalent and potent, and which ought to be regarded as 'laws' in a technical sense. But, as laws are defined by their structure, not by any systems that are developed to 'manage' them, as it were, the existence of such mechanisms is a separate issue from that of the existence of law – and the rule thereof. For Pollock, see: Frederick Pollock, *A First Book of Jurisprudence*, 5th ed. (Macmillan & Co. Ltd., 1923).

[22] Sanctions come in many forms. For example: (1) *social sanctions*, whether *formal* or *informal*, which involve changes – especially negative – in the way that others behave around and towards us (e.g. chastisement, withdrawal of affection or friendship, shaming, humiliation, degradation of status, restriction or deprivation of liberty, stigmatization, ostracism, outlawry, etc.); *economic or pecuniary sanctions* (e.g.

certain individuals and bodies, and if people are discouraged from pursuing justice outside and in spite of them; it is best if there is a situation in which, in the words of Pollock and Maitland, "[s]ave in cases particularly excepted, the man who takes the law into his own hands puts himself in the wrong, and offends the community."[23]

It is, of course, all very well having systems of adjudication and enforcement, but they are worth little if there are prohibitive barriers to access them. Such barriers might include: (i) *physical or logistical barriers*, such as might be caused by the relevant officials being (erratically) peripatetic or located a great distance away; and (ii) *economic or fiscal barriers*, such as might be caused by setting fees too high or providing insufficient financial assistance to those who require it (e.g. in the form of legal aid). Consequently, it makes sense to make efforts to reduce or eliminate barriers to access. Nevertheless, it ought to be stressed that the existence of such barriers does not necessarily prevent there being the rule of law – laws might be prevalent and potent in spite of them.

It has been said that the impression that laws are being followed is important. In this regard, it is important that our expectations are not regularly being frustrated and that, moreover, if they have been frustrated, that our expectations of what should happen as a consequence of such frustration are quickly followed. In other words, if our expectations have been frustrated, we expect timely rectification. From this we can derive some sense, at least, that our fixed associations are being adhered to.

13.7.3 Concordant

Unless laws are *consistent* and *coherent* with one another, it is difficult for them to become prevalent and potent – at least, with any sense of regularity. Inconsistency and incoherence invite confusion, and confusion invites uncertainty and paralysis. Nevertheless, it would be unrealistic to expect a legal system – as a 'living' entity, as it were, and constantly changing,[24] – to have perfect internal concordance: "the law is

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distraint, fees, tariffs, charges, etc.), *spiritual sanctions* (e.g. excommunication, damnation, etc.), or *corporeal/physical* sanctions (e.g. infliction of bodily harm, such as flogging; execution; etc.). These act both as disincentives and correctives. This is not, of course, necessarily to advocate any of these forms of punishment.

[23] Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, ed. SFC Milsom, 2nd ed., vol. 1 (Cambridge University Press, 1968), xciv.

[24] Cf. The Generational Theory of Law (*supra,* Chap. 5).

always approaching, and never reaching, consistency".[25] Consequently, in order to be functional and effective, there must be a minimum of internal concordance within a legal system; ideally, internal concordance ought to be high and, thereby, confusion and the potentiality therefor reduced to a minimum.

13.7.4 Ordered

As there need to be rules of recognition, there also need to be *rules of ordering*; there must be some laws governing *arrangement* and *priority* within and between systems, especially where there is potentiality for conflict or seeming lack of concordance as between the terms of said systems.[26] We need to know which laws to follow and in which order in any given circumstance. If we are unsure as to this, then confusion and inconsistency are likely to arise. These are the enemies of prevalence and potency, and, consequently, of the rule of law.

13.7.5 Realistic

Unrealistic laws might become prevalent for a time, but they are likely to fail in the long-term if they are unable to direct behaviour in a sustainable manner, i.e. be successfully expressed across time.

Besides being realistic, laws should also not have a deleterious effects to those that follow them or those around them. After all, if their expression causes harm to those expressing them, especially if it results in their destruction, then their very potency will adversely affect their prevalence – others will be less inclined to follow them and there might very well be fewer people around who could follow them.

13.7.6 Prospective

If laws are to guide our thoughts and actions, they must be known before those thoughts and actions take place.[27]

Retroactively changing fixed associations will likely, *ceteris paribus*, frustrate our desire for predictability – especially if done often. This is because we will exist in a constant

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[25] Holmes, *The Common Law*, 36. Cf. Cohen: "The law, of course, never succeeds in becoming a completely deductive system. It does not even succeed in becoming completely consistent. But the effort to assume the form of a deductive system underlies all constructive legal scholarship." Cohen, "The Place of Logic in the Law," 624.
[26] See, *supra*, 3.15.
[27] Cf. Justice Chase's dictum from *Calder v Bull*, 3 U.S. 386 (1798) at 388: "[N]o man should be compelled to do what the laws do not require nor to refrain from acts which the laws permit."

state of uncertainty; we will not know which of our present fixed associations might at some point become invalidated.

There is, it ought to be said, a place for retroactive or retrospective law-making where laws have resulted in some gross injustice, or where they have proved to be particularly unwise or impracticable.[28] In other words, they are permissible where there is a recognition that there is some inadequacy or failing in the original law, the evil consequences of which might be remedied or avoided in some measure by changing its historic application.[29]

13.7.7 Universal

Insofar as possible, laws ought to apply *equally and always within each given universe and class*, i.e. there should not be arbitrary discrimination in their application.[30] This makes them both easier to assimilate and follow; it also means that they are being followed consistently.

Ideally, these universes and classes should be larger rather than smaller, and have fewer exemptions therefrom,[31] meaning that individuals have fewer laws and permeations thereof to memorize. However, it does not necessarily follow that absolutely everybody should always belong to the same universe or class. As such, the rule of law might equally exist in societies with systems of castes and slavery as those without. The rule of law

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[28] Justice Chase continued, in his judgment in *Calder v Bull* (ibid., at 391): "Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive, and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion or of pardon."

[29] There has been a distinction drawn between *retrospective legislation* and *ex post facto legislation*, the latter of which, in Justice Paterson's words from *Calder v Bull* (ibid., at 396), refers to laws introduced respecting "crimes, pains, and penalties"; they create a crime, pain, or penalty where previously there was none. Paterson continues: "The historic page abundantly evinces that the power of passing such laws should be withheld from legislators, as it is a dangerous instrument in the hands of bold, unprincipled, aspiring, and party men, and has been two often used to effect the most detestable purposes." It was precisely this ban on *ex post facto* laws (i.e. retrospective penal statutes) that many early State constitutions in the United States had sought to ban – in no small part, for fear of Bills of Attainder. As seen above, Justice Chase thought that there might be some place for retrospective legislation in general; Paterson, expressing his opinion *obiter dictum* (at 397), said he would have extended the ban to all retrospective legislation if he could have done so.

[30] Much as Pollock put it: "Rules of law being once declared, the rule must have the like application to all persons and facts coming with it". This Pollock placed under the heading 'Equality', which heading was joined by 'Generality' and 'Certainty' to form for him the basis of 'justice being administered according to law': Pollock, *A First Book of Jurisprudence*, 37–46, quote at 38.

[31] Cf. the words from the first *Agreement of the People* (1647): "That in all laws made or to be made every person may be bound alike, and that no tenure, estate, charter, degree, birth, or place do confer any exemption from the ordinary course of legal proceedings whereunto others are subjected." Samuel Rawson Gardiner, ed., *The Constitutional Documents of the Puritan Revolution, 1625-60*, 3rd ed., 1906, 335.

might dictate one law for one type of person, and another law for another type of person. What makes this abhorrent to the modern eye is its subversion of our ideas of equality and our basic shared humanity – but this is not the same thing as the subversion of the rule of law. From a purely practical perspective, the rule of law suggests having fewer classes, rather than more; it is our greater sense of right and justice that dictates how these classes might, or should, be drawn. This point is continued further down.

13.8 Summation

In order for there to be the rule of law, laws need to be:

1) Existent;	6) Identified;	11) Ordered;
2) Expressed;	7) Accepted;	12) Realistic; and
3) Disseminated;	8) Followed;	13) Universal.[32]
4) Intelligible;	9) Prospective;	
5) Stable;	10) Concordant;	

It is these things that help to make laws both prevalent and potent; to achieve existence, expression, exposure, assimilation, and compulsion.

13.9 A Formal Theory

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[32] This list has a number of crossovers, for example, with that proposed by Fuller. He suggested that laws ought to be (1) enunciated; (2) publicized; (3) prospective; (4) comprehensible; (5) coherent; (6) realistic; (7) stable; and (8) consistently applied. For a summary of these, see: Lon L Fuller, *The Morality of Law*, 2nd ed. (Yale University Press, 1969), 39, see also more generally chap. 2. There are also crossovers with Raz, although he perhaps goes further. He argued that, for law to rule, laws must be: (1) prospective, open, and clear; (2) relatively stable; (3) made in accordance with an open, stable, clear, and regular process; (4) enforced by an independent judiciary; (5) enforced in accordance with the principles of natural justice; (6) subject to judicial review vis-à-vis their use by public authorities; (7) supported by an accessible judicial system; and (8) not subject to such discretion that might pervert their natural course. See: Raz, *The Authority of Law*, 214–18. There are also crossovers with the list proposed by Hayek, who suggested that 'true' laws ought to be: (1) general and prospective; (2) known and certain; and (3) blind as to persons, except insofar as identifiable differences justify different treatment (he talks of 'equality before the law'). Moreover, for there to be the rule of law, in Hayek's theory: (4) private citizens and their property are not to be 'an object of administration by the government, not a means to be used for its purposes'; (5) administrative decisions ought to be amenable to judicial review; (6) coercion is admissible only in accordance with law; (7) exceptional laws should be restricted to exceptional circumstances defined by law (i.e. states of crisis or emergency, states of siege); and (8) the principle of 'no expropriation without compensation' ought to be adhered to. Friedrich August Hayek, *The Constitution of Liberty* (Routledge Classics, 2006), chap. 14. Similarly, there are crossovers with Bingham's list, who thought that the rule of law entailed that: (1) laws must be accessible and, insofar as possible, intelligible, clear, and predictable; (2) questions of legal right and liability ought ordinarily to be decided according to law, not discretion; (3) laws ought to apply equally to all, except insofar as objective differences justify differentiation; (4) public officers ought to exercise their offices in good faith, to the purpose, and *intra vires*; (5) the law should afford adequate protection of human rights; (6) means must be provided for resolving, without prohibitive delay, *bona fide* civil disputes; (7) state adjudicative procedures ought to be fair; and (8) the state should adhere to its obligations under both national and international law. Bingham, "The Rule of Law," pt. 2.

This is a 'formal' theory of the rule of law. So long as there are fixed associations that are actually prevalent and potent, there exists the rule of law. It is the jurist's task to know, describe, and apply these;[33] to critique them where necessary and propose improvements in the proper manner.

Substantive theories go further. They argue that there are *particular* fixed expectations that ought to be both prevalent and potent; expectations running contrary to these ought not to be prevalent and potent, and, indeed, ought not to be considered as, or associated with, the idea of 'law'.[34] Such theories tend to subscribe to Augustine's maxim: *lex iniustia est non lex*.[35] To arrive at such conclusions, substantive notions of the rule of law infuse ideas of goodness and rightness into the idea of law. They confuse the *rule of law* with the *rule of good law*.[36] They tend invoke ideas of so-called natural law and rights, which are fallacious and unsustainable;[37] law has no 'inner morality'.

13.10 Other Aspects of the Rule of Law?

There are other features often thought to be intrinsic to the rule of law, which ought to be considered.[38]

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[33] I am here building on Kelsen, where he said that the task of the 'science of law' was to "to know and describe" the law: Kelsen, *Pure Theory of Law*, 69.

[34] For a discussion on formal and substantive theories, see: Paul P Craig, "Formal and Substantive Conceptions of the Rule of Law : An Analytical Framework," *Public Law*, 1997, 467–87.

[35] 'An unjust law is not law'. This formulation is not quite Augustine's, although it is generally considered to be based on a passage from his *De libero arbitrio* ('The Free Choice of the Will'): "For an unjust law, it seems to me, is no law". Augustine of Hippo, *Saint Augustine: The Teacher, The Free Choice of the Will, Grace and Free Will*, trans. Robert P Russell (The Catholic University of America Press, 1968), 81 (1.5.11). As has been noted, the idea was not novel with Augustine; it can be found earlier in Plato, which is an important point when we consider the impact of neo-platonism on Augustine's thought: Lewis Ayres, Medi Ann Volpe, and Thomas L Humphries, eds., *The Oxford Handbook of Catholic Theology* (Oxford University Press, 2019), 394; FC Copleston, *A History of Medieval Philosophy* (Methuen & Co. Ltd., 1972), chap. 3.

[36] As Austin has said: "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (Weidenfeld & Nicolson, 1954), 184.

[37] To quote Bentham: "*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts." Jeremy Bentham, "Anarchical Fallacies, Being an Examination of the Declaration of Rights Issued During the French Revolution," in *The Works of Jeremy Bentham*, ed. John Bowring, vol. 2 (William Tait, 1843), 501. To paraphrase Zane, the sentences of natural law are merely constructions of the individual mind being asserted - nay, masquerading – as the deductions and declarations of ultimate wisdom: Zane, *The Story of Law*, 135.

[38] The following all feature in the works of both Raz and Bingham. See: Raz, *The Authority of Law*; Bingham, "The Rule of Law."

First, there is the idea of *equality under law* or *isonomy*,[39] i.e. fixed associations ought to apply irrespective of the identity of those involved. To an extent, this follows from the principles outlined above. In order to be prevalent and potent, it is helpful if laws have qualities of *consistent application* and *universality*. However, equality under law is often taken to mean the idea that everybody – regardless of race, age, gender, socio-economic status, etc. – should be treated equally (i.e. the same) by the law.[40] There should not be one law for one set of people and another law for another set. This is entirely admirable, but, as indicated above, not intrinsic to the rule of law. It is perfectly possible for there to be fixed associations that apply to different sets of people in the same circumstances. What makes this idea abhorrent is our sense of justice,[41] – our sense that similar things ought to be treated similarly; that like cases ought to be determined alike;[42] that all should be treated equally except insofar as "objective differences justify differentiation".[43] As we are all similar in the sense that we are all human, it would seem insupportable to treat anybody as though they were subhuman or intrinsically different.

Second, there is the idea that there ought to be *access to some sort of legal system*. In other words, it is necessary that, for the rule of law to make sense, there ought to be some formal, institutionalized mechanisms to enforce, and ensure compliance with, those laws. Again, this is important, but not intrinsic – for the simple reason that it is not strictly necessary. There can be prevalent and potent fixed associations without any such mechanisms; informal systems of enforcement might be adequate. Nevertheless, such

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[39] For a brief history of the term *isonomy* and its progenitor *isonomia*, see: Hayek, *The Constitution of Liberty*, 144–45.

[40] Justice, so they say, is blind. On the iconography of justice, particularly as portrayed by the goddesses Ma'at, Themis, and Justitia (respectively of ancient Egypt, Greece, and Rome), see: Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000), 55–63, the portrayal of justice as blindfolded at 58-60. Besides being blindfolded, the goddess of justice is, today, typically represented as holding, in the one hand, a set of scales and, in the other, a sword; she is dressed in a simple white garment, which symbolizes purity and virtue. She is also represented as a woman, which undoubtedly is underpinned by some idea that justice ought to be attractive; she is nevertheless portrayed as being strong and resolute; the sword adds to the impression of strength.

[41] See, *supra*, 3.14.

[42] Cf. Bracton: "If like matters arise let them be decided by like, since the occasion is a good one for proceeding *a similibus ad similia*" ("*si tamen similia evenerint per simile iudicentur, cum bona sit occasio a similibus procedure ad similia*"). Henry de Bracton, *De Legibus Et Consuetudinibus Angliæ (Bracton on the Laws and Customs of England)*, ed. George Woodbine, trans. Samuel E Thorne (Harvard Law School Library, 2003), 2:21, http://bracton.law.harvard.edu/. On the use of analogical reasoning in law, see, e.g.: Gerald J Postema, "A Similibus Ad Similia: Analogical Thinking in Law," in *Common Law Theory*, ed. Douglas E Edlin (Cambridge Scholars Publishing, 2007), 102–33.

[43] These are words that form a part of Bingham's third criterion for the rule of law: Bingham, "The Rule of Law," chap. 5.

mechanisms can immensely aid in facilitating prevalence and potency and, consequently, ideally ought to be in place.

Third, there are the so-called *principles of natural justice*, which are really *principles of adjudication*. These are twofold: (1) the *rule of integrity*, i.e. determinations ought to be made according to fact and law, and not otherwise;[44] and (2) the *rule of fair hearing*, i.e. all substantially affected parties ought to be heard, or have the opportunity to be heard, in good time, prior to any determination being made.[45] These are normally embodied by certain mechanisms and procedures.[46] These help to ensure that justice is both *done* and *seen to be done*; it reassures us that our fixed associations will actually be followed. However, these mechanisms and procedures are not intrinsic to the rule of law. They do not guarantee the rule of law with their presence; it might exist in their absence.[47]

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[44] This first facet of the principles of adjudication is normally presented as being a *rule against bias*, i.e. individuals ought not to determine causes in which they personally have some sufficiently significant interest; they ought not to determine causes in which they might stand to gain or lose according to the outcome. The Latin phrase associated with this is *nemo in propria causa judex, esse debet* – no one should be made a judge in his or her own cause. Even if this interest is declared and even if the person determining the case seems of good character, there is a strong argument that they ought to be barred from making any determination nevertheless. There is always the possibility that their reasoning *might* be swayed by their interest. Determinations ought to be reserved, insofar as possible, for disinterested parties; interested parties should be disqualified. The *rule against bias* applies as much in cases of long-standing interest, as in cases where those deciding the case are subject to bribery or blackmail – in cases where some personal interest in the outcome is created. As such, the *rule against bias* might be said to be complemented by a *rule against corruption*; there ought to be laws against giving and taking of bribes, and against blackmail. Besides the qualities of impartiality and disinterestedness, those making determinations ought to have a further quality: steadfastness. This can be best facilitated by ensuring that those making determinations have a *degree of security*; they should not fear some negative consequence (e.g. censure, sanction, removal, etc.) – whether at the time or in the future – for having made decisions correct according to law. It is for this reason that judges serving during pleasure and elected judges are abhorrent; judges ought to serve subject to good behaviour, i.e. subject to their interpreting and applying the law properly. They should not have to fear making unpopular determinations – whether unpopular with some given individual (e.g. some monarch) or some wider group of people (e.g. some judicial electorate). Thus, there ought to be a *rule of security*. The *rule of integrity* attempts to capture all of these things in a single title; it stipulates that there ought to be mechanisms to ensure that judges are impartial, disinterested, incorruptible, and secure insofar as they faithful to the law; there should be nothing that might tempt or sway them from their duty.

[45] The Latin phrase often quoted is *audi alteram partem* – hear the other party or side. This is important for, to paraphrase Proverbs 18:17: the one story seems good until the other side is heard. There is an argument that this idea extends to a right to seek professional advice and representation, such that no party ought necessarily to be disadvantaged by their lack of knowledge or skill. Naturally, if this right is admitted, then there is a further argument that there ought to be material assistance available for those wanting professional advice and representation, though they are unable to afford it. Otherwise, there would be reason to suspect that 'justice' would lie with those with the greatest means and the deepest pockets.

[46] Many of these have been mentioned above, e.g. judges ought to be disqualified where they have some vested interest in the case; attempts to corrupt the legal process ought to be penalised; judges ought to serve subject to good behaviour; parties ought to be notified of any proceedings against them and have an opportunity to make submissions; etc.

[47] They cannot guarantee the rule of law, because they govern the process, not the outcome. By a like token, the rule of law might still exist in their absence, because the correct outcome might be reached, even if there are deficiencies in the process – especially if that process is only *open* to abuse, though not actually abused. Thus, interested parties might make determinations as if they were disinterested parties; the correct determination might be made, even though only one side might have been represented. This is not, of

Anything that tends to increase prevalence and consistent potency of fixed associations tends to enhance the rule of law, as does anything that tends to increase the efficiency, efficacy, and reliability of their administration; anything that tends to impede or counteract these things tends to diminish the rule of law. As Raz has said, the rule of law is but one virtue of a legal system; it does not necessarily make it a good one.[48] Absolute equality before and under the law, sustenance of liberal democracy, the availability of appropriate and proportionate remedies for a range of manifest wrongs,[49] – these are all examples of things that go towards making a *good* legal system – for the rule of *good* law – but none are intrinsic to the rule of law.

13.11 Limits of the Rule of Law

Much is made of the rule of law. However, overzealously pursuing the rule of law, in the sense of making law all-pervasive and absolute, might be undesirable and detrimental. Indeed, most people tacitly accept that there must be limits to law. This aspect is often overlooked.

Firstly, there are many cases in which it is not deemed worthwhile to develop fixed expectations; it would be unnecessarily and excessively prescriptive. After all, fixed associations are supposed to make the world simpler and more predictable; if they proliferate unnecessarily, the world becomes more complex. We would have to invest far greater time and energy into learning and assimilating them; to monitoring for times when we ought to be applying them. These are arguments of **simplicity and clarity**.

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course, an argument that such mechanisms and procedures ought to be omitted from any legal system. It is simply a statement of the fact that the rule of law, whilst encouraged by them, is not secured by them.

[48] "It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law." Raz, *The Authority of Law*, 211.

[49] This is such that it might be said, as Willes CJ did in *Winsmore v Greenbank* (1745) Willes 578, "that the law will never suffer an injury and a damage without a remedy": Albert Kiralfy, *Potter's Outlines of English Legal History*, 5th ed. (Sweet & Maxwell Limited, 1958), 172. Of course, there are different degrees of wrong and different degrees of injury, damage, etc. It would be neither possible nor profitable to attempt to address every wrong, but it makes a great deal of sense to address all wrongs that are *sufficiently serious* – either in their nature or effects. There are, almost as a matter of course, a number of complicating factors. Should cognisance only be taken of the wrongful act itself, or should any mitigating factors, and any intent or recklessness respecting the wrongful act be taken into account? Should a remedy be recoverable from anybody besides the wrongdoer? Etc.

Secondly, there is the argument of **liberty**: individuals ought to be able to choose for themselves – according to their own motives, intentions, desires, plans, etc. – how to live their lives without excessive interference. Consequently, there ought to be areas in which laws either do not tread or, if so, only lightly. Indeed, there is the argument that, rather than diminishing personal freedom, it ought to be the purpose of law to *protect* it;[50] in effect, law ought to be used to limit law.

Thirdly, there are instances where it is thought positively beneficial *not* to have fixed associations. This is the argument of **pragmatism**. After all, fixed associations – by their very nature – embody *rigidity*. Sometimes *flexibility* is preferred. This is particularly true in view of the fact of changing circumstances,[51] and where fixed associations might prevent us from doing that which we would otherwise think needs doing – especially that which we deem necessary, including for self-preservation. Alternatively, where they might cause us to do things that would seem ill-advised. Furthermore, when one considers human fallibility, as well as the shortcomings of human imagination and foresight, it becomes more appealing to allow for some degree of *personal freedom*, i.e. *liberty*;[52] by

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[50] This, for example, was the argument of Locke, although he advanced it in the context of arguing that freedom could not be achieved in a lawless society: "[*T*]*he end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*; For…*where there is no Law, there is no Freedom*." John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge University Press, 1988), 306 [Second Treatise, §57]. Hayek built on this by saying that laws can be used to establish a private sphere, in which individuals are free from coercion and violence, and are protected against fraud and deception; in which they can largely decide for themselves – according to their own ideas, beliefs, motives, intentions, desires, plans, etc. – how to act. For Hayek, this could only be properly guaranteed by the acceptance of a centralized coercive power – i.e., the state – to ensure and enforce observance of the law, see: Hayek, *The Constitution of Liberty*, esp. 126.

[51] Cf. Cardozo: "Overemphasis of certainty may carry us to the worship of an intolerable rigidity. If we were to state the law today as well as human minds can state it, new problems, arising almost overnight, would encumber the ground again." Cardozo, *The Growth of the Law*, 19.

[52] It is these very facts that Hayek puts at the centre of his arguments in favour of individual or personal freedom: "[T]he case for individual freedom rests chiefly on the recognition of the inevitable ignorance of all of us concerning a great many of the factors on which the achievement of our ends and welfare depends. / If there were omniscient men, if we could know not only all that affects the attainment of our present wishes but also our future wants and desires, there would be little case for liberty." Hayek, *The Constitution of Liberty*, 27. Further: "The fundamental reason why the best that a government can give a great society of free men is negative [in the form of peace, freedom, and justice] is the unalterable ignorance of any single mind, or any organization that can direct human action, of the immeasurable multitude of facts which must determine the order of its activities. Only fools believe that they know all, but there are many." Hayek, *Law, Legislation, and Liberty*, 464. See further: Friedrich August Hayek, "Individualism: True and False," in *Individualism and Economic Order* (The University of Chicago Press, 1948), 1–32. In other words, if other people always knew what would be best for us, then we would have little cause to argue that we should direct our own affairs; they would be better directed by others and there would be an argument that every part of our lives ought to be governed in their totality by laws determined by those others. Essentially, Hayek's argument for liberty – in this respect, at least – rests on the idea of *humility*: it would be arrogant to assume that we know what is best for everyone always, and, as a consequence of that, to seek to impose our will and ideas on others, including by excessive law-making. If 'mistakes' are to be made, it is better that they are made by individuals concerning themselves, rather than by lawmakers concerning everyone. Indeed, it is this ability of individuals to engage in a process of 'trial and error', according to Hayek, which

the same token, to entrust certain individuals and bodies with *some discretionary decision-making powers* concerning the group, its members, and its activities, especially if those persons so entrusted are possessed of greater knowledge (including real-time information) and expertise than the general population, and the wherewithal to make them count.[53] Few would contest, however, that such discretion justifies *capriciousness, arbitrariness,* or, indeed, *unreasonableness*; *uncontrolled* or *unlimited powers*.[54] Further, such discretion might be limited to *interim* and *provisional solutions*, pending proper deliberation, decision, and implementation.[55]

Fourthly, there is the argument of **achievability** – it is futile and, indeed, perhaps even harmful, to attempt to regulate certain things by law, for example, to attempt to discover and impose a 'just price' or a 'just wage'.[56]

Finally, there is the argument that, whilst it is generally beneficial to have fixed associations, they can sometimes lead to undesirable results – particularly when context and other considerations are taken into account. As such, there are situations in which their application or effect should be *mitigated* or *disregarded*. This argument favours

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enable improvements to come about that could never have been achieved in a planned or designed society: Hayek, *Law, Legislation, and Liberty*, 474-75 et passim.

[53] The extent to which these individuals and bodies ought to respect personal freedom is, of course, a matter for debate – in particular, whether the personal freedom, or some aspect or aspects thereof, of some number of persons ought to be sacrificed for the good of the rest. Whether one believes that these entrusted persons – in effect, *executive agencies* – should respect personal freedom and, if so, to what extent, the argument nevertheless remains that there is some sense in which it is desirable for there to be some flexibility as to how a group might respond to changing circumstances.

[54] In other words, discretion ought to be circumscribed and supervised by law, and exercised according to certain dictates of policy, reason, fairness, etc. – i.e. in many respects, by fixed associations more generally considered. Cf. Sir Edward Coke: "For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit* [such discretion confounds discretion]." (*Rooke's Case*, Co. Rep. 5, 99, 100): Edward Coke, *The Reports of Sir Edward Coke, Knt.*, ed. John Henry Thomas and John Farquhar Fraser, vol. 3 (Joseph Butterworth and Son; J. Cooke, 1826), 204. Further, Lord Mansfield: "But discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular." R v Wilkes (1770), 4 Burr. 2527. Further, Lord Kenyon: "it must be remembered that the discretion to be exercised on such an occasion is not a wild but a sound discretion, and to be confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself": Wilson v Rastall (1792) 100 E.R. 1283.

[55] Cf. Locke's argument the 'good of society' often requires concentrating some powers in the hands of some executive, because legislators are not always "able to foresee, and provide, by Laws, for all, that may be useful to the Community". This, however, is only an interim solution and lasts "till the Legislative can conveniently be Assembled" (Second Treatise, §159). Locke, *Two Treatises of Government*, 374.

[56] This, certainly, was the argument of Hayek. See: Hayek, *Law, Legislation, and Liberty*, chap. 10. It is worthwhile paying particular attention to the following: "though it is the aim of law to increase certainty, it can eliminate only certain sources of uncertainty and it would be harmful if it attempted to eliminate all uncertainty…" Hayek, *Law, Legislation, and Liberty*, 283.

equity, justice, and reason, which things themselves, it must be said, rely heavily on systems of fixed associations.

13.12 Statutes of Limitations and the Rule of Law

There is a question as to the extent to which statutes of limitations – which impose a certain timeframe within which legal proceedings must be initiated – are compatible with the rule of law. Is it right that, purely because a certain amount of time has elapsed, some occasion of dispute or deviancy can no longer be settled in accordance with the laws? In particular, is it right that instances of *wrongdoing* – whether purposeful or not – should not result in the usual consequences, simply because it has not been caught or raised as an issue in time (e.g. because it went unnoticed or undetected, or because the victim has been unable to bring proceedings previously)?

The short answer is that statutes of limitations *are* compatible with the rule of law – so long as the timeframes within which claims or prosecutions must be brought are not set too narrowly. After all, it does often take some time for things, and their greater significance, to become apparent. Indeed, there are many sensible reasons for imposing statutes of limitations. In the first place, there are considerations of the workload of the judiciary. By restricting the number of cases that *can* come before the adjudicators, they are thereby enabled to better handle and cope with the cases that they do have before them. It also discourages speculative, capricious, and malicious claims or prosecutions made long after the fact. Moreover, as time passes, the availability of evidence tends to diminish, meaning that it actually becomes much more difficult for adjudicators to ascertain the facts and apply the laws thereto. Without statutes of limitations, therefore, the adjudicators are likely not only to have more work to do, but the work is also likely to be more difficult.

More importantly, statutes of limitations often serve the same ends as the rule of law itself – to give people a sense of safety and security. After all, they provide *protection* to people against legal proceedings being initiated against them for 'historic' actions or inactions. It means that individuals can plan and invest with greater confidence that they will not suddenly find themselves being embroiled in proceedings about events that they might hardly even remember.

On the other side of things, however, it is easy to see how statutes of limitations might frustrate our sense of the rule of law – especially where the time limits appear to be somewhat arbitrary. After all, why should it be that the laws will be applied in a certain

case one day and not the next? In order for this situation not to arise, it is important that statutes of limitations are used wisely. There are a number of things that can help in this regard.

The first is the sensible imposition of the time limits – they should neither be so short as to likely frustrate people's expectations nor so long that there is little use in having them. There needs to be *reasonable opportunity* for any wrong to become apparent and for any actions regarding it to be commenced, but, equally, there is little point in setting the deadline a long time after a reasonable period of opportunity has elapsed.

The second is that not all time limits should necessarily begin at the same time. It makes sense that some should begin at the time when the disputed event or purported act of deviancy *occurred*. In other cases, it makes greater sense that the time limit begins at the point the one or the other is *discovered* or, rather, *realized*. After all, it could be considered unfair to require that people bring a claim or prosecution before they have realized that there is any basis for such a course of action.

The third is that there are good arguments for using statutes of limitations differently as concerning 'private wrongs' (i.e. torts) and 'public wrongs' (i.e. criminal acts) – more specifically, using them more sparingly in the latter. Our sense of justice is more likely to be frustrated if they are used liberally respecting public wrongs, especially respecting those we deem more serious in nature (e.g. homicide, sexual assault, etc.); these sorts of things we expect to be punished regardless as to when they occurred, though the nature and severity of that punishment might be modulated according to the amount of time that has elapsed and what has passed in the interim.

Naturally, statutes of limitations, where they create fixed associations, fit in with the rule of law. If they are used wisely, then there is little cause for avoiding them. Indeed, there are compelling reasons in their favour.

13.13 Concluding Remarks

The *rule of law* does not mean the *tyranny of law*;[57] the *limits of law* does not mean the *commencement of tyranny*.[58] There needs must be balance. If we are to fulfil our

[57] For 'brute legalism', we might say.
[58] "Where the law ends, there tyranny begins". As Loughlin identified, this is often associated with William Pitt the Elder (see his speech in the House of Lords, 9 January 1770), but is found earlier in Locke: Locke, *Two Treatises of Government*, 400 [Second Treatise, §202]. Cf. Loughlin, *Sword and Scales*, 13.

psychological need for regularity and certainty, there must be laws that are prevalent and potent within our social networks. This means that we know what to expect of others and what others expect of us. As contrasted with the arbitrary rule of some person or body (the so-called 'rule of men'), it also means that we are not exposed so much to human capriciousness, fickleness, partiality, self-interest, vindictiveness, etc.;[59] to the "incertain and crooked cord of discretion".[60] Laws, in theory, are more regular and predictable than people,[61] as well as impartial.[62] However, making laws overly stringent and prescriptive might frustrate our other needs and desires; it might even endanger us. Indeed, laws, unlike people, are unthinking and unfeeling. They know not whether their dictates are reasonable or unreasonable, right or wrong, good or bad. Only people can decide this. If we are to live and live well, we need law – but neither too much nor too little, neither too weak nor too strong.

The rule of law, as has been said, is but one aspect of a good legal system. It helps us to feel that we understand what has happened, what is happening, and what is likely to happen in the future. It helps us to feel *safe in knowledge*, though not necessarily and absolutely *safe in ourselves and our surroundings*. This requires a great deal more. A good legal system will build on the foundation of the rule of law by facilitating and promoting our feelings of safety and security. However, these ought not to be treated as ends in themselves. They ought always to be pursued as part of a wider goal of helping people to *live* and *live well* – or, at least, to *live as well as possible given the circumstances*. After all, a good legal system cannot guarantee sufficient food yields to feed any given population (which depends, not least, upon the weather). It can, however, make us feel that our social world is rightly ordered; that we are fairly done by within it;

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[59] Cf. "[B]ut he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men." Aristotle, *The Politics and The Constitution of Athens*, ed. Stephen Everson, trans. Jonathan Barnes and JM Moore, 2nd ed. (Cambridge University Press, 1996), 88 (Pol. 1287a30-32).

[60] These are the words of Sir Edward Coke; he contrasted this with the "golden and streight metwand [metewand] of the law": Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (London, 1644), 41.

[61] Cf. "And between men between whom there is injustice there is also unjust action…, and this is assigning too much good in themselves and too little of things evil in themselves. This is why we do not allow a *man* to rule, but *rational principle*, because a man behaves thus in his own interests and behaves as a tyrant." Aristotle, "Nicomachean Ethics (Ethica Nichomachea)," in *Great Books of the Western World, Vol. 9: The Works of Aristotle (II)*, trans. WD Ross (William Benton, 1952), 382 (Bk. V, Ch. 6, 1134a-b).

[62] Cf. "For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted the injury and the other has received it." Aristotle, "Nicomachean Ethics (Ethica Nichomachea)," 379 (Bk. V, Ch. 4; 1132a).

that it best promotes our chances of survival; that it best promotes our well-being and our ability to flourish.

A final point ought to be made concerning the relationship between the rule of law and constitutions. In a fundamental sense, the rule of law (that things should exist and occur in accordance with some shared set of fixed associations and not otherwise) and constitutions (the distribution of activities and influence as between sets of social agents) are separate and distinct things. Nevertheless, there is naturally a close relationship between them: the rule of law profoundly affects the stability and operation of constitutions. The rule of law means that people are exercising their allotted activities and influence – and nothing besides these – in a regular, consistent, and predictable manner; it means that any distribution or redistribution that takes place does so according to set patterns and procedures. This is especially important when it comes to 'public powers' and 'public offices', which affect social groups at large. As such the rule of law, as well as the *respecting* and *upholding* thereof, are important and commendable *characteristics* of a constitution, and the relevant social agents that are a part of it, to have.

However, the lack of the rule of law – to whatever degree – does not mean the lack of a constitution. Even if activities and influence are not distributed or carried out in an orderly and consistent fashion, there are still *activities* and *influence*, and some *distribution thereof*. It might not be a particularly good, coherent, or intelligible constitution, and it might not be a particularly stable one, but a constitution it remains. The rule of law tends to make for better – or, at least, more effective – constitutions,[63] and total disregard for the rule of law might destroy a particular constitutional settlement or arrangement, but, in the final analysis, the rule of law and constitutions are not inseparable bedfellows.

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[63] The rule of law tends to make for better, or more effective, constitutions in the sense that it tends to make them more stable. It does not, of course, automatically result in there being a *good* constitution sitting beside and within a system of *good* law. To take a stock example, the Nazi regime in the 1930s and '40s is well-known to have operated largely according to law, which law did not universally work towards good ends. There is a sense, however, in which the *law* was used here *to undermine the rule of law*, in the sense that some laws were passed granting sweeping and extensive (i.e. plenary) powers to Hitler's government – especially through the *Ermächtigungsgesetz* (23 March 1933), which amended the Weimar Constitution. This amendment increased the government's breadth of discretion, which step, as such steps tend to do, moved things away from the 'rule of law' towards the 'rule of men', even if that rule of men was underpinned by law. The existence of discretion is not, of course, in itself necessarily offensive to the rule of law; it only becomes so when it begins to be exercised summarily, capriciously, unjustifiably, devastatingly, etc. Generally speaking, therefore, it can be said that there existed the rule of law in Nazi Germany, though there were concerning tendencies that speaks towards there not being the *best* rule of law.

Appendix III: Regency and Minority

14.1 Regency

Regencies arise from a monarch's inability to carry out those activities and influence normally associated with their position. It has been said by others that regencies arise in three or four situations.[1] In fact, there are fundamentally only two:

(1) **Absentee regencies**: the monarch is, generally speaking, *able* to do their duties, but is not *physically present* to do so; they are *able but not present*;
(2) **Presentee regencies**: the monarch is, or can be, *physically present*, but is *for some reason unable* to carry out their duties; they are *present but not able*.[2]

14.1.1 Absentee Regencies

In absentee regencies, the monarch tends to be regarded as cognitively and physically able. They are simply too far removed from the centres of government to be able to perform their normal duties in a timely fashion – usually due to their being abroad. Consequently, there is need to cause others to do those things that (a) would normally be done by the monarch and (b) need doing in their absence. Such need was more acute in the mediaeval period than today. Before modern infrastructure and telecommunications systems, people and information travelled much more slowly – even across relatively short distances. For urgent decisions, absent monarchs were effectively useless. The best they could do was provide for the government in their absence and leave instructions for foreseeable eventualities. Absentee regencies were common throughout the mediaeval period.[3]

Absentee regencies have two notable features. The first is **provision**: The monarch determines, at least in some way, how activities and influence are to be distributed and exercised during their absence. The second is **oversight**: Even though the monarch might be unable to make day-to-day decisions, decisions of lesser urgency or greater consequence might still be referred

[1] Feilden states infancy, illness, madness, and absence; Medley states absence, vacancy, minority, and mental incapacity. Henry St Clair Feilden, W Gray Etheridge, and DHJ Hartley, *A Short Constitutional History of England*, 4th ed. (Oxford University Press, 1911), 29; Dudley Julius Medley, *A Student's Manual of Constitutional History*, 6th ed. (Oxford University Press, 1925), 87–91.
[2] It might also be said that a further possible situation for a regency is one which there is an interregnum (i.e. a vacancy of the throne) and some arrangement is necessary for the government during this period. However, as a regency is defined by the fact that the regency government is *acting in the monarch's name*, this precludes this situation from being called a regency proper.
[3] See, esp.: Francis West, *The Justiciarship in England 1066-1232* (Cambridge University Press, 1966), passim.

to them; they might continue to oversee the administration more generally, including overseeing appointments, dismissals, etc.[4]

The commencement conditions for absentee regencies have often been unclear. For example, are they triggered automatically by the monarch's departure from the kingdom or must they be formally established? Furthermore, might one be declared whilst the monarch is still present, albeit incommunicado (e.g. on pilgrimage or in some far-flung part)? Indeed, what is the difference between *regency* and *deputyship*? There are no general answers to these questions.

14.1.2 Presentee Regencies

Presentee regencies tend to ask more serious questions about monarchs' abilities. They arise when the monarch is unable to do what is expected of them, regardless of their location – usually due to some cognitive deficiency.[5] There are three grounds for presentee regencies: (1) **immaturity**; (2) **infirmity**; and (3) **incompetence**.

Immaturity is where the monarch, by virtue of their youth, lacks *sufficient mental capacity* (i.e. ability to perform complex planning and decision-making), *sufficient experience* (i.e. knowledge),[6] or, indeed, *sufficient physical strength and control* (e.g. to wield arms and fight). There is usually an assumption that such deficiency is temporary. Immaturity is most relevant in the context of royal minorities.

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[4] Perhaps the most notable examples of provision and oversight in England come from the period when Richard I was absent on crusade. He appears to have initially installed Hugh Puiset (Bp. Durham) and William Mandeville (E. Essex) as co-regents in his absence. Mandeville, however, died shortly afterwards (October 1189) and Richard first raised William of Longchamp (the Chancellor) to be co-regent with Puiset and then, later, made Longchamp sole regent (June 1190). Longchamp, however, proved unpopular and Richard sent Walter of Coutances (Abp. Rouen) back with two letters dated February 1191 – the first commanding that Longchamp and the barons come to terms and the second, following the failure of the first, enabling the removal of Longchamp. In the event, Longchamp was eventually removed on the authority of the second letter. As such, Richard *provided* for the government in his absence and continued to exercise some *oversight* over its structure. For this period, see: HWC Davis, *England under the Normans and Angevins, 1066-1272*, 10th ed. (Methuen & Co. Ltd., 1930), 287–91, 313–17; Frank Barlow, *The Feudal Kingdom of England 1042-1216*, 5th ed. (Longman, 1999), 310–13; John Gillingham, *Richard I* (Yale University Press, 1999), 120–222.

[5] It is possible, though much rarer, for a regency to come about in the case of some physical inability, though this would rather be considered a case of *deputyship* than *regency* per se.

[6] Cf. the words of the statute 28 Hen. VIII, c. 17, which provides that acts passed whilst the king is under the age of twenty-four might be unilaterally revoked after attainment of that age: "Forasmuch as laws and statutes may happen hereafter to be made within this realm at parliaments held at such times as the kings of the same shall happen to be within age, *having small knowledge and experience of their affairs*, to the great hindrance and derogation of the imperial crown of this realm, and to the universal damage of the common wealth of subjects of the same…" George Burton Adams and H Morse Stephens, eds., *Select Documents of English Constitutional History* (The Macmillan Company, 1901), 246. It should be noted that this statute was repealed in Edward VI's first year (1 Edw. VI, c. 11). See: Frederic William Maitland, *The Constitutional History of England*, ed. Herbert Albert Laurens Fisher (Cambridge University Press, 1908), 253–54.

Infirmity is where the monarch has some *physiological*,[7] or, more likely, *psychological disorder or impairment*,[8] including the effects of old age (i.e. senility).[9]

Incompetence is where the monarch is ostensibly mature and unimpaired, but is *nevertheless found lacking in their ability*. They seem incapable of acting appropriately (i.e. as expected).[10] Where incompetence seems incorrigible, dethronement has sometimes been viewed as an alternative to regency.[11]

There is a close relationship between these. Incompetence, for example, can easily be recast as, or excused as being, immaturity or infirmity, which are generally considered to be more acceptable.[12] This interchangeability might explain the protracted nature of some royal minorities; incompetence might be excused as immaturity.

What presentee regencies signally lack is *provision* and *(royal) oversight*. As such, there is good reason for treating them differently to absentee regencies.[13] Whether the various forms of presentee regency need be treated differently to one another is another question. The outlook in cases of immaturity is certainly more positive than that in cases of infirmity or incompetence. There is greater risk that the latter will be chronic.

14.2 Minority

Minors are so regarded until they reach the age of majority, which is a *threshold* between childhood and adulthood. Questions arise concerning: (1) its *location* and (2) the *sufficient conditions* for crossing it.

[7] For example, in England, Henry IV struggled greatly with his health in his final years, which meant that his son, Henry [V], often had opportunity to direct affairs, though he might have to step back during periods of remission. However, where the monarch retains their mental faculties, this type of regency is much more likely to be akin to absentee regencies; the monarch might still have *provision* and *oversight*. Indeed, such situations are more likely to be construed as periods of *deputyship*, rather than *regency*.

[8] In England, Henry VI and George III provide examples of severe psychological disturbances, which necessitated the institution of alternative arrangements.

[9] In England, Edward III's senility became increasingly apparent in his final years. Furthermore, owing to the physiological incapacity of his eldest son, Edward of Woodstock (the 'Black Prince'), the government was exercised largely under the direction of his next eldest surviving son, John of Gaunt.

[10] In England, Henry III and Edward II serve as examples, who were both displaced for a time by parties of magnates, although whether these are truly regencies is debatable.

[11] We might think here of Edward II and Richard II, in particular.

[12] After all, there is usually a sense that these things cannot be helped by the individual in question; they are not their *fault*, whereas incompetence is.

[13] It is worth noting Ward's opinion that conflating 'absentee kingship' and child kingship "obscures various subtleties of the provisions when a child was king": Ward, "Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250," 42.

There are a number of approaches to these questions. Firstly, the threshold might equate to *attainment of a certain numerical age*; such attainment, normally defined in years, is sufficient for achieving one's majority. Thus, a person might achieve their majority upon their eighteenth or twenty-first birthday. Secondly, some *physiological sign* might be required, e.g. facial hair or menstruation. Thirdly, the *completion of some rite of passage* might be required – often involving the completion of some task or participation in some ceremony. In such cases, a person's numerical age might matter but little; they attain their majority only if the rite of passage is performed successfully. For males, such rites have historically often involved the assumption of arms and armour. Fourthly, the *demonstration of some competency or ability* might be required, which demonstration is sufficient to show that one is of age; one needs to demonstrate that one has the cognitive or physical ability to do a certain thing with a given measure of success. This is not dissimilar to a rite of passage, except that rites of passage tend to be more overtly symbolic and ceremonial; demonstrations are more eminently practical.[14]

Besides location and sufficient conditions, there are three further questions. Firstly, is the age of majority *discretionary or non-discretionary*, i.e. is there some element of choice involved? Secondly, is it *graduated or binary*, i.e. achieved in stages or all at once?[15] Thirdly, is it *targeted or comprehensive*, i.e. might a person might be "of age" for some things, but not others?[16]

There is one final question, which is of supreme importance. What is the *effect* of crossing the threshold? What happens when one comes of age? Does it make any tangible difference, for example, as to what one is permitted or expected to do? Is it, perhaps, rather a mark of honour? In the context of royal minors, did attaining their majority alter their constitutional position?

There are no universal or objective answers to these questions. They are culturally relative. In some societies, children become adults sooner than in others, and do so in different ways.

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[14] There are indications in the mediaeval English legal treatises of Glanvill and Bracton that, amongst those of lower social status at least, this was the primary method by which a child would become an adult. For the heir of a burgess, it was simply necessary to be able to undertake their father's business. By contrast, for the heirs to military fees and sokemen, the age of majority was based upon chronological age – twenty-one and fifteen respectively: Ranulf De Glanvill, *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, trans. GDG Hall (Thomas Nelson and Sons Ltd, 1965), 82; Henry de Bracton, *De Legibus Et Consuetudinibus Angliæ (Bracton on the Laws and Customs of England)*, ed. George Woodbine, trans. Samuel E Thorne (Harvard Law School Library, 2003), 250–51, http://bracton.law.harvard.edu/.

[15] In modern-day United Kingdom, for example, it would appear to be graduated. At 10, a person assumes legal responsibility for their actions; at 16, people are allocated National Insurance Numbers, meaning that they can work full-time, and they can also have consensual sex; at 17, people can apply for, and obtain, a driving licence; at 18, they can vote, stand for office, etc.

[16] For example, a person might be deemed old enough to marry or engage in sexual activities, and as yet remain incapable of participating in the 'public life' of a society (e.g. by voting or standing for office).

Bibliography

PRIMARY

Adams, George Burton, and H Morse Stephens, eds. *Select Documents of English Constitutional History*. The Macmillan Company, 1901.

Ælred of Rievaulx. *Aelred of Rievaulx: The Historical Works*. Edited by Marsha L. Dutton. Translated by Jane Patricia Freeland. Cistercian Publications, 2005.

Aesop. *The Fables of Æsop: Selected, Told Anew, and Their History Traced*. Edited by Joseph Jacobs. Macmillan & Co. Ltd., 1922.

Aesop. *Aesop's Fables*. Translated by Laura Gibbs. Oxford University Press, 2002.

Alexander, Michael, trans. *Beowulf: A Verse Translation*. 2nd ed. Penguin Books, 2003.

Amt, Emilie, and SD Church, eds. *Dialogus de Scaccario and Constitutio Domus Regis*. Oxford University Press, 2007.

Anon. *A Copy of a Letter Written to an Officer of the Army by a True Commonwealths-Man, and No Courtier, Concerning the Right and Settlement of Our Present Government and Governors*. London: Thomas Newcombe, 1656.

Aquinas, Thomas. "Summa Theologiae." In *St Thomas Aquinas: Political Writings*, edited and translated by RW Dyson. Cambridge University Press, 2002.

Aquinas, Thomas. *St Thomas Aquinas: Political Writings*. Edited and translated by RW Dyson. Cambridge University Press, 2002.

Aquinas, Thomas. *Treatise on Law (Summa Theologica, Questions 90-97)*. Henry Regnery Company, 1992.

Aristotle. *Nicomachaen Ethics*. Translated by Harris Rackham. Loeb Classical Library 73. Harvard University Press, 1926.

Aristotle. "Nicomachean Ethics (Ethica Nichomachea)." In *Great Books of the Western World, Vol. 9: The Works of Aristotle (II)*, translated by WD Ross. William Benton, 1952.

Aristotle. "On the Heavens (De Caelo)." In *Great Books of the Western World, Vol. 8: The Works of Aristotle (I)*, translated by JL Stocks. William Benton, 1952.

Aristotle. "Topics (Topica)." In *Great Books of the Western World, Vol. 8: The Works of Aristotle (I)*, translated by WA Pickard-Cambridge. William Benton, 1952.

Aristotle. *The Politics and The Constitution of Athens*. Edited by Stephen Everson. Translated by Jonathan Barnes and JM Moore. 2nd ed. Cambridge University Press, 1996.

Aristotle. *The Ethics of Aristotle*. Translated by JAK Thomson. Penguin Books, 1953.

Aristotle. *The Nicomachean Ethics*. Edited by Lesley Brown. Translated by David Ross. Oxford University Press, 2009.

Attenborough, FL, ed. *The Laws of the Earliest English Kings*. Cambridge University Press, 1922.

Augustine of Hippo. *Saint Augustine: The Teacher, The Free Choice of the Will, Grace and Free Will*. Translated by Robert P Russell. The Catholic University of America Press, 1968.

Augustine of Hippo. "The Confessions." In *Augustine*, translated by Edward Bouverie Pusey, Vol. 18. Great Books of the Western World. Encyclopaedia Britannica Inc., 1952.

Aurelius, Marcus. *Meditations*. Edited by Christopher Gill. Translated by Robin Hard. Oxford University Press, 2011.

Bede. *The Ecclesiastical History of the English People*. Edited and translated by Judith McClure and Roger Collins. Oxford University Press, 1999.

Bodin, Jean. *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*. Edited and translated by Julian H Franklin. Cambridge University Press, 1992.

Bodin, Jean. *The Six Bookes of a Commonweale*. Translated by Richard Knolles. Impensis G Bishop, 1606.

Boethius. *The Consolation of Philosophy*. Translated by VE Watts. Penguin Books Ltd, 1969.

Bracton, Henry de. *De Legibus Et Consuetudinibus Angliæ (Bracton on the Laws and Customs of England)*. Edited by George Woodbine. Translated by Samuel E Thorne. Harvard Law School Library, 2003. http://bracton.law.harvard.edu/.

Brie, Friedrich WD, ed. *The Brut; or, the Chronicles of England*. Vol. 1. Early English Text Society, 1906.

Burns, Robert I, ed. *Las Siete Partidas - Medieval Government: The World of Kings and Warriors*. Translated by Samuel Parsons Scott. Vol. 2. University of Pennsylvania Press, 2001.

Caesar. *The Gallic War*. Translated by HJ Edwards. Harvard University Press, 1917.

Campbell, A, ed. *The Chronicle of Æthelweard*. Thomas Nelson and Sons Ltd, 1962.

Chandos Herald. *The Life & Feats of Arms of Edward the Black Prince*. Edited and translated by Francisque Michel. J.G. Fotheringham, 1883.

Chandos Herald. *Life of the Black Prince*. Translated by Mildred K Pope and Eleanor C Lodge, 2000.

Cicero. *Orationes: Pro Milone; Pro Marcello; Pro Ligario; Pro Rege Deiotaro; Philippicae I–XIV*. Edited by Albert Curtis Clark. 2nd ed. Vol. 2. Oxford University Press, 1918.

Cicero. *The Republic and The Laws*. Translated by Niall Rudd. Oxford University Press, 1998.

Cicero. *On Duties*. Edited by MT Griffin and EM Atkins. Cambridge Texts in the History of Political Thought. Cambridge University Press, 1991.

Costin, WC, and J Stevenson Watson, eds. *The Law and Working of the Constitution: Documents, 1660-1914*. Vol. 1. Adam and Charles Black, 1952.

Dasent, John Roche, ed. *Acts of the Privy Council of England*. Vol. 2. London, 1890.

Dionysius of Halicarnassus. *Roman Antiquities*. Translated by Earnest Cary and Edward Spelman. Vol. 4. Loeb Classical Library 364. Harvard University Press, 1943.

Epictetus. *Discourses*. Translated by W. A. Oldfather. Vol. 1. Loeb Classical Library 131. Harvard University Press, 1925.

Finlay, Alison, ed. *Fagrskinna, a Catalogue of the Kings of Norway: A Translation with Introduction and Notes*. Koninklijke Brill NV, 2004.

FitzNigel, Richard. "Dialogus de Scaccario/The Dialogue of the Exchequer." In *Dialogus de Scaccario and Constitutio Demus Regis*, edited and translated by Emilie Amt. Oxford University Press, 2007.

Fortescue, John. "De Titulo Edwardi Comitis Marchiæ." In *The Works of Sir John Fortescue, Knight, Chief Justice of England and Lord Chancellor to King Henry the Sixth*, edited by Thomas Fortescue, translated by William Stubbs, Vol. 1. Chiswick Press, 1869.

Fortescue, John. *The Works of Sir John Fortescue, Knight, Chief Justice of England and Lord Chancellor to King Henry the Sixth*. Edited by Thomas Fortescue. Vol. 1. Chiswick Press, 1869.

Fortescue, John. *On the Laws and Governance of England*. Edited and translated by Shelley Lockwood. Cambridge Texts in the History of Political Thought. Cambridge University Press, 1997.

Fortescue, John. "De Natura Legis Naturae." In *The Works of Sir John Fortescue, Knight, Chief Justice of England and Lord Chancellor to King Henry the Sixth*, edited by Thomas Fortescue, translated by Chichester Fortescue, Vol. 1. Chiswick Press, 1869.

Frontinus. *The Stratagems and The Aqueducts of Rome*. Edited by Mary B McElwain. Translated by Charles E Bennett and Clemens Herschel. Loeb Classical Library 174. Harvard University Press, 1925.

Furnivall, Frederick J, ed. *Caxton's Book of Curtesye, Printed at Westminster about 1477-8 AD and Now Reprinted with Two MS Copies of the Same Treatise*. Early English Text Society, 1868.

Gairdner, James, ed. *The Historical Collections of a Citizen of London in the Fifteenth Century*. Camden Society, 1876.

Gardiner, Samuel Rawson, ed. *The Constitutional Documents of the Puritan Revolution, 1625-60*. 3rd ed., 1906.

Geoffrey of Monmouth. *The History of the Kings of Britain*. Edited by Lewis Thorpe. Penguin Books, 1966.

Gervase of Canterbury. *The Historical Works of Gervase of Canterbury*. Edited by William Stubbs. Vol. 2. Longmans and Co., 1880.

Gildas. *Gildae de Excidio Britanniae. Gildas: The Ruin of Britain.* Edited by Hugh Williams. David Nutt, 1899.

Giles, JA, ed. *The Anglo-Saxon Chronicle*. 2nd ed. G. Bell and Sons, Ltd., 1914.

Giles, JA, ed. *Six Old English Chronicles*. Henry G Bohn, 1848.

Giles, JA, ed. *The Anglo-Saxon Chronicle*. Translated by James Ingram. JM Dent & Sons Limited, 1912.

Gilson, JP. "A Defence of the Proscription of the Yorkists in 1459." *The English Historical Review* 26, no. 103 (1911): 512–25.

Glanvill, Ranulf De. *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*. Translated by GDG Hall. Thomas Nelson and Sons Ltd, 1965.

Halicarnassus, Dionysius of. *Roman Antiquities*. Translated by Earnest Cary and Edward Spelman. Vol. 1. Loeb Classical Library 319. Harvard University Press, 1937.

Hall, Edward. *Hall's Chronicle; Containing the History of England during the Reign of Henry the Fourth and the Succeeding Monarchs to the End of the Reign of Henry the Eighth*. Edited by Henry Ellis, 1809.

Hardy, Thomas Duffus, ed. *Modus Tenendi Parliamentum; An Ancient Treatise on the Mode of Holding the Parliament in England*. George E Eyre and William Spottiswoode, 1846.

Hardyng, John. *The Chronicle of John Hardyng*. Edited by Henry Ellis. London, 1812.

Herodotus. *The Histories*. Edited by John Marincola. Translated by Aubrey de Sélincourt. 4th ed. Penguin Books Ltd, 2003.

Holden, AJ, S Gregory, and David Crouch, eds. *History of William Marshal*. Vol. 1. Anglo-Norman Text Society, 2002.

Holden, AJ, S Gregory, and David Crouch, eds. *History of William Marshal*. Vol. 2. Anglo-Norman Text Society, 2004.

Holden, AJ, S Gregory, and David Crouch, eds. *History of William Marshal*. Vol. 3. Anglo-Norman Text Society, 2006.

Horne, Andrew. *Mirror of Justices*. Edited by William Joseph Whittaker. Selden Society, 1895.

Horne, Andrew. *The Mirrour of Justices: Written Originally in the Old French, Long Before the Conquest; and Many Things Added [Trans. 1646]*. Translated by William Hughes. John Byrne & Co., 1903.

Huntingdon, Henry of. *The History of the English People 1000-1154*. Translated by Diana Greenway. Oxford University Press, 2002.

Isidore of Seville. *The Etymologies of Isidore of Seville*. Translated by Stephen A Barney, WJ Lewis, JA Beach, and Oliver Berghof. Cambridge University Press, 2010.

Jamison, Stephanie W, and Joel P Brereton, trans. *The Rigveda: The Earliest Religious Poetry of India*. Vol. 1. Oxford University Press, 2014.

Jamison, Stephanie W, and Joel P Brereton, trans. *The Rigveda: The Earliest Religious Poetry of India*. Vol. 3. Oxford University Press, 2014.

John of Paris. *On Royal and Papal Power: A Translation, with Introduction*. Translated by Arthur P Monahan. Columbia University Press, 1974.

John of Salisbury. *Historia Pontificalis*. Edited and translated by Marjorie Chibnall. Thomas Nelson and Sons Ltd, 1956.

John of Salisbury. *Policraticus*. Edited and translated by Cary J Nederman. Cambridge University Press, 1990.

John of Worcester. *The Chronicle of Florence of Worcester with Two Continuations*. Edited and translated by Thomas Forester. Henry G Bohn, 1854.

Kemble, John Mitchell, ed. *Codex Diplomaticus Aevi Saxonici*. Vol. 4. Sumptibus Societatis, 1846.

Kempis, Thomas à. *The Imitation of Christ*. Translated by Leo Sherley-Price. Penguin Books, 1952.

Keynes, Simon, and Michael Lapidge, trans. *Alfred the Great: Asser's Life of King Alfred and Other Contemporary Sources*. Penguin Books, 1983.

Leadam, IS. *Select Cases before the King's Council in the Star Chamber*. Bernard Quaritch, 1903.

Lee, Guy Carleton. *Leading Documents of English History*. George Bell & Sons, 1900.

Livy. *History of Rome*. Translated by BO Foster. Vol. 1. Loeb Classical Library 114. Harvard University Press, 1919.

Map, Walter. *Du Nugis Curialium (Courtiers' Trifles)*. Edited by MR James, CNL Brooke, and RAB Mynors. Oxford University Press, 1983.

Marsiglio of Padua. "De Translatio Imperii." In *Defensor Minor and De Translatio Imperii*, edited by Cary J Nederman, translated by Fiona Watson and Cary J Nederman, 65–82. Cambridge University Press, 1993.

Marsiglio of Padua. "Defensor Minor." In *Defensor Minor and De Translatio Imperii*, edited and translated by Cary J Nederman, 1–64. Cambridge University Press, 1993.

Marsiglio of Padua. *Defensor Minor and De Translatione Imperii*. Edited by Cary J Nederman. Cambridge University Press, 1993.

Marsilius of Padua. *The Defender of the Peace*. Edited and translated by Annabel Brett. Cambridge University Press, 2005.

Marx, William, ed. *An English Chronicle 1377-1461: A New Edition*. The Boydell Press, 2003.

Myers, AR, ed. *English Historical Documents*. Vol. 4. Eyre and Spottiswoode, 1969.

Nichols, John, ed. *A Collection of All the Wills Now Known to Be Extant of the Kings and Queen of England et Al. from the Reign of William the Conqueror to That of Henry the Seventh Etc.* John Nichols, 1780.

Nicolas, Harris, ed. *Proceedings and Ordinances of the Privy Council of England*. Vol. 1, 1834.

Nicolas, Harris, ed. *Proceedings and Ordinances of the Privy Council of England*. Vol. 2, 1834.

Nicolas, Harris, ed. *Proceedings and Ordinances of the Privy Council of England*. Vol. 3, 1834.

Nicolas, Harris, ed. *Proceedings and Ordinances of the Privy Council of England*. Vol. 4, 1835.

Nicolas, Harris, ed. *Proceedings and Ordinances of the Privy Council of England*. Vol. 5, 1835.

Nicolas, Harris, ed. *Proceedings and Ordinances of the Privy Council of England*. Vol. 6, 1837.

Niermeyer, JF, and C van de Kieft, eds. *Mediae Latinitatis Lexicon Minus*. EJ Brill, 1976.

Ogg, Frederic Austin, ed. *A Source Book of Mediæval History*. American Book Company, 1907.

Oliver, Lisi. *The Beginnings of English Law*. University of Toronto Press, 2002.

Paris, Matthew. *Matthew Paris's English History from the Year 1235 to 1273*. Translated by JA Giles. Vol. 1. George Bell & Sons, 1852.

Paris, Matthew. *Matthew Paris's English History from the Year 1235 to 1273*. Translated by JA Giles. Vol. 2. Henry G Bohn, 1853.

Paris, Matthew. *Matthew Paris's English History from the Year 1235 to 1273*. Translated by JA Giles. Vol. 3. Henry G Bohn, 1854.

Parliament Rolls of Medieval England, ed. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (Woodbridge, 2005), British History Online http://www.british-history.ac.uk/no-series/parliament-rolls-medieval [accessed May 2019].

Plato. "Cratylus." In *Great Books of the Western World, Vol. 7: The Dialogues of Plato*, translated by Benjamin Jowett. William Benton, 1952.

Plato. "Theaetetus." In *Great Books of the Western World, Vol. 7: The Dialogues of Plato*, translated by Benjamin Jowett. William Benton, 1952.

Plato. *The Republic*. Translated by Robin Waterfield. Oxford University Press, 1993.

Plato. "Statesman." In *Great Books of the Western World, Vol. 7: The Dialogues of Plato*, edited by Robert Maynard Hutchins and Mortimer J Adler, translated by Benjamin Jowett, 580–608. William Benton, 1952.

Plato. *Timaeus. Critias. Cleitophon. Menexenus. Epistles*. Translated by RG Bury. Harvard University Press, 1929.

Polydore Vergil. *The Anglica Historia, A.D. 1485-1537*. Edited and translated by Denys Hay. Royal Historical Society, 1950.

Prothero, GW, ed. *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*. Oxford University Press, 1913.

Pseudo-Dionysius. *The Complete Works*. Translated by Colm Luibheid and Paul Rorem. Paulist Press, 1987.

Publilius Syrus. *The Moral Sayings of Publius Syrus, A Roman Slave*. Translated by D Lyman. LE Barnard & Company, 1856.

Quintus Serenus. *Liber Medicinalis*. Edited by Friedrich Vollmer. Corpus Medicorum Latinorum II. B. G. Teubner, 1916.

Raithby, John, ed. *Statutes of the Realm*. Vol. 7. Great Britain Record Commission, 1820.

Raz, Joseph. *The Concept of a Legal System*. 2nd ed. Oxford University Press, 1980.

Richard Rolle of Hampole. *The Psalter of Psalms of David and Certain Canticles with a Translation and Exposition in English*. Edited by HR Bramley. Clarendon Press, 1884.

Robertson, AJ, ed. *The Laws of the Kings of England from Edmund to Henry I*. Cambridge University Press, 1925.

Roger of Hoveden. *Cronica Magistri Rogeri de Houedene*. Edited by William Stubbs. Vol. 1. Longmans, Green, Reader, and Dyer, 1868.

Roger of Hoveden. *The Annals of Roger de Hoveden Comprising the History of England and of Other Countries of Europe From AD 732 to 1201*. Edited by Henry T Riley. Vol. 1. Henry G Bohn, 1853.

Roger of Hoveden. *The Annals of Roger de Hoveden Comprising the History of England and of Other Countries of Europe From AD 732 to 1201*. Edited by Henry T Riley. Vol. 2. Henry G Bohn, 1853.

Roscher, Wilhelm Heinrich. *Die Hippokratische Schrift Von Der Siebenzahl in Ihrer Vierfachen Überlieferung*. Ferdinand Schöningh, 1913.

Roth, Martha T. *Law Collections from Mesopotamia and Asia Minor*. Edited by Piotr Michalowski. Scholars Press, 1995.

Rymer, Thomas. *Foedera, Conventiones, Litterae et Cujuscunque Generis Acta Publica Inter Reges Angliae et Alios Quosuis*. Edited by Adamo Clarke and Frederick Holbrooke. Vol. 1. London, 1816.

Sanders, Thomas Collett, trans. *The Institutes of Justinian, with English Introduction, Translation, and Notes*. Longmans, Green and Co., 1952.

Seneca. *Moral Essays*. Translated by John W. Basore. Vol. 1. Loeb Classical Library 214. Harvard University Press, 1928.

Sisam, Celia, and Kenneth Sisam, eds. *The Oxford Book of Medieval English Verse*. Oxford University Press, 1970.

Stephenson, Carl, and Frederick George Marcham, eds. *Sources of English Constitutional History*. Translated by Carl Stephenson and Frederick George Marcham. 2nd ed. Vol. 1. Harper & Row, 1972.

Stevenson, Joseph, ed. *The Church Historians of England*. Vol. 2.2. Seeleys, 1854.

Stevenson, William Henry, ed. *Asser's Life of King Alfred: Together with the Annals of Saint Neots Erroneously Ascribed to Asser*. Oxford University Press, 1904.

Strype, John. *Ecclesiastical Memorials: Relating Chiefly to Religion, and Its Reformation Under the Reigns of King Henry VIII, King Edward VI, and Queen Mary the First; with the Appendixes Containing the Original Papers, Records, Etc*. Vol. 2.2. Oxford University Press, 1822.

Stubbs, William, ed. *Memoriale Fratris Walteri de Coventria*. Vol. 2. Longman & Co., 1873.

Stubbs, William. *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First*. Edited by HWC Davis. 9th ed. Oxford University Press, 1913.

Swanton, Michael, trans. *The Anglo-Saxon Chronicles*. 2nd ed., 2000.

Tacitus. *Agricola and Germania*. Translated by Harold Mattingly and JB Rives. Penguin Books, 2009.

Tacitus. *The Germania, with Introduction and Notes*. Edited by Duane Reed Stuart. The Macmillan Company, 1916.

Taylor, Frank, and John Smith Roskell, trans. *Gesta Henrici Quinti: The Deeds of Henry the Fifth*. Oxford University Press, 1975.

Tyler, J. Endell. *Henry of Monmouth: Or, Memoirs of the Life and Character of Henry the Fifth, as Prince of Wales and King of England*. Vol. 2. Richard Bentley, 1838.

Unknown. "Constitutio Domus Regis/Disposition of the King's Household." In *Dialogus de Scaccario and Constitutio Demus RegisDialogus de Scaccario and Constitutio Demus Regis*, edited and translated by SD Church. Oxford University Press, 2007.

Usk, Adam. *The Chronicle of Adam Usk, 1377-1421*. Edited and translated by Chris Given-Wilson. Oxford University Press, 1997.

Vegetius Renatus, Publius Flavius. *Military Institutions of Vegetius*. Edited by John Clarke. London, 1767.

Vincent, Nicholas, ed. *The Letters and Charters of Cardinal Guala Bicchieri, Papal Legate in England, 1216-1218*. Vol. lxxxiii. Canterbury and York Society, 1996.

Walsingham, Thomas. *The Chronica Maiora of Thomas Walsingham (1376-1422)*. Edited by James Clark. Translated by David Preest. The Boydell Press, 2005.

Walsingham, Thomas. *Historia Anglicana*. Edited by Henry Thomas Riley. Vol. 1. Longman, Green, Longman, Roberts, and Green, 1863.

Walsingham, Thomas. *The St Albans Chronicle: The Chronica Maiora of Thomas Walsingham II 1394-1422*. Edited and translated by John Taylor, Wendy R Childs, and Leslie Watkins. Oxford University Press, 2011.

Walsingham, Thomas. *The St Albans Chronicle: The Chronica Maiora of Thomas Walsingham I 1376-1394*. Edited and translated by John Taylor, Wendy R Childs, and Leslie Watkins. Oxford University Press, 2003.

Wavrin, John de. *A Collection of the Chronicles and Ancient Histories of Britain, Now Called England*. Translated by Edward LCP Hardy. Vol. 5, 1891.

Wavrin John de. *A Collection of the Chronicles and Ancient Histories of Great Britain, Now Called England*. Translated by William Hardy and Edward LCP Hardy. Vol. 4. Eyre and Spottiswoode, 1887.

Weever, John. *Antient Funeral Monuments, of Great Britain, Ireland, and the Islands Adjacent*. W. Tooke, 1767.

Wendover, Roger of. *Flowers of History*. Edited by JA Giles. Vol. 2. Henry G Bohn, 1864.

Wendover, Roger of. *Flores Historiarum*. Sumptibus Societatis, 1861.

Whitelock, Dorothy, ed. *English Historical Documents, c. 500-1042*. 2nd ed. Vol. 1. Oxford University Press, 1979.

William of Malmesbury. *Gesta Regum Anglorum*. Edited by Thomas Duffus Hardy. Vol. 1. Sumptibus Societatis, 1840.

William of Malmesbury. *Chronicle of the Kings of England from the Earliest Period to the Reign of Stephen*. Translated by JA Giles. George Bell & Sons, 1904.

Wright, Thomas, ed. *Political Poems and Songs Relating to English History, Composed during the Period from the Accession of Edw. III to That of Ric. III*. Vol. 1. Longman, Green, Longman, and Roberts, 1859.

Xenophon. *Memorabilia. Oeconomicus. Symposium. Apology.* Translated by EC Marchant and OJ Todd. Loeb Classical Library 168. Harvard University Press, 2013.

GENERAL

The Penny Cyclopaedia of the Society for the Diffusion of Useful Knowledge. Vol. 7. Charles Knight & Co., 1837.

A Lexicon Abridged from Liddell and Scott's Greek-English Lexicon. Oxford University Press, 1891.

Ackerman, Bruce. *We the People: Foundations*. Harvard University Press, 1991.

Adams, George Burton. "The Origin of the English Constitution." *The American Historical Review* 13, no. 2 (January 1908): 229–45.

Adams, George Burton. *The Origin of the English Constitution*. 1st ed. Yale University Press, 1912.

Adams, George Burton. *The Origin of the English Constitution*. 2nd ed. Yale University Press, 1920.

Adrados, Francisco Rodríguez. *History of the Graeco-Latin Fable*. Translated by Leslie A Ray. Vol. 1. Brill, 1999.

Adrados, Francisco Rodríguez. *History of the Graeco-Latin Fable: The Fable during the Roman Empire and in the Middle Ages*. Translated by Leslie A. Ray. Vol. 2. Brill, 2000.

Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford University Press, 1998.

Agamben, Giorgio. *State of Exception*. Translated by Kevin Attell. The University of Chicago Press, 2005.

Alcaeus. *The Songs of Alcaeus: Memoir and Text with Literal and Verse Translations and Notes*. Edited by James S Easby-Smith. WH Lowdermilk and Company, 1901.

Alexander, James W. *Ranulf of Chester: A Relic of Conquest*. The University of Georgia Press, 1983.

Alfonso, Isabel, Hugh Kennedy, and Julio Escalona, eds. *Building Legitimacy: Political Discourses and Forms of Legitimation in Medieval Societies*. Brill, 2004.

Ali, Shaheen Sardar. "Authority and Authenticity: Sharia Councils, Muslim Women's Rights, and the English Courts." *Child and Family Law Quarterly* 25 (2013): 113–37.

Allan, Alison Rosemary. "Political Propaganda Employed by the House of York in England in the Mid-Fifteenth Century, 1450-1471." University of Wales (Swansea), 1981.

Allen, Carleton Kemp. *Law in the Making*. 7th ed. Oxford University Press, 1964.

Allen, Carleton Kemp. *Legal Duties and Other Essays in Jurisprudence*. Oxford University Press, 1931.

Allison, JWF. “History in the Law of the Constitution.” *The Journal of Legal History* 28, no. 3 (2007): 263–82.

Allison, JWF. “History To Understand, and History To Reform, English Public Law.” *The Cambridge Law Journal* 72, no. 3 (2013): 526–57.

Allison, JWF. *The English Historical Constitution: Continuity, Change and European Effects*. Cambridge University Press, 2007.

Allmand, Christopher. *Henry V*. Methuen, 1992.

Allmand, Christopher. *Henry V*. 2nd ed. Yale University Press, 1997.

Allott, Antony. *The Limits of Law*. Butterworth & Co (Publishers) Ltd, 1980.

Allport, Floyd Henry. *Social Psychology*. Houghton Mifflin Company, 1924.

Almeida, Fábio Portela Lopes de. “Constitution: The Evolution of a Societal Structure (PhD Thesis).” Universidade de Brasília, 2016.

Anderson, Benedict. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. 3rd ed. Verso, 2006.

Andrews, Charles McLean. *A History of England*. Allyn and Bacon, 1903.

Andrews, Charles McLean. *The Old English Manor: A Study in English Economic History*. The John Hopkins Press, 1892.

Anson, William Reynell. *The Law and Custom of the Constitution*. 4th ed. Vol. 1. Clarendon Press, 1911.

Armitage-Smith, Sydney. *John of Gaunt: King of Castile and Leon; Duke of Aquitaine and Lancaster; Earl of Derby, Lincoln, and Leicester; Seneschal of England*. Archibald Constable & Co. Ltd., 1905.

Atherton, Mark. *Complete Old English (Anglo-Saxon)*. Teach Yourself, 2010.

Audi, Robert. *Practical Reasoning and Ethical Decision*. Routledge, 2006.

Augustine of Hippo. *Confessions, Volume II: Books 9-13*. Translated by William Watts. Harvard University Press, 1912.

Aunger, Robert, ed. *Darwinizing Culture: The Status of Memetics as a Science*. Oxford University Press, 2001.

Aunger, Robert. *The Electric Meme: A New Theory of How We Think*. The Free Press, 2002.

Austin, John. *The Province of Jurisprudence Determined*. Cambridge University Press, 1995.

Austin, John. *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*. Weidenfeld & Nicolson, 1954.

Axtmann, Roland. "The State of the State: The Model of the Modern State and Its Contemporary Transformation." *International Political Science Review/Revue Internationale de Science Politique* 25, no. 3 (2004): 259–79.

Ayer, Alfred J. *Language, Truth and Logic*. Penguin Books, 1946.

Ayres, Lewis, Medi Ann Volpe, and Thomas L Humphries, eds. *The Oxford Handbook of Catholic Theology*. Oxford University Press, 2019.

Bagehot, Walter. *Physics and Politics, or Thoughts on the Application of the Principles of "Natural Selection" and "Inheritance" to Political Society*. 2nd ed. Henry S. King and Co., 1873.

Bagehot, Walter. *The English Constitution*. 2nd ed. Little, Brown, and Company, 1873.

Baker, John. *An Introduction to English Legal History*. 5th ed. Oxford University Press, 2019.

Baker, John. "The Unwritten Constitution of the United Kingdom." *Ecclesiastical Law Journal* 15, no. 1 (2013): 4–27.

Baldwin, James Fosdick. *The King's Council in England during the Middle Ages*. Oxford University Press, 1913.

Balkin, Jack M. *Cultural Software: A Theory of Ideology*. Yale University Press, 1998.

Balkin, Jack M. "Framework Originalism and the Living Constitution." *Northwestern University Law Review* 103, no. 2 (2009): 549–614.

Balkin, Jack M. "How Social Movements Change (Or Fail To Change) the Constitution: The Case of the New Departure." *Suffolk University Law Library* 39 (2005): 27–65.

Balkin, Jack M. "The Roots of the Living Constitution." *Boston University Law Review* 92 (2012): 1129–60.

Balkin, Jack M, and Sanford V Levinson. "Law and the Humanities: An Uneasy Relationship." *Yale Journal of Law and the Humanities* 18 (2006): 155–87.

Barber, Nick W. "The Afterlife of Parliamentary Sovereignty." *International Journal of Constitutional Law* 9, no. 1 (September 27, 2011): 144–54.

Barber, Nick W. *The Constitutional State*. Oxford University Press, 2010.

Barker, Ernest. *National Character and the Factors in Its Formation*. 4th ed. Methuen & Co. Ltd., 1948.

Barlow, Frank. *The Feudal Kingdom of England 1042-1216*. 5th ed. Longman, 1999.

Barnard, Tony, and Hugh Neill. *Mathematical Groups*. Teach Yourself, 1996.

Barnes, John Arundel. "Kinship Studies: Some Impressions of the Current State of Play." *Man* 15, no. 2 (1980): 293–303.

Barnett, Hilaire. *Constitutional and Administrative Law*. 10th ed. Routledge, 2013.

Barraclough, Geoffrey. *The Medieval Papacy*. Thames and Hudson, 1968.

Bartlett, Robert. *England Under The Norman And Angevin Kings, 1075-1225*. Oxford University Press, 2002.

Barwise, Jon, and John Etchemendy. *Language, Proof, and Logic*. Seven Bridges Press, 1999.

Bates, Frederick L. "A Conceptual Analysis of Group Structure." *Social Forces* 36, no. 2 (1957): 103–11.

Bates, Frederick L. "Institutions, Organizations, and Communities: A General Theory of Complex Structures." *The Pacific Sociological Review* 3, no. 2 (1960): 59–70.

Bates, Frederick L. "Position, Role, and Status: A Reformulation of Concepts." *Social Forces* 34, no. 4 (1956): 313–21.

Bates, Frederick L, and Lloyd Bacon. "The Community as a Social System." *Social Forces* 50, no. 3 (1972): 371–79.

Baugh, Albert C, and Thomas Cable. *A History of the English Language*. 3rd ed. Routledge & Kegan Paul, 1978.

Bechhofer, Frank, and David McCrone, eds. *National Identity, Nationalism and Constitutional Change*. Springer Nature, 2009.

Beckerman, John S. "Succession in Normandy, 1087, and in England, 1066: The Role of Testamentary Custom." *Speculum* 47, no. 2 (April 1972): 258–60.

Beem, Charles. "'Have Not Wee a Noble Kynge?' The Minority of Edward VI." In *The Royal Minorities of Medieval and Early Modern England*, edited by Charles Beem, 211–48. Palgrave Macmillan, 2008.

Beem, Charles, ed. *The Royal Minorities of Medieval and Early Modern England*. Basingstoke: Palgrave Macmillan, 2008.

Beem, Charles. "Woe to Thee, O Land? Some Final Thoughts." In *The Royal Minorities of Medieval and Early Modern England*, edited by C Beem, 249–54. Palgrave Macmillan, 2008.

Beem, Charles. "Woe to Thee, O Land? The Introduction." In *The Royal Minorities of Medieval and Early Modern England*, edited by Charles Beem, 1–16. Palgrave Macmillan, 2008.

Bell, Colin, and Howard Newby. *Community Studies: An Introduction to the Sociology of the Local Community*. George Allen and Unwin Ltd., 1971.

Bell, Kimberly. "Merlin as Historian in 'Historia Regum Britannie.'" *Arthuriana* 10, no. 1 (2000): 14–26.

Bellamy, Richard. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge University Press, 2007.

Benedict, Ruth. *Patterns of Culture*. Houghton Mifflin Company, 1989.

Bennett, Michael. "Edward III's Entail and the Succession to the Crown, 1376-1471." *The English Historical Review* 113, no. 452 (1998): 580–609.

Benoist, Charles. *La Politique*. Léon Chailley, 1894.

Bentham, Jeremy. "Anarchical Fallacies, Being an Examination of the Declaration of Rights Issued During the French Revolution." In *The Works of Jeremy Bentham*, edited by John Bowring, 2:489–534. William Tait, 1843.

Bentham, Jeremy. *Of Laws in General*. Edited by HLA Hart. University of London, 1970.

Bentley, Michael. *Modernizing England's Past: English Historiography in the Age of Modernism, 1870-1970*. Cambridge University Press, 2005.

Berman, Harold J. "The Origins of Historical Jurisprudence: Coke, Selden, Hale." *The Yale Law Journal* 103, no. 7 (1994): 1651–1738.

Berman, Harold J, William R Greiner, and Samir N Saliba. *The Nature and Functions of Law*. 5th ed. The Foundation Press, Inc., 1996.

Bertelli, Sergio. *The King's Body: Sacred Rituals of Power in Medieval and Early Modern Europe*. Translated by R. Burr Litchfield. Pennsylvania State University Press, 2001.

Bigelow, Melville M, and Brooks Adams. *Centralization and the Law: Scientific Legal Education*. Little, Brown, and Company, 1906.

Biggs, Frederick M. "Edgar's Path to the Throne." In *Edgar, King of the English 959-975*, edited by Donald Scragg, 124–39. Boydell & Brewer, 2008.

Bingham, Tom. "The Rule of Law." Penguin Books, 2010.

Birner, Jack, and Rudy van Zijp, eds. *Hayek, Co-Ordination and Evolution: His Legacy in Philosophy, Politics, Economics, and the History of Ideas*. Routledge, 1994.

Black, Antony. *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*. Methuen & Co. Ltd., 1984.

Black, Antony. *Political Thought in Europe, 1250-1450*. Cambridge University Press, 1992.

Black, Jeremy. *George III: America's Last King*. Yale University Press, 2006.

Blackmore, Susan. "Evolution and Memes: The Human Brain as a Selective Imitation Device." *Cybernetics and Systems: An International Journal* 32, no. 1–2 (2001): 225–55.

Blackmore, Susan. *The Meme Machine*. Oxford University Press, 1999.

Blackstone, William. *Commentaries on the Laws of England. Book I: Of the Rights of Persons*. Edited by David Lemmings. Vol. 1. Oxford University Press, 2016.

Blackstone, William. *Commentaries on the Laws of England. Book II: Of the Rights of Things*. Edited by Simon Stern. Vol. 2. Oxford University Press, 2016.

Blackstone, William. *Commentaries on the Laws of England. Book III: Of Private Wrongs*. Edited by Thomas P Gallanis. Vol. 3. Oxford University Press, 2016.

Blackstone, William. *Commentaries on the Laws of England. Book IV: Of Public Wrongs*. Edited by Ruth Paley. Vol. 4. Oxford University Press, 2016.

Blair, Peter Hunter. *An Introduction to Anglo-Saxon England*. 2nd ed. Cambridge University Press, 1977.

Bloch, Maurice. "A Well-Disposed Social Anthropologist's Problems with Memes." In *Darwinizing Culture: The Status of Memetics as a Science*, edited by Robert Aunger, 189–204. Oxford University Press, 2001.

Bogdanor, Vernon. *The New British Constitution*. Hart Publishing, 2009.

Bogdanor, Vernon, Tarunabh Khaitan, and Stefan Vogenauer. "Should Britain Have a Written Constitution?" *Political Quarterly* 78, no. 4 (2007): 499–517.

Bolingbroke, Henry. "Letter X (The Craftsman: 26 January 1734)." In *Bolingbroke: Political Writings*, edited by David Armitage, 88–97. Cambridge University Press, 1997.

Bon, Gustave Le. *The Crowd: A Study of the Popular Mind*. The Macmillan Company, 1896.

Bon, Gustave Le. *The Psychology of Peoples*. The Macmillan Company, 1898.

Bondarenko, Dmitri M. "On the Nature and Features of the (Early) State: An Anthropological Reanalysis." *Zeitschrift Für Ethnologie* 139, no. 2 (2014): 215–32.

Borgatti, Stephen P, and Virginie Lopez-Kidwell. "Network Theory." In *The SAGE Handbook of Social Network Analysis*, edited by John Scott and Peter J Carrington, 40–54. SAGE Publications, 2011.

Bork, Karrigan S. "An Evolutionary Theory of Administrative Law." *SMU Law Review Article* 72, no. 1 (2019): 81–138.

Bosanquet, Bernard. *The Philosophical Theory of the State*. 4th ed. Macmillan & Co. Ltd., 1923.

Boswell, James. *Life of Samuel Johnson, LL.D.: Comprehending an Account of His Studies, and Numerous Works, in Chronological Order; with His Correspondence and Conversations*. Henry Washbourne and Co., 1857.

Boswell, JS. "The More Things Change: Isabella and Mortimer, Edward III, and the Painful Delay of a Royal Majority (1327-1330)." In *The Royal Minorities of Medieval and Early Modern England*, edited by Charles Beem, 67–102. Palgrave Macmillan, 2008.

Bowler, Peter J. *Evolution: The History of an Idea*. 2nd ed. University of California Press, 1989.

Boyd, Robert, and Peter J Richerson. *Culture and the Evolutionary Process*. The University of Chicago Press, 1985.

Boyd, Robert, and Peter J Richerson. *Not By Genes Alone: How Culture Transformed Human Evolution*. The University of Chicago Press, 2008.

Boyd, Robert, and Peter J Richerson. *The Origin and Evolution of Cultures*. Oxford University Press, 2005.

Brans, Marleen, and Stefan Rossbach. "The Autopoiesis of Administrative Systems: Niklas Luhmann on Public Administration and Public Policy." *Public Administration* 75 (1997): 417–39.

Braund, David. *Ruling Roman Britain: Kings, Queens, Governors, and Emperors from Julius Caesar to Agricola*. Routledge, 1996.

Bresiger, Gregory. "Laissez Faire and Little Englanderism: The Rise, Fall, Rise, and Fall of the Manchester School." *Journal of Libertarian Studies* 13, no. 1 (1997): 45–79.

Britnell, RH, and AJ Pollard, eds. *The McFarlane Legacy: Studies in Late Medieval Politics and Society*. Alan Sutton Publishing Ltd, 1995.

Brock, Roger. *Greek Political Imagery from Homer to Aristotle*. Bloomsbury Academic, 2013.

Broderick, Albert, ed. *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T Delos*. Translated by Mary Welling. Harvard University Press, 1970.

Brodie, Richard. *Virus of the Mind: The Revolutionary New Science of the Meme and How It Can Help You*. Hay House, 2009.

Brosnan, Sarah F, Mark F Grady, Susan P Lambeth, Steven J Schapiro, and Michael J Beran. "Chimpanzee Autarky." *PLoS ONE*, no. 1 (2008): 1–5.

Brown, Donald E. *Human Universals*. McGraw-Hill Education, 1991.

Brown, Rupert J, and Gorden F Ross. “The Battle for Acceptance: An Investigation into the Dynamics of Intergroup Behaviour.” In *Social Identity and Intergroup Relations*, edited by Henri Tajfel, 155–78. Cambridge University Press, 1982.

Brown, W Jethro. “Law and Evolution.” *Yale Law Journal* 29, no. 4 (1920): 394–400.

Brown, W Norman. “The Creation Myth of the Rig Veda.” *Journal of the American Oriental Society* 62, no. 2 (1942): 85–98.

Browne, Kingsley R. “An Evolutionary Perspective on Sexual Harassment: Seeking Roots in Biology Rather than Ideology.” *Journal of Contemporary Legal Issues* 8 (1997): 5–78.

Brownlee, Jason. “Hereditary Succession in Modern Autocracies.” *World Politics* 59, no. 4 (2007): 595–628.

Brownlie, Ian. *Principles of Public International Law*. 6th ed. Oxford University Press, 2003.

Bruhn, John. *The Group Effect: Social Cohesion and Health Outcomes*. Springer, 2009.

Brundage, Anthony, and Richard A Cosgrove. *The Great Tradition: Constitutional History and National Identity in Britain and the United States, 1870-1960*. Stanford University Press, 2007.

Brundage, James A. *Medieval Canon Law*. Routledge, 2013.

Buck, Ross. “The Evolutionary Bases of Social and Moral Emotions.” In *Evolution and the Social Mind: Evolutionary Psychology and Social Cognition*, edited by Joseph P Forgas, Martie G Haselton, and William von Hippel. Psychology Press, 2007.

Bukharin, Nikolai. *Historical Materialism: A System of Sociology*. International Publishers Co, Inc, 1925.

Bullough, Geoffrey, ed. *Narrative and Dramatic Sources of Shakespeare*. Vol. 5. Routledge and Kegan Paul, 1964.

Burgess, Glenn. *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642*. The Macmillan Press Ltd, 1992.

Burke, Bernard. *A Genealogical History of the Dormant, Abeyant, Forfeited, and Extinct Peerages of the British Empire*. Harrison, 1886.

Burke, Edmund. *Reflections on the Revolution in France*. Edited by Conor Cruise O’Brien. Penguin Books, 2004.

Burnet, John. *Early Greek Philosophy*. 2nd ed. Adam and Charles Black, 1908.

Burns, JH, ed. *The Cambridge History of Medieval Political Thought, c.350-c.1450*. Cambridge University Press, 1988.

Burr, Vivien. *Social Constructionism*. 2nd ed. Routledge, 2003.

Burrow, John Wyon. *A Liberal Descent: Victorian Historians and the English Past*. Cambridge University Press, 1981.

Burrow, John Wyon. *Evolution and Society: A Study in Victorian Social Theory*. Cambridge University Press, 1966.

Bury, JB. *A History of Freedom of Thought*. Williams and Norgate, 1913.

Butterfield, Herbert. *The Englishman and His History*. Cambridge University Press, 1944.

Butterfield, Herbert. *The Whig Interpretation of History*. WW Norton and Company, 1965.

Caenegem, RC van. *An Historical Introduction to Western Constitutional Law*. Cambridge University Press, 1995.

Caenegem, RC van. "Government, Law and Society." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 174–210. Cambridge University Press, 1988.

Cairns, Huntington. "What Is Law?" *Washington and Lee Law Review* 27, no. 2 (1970): 193–222.

Cairns, John W. "Henry Goudy, Hannis Taylor, and Plagiarism Considered as a Fine Art." *Tulane European and Civil Law Forum* 30, no. 1 (2015): 1–79.

Califf, David J. "Metrodorus of Lampsacus and the Problem of Allegory: An Extreme Case?" *Arethusa* 36, no. 1 (2003): 21–36.

Callies, and Callies. "Law, the State, and Evolutionary Theory: Introduction." *German Law Journal* 9, no. 4 (2008): 389–96.

Calnan, Alan. "Beyond Jurisprudence." *Southern California Interdisciplinary Law Journal* 27, no. 1 (2017): 1–78.

Cam, Helen M. *Law-Finders and Law-Makers in Medieval England: Collected Studies in Legal and Constitutional History*. Merlin Press, 1962.

Cam, Helen M. *Liberties and Communities in Medieval England: Collected Studies in Local Administration and Topography*. Cambridge University Press, 1944.

Cam, Helen M. *Studies in the Hundred Rolls: Some Aspects of Thirteenth-Century Administration*. Oxford University Press, 1921.

Cam, Helen M. *The Hundred and the Hundred Rolls; an Outline of Local Government in Medieval England*. Methuen, 1930.

Campbell, James. "What Is Not Known about the Reign of Edward the Elder." In *Edward the Elder, 899-924*, edited by NJ Higham and DH Hill. Routledge, 2001.

Campbell, James, Eric John, and Patrick Wormald. *The Anglo-Saxons*. Edited by James Campbell. Phaidon Press Limited, 1982.

Campbell, Miles W. "Earl Godwin of Wessex and Edward the Confessor's Promise of the Throne to William of Normandy." *Traditio* 28, no. 1972 (1972): 141–58.

Canning, Joseph P. "Introduction (c.1150-1450): Politics, Institutions and Ideas." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 339–66. Cambridge University Press, 1988.

Cantor, Georg. *Contributions to the Founding of the Theory of Transfinite Numbers*. Translated by Philip EB Jourdain. Dover Publications, Inc., 1915.

Caporael, Linnda R, and Reuben M Baron. "Groups as the Mind's Natural Environment." In *Evolutionary Social Psychology*, edited by Jeffry A Simpson and Douglas T Kenrick, 317–44. Psychology Press, 1997.

Cardozo, Benjamin N. *The Growth of the Law*. Yale University Press, 1924.

Cardozo, Benjamin N. *The Nature of the Judicial Process*. Yale University Press, 1921.

Carlyle, RW, and AJ Carlyle. *A History of Mediaeval Political Theory in the West*. Vol. 1. William Blackwood & Sons Ltd., 1962.

Carpenter, Christine. "Political and Constitutional History: Before and After McFarlane." In *The McFarlane Legacy: Studies in Late Medieval Politics and Society*, edited by RH Britnell and AJ Pollard, 175–206. Alan Sutton Publishing Ltd, 1995.

Carpenter, Christine. "Review: Fifteenth-Century English Politics." *The Historical Journal* 26, no. 4 (1983): 963–67.

Carpenter, Christine. "Review: Fifteenth-Century English Politics." *The Historical Journal* 26, no. 4 (1983): 963–67.

Carpenter, Christine. *The Wars of the Roses: Politics and the Constitution in England, c.1437-1509*. Cambridge University Press, 1997.

Carpenter, David A. "The Fall of Hubert de Burgh." *Journal of British Studies* 19, no. 2 (1980): 1–17.

Carpenter, David A. *The Minority of Henry III*. University of California Press, 1990.

Carpenter, David A. *The Struggle for Mastery – The Penguin History of Britain 1066 – 1271*. Penguin, 2003.

Carroll, Sean B. *The Making of the Fittest: DNA and the Ultimate Forensic Record of Evolution*. Quercus, 2009.

Castro, Laureano, and Miguel a Toro. “The Evolution of Culture: From Primate Social Learning to Human Culture.” *Proceedings of the National Academy of Sciences of the United States of America* 101, no. 27 (2004): 10235–40.

Cavalli-Sforza, LL, and MW Feldman. *Cultural Transmission and Evolution: A Quantitative Approach*. Princeton University Press, 1981.

Chadwick, Henry. “Christian Doctrine.” In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 9–20. Cambridge University Press, 1988.

Chadwick, Nora. *The Celts*. Penguin Books Ltd, 1970.

Chambers, Robert. *Vestiges of the Natural History of Creation*. 11th ed. John Churchill, 1860.

Chaney, William A. *The Cult of Kingship in Anglo-Saxon England: The Transition from Paganism to Christianity*. Manchester University Press, 1970.

Cheney, CR. *A Handbook of Dates for Students of British History*. Edited by Michael Jones. 2nd ed. Cambridge University Press, 2000.

Chesterton, Gilbert Keith. *What’s Wrong with the World*. Cassell and Company Ltd., 1910.

Cheyette, Fredric. “Kings, Courts, Cures, and Sinecures: The Statute of Provisors and the Common Law.” *Traditio* 19, no. 1963 (1963): 295–349.

Chielens, Klaas, and Francis Heylighen. “Operationalization of Meme Selection Criteria: Methodologies to Empirically Test Memetic Predictions.” *Proceedings of the Joint Symposium on Socially Inspired Computing*, 2005, 14–20.

Chisholm, Roderick M. *Person and Object: A Metaphysical Study*. George Allen and Unwin Ltd., 1976.

Chisholm, Roderick M. “Practical Reason and the Logic of Requirement.” In *Practical Reason*, edited by Stephan Körner, 1–17. Basil Blackwell, 1974.

Chorvat, Terrence, and Kevin McCabe. “The Brain and the Law.” *Philosophical Transactions: Biological Sciences* 359, no. 1451 (2004): 1727–36.

Chrimes, Stanley Bertram. *Henry VII*. Methuen, 1977.

Chrimes, Stanley Bertram. *An Introduction to the Administrative History of Mediaeval England*. 3rd ed. Basil Blackwell, 1966.

Chrimes, Stanley Bertram. *English Constitutional Ideas in the Fifteenth Century*. Cambridge University Press, 1936.

Chrimes, Stanley Bertram. “The Pretensions of the Duke of Gloucester in 1422.” *The English Historical Review* 45, no. 177 (1930): 101–3.

Christiansen, Morten H, Nick Chater, and Florencia Reali. “The Biological and Cultural Foundations of Language.” *Communicative & Integrative Biology* 2, no. 3 (2009): 221–22.

Christie, Mabel E. *Henry VI*. Constable and Company Ltd., 1922.

Chua, Vincent, Julia Madej, and Barry Wellman. “Personal Communities: The World According to Me.” In *The SAGE Handbook of Social Network Analysis*, edited by John Scott and Peter J Carrington, 101–15. SAGE Publications, 2011.

Church, SD. “King John’s Testament and the Last Days of His Reign.” *The English Historical Review* CXXV, no. 514 (2010): 505–28.

Clanchy, MT. *From Memory to Written Record: England 1066-1307*. 3rd ed. Wiley-Blackwell, 2013.

Clark, Edwin Charles. *Practical Jurisprudence, a Comment on Austin*. Cambridge University Press, 1883.

Clark, Robert C. “The Interdisciplinary Study of Legal Evolution.” *Yale Law Journal* 90 (1981): 1238–74.

Clarke, Maude Violet. *Medieval Representation and Consent: A Study of Early Parliaments in England with Special Reference to the Modus Tenendi Parliamentum*. Longmans, Green and Co., 1936.

Clifford-Vaughan, Michalina, and Margaret Scotford-Norton. “Legal Norms and Social Order: Petrazycki, Pareto, Durkheim.” *The British Journal of Sociology* 18 (1967): 269–77.

Cobb, William S. “Plato’s Minos.” *Ancient Philosophy* 8 (1988): 187–207.

Cohen, Felix S. “Transcendental Nonsense and the Functional Approach.” *Columbia Law Review* 35, no. 6 (1935): 809–49.

Cohen, Morris Raphael. “Communal Ghosts and Other Perils in Social Philosophy.” *The Journal of Philosophy, Psychology and Scientific Methods* 16, no. 25 (1919): 673–90.

Cohen, Morris Raphael. “Positivism and the Limits of Idealism in the Law.” *Columbia Law Review* 27, no. 3 (1927): 237–50.

Cohen, Morris Raphael. “The Place of Logic in the Law.” *Harvard Law Review* 29, no. 6 (1916): 622–39.

Cohen, Ronald. “State Origins: A Reappraisal.” In *The Early State*, edited by Henri JM Claessen and Peter Skalnik. Mouton Publishers, 1978.

Cokayne, George Edward. *The Complete Peerage of England, Scotland, and Ireland, Great Britain, and the United Kingdom Extant, Extinct, or Domant*. Edited by Vicary Gibbs. 2nd ed. Vol. 1. The St Catherine Press, 1910.

Cokayne, George Edward. *The Complete Peerage of England, Scotland, and Ireland, Great Britain, and the United Kingdom Extant, Extinct, or Domant*. Edited by Vicary Gibbs. 2nd ed. Vol. 2. The St Catherine Press, 1912.

Cokayne, George Edward. *The Complete Peerage of England, Scotland, and Ireland, Great Britain, and the United Kingdom Extant, Extinct, or Domant*. Edited by Vicary Gibbs. 2nd ed. Vol. 3. The St Catherine Press, 1913.

Cokayne, George Edward. *The Complete Peerage of England, Scotland, and Ireland, Great Britain, and the United Kingdom Extant, Extinct, or Domant*. Edited by Vicary Gibbs and HA Doubleday. 2nd ed. Vol. 5. The St Catherine Press, 1926.

Cokayne, George Edward. *The Complete Peerage of England, Scotland, and Ireland, Great Britain, and the United Kingdom Extant, Extinct, or Domant*. Edited by HA Doubleday and Lord Howard de Walden. 2nd ed. Vol. 9. The St Catherine Press, 1936.

Coke, Edward. *The Fourth Part of the Institutes of the Laws of England*. London, 1644.

Coke, Edward. *The Reports of Sir Edward Coke, Knt.* Edited by George Wilson. Vol. 2. J Rivington and Sons; W Owen; T Longman and G Robinson; G Kearsly; W Flexney and W Cater; E Brooke; T Whieldon and Co., 1777.

Coke, Edward. *The Reports of Sir Edward Coke, Knt.* Edited by John Henry Thomas and John Farquhar Fraser. Vol. 3. Joseph Butterworth and Son; J. Cooke, 1826.

Coke, Edward. *The Reports of Sir Edward Coke, Knt.* Edited by John Henry Thomas and John Farquhar Fraser. Vol. 4. Joseph Butterworth and Son; J. Cooke, 1826.

Coker, Francis W. "The Technique of the Pluralistic State." *The American Political Science Review* 15, no. 2 (1921): 186–213.

Cole, GDH. *Social Theory*. 3rd ed. Methuen & Co. Ltd., 1923.

Coleman, Jules L. "Incorporationism, Conventionality, and the Practical Difference Thesis." In *Hart's Postscript: Essays on the Postscript to 'The Concept of Law.'* Oxford University Press, 2001.

Coleman, Jules L. "Negative and Positive Positivism." *The Journal of Legal Studies* 11, no. 1 (1982): 139–64.

Coleman, Jules L. *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*. Oxford University Press, 2003.

Collins, Randall. "On the Microfoundations of Macrosociology." *American Journal of Sociology* 86, no. 5 (1981): 984–1014.

Cominelli, Luigi. *Cognition of the Law: Toward a Cognitive Sociology of Law and Behavior*. Springer, 2018.

Comte, Auguste. *The Positive Philosophy of Auguste Comte*. Edited by Harriet Martineau. Vol. 1. George Bell & Sons, 1896.

Conee, Earl, and Theodore Sider. *Riddles of Existence: A Guided Tour of Metaphysics*. 2nd ed. Oxford University Press, 2014.

Conte, Rosaria. "Memes through (Social) Minds." In *Darwinizing Culture: The Status of Memetics as a Science*, edited by Robert Aunger, 83–120. Oxford University Press, 2001.

Cooke, CA. *Corporation, Trust, and Company: An Essay in Legal History*. Manchester University Press, 1950.

Cooley, Thomas McIntyre. *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*. Edited by Alexis C Angell. 6th ed. Little, Brown, and Company, 1890.

Coote, Lesley Ann. *Prophecy and Public Affairs in Later Medieval England*. York Medieval Press, 2000.

Coote, Lesley Ann. "Prophecy, Genealogy, and History in Medieval English Political Discourse." In *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, edited by Raluca L Radulescu and Edward Donald Kennedy, 27–44. Brepols, 2008.

Copleston, FC. *A History of Medieval Philosophy*. Methuen & Co. Ltd., 1972.

Cormack, Margaret. "Introduction: Approaches to Childbirth in the Middle Ages." *Journal of the History of Sexuality* 21, no. 2 (2012): 201–7.

Corbin, Arthur Linton. "Principles of Law the Their Evolution." *Yale Law Journal* 64, no. 2 (1954): 161–63.

Corwin, Edward S. "The Basic Doctrine of American Constitutional Law." *Michigan Law Review* 12, no. 4 (1914): 247–76.

Cosgrove, Richard A. "The Culture of Academic Legal History: Lawyers' History and Historians' Law 1870-1930." *Cambrian Law Review* 33 (2002): 23–34.

Costa, CDN, and Mary Herberg, eds. *Langenscheidt's Universal Dictionary: Latin-English, English-Latin*. Langenscheidt/Hodder and Stoughton, 1966.

Coster, Will. *Family and Kinship in England, 1450-1800*. Pearson Education Ltd., 2001.

Coster, Will. "Kinship and Inheritance in Early Modern England: Three Yorkshire Parishes." Vol. 83. Borthwick Papers, 1993.

Cotterrell, Roger. *Law's Community: Legal Theory in Sociological Perspective*. Oxford University Press, 1997.

Cotterrell, Roger. “Leon Petrazycki and Contemporary Socio-Legal Studies.” *International Journal of Law in Context* 11 (2015): 1–16.

Cotterrell, Roger. *The Sociology of Law: An Introduction*. 2nd ed. Butterworths, 1992.

Craig, Paul. “Formal and Substantive Conceptions of the Rule of Law : An Analytical Framework.” *Public Law*, 1997, 467–87.

Craig, Paul. “Public Law, Political Theory and Legal Theory.” *Public Law* Sum (2000): 211–39.

Craik, Elizabeth M. *The “Hippocratic Corpus”: Content and Context*. Routledge, 2015.

Creasy, Edward Shepherd. *The Rise and Progress of the English Constitution*. 3rd ed. Richard Bentley, 1856.

Creasy, Edward Shepherd. *The Text-Book of the Constitution: Magna Charta, The Petition of Right, and the Bill of Rights, with Historical Comments and Remarks on the Present Political Emergencies*. Richard Bentley, 1848.

Creel, Scott, and Nancy Marusha Creel. *The African Wild Dog: Behavior, Ecology, and Conservation*. Princeton University Press, 2002.

Cromartie, Alan. “The Idea of Common Law as Custom.” In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 203–27. Cambridge University Press, 2007.

Crouch, David. *William Marshal: Knighthood, War and Chivalry*. 2nd ed. Pearson Education Ltd., 2002.

Crystal, David. *The Stories of English*. Allen Lane, 2004.

Curtis, SJ. *A Short History of Western Philosophy in the Middle Ages*. MacDonald & Co. Ltd., 1950.

Dąbrowski, Andrzej. “Genesis and Nature of Moral and Legal Norms. Leon Petrażycki’s Naturalistic Solution.” *Studia Humana* 7, no. 3 (2018): 39–52.

Daly, Martin, Catherine Salmon, and Margo Wilson. “Kinship: The Conceptual Hole in Psychological Studies of Social Coognition and Close Relationships.” In *Evolutionary Social Psychology*, edited by Jeffry A Simpson and Douglas T Kenrick, 265–396. Lawrence Erlbaum Associates, Ltd, 1997.

Damasio, Antonio. *Descartes’ Error: Emotion, Reason and the Human Brain*. Vintage Books, 2006.

Dark, KR. *Civitas to Kingdom: British Political Continuity 300-800*. Leicester University Press, 1994.

Darwin, Charles. *The Origin of Species by Means of Natural Selection or, The Preservation of Favoured Races in the Struggle for Life*. Wordsworth Editions Limited, 1998.

Darwin, Erasmus. *Zoonomia; or, the Laws of Organic Life*. Vol. 1. J. Johnson, 1794.

Darwin, Erasmus. *Zoonomia; or, the Laws of Organic Life*. Vol. 2. J. Johnson, 1796.

David Adams Leeming. *Creation Myths of the World: An Encyclopedia*. 2nd ed. Vol. 1. ABC Clio, 2010.

Davies, Cecily. "The Statute of Provisors of 1351." *History* 38, no. 133 (1953): 116–33.

Davis, HWC. *England under the Normans and Angevins, 1066-1272*. 10th ed. Methuen & Co. Ltd., 1930.

Dawkins, Richard. *The Extended Phenotype: The Long Reach of the Gene*. 2nd ed. Oxford University Press, 2008.

Dawkins, Richard. *The Selfish Gene*. 3rd ed. Oxford University Press, 2006.

Deakin, Simon. "Evolution for Our Time: A Theory of Legal Memetics." *Current Legal Problems* 55, no. 1 (2002): 1–42.

Deakin, Simon. "Law as Evolution, Evolution as Social Order: Common Law Method Reconsidered." *Legal Studies Research Paper Series*, 2015.

Deane, Herbert A. *The Political Ideas of Harold J Laski*. Columbia University Press, 1955.

DeLamater, John, and Amanda Ward, eds. *Handbook of Social Psychology*. 2nd ed. Springer, 2013.

Dennett, Daniel C. *Breaking the Spell: Religion as a Natural Phenomenon*. Penguin Books, 2007.

Dennett, Daniel C. *Consciousness Explained*. Penguin Books, 1991.

Dennett, Daniel C. *Darwin's Dangerous Idea: Evolution and the Meanings of Life*. Penguin Books, 1996.

Dennett, Daniel C. "Memes: Myths, Misunderstandings and Misgivings." *Paper Presented at the Chapel Hill Colloquium, North Carolina, October*, 1998. https://ase.tufts.edu/cogstud/dennett/papers/MEMEMYTH.FIN.htm.

Derrett, J. Duncan M. "Factum Valet: The Adventures of a Maxim." *The International and Comparative Law Quarterly* 7, no. 2 (1958): 280–302.

Derry, John W. *The Regency Crisis and the Whigs, 1788-9*. Cambridge University Press, 1963.

Descartes, René. *A Discourse on Method, Medications on the First Philosophy, and Principles of Philosophy*. Translated by John Veitch. Everyman, 1994.

Deschamps, Jean-Claude. "Social Identity and Relations of Power between Groups." In *Social Identity and Intergroup Relations*, edited by Henri Tajfel, 85–98. Cambridge University Press, 1982.

Diamond, Jared. *Collapse: How Societies Choose to Fail or Survive*. Penguin Books, 2005.

Dicey, Albert Venn. *A Leap in the Dark or Our New Constitution*. John Murray, 1893.

Dicey, Albert Venn. *An Introduction to the Study of the Law of the Constitution*. 8th ed. Macmillan & Co. Ltd., 1915.

Dicey, Albert Venn. *An Introduction to the Study of the Law of the Constitution*. Edited by ECS Wade. 10th ed. MacMillan Education Ltd, 1959.

Dicey, Albert Venn. *Lectures on the Relation Between Law & Public Opinion in England during the Nineteenth Century*. Macmillan & Co. Ltd., 1905.

Diderot, Denis. *Thoughts on the Interpretation of Nature: And Other Philosophical Works*. Translated by Lorna Sandler. Clinamen Press, 2000.

Dilcher, Gerhard. "The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization." *Rechtsgeschichte* 24 (2016): 20–72.

Distin, Kate. *Cultural Evolution*. Cambridge University Press, 2010.

Distin, Kate. *The Selfish Meme*. Cambridge University Press, 2004.

Dixon, Owen. "The Common Law as an Ultimate Constitutional Foundation." *Australian Law Journal* 31 (1957): 240–45.

Dixon, William Hepworth. *Royal Windsor*. Vol. 2. Hurst and Blackett, 1879.

Dobner, Petra. "More Law, Less Democracy?: Democracy and Transnational Constitutionalism." In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 141–61. Oxford University Press, 2010.

Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford University Press, 2010.

Dockray, Keith. *The Life of Henry V: Warrior King*. Tempus, 2007.

Dodd, Gwilym. "Richard II and the Fiction of Majority Rule." In *The Royal Minorities of Medieval and Early Modern England*, edited by C Beem, 103–60. Palgrave Macmillan, 2008.

Donisthorpe, Wordsworth. *Individualism: A System of Politics*. Macmillan & Co., 1889.

Donisthorpe, Wordsworth. *Law in a Free State*. Macmillan & Co., 1895.

Doran, Susan, and Paulina Kewes, eds. *Doubtful and Dangerous: The Question of Succession in Late Elizabethan England*. Manchester University Press, 2014.

Douglas, David C. *William the Conqueror*. Methuen & Co. Ltd., 1969.

Drout, Michael David Craig. *How Tradition Works: A Meme-Based Cultural Poetics of the Anglo-Saxon Tenth Century*. Arizona Center for Medieval and Renaissance Studies, 2006.

Duby, Georges. *The Three Orders: Feudal Society Imagined*. Translated by Arthur Goldhammer. The University of Chicago Press, 1980.

Duguit, Léon. *Law in the Modern State*. Translated by Frida Laski and Harold Laski. BW Huebsch, 1919.

Duguit, Léon. "The Law and the State." *Harvard Law Review* 31 (1917): 1–185.

Dumont, Louis. *An Introduction to Two Theories of Social Anthropology: Descent Groups and Marriage Alliance*. Translated by Robert Parkin, 2006.

Dumville, David N. "The Ætheling: A Study in Anglo-Saxon Constitutional History." *Anglo-Saxon England* 8 (1979): 1–33.

Dunbar, RIM. "The Social Brain Hypothesis and Its Implications for Social Evolution." *Annals of Human Biology* 36, no. 5 (2009): 562–72.

Dunbar, RIM. "The Social Brain Hypothesis and Its Relevance to Social Psychology." In *Evolution and the Social Mind: Evolutionary Psychology and Social Cognition*, edited by Joseph P Forgas, Martie G Haselton, and William von Hippel, 21–31. Psychology Press, 2007.

Dunbar, RIM. "The Social Brain: Mind, Language, and Society in Evolutionary Perspective." *Annual Review of Anthropology* 32, no. 1 (October 2003): 163–81.

Dunbar, RIM. "The Social Role of Touch in Humans and Primates: Behavioural Function and Neurobiological Mechanisms." *Neuroscience and Biobehavioral Reviews* 34, no. 2 (2010): 260–68.

Dunbar, RIM, Louise Barrett, and John Lycett. *Evolutionary Psychology*. Oneworld Publications, 2007.

Duncan, John Paul. "Review: Medieval Political Ideas, Ewart Lewis." *Books Abroad* 30, no. 3 (1956): 336–37.

Dworkin, Ronald M. *Law's Empire*. FontanaPress, 1986.

Dyzenhaus, David. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge University Press, 2006.

Dyzenhaus, David. “The Politics of the Question of Constituent Power.” In *The Paradox of Constitutionalism: Constituent Power and Constituted Forms*, edited by Martin Loughlin and Neil Walker, 129–46. Oxford University Press, 2007.

Eagleman, David. *The Brain: The Story of You*. Canongate Books, 2016.

Eaton, Ralph M. *General Logic: An Introductory Survey*. Charles Scribner’s Sons, 1959.

Eckardt, Martina. “Explaining Legal Change from an Evolutionary Economics Perspective.” *German Law Journal* 9, no. 4 (2008): 437–64.

Edgerton, Robert B. *Sick Societies: Challenging the Myth of Primitive Harmony*. The Free Press, 1992.

Edwards, John. *Mary I: England’s Catholic Queen*. Yale University Press, 2011.

Edwards, Richard A. “Republican Britain - The Constitutional Implications.” *Cambrian Law Review* 31, no. 1 (2000): 1–20.

Ehrlich, Eugen. *Fundamental Principles of the Sociology of Law*. Translated by Walter L Moll. Harvard Library Law School, 1936.

Ehrlich, Paul R. *Human Natures: Genes, Cultures, and the Human Prospect*, 2000.

Ehrlich, Stanislaw. *Pluralism: On and Off Course*. Pergamon Press, 1982.

Eisfeld, Rainer. “The Emergence and Meaning of Socialist Pluralism.” *International Political Science Review/Revue Internationale de Science Politique* 17, no. 3 (1996): 267–79.

Elliott, E Donald. “The Evolutionary Tradition in Jurisprudence.” *Columbia Law Review* 85 (1985): 38–94.

Elkins, Zachary, Tom Ginsburg, and James Melton. *The Endurance of National Constitutions*. Cambridge University Press, 2009.

Elliott, Mark, and Robert Thomas. *Public Law*. 2nd ed. Oxford University Press, 2014.

Ellis, Ellen Deborah. “The Pluralistic State.” *The American Political Science Review* 14, no. 3 (1920): 393–407.

Ellwood, Charles A. “Lombroso’s Theory of Crime.” *Journal of Criminal Law and Criminology* 2, no. 5 (1912): 716–23.

Ellwood, Charles A. “The Relations of Sociology and Social Psychology.” *Journal of Abnormal and Social Psychology* 19 (1924): 3–12.

Elton, GR. *England under the Tudors*. Methuen & Co. Ltd., 1962.

Engels, Friedrich. *The Origin of the Family, Private Property, and the State*. Translated by Ernest Untermann. Charles H Kerr & Company, 1902.

Epictetus. *The Moral Discourses of Epictetus*. Translated by Elizabeth Carter. JM Dent & Sons Limited, 1910.

Epstein, Brian. "Ontological Individualism Reconsidered." *Synthese* 166, no. 1 (2009): 187–213.

Epstein, Steven A. *Wage Labor and Guilds in Medieval Europe*. The University of North Carolina Press, 1991.

Erman, Eva. "The Recognitive Practices of Declaring and Constituting Statehood." *International Theory* 5, no. 1 (2013): 129–50.

Estepa, Carlos. "The Strengthening of Royal Power in Castile under Alfonso XI." In *Building Legitimacy: Political Discourses and Forms of Legitimation in Medieval Societies*, edited by Isabel Alfonso, Hugh Kennedy, and Julio Escalona. Brill, 2004.

Evelyn-White, Hugh G, ed. *Hesiod, The Homeric Hymns, and Homerica*. Translated by Hugh G Evelyn-White. William Heinemann, 1914.

Farran, Charles d'Olivier. "The Law of the Accession." *The Modern Law Review* 16, no. 2 (April 1953): 140–47.

Fassbender, Bardo. "The United Nations Charter As Constitution of The International Community." *Columbia Journal of Transnational Law* 36 (1998): 529–619.

Faust, Katherine. "Animal Social Networks." In *The SAGE Handbook of Social Network Analysis*, edited by John Scott and Peter J Carrington, 148–66. SAGE Publications, 2011.

Feilden, Henry St Clair, W Gray Etheridge, and DHJ Hartley. *A Short Constitutional History of England*. 4th ed. Oxford University Press, 1911.

Feuerbach, Ludwig. *The Essence of Christianity*. Translated by George Eliot. Dover Publications, Inc., 2008.

Field, GC. *Political Theory*. Methuen & Co. Ltd., 1956.

Figgis, John Neville. *Churches in the Modern State*. Longmans, Green and Co., 1913.

Figgis, John Neville. *Studies of Political Thought from Gerson to Grotius, 1414-1625*. 2nd ed. Cambridge University Press, 1916.

Figgis, John Neville. *The Divine Right of Kings*. 2nd ed. Cambridge University Press, 1914.

Finlay, Alison, ed. *Fagrskinna, a Catalogue of the Kings of Norway: A Translation with Introduction and Notes*. Koninklijke Brill NV, 2004.

Finn, John E. "Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation." *Columbia Journal of Transnational Law* 48, no. 3 (2010): 442–502.

Finnis, John. *Natural Law and Natural Rights*. 2nd ed. Oxford University Press, 2011.

Fisher, DJV. *The Anglo-Saxon Age, c. 400-1042*. Longman Group Ltd., 1973.

Fisher, James, and RA Hinde. "Further Observations of the Opening of Milk Bottles by Birds." *British Birds* 44, no. 12 (1951): 393–96.

Fisher, James, and RA Hinde. "The Opening of Milk Bottles by Birds." *British Birds* 42 (1949): 347–57.

Fisher, Matthew. "Genealogy Rewritten: Inheriting the Legendary in Insular Historiography." In *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, edited by Raluca L Radulescu and Edward Donald Kennedy, 123–42. Brepols, 2008.

Fittipaldi, Edoardo. "Leon Petrażycki's Theory of Law." In *A Treatise of Legal Philosophy and General Jurisprudence*, edited by Enrico Pattaro and Corrado Roversi, 12:443–504, 2016.

Fitzgibbons, Jonathan. "Hereditary Succession and the Cromwellian Protectorate: The Offer of the Crown Reconsidered." *English Historical Review* 128, no. 534 (2013): 1095–1128.

Flinn, Mark V. "Culture and the Evolution of Social Learning." *Evolution and Human Behaviour* 18 (1997): 23–67.

FO. *The Law-French Dictionary Alphabetically Digeſted*. 2nd ed. Eliz. Nutt & R. Golling, 1718.

Foot, Sarah. *Æthelstan: The First King of England*. Yale University Press, 2011.

Foot, Sarah. "The Making of Angelcynn: English Identity before the Norman Conquest." *Transactions of the Royal Historical Society* 6, no. 1996 (1996): 25–49.

Forbes, Graeme. *Modern Logic: A Text in Elementary Symbolic Logic*. Oxford University Press, 1994.

Forgas, Joseph P, Martie G Haselton, and William von Hippel, eds. *Evolution and the Social Mind: Evolutionary Psychology and Social Cognition*. Psychology Press, 2007.

Foster, Jonathan K. *Memory: A Very Short Introduction*. Oxford University Press, 2009.

Fouracre, Paul. "Conflict, Power and Legitimation in Francia in the Late Seventh and Eighth Centuries." In *Building Legitimacy: Political Discourses and Forms of Legitimation in Medieval Societies*, edited by Isabel Alfonso, Hugh Kennedy, and Julio Escalona. Brill, 2004.

Fracchia, Joseph, and RC Lewontin. "Does Culture Evolve?" *History and Theory* 38, no. 4 (1999): 52–78.

Francis, Mark. “The Evolutionary Turn in Positivism: GH Lewes and Leslie Stephen.” In *The Oxford Handbook of British Philosophy in the Nineteenth Century*, edited by WJ Mander, 287–305. Oxford University Press, 2014.

Francke, Kuno, and William Guild Howard, eds. *The German Classics of the Nineteenth and Twentieth Centuries*. Vol. 6. The German Publication Society, 1913.

Frantzen, Allen J. “Bede and the Bawdy Bale: Gregory the Great, Angels, and the ‘Angli.’” In *Anglo-Saxonism and the Construction of Social Identity*, edited by Allen J Frantzen and John D Niles, 17–39. University Press of Florida, 1997.

Frantzen, Allen J, and John D Niles, eds. *Anglo-Saxonism and the Construction of Social Identity*. University Press of Florida, 1997.

Freeman, Edward Augustus. *Historical Essays*. 5th ed. 1. Macmillan & Co., 1896.

Freeman, Edward Augustus. *The Growth of the English Constitution from the Earliest Times*. 3rd ed. Macmillan & Co., 1894.

Freeman, Edward Augustus. “The Continuity of English History.” In *Historical Essays*, 5th ed., 40–52. 1. Macmillan & Co., 1896.

Freeman, Edward Augustus. *The History of the Norman Conquest of England: Its Causes and Its Results*. Vol. 3. Oxford University Press, 1869.

Freeman, Edward Augustus. “The Mythical and Romantic Elements in Early English History.” In *Historical Essays*, 5th ed., 1–39. 1. Macmillan & Co., 1896.

Freeman, Linton C. “The Development of Social Network Analysis - with an Emphasis on Recent Events.” In *The SAGE Handbook of Social Network Analysis*, edited by John Scott and Peter J Carrington, 26–39. SAGE Publications, 2011.

Fried, Michael S. “The Evolution of Legal Concepts: The Memetic Perspective.” *Jurimetrics* 1, no. 3 (1999): 291–316.

Frotscher, Werner, and Bodo Pieroth. *Verfassungsgeschichte*. 7th ed. CH Beck, 2008.

Fuller, Lon L. *The Morality of Law*. 2nd ed. Yale University Press, 1969.

Fulton, Forrest. *A Manual of Constitutional History, Founded on the Works of Hallam, Creasy, May and Broom*. Butterworths, 1875.

Ferguson, Adam. *An Essay on the History of Civil Society*. Edited by Duncan Forbes. Edinburgh University Press, 1966.

Fustel de Coulanges, Numa Denis. *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome*. Translated by Willard Small. Doubleday Anchor Books, 1956.

Gaarder, Jostein. *Sophie's World: A Novel About the History of Philosophy (20th Anniversary Edition)*. Translated by Paulette Møller. Weidenfeld & Nicolson, 2015.

Galton, Francis. *Hereditary Genius: An Inquiry into Its Laws and Consequences*. 2nd ed. Macmillan & Co., 1892.

Galton, Francis. *Inquiries into Human Faculty and Its Development*. Macmillan & Co., 1883.

Garner, Bryan A. *Garner's Dictionary of Legal Usage*. 3rd ed. Oxford University Press, 2011.

Garnett, George. *Conquered England: Kingship, Succession, and Tenure 1066-1166*. Oxford University Press, 2007.

Garnett, George. "Coronation and Propaganda: Some Implications of the Norman Claim to the Throne of England in 1066." *Transactions of the Royal Historical Society* 36, no. 1986 (1986): 91–116.

Gates, Stephen. "The Nature and Identity of the Constitution during the Minority of Henry III (1216-1227)." University of Exeter, 2014.

Gazda, Stefanie K, Richard C Connor, Robert K Edgar, and Frank Cox. "A Division of Labour with Role Specialization in Group-Hunting Bottlenose Dolphins (Tursiops Truncatus) off Cedar Key, Florida." *Proc. R. Soc. B* 272 (2005): 135–40.

Gebert, Bjoern. "Book Review: John Robert Maddicott, The Origins of the English Parliament, 924-1327." *The Medieval History Journal* 16, no. 1 (2013): 207–10.

Gee, Graham, and Grégoire CN Webber. "What Is a Political Constitution?" *Oxford Journal of Legal Studies* 30, no. 2 (April 14, 2010): 273–99.

Geevers, Liesbeth. "Family Matters: William of Orange and the Habsburgs after the Abdication of Charles V (1555–67)." *Renaissance Quarterly* 63, no. 2 (2010): 459–90.

Geldart, William. *Elements of English Law*. Edited by William Searle Holdsworth and HG Hanbury. Oxford University Press, 1959.

Gentner, Dedre. "Structure-Mapping: A Theoretical Framework for Analogy." *Cognitive Science* 7, no. 2 (1983): 155–70.

George, Frank Honywill. *Cybernetics*. Teach Yourself Books, 1971.

Gers, Matt. "The Case for Memes." *Biological Theory* 3, no. 4 (2008): 305–15.

Gettell, Raymond G. *History of Political Thought*. George Allen and Unwin Ltd., 1923.

Gibbon, David Mac. "Jean Bourdichon: A Court Painter of the Fifteenth Century." Glasgow University Press, 1933.

Gierke, Otto. *Natural Law and the Theory of Society, 1500-1800*. Translated by Ernest Barker. Vol. 1. Cambridge University Press, 1934.

Gierke, Otto. *Political Theories of the Middle Age*. Translated by Frederic William Maitland. Cambridge University Press, 1922.

Giesey, Ralph E. "The Juristic Basis of Dynastic Right To the French Throne." *Transactions of the American Philosophical Society* 51, no. 5 (1961): 3–47.

Gigerenzer, Gerd, and Reinhard Selten, eds. *Bounded Rationality: The Adaptive Toolbox*. The MIT Press, 2002.

Gilkes, RK. *The Tudor Parliament*. University of London Press Ltd., 1969.

Gillingham, John. *Richard I*. Yale University Press, 1999.

Given-Wilson, Chris. "Designation and Succession to the Throne in Fourteenth-Century England." In *Building Legitimacy: Political Discourses and Forms of Legitimation in Medieval Societies*, edited by Isabel Alfonso, Hugh Kennedy, and Julio Escalona. Brill, 2004.

Given-Wilson, Chris. *Henry IV*. Yale University Press, 2016.

Given-Wilson, Chris, and Alice Curteis. *The Royal Bastards of Medieval England*. Routledge and Kegan Paul, 1984.

Gleeson, SE. "Review: English Constitutional Ideas in the Fifteenth Century, SB Chrimes." *Speculum* 12, no. 3 (1937): 397–99.

Goff, Jacques Le. "Is Politics Still the Backbone of History?" Translated by Barbara Bray. *Daedalus* 100, no. 1 (1971): 1–19.

Goldman, Alvin I. "Oxford Handbooks Online Theory of Mind." In *The Oxford Handbook of Philosophy of Cognitive Science*, edited by Eric Margolis, Richard Samuels, and Stephen P. Stich. Oxford University Press, 2012.

Gooch, George Peabody. *History and Historians in the Nineteenth Century*. 2nd ed. Longmans, Green and Co., 1913.

Goodman, Anthony, and David Morgan. "The Yorkist Claim to the Throne of Castile." *Journal of Medieval History* 11 (1985): 61–69.

Goody, Jack. *The Development of the Family and Marriage in Europe*. Cambridge University Press, 1983.

Gordon, Neal A. "The Implications of Memetics for the Cultural Defense." *Duke Law Journal* 50, no. 6 (2001): 1809–34.

Gorecki, Jan, ed. *Sociology and Jurisprudence of Leon Petrażycki*. University of Illinois Press, 1975.

Gosling, Daniel Frederick. “Church, State, and Reformation: The Use and Interpretation of Praemunire from Its Creation to the English Break with Rome (PhD Thesis).” The University of Leeds, 2016.

Gough, JW. *Fundamental Law in English Constitutional History*. Oxford University Press, 1955.

Gould, Stephen Jay. *Bully for Brontosaurus*. WW Norton and Company, 1991.

Gould, Stephen Jay. “Exaptation: A Crucial Tool for an Evolutionary Psychology.” *Journal of Social Issues* 47, no. 3 (1991).

Goyal, Sanjeev. “Social Networks in Economics.” In *The SAGE Handbook of Social Network Analysis*, edited by John Scott and Peter J Carrington, 67–79. SAGE Publications, 2011.

Grady, Mark F. “Legal Evolution and Precedent.” *Jahrbuch Für Recht Und Ethik/Annual Review of Law and Ethics* 3 (1995): 147–82.

Grady, Mark F, and Michael T McGuire. “A Theory of the Origin of Natural Law.” *Journal of Contemporary Legal Issues* 8 (1997): 87–130.

Grady, Mark F, and Michael T McGuire. “The Nature of Constitutions.” *Journal of Bioeconomics* 1 (1999): 227–40.

Gransden, Antonia. *Historical Writing in England*. Vol. 1. Routledge & Kegan Paul Ltd., 1974.

Gransden, Antonia. *Historical Writing in England*. Vol. 2. Routledge and Kegan Paul, 1982.

Graves, EB. “The Legal Significance of the Statute of Praemunire of 1353.” In *Anniversary Essays in Medieval History by Students of Charles Homer Haskins*, 57–80. Houghton Mifflin, 1929.

Gray, HL. “Review: English Constitutional Ideas in the Fifteenth Century, SB Chrimes.” *The American Historical Review* 42, no. 3 (1937): 519–23.

Green, Leslie. “Positivism and the Inseparability of Law and Morals.” *New York University Law Review* 83 (2008): 1035–58.

Green, Thomas Hill. *Prolegomena to Ethics*. Edited by AC Bradley. 4th ed. Oxford University Press, 1899.

Greenberg, Janelle. “The Confessor’s Laws and the Radical Face of the Ancient Constitution.” *The English Historical Review* 104, no. 412 (2013): 611–37.

Greenberg, Janelle. *The Radical Face of the Ancient Constitution: St Edward’s ‘Laws’ in Early Modern Political Thought*. Cambridge University Press, 2001.

Greenwood, John D. *The Disappearance of the Social in American Social Psychology*. Cambridge University Press, 2003.

Griffith, JAG. “The Brave New World of Sir John Laws.” *The Modern Law Review* 63, no. 2 (2000): 159–76.

Griffith, JAG. “The Common Law and the Political Constitution.” *Law Quarterly Review* 117, no. Jan (2001): 42–67.

Griffith, JAG. “The Political Constitution.” *The Modern Law Review* 42, no. 1 (January 1979): 1–21.

Griffiths, John. “What Is Legal Pluralism?” *Journal of Legal Pluralism* 24 (1986): 1–55.

Griffiths, John. “What Is Sociology of Law? (On Law, Rules, Social Control and Sociology).” *The Journal of Legal Pluralism and Unofficial Law* 49, no. 2 (2017): 93–142.

Griffiths, Ralph A. “Duke Richard of York’s Intentions in 1450 and the Origins of the Wars of the Roses.” *Journal of Medieval History* 1 (1975): 187–209.

Griffiths, Ralph A. “The King’s Council and the First Protectorate of the Duke of York, 1453-1454.” *The English Historical Review* 99, no. 390 (1984): 67–82.

Griffiths, Ralph A. “The Minority of Henry VI, King of England and of France.” In *The Royal Minorities of Medieval and Early Modern England*, edited by C Beem, 161–94. Palgrave Macmillan, 2008.

Griffiths, Ralph A. *The Reign of King Henry VI*. 2nd ed. Sutton Publishing, 1998.

Griffiths, Ralph A. “The Sense of Dynasty in the Reign of Henry VI.” In *Patronage, Pedigree, and Power in Later Medieval England*, edited by Charles Ross. Alan Sutton, 1979.

Grimm, Dieter. *Sovereignty: The Origin and Future of a Political Concept*. Translated by Belinda Cooper. Columbia University Press, 2015.

Grimm, Dieter. “The Achievement of Constitutionalism and Its Prospects in a Changed World.” In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 3–22. Oxford University Press, 2010.

Grotke, Kelly L, and Markus J Prutsch, eds. *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*. Oxford University Press, 2014.

Gruter, Margaret, and Paul Bohannan, eds. *Law, Biology and Culture: The Evolution of Law*. Ross-Erikson, Inc., 1983.

Gurvitch, Georges. *Sociology of Law*. Kegan Paul, Trench, Trübner & Co. Ltd., 1947.

Gusfield, Joseph R. *Community: A Critical Response*. Basil Blackwell, 1975.

Habermas, Jürgen. *Communication and the Evolution of Society*. Translated by Thomas McCarthy. Beacon Press, 1979.

Habermas, Jürgen. *The Divided West*. Polity Press, 2006.

Hallam, Henry. *Constitutional History of England: Henry VII to George II*. Vol. 1. JM Dent & Sons Limited, n.d.

Hallam, Henry. *Constitutional History of England: Henry VII to George II*. Vol. 2. JM Dent & Sons Limited, n.d.

Hallam, Henry. *Constitutional History of England: Henry VII to George II*. Vol. 3. JM Dent & Sons Limited, n.d.

Hallam, Henry. *View of the State of Europe during the Middle Ages*. 11th ed. Vol. 1. John Murray, 1856.

Hallam, Henry. *View of the State of Europe during the Middle Ages*. 11th ed. Vol. 2. John Murray, 1856.

Hallam, Henry. *View of the State of Europe during the Middle Ages*. 11th ed. Vol. 3. John Murray, 1856.

Hamil, Frederick Coyne. "Presentment of Englishry and the Murder Fine." *Speculum* 12, no. 3 (1937): 285–98.

Hanawalt, Barbara A. *Growing Up in Medieval London: The Experience of Childhood in History*. Oxford University Press, 1993.

Hans-Werner Goetz. "Review: Medieval Represention and Consent, MV Clarke; English Constitutional Ideas in the Fifteenth Century, SB Chrimes." *Historische Zeitschrift* 158, no. 1 (1938): 152–55.

Harrison, Frederic. *The Historical Method of Professor Freeman*. The Macmillan Company, 1898.

Harrison, Ross. "The Moral Role of Conventions." In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau Saussine and James Bernard Murphy, 35–52. Cambridge University Press, 2007.

Harriss, Gerald. *Cardinal Beaufort: A Study of Lancastrian Ascendancy and Decline*. Oxford University Press, 1988.

Harriss, Gerald. "Introduction: The Exemplar of Kingship." In *Henry V: The Practice of Kingship*, edited by GL Harriss, 1–30. Oxford University Press, 1985.

Harriss, Gerald. *Shaping the Nation: England 1360-1461*. Oxford University Press, 2005.

Harris-Stoertz, Fiona. "Pregnancy and Childbirth in Twelfth- and Thirteenth-Century French and English Law." *Journal of the History of Sexuality* 21, no. 2 (2012): 263–81.

Hart, HLA. *The Concept of Law*. Edited by Penelope A Bulloch and Joseph Raz. 2nd ed. Oxford University Press, 1994.

Harvey, AD. *Body Politic: Political Metaphor and Political Violence*. Cambridge Scholars Publishing, 2007.

Harvey, AD. "The Body Politic: Anatomy of a Metaphor." *Contemporary Review* 275, no. 1603 (1999): 85–93.

Haslam, Nick. "Four Grammars for Primate Social Relations." In *Evolutionary Social Psychology*, edited by Jeffry A Simpson and Douglas T Kenrick, 297–316. Lawrence Erlbaum Associates, Ltd, 1997.

Hassall, Arthur. "Constitutional Kingship (1399-1485)." In *Essays Introductory to the Study of English Constitutional History by Resident Members of the University of Oxford*, edited by Henry Offley Wakeman and Arthur Hassall, 224–66. Rivingtons, 1887.

Hauriou, Maurice. "An Interpretation of the Principles of Public Law." *Harvard Law Review* 31, no. 6 (1918): 813–21.

Hayek, Friedrich August. *Individualism and Economic Order*. The University of Chicago Press, 1948.

Hayek, Friedrich August. *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*. Routledge Classics, 2013.

Hayek, Friedrich August. "Scientism and the Study of Society I." *Economica* 9, no. 35 (1942): 267–91.

Hayek, Friedrich August. "Scientism and the Study of Society II." *Economica* 10, no. 37 (1943): 34–63.

Hayek, Friedrich August. "Scientism and the Study of Society III." *Economica* 11, no. 41 (1944): 27–39.

Hayek, Friedrich August. "The Rules of Morality Are Not the Conclusions of Our Reason." *Twelfth International Conference on the Unity of the Sciences, The Chicago Marriott Hotel*, November 25, 1983.

Hayek, Friedrich August. *The Constitution of Liberty*. Routledge Classics, 2006.

Hayek, Friedrich August. *The Counter-Revolution of Science*. The Free Press, 1955.

Hayek, Friedrich August. *The Fatal Conceit: The Errors of Socialism*. Edited by WW Bartley III. The University of Chicago Press, 1989.

HDH. "Review: English Constitutional Ideas in the Fifteenth Century, SB Chrimes." *The Cambridge Law Journal* 6, no. 2 (1937): 265–67.

Hebb, DO. *The Organization of Behavior: A Neuropsychological Theory*. John Wiley & Sons, Inc., 1949.

Hegel, Georg Wilhelm Friedrich. *Hegel's Philosophy of Mind*. Translated by William Wallace. Oxford University Press, 1894.

Hegel, Georg Wilhelm Friedrich. *Outlines of the Philosophy of Right*. Edited by Stephen Houlgate. Translated by TM Knox. Oxford University Press, 2008.

Heider, Grace M. "More About Hull and Koffka." *American Psychologist* 32, no. 5 (1977): 383.

Held, David. "The Development of the Modern State." In *Formations of Modernity*, edited by Stuart Hall and Bram Gieben, 71–126. The Open University, 1992.

Helvétius, Claude Adrien. *De L'Esprit: Or Essays on the Mind, and Its Several Faculties*. Translated by William Mudford. M. Jones, 1807.

Hempel, Carl G. *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science*. The Free Press, 1965.

Heraclitus. *The Art and Thought of Heraclitus: A New Arrangement and Translation of the Fragments with Literary and Philosophical Commentary*. Edited by Charles H. Kahn. Cambridge University Press, 1979.

Herman, Arthur. *How the Scots Invented the Modern World*. MJF Books, 2001.

Herz, John H. "The Problem of Successorship in Dictatorial Régimes; A Study in Comparative Law and Institutions." *The Journal of Politics* 14, no. 1 (1952): 19–40.

Hewstone, Miles, and JMF Jaspars. "Intergroup Relations and Attribution Processes." In *Social Identity and Intergroup Relations*, edited by Henri Tajfel, 99–136. Cambridge University Press, 1982.

Heylighen, Francis. "What Makes a Meme Successful? Selection Criteria for Cultural Evolution." In *Proc. 15th Int. Congress on Cybernetics*, 418–23, 1998.

Hickok, Gregory. *The Myth of Mirror Neurons: The Real Neuroscience of Communication and Cognition*. WW Norton and Company, 2014.

Higham, NJ. *The Death of Anglo-Saxon England*. Sutton Publishing, 1997.

Higham, NJ, and DH Hill, eds. *Edward the Elder, 899-924*. Routledge, 2001.

Hillen, Christian, and Frank Wiswall. "The Minority of Henry III in the Context of Europe." In *The Royal Minorities of Medieval and Early Modern England*, edited by Charles Beem, 17–66. Palgrave Macmillan, 2008.

Hiller, E. T. "The Community as a Social Group." *American Sociological Review* 6, no. 2 (1941): 189–202.

Hillgruber, Michael. "Die Erzählung Des Menenius Agrippa. Eine Griechische Fabel in Der Römischen Geschichtsschreibung." *Antike Und Abendland* 42 (1996): 42–56.

Himma, Kenneth Einar. “Substance and Method in Conceptual Jurisprudence and Legal Theory.” *Virginia Law Review* 88, no. 5 (2002): 1119–1228.

Hinsley, Francis Harry. *Sovereignty*. 2nd ed. Cambridge University Press, 1986.

Hintikka, Jaako. “Practical vs Theoretical Reason - An Ambiguous Legacy.” In *Practical Reason*, edited by Stephan Körner, 83–102. Basil Blackwell, 1974.

Hoak, DE. *The King’s Council in the Reign of Edward VI*. Cambridge University Press, 1976.

Hobbes, Thomas. *Leviathan (1651)*. Edited by JCA Gaskin. Oxford University Press, 1996.

Hobbes, Thomas. *The Metaphysical System of Hobbes, as Contained in Twelve Chapters from His ‘Elements of Philosophy Concerning the Body’, and in Briefer Extracts from His ‘Human Nature’ and ‘Leviathan.’* Edited by Mary Whiton Calkins. The Open Court Publishing Company, 1905.

Hobhouse, Leonard Trelawney. *Morals in Evolution: A Study in Comparative Ethics*. 5th ed. Henry Holt and Company, 1925.

Hobhouse, Leonard Trelawney. *Social Development: Its Nature and Conditions*. George Allen and Unwin Ltd., 1924.

Hobhouse, Leonard Trelawney. *Social Evolution and Political Theory*. Columbia University Press, 1911.

Hobhouse, Leonard Trelawney. *Sociology and Philosophy: A Centenary Collection of Essays and Articles*. Edited by Morris Ginsberg. Harvard University Press, 1966.

Hobhouse, Leonard Trelawney. *The Metaphysical Theory of the State: A Criticism*. George Allen and Unwin Ltd., 1918.

Holdcroft, David, and Harry Lewis. “Memes, Minds, and Evolution.” *Philosophy* 75, no. 292 (2000): 161–82.

Holdsworth, William Searle. *A History of English Law*. 3rd ed. Vol. 1. Little, Brown, and Company, 1922.

Holdsworth, William Searle. *A History of English Law*. 3rd ed. Vol. 2. Methuen & Co. Ltd., 1923.

Holdsworth, William Searle. *A History of English Law*. 3rd ed. Vol. 3. Methuen & Co. Ltd., 1923.

Holdsworth, William Searle. *A History of English Law*. 3rd ed. Vol. 4. Methuen & Co. Ltd., 1945.

Holdsworth, William Searle. *A History of English Law*. 2nd ed. Vol. 5. Methuen & Co. Ltd., 1945.

Holdsworth, William Searle. “Review: English Constitutional Ideas in the Fifteenth Century, SB Chrimes.” *The University of Pennsylvania Law Review* 2, no. 2 (1938): 386–88.

Holdsworth, William Searle. *Some Lessons from Our Legal History*. The Macmillan Company, 1928.

Holdsworth, William Searle. “The Reception of Roman Law in the Sixteenth Century I.” *Law Quarterly Review* 27 (1911): 387–98.

Holdsworth, William Searle. “The Reception of Roman Law in the Sixteenth Century II.” *Law Quarterly Review* 28 (1912): 39–51.

Holdsworth, William Searle. “The Reception of Roman Law in the Sixteenth Century III.” *Law Quarterly Review* 28 (1912): 131–47.

Holdsworth, William Searle. “The Reception of Roman Law in the Sixteenth Century IV.” *Law Quarterly Review* 28 (1912): 236–54.

Holland, James, and Julian Webb. *Learning Legal Rules*. 6th ed. Oxford University Press, 2006.

Holland, Thomas Erskine. *The Elements of Jurisprudence*. 12th ed. Oxford University Press, 1916.

Hollingshead, August B. “Four Factor Index of Social Status (Unpublished Working Paper, 1975).” *Yale Journal of Sociology* 8 (2011): 21–52.

Hollister, C Warren. *Henry I*. Yale University Press, 2001.

Holmes, Oliver Wendell. “Law in Science and Science in Law.” *Harvard Law Review* 12, no. 7 (1899): 443–63.

Holmes, Oliver Wendell. *The Common Law*. Little, Brown, and Company, 1923.

Holmes, Oliver Wendell. “The Path of Law.” *Harvard Law Review* 10, no. 8 (1897): 457–78.

Holt, James Clarke. *Magna Carta*. Edited by George Garnett and John Hudson. 3rd ed. Cambridge University Press, 2015.

Holt, James Clarke. *Magna Carta*. 2nd ed. Cambridge University Press, 1992.

Holt, James Clarke. “Politics and Property in Early Medieval England.” *Past and Present* 57, no. 1 (November 1972): 3–52.

Homans, George Casper. *The Human Group*. Routledge & Kegan Paul Ltd., 1951.

Home (Lord Kames), Henry. *Historical Law-Tracts*. 2nd ed. Edinburgh, 1761.

Home (Lord Kames), Henry. *Sketches of the History of Man*. Vol. 1. Edinburgh, 1807.

Houts, Elisabeth van. “The Norman Conquest through European Eyes.” *The English Historical Review* 110, no. 438 (1995): 832–53.

Hopkins, Lisa. *Drama and the Succession to the Crown, 1561-1633*. Ashgate, 2011.

Horrox, Rosemary. *Richard III: A Study in Service*. Cambridge University Press, 1989.

Horwitz, Murray, and Jacob M Rabbie. “Individuality and Membership in the Intergroup System.” In *Social Identity and Intergroup Relations*, edited by Henri Tajfel, 241–76. Cambridge University Press, 1982.

Housley, Norman. “The Crusades and Islam Norman.” *Medieval Encounters* 13 (2007): 189–208.

Hovenkamp, Herbert J. “Evolutionary Models in Jurisprudence.” *Texas Law Review* 64, no. 4 (1985): 645–85.

Howard, Ian. *Swein Forkbeard’s Invasions and the Danish Conquest of England 991-1017*. The Boydell Press, 2003.

Howard, Judith A. “Social Psychology of Identities.” *Annual Review of Sociology* 26 (2000): 367–93.

Hrbacek, Karel, and Thomas Jech. *Introduction to Set Theory*. 3rd ed. Marcel Dekker, Inc., 1999.

HRH The Duke of Windsor. *The Crown and the People, 1902-1953*. Funk and Wagnalls Company, 1951.

Hull, David L. “Taking Memetics Seriously: Memetics Will Be What We Make It.” In *Darwinizing Culture: The Status of Memetics as a Science*, edited by Robert Aunger, 43–68. Oxford University Press, 2001.

Hume, David. “A Treatise of Human Nature [1739-40].” In *The Essential Works*. Wordsworth Editions Limited, 2011.

Hume, David. *An Enquiry Concerning Human Understanding*. Edited by Tom L Beauchamp. Oxford Philosophical Texts. Oxford University Press, 1999.

Hume, David. *The Essential Philosophical Works*. Wordsworth Editions Limited, 2011.

Hume, David, and JS Brewer. *The Student’s Hume: A History of England, Based on the History of David Hume, Incorporating the Researches of Recent Historians*. 13th ed. John Murray, 1889.

Huneycutt, Lois L. *Matilda of Scotland: A Study in Medieval Queenship*. Boydell Press, 2003.

Hunt, Lynn, ed. *The French Revolution and Human Rights: A Brief Documentary History*. Translated by Lynn Hunt. Bedford/St Martin’s, 1996.

Husik, Isaac. “The Legal Philosophy of Rudolph Stammler.” *Columbia Law Review* 24, no. 4 (1924): 373–89.

Hutchinson, Allan C, and Simon Archer. “Of Bulldogs and Soapy Sams: The Common Law and Evolutionary Theory.” *Current Legal Problems* 54 (2001): 19–59.

Hutchison, Harold F. *Henry V: A Biography*. Eyre and Spottiswoode, 1967.

Hutton, William Holden. *William Stubbs, Bishop of Oxford 1825-1901*. Archibald Constable & Co. Ltd., 1906.

Iacoboni, Marco. “Imitation, Empathy, and Mirror Neurons.” *Annu. Rev. Psychol.*, 2009, 653–70.

Iacoboni, Marco, and John C Mazziotta. “Mirror Neuron System: Basic Findings and Clinical Applications.” *Annals of Neurology* 62, no. 3 (2007): 213–18.

Ibbetson, David. “Custom in Medieval Law.” In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 151–75. Cambridge University Press, 2007.

Jablonka, Eva, and Marion J Lamb. *Evolution in Four Dimensions: Genetic, Epigenetic, Behavioural, and Symbolic Variation in the History of Life*. Massachusetts Institute of Technology, 2005.

Jackson, Kenneth. “Varia: II. Gildas and the Names of the British Princes.” *Cambridge Medieval Celtic Studies* 3 (1982): 30–40.

Jackson, Robert H. *Quasi-States: Sovereignty, International Relations and the Third World*. Cambridge University Press, 1991.

Jamroziak, Emilia. “Genealogy in Monastic Chronicles in England.” In *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, edited by Raluca L Radulescu and Edward Donald Kennedy, 103–22. Brepols, 2008.

Jefferson, Thomas. “Letter to James Madison (Paris, 6 September 1789).” In *The Works of Thomas Jefferson*, edited by Paul Leicester Ford, 6:3–11. GP Putnam’s Sons, 1904.

Jefferson, Thomas. “Letter to Samuel Kercheval (Monticello, 12 July 1816).” In *The Works of Thomas Jefferson*, edited by Paul Leicester Ford, 12:3–15. GP Putnam’s Sons, 1905.

Jenkins, Iredell. *Social Order and the Limits of Law*. Princeton University Press, 1980.

Jenks, Edward. *A Short History of English Law*. 3rd ed. Methuen & Co. Ltd., 1924.

Jenks, Edward. *Law and Politics in the Middle Ages*. 2nd ed. John Murray, 1919.

Jennings, W Ivor. *The Law and the Constitution*. 5th ed. Hodder & Stoughton, 1959.

Jha, Vivekanand. “Social Stratification in Ancient India: Some Reflections.” *Social Scientist* 19, no. 3 (1991): 19–40.

Jhering, Rudolf von. *Law as a Means to an End*. Edited by Joseph H Drake. Translated by Isaac Husik. Augustus M Kelley and Rothman Reprints Inc., 1968.

Jolliffe, JEA. *The Constitutional History of Medieval England from the English Settlement to 1485*. 4th ed. WW Norton and Company, 1961.

Jones, Owen D. “Evolutionary Analysis in Law: An Introduction and Application to Child Abuse.” *North Carolina Law Review* 75, no. 4 (1997): 1117–1242.

Jones, Owen D. “Law and Biology: Toward an Integrated Model of Human Behavior.” *Journal of Contemporary Legal Issues* 8 (1997): 167–208.

Jones, Owen D. “Law and Evolutionary Biology: Obstacles and Opportunities.” *Journal of Contemporary Health Law & Policy* 10, no. 1 (1994): 265–83.

Jones, Owen D, and Timothy H Goldsmith. “Law and Behavioral Biology.” *Columbia Law Review* 105, no. 2 (2005): 405–502.

Jones, Owen D, Jeffrey D Schall, and Francis X Shen. *Law and Neuroscience*. Wolters Kluwer, 2014.

Jouanjan, Olivier. “What Is a Constitution? What Is Constitutional History?” In *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, edited by Kelly L Grotke and Markus J Prutsch, 323–31. Oxford University Press, 2014.

Kaczyńska, Elwira. “The Indo-European Origin of Latin Lex.” *HABIS* 44 (2013): 7–14.

Kalman, Laura. *The Strange Career of Legal Liberalism*. Yale University Press, 1996.

Kaminsky, Howard. “The Noble Feud in the Later Middle Ages.” *Past & Present* 177 (2002): 55–83.

Kandel, Eric R. *In Search of Memory: The Emergence of a New Science of Mind*. W. W. Norton & Company, 2006.

Kandel, Eric R, James H Schwartz, Thomas M Jessell, Steven A Siegelbaum, and AJ Hudspeth, eds. *Principles of Neural Science*. 5th ed. The McGraw-Hill Companies, Inc., 2013.

Kandel, Eric R., Yadin Dudai, and Mark R. Mayford. “The Molecular and Systems Biology of Memory.” *Cell* 157, no. 1 (2014): 163–86.

Kant, Immanuel. *Prolegomena Zu Einer Jeder Künftigen Metaphysik Die Als Wissenschaft Wird Auftreten Können*. Edited by Karl Vorländer. 6th ed. Felix Meiner, 1920.

Kantorowicz, Ernst H. “Pro Patria Mori in Medieval Political Thought.” *The American Historical Review* 56, no. 3 (1951): 472–92.

Kantorowicz, Ernst H. *The King's Two Bodies: A Study in Mediaeval Political Theology*. Princeton University Press, 1998.

Kantorowicz, Hermann. "Savigny and the Historical School of Law." *Law Quarterly Review* 53 (1937): 326–43.

Kantorowicz, Hermann. *The Definition of Law*. Edited by AH Campbell. Cambridge University Press, 1958.

Keefe, Thomas K. "Geoffrey Plantagenet's Will and the Angevin Succession." *Albion: A Quarterly Journal Concerned with British Studies* 6, no. 3 (1974): 266–74.

Keir, David Lindsay. *The Constitutional History of Modern Britain Since 1485*. 9th ed. Adam and Charles Black, 1969.

Keller, AG. "Law in Evolution." *Yale Law Journal* 28, no. 8 (1919): 769–83.

Kelly, Duncan. "Egon Zweig and the Intellectual History of Constituent Power." In *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, edited by Kelly L Grotke and Markus J Prutsch, 332–50. Oxford University Press, 2014.

Kelsen, Hans. *General Theory of Law and State*. Translated by Anders Wedberg. Harvard University Press, 1945.

Kelsen, Hans. *General Theory of Norms*. Translated by Michael Hartney. Oxford University Press, 1991.

Kelsen, Hans. *Pure Theory of Law*. Translated by Max Knight. University of California Press, 1967.

Kemble, John Mitchell. *The Saxons in England: A History of the English Commonwealth till the Period of the Norman Conquest*. Edited by Walter de Gray Birch. 2nd ed. Vol. 1. Bernard Quaritch, 1876.

Kennerley, Steven W, and Mark E Walton. "Decision Making and Reward in Frontal Cortex: Complementary Evidence From Neurophysiological and Neuropsychological Studies." *Behavioral Neuroscience* 125, no. 3 (2011): 297–317.

Kerr, Margaret H, Richard D Forsyth, and Michael J Plyley. "Cold Water and Hot Iron: Trial by Ordeal in England." *The Journal of Interdisciplinary History* 22, no. 4 (1992): 573–95.

Kerridge, Roger, and AHR Brierley. *Parry & Kerridge: The Law of Succession*. 12th ed. Sweet & Maxwell, 2009.

Kerwin, Jerome G. "Review: Medieval Political Ideas, Ewart Lewis." *Church History* 24, no. 2 (1955): 184–85.

Kewes, Paulina. "The 1553 Succession Crisis Reconsidered." *Historical Research* 90, no. 249 (2017): 465–85.

Keysers, Christian, and Valeria Gazzola. “Hebbian Learning and Predictive Mirror Neurons for Actions, Sensations and Emotions.” In *Philos Trans R Soc Lond B Biol Sci.*, 369:20130175, 2014.

Keysers, Christian, and Valeria Gazzola. “Towards a Unifying Neural Theory of Social Cognition.” *Progress in Brain Research* 156 (2006): 379–401.

Kidd, Benjamin. *Social Evolution*. 2nd ed. The Macmillan Company, 1898.

Kinderman, Peter, RIM Dunbar, and Richard P Bentall. “Theory-of-Mind Deficits and Causal Attributions.” *British Journal of Psychology* 89 (1998): 191–204.

King, Anthony. *Does the United Kingdom Still Have a Constitution? (The Hamlyn Lectures)*. Sweet & Maxwell, Ltd., 2001.

King, Anthony. *The British Constitution*. Oxford University Press, 2007.

King, Michael. “The ‘Truth’ about Autopoiesis.” *Journal of Law and Society* 20, no. 2 (1993): 218–36.

King, Edmund. *King Stephen*. Yale University Press, 2010.

King, Michael, and Chris Thornhill, eds. *Luhmann on Law and Politics: Critical Appraisals and Applications*. Hart Publishing, 2006.

King, PD. “The Barbarian Kingdoms.” In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 123–54. Cambridge University Press, 1988.

Kingsford, Charles Lethbridge. *Henry V: The Typical Medieval Hero*. GP Putnam’s Sons, 1901.

Kiralfy, Albert. *Potter’s Outlines of English Legal History*. 5th ed. Sweet & Maxwell Limited, 1958.

Kirby, DP. *The Earliest English Kings*. 2nd ed. Routledge, 2000.

Kletzer, Christoph. “Custom and Positivity: An Examination of the Philosophic Ground of the Hegel-Savigny Controversy.” In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 125–48. Cambridge University Press, 2007.

Knowles, Elizabeth, ed. “Cooks Spoil the Broth, Too Many.” *The Oxford Dictionary of Phrase and Fable*. Oxford University Press, 2005.

Knox, Robert. *Races of Men: A Fragment*. Lea & Blanchard, 1850.

Knowles, Julian B. *The Abolition of the Death Penalty in the United Kingdom: How It Happened and Why It Still Matters*. The Death Penalty Project, 2015.

Koffka, Kurt. *Principles of Gestalt Psychology*. Routledge & Kegan Paul Ltd., 1935.

Koford, Kenneth J, and Jeffrey B Miller. “Habit, Custom, and Norms in Economics.” In *Social Norms and Economic Institutions*, edited by Kenneth J Koford and Jeffrey B Miller, 21–38. The University of Michigan Press, 1991.

Kohler, Josef. *Philosophy of Law*. Translated by Adalbert Albrecht. The Boston Book Company, 1914.

Körner, Stephan, ed. *Practical Reason*. Basil Blackwell, 1974.

Krisch, Nico. “Global Administrative Law and the Constitutional Ambition.” In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 245–66. Oxford University Press, 2010.

Kudo, H., and RIM Dunbar. “Neocortex Size and Social Network Size in Primates.” *Animal Behaviour* 62, no. 4 (2001): 711–22.

Kummer, Hans. *Primate Societies: Group Techniques of Ecological Adaptation*. Aldine Atherton Inc., 1971.

Laborderie, Olivier de. “A New Pattern for English History: The First Genealogical Rolls of the Kings of England.” In *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, edited by Raluca L Radulescu and Edward Donald Kennedy, 45–62. Brepols, 2008.

Lamarck, Jean-Baptiste. *Zoological Philosophy: An Exposition with Regard to the Natural History of Animals*. Translated by Hugh Elliot. Macmillan & Co. Ltd., 1914.

Lapidge, Michael, John Blair, Simon Keynes, and Donald Scragg, eds. *The Wiley Blackwell Encyclopedia of Anglo-Saxon England*. 2nd ed. John Wiley & Sons, Ltd, 2014.

Lapsley, Gaillard. “Some Recent Advance in English Constitutional History (before 1485).” *Cambridge Historical Journal* 5, no. 2 (1936): 119–61.

Lapsley, Gaillard. “The Parliamentary Title of Henry IV.” *The English Historical Review* 49, no. 195 (1934): 423–49.

Lapsley, Gaillard. “The Parliamentary Title of Henry IV (Continued).” *The English Historical Review* 49, no. 196 (1934): 577–606.

Laski, Harold J. *Authority in the Modern State*. Yale University Press, 1919.

Laski, Harold J. “Morris Cohen’s Approach to Legal Philosophy.” *University of Chicago Law Review* 15, no. 3 (1948): 575–87.

Laski, Harold J. “The Early History of the Corporation in England.” *Harvard Law Review* 30, no. 6 (1917): 561–88.

Laski, Harold J. *The Foundations of Sovereignty*. George Allen and Unwin Ltd., 1921.

Laski, Harold J. “The Personality of Associations.” *Harvard Law Review* 29, no. 4 (1916): 404–26.

Laski, Harold J. *The State in Theory and Practice*. George Allen and Unwin Ltd., 1935.

Lawson, MK. *Cnut: England’s Viking King, 1016-35*. 2nd ed. The History Press, 2011.

Lee, Daniel. “The Society of Society: The Grand Finale of Niklas Luhmann.” *Sociological Theory* 18, no. 2 (2000): 320–30.

Lee, Stephen J. *Aspects of British Political History, 1815-1914*. Routledge, 1994.

Lefebvre, Louis. “The Opening of Milk Bottles by Birds: Evidence for Accelerating of Cultural Transmission.” *Behavioural Processes* 34 (1995): 43–54.

Lehmann, J, AH Korstjens, and RIM Dunbar. “Group Size, Grooming and Social Cohesion in Primates.” *Animal Behaviour* 74, no. 6 (2007): 1617–29.

Leiter, Brian, and Michael Weisberg. “Why Evolutionary Biology Is (so Far) Irrelevant to Legal Regulation.” *Law and Philosophy* 29, no. 1 (2010): 31–74.

Lemert, Edwin M. “The Folkways and Social Control.” *American Sociological Review* 7, no. 3 (1942): 394.

L’Estrange, Roger. *The Case Put Concerning the Succession of His Royal Highness the Duke of York*. London: M. Clark, 1679.

Levine, Mortimer. *The Early Elizabethan Succession Question, 1558-1568*. Stanford University Press, 1966.

Levine, Mortimer. “A Parliamentary Title to the Crown in Tudor England.” *The Huntington Library Quarterly* 25, no. 2 (1962): 121–27.

Lewis, Andrew W. “Anticipatory Association of the Heir in Early Capetian France.” *The American Historical Review* 83, no. 4 (October 1978): 906–27.

Lewis, Andrew W. *Royal Succession in Capetian France: Studies on Familial Order and the State*. Harvard University Press, 1981.

Lewis, Ewart, ed. *Medieval Political Ideas*. Vol. 1. Cooper Square Publishers Inc., 1974.

Lewis, NB. “Re-Election to Parliament in the Reign of Richard II” 48, no. 191 (2014): 364–94.

Lewis, NB. “The ‘Continual Council’ in the Early Years of Richard II, 1377-80.” *English Historical Review* 41, no. CLXII (1926): 246–51.

Lewis, V Bradley. “Plato’s ‘Minos’: The Political and Philosophical Context of the Problem of Natural Right.” *The Review of Metaphysics* 60, no. 1 (2006): 17–53.

Leyland, Peter. *The Constitution of the United Kingdom: A Contextual Analysis*. 2nd ed. Hart Publishing, 2012.

Liddle, B, and D Nettle. "Higher-Order Theory of Mind and Social Competence in School Age Children." *Journal of Cultural and Evolutionary Anthropology* 4 (2006): 231–46.

Liddle, William D. "'A Patriot King, or None': Lord Bolingbroke and the American Renunciation of George III." *The Journal of American History* 65, no. 4 (1979): 951–70.

Liebermann, Felix. *The National Assembly in the Anglo-Saxon Period*. Halle a.S. Max Niemeyer, 1913.

Lindahl, Hans. "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood." In *The Paradox of Constitutionalism: Constituent Power and Constituted Forms*, edited by Martin Loughlin and Neil Walker, 9–26. Oxford University Press, 2007.

Linton, Ralph. *The Study of Man: An Introduction*. Appleton-Century-Crofts, Inc., 1936.

Linton, Ralph. *The Tree of Culture*. Alfred A Knopf, 1955.

Lipscomb, Suzannah. *The King Is Dead: The Last Will and Testament of Henry VIII*. Head of Zeus, 2015.

Llanque, Marcus. "On Constitutional Membership." In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 162–78. Oxford University Press, 2010.

Llewellyn, KN. "The Constitution as an Institution." *Columbia Law Review* 34, no. 1 (1934): 1–40.

Loach, Jennifer. *Edward VI*. Edited by George Bernard and Penry Williams. Yale University Press, 2002.

Lobban, Michael. "Custom, Common Law Reasoning and the Law of Nations in the Nineteenth Century." In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 256–78. Cambridge University Press, 2007.

Lobingier, Charles Sumner. "The Reception of the Roman Law in Germany." *Michigan Law Review* 14, no. 7 (1916): 562–69.

Locke, John. "A Letter Concerning Toleration (1689)." In *A Letter Concerning Toleration and Other Writings*, edited by Mark Goldie, translated by William Popple. Liberty Fund, Inc., 2010.

Locke, John. *A Letter Concerning Toleration and Other Writings*. Edited by Mark Goldie. Liberty Fund, Inc., 2010.

Locke, John. “An Essay Concerning Human Understanding [1690].” In *An Essay Concerning Human Understanding with the Second Treatise of Government*. Wordsworth Editions Limited, 2014.

Locke, John. *The Works of John Locke in Nine Volumes*. 12th ed. Vol. 5. C. Baldwin, 1824.

Locke, John. *Two Treatises of Government*. Edited by Peter Laslett. Cambridge University Press, 1988.

Lockyer, Roger. *Tudor and Stuart Britain*. Longmans, Green and Co., 1964.

Loewenstein, Karl. *Political Power and the Governmental Process*. University of Chicago Press, 1957.

Lolme, Jean-Louis De. *The Constitution of England; or, An Account of the English Government*. Edited by David Lieberman. Liberty Fund, Inc., 2007.

Lombroso, Cesare. *Crime, Its Causes and Remedies*. Translated by Henry P Horton. Little, Brown, and Company, 1911.

Lord Neuberger. “The UK Constitutional Settlement and the Role of the UK Supreme Court (10 October 2014).” *Legal Wales Conference*, 2014. https://www.supremecourt.uk/docs/speech-141010.pdf.

Lord Woolf. “The Rule of Law and a Change in the Constitution.” *The Cambridge Law Journal* 63, no. 2 (2004): 317–30.

Loughlin, Martin. “Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice.” In *The Paradox of Constitutionalism: Constituent Power and Constituted Forms*, edited by Martin Loughlin and Neil Walker, 27–48. Oxford University Press, 2007.

Loughlin, Martin. “Constitutional Pluralism: An Oxymoron?” *Global Constitutionalism* 3, no. 1 (2014): 9–30.

Loughlin, Martin. *Foundations of Public Law*. Oxford University Press, 2010.

Loughlin, Martin. “Modernism in British Public Law, 1919-79.” *Public Law*, no. Jan (2014): 56–67.

Loughlin, Martin. *Public Law and Political Theory*. Oxford University Press, 1992.

Loughlin, Martin. *Sword and Scales: An Examination of the Relationship between Law and Politics*. Hart Publishing, 2000.

Loughlin, Martin. *The Idea of Public Law*. Oxford University Press, 2003.

Loughlin, Martin. “The Functionalist Style in Public Law.” *The University of Toronto Law Journal* 55, no. 3 (2005): 361–403.

Loughlin, Martin. “The State, the Crown and the Law.” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 33–76. Oxford University Press, 1999.

Loughlin, Martin. “Towards a Republican Revival?” *Oxford Journal of Legal Studies* 26, no. 2 (2006): 425–37.

Loughlin, Martin. “What Is Constitutionalisation?” In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 47–72. Oxford University Press, 2010.

Loughlin, Martin, and Neil Walker, eds. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford University Press, 2007.

Lourenço, Ana. “Autopoetic Social Systems Theory: The Co-Evolution of Law and the Economy.” *Centre for Business Research, University of Cambridge Working Paper No. 409*, 2010.

Lovejoy, Arthur O. *The Great Chain of Being: A Study of the History of an Idea*. Harvard University Press, 1936.

Loveland, Ian. “Public Law, Political Theory and Legal Theory - A Response to Professor Craig’s Paper.” *Public Law* Sum (2000): 205–10.

Loveland, Ian. *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*. 5th ed. Oxford University Press, 2009.

Lowell, James Russell. *Poems of James Russell Lowell*. Oxford University Press, 1912.

Lucretius. *Of the Nature of Things*. Translated by William Ellery Leonard. JM Dent & Sons Limited, 1916.

Lucretius. *The Nature of Things*. Translated by AE Stallings. Penguin Books, 2007.

Luhmann, Niklas. *A Sociological Theory of Law*. Edited by Martin Albrow. Translated by Elizabeth King and Martin Albrow. Routledge & Kegan Paul, 1985.

Luhmann, Niklas. “Law as a Social System.” *Northwestern University Law Review* 63, no. 1&2 (1989): 136–50.

Luhmann, Niklas. *Law as a Social System*. Edited by Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert. Translated by Alex Ziegert. Oxford University Press, 2004.

Luhmann, Niklas. *Organization and Decision*. Edited by Dirk Baecker. Translated by Rhodes Barrett. Cambridge University Press, 2018.

Luhmann, Niklas. *Social Systems*. Translated by John Bednarz Jn. and Dirk Baecker. Stanford University Press, 1995.

Luhmann, Niklas. *Theory of Society*. Translated by Rhodes Barrett. Vol. 1. Stanford University Press, 2012.

Luhmann, Niklas. *Theory of Society*. Translated by Rhodes Barrett. Vol. 2. Stanford University Press, 2013.

Lukes, Steven. "Methodological Individualism." *The British Journal of Sociology* 19, no. 2 (1968): 119–29.

Luscombe, DE. "Introduction: The Formation of Political Thought in the West." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 155–73. Cambridge University Press, 1988.

Luscombe, DE, and GR Evans. "The Twelfth-Century Renaissance." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 306–38. Cambridge University Press, 1988.

Lyon, Ann. *The Constitutional History of the United Kingdom*. 2nd ed. Routledge, 2016.

Lyon, Ann. *The Place of Women in European Royal Succession in the Middle Ages*. *Liverpool Law Review*. Vol. 27, 2006.

Lyon, Bryce Dale. *A Constitutional and Legal History of Medieval England*. 2nd ed. WW Norton and Company, 1980.

Lyons, David. *Ethics and the Rule of Law*. Cambridge University Press, 1984.

Maccioni, P Alessandra, and Marco Mostert. "Isaac Dorislaus (1595–1649): The Career of a Dutch Scholar in England." *Transactions of the Cambridge Bibliographical Society* 8, no. 4 (1986): 419–70.

MacCormack, Geoffrey. "Law as Fact." *ARSP: Archiv Für Rechts- Und Sozialphilosophie/Archives for Philosophy of Law* 69, no. 4 (1974): 484–503.

MacCormack, Geoffrey. "Scandinavian Realism." *The Juridical Review* 15 (1970): 33–55.

MacCormick, Neil. "Norms, Institutions, and Institutional Facts." *Law and Philosophy* 17 (1998): 301–45.

MacCormick, Neil. *Questioning Sovereignty: Law, State, and Practical Reasoning*. Oxford University Press, 1999.

Macdonald, Roderick A. "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism." *Arizona Journal of International and Comparative Law* 15, no. 1 (1998): 69–92.

MacDoughall, Hugh A. *Racial Myth in English History: Trojans, Teutons, and Anglo-Saxons*. Harvest House Ltd., 1982.

Maddicott, John. *The Origins of the English Parliament, 924-1327*. Oxford University Press, 2010.

Madison, James. "Letter to Thomas Jefferson (New York, 4 February 1790)." In *Letters and Other Writings of James Madison*, 1:503–6. JB Lippincott & Co., 1865.

Maine, Henry Sumner. *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas*. Edited by Frederick Pollock. 10th ed. John Murray, 1909.

Maine, Henry Sumner. *Lectures on the Early History of Institutions*. 7th ed. John Murray, 1905.

Mair, Lucy. *An Introduction to Social Anthropology*. 2nd ed. Oxford University Press, 1972.

Maitland, Frederic William. *Domesday Book and Beyond: Three Essays in the Early History of England*. Cambridge University Press, 1921.

Maitland, Frederic William. *State, Trust, and Corporation*. Edited by David Runciman and Magnus Ryan. Cambridge University Press, 2003.

Maitland, Frederic William. "The Body Politic." In *The Collected Papers of Frederic William Maitland*, edited by Herbert Albert Laurens Fisher, 3:285–303. Cambridge University Press, 1911.

Maitland, Frederic William. *The Constitutional History of England*. Edited by Herbert Albert Laurens Fisher. Cambridge University Press, 1908.

Maitland, Frederic William. "The Corporation Sole." *Law Quarterly Review* 16 (1900): 335–54.

Maitland, Frederic William. "The Crown as Corporation." *Law Q* 17 (1901): 131–46.

Maitland, Frederic William, and Francis C Montague. *A Sketch of English Legal History*. Edited by JF Colby. GP Putnam's Sons, 1915.

Majerus, Michael EN. "Industrial Melanism in the Peppered Moth, Biston Betularia: An Excellent Teaching Example of Darwinian Evolution in Action." *Evolution: Education and Outreach* 2 (2009): 63–74.

Mak, Elaine. "Understanding Legal Evolution through Constitutional Theory: The Concept of Constitutional (In-)Flexibility." *Erasmus Law Review* 4, no. 4 (2011): 193–210.

Mander, WJ. *British Idealism: A History*. Oxford University Press, 2011.

Mander, WJ, ed. *The Oxford Handbook of British Philosophy in the Nineteenth Century*. Oxford University Press, 2014.

Mann, Michael. "Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying." *Daedalus* 122, no. 3 (1993): 115–40.

Mannheim, Karl. “The Problem of Generations.” In *Essays on the Sociology of Knowledge*, edited by Paul Kecskemeti, 276–322. Routledge, 1952.

Manser, Martha B. “Response of Foraging Group Members to Sentinel Calls in Suricates, Suricata Suricatta.” *Proc. R. Soc. Lond. B* 266 (1999): 1013–19.

Marafioti, Nicole. *The King’s Body: Burial and Succession in Late Anglo-Saxon England*. University of Toronto Press, 2014.

Marin, Alexandra, and Barry Wellman. “Social Network Analysis: An Introduction.” In *The SAGE Handbook of Social Network Analysis*, edited by John Scott and Peter J Carrington, 11–25. SAGE Publications, 2011.

Markus, RA. “Introduction: The West.” In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns. Cambridge University Press, 1988.

Markus, RA. “The Latin Fathers.” In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 92–122. Cambridge University Press, 1988.

Marshall, Geoffrey. *Constitutional Theory*. Oxford University Press, 1971.

Martin, Thomas F. “Augustine and the Politics of Monasticism.” In *Augustine and Politics*, edited by John Doody, Kevin L Hughes, and Kim Paffenroth, 165–86. Lexington Books, 2005.

Marvin, Julia. “Narrative, Lineage, and Succession in the Anglo-Norman Prose Brut Chronicle.” In *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, edited by Raluca L Radulescu and Edward Donald Kennedy, 205–20. Brepols, 2008.

Masters, Roger D. “Comment on Article by Professor McGinnis.” *Journal of Contemporary Legal Issues* 8 (1997): 241–48.

Masters, Roger D, and Michael T McGuire, eds. *The Neurotransmitter Revolution: Serotonin, Social Behavior, and the Law*. Southern Illinois University Press, 1994.

Matheson, Lister M. “Genealogy and Women in the Prose Brut, Especially the Middle English Common Version and Its Continuations.” In *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, edited by Raluca L Radulescu and Edward Donald Kennedy, 221–58. Brepols, 2008.

Mazzarello, Paolo. “Cesare Lombroso: An Anthropologist between Evolution and Degeneration.” *Functional Neurology* 26, no. 2 (2011): 97–101.

McAdams, Richard H. “The Origin, Development, and Regulation of Norms.” *Michigan Law Review* 96 (1997): 338–433.

McBain, Howard Lee. *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law*. The Macmillan Company, 1941.

McCall, George J. “Interactionist Perspectives in Social Psychology.” In *Handbook of Social Psychology*, edited by John DeLamater and Amanda Ward, 3–30. Springer, 2013.

McCarter, P Kyle. “The River Ordeal in Israelite Literature.” *The Harvard Theological Review* 66, no. 4 (1973): 403–12.

McCoy, Charles NR. “Review: Medieval Political Ideas, Ewart Lewis.” *The Catholic Historical Review* 42, no. 3 (1956): 363.

McDougall, William. *The Group Mind: A Sketch of the Principles of Collective Psychology with Some Attempt to Apply Them to the Interpretation of National Life and Character*. 2nd ed. Cambridge University Press, 1927.

McFarlane, KB. *Lancastrian Kings and Lollard Knights*. Edited by GL Harriss and JRL Highfield. Oxford University Press, 1972.

McFarlane, KB. “Review: English Constitutional Ideas in the Fifteenth Century, SB Chrimes.” *The English Historical Review* 53, no. 212 (1938): 707–10.

McFarlane, KB. *The Nobility of Later Medieval England*. Oxford University Press, 1973.

McGinnis, John O. “The Human Constitution and Constitutive Law: A Prolegomenon.” *Journal of Contemporary Legal Issues* 8 (1997): 211–40.

McGinnis, John O. “The Original Constitution and Our Origins.” *Harvard Journal of Law & Public Policy* 19, no. 2 (1996): 251–62.

McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. 2nd ed. Cornell University Press, 1947.

McKisack, May. *The Fourteenth Century, 1307-1399*. Oxford University Press, 1959.

McLeod, Ian. *Legal Theory*. 6th ed. Palgrave Macmillan, 2012.

McMillan, David W, and David M Chavis. “Sense of Community: A Definition and Theory.” *Journal of Community Psychology* 14, no. 1 (1986): 6–23.

McTaggart, John Ellis. *Studies in Hegelian Cosmology*. 2nd ed. Cambridge University Press, 1918.

Medley, Dudley Julius. *A Student’s Manual of Constitutional History*. 6th ed. Oxford University Press, 1925.

Menger, Carl. *Problems of Economics and Sociology*. Edited by Louis Schneider. Translated by Francis J Nock. University of Illinois Press, 1963.

Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22, no. 5 (1988): 869–96.

Merry, Sally Engle. “McGill Convocation Address: Legal Pluralism in Practice.” *McGill Law Journal* 59 (2013): 1–9.

Merry, Sally Engle. “Transnational Human Rights and Local: Mapping the Middle.” *American Anthropologist* 108, no. 1 (2006): 38–51.

Merton, Robert King. *Social Theory and Social Structure*. 3rd ed. The Free Press, 1968.

Mesoudi, Alex. *Cultural Evolution*. University Of Chicago Press, 2011.

Mesoudi, Alex. “Cultural Evolution: A Review of Theory, Findings and Controversies.” *Evolutionary Biology*, 2015.

Mesoudi, Alex. “Cultural Evolution: Integrating Psychology, Evolution and Culture.” *Current Opinion in Psychology* 7 (2016): 17–22.

Mesoudi, Alex. “Migration, Acculturation, and the Maintenance of between-Group Cultural Variation.” *PLoS ONE* 13, no. 10 (2018).

Mesoudi, Alex, and Alex Thornton. “What Is Cumulative Cultural Evolution?” *Proc. R. Soc. B* 285 (2018): 20180712.

Michel, JB, YK Shen, AP Aiden, A Veres, MK Gray, JP Pickett, D Hoiberg, et al. “Quantitative Analysis of Culture Using Millions of Digitized Books.” *Science* 331, no. 6014 (2011): 176–82.

Mieder, Wolfgang, ed. *The Prentice-Hall Encyclopedia of World Proverbs: A Treasury of Wit and Wisdom Through the Ages*. Prentice-Hall, Inc., 1986.

Mill, John Stuart. “Considerations on Representative Government [1861].” In *On Liberty and Other Essays*, edited by John Gray, 205–470. Oxford University Press, 1991.

Mill, John Stuart. *On Liberty and Other Essays*. Edited by John Gray. Oxford University Press, 1991.

Millar, John. *An Historical View of the English Government, From the Settlement of the Saxons in Britain to the Revolution in 1688*. Edited by Mark Salber Philips and Dale R Smith. Liberty Fund, Inc., 2006.

Millar, John. *The Origin of the Distinction of Ranks; or, An Inquiry into the Circumstances Which Give Rise to Influence and Authority in the Different Members of Society*. Edited by Aaron Garrett. Liberty Fund, Inc., 2006.

Miller, David. *Social Justice*. Oxford University Press, 1979.

Miller, John. “The Glorious Revolution: ‘Contract’ and ‘Abdication’ Reconsidered.” *The Historical Journal* 25, no. 3 (1982): 541–55.

Miller, Jon Charles. “Hume’s Impression of Succession (Time).” *Dialogue* 47, no. 3–4 (2008): 603–17.

Mitchell, Bruce, and Fred C Robinson. *A Guide to Old English*. 5th ed. Blackwell Publishing, 1994.

Mitteis, Heinrich. *The State in the Middle Ages: A Comparative Constitutional History of Feudal Europe*. Translated by HF Orton. North-Holland Publishing Company, 1975.

Moline, Jon. "Aristotle, Eubulides and the Sorites." *Mind* 78, no. 311 (1969): 393–407.

Montesquieu. *The Spirit of the Laws*. Translated by Anne M Cohler, Basia Carolyn Miller, and Harold Samuel Stone. Cambridge University Press, 1989.

Moody, James, and Douglas R White. "Structural Cohesion and Embeddedness: A Hierarchical Concept of Social Groups." *American Sociological Review* 68, no. 1 (2003): 103–27.

Moore, Sally Falk. *Law as Process: An Anthropological Approach*. Routledge & Kegan Paul Ltd., 1978.

Morgan, Lewis Henry. *Ancient Society, or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization*. Henry Holt and Company, 1877.

Moritz, Elan. "Memetic Science: I - General Introduction." *Journal of Ideas* 1, no. 1 (1990): 3–23.

Morwood, James, ed. *Pocket Oxford Latin Dictionary*. Oxford University Press, 2005.

Motyka, Krzystof. "Law and Sociology: The Petrażyckian Perspective." In *Law and Sociology*, edited by Michael Freeman. Oxford University Press, 2006.

Mudrack, P. E. "Defining Group Cohesiveness: A Legacy of Confusion?" *Small Group Research* 20, no. 1 (1989): 37–49.

Mueller, Dennis C. *Constitutional Democracy*. Oxford University Press, 1996.

Mumby, Julie. "The Descent of Family Land in Later Anglo-Saxon England." *Historical Research* 84, no. 225 (2011): 399–415.

Murphy, James Bernard. "Habit and Convention at the Foundation of Custom." In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 53–78. Cambridge University Press, 2007.

Murphy, Walter F. *Constitutional Democracy: Creating and Maintaining a Just Political Order*. The John Hopkins University Press, 2007.

Murphy, Walter F. "Constitutions, Constitutionalism, and Democracy." In *Constitutionalism and Democracy: Transitions in the Contemporary World*, edited by Douglas Greenberg, Stanley N Katz, Melanie Beth Oliviero, and Steven C Wheatley, 3–25. Oxford University Press, 1993.

Musolff, Andreas. *Metaphor, Nation and the Holocaust: The Concept of the Body Politic*. Routledge, 2010.

Myers, JNL. *The English Settlements*. Oxford University Press, 1989.

Naismith, Rory. "The Origins of the Line of Egbert, King of the West Saxons, 802-839." *English Historical Review* 126, no. 518 (2011): 1–16.

Nederman, Cary J, and Kate Langdon Forhan, eds. *Readings in Medieval Political Theory 1100-1400*. Hackett Publishing Company, Inc., 1993.

Neill, E. "History of European Ideas Evolutionary Theory and British Idealism: The Case of David George Ritchie." *History of European Ideas* 29, no. 3 (2003): 313–38.

Nelson, Janet L. "Kingship and Empire." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 211–51. Cambridge University Press, 1988.

Nelson, Janet L. "The Franks and the English in the Ninth Century Reconsidered." In *Preservation and Transmission of Anglo-Saxon Culture: Selected Papers from the 1991 Meeting of the International Society of Anglo-Saxonists*, edited by Paul E Szarmach and Joel T Rosenthal, 141–58. Kalamazoo, 1997.

Nelson, Janet L. "The Problem of King Alfred's Royal Anointing." *Journal of Ecclesiastical History* XVIII, no. 2 (1967): 145–63.

Nenner, Howard. *The Right to Be King: The Succession to the Crown of England, 1603-1714*. Macmillan Press Ltd., 1995.

Nestle, Wilhelm. "Die Fabel Des Menenius Agrippa." *Klio - Beiträge Zur Alten Geschichte* 21, no. 21 (1927): 350–360.

Neumann, Volker, and Carl Schmitt. "Carl Schmitt." In *Weimar: A Jurisprudence of Crisis*, edited by Arthur J. Jacobson and Bernhard Schlink, 280–312. University of California Press, 2000.

Neves, Marcelo. *Transconstitutionalism*. Translated by Kevin Mundy. Hart Publishing, 2013.

Nicholls, David. *The Pluralist State*. The Macmillan Press Ltd, 1975.

Nicol, DM. "Byzantine Political Thought." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 49–80. Cambridge University Press, 1988.

Nisbet, Robert A. *The Sociological Tradition*. Heinemann Education Books Ltd., 1967.

Nisbett, Richard E., and Eugene Borgida. "Attribution and the Psychology of Prediction." *Journal of Personality and Social Psychology* 32, no. 5 (1975): 932–43.

Norbye, Marigold Anne. "Genealogies in Medieval France." In *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, edited by Raluca L Radulescu and Edward Donald Kennedy, 79–102. Brepols, 2008.

Norgate, Kate. *John Lackland*. Macmillan & Co. Ltd., 1902.

Norgate, Kate. *The Minority of Henry the Third*. Macmillan & Co. Ltd., 1912.

Novalis. *Heinrich von Ofterdingen*. Edited by Julian Schmidt. FU Brodhaus, 1876.

Oakeshott, Michael Joseph. *On History and Other Essays*. Barnes and Noble Books, 1983.

Oakeshott, Michael Joseph. *On Human Conduct*. Oxford University Press, 1975.

Obbink, Dirk. "Allegory and Exegesis in the Dervenis Papyrus: The Origin of Greek Scholarship." In *Metaphor, Allegory, and the Classical Tradition: Ancient Thought and Modern Revisions*, edited by G. R. Boys-Stones, 177–88. Oxford University Press, 2003.

Offler, HS. "Review: Medieval Political Ideas, Ewart Lewis." *The English Historical Review* 70, no. 277 (1955): 633–35.

Olivecrona, Karl. *Law as Fact*. 2nd ed. Stevens & Sons, 1971.

Oman, Charles. *A History of England before the Norman Conquest*. 6th ed. Methuen & Co., 1924.

Onions, CT, GWS Friedrichsen, and RW Burchfield, eds. *The Oxford Dictionary of English Etymology*. Oxford University Press, 1966.

Oosterhoff, AH. "The Law of Mortmain: An Historical and Comparative Review." *The University of Toronto Law Journal* 27, no. 3 (1977): 257–334.

Oppenheimer, Franz. *The State*. Translated by John Gitterman. Free Life Editions, 1975.

Ormrod, W Mark. *Edward III*. Yale University Press, 2011.

Ormrod, W. Mark. *The Reign of Edward III: Crown and Political Society 1327-1377*. Yale University Press, 1990.

Ossowska, Maria. "Moral and Legal Norms." In *Sociology and Jurisprudence of Leon Petrażycki*, edited by Jan Gorecki. University of Illinois Press, 1975.

Ostlund, Leonard A. "Tarde, Le Bon, and Bagehot: Early Group-Interaction Theorists." *Social Science* 32, no. 3 (1957): 166–71.

Otter, Sandra M den. *British Idealism and Social Explanation: A Study in Late Victorian Thought*. Oxford University Press, 1996.

Ovid. *Metamorphoses*. Translated by Frank Justice Miller. Vol. 2. Harvard University Press, 1916.

Ovid. *Metamorphoses*. Translated by AD Melville. Oxford University Press, 1986.

Paine, Thomas. *Rights of Man, Common Sense and Other Political Writings*. Edited by Mark Philp. Oxford University Press, 1995.

Painter, Sidney. *William Marshal: Knight-Errant, Baron, and Regent of England*. John Hopkins Press, 1966.

Palaima, Thomas G. "The Nature of the Mycenaean Wanax: Non-Indo-European Origins and Priestly Functions." *Aegaeum* 11 (1995): 119–39.

Paley, William. *The Works of William Paley: With Illustrative Notes and a Life of the Author*. William Smith, 1838.

Palgrave, Francis. *An Essay Upon the Original Authority of the King's Council*. Commissioners on the Public Records of the Kingdom, 1834.

Palgrave, Francis. *The Rise and Progress of the English Commonwealth: Anglo-Saxon Period, Containing the Anglo-Saxon Policy, and the Institutions Arising Out of Laws and Usages Which Prevailed Before the Conquest*. Vol. 1. John Murray, 1832.

Palgrave, Francis. *The Rise and Progress of the English Commonwealth: Anglo-Saxon Period, Containing the Anglo-Saxon Policy, and the Institutions Arising Out of Laws and Usages Which Prevailed Before the Conquest*. Vol. 2. John Murray, 1832.

Parpworth, Neil. "The Succession to the Crown Act 2013: Modernising the Monarchy." *The Modern Law Review* 76, no. 6 (2013): 1070–93.

Pardo, Michael S, and Dennis Patterson. *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience*. Oxford University Press, 2013.

Parsons, Talcott. *The Evolution of Society*. Edited by Jackson Toby. Prentice-Hall, Inc., 1977.

Parsons, Talcott. *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers*. 2nd ed. Free Press, 1949.

Partridge, Eric. *Origins: A Short Etymological Dictionary of Modern English*. 4th ed. Routledge & Kegan Paul, 1966.

Patourel, John Le. "The Norman Succession, 996-1135." *The English Historical Review* 86, no. 339 (April 1971): 225–50.

Pavel, Carmen. *Divided Sovereignty: International Institutions and the Limits of State Authority*. Oxford University Press, 2015.

Payne, Sebastian. "The Royal Prerogative." In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 77–110. Oxford University Press, 1999.

Peacock, Walter Gillis. "In Search of Social Structure." *Sociological Inquiry* 61, no. 3 (1991): 281–98.

Peart, Sandra J, and David M Levy, eds. *F.A. Hayek and the Modern Economy*. Palgrave Macmillan, 2013.

Pelikan, Jaroslav. *The Vindication of Tradition*. Yale University Press, 1984.

Pennington, Kenneth. "Law, Legislative Authority, and Theories of Government, 1150–1300." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 424–53. Cambridge University Press, 1988.

Pernoud, Régine. *Blanche of Castile*. Translated by Henry Noel. Collins, 1975.

Perreau-Saussine, Amanda. "Three Ways of Writing a Treatise on Public International Law: Textbooks and the Nature of Customary International Law." In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 228–55. Cambridge University Press, 2007.

Perreau-Saussine, Amanda, and James Bernard Murphy, eds. *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*. Cambridge University Press, 2007.

Perry, Adam. "Constitutional Conventions and the Prince of Wales." *The Modern Law Review* 76, no. 6 (2013): 1119–28.

Petrażycki, Leon. *Law and Morality*. Translated by Hugh Webster Babb. Harvard University Press, 1955.

Peverley, Sarah L. "Genealogy and John Hardyng's Verse Chronicle." In *Broken Lines: Genealogical Literature in Late-Medieval Britain and France*, edited by Raluca L Radulescu and Edward Donald Kennedy, 259–82. Brepols, 2008.

Phillips, Seymour. *Edward II*. Yale University Press, 2010.

Pickthorn, Kenneth. *Early Tudor Government: Henry VII*. Cambridge University Press, 1934.

Pierce, Gwynedd. "Stanley Bertram Chrimes (1907-1984)." *Morgannwg Transactions of the Glamorgan Local History Society* 28 (1984): 8–9.

Pierson, Christopher. *The Modern State*. 2nd ed. Routledge, 2004.

Pike, Luke Owen. *Constitutional History of the House of Lords*. Macmillan & Co., 1894.

Pitkin, Hanna Fenichel. "The Idea of a Constitution." *Journal of Legal Education* 37, no. 2 (1987): 167–69.

Plato. *Complete Works*. Edited by John M Cooper. Hackett Publishing Company, Inc., 1997.

Plaut, W.Gunther. *The Torah: A Modern Commentary*. Union of Hebrew Congregations, 1981.

Plessis, Paul du. *Borkowski's Textbook on Roman Law*. 4th ed. Oxford University Press, 2010.

Plotkin, Henry. “Culture and Psychological Mechanisms.” In *Darwinizing Culture: The Status of Memetics as a Science*, edited by Robert Aunger, 69–82. Oxford University Press, 2001.

Plotkin, Henry. *Darwin Machines and the Nature of Knowledge*. Penguin Books, 1994.

Plowden, Edmund. *Les Commentaries, Ou Reports de Edmund Plowden*. London, 1588.

Plowden, Edmund. *The Commentaries, or Reports of Edmund Plowden ... : Containing Divers Cases upon Matters of Law, Argued and Adjudged in the Several Reigns of King Edward VI, Queen Mary, King and Queen Philip and Mary, and Queen Elizabeth*. Edited and translated by Broomly [incertum]. London, 1761.

Plucknett, Theodore Ft. *A Concise History of the Common Law*. 5th ed. Butterworth & Co (Publishers) Ltd, 1956.

Plucknett, Theodore FT. “Maitland’s View of Law and History.” *Law Quarterly Review* 67 (1951): 179–94.

Plucknett, Theodore FT. *Taswell-Langmead’s English Constitutional History: From the Teutonic Conquest to the Present Time*. 11th ed. Sweet & Maxwell, Ltd., 1960.

Plucknett, Theodore FT. “The Relations between Roman Law and English Common Law down to the Sixteenth Century: A General Survey.” *The University of Toronto Law Journal* 3, no. 1 (1939): 24–50.

Plummer, Charles. *The Life and Times of Alfred the Great*. Oxford University Press, 1902.

Plutarch. *Makers of Rome - Nine Lives*. Translated by Ian Scott-Kilvert. Penguin Books Ltd, 1965.

Plutarch. “Theseus.” In *The Rise and Fall of Athens: Nine Greek Lives by Plutarch*, translated by Ian Scott-Kilvert, 13–42. Penguin Books, 1960.

Pocock, JGA. *Ancient Constitution and the Feudal Law: A Reissue with a Retrospect*. Cambridge University Press, 1987.

Pocock, JGA. “Burke and the Ancient Constitution-A Problem in the History of Ideas.” *The Historical Journal* 3, no. 2 (1960): 125–43.

Poggi, Gianfranco. *The State: Its Nature, Development, and Prospects*. Polity Press, 1990.

Political and Constitutional Reform Committee. “Rules of Royal Succession, 11th Report HC 1615 (2010-12),” 2010.

Pollard, AF. *England under Protector Somerset*. Kegan Paul, Trench, Trübner & Co. Ltd., 1900.

Pollard, AF. *The Evolution of Parliament*. 2nd ed. Longmans, Green and Co. Ltd., 1926.

Pollard, AJ. *Late Medieval England, 1399-1509*. Pearson Education Ltd., 2000.

Pollard, AJ. "Review: John Watts, Henry VI and the Politics of Kingship." *The American Historical Review* 103, no. 3 (1998): 869–870.

Pollock, Frederick. *A First Book of Jurisprudence*. 5th ed. Macmillan & Co. Ltd., 1923.

Pollock, Frederick. "Law and Command." *Law Magazine and Review* 1, no. 3 (1872): 189–205.

Pollock, Frederick. *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England*. 9th ed. Stevens and Sons, Limited, 1924.

Pollock, Frederick, and Frederic William Maitland. *The History of English Law Before the Time of Edward I*. Edited by SFC Milsom. 2nd ed. Vol. 1. Cambridge University Press, 1968.

Pollock, Frederick, and Frederic William Maitland. *The History of English Law Before the Time of Edward I*. Edited by SFC Milsom. 2nd ed. Vol. 2. Cambridge University Press, 1968.

Poole, Reginald L. "The Appointment and Deprivation of St. William , Archbishop of York." *The English Historical Review* 45, no. 178 (1930): 273–81.

Poole, Thomas. "Back to the Future? Unearthing the Theory of Common Law Constitutionalism." *Oxford Journal of Legal Studies* 23, no. 3 (2003): 435–54.

Poole, Thomas. "Questioning Common Law Constitutionalism." *Legal Studies* 25, no. 1 (2005): 142–63.

Pope, Alexander. *The Poetical Works of Alexander Pope*. Edited by Adolphus William Ward. Macmillan & Co., 1871.

Poplin, Dennis E. *Communities: A Survey of Theories and Methods of Research*. The Macmillan Company, 1972.

Poppel, Frans Van, Gerrit Bloothooft, Doreen Gerritzen, and Jan Verduin. "Naming for Kin and the Development of Modern Family Structures: An Analysis of a Rural Region in the Netherlands in the Nineteenth and Early Twentieth Centuries." *History of the Family* 4, no. 3 (1999): 261–95.

Popper, Karl. *The Open Society and Its Enemies. Volume One - The Spell of Plato*. Routledge Classics, 2003.

Popper, Karl. *The Open Society and Its Enemies. Volume Two - The High Tide of Prophecy: Hegel, Marx, and the Aftermath*. 5th ed. Routledge, 1966.

Popper, Karl. *The Open Universe: An Argument for Indeterminism*. Rowman and Littlefield, 1982.

Porter, Jean. “Custom, Ordinance and Natural Right in Gratian’s Decretum.” In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 79–100. Cambridge University Press, 2007.

Pospisil, Leopold. *Anthropology of Law: A Comparative Perspective*. Harper & Row, 1971.

Post, Gaines. *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322*. Princeton University Press, 1964.

Post, Gaines. “Two Notes on Nationalism in the Middle Ages.” *Traditio* 9 (1953): 281–320.

Postema, Gerald J. “A Similibus Ad Similia: Analogical Thinking in Law.” In *Common Law Theory*, edited by Douglas E Edlin, 102–33. Cambridge Scholars Publishing, 2007.

Postema, Gerald J. “Custom in International Law: A Normative Practice Account.” In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 279–306. Cambridge University Press, 2007

Postema, Gerald J. “Jurisprudence, the Sociable Science.” *Virginia Law Review* 101 (2015): 869–901.

Poulter, Sebastian. “The Claim to a Separate Islamic System of Personal Law for British Muslims.” In *Islamic Family Law*, edited by Chibli Mallat and Jane Frances Connors, 147–66. Graham & Trotman, 1990.

Pound, Roscoe. *Interpretations of Legal History*. The Macmillan Company, 1923.

Pound, Roscoe. “Law in Books and Law in Action.” *American Law Review* 44 (1910): 12–36.

Pound, Roscoe. “The Scope and Purpose of Sociological Jurisprudence. I.” *Harvard Law Review* 24, no. 8 (1911): 591–619.

Pound, Roscoe. “The Scope and Purpose of Sociological Jurisprudence. II.” *Harvard Law Review* 25, no. 2 (1911): 140–68.

Pound, Roscoe. “The Scope and Purpose of Sociological Jurisprudence. III.” *Harvard Law Review* 25, no. 6 (1912): 489–516.

Powell, Edward. “After ‘After McFarlane’: The Poverty of Patronage and the Case for Constitutional History.” In *Trade, Devotion and Governance. Papers in Later Medieval History*, 1–16. Stroud, 1994.

Powell, Edward. *Kingship, Law, and Society: Criminal Justice in the Reign of Henry V*. Oxford University Press, 1989.

Powell, Timothy E. “The ‘Three Orders’ of Society in Anglo-Saxon England.” *Anglo-Saxon England* 23 (1994): 103–32.

Powicke, FM. *King Henry III and the Lord Edward: The Community of the Realm in the Thirteenth Century*. Oxford University Press, 1966.

Prestwich, Michael. *Edward I*. Methuen, 1988.

Prestwich, Michael. *Plantagenet England, 1225-1360*. Oxford University Press, 2005.

Preuss, Ulrich K. "Disconnecting Consitutitons from Statehood: Is Global Constitutionalism a Viable Concept?" In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 23–46. Oxford University Press, 2010.

Previté-Orton, CW. *A History of Europe from 1198-1378*. 3rd ed. Methuen & Co. Ltd., 1951.

Previté-Orton, CW. *Outlines of Medieval History*. 2nd ed. Cambridge University Press, 1933.

Priel, Dan. "Jurisprudence and Psychology." *Comparative Research in Law & Political Economy. Research Paper No. 49/2010*, 2010.

Priest, Graham. *Logic: A Very Short Introduction*. Oxford University Press, 2000.

Prioreschi, Plinio. *A History of Medicine*. Vol. 3. Horatius Press, 1996.

Pritchett, C. Herman. "Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941." *The American Political Science Review* 35, no. 5 (1941): 890–98.

Procopé, John. "Greek and Roman Political Theory." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 21–36. Cambridge University Press, 1988.

Prosser, CW, and Margaret Sharp. *A Short Constitutional History of England*. Longmans, Green and Co., 1938.

Radulescu, Raluca L, and Edward Donald Kennedy, eds. *Broken Lines*. Brepols, 2008.

Raithby, John, ed. *Statutes of the Realm*. Vol. 7. Great Britain Record Commission, 1820.

Ramsey, James H. *The Dawn of the Constitution or the Reigns of Henry III and Edward I (AD 1216-1307)*. Swan Sonnenschein & Co., 1908.

Ranke, Leopold von. *Geschichten Der Romanischen Und Germanischen Völker von 1494 Bis 1514*. 3rd ed. Duncker & Humblot, 1885.

Rawls, John. *A Theory of Justice*. 2nd ed. Oxford University Press, 1999.

Raz, Joseph. "Legal Validity." *ARSP: Archiv Für Rechts- Und Sozialphilosophie/Archives for Philosophy of Law* 63, no. 3 (1977): 339–53.

Raz, Joseph. "On The Nature of Law." *Archiv Für Rechts- Und Sozialphilosphie* 82, no. 1 (1996): 1–25.

Raz, Joseph. *Practical Reason and Norms*. 2nd ed. Oxford University Press, 1999.

Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford University Press, 1979.

Raz, Joseph. *The Concept of a Legal System*. 2nd ed. Oxford University Press, 1980.

Redlich, Josef. *Local Government in England*. Edited by Fracis W Hirst. Vol. 1. Macmillan & Co. Ltd., 1903.

Redmonds, George. *Christian Names in Local and Family History*. The National Archives, 2004.

Redmount, Robert S. "Law as a Psychological Phenomenon." *The American Journal of Jurisprudence* 18 (1973): 80–104.

Redmount, Robert S. "Psychological Views in Jurisprudential Theories." *University of Pennsylvania Law Review* 107, no. 4 (1959): 472–513.

Reicher, Stephen D. "The Determination of Collective Behaviour." In *Social Identity and Intergroup Relations*, edited by Henri Tajfel, 41–84. Cambridge University Press, 1982.

Reiczigel, Jenő, Zsolt Lang, Lajos Rózsa, and Béla Tóthmérész. "Measures of Sociality: Two Different Views of Group Size." *Animal Behaviour* 75, no. 2 (2008): 715–21.

Reiss, Ira L. "The Operational Approach: Just How New Is It?" *American Journal of Sociology* 87, no. 5 (1982): 1167–69.

Resnick, David. "Locke and the Rejection of the Ancient Constitution." *Political Theory* 12, no. 1 (1984): 97–114.

Reyna, Valerie F, and Charles J Brainerd. "Comment on Article by Professor Wohlmuth." *Journal of Contemporary Legal Issues* 8 (1997): 287–98.

Reynolds, Susan. "What Do We Mean by 'Anglo-Saxon' and 'Anglo-Saxons'?" *Journal of British Studies* 24, no. 4 (1985): 395–414.

Richards, Mary P. "Anglo-Saxonism in the Old English Laws." In *Anglo-Saxonism and the Construction of Social Identity*, edited by Allen J Frantzen and John D Niles, 40–59. University Press of Florida, 1997.

Richardson, Henry Gerald, and George Osborne Sayles. *The Governance of Medieval England from the Conquest to Magna Carta*. Edinburgh University Press, 1963.

Richmond, Velma Bourgeois. "Historical Novels to Teach Anglo-Saxonism." In *Anglo-Saxonism and the Construction of Social Identity*, edited by Allen J Frantzen and John D Niles, 173–201. University Press of Florida, 1997.

Riesenberg, Peter. "Review: Medieval Political Ideas, Ewart Lewis." *Political Science Quarterly* 71, no. 3 (1956): 456–57.

Ritchie, David George. *Darwinism and Politics*. 2nd ed. Swan Sonnenschein & Co., 1891.

Ritchie, David George. *The Principles of State Interference: Four Essays on the Political Philosophy of Mr. Herbert Spencer, J.S. Mill, and T.H. Green*. 4th ed. Swan Sonnenschein & Co., 1902.

Rivers, William Halse Rivers. "Survival in Sociology." *The Sociological Review* 6, no. 4 (1913): 293–305.

Rivers, William Halse Rivers. *The History of Melanesian Society*. Vol. 2. Cambridge University Press, 1914.

Roach, Levi. *Æthelred the Unready*. Yale University Press, 2016.

Robinson, IS. "Church and Papacy." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 252–305. Cambridge University Press, 1988.

Rockow, Lewis. *Contemporary Political Thought in England*. Leonard Parsons, 1925.

Romano, Santi. *The Legal Order*. Translated by Mariano Croce. Routledge, 2017.

Roscher, Wilhelm Heinrich. "Das Alter Der Weltkarte in 'Hippokrates' Περί Εβδομάδων Und Die Reichskarte Des Darius Hystaspis." *Philologus - Zeitschrift Für Antike Literatur Und Ihre Rezeption* 70, no. 1–4 (1911): 529–538.

Roscher, Wilhelm Heinrich. *Die Hippokratische Schrift Von Der Siebenzahl in Ihrer Vierfachen Überlieferung*. Ferdinand Schöningh, 1913.

Roscher, Wilhelm Heinrich. *Über Alter, Ursprung Und Bedeutung Der Hippokratischen Schrift von Der Siebenzahl: Ein Beitrag Zur Geschichte Der Ältesten Griechischen Philosophie Und Prosaliteratur*. Abhandlungen Der Philologisch-Historischen Klasse Der Königl. Sächsischen Gesellschaft Der Wissenschaften; Bd. 28, n. 5. B. G. Teubner, 1911.

Rosenthal, Joel T. "Mediaeval Longevity and the Secular Peerage, 1350-1500." *Population Studies* 27, no. 2 (1973): 287–93.

Rosenzweig, Linda W. "The Abdication of Edward VIII: A Psycho-Historical Explanation." *Journal of British Studies* 14, no. 2 (1975): 102–19.

Roskell, JS. *The Commons in the Parliament of 1422: English Society and Parliamentary Representation under the Lancastrians*. Manchester University Press, 1954.

Roskell, JS. "The Office and Dignity of Protector of England, with Special Reference to Its Origins." *The English Historical Review* 68, no. 267 (1953): 193–233.

Ross, Charles. *Edward IV*. Eyre Methuen, 1974.

Ross, Charles. *Richard III*. Methuen, 1988.

Ross, Lee. “The Intuitive Psychologist And His Shortcomings: Distortions in the Attribution Process.” *Advances in Experimental Social Psychology*, 1977.

Round, J. Horace. *Geoffrey de Mandeville: A Study of the Anarchy*. Longmans, Green and Co., 1892.

Round, J. Horace. *The King’s Serjeants and Officers of State with Their Coronation Services*. James Nisbet and Co. Ltd., 1911.

Rousseau, Jean-Jacques. *The Social Contract*. Translated by Maurice Cranston. Penguin Books, 2004.

Rowell, Thelma. *Social Behaviour of Monkeys*. Penguin Books Ltd, 1972.

Rubin, Paul H, and Evelyn Gick. “Hayek and Modern Evolutionary Theory.” *Advances in Austrian Economics* 7 (2004): 79–100.

Runciman, David. *Pluralism and the Personality of the State*. Cambridge University Press, 1997.

Rush, Michael. “Reviews: Constitutional History of the United Kingdom (Ann Lyon) and Constitutional Change in the United Kingdom (FN Forman).” *Representation* 41, no. 2 (2005): 127–28.

Russell, Bertrand. *History of Western Philosophy*. Routledge, 2000.

Ryle, Gilbert. *The Concept of Mind*. Peregrine Books, 1963.

Sabine, George H. “Rudolf Stammler’s Critical Philosophy of Law.” *Cornell Law Quarterly* 18, no. 3 (1933): 321–50.

Sadurski, Wojciech. “Social Justice and Legal Justice.” *Law and Philosophy* 3 (1984): 329–54.

Salter, David, Natalie Lee, and John Snape. *Revenue Law - Text and Materials*. Tottel Publishing, 2007.

Salzman, LF. *English Life in the Middle Ages*. Oxford University Press, 1926.

Santos, Boaventura de Sousa. “Law: A Map of Misreading. Toward a Postmodern Conception of Law.” *Journal of Law and Society* 14, no. 3 (1987): 279–302.

Sapolsky, Robert M. *Why Zebras Don’t Get Ulcers*. 3rd ed. St. Martin’s Griffin, 2004.

Sartori, Giovanni. “Constitutionalism: A Preliminary Discussion.” *The American Political Science Review* 56, no. 4 (1962): 853–64.

Saul, Nigel. *Richard II*. Yale University Press, 1999.

Savigny, Friedrich Carl von. *Of the Vocation of Our Age for Legislation and Jurisprudence*. Translated by Abraham Hayward. Littlewood & Co., 1831.

Sawyer, R Keith. *Social Emergence: Societies as Complex Systems*. Cambridge University Press, 2005.

Schauer, Frederick. "Pitfalls in the Interpretation of Customary Law." In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 13–34. Cambridge University Press, 2007.

Schmitt, Carl. *Constitutional Theory*. Translated by Jeffrey Seitzer. Duke University Press, 2008.

Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. The MIT Press, 1988.

Schmitt, Carl. *The Concept of the Political: Expanded Edition*. Translated by George Schwab. The University of Chicago Press, 2007.

Schulz, Fritz. *Classical Roman Law*. Oxford University Press, 1954.

Schumpeter, Joseph. *Das Wesen Und Der Hauptinhalt Der Theoretischen Nationalökonomie*. Duncker & Humblot, 1908.

Schumpeter, Joseph. "On the Concept of Social Value." *The Quarterly Journal of Economics* 23, no. 2 (1909): 213–32.

Schwartz, Richard D, and James C Miller. "Legal Evolution and Societal Complexity." *American Journal of Sociology* 70, no. 2 (1964): 159–69.

Scott, John, and Peter J Carrington, eds. *The SAGE Handbook of Social Network Analysis*. SAGE Publications, 2011.

Scott, W Richard. *Institutions and Organizations: Ideas, Interests, and Identities*. 4th ed. SAGE Publications, 2014.

Searle, John R. *Making the Social World: The Structure of Human Civilization*. Oxford University Press, 2010.

Searle, John R. *The Construction of Social Reality*. Penguin Books, 1995.

Sedley, Stephen. "The Common Law and the Political Constitution: A Reply." *Law Quarterly Review* 117, no. Jan (2001): 68–70.

Selden, John. *Titles of Honor*. 3rd ed. E. Tyler and R. Holt, for Thomas Dring, 1672.

Semon, Richard. *Die Mneme: Als Erhaltendes Prinzip Im Wechsel Des Organischen Geschehens*. Wilhelm Engelmann, 1904.

Semon, Richard. *The Mneme*. Translated by Louis Simon. George Allen and Unwin Ltd., 1921.

Sen, Amartya. "Choice, Orderings and Morality." In *Practical Reason*, edited by Stephan Körner, 54–67. Basil Blackwell, 1974.

Seung, Sebastian. *Connectome: How the Brain's Wiring Makes Us Who We Are*. Allen Lane, 2012.

Seward, Desmond. *Henry V: The Scourge of God*. Viking, 1988.

Shapiro, Scott J. *Legality*. Harvard University Press, 2011.

Sheehan, Michael M. *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*. Pontifical Institute of Medieval Studies, 1963.

Shepard, Max A. "An Analysis of Analytical Jurisprudence." *The Journal of Politics* 1, no. 4 (1939): 371–95.

Sherif, Muzafer. *An Outline of Social Psychology*. Harper & Brothers Publishers, 1948.

Sherif, Muzafer. *The Psychology of Social Norms*. Harper & Brothers Publishers, 1936.

Shklar, Judith N. "Political Theory and the Rule of Law." In *Political Thought and Political Thinkers*, edited by Stanley Hoffmann. University of Chicago Press, 1998.

Siegel, Reva B. "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA." *California Law Review* 94 (2006): 1323–1420.

Sikes, JG. *Peter Abailard*. Cambridge University Press, 1932.

Silverman, David. *The Theory of Organisations*. Heinemann, 1970.

Simhony, Avital. "Idealist Organicism: Beyond Holism and Individualism." *History of Political Thought* 12, no. 3 (1991): 515–35.

Simpson, Jeffry A, and Douglas T Kenrick, eds. *Evolutionary Social Psychology*. Lawrence Erlbaum Associates, Ltd, 1997.

Sinclair, MBW. "Evolution in Law: Second Thoughts." *University of Detroit Mercy Law Review* 71, no. 1 (1993): 31–58.

Sinclair, MBW. "The Use of Evolution Theory in Law." *Articles by Maurer Faculty* 2271 (1987).

Skinner, BF. "'Superstition' in the Pigeon." *Journal of Experimental Psychology* 38, no. 2 (1948): 168–172.

Skinner, Quentin. “A Genealogy of the State.” *British Academy Publications Online* 162, no. May 2008 (2008): 325–70.

Skinner, Quentin. “The State.” In *Political Innovation and Conceptual Change*, edited by Terence Ball, James Farr, and Russell L Hanson, 90–31. Cambridge University Press, 1989.

Slee, Peter RH. *Learning and a Liberal Education: The Study of Modern History in the Universities of Oxford, Cambridge, and Manchester 1800-1914*. Manchester University Press, 1986.

Smalley, Beryl. *Studies in Medieval Thought and Learning From Abelard to Wyclif*. The Hambledon Press, 1981.

Smith, Andrew, and Jatinder Mann. “A Tale of Two Ex-Dominions: Why the Procedures for Changing the Rules of Succession Are So Different in Canada and Australia,” 2013. http://www.queensu.ca/iigr/WorkingPapers/NewWorkingPapersSeries/workingpaper052013smithandmann.pdf.

Smith, Eliot R, and Diane M Mackie. *Social Psychology*. 3rd ed. Psychology Press, 2007.

Smith, Goldwin. *A Constitutional and Legal History of England*. Charles Scribner’s Sons, 1955.

Smith, Joan. “The Failure of Functionalism.” *Phil. Soc. Sci.*, 1975, 33–42.

Smith, Sir William, and JF Lockwood, eds. *A Smaller Latin-English Dictionary*. 3rd ed. John Murray, 1933.

Smyth, Alfred P. *King Alfred the Great*. Oxford University Press, 1995.

Soanes, Catherine, and Sara Hawker, eds. *Compact Oxford English Dictionary of Current English*. 3rd ed. Oxford University Press, 2005.

Southern, RW. “Presidential Address: Aspects of the European Tradition of Historical Writing: 3. History as Prophecy.” *Transactions of the Royal Historical Society* 22 (1972): 159–80.

Spagnolo, Benjamin. *The Continuity of Legal Systems in Theory and Practice*. Hart Publishing, 2015.

Spence, Lewis. *Myths and Legends of Ancient Egypt*. David D Nickerson & Company, 1910.

Spencer, Herbert. *Essays: Scientific, Political, and Speculative*. Library Ed. Williams and Norgate, 1891.

Spencer, Herbert. *First Principles*. 6th ed. Williams and Norgate, 1928.

Spencer, Herbert. *Social Statics, or The Conditions Essential to Human Happiness Title*. John Chapman, 1851.

Spencer, Herbert. *The Evolution of Society: Selections from Herbert Spencer's Principles of Sociology*. Edited by Robert Leonard Carneiro. The University of Chicago Press, 1967.

Spencer, Herbert. *The Principles of Psychology*. 3rd ed. Vol. 1. D. Appleton and Company, 1883.

Spencer, Herbert. *The Study of Sociology*. Henry S. King and Co., 1873.

Spinoza, Benedict de. *A Theological-Political Treatise and A Political Treatise*. Translated by RHM Elwes. Dover Publications, Inc., 2004.

St John, Henry. *Remarks on the History of England, From the Minutes of Humphrey Oldcastle*. 2nd ed. R Francklin, 1747.

Stacher, Joshua. "Reinterpreting Authoritarian Power: Syria's Hereditary Succession." *The Middle East Journal* 65, no. 2 (2011): 197–212.

Stake, Jeffrey Evans. "Are We Buyers or Hosts - A Memetic Approach to the First Amendment." *Alabama Law Review* 52, no. 4 (2001): 1213–68.

Stake, Jeffrey Evans. "Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities." *Florida State University Law Review* 32 (2005): 401–24.

Stake, Jeffrey Evans. "Pushing Evolutionary Analysis of Law or Evolving Law: Design without a Designer." *Florida Law Review* 53 (2001): 875–92.

Stammler, Rudolf. *The Theory of Justice*. Translated by Isaac Husik. The Macmillan Company, 1925.

Stein, PG. "Roman Law." In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 37–48. Cambridge University Press, 1988.

Stein, Peter. *Legal Evolution: The Story of an Idea*. Cambridge University Press, 1980.

Steiner, Emily. "Naming and Allegory in Late Medieval England." *The Journal of English and Germanic Philology* 106, no. 2 (2007): 248–75.

Stehr, Nico. "The Evolution of Meaning Systems: An Interview with Niklas Luhmann." *Theory, Culture & Society* 1, no. 1 (1982): 33–48.

Stenton, FM. *Anglo-Saxon England*. 3rd ed. Oxford University Press, 1971.

Stephen, James Fitzjames. *A History of the Criminal Law of England*. Vol. 1. Macmillan & Co., 1883.

Stevenson, WH. "Trinoda Necessitas." *The English Historical Review* 29, no. 116 (1914): 689–703.

Stiller, James, and RIM Dunbar. “Perspective-Taking and Memory Capacity Predict Social Network Size.” *Social Networks* 29, no. 1 (2007): 93–104.

Stone, Linda, Paul F Lurquin, and LL Cavalli–Sforza. *Genes, Culture, and Human Evolution: A Synthesis*. Blackwell Publishing, 2007.

Story, Joseph. *Commentaries on the Constitution of the United States*. Vol. 1. Brown, Shattuck, and Co, 1833.

Strang, Johan. “Two Generations of Scandinavian Legal Realists.” *Retfærd Årgang* 32, no. 1/124 (2009): 62–82.

Strauss, David A. “Do We Have a Living Constitution?” *Drake Law Review* 59 (2011): 973–84.

Strauss, David. *The Living Constitution*. Oxford University Press, 2010.

Strayer, Joseph R. *On the Medieval Origins of the Modern State*. Princeton University Press, 1970.

Strohm, Paul. *England’s Empty Throne: Usurpation and the Language of Legitimation, 1399-1422*. Yale University Press, 1998.

Strong, Patrick, and Felicity Strong. “The Last Will and Codicils of Henry V.” *The English Historical Review* 96, no. 378 (January 1981): 79–102.

Stubbs, William. *The Constitutional History of England in Its Origin and Development*. 6th ed. Vol. 1. Clarendon Press, 1903.

Stubbs, William. *The Constitutional History of England in Its Origin and Development*. 4th ed. Vol. 2. Clarendon Press, 1896.

Stubbs, William. *The Constitutional History of England in Its Origin and Development*. 5th ed. Vol. 3. Clarendon Press, 1896.

Studd, JR. *A Catalogue of the Acts of the Lord Edward, 1254-1272*. PhD Thesis: University of Leeds, 1971.

Sueur, Cédric, Jean-Louis Deneubourg, Odile Petit, and Iain D. Couzin. “Group Size, Grooming and Fission in Primates: A Modeling Approach Based on Group Structure.” *Journal of Theoretical Biology* 273, no. 1 (2011): 156–66.

Sullivan, Francis Stoughton. *An Historical Treatise on the Feudal Law, and the Constitution and Laws of England: With a Commentary on Magna Charta, and Necessary Illustrations of Many of the English Statutes : In a Course of Lectures Read in the University of Dublin*. London, 1772.

Sumner, William Graham. *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals*. Ginn and Company, 1906.

Sunkin, Maurice, and Sebastian Payne. "The Nature of the Crown: An Overview." In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 1–22. Oxford University Press, 1999.

Sunkin, Maurice, and Sebastian Payne, eds. *The Nature of the Crown: A Legal and Political Analysis*. Oxford University Press, 1999.

Sunstein, Cass R. *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before*. Princeton University Press, 2009.

Suwannathat-Pian, Kobkua. "Thrones, Claimants, Rulers and Rules: The Problem of Succession in the Malay Sultanates." *Journal of the Malaysian Branch of the Royal Asiatic Society* 66, no. 2 (1993): 1–27.

Sweet, Henry, and Norman Davis. *Sweet's Anglo-Saxon Primer*. 9th ed. Oxford University Press, 1980.

Swinburne, Henry. *A Treatise of Testaments and Last Wills*. Edited by John Joseph Powell and James Wake. 7th ed. Vol. 1. W Clarke and Sons, 1803.

Tabuteau, Emily Zack. "The Role of Law in the Succession to Normandy and England, 1087." *Haskins Society Journal* 3 (1991): 141–69.

Tait, James. *The Medieval English Borough: Studies on Its Origins and Constitutional History*. Manchester University Press, 1936.

Tajfel, Henri. "Instrumentality, Identity, and Social Comparisons." In *Social Identity and Intergroup Relations*, edited by Henri Tajfel, 483–508. Cambridge University Press, 1982.

Tajfel, Henri, ed. *Social Identity and Intergroup Relations*. Cambridge University Press, 1982.

Tamanaha, Brian Z. *A General Jurisprudence of Law and Society*. Oxford University Press, 2001.

Tamanaha, Brian Z. "A Non-Essentialist Version of Legal Pluralism." *Journal of Law and Society* 27, no. 2 (2000): 296–321.

Tamanaha, Brian Z. *A Realistic Theory of Law*. Cambridge University Press, 2017.

Tamanaha, Brian Z. "The Folly of the 'Social Scientific' Concept of Legal Pluralism." *Journal of Law and Society* 20, no. 2 (1993): 192–217.

Tamanaha, Brian Z. "The Promise and Conundrums of Pluralist Jurisprudence." *The Modern Law Review* 82, no. 1 (2019): 159–79.

Tamanaha, Brian Z. "Understanding Legal Pluralism: Past to Present, Local to Global." *Sydney Law Review* 30, no. July (2007): 375–411.

Tamanaha, Brian Z. "Understanding Legal Realism." *Texas Law Review* 87, no. 4 (2009): 731–86.

Tarski, Alfred. *Introduction to Logic and to the Methodology of Deductive Sciences*. Edited by Jan Tarski. 4th ed. Oxford University Press, 1994.

Taswell-Langmead, Thomas Pitt. *Constitutional History: A Textbook for Students and Others*. 1st ed. Stevens & Haynes, 1875.

Taswell-Langmead, Thomas Pitt. *English Constitutional History: From the Teutonic Conquest to the Present Time*. Edited by CHE Carmichael. 3rd ed. Stevens & Haynes, 1880.

Taswell-Langmead, Thomas Pitt. *English Constitutional History: From the Teutonic Conquest to the Present Time*. Edited by Coleman Phillipson. Sweet & Maxwell, Ltd., 1919.

Taylor, C. "Sir John Fortescue and the French Polemical Treatises of the Hundred Years War" 114, no. 455 (1999): 112–29. http://eprints.whiterose.ac.uk/46960/.

Taylor, Hannis. *The Origin and Growth of the English Constitution*. Vol. 1. Houghton, Mifflin and Company, 1889.

Taylor, Hannis. *The Origin and Growth of the English Constitution*. Vol. 2. Houghton, Mifflin and Company, 1898.

Lord Tennyson, Alfred. *Poems and Plays*. Edited by T Herbert Warren and Frederick Page. Oxford University Press, 1971.

Terry, Benjamin. "Review: The English Constitution - George Burton Adams." *The American Historical Review* 18, no. 3 (1913): 567–71.

Teubner, Gunther. "Fragmented Foundations: Societal Constitutionalism beyond the Nation State." In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 327–41. Oxford University Press, 2010.

Teubner, Gunther. "'Global Bukowina': Legal Pluralism in the World Society." In *Global Law Without a State*, edited by Gunther Teubner, 3–28. Dartmouth, 1997.

Teubner, Gunther. "The Two Faces of Janus: Rethinking Legal Pluralism." *Cardozo Law Review* 13 (1991): 1443–62.

Thomas, Peter DG. "'Thoughts on the British Constitution' by George III in 1760." *Historical Research* 60, no. 143 (1987): 361–63.

Thormann, Janet. "The Anglo-Saxon Chronicle Poems and the Making of the English Nation." In *Anglo-Saxonism and the Construction of Social Identity*, edited by Allen J Frantzen and John D Niles, 60–85. University Press of Florida, 1997.

Thorne, SE. “Review: English Constitutional Ideas in the Fifteenth Century, SB Chrimes.” *Harvard Law Review* 50, no. 5 (1937): 848–50.

Thornhill, Chris. *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*. Cambridge University Press, 2011.

Tierney, Brian. “Vitoria and Suarez on Ius Gentium, Natural Law, and Custom.” In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, edited by Amanda Perreau-Saussine and James Bernard Murphy, 101–24. Cambridge University Press, 2007.

Tilly, Charles. *Coercion, Capital, and European States, AD 990-1992*. 2nd ed. Blackwell Publishers, 1992.

Timasheff, Nicholas Sergeyevitch. *An Introduction to the Sociology of Law*. Harvard University Press, 1939.

Tocqueville, Alexis de. *Democracy in America*. Edited by JP Mayer. Translated by George Lawrence. Doubleday & Co., Inc., 1969.

Toller, T Northcote, ed. *An Anglo-Saxon Dictionary. Supplement.* Henry Frowde, 1921.

Tomasello, Michael. “Cultural Transmission in the Tool Use and Communicatory Signaling of Chimpanzees?” In *“Language” and Intelligence in Monkeys and Apes: Comparative Developmental Perspectives*, edited by Sue Taylor Parker and Kathleen Rita Gibson, 274–311. Cambridge University Press, 1990.

Tomkins, Adam. *Our Republican Constitution*. Hart Publishing, 2005.

Tout, Thomas Frederick. *Chapters in the Administrative History of Mediaeval England*. Vol. 3. Longmans, Green and Co., 1928.

Tout, Thomas Frederick. “The ‘Communitas Bacheleriae Angliae.’” *English Historical Review* 17, no. 65 (1902): 89–95.

Townend, Peter, ed. *Burke’s Genealogical History of the Peerage, Baronetage, and Knightage*. 105th ed. Burke’s Peerage Ltd., 1970.

Tribe, Laurence H. “The Idea of the Constitution: A Metaphor-Morphosis.” *Journal of Legal Education* 37, no. 2 (1987): 170–73.

Trivers, Robert. *Social Evolution*. The Benjamin/Cummings Publishing Company, Inc., 1985.

Tulving, Endel. “Episodic Memory: From Mind to Brain.” *Annual Review of Psychology* 53 (2002): 1–25.

Tulving, Endel. “Introduction to Memory.” In *The New Cognitive Neurosciences*, edited by MS Gazzaniga, 2nd ed., 727–32. MIT Press, 2000.

Tumin, Melvin. “The Functionalist Approach to Social Problems.” *Social Problema* 12, no. 4 (1965): 379–88.

Turner, GJ. “The Minority of Henry III. Part I.” *Transactions of the Royal Historical Society* 18 (1904): 245–95.

Turner, GJ. “The Minority of Henry III. Part II.” *Transactions of the Royal Historical Society* 1 (1907): 205–62.

Turner, John C. “Towards a Cognitive Redefinition of the Social Group.” In *Social Identity and Intergroup Relations*, edited by Henri Tajfel, 15–40. Cambridge University Press, 1982.

Turner, John C, Michael A Hogg, Penelope J Oakes, Stephen D Reicher, and Margaret S Wetherell. *Rediscovering the Social Group: A Self-Categorization Theory*. Basil Blackwell, 1987.

Turpin, CC. “The Reception of Roman Law.” *Irish Jurist* 3, no. 1 (1968): 162–74.

Turpin, Colin, and Adam Tomkins. *British Government and the Constitution: Text and Materials*. 7th ed. Cambridge University Press, 2011.

Twomey, Anne. “Changing the Rules of Succession to the Throne.” *Public Law* Apr (2011): 378–401.

Tyerman, Christopher. *How to Plan a Crusade: Reason and Religious War in the High Middle Ages*. Penguin Books, 2015.

Tyler, James Endell. *Henry of Monmouth: Or, the Memoirs of the Life and Character of Henry the Fifth*. Vol. 2. Richard Bentley, 1838.

Tylor, Edward Burnett. *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art, and Custom*. 6th ed. Vol. I & II. John Murray, 1920.

Tylor, Edward Burnett. *Researches into the Early History of Mankind and the Development of Civilization*. 2nd ed. John Murray, 1870.

Ullmann, Walter. *Principles of Government and Politics in the Middle Ages*. 3rd ed. Methuen & Co. Ltd., 1974.

Umali, Violeda A., and Emerson S. Bañez. “Evolving Democracy: A Memetic Analysis of the Latest Proposal for Constitutional Change in the Philippines.” In *Political Marketing: Strategic “Campaign Culture,”* edited by Kostas Gouliamos, Antonis Theocharous, and Bruce I. Newman, 74–96. Routledge, 2014.

Unger, Roberto Mangabeira. *Law in Modern Society: Toward a Criticism of Social Theory*. The Free Press, 1976.

Valente, Claire. “The Deposition and Abdication of Edward II.” *The English Historical Review* 113, no. 453 (1998): 852–81.

Varela, FG, HR Maturana, and R Uribe. “Autopoiesis: The Organization of Living Systems, Its Characterization and a Model.” *Currents in Modern Biology* 5, no. 4 (1974): 187–96.

Vattel, Emer de. *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns [1758], with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*. Edited by Béla Kapossy and Richard Whatmore. Translated by Thomas Nugent. Liberty Fund, Inc., 2008.

Verdon, Michel. “Descent: An Operational View.” *Man* 15, no. 1 (1980): 129–50.

Vermeule, Adrian. “Common Law Constitutionalism and the Limits of Reason.” *Columbia Law Review* 183 (2007): 1–36.

Vermeule, Adrian. *The System of the Constitution*. Oxford University Press, 2012.

Vickers, Kenneth H. *England in the Later Middle Ages*. 7th ed. Aberdeen University Press, 1950.

Vickers, KH. *Humphrey, Duke of Gloucester: A Biography*. Archibald Constable & Co. Ltd., 1907.

Vilaça, Guilherme Vasconcelos. “From Hayek’s Spontaneous Orders to Luhmann’s Autopoietic Systems.” *Studies in Emergent Order* 3 (2010): 50–81.

Vincent, George Edgar. “The Rivalry of Social Groups.” *American Journal of Sociology* 16, no. 4 (1911): 469–84.

Vincent, Nicholas. *Peter Des Roches: An Alien in English Politics*. Cambridge University Press, 1996.

Vinogradoff, Paul. *Roman Law In Mediaeval Europe*. Harper & Brothers, 1909.

Vugt, Mark van, and Rob Kurzban. “Cognitive and Social Adaptations for Leadership and Followership: Evolutionary Game Theory and Group Dynamics.” In *Evolution and the Social Mind: Evolutionary Psychology and Social Cognition*, edited by Joseph P Forgas, Martie G Haselton, and William von Hippel. Psychology Press, 2007.

Wacks, Raymond. *Philosophy of Law: A Very Short Introduction*. Oxford University Press, 2006.

Wade, HWR. “The Basis of Legal Sovereignty.” *The Cambridge Law Journal* 13, no. 2 (1955): 172–97.

Wade, William. “The Crown, Ministers and Officials: Legal Status and Liability.” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 23–32. Oxford University Press, 1999.

Wagner, Nils-Frederic, and Georg Northoff. “A Fallacious Jar? The Peculiar Relation between Descriptive Premises and Normative Conclusions in Neuroethics.” *Theoretical Medicine and Bioethics* 36, no. 3 (2015): 215–35.

Wahl, Rainer. “In Defence of ‘Constitution.’” In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 220–42. Oxford University Press, 2010.

Wain, John, ed. *The Oxford Library of English Poetry*. Vol. 3. Guild Publishing London, 1990.

Waldron, Jeremy. “Is the Rule of Law an Essentially Contested Concept (In Florida)?” *Law and Philosophy* 21, no. 2 (2002): 137–64.

Walker, Neil. “Beyond the Holistic Constitution?” In *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, 291–308. Oxford University Press, 2010.

Walker, Neil. “Constitutional Pluralism Revisited.” *European Law Journal* 23, no. 3 (2016): 333–55.

Walker, Neil. “Our Constitutional Unsettlement.” *Public Law*, 2014, 529–48.

Walker, Neil. “The Idea of Constitutional Pluralism.” *Modern Law Review* 65, no. 3 (2002): 317–59.

Walker, Reena H, Andrew J King, J Weldon McNutt, and Neil R Jordan. “Sneeze to Leave: African Wild Dogs (Lycaon Pictus) Use Variable Quorum Thresholds Facilitated by Sneezes in Collective Decisions.” *Proc. R. Soc. B*, 2017, 284: 20170347.

Wallace, Alfred Russel. *Darwinism: An Exposition of the Theory of Natural Selection with Some of Its Applications*. Macmillan & Co., 1890.

Wallace, Alfred Russel. *Contributions to the Theory of Natural Selection: A Series of Essays*. Macmillan & Co., 1871.

Wallace, Alfred Russel. *The Malay Archipelago: The Land of the Orang-Utan and the Bird of Paradise*. 5th ed. Macmillan & Co., 1874.

Wallace, Elisabeth. “The Political Ideas of the Manchester School.” *University of Toronto Quarterly* 29, no. 2 (1960): 122–38.

Wallace-Hadrill, John Michael. *Early Germanic Kingship in England and on the Continent*. Oxford University Press, 1971.

Wallas, Graham. *Human Nature in Politics*. 3rd ed. Constable and Company Ltd., 1927.

Walsh, WH. “Kant’s Concept of Practical Reason.” In *Practical Reason*, edited by Stephan Körner, 189–212. Basil Blackwell, 1974.

Ward, Emily Joan. “Child Kingship in England, Scotland, France, and Germany, c.1050 - c.1250.” University of Cambridge, 2018.

Warntjes, Immo. “Regnal Succession in Early Medieval Ireland.” *Journal of Medieval History* 30 (2004): 377–410.

Warren, Wilfred Lewis. *Henry II*. Methuen, 1977.

Warren, Wilfred Lewis. *King John*. Peregrine Books, 1966.

Wassenhoven, Dominik. “The Role of Bishops in Anglo-Saxon Succession Struggles, 955 × 978.” In *Leaders of the Anglo-Saxon Church: From Bede to Stigand*, 97–107. Boydell & Brewer, 2012.

Watkins, JWN. “Historical Explanation in the Social Sciences.” *The British Journal for the Philosophy of Science* 8, no. 30 (1957): 104–17.

Watkins, JWN. “Ideal Types and Historical Explanation.” *The British Journal for the Philosophy of Science* 3, no. 9 (1952): 22–43.

Watkins, JWN. “Methodological Individualism: A Reply.” *Philosophy of Science* 22, no. 1 (1955): 58–62.

Watson, Alan. *The Evolution of Law*. The John Hopkins University Press, 1985.

Watson, Alan. “The Evolution of Law: Continued.” *Law and History Review* 5, no. 2 (1987): 537–70.

Watson, Nicholas. *Richard Rolle and the Invention of Authority*. Cambridge University Press, 1991.

Watt, DER. “The Minority of Alexander III of Scotland.” *Transactions of Royal Historical Society* 21, no. 5th Series (1971): 1–23.

Watt, JA. “Spiritual and Temporal Powers.” In *The Cambridge History of Medieval Political Thought, c.350-c.1450*, edited by JH Burns, 367–423. Cambridge University Press, 1988.

Watt, JA. “The Theory of Papal Monarchy in the Thirteenth Century: The Contribution of the Canonists.” *Traditio* 20 (1964): 179–317.

Watts, John. *Henry VI and the Politics of Kingship*. Cambridge University Press, 1999.

Watts, John. “Usurpation in England: A Paradox of State Growth.” In *Coups d’État à La Fin Du Moyen Age? Aux Fondements Du Pouvoir Politique En Europe Occidentale*, edited by François Foronda, Jean-Philippe Genêt, and José Manuel Nieto Soria, 115–30. Casa de Velézquez, 2005.

Waugh, Scott L. “Book Review: The Origins of the English Parliament, 924–1327 by JR Maddicott.” *The English Historical Review* 126, no. 520 (2011): 636–38.

Waugh, WT. “The Great Statute of Praemunire.” *The English Historical Review* 37, no. 146 (April 1922): 173–205.

Waugh, WT. “The Great Statute of Praemunire.” *History* 8, no. 32 (1924): 289–92.

Weber, Barret. “Book Review: Niklas Luhmann, Theory of Society, Volume 1.” *The Canadian Journal of Sociology* 38, no. 4 (2013): 680–83.

Weber, Max. *Economy and Society: An Outline of Interpretative Sociology*. Edited by Guenther Roth and Claus Wittich. Vol. 1. University of California Press, 2013.

Weber, Max. *Economy and Society: An Outline of Interpretative Sociology*. Edited by Guenther Roth and Claus Wittich. Vol. 2. University of California Press, 2013.

Webster, Noah. “Bills of Rights (1788).” In *A Collection of Essays and Fugitiv Writings on Moral, Historical, Political, and Literary Subjects*. Thomas and Andrews, 1790.

Weir, Alison. *Britain’s Royal Families: The Complete Genealogy*. Vintage Books, 2008.

Wells, John Edwin. *A Manual of the Writings in Middle English, 1050-1400*. Yale University Press, 1916.

West, Francis. *The Justiciarship in England 1066-1232*. Cambridge University Press, 1966.

West, ML. “The Cosmology of ‘Hippocrates’, De Hebdomadibus.” *The Classical Quarterly* 21, no. 2 (1971): 365–88.

West, Ranyard. *International Law and Psychology. Two Studies: The Intrusion of Order. Conscience and Society.* Oceana Publications Inc., 1974.

West, Ranyard. “Law and Psychology.” *Ethics* 54, no. 2 (1944): 146–48.

Wexler, Bruce E. *Brain and Culture: Neurobiology, Ideology, and Social Change*. The MIT Press, 2006.

Wheare, Kenneth Clinton. *Modern Constitutions*. Oxford University Press, 1951.

Wheeler, GH. “Gildas de Excidio Britanniae, Chapter 26.” *The English Historical Review* XLI, no. CLXIV (1926): 497–503.

White, Leslie. “Man’s Control over Civilization: An Anthropocentric Illusion.” *Scientific Monthly* 66, no. 3 (1948): 235–47.

White, Leslie. “The Concept of Culture.” *American Anthropologist* 61, no. 2 (1959): 227–51.

Whitehead, Alfred North. *The Aims of Education and Other Essays*. Ernest Benn Ltd., 1962.

Whitehead, Alfred North, and Bertrand Russell. *Principia Mathematica*. 2nd ed. Vol. 1. Cambridge University Press, 1963.

Whitelock, Dorothy. *The Beginnings of English Society*. 2nd ed. Penguin Books Ltd, 1974.

Whiten, Andrew, Christine A Caldwell, and Alex Mesoudi. “Cultural Diffusion in Humans and Other Animals.” *Current Opinion in Psychology* 8 (2016): 15–21.

Whiten, Andrew, Nicola Mcguigan, Sarah Marshall-Pescini, and Lydia M Hopper. “Emulation, Imitation, Over-Imitation and the Scope of Culture for Child and Chimpanzee.” *Phil. Trans. R. Soc. B* 364 (2009): 2417–28.

Wilde, Marc De. “The Dark Side of Institutionalism: Carl Schmitt Reading Santi Romano.” *Journal of Ethics & Global Politics* 11 (2018): 12–24.

Wilkie, J.S. “The Idea of Evolution in the Writings of Buffon.—I.” *Annals of Science* 12, no. 1 (1956): 48–62.

Wilkie, J.S. “The Idea of Evolution in the Writings of Buffon.—II.” *Annals of Science* 12, no. 3 (1956): 212–27.

Wilkie, J.S. “The Idea of Evolution in the Writings of Buffon.—III.” *Annals of Science* 12, no. 4 (1956): 255–66.

Wilkinson, Bertram. *Constitutional History of England in the Fifteenth Century (1399-1485), with Illustrative Documents*. Longmans, Green and Co., 1964.

Wilkinson, Bertram. *The Constitutional History of England, 1216-1399: Politics and the Constitution, 1216-1307*. Vol. 1. Longmans, Green and Co., 1948.

Wilkinson, Bertram. *The Constitutional History of England, 1216-1399: Politics and the Constitution, 1307-1399*. Vol. 2. Longmans, Green and Co., 1952.

Wilkinson, Bertram. *The Constitutional History of England, 1216-1399: The Development of the Constitution, 1216-1399*. Vol. 3. Longmans, Green and Co., 1958.

Wilkinson, Bertram. *The Later Middle Ages in England, 1216-1485*. Longman, 1969.

Wilkinson, Bertram. “The Deposition of Richard II and the Accession of Henry IV.” *English Historical Review* 54, no. 214 (1939): 215–39.

Willard, James F, and William A Morris, eds. *The English Government at Work, 1327-1336*. Vol. 1. The Mediaeval Academy of America, 1940.

William Jones. *The Poetical Works of Sir William Jones*. Edited by Thomas Park. Vol. 1. J Sharpe, 1808.

Williams, Ann. “Some Notes and Considerations on Problems Connected with the English Royal Succession, 860-1066.” In *Proceedings of the Battle Conference on Anglo-Norman Studies*, edited by R Allen Brown. The Boydell Press, 1978.

Williams, E Carleton. *My Lord of Bedford, 1389-1435: Being a Life of John of Lancaster First Duke of Bedford, Brother of Henry V, and Regent of France*. Longmans, 1963.

Williams, Glanville L "International Law and the Controversy Concerning the Word 'Law.'" *British Year Book of International Law* 22 (1945): 146–63.

Williams, Howard. "The End of History in Hegel and Marx." *The European Legacy* 2, no. 3 (1997): 557–66.

Williams, Penry. *The Later Tudors: England, 1547-1603*. Oxford University Press, 1995.

Williams, Raymond. *Culture and Society, 1780-1950*. Penguin Books, 1963.

Williamson, James A. *The Tudor Age*. 3rd ed. Longman Group Ltd., 1979.

Williamson, Mary F., and Tom Sharp. *Just a Larger Family: Letters of Marie Williamson from the Canadian Home Front,1940–1944*. Wilfrid Laurier Univ. Press, 2011.

Williston, Samuel. "History of the Law of Business Corporations before 1800. I." *Harvard Law Review* 2, no. 3 (1888): 105–24.

Williston, Samuel. "History of the Law of Business Corporations before 1800. II. (Concluded)." *Harvard Law Review* 2, no. 4 (1888): 149–66.

Willms, Lothar. "On the IE Etymology of Greek (w)Anax." *Glotta* 86 (2010): 232–71.

Wilson, Edward O. *Consilience: The Unity of Knowledge*. Thorndike Press, 1998.

Wilson, Woodrow. "What Is Progress? (1913)." In *The New Freedom: A Call for the Emancipation the Generous Energies of a People*, edited by William Bayard Hale, 33–54. Doubleday, Page, & Co., 1918.

Withycombe, EG. *The Oxford Dictionary of English Christian Names*. 3rd ed. Oxford University Press, 1977.

Witt, Ulrich. "The Theory of Societal Evolution: Hayek's Unfinished Legacy." In *Hayek, Co-Ordination and Evolution: His Legacy in Philosophy, Politics, Economics, and the History of Ideas*, edited by Jack Birner and Rudy van Zijp, 178–89. Routledge, 1994.

Wohlmuth, Paul C. "Jurisprudence and Memory Research." *Journal of Contemporary Legal Issues* 8 (1997): 249–86.

Wolffe, Bertram. *Henry VI*. Eyre Methuen, 1981.

Wolfram, Herwig. "The Shaping of the Early Medieval Kingdom." *Viator: Medieval and Renaissance Studies* 1 (1971).

Wolpert, Daniel. "The Real Reason for Brains." *TED Talks*, 2011. https://www.ted.com/talks/daniel_wolpert_the_real_reason_for_brains?language=en.

Wood, David. *How Children Think and Learn*. 2nd ed. Blackwell Publishers, 1998.

Wormuth, Francis D. “Review: Medieval Political Ideas, Ewart Lewis.” *The Western Political Quarterly* 9, no. 4 (1956): 1009–10.

Wormuth, Francis D. “The Dilemma of Jurisprudence.” *The American Political Science Review* 35, no. 1 (1941): 44–52.

Yilmaz, Ihsan. “The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England.” *Journal of Ethnic and Migration Studies* 28, no. 2 (2002): 343–54.

Yonge, Charlotte M. *History of Christian Names*. Macmillan & Co., 1884.

Yorke, Barbara. “Edward as Ætheling.” In *Edward the Elder, 899-924*, edited by NJ Higham and DH Hill, 25–39. Routledge, 2001.

Yorke, Barbara. “Joint Kingship in Kent c. 560 to 785.” *Archaeologia Cantiana*, 1983.

Yorke, Barbara. *Kings and Kingdoms of Early Anglo-Saxon England*. Routledge, 1990.

Zaluski, Wojciech. *Evolutionary Theory and Legal Philosophy*. Edward Elgar Publishing Limited, 2009.

Zaluski, Wojciech. “Evolutionary View of Human Nature and the Goals of Law.” *EUI Working Papers*, 2008.

Zaluski, Wojciech. *Law and Evil: The Evolutionary Perspective*. Edward Elgar Publishing Limited, 2018.

Zamboni, Mauro. “From ‘Evolutionary Theory and Law’ to a ‘Legal Evolutionary Theory.’” *German Law Journal* 9, no. 4 (2008): 515–46.

Zane, John Maxcy. *The Story of Law*. Edited by Charles J Reid Jr. 2nd ed. Liberty Fund, Inc., 1998.

Zimmern, Alfred Eckhard. *The Greek Commonwealth: Politics and Economics in Fifth-Century Athens*. Oxford University Press, 1911.

Zippelius, Reinhold. *Kleine Deutsche Verfassungsgeschichte: Vom Frühen Mittelalter Bis Zur Gegenwart*. 7th ed. CH Beck, 2006.

Zywicki, Todd J. “Evolutionary Psychology and the Social Sciences.” *Law and Economics Working Paper 00-35 (George Mason University)*, 2000.

Zywicki, Todd J. “The Nature of the State and the State of Nature: A Comment on Grady & McGuire’s Paper.” *Journal of Bioeconomics* 1 (1999): 241–61.