SOME RECENT WORKS ON THE POLITICAL THEORIES
OF THE MEDIEVAL CANONISTS

During the past decade there has been a significant shift of emphasis in work on the medieval canonists. The traditional studies on the literary history of canonistic sources and on problems of specifically ecclesiastical jurisprudence continue to flourish, and, indeed, have been stimulated by the plans for a new edition of Gratian’s Decretum; but alongside this work, and complementary to it, there has appeared a new trend, a lively interest in the content and influence of canonistic doctrine concerning public law and political theory. This trend, moreover, shows all the international diffusion — and even, perhaps, something of the interplay of national susceptibilities — that its exponents have discerned in the work of the medieval canonists themselves. It is especially interesting that notable contributions have come from England and the United States as well as from the more established centers of canonistic studies.

The political aspects of the canonists’ teaching have never been entirely neglected of course. Pioneer workers like Maassen and Schulte often found occasion to print relevant material in their textual studies and, more recently, writers on medieval political theory like the Carlyles, Riccière, Leclerc, have all made some limited use of canonistic sources. The work of the past few years has been marked by a more systematic treatment of broad tracts of canonistic thought, and by a more painstaking investigation of manuscript sources, accompanied by the publication of many new texts. It has also been marked — and this is its very raison d’être — by a new awareness of the vitality and importance of canonistic thought on major questions of ecclesiastical and secular government. The problems which have recently engaged the attention of scholars in this field are not peripheral ones, and in drawing together the threads of recent research one is not concerned merely with a sort of abstruse ‘legal

* It seems, however, not absolutely certain that the title Περὶ ἀποστασίας βίου really signifies ‘On Renunciation of Life’ and not rather ‘On a Life of Renunciation.’ See W. Jaeger, op. cit. 76ff., for the ascetic use of the terms ὁ κατ’ ἀπετίθην βίος. ὁ κατὰ φιλοσοφίαν βίος. Further philological investigation of this point seems desirable.
archaeology’; it is a question rather of assessing the results of a fresh approach to the great central issues of medieval politics. Among those issues the problem of Regnum and Sacerdotium remains a principal focal point of research, but recent workers have gone beyond this familiar field — or battlefield — to investigate the canonistic contribution to the medieval idea of sovereignty in all its aspects. There are three main themes that are being explored, each with its own unresolved problems. We might define them as the problems of Regnum and Sacerdotium, of Regnum and Imperium, of Regnum and Rex, and it will be convenient to review the recent work under those headings.

All these topics, the relations of Church and State, the external organization of states, the internal sovereignty of states, involve problems that are very much alive in the modern world, and that fact may help to explain both the growing interest in canonistic teaching concerning them and the sharp divergencies in current interpretations of that teaching. Such divergencies, however, would also arise almost inevitably from the nature of the source material itself, and one can hardly explain the current controversies without some account of the difficulties inherent in handling medieval canonistic texts. It happens that one of the most able scholars in the field, Fr. Alfons M. Stickler, has devoted his last article to precisely this point and so a summary of his conclusions will provide a most suitable introduction to a survey of the main problems that are being discussed.

Fr. Stickler sets out to provide rules of guidance for a student embarking on research into the canonists’ theories of Church and State, and in laying down sound precepts he indicates very plainly (by the argument a contrario sensu as the canonists would say) the pitfalls that gape for the unwary novice. He puts forward six ‘methodological considerations’ which seem important enough to be summarized seriatim. (1) In considering a canonistic text the student must pay careful attention to the content of the law that was being glossed. The canonists did show great freedom in interpretation, in marshalling opposing arguments, in suggesting particular exceptions to general rules, but they did not feel free to maintain a personal position in defiance of established law. (2) It is essential to take into account the literary form of any particular text. For instance, Notabilia, observations introduced by some expression like arg(umentum), no(ta), ita habes, did not necessarily reflect a personal opinion of the author. He was merely pointing out that the text could be used in support of a certain position without committing himself. Others forms of canonistic argument presented the case for and against a given proposition, but, again, without always reaching a definite conclusion. Only when there is such a conclusion can one be sure of the author’s own opinion. (3) Neither in the Corpus Iuris Canonici nor in the glosses on it does one find any single section devoted to a systematic exposition of public law. The various problems arose in different contexts, and sometimes the most important canonistic glosses were evoked by a chance word or phrase in some text dealing with a quite different issue. Therefore it is necessary to study the whole of a canonist’s work to arrive at a just appreciation of his view on any disputed point. Moreover, ‘theory without practice is like a vessel without content’; one cannot arrive at a balanced view of the canonists’ teaching on Church and State merely

by quoting statements of abstract principle from their work. It is necessary also to consider what concrete applications of legislative, judicial, and executive power they envisaged. (4) To evaluate the contribution of an author to the growth of canonistic thought one must have a clear understanding, not only of his own doctrines, but also of those of his predecessors and contemporaries and successors. (5) It is also useful to consider the affiliation of the author to a particular school of canonistic thought, of which three main ones have been distinguished in the twelfth century, that of Bologna, that of Paris, and the Anglo-Norman school. Where there was a strong international element, as at Bologna, the nationality of a canonist may also be a significant factor. (6) For a complete and perfect understanding of canonistic teachings on Church and State one must consider the contributions of contemporary theology, philosophy, and especially of Roman legal science; but, so far as theology and philosophy are concerned, one must also be on guard against over-estimating the influence of their abstract conceptions on the concrete and practical thought of the canonists.

Of all these various considerations No. 2 is perhaps the most important. It may serve to remind us that, by an adroit selection of texts, one can ‘prove’ well-nigh anything out of any of the major canonistic works. For an objective enquiry it is essential to bear in mind that the innumerable arguments advanced in the course of a canonistic gloss do not necessarily represent the opinions of the author or, sometimes, of anyone else. There is no field of study where patience and docility to the texts are more essential; and even when those qualities are not lacking there is still room for sharp differences of opinion concerning the teachings of individual canonists, and the general trends of canonistic thought.

I. Regnum and Sacerdotium

Such differences of opinion are very much in evidence in recent work on the canonists’ theories of Church and State. The problems involved can be introduced by a description of one of the most lively contributions to the debate, Dr. Walter Ullmann’s Medieval Papalism. This book presents a vigorous and trenchant statement of the view that the medieval canonists were primarily responsible for the growth of the theory of political omnipotence of the pope as Boniface VIII propounded it in Unam Sanctam (p. 11). After an introduction emphasizing the vitality and prestige of canonistic scholarship in the high Middle Ages — all the participants in the discussion are at any rate agreed on that point — Dr. Ullmann begins his argument with an analysis of canonistic ideas on natural law. He distinguishes several different conceptions: natural law as the mere instinct of all ‘animalic creatures’; as the moral judgments of the natural reason; as the precepts of the Old and New Testaments, in which sense natural law was equated with divine law. This con-

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1 W. Ullmann, Medieval Papalism: The Political Theories of the Medieval Canonists (London 1949).

ception of natural law as a set of Christian principles 'was in fact the chief tenet of the canonists' (p. 47) and, accordingly, 'the natural (divine) law was throughout conceived of as unalterable and immutable' (p. 46). All this, however, turns out to be only a sort of elaborate range-finding for the artillery blast that follows in the next chapter. Before the omnipotence of the pope the immutability of the natural law was 'but a hollow name.' The pope could do whatever God could do; the canonists, Dr. Ullmann holds, set him above natural law just as the civilians set the emperor above human law. This assertion is supported by examples of canonistic teaching on the pope's power to deprive a person of his 'natural' liberty, dissolve marriages, absolve from oaths.

Moreover, the canonists claimed 'not only a supremacy of the pope in spiritual matters ... but also, and to an equal degree, his supremacy in all temporal matters' (p. 77). Dr. Ullmann therefore undertakes an analysis of the 'transcendental ideas' upon which this claim was based, suggesting that, for the canonists, the struggle between Church and State was simply 'the political aspect of the ancient antagonism between mind and matter' (p. 81). The ecclesiastical power was identified with mind, the civil power with matter and 'the inequality of mind and matter was faithfully reflected in the corresponding inequality of pope and emperor' (p. 82). But it was not merely a question of inequality. The temporal power existed for the sake of the spiritual, and so 'the spiritual authority had complete and unrestricted power over the temporal' (p. 84). The emperor was a mere instrument of the pope, delegated to perform those tasks that were 'of too mean a character,' too 'vile,' too 'sordid,' too 'menial' to be dealt with by the spiritual power. This conception of the relations of mind and body was derived from Aristotle's De anima, supported by Holy Writ, with the Donation of Constantine providing a useful auxiliary argument on the level of human law for the canonists' position. The practical corollaries of that position were the exemption of clerics and ecclesiastical affairs from all secular authority, and the extension of the Church's jurisdiction over 'every conceivable aspect of human life' (p. 107). (Various examples are given of the extension of spiritual jurisdiction beyond the purely ecclesiastical sphere, e.g. to cases involving dowries, wills, legitimation of children, all criminal cases — since they involved sin —, breaches of peace treaties, temporal disputes between kings.)

Dr. Ullmann goes on to argue that the jurisdiction of the pope was not limited to Christendom but extended over the whole world, and to examine the im-


4 Dr. Ullmann strongly emphasizes an ideological conflict between civilians and canonists, the one school exalting the emperor, the other the pope. The theme is developed further in his article, 'Honorius III and the Prohibition of Legal Studies,' The Juridical Review 60 (1948) 177-86. For another interpretation of Honorius' attitude see S. Kuttner, 'Papst Honorius III und das Studium des Zivilrechts,' Festschrift für Martin Wolff (Tübingen 1952) 79-101.

5 To the present writer the weakest point in the whole argument is the lack of canonistic documentation for these assertions.
Applications of this view for the juristic theory of the crusade. He returns in his last chapter to the core of his argument, describing in greater detail the development of the theory that the emperor received his authority from the pope as a mere subordinate agent. According to Dr. Ullmann this theory took root during the pontificate of Innocent III. Before that time the views of Innocent’s old teacher, Huguccio, had prevailed, and Huguccio held that, since the time of Christ, spiritual and temporal power had been divided ‘in order to promote humility and prevent pride.’ The emperor, therefore, did not receive the power of the sword from the pope but from the princes who elected him; papal consecration conferred only the title of emperor, not the reality of power. These views were repeated by the Spaniard Laurentius and by the Englishman Ricardus; their decisive defeat was due to the vigorous pontificate of Innocent himself and to the influence of another Englishman, Alanus, ‘who may well be considered the scientific framer of the extreme papalist point of view’ (p. 147). Sharply rejecting the dualist position of Huguccio, Alanus maintained that the pope conferred the gladius materialis on the emperor, for the Church formed one body and it ought to have only one head. Christ possessed both swords and he conferred them both on Peter; if He had not done so it would have been impossible for Pope Zacharias to have deposed King Childeric. In fact, the pope as iudex ordinarius ... quoad spiritualia et quoad temporalia could depose the emperor or any other temporal ruler, or even exercise temporal power himself. Alanus did not create this theory ex nihilo but it was through his influence that it gained general currency; his views were repeated by Tancred and afterwards became universally accepted among the canonists. It only remained for later glossators like Bernardus Parmensis, Goffredus Tranensis, Innocent IV, Hostiensis to strengthen the scriptural and historical basis of the argument — and for the popes to put it into practice in their relations with emperors and kings.

There have been a number of recent studies which, without going over precisely the same canonistic ground as Dr. Ullmann, suggest different interpretations of some of the papal documents that he cites, and there has been

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6 M. Maccarrone, *Chiesa e stato nella dottrina di papa Innocenzo III* (Lateranum N.S. 6 III-lv; Rome 1940). Maccarrone argues that all Innocent III’s claims on behalf of the papacy and all his interventions in secular affairs were consistent with the dualist doctrine taught by Huguccio. His views were accepted by A. Fliche, in *La Chrétienté romaine* (1198-1274) (Fliche and Martin, Histoire de l’Église 10; Paris 1950) 30-43. Maccarrone has also discussed the expression *Vicarius Christi*, much emphasized by Ullmann, and concludes that, for Innocent III, it did not imply a claim to temporal power, though it acquired a hierocratic connotation later in the thirteenth century, ‘Il papa •Vicarius Christi•,’ *Miscellanea Pio Paschini* (Rome 1949) 427-500; *Vicarius Christi: Storia del titolo papale* (Lateranum N.S. 18 I-lv; Rome 1952). On papal *plenitudo potestatis* see G. Ladner, ‘The Concepts of •Ecclesia• and •Christianitas• and Their Relation to the Idea of Papal •Plenitudo Potestatis• from Gregory VII to Boniface VIII,’ *Miscellanea historiae pontificiae* 18 (Rome 1954) 49-77. Ladner maintains that in the papal letters of the thirteenth century *plenitudo potestatis* referred to the universal spiritual authority of the pope, together with his indirect power in temporal affairs and his direct lordship over the Papal States, but that it did not refer to direct universal temporal authority, as Ullmann claims. G. Le Bras has argued that even Boniface VIII took up a moderate and balanced position on the temporal power of the pope: ‘Boniface VIII, symphoniste et modérateur,’ in
one substantial review article challenging his interpretation of the canonistic doctrines themselves. Fr. Stickler offers a considerable number of detailed criticisms on particular points, and, besides this, he castigates Dr. Ullmann's whole method of enquiry.

The reader is bidden to accept a good many statements without any, or without adequate textual support. And where the texts are provided, this is usually done without any systematic criteria: without regard to the chronological order, without distinguishing the schools, or the respective importance, or the common acceptance of a view... This method is certainly not apt to give a correct impression of the communis opinio of the period... (p. 454).

Dr. Ullmann is especially blamed for having failed to investigate adequately the sources of Alanus' theories and for having consequently exaggerated his importance as a founder of the hierocratic doctrine. Altogether, a good deal of Fr. Stickler's criticism amounts to a complaint that Dr. Ullmann's work does not conform to the 'methodological criteria' that we have outlined. There is some truth in this, but it must be remembered that Medieval Papalism was composed as a course of lectures. They were very stimulating to those who heard them, and that was partly because, like another eminent legal historian, Dr. Ullmann availed himself of 'the lecturer's right to pick and choose, to be aphoristic.' He did not attempt or pretend to provide a detailed chronological history of the development of canonistic ideas. He presented instead a bold and vivid picture of the basic aspects of canonistic political thought, concentrating especially on the period of greatest vitality, the first half of the thirteenth century. Fr. Stickler's most damaging criticism, therefore, is that, precisely for that period, the whole picture is out of focus. To him 'it appears more than doubtful that from Alanus on both the canonists and the Curia abandoned the dualist theory which prevailed up till then.' He quotes a number of texts from Alanus, Tancred, and Hostiensis in support of this statement, but obviously, in the course of a review, could not embark on a synthesis that would reconcile them with the texts on which Dr. Ullmann relies, which certainly do seem to present the pope as a kind of universal overlord.

Mélanges d'histoire du moyen âge... Louis Halphen (Paris 1951). On the other hand, G. De Vergotti, like Ullmann, emphasizes the growing insistence on a direct power of the pope in temporal affairs in the decretals of the thirteenth century, Il diritto pubblico italiano nel secolo XII-XIV 1 (2nd ed. Milan 1954) 79-104. The development of the claim to lordship over all islands in the letters of the medieval popes has been traced by Luis Weckmann, Las Bulas Alejandro de 1493 y la Teoría Política del Papado Medieval (Mexico 1949).

7 A. M. Stickler, 'Concerning the Political Theories of the Medieval Canonists,' Traditio 7 (1949-51) 450-483.

8 e.g. that Dr. Ullmann has misunderstood the canonistic doctrine on papal dispensation in his chapter on 'The Pope and Natural Law'; that he has strained the meaning of his texts in presenting the canonists as merely contemptuous of temporal power and of the laity in general; that he has misrepresented the papal and canonistic teaching on appeals from a secular court to an ecclesiastical one.

9 In this connection Fr. Stickler points out that 'the characteristic utterances of Unam Sanctam can be found verbatim in two of Gratian's contemporaries, Hugh of St. Victor and Bernard of Clairvaux... ' (p. 457).
Fr. Stickler is content to observe that 'in this conflict of utterances there lies a real problem which may eventually be solved.' For an attempt at a full-scale alternative synthesis, presenting conclusions radically different from those of Dr. Ullmann, we must turn to a recent work of Professor Sergio Mochi Onory, _Fonti canonistiche dell' idea moderna dello stato_. Dr. Ullmann holds firmly at the center of his thought two ideas which should indeed always be present to students of medieval political theory — the idea of Christian society as a united organism; the idea of the primacy of the spiritual within that society. It is certainly true that, for the canonists, the temporal was inferior to the spiritual, but Dr. Ullmann takes it for granted that inferiority meant hierarchical subordination, and that that in turn meant utter subjection. It may be that, in emphasizing the unity of Christian society, he has oversimplified the subtleties of its articulation. This articulation of Christian society in all its aspects is precisely the theme that Mochi Onory has chosen to develop. His work spreads over all three departments into which our survey is divided, and we shall perhaps do an injustice to his closely interwoven arguments by separating them for purposes of analysis; but this seems the best way of comparing his conclusions in each field with those of other workers.

In the matter of Church and State his main contention — diametrically opposed to Dr. Ullmann's — is that canonistic doctrine respected the essential integrity of the secular power. Temporal rulers and their peoples were subject in spiritualities to the pope as head of the Church, but in the conduct of secular affairs the canonists conceded to them a sphere of _autonomia e sufficienza di vita_, to use the author's favorite phrase. Mochi Onory's work differs from Ullmann's in method as well as in conclusions. He has relied almost entirely on printed material whereas Ullmann based his work largely on manuscripts; and, unlike Ullmann again, he has attempted a chronological development, tracing the threads of canonistic thought decade by decade from the appearance of Gratian's _Decretum_. We can, therefore, illustrate from the texts cited in his work the main stages in the development of canonistic doctrine, and thus provide a historical background for the evaluation of Dr. Ullmann's conclusions as well as his own.

The best starting point is provided by a comment in the _Summa_ of Rufinus (1157-1159) on a text of St. Peter Damian, incorporated in the _Decretum_ and there attributed to Pope Nicholas II. In this text the saint, apparently paraphrasing Matthew 16.19, used the words, 'qui beato Petro aeternae vitae claviger me terreni simul et coelestis imperii iura commisit.' There seems no reason to suppose that Peter Damian intended anything but a reference to the familiar doctrine that sins forgiven by the apostle on earth would be forgiven in Heaven. Rufinus, however, suggested that _coeleste imperium_ referred to the clergy and spiritual affairs, _terrenum imperium_ to the laity and secular affairs.

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10 S. Mochi Onory, _Fonti canonistiche dell' idea moderna dello stato_ (Milan 1951). Mochi Onory died soon after his book was published, and it is an invidious task to criticize the work of a scholar who can no longer reply. But works of synthesis often advance our knowledge as much by the discussions they stimulate as by their own immediate contribution. Mochi Onory, with his enthusiasm for the canonists and their works, would surely have wished the discussion to continue.

11 Dist. 22 c.1.

12 _Fonti_ 87; 'Celeste imperium celestium militum i.e. clericorum universitatem cum
and thereby shaped the course of the whole subsequent controversy. He explained that the papal *ius terreni imperii* was expressed in two-fold fashion; the Pope confirmed the earthly power of the emperor by consecrating him, and subsequently imposed penances for his sins and granted absolution to him as to any other layman.

Summus itaque patriarcha quoad auctoritatem ius habet terreni imperii, eo scil. modo quia primum sua auctoritate Imperatorem in terreno regno consecrando confirmat, et post tam ipsum quam reliquos seculares istis secularibus abutentes, sola sua auctoritate pene addicit et ipsos eosdem post penitentes absolvit.13

This gloss contains the seeds of much future doctrine. The function of consecrating the emperor, in fact the heritage of a particular historical situation, was treated as an inherent part of the authority divinely conferred on Peter from the very beginning of the Church. Again, the power to judge the emperor *ratione peccati*, presented by Rufinus traditionally enough as simply a power to remit sin, would be shown to have far-reaching political implications once it became associated with the idea of a worldly *imperium* of the pope. Rufinus himself, however, went on to draw an important distinction between *auctoritas* and *amministratio* explaining that the pope could not actually exercise the temporal power that he confirmed in the emperor.14 Mochi Onory emphasizes this element in his teaching and feels able to conclude that Rufinus envisaged an effective division of powers in the Gelasian tradition.

In 1186, the *Summa Lipsiensis*, reflecting the movements of thought of the preceding generation, presented both a significant development of Rufinus’ argument and a clear statement of a sharply opposed point of view. The relevant gloss was again on the words, *terreni simul et coelestis imperii*. After repeating Rufinus’ suggestion that these words referred to a papal *imperium* over clergy and laity, the author of the *Summa* introduced into this interpretation of the power of the keys that other scriptural metaphor of the two swords which henceforth would become almost inextricably associated with it.

... *terreni simul et coelestis*. Celeste vocat Imperium celestium militum, ld est clericorum universitatem cum his, que ad eos pertinent. Terrenum regnum vocat homines seculares cum rebus secularibus. Per hoc ergo videtur, quod summus pontefex utrumque habet gladium... et quod ab eo suum habet imperator et quod posset deponi ab eo, si abutatur sua potestate ut XV. q. VI. Alius.15

Rufinus had written of consecration and confirmation, but here the pope was presented as the direct source of the emperor’s power, endowed also with the

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14 *Ibid.* ‘Ipse vero princeps post ipsum auctoritatem habet seculares regendi et preter ipsum officium amministrandi; etenim nec apostolicum secularia nec principem ecclesiasticum procurare oportet...’
15 *Fonti* 110 (*Summa ad Dist.* 22 c.1). 15 q.6 c.3 *Alius* referred to the ‘deposition’ of Childebert, king of the Franks, by Pope Zacharias.
authority to take away that power. At the end of the gloss it was added that those who held this opinion distinguished between auctoritas and administra-
tio and denied to the pope the right of actually administering secular affairs.\textsuperscript{18}

The author of the \textit{Summa Lipsiensis} did not commit himself to the support of this opinion however, and presented along with it a very different point of view. According to this second interpretation the emperor's power could not be derived from the pope since there had been emperors before there were popes: the real source of imperial power, under God, was the populus. The pope possessed both swords only in the sense that he exercised spiritual authority over the laity as well as over the clergy: his anointing of the emperor served only to confirm a power already conferred by election. The exercise of the spiritual authority could, however, have repercussions in the temporal sphere. When, for instance, the pope was said to have deposed a king, it meant that he had excommunicated the king and so caused his subjects to withdraw their allegiance from him.\textsuperscript{17}

We have here in embryo the two classical positions that later canonists would develop in more detail. Neither is quite uncompromising. Even the 'hierocratic' argument denied to the pope the normal exercise of temporal power; even the 'dualist' argument acknowledged that the pope, by the exercise of his spiritual authority, might on occasion intervene decisively in matters of secular government. Mochi Onory extracts from the glosses of this period many cases in which such interventions were justified on the ground of the pope's spiritual jurisdiction in the moral sphere — e.g. it was maintained that the pope could revise unjust sentences of a secular ruler, annul feudal arrangements repugnant to equity or Christian moral principles, decide issues involving internal peace or peace between states, determine the licitness of a war, summon a prince to the defense of Christendom. Mochi Onory maintains that all this did not destroy the autonomy of a ruler in the conduct of secular affairs, since these were all exceptional cases involving issues properly pertaining to the spiritual power.

He devotes several chapters to Huguccio as the greatest exponent of the dualist tradition.\textsuperscript{18} After the argument concerning the two swords discussed

\textsuperscript{18} \textit{Fonti} 111: 'Nota, qui primam tenent sententiam, dicunt quod summi pon(tificis) utrumque habet gladium: alterum non administratio, set tantum auctoritate, ut materialem; celestem vero et ecclesiasticum plena auctoritate.'

\textsuperscript{17} \textit{Fonti} 110-1: 'Alii dicunt in contrarium et his rationibus: ante enim erant imperatores quam summi pon(tificis) et tunc habebant potestatem, quia omnis potestas a deo est. Item nonne potest uti gladio quem consequitur in electicne populi, quia populus ei et in eum omne ius et potestatem transfrat? Item quomodo posset el papa dare potesta-
tem vel executionem gladi, cum non habeat, nec habere vel exercere possit... Quod ergo hic dicitur quod habet utrumque gladium, id est tam super clericos, quam super laicos imperium habet spirituale, ut quem ligat in terra, ligitus sit in celis. Regem autem de-
posuisse dicitur papa, cum ipsum pro sua contumacia excommunicaret et ita subditos ab elius obedientia subtraxit, cum nulli debent domino excommunicato obedire... Item quid
\textsuperscript{18} For a judicious discussion of Huguccio's views see also Maccarrone, \textit{Chiesa e Stato} 68-78. On his alleged Gibellinism see G. Catalano, 'Contributo alla Biografia di Uguccio da Pisa,' \textit{Il diritto ecclesiastico} 65 (1954) 3-67 at 49-60.
by Dr. Ullmann, Huguccio went on to raise the delicate question, who was
greater, pope or emperor. He first replied that the pope was greater than
the emperor in spiritualibus, the emperor greater than the pope in temporalibus.
But he hastened to modify this deceptively simple formula. The superiority
of the pope lay in the fact that he possessed spiritual power over the emperor,
could judge him and condemn him; but the emperor could not judge the pope
in any circumstances. He had more temporal power than the pope but not
temporal power over the pope. In another context Huguccio wrote that
secular power was as inferior to spiritual as lead to gold, and indeed, although
he so firmly defended the dualist theory of the origin of the two powers, he
also clearly maintained a certain subordination of the temporal power to the
spiritual. This recognition of the intrinsic superiority of the spiritual power
was, moreover, developed into a doctrine that the pope could assume the func-
tions of a secular judge to prevent a failure of justice in circumstances where
no established temporal authority was competent to act. Thus, in discussing
the deposition of a secular ruler, he not only referred to a subtraction of obe-
dience brought about by sentence of excommunication, but also suggested
that the pope, as a superior judge, could confirm and thereby validate a sen-
tence of deposition promulgated by princes or barons. Likewise the pope could
remedy injustices arising from the neglect of the emperor and compel the
emperor to make restitution to an injured party, this again because there
was no other competent judge — ‘et in secularibus etiam papa imperatorem
judicare potest, si alterius judicium subire nolit.’ On the other hand, the
pope could not depose a king or baron subject to emperor or king because
in that case there did exist a legitimate secular judge:

19 Fonti 149: ‘Set queret aliquis uter utro sit maior? Et quidem in spiritualibus papa
maler est imperatore, imperator malor papa in temporalibus... Set aliter, et aliter; papa
sic est malor in spiritualibus, quod habet iurisdictionem in spiritualibus super impera-
torem, ut in els posit eum ligare, condemnare ... sed imperator non sic est malor papa
in temporalibus ... nullam eum iurisdictionem vel prelacionem habet imperator super
papam: set dicitur esse malor in temporalibus quam ille quia malorem potestatem et juris-
dictionem habet in els quam ille, non tamen super eum....’ (Summa ad Dist. 96 c.6).
20 Fonti 155: ‘Set numquid papa potest deponere imperatorem vel regem qui non sub-
est imperator? Sic, si de voluntate principum coram eo accusetur et convincatur, et
convinctus et admonitus nolit satisfacere, tune debet excommunicare, ut si sic non respi-
cit recte sententiam depositionis percellitur a papa vel a principibus de volun
tate pape, est enim papa malor et el preest el.... Sed nonne principes et barones si coram els con
vincatur possunt eum deponere? credo quod sic, set habeant assensum pape, aliter non,
cum ludge superior, id est papa, Invenitur’ (Summa ad 15 q.6 c.3); Fonti 153: ‘Princi
paliter, ergo neurtum pendet ex alquo, verum est quo ad institutionem, sed in multis
imperialibus (sic) potestas pendet ex pontificali, rationem, de neglgentia habita circa
eos corregendos, nam si negligentes fuerunt in corrigendo eos uent penas pro suo delicto
ut XVII q.II cognovimus, et quia gravius, nosti itaque et infra pendere, quo ad spiritualia,
et in secularibus etiam papa imperatorem iudicare potest, si alterius judicium subire nolit....’
(Summa ad Dist. 96 c.10). (In some of the passages transcribed from Huguccio it seems that
either Mochi Onory’s manuscripts or his readings are at fault.) Huguccio’s idea of the pope
as ludge superior is by no means identical with the idea of an indirect influence of the
spiritual power in temporal affairs, ratione pecellati.
Set queret aliquid, an papa posset similiter deponere comites et alios barones qui subsunt regibus vel imperatoribus sine consensu illorum quibus subsunt. Credo quod non, quia non debent sub eo conveniri vel accusari, sed sub suo rege vel imperatore. Simile est de metropolitano, qui licet possit judicare episcopos suos ... non tamen eorum clericos.\(^{21}\)

Mochi Onory presents these arguments at length, and in commenting on them, draws a series of interesting comparisons between Huguccio’s theory of the relations between pope and emperor and his views on the structure of the ecclesiastical hierarchy itself. The implied analogy between a bishop and a king in the passage just cited gains added interest when we turn to Huguccio’s explanation of the relationship between pope, metropolitans, and bishop, which Mochi Onory also explored. The metropolitans, Huguccio maintained, was the ordinary judge of the bishops of his province, but he was not the ordinary judge of the clergy subject to those bishops (just as the pope could depose a king but not the subject of a king). But, within the ecclesiastical hierarchy, the pope, in virtue of his *plenitudo potentatis*, was the *iudex ordinarius* of every one, of prelates and their subjects alike.\(^{22}\) Evidently, even though Huguccio was prepared to countenance a considerable influence of the spiritual power over the temporal, he attributed to the pope a quite different type of authority in the ecclesiastical sphere from that conceded to him in temporal affairs. Mochi Onory naturally emphasizes this dualism and finds no difficulty in arguing that Huguccio’s doctrines left to the secular state an essential core of autonomous life.

After dealing with Huguccio, however, he was faced with the more difficult problem of Alanus. For Dr. Ullmann the work of Alanus was the spring from which flowed the main stream of hierocratic tradition through Tancred and Bernardus Parmensis to the full flood of Innocent IV and Hostiensis. Mochi Onory does not carry his study down to include the glossators of the Gregorian Decretals, but he does deal with Alanus and Tancred, and he, in a quite different spirit, endeavors to accommodate their doctrines to his own view that the canonists generally favored a dualist theory of divided powers. We have seen how Alanus claimed that the pope possessed the *gladius materialis* and conferred it on the emperor. His gloss continued:

\[\text{Si ergo papa iudex ordinarius est et quoad spiritualla et quoad temporalia, potest ab eo deponi imperator et eodem modo quilibet laicus habens potestatem vel dignitatem aliquam sub imperatore, si plenitudinem (?) potestatis suae uti vellet.}\(^{23}\)

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\(^{21}\) *Fonti* 156 (*Summa ad 15 q.6 c.3*).

\(^{22}\) *Fonti* 166: ‘... metropolitanus non est iudex ordinarius nisi in parrochla sua, et licet sit iudex ordinarius suorum episcoporum non tamen illorum qui subsunt episcopi ... in papa tamen speciale est. qui est iudex ordinarius omnium, sicelicet maiorum et minorum prelatorum et subditorum ... ipse enim solus habet plenitudinem potestatis... ’ (*Summa ad 6 q.3 c.2*).

\(^{23}\) *Fonti* 191-2: ‘Verius est quod gladium habeat a papa. Est enim corpus unum ecclesiae, ergo unum solum caput habere debet. Item, dominus utroque gladio usus est... Sed Petrum vicarium suum in terris in solidum constituit ergo utrumque gladium ei relinquit... Item si quoad temporalia Imperator sub papa non fuisset, ergo de eis sub papa respondere non teneretur, at in neutra princeps a papa depositus, ut XV q.VI alius. Prop- ter hoc dicatur, quod gladium materialem habet a papa. Canonica tamen canonico- corum electio sibi tribuit. Si ergo papa iudex ordinarius est... ’ (*Gloss ad Comp. I 2.20.7*).
Alanus was using *plenitudo potestatis* in the same sense as Huguccio to describe a power of ordinary jurisdiction extending beyond the second rank of a hierarchy to embrace inferiors at all levels. But whereas Huguccio had attributed to the pope this universal jurisdiction only in the ecclesiastical sphere, Alanus extended it to the temporal sphere as well. This might seem to demolish any possible claim to autonomy of the secular ruler, but Mochi Onory makes considerable play with the next words of the gloss:

Sed numquid pro omni crimine potest deponi imperator? Respondeo: *immo pro nullo, nisi persistere in illo contenderit*. Sed nec tune forte pro omni, sed solum pro tali, quod scandalum inducit, ut est haeresis, symonia, discordia continua et si qua sunt similia... Sed numquid papa materialem gladium sibi posset retenere? Resp. non, dominus enim gladios divisit, ut XCVI. di. cum ad verum, et praeterea ecclesia ex hoc plurimum turbaretur.

According to Mochi Onory’s interpretation of this passage the emperor could be deposed only for persistent ‘*crimen* (= *peccatum*)’ and so, ‘*In this fashion canonistic thought reached a secure conclusion: the ratio criminis (= *peccatum*) constituted the title in virtue of which the pope intervened in the deposition of a prince...*’ Mochi Onory’s argument does seem to become rather strained at this point. Alanus stated clearly enough that the pope’s power of deposition stemmed from his possession of supreme temporal authority, not from any indirect effect of his spiritual authority, and contemporaries of Alanus sometimes held that a ruler who was merely *inutilis* could be deposed without any question of *peccatum*. Mochi Onory seems on firmer ground in pointing out that the denial to the pope of the actual exercise of temporal authority still provided some possibility of *autonomia e sufficienza di vita* for the secular power.

It is true that the ‘monistic’ theory could leave to the prince a real freedom of action in his own sphere (even though his authority was derived from the pope) provided that the exclusion of the pope from the actual exercise of temporal power was rigorously maintained. But it is also true that the ‘dualist’ theory could be developed in a fashion that would make temporal rulers no more than servants of the pope (although he was not the source of their power). The practical content of the canonists’ theories would depend on the policies actually pursued by the popes, and on the material that their decretal letters provided for the canonistic collections. The last part of Mochi Onory’s book is therefore devoted to an exposition of the interplay of canonistic thought around certain crucial decretals of Innocent III, especially

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24 *Fonti 194.*
25 It will be seen that there is a direct conflict on this point between Mochi Onory and Ullmann. Ullmann, relying on MS Aug. XL, Badische Landesbibliothek, Karlsruhe, wrote: ‘*The pope if he wished could use both swords: *Utroque gladio uti potest*’ (Medieval Papalism 149). These words do not occur in Mochi Onory’s version (Schulte’s transcription from MS Ye.52, Universitätsbibliothek, Halle). The nearest parallel is ‘*dominus utroque gladio usus est,*’ but there *dominus* referred to Christ. That Mochi Onory’s text reflects Alanus’ true viewpoint is proved by a recently printed text from Alanus’ apparatus on the *Decretum* (*Ius Naturale*), ‘*Sed nunquid papa potest materialem sibi retenere si vellet.*’ Respondeo non, quia dominus gladios divisit, ut hic, et ecclesia ex hoc plurimum turbaretur’: Gaines Post, *Two Notes on Nationalism in the Middle Ages,* *Traditio* 9 (1953) 281-320 at 304.
Per Venerabilem, Licet, Novit, and Venerabilem. The first three decretals provided concrete examples of the pope claiming temporal jurisdiction where there was no competent lay judge, or where justice had been denied, or where a moral issue was involved. (In the decretal Novit Innocent defended his intervention *ratione peccati* in a feudal dispute between the king of France and the king of England.) Venerabilem set out the papal theory of the *translatio imperii*, and Innocent's claim that he could examine and reject the candidate for the imperial title elected by the princes. We are here working over the same ground that Ullmann covered in his last chapter, but Mochi Onory harvests a very different crop of inferences from the same material. He insists — following Maccarrone — that all Innocent's claims were consistent with a dualist theory on the origins of spiritual and temporal power, and he does show that canonists committed to a dualist position were able to assimilate them into the framework of their thought without undue strain.

But there still remains a real difficulty in reconciling Innocent's legislative and political activity with Mochi Onory's pattern of thought. It is not so much that Innocent committed the papacy, and in its wake the canonists, to an uncompromising hierocratic monism, but rather that he showed how even the dualist doctrine of Huguccio could justify such vast encroachments into the sphere of secular jurisdiction as to undermine any effective independence of the temporal power. If the pope could take cognizance of any secular case where a plaintiff pleaded that he had been denied justice, if he claimed the final say in any matter of criminal jurisdiction involving sin, if this jurisdiction *ratione peccati* was to be extended even to the intricacies of feudal disputes, what then became of the state's *autonomia e sufficienza di vita*? Even canonists more moderate than Alanus and Tancred were led to defend a great expansion of papal claims over the lay power, and, if one takes into account the developments of Innocent III's arguments by Innocent IV and Hostiensis, it becomes well-nigh impossible to imagine any kind of significant political action over which the pope did not claim ultimate jurisdiction on one ground or another. In the works of the thirteenth-century canonists the autonomy of the secular power does indeed come to appear as 'a vessel without content.'

Mochi Onory does not ignore this tendency of canonistic thought, but, we think, does not assimilate it adequately into the framework of his theory. He shows no inclination to minimize the popes' interventions in the secular sphere, nor the canonists' claims arising out of them; he even seems to document such claims with a certain enthusiasm. To the argument that they destroy that independence of the secular power which, he claims, the canonists were anxious to defend, he has a simple answer, repeated several times in the course of his work. The papal *imperium spirituale* did not violate the essential autonomy of the secular power since, whenever the pope intervened in the secular sphere, he acted from spiritual motives — *di motivi d'ordine spirituale e religioso*. And so we reach the conclusion that the nations of Christendom were to be ruled by 'Catholic monarchs, sovereign in the bounds of their own kingdoms, subject only to the authority of one who, from motives pertaining to the spiritual world, approves and guides, judges and controls, confirms and deposes' (p. 226). It might seem that the question whether a ruler who is subject to 'judgment,' 'control,' 'deposition' can be called sovereign in any

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26 In the Gregorian Decretals respectively 4.17.13, 2.2.10, 2.1.13, 1.6.34.
normal sense of the word is more a problem of semantics than of political theory. But, in any case, the idea that the motive of a superior provides a proper criterion for determining the degree of independence of an inferior seems open to criticism. St. Louis was presumably actuated by spiritual motives in his government of France; every medieval king was supposed to rule 'from spiritual motives.' One cannot help feeling that some recent writers who have sought to defend the thirteenth-century pontiffs against charges of excessive worldly ambition are at times not certain whether they wish to prove that the popes did not pursue temporal power or that they pursued it with the very best of intentions.

The most paradoxical feature of Mochi Onory's conclusion is that he seems to be saying the same thing that Ullmann does in the last pages of *Medieval Papalism* — 'It was the spiritual power who directed and guided the temporalities of life to the end recognized as true and fitting for man.' It might remove much confusion if we could come to understand how two gifted writers could cover so much common ground, and even reach a verbal similarity in their conclusions, yet really hold such radically different views concerning the whole temper and tendency of canonistic thought. The solution may lie in the fact that the papal decretals and canonistic glosses of the Middle Ages readily lend themselves to two different types of interpretation. One can seek in them abstract principles of general validity, perennially relevant to the problems of Church and State, or one can turn to them simply for help in understanding the particular policies that medieval pontiffs were led to adopt, and the canonists to defend, by the exigencies of contemporary politics. Each type of enquiry will have its own methods and emphases. We may agree, for instance, that Boniface VIII was a very ambitious prelate but still find *Unam Sanctam* a very ambiguous document. Again, Fr. Stickler takes Dr. Ullmann to task for failing to state clearly that, in principle, there could be no appeal from a secular court to an ecclesiastical one, that such an appeal was only allowed in certain exceptional cases. It is well to have the principle stated; but it is also useful to be reminded that, in canonistic doctrine, the 'exceptions' became almost all-embracing. The relevance of either consideration depends on what one is trying to prove.

On this basis we might argue that Ullmann and Mochi Onory have each used a method of analysis that would have been more appropriate in pursuing the objective of the other. Ullmann has proved convincingly enough that if one takes together all the divers claims and arguments that the popes, and the canonists on their behalf, put forward in the Middle Ages, often in the heat of bitter disputes with the secular power, they do add up, for all practical purposes, to an assertion of papal overlordship. But what he asserts is that the canonistic doctrine of papal world monarchy was a necessary corollary of a papally-inspired monistic philosophy of politics. Mochi Onory, on the other hand, has devoted great ingenuity and diligence to proving that, even in the most extreme hierocratic utterances down to the time of Tancred, there is always some loop-hole in the formulation of the abstract principle involved that makes it just possible to reconcile these texts with a dualist theory of Church and State. But he will have it that these canonists were all aglow with enthusiasm for the effective independence of secular rulers in the real world.

27 *Medieval Papalism* 194.
There is one great merit in Mochi Onory's work which requires some further discussion. More than any other writer in the field he has shown himself aware that the medieval problems of Sacerdotium and Regnum cannot be considered adequately in a vacuum. He has sought instead to treat the structure of Church-State relations as an integral element in the pattern of medieval society as a whole. Above all he has emphasized how often the canonists borrowed analogies from within the ecclesiastical hierarchy itself to define relations between the spiritual and temporal powers, and how receptive they were too to conceptions derived from secular systems of government. A continuation of this line of thought might even suggest a solution to the central problem of current dispute — whether canonistic thought was essentially 'monist' or 'dualist' in its orientation. The real problem is not so much that some canonists seem to be monists and some dualists, but that no canonist whose works have been explored so far is consistent in defending a position of absolute monism or of absolute dualism. The real solution may be that in seeking to identify the canonists' doctrines with one doctrinaire position or the other we are imposing on them categories of thought that have little relation to the real sources and content of their work. The problems that most interested the canonists were practical rather than speculative ones — what authority had the pope to confirm, appoint, depose secular rulers? to intervene in the internal affairs of kingdoms? hear appeals? exercise authority during vacancies? The mass of accumulated jurisprudence on the relations of superiors and subordinates within the Church and within the State provided the obvious raw material from which the answers could be quarried. Such material could of course provide a variety of answers, but it remains true that the substantial content of the canonists' teaching was probably influenced more by their working experience of the structure of medieval societies than by any disposition to press abstract principles to logical conclusions. It is odd that so much has been written on the canonists' theories of Church-and-State, but so little about their theory of the Church, or, for that matter, of the State. This situation may account for some of the current difficulties of interpretation.

It might seem that the power relations involved in the subordination of temporal authority to spiritual were much more subtle and elusive than any that would occur in the straight-forward hierarchical subordination of inferior to superior within either society. But we should not allow ourselves to become even more hypnotized than were medieval thinkers themselves by the impressive simplicity of the Dyonisian celestial hierarchy, with its omnipotent head, and power flowing from the head downwards from rank to rank in a pyramid of perfect symmetry. Whatever lip-service was paid to the idea,

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28 Hence, the conclusions of the medieval canonists are not likely to prove very relevant in the discussion of the same problems against the backgrounds of quite different societies.

29 Modern partisans of the dualist theory too readily interpret the texts asserting that the temporal power was not derived from the spiritual as excluding any sort of direct hierarchical subordination; their adversaries too readily see in the claims that the pope did confer authority on the emperor an assertion of the unqualified subjection of the temporal power.
medieval hierarchies of government were not so simple as that in practice; in fact their complexities provided the canonists with analogies for most of the problems involved in defining the pope's powers over a secular ruler. It is true that analogies of this sort could provide no adequate answer to the enduring philosophical and theological problems involved in the relations of spiritual and temporal power; but it may also be true that the solution of such problems was not a major preoccupation of the medieval canonists. They did have the idea of an indirect power of the spiritual authority in temporal affairs, *ratione peccati*, but they showed little inclination to probe into the perennial problems concerning the relations between secular law and moral law that such a concept implies. They did take sides on the central philosophical issue: whether, in virtue of its inherent superiority, spiritual authority was necessarily the source of temporal power. But when one looks for a rational defense of one side or the other, one usually encounters only a string of precedents and metaphors — all too often dubious precedents and muddled metaphors.

We are not suggesting that the epic clashes of *Regnum* and *Sacerdotium* in the Middle Ages stimulated no profound reflections on the deepest problems involved; but, if one is looking for universally valid principles rationally defended, there is much richer material to be found in the medieval philosophers and theologians than in the lawyers. Still less are we suggesting that the canonists' contribution in this field was negligible and unworthy of the attention it has been receiving. For the historian who seeks simply to understand the workings of thirteenth-century ecclesiastical polity — and politics — a knowledge of the canonists is becoming indispensable. We are only on the threshold of the work that needs to be done.

A number of articles by Fr. Stickler provide good examples of the sort of work that can be most useful now that the broad lines of the subject have been opened up. Although we have mentioned some of Fr. Stickler's views already, we have reserved for a separate discussion his own original contributions to the discussion since they are rather different in purpose and temper from the

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Thus, some canonists held that temporal power was subordinate to spiritual, yet not derived from it. This was not a unique relationship; writers like Huguccio and Joannes Teutonicus were by no means certain that, within the ecclesiastical hierarchy, a bishop's authority was derived from the pope, but they had no doubt that the bishop was hierarchically subordinate to the pope. (The point is discussed in my forthcoming book, *Foundations of the Conciliar Theory.*) Again, we have seen how Huguccio borrowed an analogy from within the ecclesiastical hierarchy to explain the position of the pope in relation to the subjects of a temporal king; if he had turned to the temporal sphere he would have found similar examples in the relations of lords to sub-vassals. C. C. Bayley has recently shown how Innocent III, in developing his doctrine on the powers implied by his right to confirm the election of the emperor, closely followed the law relating to confirmation of episcopal elections (*The Formation of the German College of Electors in the Mid-Thirteenth Century* [Toronto 1949] 124-8). So too, the whole papal argument concerning vacancy of the empire or negligence of the emperor is paralleled in the canon law relating to devolution of authority to superiors in the ecclesiastical hierarchy. And here, again, the claim that a ruler who did not normally exercise jurisdiction over the subjects of his subordinates could do so on a complaint of denial of justice, was a commonplace in the sphere of secular government.
works already considered. Ullmann and Mochi Onory have each built up an imposing synthesis and defended it with a certain warmth. Fr. Stickler’s articles have been severely analytical, concerned with the clarification of certain technical terminology used by the canonists in their discussions on Regnum and Sacerdotium. His great theme is the interpretation of the allegory of the two swords, and he has patiently pursued this theme from Gregory VII through Anselm of Lucca and St. Bernard to the canonists of the twelfth century. As regards the canonists, the article which best conveys the essence of his thought is one on Gratian himself, in which Fr. Stickler reaches the striking conclusion that the terms gladius spiritualis and gladius materialis, commonly assumed by thirteenth-century canonists and modern scholars alike to refer to ecclesiastical and secular power, had no such connotations for Gratian. To him they meant rather the powers of spiritual coercion and of physical coercion which both belonged to the Church as a juridically perfect society. The highest form of spiritual coercion was excommunication while there were two extreme forms of physical coercion, sentence of mutilation or death (effusio sanguinis) and the making of war (vis armata). However, since it was considered improper for clerics to have any part in the shedding of blood, the Church could not itself use the gladius materialis which it possessed but had to call on the lay power to do so. This delegation to lay rulers of the gladius materialis of the Church made possible all the subsequent confusions of thought and terminology. The chances of such confusion were heightened by the fact that a lay ruler did have an obligation to use his own secular power in the service of the Church at the request of pope or bishop. Hence, when we read of a prince using force on behalf of the Church, it is often not clear whether he was exercising the delegated authority of the Church or his own authority at the request of the Church. But it is clear that when Gratian used a phrase like papa dat gladium imperatori, he did not mean that the pope bestowed temporal power on the emperor — only that he delegated to the emperor the exercise of the material sword of the Church.

Fr. Stickler has applied these conclusions in another paper where he undertakes a systematic analysis of Gratian’s views on the relations of Sacerdotium and Regnum. It is the most detailed study of Gratian that has been undertaken from this point of view, and provides a model of scholarly method even if the conclusions have not been universally accepted. The result of the ana-

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83 There was a distinction here between effusio sanguinis and vis armata. A cleric could not exercise the first power even indirectly; he could not, that is, delegate the jurisdiction of the Church to a lay judge with the demand that death or mutilation be inflicted. He could, however, exercise the vis armata indirectly by summoning lay rulers to make war on behalf of the Church.

84 ‘Magistri Gratiani sententia de potestate ecclesiae in statum,’ Apollinaris 21 (1948) 36-111.

85 Dr. Ullmann has expressed sharp disagreement. See ‘The Medieval Interpretation
lysis is to rank Gratian very definitely among the adherents of the Gelasian dualist tradition. According to Fr. Stickler, 'the father of the science of canon law' taught that both powers were instituted by God, separate in offices and functions, neither dependent on the other. Lay princes were subject to the jurisdiction of the Church in spiritual matters and the sentences of the Church in such matters might have an influence (influxus) on secular affairs. Nevertheless, in principle, 'the temporal power is in no way juridically dependent on the spiritual; neither by divine law nor by human law.'

This work on Gratian provides a firmer foundation than has hitherto been available for investigating the development of thought among the glossators of the Decretum. In a discussion of the Quaestiones Bambergenses Fr. Stickler notices some hints of a confusion of terminology, but his major contribution to the unravelling of Decretist thought is an article on Huguccio. In the work of this great canonist the idea of the gladius materialis as temporal power, the 'political' sword-idea existed side by side with the older 'coercive-jurisdiction' idea, both being fully developed in different contexts. It is not clear whether Huguccio was himself conscious of the double meaning he attached to the allegory of the sword. He showed no awareness of the problem and he never discussed it; if he had done so he might have provided an invaluable clarification at a critical moment in the development of canonistic thought. On the other hand, he never fell into confusion; he did not, that is, cite passages referring to the old idea of the sword when he was using the term as a symbol of temporal power. However, it is easy to see how such confusion could arise in the works of his successors and, perhaps, distort their whole outlook on the relations of Church and State.

These articles are full of penetrating and valuable insights. It is evident that a development of the line of argument they suggest might undermine the theory that the canonists regarded the emperor as a mere minister, a servant of the pope, and Fr. Stickler promises to come to grips with this problem in an article on 'Imperator vicarius Papae.' It is also true, however, that his technical articles as yet provide no irresistible evidence for his general views on the development of canonistic thought, for he has not yet dealt in detail with the major canonists of the mid-thirteenth century. Fr. Stickler has shown himself a formidable critic but he has not yet followed Dr. Ullmann onto his own ground.

For a final evaluation of thirteenth-century canonistic teachings on Church and State we shall need a new survey of those teachings themselves, based on all the available texts. We shall also need a broader study setting the

of Frederick I's Authentic •Habita•, 'Studi in memoria di Paolo Koschaker 1 (Milan 1953) 101-36 at 106.

•De potestate gladii materialis ecclesiae secundum Quaestiones Bambergenses Ineditas, 'Salesianum 6 (1944) 113-140; 'Der Schwerterbegriff bel Huguccio,' Ephemerides iuris canonici 3 (1937) 201-42.

•Sacerdotium et Regnum,' Salesianum 15 (1953) 577 n. 2. The article is to appear in the centenary Festschrift of the Institut für österreichische Geschichtsforschung (1954). See infra, Additional Note.

Before a new synthesis is undertaken it seems desirable that other expressions prominent in the controversy should be subjected to the same sort of stringent analysis that Fr. Stickler has applied to the allegory of the swords. We would suggest especially
doctrines of the high Middle Ages against the background of earlier ecclesiastical tradition. Dr. Ullmann has lately been devoting all his attention to this second task. It is to be hoped that Fr. Stickler will bear in mind the saying of Fustel de Coulanges that an hour of synthesis is worth a life-time of analysis, and will eventually undertake the first.

II. Regnum and Imperium

Contemporary interest in the origins of the European system of nation states has no doubt been stimulated both by the recent perversions of nationalism and by the current attempts to re-create some form of supra-national authority. The problem has many aspects and the juristic approach has not been neglected in recent work.

When the Roman Empire collapsed, independent kingdoms established themselves in its ruins. From the time of Charlemagne there existed a rather vague theory that all kings should again be subject to one emperor who was thought of as the temporal head of Christendom; with the revival of the study of Roman law in the twelfth century the theory acquired sharper outlines, the contemporary German emperor of course being cast for the role of dominus mundi, though, needlessly to say, no emperor actually exercised universal authority in the Middle Ages. The juristic problem is to determine when the de facto independence of the national kings became supported, not only by effective military power, nor even by conscious patriotic sentiment, but by a coherent legal theory opposed to the universalism of the classical Roman law. One of the main themes of Mochi Onory's Fonti canonistiche is that the canonists of the twelfth and early thirteenth centuries were responsible for creating such

las clavium, still very obscure when applied to the public power of the pope in spite of the work of Van de Kerckhove, La notion de juridiction dans la doctrine des décritistes et des premiers décretalistes (Assisi 1937); and, above all, that much-misunderstood term plentuus potestatis, for which a beginning has just been made in Dr. Ladner's article cited n. 6 above.

See his articles, 'The Origins of the Ottonianum,' Cambridge Historical Journal 11 (1953) 114-28; 'Cardinal Holland and Besançon,' Miscellanea Historiae Pontificiae 18 (Rome 1954) 107-125; 'Frederick's Opponent, Innocent IV, as Melchisedek,' in All' del Convegno internazionale di Studi Federiciani (Palermo 1952); 'Cardinal Humbert and the Ecclesia Romana,' Studi Gregoriani 4 (1952) 111-27; 'Nos si aliquid incometenter...,' Ephemerides Iuris Canonici 9 (1953) 279-287.

The best recent survey of the whole subject is that of F. A. F. von der Heydte, Die Geburtstunde des souveranen Staates (Regensburg 1952). The author has based his study mainly on the theologians, publicists, and civilians of the thirteenth and fourteenth centuries. He mentions the canonists incidentally but was not able to use the recent work emphasizing the importance of their contribution. — Dr. Rolf Most, who was killed in the recent war, was working up to the time of his death on ideas concerning the empire and national statehood in the glosses of the canonists. His only published work in this field was a study on Lupold of Liebenburg, in which he compared the historical and juristic approach of Lupold with the theological basis of Ockham's thought, 'Der Reichsgedanke des Lupold von Liebenburg,' Deutsches Archiv für Geschichte des Mittelalters 4 (1940) 444-85. He left unfinished a projected thesis, Stuimen zur abendländischen Geltung des deutschen Kaiserums im ausgehenden Mittelalter, insbesondere in Spanien. On his work see H. Heimpel, Deutsches Archiv 5 (1941-42) 511-13.
a theory. Alert to the actual trends of political development and, as partisans of the papacy, hostile to the empire, they built a new doctrine around the idea rex, imperator in regno suo, superiorem in temporalibus non recognoscit. The kingdoms were to be loosed from the bond of legal subjection to the empire, the unity of Christendom maintained by the universal imperium spirituale of the pope, which respected the autonomy of the king in secular affairs.

In presenting these views Mochi Onory was saying the last word — or almost the last word — in an argument that has been going on for the past forty years about the origins of the phrase, rex est imperator in regno suo. In 1913 Sidney Woolf traced the expression from Bartolus to Oldradus da Ponte (d. 1335). Ercole next showed that it was employed in France in the controversies between Philip the Fair and Boniface VIII and attributed the earliest use of it to the French canonist Gulielmus Durandus. In 1921 Paul Fournier noticed a similar usage in the work of a contemporary Sicilian jurist, Andrea d'Isernia. Nine years later Calasso entered the fray and from then on it became mainly a duel between him and Ercole, the one claiming an Italian, the other a French origin for the crucial formula. Calasso first supported the claim to priority of the Neapolitan jurist Marinus da Caramanico; Ercole riposted with the French writer Jean de Blanot, whose work appeared before that of Marinus in 1256. In his latest book Calasso has argued that the idea of the king as emperor in his own kingdom was current among the canonists and legislators of Bologna in the earliest years of the thirteenth century, and that it was developed scientifically into a theory of the independence of national kings by the civilian glossators of South Italy, most especially by his favorite author, Marinus.

As evidence for the early currency of the idea in Bologna Calasso cites two canonistic texts and one civilian one. Stephanus Tornacensis, glossing the words, Constitutio, vel edictum est quod rex vel imperator constituit vel editit, wrote: '(Rex) in regno suo, vel eundem vocat regem et imperatorem.' Calasso does not lay much emphasis on this, and rightly so, for, properly understood, it has nothing whatsoever to do with the question at issue. The second canonistic text is much more important. It is from Alanus, and it occurs at the end of the famous passage where he claimed that the pope conferred power on the emperor and could depose him. After presenting his arguments Alanus concluded: 'Et quod dictum est de imperatore, dictum habeatur de quolibet rege vel principe, qui nulli subest. Unusquisque enim tantum juris habet in regno suo quantum imperator in imperio.'

The importance of this passage for the controversy about the idea of the king as emperor was pointed out by Rivière as long ago as 1926.

Calasso wel-

\[\text{\textsuperscript{41}}\] For the bibliography of this controversy see Mochi Onory, Fonti 9 n. 1.
\[\text{\textsuperscript{42}}\] F. Calasso, I glossatori e la teoria della sovranità (Milan 1945). In subsequent notes references are given to the second edition, Milan 1951.
\[\text{\textsuperscript{43}}\] I glossatori 35 (Summa ad Dist. 2 c.4). Stephanus was explaining that either the word rex in his text meant a local king who could issue only local edicts or else the word rex was used to designate the emperor. He did not mean that every local king had imperial power.
\[\text{\textsuperscript{44}}\] I glossatori 35 (Gloss ad Comp. I 2.20.7). The gloss continued: 'Divisio enim regnorum de Jure gentium Introductum a papa approbatur, licet antiquo Jure gentium imperator unus in orbe esse debet.' (cit. Fonti, 192).
\[\text{\textsuperscript{45}}\] Le problème de l'église et de l'état au temps de Philippe le Bel (Louvain-Paris 1926) 424-30.
comed it as evidence for the currency of the idea in Italy long before its appearance in France. But it could not have been completely satisfactory from his point of view to find the first germs of a theory of national sovereignty in the works of a Frenchman and an Englishman even if they were both professors at Bologna. He therefore argues that the context of Alanus' passage makes it impossible to read into his words any such implication. It was precisely in propounding the theory of papal overlordship that Alanus referred to the independence of kings and princes; he wished to maintain the doctrine of a universal empire, and merely to substitute the pope for the emperor as its head. Calasso lays far more emphasis on his civilian text, from the great Azo himself. It was a question of defining the powers of the king of France in a feudal dispute. In arguing the case for the king, Azo wrote: "Item quilibet (rex) hodie videtur eandem potestatem habere in terra sua, quam imperator, ergo potuit facere quod placet." 46

As for the canonists, apart from explaining away the text of Alanus, observing that Joannes Teutonicus upheld the authority of the emperor, and discerning the seeds of the hierocratic theory in Huguccio, Calasso has little to say about them, and he certainly does not attribute to them a major part in the evolution of the idea of national independence. All through the thirteenth century, according to him, 'il principio d'ordine universale manteneva sempre, nella dialettica della Chiesa, la sua integrità originaria.'

At this point Mochi Onory stepped in to state the case for the canonists. In his opinion, the text of Azo is without significance, 47 that of Alanus a most important contribution to a broad movement of canonistic thought that established a firm juristic basis for a theory of national sovereign states. The validity of this claim depends partly of course on the correctness of Mochi Onory's view that the canonists did not claim for the pope a universal temporal imperium. A great deal of his argument rests also on another presupposition which is again controversial, namely that the attribution to a king of the powers of an emperor within his own territory necessarily implied that the king was independent of any external authority. Calasso has expressed doubt on this point. As Gaines Post observes,

Francesco Calasso refuses to believe that rex imperator in regno suo meant independence of the Empire, for in a sense every local administrator was king or emperor in his sphere of jurisdiction... But I find this argument weak: some canonists and legists, and theologians, held that the king, who had the powers of the emperor in his own realm, recognized no superior. 48

Calasso's argument is weak if it is exaggerated to exclude as irrelevant all early expressions of the rex-imperator idea — which is what Gaines Post had in mind — but, taken in a more moderate sense, it is not without substance. The claim that a subordinate exercised in a limited territory the same powers that a superior exercised universally did not in fact necessarily imply that the subordinate recognized no superior. Canonists of the early thirteenth

46 I glossatori 38.
47 Fonti 65-7. Mochi Onory points out that Azo, in his final decision on the case, did not accept the principle of the text cited.
century could write that the difference between the plena auctoritas which only the pope possessed and the authority of any other bishop lay simply in the universal extension of the papal power; apart from this universality the bishop possessed in his own diocese the elements of power that made up plena auctoritas. Again, some of the canonistic glosses which most clearly developed the claims of kings to exercise the public authority attributed to the emperor in Roman law were written on the canons In apibus and Scitote, of which the first specifically laid down that there was one single emperor, and the second dealt with the organization of an ecclesiastical province, with the obvious implication that the province was part of wider unity.

If the phrase, rex, imperator in regno suo, superiorem in temporalibus non recognoscit, had been a commonplace in canonistic glosses, then indeed it would be reasonable to suppose that any reference to the king as emperor carried some hint of independent authority, but in fact the phrase never occurs at all in the works with which we are concerned. It is formed by a conflation of two ideas which were at first quite separable. Certainly, there were some canonists who held that there were kings who recognized no superior, and when we find a clear-cut statement of that view in their works together with the assertion that the king exercised the powers of an emperor in regno suo, it is reasonable to assume that the second claim was intended to buttress the first. When, for instance, we find Vincentius Hispanus defending the fiscal and legislative powers of the king of Castile, we may with some reason suppose that he was eager to demonstrate the self-sufficiency of the Spanish kingdom, perhaps in order to refute the claim of Joannes Teutonicus that a kingdom separated from the empire was 'headless' and 'monstrous.' But such an inference is only justified by the fact that other glosses of Vincentius decisively repudiate imperial claims over Spain. The mere attribution to a king of public authority in his own kingdom no more proved that the king was independent of the emperor than the parallel descriptions of a bishop's jurisdiction in his diocese proved that the bishop was independent of the pope.

If this criticism is well founded it upsets all Mochi Onory's claims for the twelfth-century canonists up to and including Huguccio. In the first part of his work he has taken great pains to gather together glosses referring to the powers of kings and magistrates of cities over their own peoples, and he attaches great importance to the gloss of Stephanus Tornacensis already quoted. But none of this is really relevant to the problem of rex and imperator. He also discusses the claim of local communities to enact laws or maintain customs contrary to the universal written law. Here he does seem to be coming to grips with the problem of local autonomy, but it has been pointed out that in the texts he cites the canonists were merely echoing earlier controversies among the civilians, not making an original contribution of their own.

49 MS 676, Calus College, Cambridge ad Dist. 11 c.2: 'Plena potestas consistit in precepto, necessitate observantie, generalitate. Quilibet episcopus duo Istorum habet In sua diocesi scil. preceptum et necessitatem observantie. Summus vero pontifex habet tres, scil. preceptum, necessitatem et generalitatem.' (On this MS see S. Kuttner and E. Rathbone, 'Anglo-Norman Canonists of the Twelfth Century,' Traditio 7 [1949-51] 279-339, at 317f.). There are similar passages in Huguccio and the Glossa Palatina ad Dist. 11 c.2.

50 7 q.1 c.41 and 6 q.3 c.2.

The weaknesses in the earlier part of Mochi Onory’s work can be illustrated best from his chapter on Huguccio, who receives more attention than any other canonist, and who is presented as a great figure of transition, half-committed to the old ideas, yet reaching forward towards a new synthesis. Mochi Onory begins by asserting (but without adequate textual support) that Huguccio attributed to each king *plenitudo potestatis* in his own kingdom, then proceeds to cite two texts in which, he claims, Huguccio referred to a king as emperor *in regno suo*. But in fact both texts really stated that the *imperator* could be called *rex*, not that every *rex* was an *imperator*. Then, relying on Huguccio’s glosses on *In apibus* and *Seitote*, Mochi Onory points out that he insisted on the need for one single sovereign power — supreme judge and supreme legislator — in each realm. Moreover he explicitly referred to the existence of kings independent of the emperor. This is the one valid point in the argument. Huguccio actually did write, in discussing the deposition of an emperor by the pope, ‘potest deponere imperatorem vel regem qui non subest imperatori’; but when one considers this passing phrase in the whole context of his work, it seems extremely improbable that he had in mind anything but *de facto* independence. Whenever he discussed the question explicitly he maintained that all kings were *de iure* subject to the emperor — ‘solus enim romanus dicitur iure imperator, sub quo omnes reges debent esse.’

Mochi Onory, having extracted from Huguccio’s glosses a picture of the king as equal to the emperor, sovereign in his own territory, finds this very paradoxical, and even sees Huguccio as ‘tormented with doubt.’ He lays great emphasis on a text in which Huguccio first observed that the French and English were, or ought to be, subject to the Roman empire, and then added:

Item, saltem ratione pontificis subsunt romano imperio; omnes enim christiani subsunt apostolico et ideo omnes tenentur vivere secundum leges romanidas, saltem quas approbat ecclesia.

Mochi Onory sees in this text a crucial stage in the development of the doctrine of papal *imperium spiritual*; Calasso sees in it the beginning of the hierocratic theory. We are inclined to think that Huguccio was not intending any subtle novelty, but merely observing that, while the French and English ought to be subject to the emperor, they certainly were subject to the pope *de facto* as well as *de iure*. For the immediate controversy the main relevance of the text would seem to be that Huguccio again firmly asserted the universal authority of the emperor as a matter of right. His position on this question was quite consistent and thoroughly conservative. Naturally he knew that some kings did not recognize the emperor’s authority *de facto*, but he never suggested that this state of affairs could be justified *de iure*.

Mochi Onory’s arguments have recently been criticized in rather astringent

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62 Fonti 164. Mochi Onory discusses at some length Huguccio’s use of *plena potestas* and *plenitudo potestatis* (158-61), but none of the texts cited apply *plenitudo potestatis* to royal authority.

63 Fonti 165, 167 (Summa ad 7 q.1 c.41, Dist.2 c.4). Mochi Onory’s misinterpretations of these texts were noticed independently by Meijers, *art. cit.* 123 n. 2 and by Kuttner, ‘Papst Honorius und das Studium des Zivilrechts’ (supra n. 4) 97 n. 2.

64 Fonti 165 (Summa ad 7 q.1 c.41).

65 Fonti 175 (Summa ad Dist.1 c.12).
fashion by E. M. Meijers. All his criticisms are valid and documented — he concentrates on Mochi Onory’s neglect of Roman law doctrines and his misunderstanding of the rex-imperator equation in Huguccio. Yet the review as a whole seems a little harsh in tone, for Mochi Onory did make a substantial contribution in the latter part of his book. Once Huguccio is left behind we have a much more firmly based argument with sufficient material on the direct point at issue to show, at least, that Calasso dismissed the canonists far too casually.

The first canonistic gloss which clearly defended the independence of the national kings, and associated the claim to independence with the assertion that the king possessed the powers of an emperor in his kingdom, came from the Englishman Ricardus. After stating the traditional point of view that all kings were subject to the emperor, he continued:

Set contra: Patet reges multos imperatorl non subjici. Videtur enim quod sicut per violentiam essent subjici, quod violenter possint ad propriam redire libertatem. Nam universitas civitatis, multo magis regni, jurisdictioem et imperium conferre potest ... et exercitus eligi imperatorem, pari ratione et regem... Item cum uteque tam imperator quam rex eadem auctoritate, eadem consecratione, eadem crismate inungitur, unde ergo potestatis diversitas

This was written in the last years of the twelfth century. A decade later, Alanus, another Englishman, produced the gloss already quoted, and, however one interprets Alanus’ doctrine of papal power, this gloss certainly upheld the independence of kings from the emperor. In the meantime there had appeared Innocent III’s decretal Per Venerabilem (1201), which stated that the king of France acknowledged no temporal overlord (cum ... superiorem in temporaibus minime recognoscat). Comment on this was at first cautious. Laurentius merely wrote dryly, de facto, Joannes Galensis also wrote, de facto, with the added explanation that de iure the king was subject to the pope in spiritualities and temporalities; Joannes Teutonicus, a strong defender of the German imperium, observed, ‘de iure tamem (rex) subest romano imperatori,’ referring to his gloss on Venerabilem where he had written that the pope transferred the regimen mundi to the Germans. But, finally, the Spanish canonist Vincentius carried the argument to a new conclusion with the terse comment, ‘De facto, Jo. Inno de iure’; and thereby, according to Mochi Onory, ‘inseri

56 Supra n. 51.

57 Fonti 253. The text was also cited by Ullmann, ‘The Development of the Medieval Idea of Sovereignty,’ English Historical Review 64 (1949) 1-33. In this article Dr. Ullmann analyzed the contributions of the French school of jurists emphasized by Ercole and of the Italian school emphasized by Calasso, and showed how their ideas flowed together in the work of Oldradus da Ponte.


59 He upheld the same point of view in his glossa ordinaria on the Decretum ad Dist. 63 c.22. Mochi Onory notes that he made a special exemption in the case of Spain, but G. Post has pointed out that the words referring to Spain may be a late interpolation, as was definitely a similar phrase in Joannes’ apparatus to the Comp. III: ‘Two Notes on Nationalism’ (cited supra n. 25) 299 n. 10, 300.
nel dibattito delle idee contrastanti il vero e proprio elemento decisivo per la soluzione di tutto il problema.60

Meijers has pointed out that the arguments in favor of national independence occur in canonistic glosses more frequently than in civilian ones, not because of a doctrinal evolution which the canonists as such contributed to without distinction of nationality, but because there happened to be representatives of various nations among the canonists, while all the leading civilians were Italians. "Le sentiment national était ici le facteur décisif." Mochi Onory would perhaps not regard this as inconsistent with his own position. It is part of his general argument that canonistic scholarship — precisely because of its international character — was especially alert and sensitive to the political realities of the age. Certainly it was important for the future that the Church did not become rigorously committed to the doctrine of universal empire — an attractive position after all in view of the especially strong claims of the pope over the emperor — and Mochi Onory's work serves a very useful purpose in showing how the canonists kept the question at least open to discussion.61

In two recent articles, Professor Gaines Post has published a considerable number of new glosses from the early thirteenth-century canonists which tend to confirm Mochi Onory's claim that these writers were much preoccupied with the problem of national sovereignty.62 In a study of the idea pugna pro patria, he provides some canonistic documentation for a theme recently treated from non-legal sources by E. Kantorowicz, and emphasizes especially a tendency of the canonists to use patria in the sense of kingdom. In the other study, on the rex-imperator idea, he prints for the first time the full text of Joannes Teutonicus' gloss on the decretal Venerabilem and a new text from Alanus' apparatus on the Decretum. Both confirm the views attributed to the authors on the basis of texts previously known; Joannes appears again as the champion of empire, Alanus as the defender of national independence. Most interesting of all is a newly published gloss from the Apparatus of Vincentius Hispanus on the Gregorian Decretals, in which the laconic comment cited by Mochi Onory was expanded into a full-blooded, patriotic protest against the claims of the German emperors. Joannes Teutonicus said that the Germans merited the empire by their virtues. Vincentius replied that they had lost it by their stupidity, and that the Spaniards had acquired empire by their valor and probity. He concluded with an eloquent panegyric on Spain, and, in another context, modestly claimed that Spain was the greatest of the provinces of

60 Fonti 282.

61 The attitudes of subsequent popes varied according to the political situation. De Vergottinl has pointed out that in 1220 at a moment of rapprochement, Honorius III regarded Frederick II's legislation on the defense of the Church as valid for the whole of Christendom, Studi sulla legislazione di Federico II in Italia: Le leggi del 1220 (Milan 1952) 159-66. In another work De Vergottini has restated at length the arguments of Mochi Onory, with modifications suggested by recent criticisms of them: Il diritto pubblico (cited supra n. 6) 210-36.

62 Cited supra n. 25, n. 48. Post's own conclusion is that, for the twelfth and most of the thirteenth century, "Mochi Onory goes too far, Calasso not far enough, in finding expressions of independence of the greater kingdoms from the Empire" ('Two Notes on Nationalism' 319).
Christendom. Professor Post has devoted a separate article to a more detailed study of these glosses of Vincentius, setting them against the whole background of the Spanish *Reconquista*, and arguing that Vincentius was not claiming universal empire for the Spaniards, but rather a ‘national empire’ of their own.\(^2\)

The legal technicality of exemption from imperial jurisdiction gains new meaning and life when it is thus related to the great contemporary currents of thought and action; and, as more and more texts become available, the main need will be for studies that aim to integrate the canonistic material into broader surveys of the growth of nationalist ideas. It is especially to be hoped that the focus of future discussion will shift from the question where the phrase *rex in regno suo est imperator* originated, and who is to have the credit for inventing it. That argument is becoming a little threadbare. So far as the equation *rex-imperator* is concerned, the indications are that some such terminology will be found as far back as scholars care to press the research. If we concentrate on the more significant problem, the adaptation of the phrase to support national claims to independence from the empire, it now seems clear that the critical time was around 1200, that the canonists played a very considerable part in the development, and that, among the canonists, Englishmen and Spaniards were mainly responsible for the new theory.

\(^2\) ‘Blessed Lady Spain.’ The texts printed in this article are valuable, but Professor Post’s interpretations seem to require some emendations. In the following notes the Latin text is given first, then his comment, then our own comment. (1) ‘Et si vinco vincentem te, vinco te, ff. de diver. et temp. prescrip. de accessionibus (*Dig.* 44,3) *Vinc.*’ (‘The last sentence is not clear... The reference to the Digest 44,3 seems to have no bearing on the words’: 203 n. 28). The meaning seems clear enough though the argument is a little naive. The pope had praised the French above the other provinces, but the Spaniards had defeated the French; therefore Spain was greater than the other provinces — because ‘if I beat someone who beats you, I beat you.’ The Roman law text is *Dig.* 44.3.14.3 and does refer to this principle. (2) ‘Nec aliquid regnum eximi potuit ab imperio, quia illud esset achepalum.’ (‘... the empire would be a headless monster if any kingdom were independent of it...’: 206). Evidently it is not the empire that would be made headless by the defection of a single kingdom, but the kingdom that would lose its proper head in being cut off from the empire. (3) ‘Sed ego *Vinc.* dico quod theutoni ci per busnardiam perdiderunt imperium. Quodlibet enim thigurium sibi usurpat dominium, et quellibet civitas de dominio cum eis contendit.’ (‘For every hut usurps lordship (*dominium*) for itself and every city contends with others for the same’: 206). The true meaning is that every city contends with the Germans, not with other cities. (4) ‘Iuvantur ergo *Spani* meritis et probitate; nec indigent corpore prescriptionum vel consuetudinum sicut theutonicis.’ (‘Unlike the Germans they have no need of a body of prescripts and customs’: 206; ‘Presumably because the Spanish have the Roman law. But is Vincentius oblivious to the customary law in Spain?’ 206 n. 43). Vincentius would not have argued that the Spanish were independent of the empire because they had Roman law; that argument was always used by the canonists in just the contrary sense. The text means, ‘Nor do they lack a body of prescripts and customs...’
We have said that little has been written on the canonists’ theory of the State. That is not quite true, since nearly all the discussions on Regnum and Imperium involve some consideration of a king’s authority in relation to his subjects; but there has been no ex professo treatment of the canonists’ ideas concerning the internal government of secular states. The richness of the material available for such a study can be gathered from the texts assembled by Mochi Onory even though he neither explored in detail the manuscripts of the twelfth century nor used the printed editions of the great canonists from mid-thirteenth century onwards. Among the topics he discusses, and illustrates with canonistic texts, are the populus as the source of political authority; elective versus hereditary monarchy; the right of the populus to exercise jurisdiction, enact legislation, consent to legislation; the right of resistance to tyranny. He also discusses sovereignty, in the sense of the need in each community for one single authority charged with the supreme direction of public affairs, and, in considering the nature of this authority, he shows how the canonists emphasized especially the legislative and fiscal aspects—an interesting point, since we still sometimes read that ‘in the Middle Ages all law was custom,’ the function of a king merely to declare the law and judge according to it. It seems that when the medieval canonists considered the content of political authority they thought at once of the power to make law and the power to raise taxes.

The very listing of topics discussed by the canonists reveals the influence of Roman law doctrines on their political thought, and indeed, in this field, the works of the canonists and of the civilians can hardly be considered separately with any profit. But, even if it proved that the main contribution of the canonists was the assimilation and diffusion of Roman law concepts, their work would hardly be the less important for that; and, in fact, if the research were extended to include writers like Hostiensis, whose vast Lectura contains much relevant material, one would probably find distinctively canonistic ideas applied to the analysis of political authority. Another factor which certainly influenced canonistic thought was the actual practice of political life in the Italian city-states, for, when the great Italian canonists of the mid-thirteenth century thought of a political community, it was the city-state that came most naturally to mind, though they did on occasion discuss the position of a king in a feudal monarchy. In the history of medieval government the greatest change of all was from feudal hierarchy to corporate state, and the canonists, with their way of considering all political groupings against a background of Roman law, ecclesiastical corporation structure, and Italian communal organization, probably contributed much to the movement of ideas that accompanied the change.

A whole chapter of medieval political theory remains to be written. A sort of preview of the probable contents of that chapter has been provided by Professor Gaines Post in a paper on the medieval theory of public law and the State.\(^\text{64}\) He first criticizes the view, which he associates especially with Gierke,

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Kern, and de Lagarde, that in the thirteenth century there was no public law, only an interlocking mass of private rights, and consequently no State, that is to say, no public authority charged with the protection of the common welfare even, if necessary, at the expense of private rights. On the contrary, Post maintains, the civilian glossators of the thirteenth century, starting out from Ulpian's dictum 'Public law pertains to the status rei Romanae,' built up a theory that the prince could levy extraordinary taxation for the protection of the status regni, the common welfare of the community, and could make new laws when 'evident utility' required them. The canonists too conceded to civil rulers the right to tax the clergy if this was necessary for the common welfare and the pope's consent was obtained; and the popes themselves appealed to the principle of necessity in demanding subsidies from the clergy. Hence, while 'normally the ruler was preserving the status of all in the realm when he was ruling according to the law which protected all private rights and interests,' in exceptional emergencies, 'the common welfare of the community was above all private rights, privileges, and immunities.' Already in the thirteenth century the adage, necessitas legem non habet, was becoming a principle of public law.

Professor Ernst H. Kantorowicz has recently turned aside from his valuable studies in political theology to illustrate the importance of canonistic influence on the developing idea of public authority from another angle. His contribution deals with a question much disputed among constitutional historians, the oath sworn by medieval English kings at their coronation to preserve inviolate the rights of the crown — with an implied distinction between the crown and the person of the king. Kantorowicz argues very convincingly that the oath against alienation — which in canonical practice and juristic theory was already required from bishops directly dependent on the pope — was added to the oath sworn in 1216 by King Henry III, the pope's feudal vassal, through the influence of the papal legate, Guala. Subsequent papal letters and canonistic commentaries on them treated it as a normal part of any king's coronation oath. The argument from thirteenth-century canonistic doctrines on alienation (which Kantorowicz did not have occasion to explore thoroughly in this article) could certainly be developed much further in this context.

The growth of a theory of public authority could enhance the authority of a ruler; but it had other implications as well. To revert to Professor Post's argument, he points out that, although the king could demand extra-ordinary taxes in case of necessity, the subjects could claim a right of consent precisely because, in a common emergency, all their interests were involved. Post himself has not been content to pursue the hackneyed argument that Roman and canon law principles paved the way for Renaissance despotism. On the contrary, the whole theme of his specialist articles in this field has been the contribution of Roman and canon law to the growth of medieval constitutionalism, especially in connection with the rise of representative assemblies.

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66 C. C. Bayley has used a somewhat similar approach in showing how canon law doctrines...
Many factors contributed to the growth of such institutions, he points out, but their emergence would hardly have been possible at all without a procedure of 'corporate representation'—the representation of a corporate group by a proctor equipped with full powers to act on its behalf. The formula commonly used to define the powers of representatives in medieval assemblies was plena potestas, and Professor Post shows that this formula was first given general currency in the Middle Ages, and applied to the representation of corporations as well as individuals, by the legists and canonists—especially the canonists—of the second half of the twelfth century. He denies that the procuradores attending the twelfth-century Cortes of the Spanish kingdoms (where the two laws were little studied at that time) were true 'corporate representatives, empowered by mandates to carry the will of their communities to the king in his council,' and he finds the first certain example of such representation in a letter of Innocent III (1200) commanding six cities in the March of Ancona to send to the papal curia procuratores equipped with plenaria potestas. The first secular ruler definitely known to have summoned representatives with mandates from their communities was Frederick II (1231), again in Italy.

By the middle of the thirteenth century the procedure of proctorial representation was spreading to assemblies in Spain, England, and France, and in the meantime the canonists and legists had much elaborated the terminology used in the definition of proctorial mandates. There was a distinction between a special mandate which empowered a proctor to act in one case only, and a general mandate which gave him authority for a whole series of cases. Even the proctor equipped with a general mandate had to refer back to his principal for instructions in certain circumstances, but when the mandate was strengthened with a clause conceding plena potestas (or with a similar formula), the proctor was held to be sufficienter instructus, able to do all that his principal could have done had he been present in court. It still happened sometimes that a proctor was granted a delay to consult his principal, but this was at the discretion of the court. All this has an obvious relevance to the claims of representatives in national assemblies to refer back to their constituencies for instructions. Post discusses the attempts of constituents to protect their interests by limiting the mandates of their representatives, but concludes that usually the kings were able to thwart such attempts by insisting on mandates conferring plena potestas. There is, however, a far more important issue involved in the relation between everyday procedural plena potestas and parliamentary plena potestas. In private law, plena potestas 'expressed the consent of the interested parties both to the representation and to the authority of the court to decide the issue, after judicial process, and pass sentence.' The question arises whether the plena potestas of a parliamentary representative implied a right of 'political' consent, limiting the royal authority (in other words a right to refuse consent), or whether, as in private law, it signified rather a consent in advance to whatever decisions the king should promulgate in his

Influenced the organization and procedure of the thirteenth-century German college of electors, op. cit. supra n. 30.

67 'Roman Law and Early Representation In Spain and Italy,' Speculum 18 (1943) 211-32.

68 'Plena Potestas and Consent in Medieval Assemblies,' Traditio 1 (1943) 355-408.
parliament. Gaines Post holds that, when a king sought extraordinary taxes or extraordinary powers for the defense of the realm, he had a duty to obtain consent but a right to exact that consent. The representative might argue that the proposed subsidy was unnecessary, or that his community was unable to bear the burden — like a proctor defending his principal's interests in court — but he had no right to refuse consent when the royal decision was finally promulgated.

This problem could not be analyzed in all its aspects, however, in an article on plena potestas, since it involves not only the nature of the representatives' mandates, but the nature of the assembly itself. The argument was therefore carried further in an article which took as its theme the Roman law dictum, quod omnes tangit ab omnibus approbetur, found in certain election writs of Edward I of England. Professor Post maintains that the phrase was not merely 'a rhetorical flourish of some scribe in the royal chancery' but an introduction into the sphere of public law of an equitable principle already well established in English private law. He first shows how the legists and canonists of the thirteenth century developed from the classical texts two legal principles — no right held by several persons in common could be alienated without the consent of them all, and no one could be deprived of a right in which he shared without being summoned before a court to accept its judgment. These principles Post defines as 'voluntary consent' and 'procedural consent.' There were certain refinements of each. As regards 'voluntary consent,' the vote of the greater part of a corporation was held to bind the whole body; and as regards 'procedural consent,' it was not essential that a defendant should actually appear in court. If he was duly summoned and failed to appear or present a valid excuse, the case against him could proceed as if he were present (his 'consent' to the jurisdiction of the court being presumed.)

The precise situations of Roman law did not arise in England but there were numerous cases of co-ownership and common rights to which the same principles could be applied. Professor Post's main purpose in this article is to establish that Bracton did know the Romano-canonical doctrines on the quod omnes tangit principle and did adapt them in their varied applications and meanings to the procedure of the common law. Once established in English private law they were in a position to influence the development of parliament considered both as a high court of justice and as a tax-granting assembly; as a high court of justice because tenants-in-chief could claim that suits involving their estates touched the king as an interested party and could only be settled in his presence; as a tax-granting assembly because the magnates could protest that the business of a tax touched the knights and burgesses and could not be decided unless they were summoned. (In summoning them, however, the king would intend to exact only 'procedural consent.') Again, the principles of private law could explain why boroughs that failed to send

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70 Or, as Post points out, the initiative might well have come from the knights themselves. In his most recent article (a revised version of a paper read at the meeting of the American Historical Association in 1949) Professor Post has applied these conclusions to an analysis of the terminology of the Statute of York, 'The Two Laws and the Statute of York,' Speculum 29 (1954) 417-32.
representatives were held liable for taxes granted in parliament; if they were properly summoned and failed to respond they were guilty of default, 'their silence being interpreted as consent.' And, finally, the private law doctrine of corporate consent seems reflected in the acceptance of majority decisions in parliament.

Gaines Post does not press his arguments further than the evidence warrants, and promises further studies on a number of debatable points, but his articles already provide a substantial contribution to a central problem of medieval constitutional history. The nature of the topics he has discussed has led him to emphasize mainly the curial aspects of parliament; it is likely that further investigation of canonistic material would provide evidence favorable to the less orthodox views of Miss Clarke and of Professor Wilkinson.

John Higham has recently offered a neat definition of two complementary approaches to intellectual history. There is an internal approach which 'seeks the connection between thought and thought' and an external approach which seeks rather 'the connection between thought and deed.' Most of the work that we have been considering belongs to the first category (though obviously enough the canonists' theories on Church and State had far-reaching practical repercussions in an age when nearly every great pope was also a great lawyer). Post's studies on representation and consent exemplify rather the second approach or, more accurately, a fusion of both types of argument. There is need for more work of the same kind, and, indeed, the study of canonistic influence on the growth of medieval institutions is perhaps the most fertile field for research in medieval canon law outside the sphere of pure literary history. Such research could have a special value at a time when, in America, the 'history of ideas' has been raised to the status of an independent discipline and, in England, an influential school of historians seems anxious to 'take the mind out of history' altogether. These may seem odd developments of historiography for an age bedeviled by clashing ideologies whose impact on the world of practical affairs is all too painfully apparent; but it is certainly true that both methods of enquiry have achieved some brilliant results. It would be regrettable, all the same, if they came altogether to dominate the study of medieval history, and especially if the second approach should come to dominate the study of medieval institutions, where the source material is far less suited to this kind of enquiry than that of later epochs. It is all very well to take the mind out of a collection of eighteenth-century English gentlemen; one does not lose much perhaps, and there is still plenty of fascinating material left for the historian. But if we take the mind out of the Middle Ages, then indeed all is chaos and night.

Canonistic studies provide a useful bridge between the realm of pure theory and the world of hard facts, both because canonistic thought was concrete and realistic, moving close to the real world of events, and because the canonists themselves were often practical men of affairs engaged in the actual conduct of government in Church and State. Obviously no one imagines that medieval parliaments came into existence because canon law provided a convenient procedure of corporate representation and Roman law a principle that all interested parties in a case should be consulted. But when, in the great national

monarchies of the Middle Ages, there arose urgent political and economic reasons why the substantial classes of the realm should be associated with the king in the conduct of major fiscal, judicial, and political business, there arose also the need for legal formulas and procedures which could define the form that that association should take. If Roman and canonist procedures had not been available, no doubt something else would have been improvised. But since the doctrines of the two laws were at hand and were used, they did come to play a part in shaping the development of medieval representative assemblies. The essential nature of institutions, as well as the essential substance of law, is sometimes secreted in the interstices of procedure.

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It is strange that, in the past, so great and potent an influence on European civilization as the law of the Church Universal has been widely regarded— even among medievalists— as something recondite, if not repugnant, outside the main stream of medieval life and thought. The recent work should help to dispel that illusion. In all three fields that we have considered striking advances have been made in the past few years; and in each much remains to be done. Indeed the most stimulating aspect of canonistic studies in their present stage is the challenge of the vast mass of unedited and unused manuscript material. The preliminary voyages of exploration have brought back treasure from this half-forgotten land; we must now look forward to a systematic conquest.

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Additional Note.—Since this article went to press, two new papers by Father Stickler have become accessible, in which he further develops his arguments, _Imperator vicarius Papae,_ *Mitteilungen des Institutes für österreichische Geschichtsforschung* 62 (1954) 165-212; _Sacerdozio e regno nelle nuove ricerche attorno al secoli xii e xiii..._ , *Miscellanea historiae pontificiae* 18 (1954) 1-26. There has also appeared an important book by Father F. Kempf, S. J., *Papsttum und Kaisertum bei Innozenz III._ (Miscell. hist. pont. 19; Rome 1954). This work will require detailed assessment in some future Bibliographical Survey. Like Maccarrone, Fr. Kempf denies that Innocent III claimed direct temporal power for the papacy, and he has used the numerous texts published by Fr. Stickler to present Innocent's position against a detailed background of contemporary canonistic theory.