PART XI. POLITICAL IDEAS OF THE THIRTEENTH CENTURY WITH A GLIMPSE AT THE LATER MIDDLE AGES

CONTENTS *Page*

[NOTE: The order of the texts in §§ A–D (and in many cases the translations) is derived from K. Pennington, *The Prince and the Law, 1200–1600* (Berkeley, 1993)† (cited as Pennington).]

A. THE EMPEROR, THE JURISTS, AND THE HORSE

1. Continuator of Otto of Morena (c. 1220)

MGH, *Scriptores* 18 (1863) 607 (in Pennington, 16 n. 34)

When the lord Frederick the emperor was once riding on a palfrey between Sirs Bulgarus and Martinus, he asked them whether he was lord [*dominus*, the word also means 'owner'] of the world. And Sir Bulgarus replied that he was not owner (*dominus*) so far as property was concerned. Sir Martinus, however, replied that he was lord (*dominus*). And then the lord emperor, when he got down off the palfrey, had it presented to the said Sir Martinus. Sir Bulgarus, however, when he heard this, concocted this elegant turn of phrase: "I lost an equine, because I upheld equity—which was not equitable."

2. Azo, *Summa Codicis* 3.13 (On the jurisdiction of all judges)

(Pennington, p. 18 n. 47)

Does this pure power (*merum imperium*) pertain only to the prince? And some say that he alone has it. And it is said to be pure in him because he has it without any magistrate over him (*sine prelatura alicuius*). But certainly exalted magistrates also have pure power if the definition of the law that I have just given is good. For even the governors of provinces have the power of the sword, as [D.1.18.6.8]. Municipal magistrates, however, do not have it, as [(probably) D.2.1.12]. I say, however, that full or most full jurisdiction pertains to the prince alone, but pure power also to other exalted podestà, although on account of this I lost [one early MS. says 'he lost'] a horse, which was not equitable.

3. C.7.37.3 (*Bene a Zenone*) (Justinian, 531)

(S.P. Scott trans. with corrections and with the Accursian gloss)

The Emperor Justinian to Florus: It was very properly provided by the Emperor Zeno of divine memory, in the case of fiscal alienation, that persons who obtain property from our treasury by way of donation, purchase, or any other kind of alienation—if anything should arise to impugn the validity of the contract, either on the ground of eviction, or to produce any other annoyance with reference to the ownership or hypothecation of the property—shall not suffer any loss; and that no suits can be brought against the purchasers, or those who have received the property by way of donation, or who have possession of the same under any other title; but they can only be brought against the treasury within the term of four years, which, having elapsed, no action will lie against the treasury.

We know that this rule is constantly observed in fiscal alienations, but that it is not observed in the case of property acquired from private resources of the Emperor, and from the funds of the treasury. This is unreasonable, for why should such a difference be established when everything is understood to belong to the prince, whether what is alienated is derived from his private property, or from that belonging to the treasury?

In like manner, when anything is alienated by the empress, why should it not enjoy the same privilege? Our stewards, by whom we are accustomed to administer our estates when anything is sold, are required to attach to the bills of sale agreements with reference to eviction, and others having a view to private convenience, and to acknowledge obligations of this kind in instruments relating to alienations, as well as those concerning changes or compromises, where such transactions take place. This also refers to those who do not acknowledge the imperial majesty, nor realize what a distance exists between private fortune and imperial rank, but attempt to injure and cause loss to our stewards, by whom the affairs of the imperial household are conducted.

For the purpose of correcting all these things, we order by this general rule, which shall be valid for all time, that every alienation proceeding from the imperial palace, whether it is made by us or by her august majesty the empress, or by those who may hereafter by worthy of the imperial name—whether the property has already been alienated, or may be alienated hereafter—shall remain irrevocable; whether the transfer has been by us in person, or by our agents pursuant to our authority. And let no one be so bold as to bring suit

against those who acquire such property under any title whatsoever, whether the said property be movable, immovable, or capable of moving itself, or whether it consists of incorporeal rights or civil privileges, or think that there is any way open for him to molest them, but every avenue shall be closed, and every method of procedure, and every hope of the tolerance of such malignancy, shall be excluded.

They shall, however, have the right to bring actions *in rem* or hypothecary actions against us within the term of four years, as they can do against the treasury, if they think that they are entitled to such actions; and such a cause shall proceed by our order and be decided in the proper manner. When, however, the said term of four years has elapsed, no one will be entitled to bring any suit whatsoever against us. Therefore, because we know that not only we ourselves but also our illustrious consort the empress has already given, sold, and alienated much property in other ways, and that our liberality as well as that of our illustrious consort the empress has been, above all, displayed with reference to churches, hospitals, poorhouses, as well as bishops, monks, and innumerable other persons, we order that they also shall hold by indisputable title what they have acquired, and that no proceeding shall be instituted against them, and that, within the term of four years from the present time, they [presumably adverse claimants] shall all have a right to bring suit against us to recover said property; but they are hereby notified that, after the said term of four years has expired, they shall be entitled to no recourse against us. For as imperial rank is entitled to many privileges, all imperial donations shall be irrevocable, without being recorded, and the title to any property which the illustrious emperor may have given to his august consort temporarily, or during marriage, or which he himself may have received from his illustrious consort the empress as a donation shall immediately become complete, without being subject to confirmation by time, and this shall be considered an imperial privilege. For why should those who, giving their advice and their efforts, toil day and night for the benefit of the entire world, not enjoy privileges becoming their rank?

Therefore your excellency as well as all our other judges shall cause these provisions to be observed which we have promulgated for the honor of the imperial name, and for the security of those who have experienced our bounty, and which shall be valid from the time when by the divine will we assumed imperial insignia.

Everything to the prince. Even as to property, as M. said to the prince at Roncaglia, through fear or favor. And for this proposition, see D.1.14.3 at the end [suggesting that the emperor has the power to free any slave he wishes]. But Bulgarus said the contrary there. And explain it this way: so far as protection and jurisdiction [are concerned everything is the prince's]. In this way the sea shores in the Roman empire are said to belong to the Roman people, as [D.43.8.3]. Or more truly, everything is his, that it to say, things belonging to the fisc and his patrimony, as the argument is expounded in [D.43.8.2 and D.43.8.3]. Whence my book does not belong to the prince, but direct action for vindication is given to me not to the prince. Accursius.

4. **D.14.2.9**

(*On the Rhodian law* with the Accursian gloss)

Volusius Maeianus, *From the Rhodian law*. Petition of Eudaemon of Nicomedia to the Emperor Antoninus: "Antoninus, King and Lord, we were shipwrecked in Icaria and robbed by the people of the Cyclades." Antoninus replied to Eudaemon: "I am master of the world [*tou kosmou kyrios*, *dominus mundi* in the translation that Accursius was using], but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it." Augustus, now deified, decided likewise.

Petition. Some people take this as a law and some subsume it under the preceding law. And note that it is read in two ways. According to one way it is an argument for custom that derogates from the law. Accursius.

Lord of the world. Understand "I am" [as the translation does].

Must be judged. That is, it is to be observed in judgments in such a way that no law can be cited in opposition to the custom of seafarers, as some say ... but badly. You however say that the aforesaid law is to be followed, that is the sea-law and their custom, only in those things in which it does not contradict our law, for the goods of those shipwrecked are to be restored to them, as [D.14.2.8; D.47.9.12].

5. **X 1.6.34 (=3 Comp. 1.5.3) (Innocent III, *Venerabilem*) (1202)**

(with the gloss of Johannes Teutonicus [Pennington, p. 32 n. 102])

[This is a very long decretal in which Innocent III lays down rules for regulating imperial elections upon the death of Frederick Barbarossa. Johannes is commenting on the following passage that deals with the German princes who claimed the right to elect the emperor:] Truly, we recognize that the right and power of electing a king to be promoted afterwards to emperor belongs to those princes to whom by law and ancient custom it is known to pertain, especially since this right and power came to them through the apostolic see which transferred the Roman empire from the Greeks to the Germans in the person of that distinguished man Charlemagne.

To the Germans. The emperor is over all kings, as [C.7 q.1 c.41] and all nations are under him, as [C.11 q.1 c.37], for he is lord of the world [D.14.2.9]. Even the Jews are under him [C.1.9(12).8] and all provinces are under him [D.63 c.22], unless they can show themselves to be exempt [D.50.15.8]. None of the kings can have prescribed an exemption, since prescription has no place in this [X 2.26.17]. A kingdom cannot have been exempted from imperial authority, since it would be without at head [D.21 c.8] and it would be a monster without a head. Rather all must give the emperor tribute, unless they are exempt [D.50.15.8]. All things are in the power of the emperor. [C.23 q.8 c.21; C.7.37.3].

[The substance of this gloss is repeated in Johannes's ordinary gloss to the *Decreta* (D.63 c.22). It was also carried over into Bernard of Parma's ordinary gloss on the decretals, and was repeated in substance in Durantis's great treatise on procedure, the *Speculum iudiciale*.]

6. **Odofredus, Commentaria in Digestum 2.1.3**

(Pennington, p. 25 nn. 75–7)

Ulpian, *Edict, book 1*. *Imperium* is pure or mixed. To have pure *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas*. *Imperium* is mixed where it also carries jurisdiction to grant *bonorum possessio*. Such jurisdiction also includes the power to appoint a judge.

Imperium. Here it is customary to ask to whom does pure *imperium* pertain? And certainly we say that pure *imperium* pertains to the prince by excellence and after the prince to other major and most distinguished magistrates, for if a provincial governor has pure *imperium*, as [D.1.18.6.8], how much more so the greater judges? Whence [a story about] the lord Henry the father of Frederick II who was ruling forty years ago: At that time Sir Azo and Sir Lotarius were teaching in this city and the emperor called them to him for a certain business, and while he was riding one day with them, he posed this question: "Gentlemen, tell me to whom pure *imperium* pertains." Sir Azo said to Sir Lotarius, "You tell me." Although Sir Lotarius was a better knight, nonetheless, Azo was better in our law. (And you ought to know that Sir Lotarius greatly loved the ladies, and gazed on them freely, although afterwards he was made archbishop of Pisa, and on account of him two decretals were written [X 2.2.12; X 2.26.17 (neither of which has anything to do with scandalous behavior of the archbishop)].) And since Sir Lotarius said: "Since Sir Azo wants me to speak first, I tell you that pure *imperium* pertains to you alone and to none other." Afterwards the emperor asked Azo, "What will you say?" Sir Azo said, "In our laws it is said that other judges have the power of the sword, but you have [it] by excellence. Nonetheless, other judges have it too, such as governors of provinces [D.1.18.6.8], [and] much more so other greater [magistrates]. Insofar as you have not revoked the jurisdiction of magistrates, others can exercise pure *imperium*." When they had returned to the palace, the lord emperor sent Sir Lotario a horse, and nothing to Sir Azo. Whence Sir Azo said in the summary of this title, "I say that pure *imperium* belongs to the prince alone by excellence; nonetheless others can exercise pure *imperium*, such as the governors of provinces; and much more so the greater judges according to [D.1.18.6.8]. On account of these words we lost a horse, which was not equitable, because I spoke the law well and not Sir Lotarius."

7. **Odofredus, Commentaria in Codicem 7.37.3**

(Pennington, 24 nn. 71, 73)

Everything to the prince. Here Sir Martinus wanted to gather that the emperor is owner of every single thing. Again for his opinion he cited the law which says that the emperor can give our lands to soldiers for their support, as [D.6.1.15; D.21.2.11] and because in the book of Kings it says "our daughters" [1 Sam. 8:13]. Again for his opinion he cited [D.1.14.3] and thus he responded to Frederick I when he was at Roncaglia, through fear or favor. But Bulgarus said to the contrary in the same place. But we say to the contrary, because since someone has an action to vindicate his thing, as [C.3.29.9], therefore the emperor does not have the action to vindicate, because two people cannot be completely [*in solidum*] the owner of one thing [D.13.6.5.15 (a famous text denying the possibility of two ownership interests in one thing; co-owners, properly speaking, each own an "undivided share" (*pro indiviso*)]. And Sir Bulgarus understood what is said here "all to the prince" to apply to protection or jurisdiction, or, more truly, things belonging to the treasury and things belonging to his patrimony. It is no objection that there are laws which say that the emperor may give our lands to soldiers for support, because this is true [only] when the price is given to us, as [C.7.13.4].

B. HOSTIENSIS ON PAPAL POWER

[Note: Pennington extracts these glosses from manuscript sources. The printed edition of Hostiensis (Venice, 1581) follows, by and large, what Pennington calls the the "second recension." The printed glosses (and, I suspect, the manuscript ones) are considerably longer than what Pennington gives, and in many cases fill out the argument. Hostiensis is not as jerky and cryptic as the extracts below make him appear to be.]

1. **X 1.7.3 (Innocent III, *Quanto personam*) (1198)**

(with the glosses of Laurentius Hispanus and Hostiensis)

Innocent III to Peter the scholar of Mainz:

Although the person of the bishop of Hildesheim [we love with sincere affection], he, abandoning the church of Hildesheim, transferred himself to the church of Würzburg on his own authority, not mindful that Truth protests in the Gospel, "What God has joined let not man separate." The Lord and master retained the power of transferring bishops to himself in such a way that he granted and conceded it by a special privilege only to blessed Peter his vicar and through him to his successors, as ancient practice, to which the decrees of the fathers order reverence to be paid, attests, and as the sanctions of the sacred canons plainly assert. For it is not man but God who separates whom the Roman Pontiff, who performs on earth the function not of a simple man but of the true God, separates, having weighed the necessity of the churches and their utility, by divine rather than human authority. Lest the perversity of this deed become an example for the presumptuous, which indeed, if it is true, cannot but become notorious, we command him that he entirely withdraw from the administration of the church of Würzburg. Further, since the canons of Würzburg plainly conferred their vows on him unlawfully, wishing, as is fitting, that they be punished as they have sinned, we suspend them this time from the power of election. Because, moreover, he so improperly abandoned the church of Hildesheim, to which he was bound, from which according to the Apostle he ought not to seek dissolution, we strictly forbid him from returning to it, since according to the canonical tradition he who transfers to a greater people ought to be repelled from the foreign seat and lose his own, so that he might neither preside over those whom he spurned through pride nor over those whom he desired through avarice.

Simple man (Laurentius Hispanus, c. 1215) (Pennington, 47): Hence [the pope] is said to have divine will [*arbitrium*, the word can mean "discretion"]. [C.1.1.1.1] O, how great is the power of the prince; he changes the nature of things by applying the essences of one thing to another, argument [C. 6.43.2], and he can make iniquity from justice by correcting any canon or law, for in these things his will is held to be reason, argument [I.1.2.6]. And there is no one in this world who would say to him, "Why do you do this?" [De pen. D.3 d.p.21] He is held, nevertheless, to shape this power to the public good.

Function (Hostiensis, Pennington, 51): Therefore the consistory of God and of the pope are to be regarded as one and the same thing [VI 2.15.2], for he holds the very place of God [X 3.12.1] and in binding

and in loosing whatever he does is ratified, for the key does not err. This is how you should understand [C.24 q.1 c.6] and you have the same thing in [X 1.7.1]. And briefly, except for sin, he can do almost anything like God [De pen. D.2 c.5?] where you should say what is noted in [X 3.8.4] and [X 3.34.7].

2. **X 1.7.1**

(*Cum ex illo*, Innocent III) (1198)

Innocent III to the patriarch of Antioch:

Since by the general privilege which our Lord granted to blessed Peter and through him to the Roman church canonical institutions afterwards flowed by which greater causes concerning the church ought to be brought to the apostolic see, and because of this translations of bishops and changes of sees pertain to the bishop of the highest apostolic see of right, nor should any changes be made about these things without his consent. We marvel that you translated L. elect of Apamia [? a metropolitan of Armenia] to the church of Tripoli, and by a new kind of change made the greater small and diminished in a way the great, made a bishop out of an archbishop, even presuming to "de-ararchbishop" [someone]. Although the aforesaid L. had not yet been consecrated an archbishop, he had received the office of confirmation and was exercising archiepiscopal functions insofar as was permitted to him, as he tells us in his referral, and he asserts that the bishop of Valania had confirmed him. Lest therefore others be allowed to perpetrate similar audacities, we order you to be suspended from confirming bishops.

Privilege (Hostiensis, Pennington, p. 51): In a broad sense all power is from the Lord God, whence [Paul's letter to the] Romans c. 13: "There is no power except from God. Therefore whoever resists power," etc. Therefore it is said that both of them, specifically *sacerdotium* and *imperium*, come from the same [source]. [Nov.6.6] Concerning the superority of the pope, however, note fully [X 4.17.13; VI 5.4.1].

3. **X 1.7.2**

(Innocent III, *Inter corporalia*) (1199)

Innocent III to the dean and chapter of Anger:

Between corporal and spiritual things we recognize this difference, that corporal things are more easily destroyed than built and spiritual things are more easily built than destroyed. Whence according to the canonical sanctions a bishop can give the honor [of being bishop], alone he cannot take it away. Bishops also take their office of consecration from their metropolitans, but they cannot be condemned except by the Roman pontiff. Since therefore the spiritual bond is stronger than the carnal, it ought not to be doubted that the almighty God has reserved the spiritual bond which is between a bishop and his church to be dissolved by his judgment alone. He has also reserved the dissolution of the carnal marriage which is between man and woman to his judgment alone, commanding that those whom God has joined let not man separate. Not human power but rather divine dissolves the spiritual marriage when by translation, deposition or cession by authority of the Roman pontiff (who acts, as is apparent, as the vicar of Jesus Christ) a bishop is removed from his church. And therefore these three things which we mentioned are reserved to the Roman pontiff alone not only by canonical constitution but also by divine institution. And just as a consecrated bishop should not leave his see without license of the Roman pontiff, so also a confirmed elect, since it ought not to be doubted that after election and canonical confirmation there is a spiritual contract between the persons of the electors and the elect, to which the further episcopal dignity adds nothing, since someone endowed with episcopal dignity can, nonetheless, be bishop of no church, as happens to him who renounces the pontifical burden but not the honor. Whence, since there is no greater bond of a bishop to his church than that of an elect, especially when he is confirmed, but rather the very same and no other, the same law obtains in both. [The decretal goes on to expound the law just announced and to answer a particularly knotty problem concerning the bishop-elect of Avranches, but the passages glossed are those given above.]

Dissolved (Hostiensis, Pennington, p. 51): Because what is done by the authority of the pope is understood to be done by the authority of God, and because he is his vicar, as follows. And because he has this power from God, as above [X 1.7.1]. And this is proved by [C.24 q.1 c.6; C.24 q.3 c.4; C.11 q.3 c.31; VI 5.4.1]

4. **X 3.8.4**

(Innocent III, *Proposuit*) (1198)

Innocent III to the provost and chapter of Cambrai:

T. the priest proposed to us that when C[lement III] our predecessor sent an apostolic mandate to you to receive T. as a brother and assign to him the next vacant prebend in your gift in your church, making the dean of Reims the executor, the dean, finding you contumacious, invested him in the next vacant prebend in your church which pertained to the gift of the chapter. But when the prebend which pertained to your gift in the church of Cambrai became vacant, you assigned it to others. Our same predecessor, however, wishing to ratify what had been done by the same dean, quashed the collation of the prebend which you had made and invested T. by a ring. Although it is not our intention to ratify investitures made against the canonical institutes of [benefices] to become vacant, although according to the plenitude of power we could dispense over the law, mindful, however, that the same priest was not invested by our predecessor with a [benefice] to become vacant but one that was vacant, that it to say, of one that was understood to be vacant after the quashing of the grant made by you, we command that having removed from this prebend any detainer, you assign it to T. with full canonical honor.

Dispense (Hostiensis, Pennington, 60 nn. 85, 87): Even against the Apostle without, however, breach of faith [D.34 c.18 (concerning clerks who marry widows)] or against a canon of the apostles [D.78 cc. 4–5 (concerning the age for ordination)] or against the Old Testament so far as tithes are concerned ... . He cannot, however, dispense against the general state of the church which I understand to mean in subversion of the faith. Otherwise I do not deny him anything, even if wishes to change squares into circles. But what if he wants to issue a statute that all the clergy could marry, since divine law does not forbid clerical marriages? (But [a contrary argument would be that] he cannot dispense the monastic rule forbidding a monk to have property, as is noted below [X 3.35.6].) This alone you should believe: he can dispense in all things provided that he does not violate the faith and provided that his dispensation does not lead to mortal sin, subversion of the faith, or danger for the salvation of souls. In these matters, he has no power against God. ... So, he may dispense from canon law generally and from divine law when he is not prohibited from dispensing and where there is no obvious mortal sin.

Over the law (Hostiensis, Pennington, 58): As if he says, we are bound by no law but rather we are placed above all laws and councils ... . This [law], however, is fitting for us, even though it does not bind us. [D.1.3.31; C.1.14.4] Truly, because it conforms to our will, it is to be obeyed even though it is hard ... . Nonetheless I hand over a rule to you: that the pope of his own accord has so much power that even if he does and says whatever he pleases, he cannot be accused or condemned by any man, so long as he is not a heretic ... . He can, however, and ought to be warned in secret or even openly, if he sins mortally, for willy-nilly he is subject to the truth of the Gospel so far as warnings are concerned ... . But as to the matter that he speaks of here, he is not subject to the church except in heresy. I shall, however, say this, if he is impenitent, that it is for the church to pray to God that He inspire him and for the church triumphant to pray for him [translation uncertain]; otherwise, even if the emperor and all the clergy and people should gather together, they cannot judge him, but [can] warn him that his very soul is in his own hands, particularly to him [who is] above all others, [and] if he should so die, a terrible judgment awaits him and unbearable suffering ... . Over subjects, however, he has such plenitude of power that as soon as he commands something, he is to be obeyed, even if there is doubt whether it is a mortal sin, so long as conscience can be overcome ... . But if one is certain that the pope's command would result in mortal sin, then the heavenly pope should be obeyed. ... The church triumphant never fails, and has not failed. If your conscience dictates that you should not obey, you should stand by your conscience, but endure excommunication patiently ... even if your conscience is in error, unless you can detect it ... . In every case in which you would commit a mortal sin by breaking divine law, you should not obey. If a mortal sin is committed by breaking human or canon law, then the pope should always be obeyed. ... And thus you should understand that when Innocent says "over the law," it means positive law.

5. **X 3.34.7**

(Innocent III, *Magne devotionis*) (1198)

Innocent III to the bishop of Troyes:

Of great devotion, etc. When the church of Troyes was burdened contrary to ecclesiastical liberty, and you believed that the same church could most easily be aided by no one other than the count of Campania, who at that time was overseas [on a crusade], you proposed to go to him and as a sign of your pilgrimage and devotion to the Holy Land you took up the cross of the Lord. Although when you heard of his death you saw your intention frustrated, you nonetheless did not wish to return to your own without consulting the apostolic see, but coming to the City [i.e., Rome] you expressed your proposal for the state of the church of Troyes. Truly, we think that three things are to be attended to in this matter: what it permissible according to equity, what is fitting according to honesty, and what is expedient according to utility. Clearly, it does not seem permissible that you go against a lawful vow, since the voice of the prophet cries: "Vow and render to the Lord your God," [Ps. 75.12], where the first [verb] refers to counsel and the second to command. Nor does it seem fitting, since it is written in the Gospel, "No one putting his hand to the plough and looking back is fit for the reign of God." [Cf. Lk. 9:62.] Nor does it seem to be expedient since out of your absolution scandal could be generated in the minds of laymen, who would say "Where is the God of the clerics?" [an echo of the Psalms, "The nations ask: Where is their God?"] and who would believe by this example that they are not bound to observe their oaths. For what is done by prelates is easily turned into an example by subjects, as the Lord says to Moses in Leviticus [Lev. 4.4], "If a priest, who is anointed, sins, he will make the people delinquent." However, the deficiencies of an age of life growing old and white hair, which scarcely can bear its labors and sorrows, argues to the contrary, and the cries of the church of Troyes, to whom you are bound with a bond of pastoral care, without the assent of which you probably ought not to have uttered your pilgrimage oath. Also, the vow itself, which in its form was holy and honest, seems unlawful because of the person of the one who vowed. For since by canonical institutes a clerk ought not make a pilgrimage without the license of his bishop, and a bishop not less but rather more is bound to the apostolic see, it might be arguable that without general or special license you ought not to have taken a vow of pilgrimage, by which you would be absent for such a long time. Since moreover in the old law, in which a command of the Lord did not bind less than a vow binds today in the church, the first-born, which were mandated to be offered to the Lord, were sometimes offered, such as the first-born of the Levites, and sometimes redeemed, like [the first-born] of other tribes; some were commuted into something else, like the first-born of an ass, which was commuted for a sheep [cf. Ex. 34:19–20; Nu. 18:15];[1] deriving from this that a vow can be commuted into another act of piety, not caring that the mouth of those who speak wicked things is speaking,[2] because we are sure in the authority of him who when he heard from his disciples "Do you know that the Pharisees hearing this word are scandalized?", replied "Let them be; they are blind and leaders of the blind" [Mt. 15.12], we grant license that the vow of pilgrimage can be commuted in this way, that expenses that you would incur in going, staying and coming back, you commit to some religious person to be transferred without any diminution to the necessary uses of that land [i.e., the Holy Land]. You should also recompense labor with labors, by keeping watchful vigils, devoutly spending time in prayer, and strongly practicing fasts. It specially induced us to make this indulgence for you that you took this vow of pilgrimage to seek the liberty of the church of Troyes through the same count, who being removed from our midst, because the reasons have ceased, more easily can also its effects cease.

Three (Hostiensis, Pennington, 62 nn. 90–2): Which it is always important to consider in such matters, argument from [D.4 c.6; C.11 q.1 c.34], and especially the Roman church and pope who are above all ought [to consider] these things. I ask, therefore, what is permitted to the apostolic see? Reply: What have I asked? Rather, what is not permitted? It can do all things provided that it does not deviate from the faith. Saving that so long as the pope does not deviate from the faith, he cannot be condemned by anybody, as

[1] Although neither of these mentions a special rule for the Levites. Cf. Lv. 27 and Nu. 30 on vows (suggested by Hostiensis).

[2] A reminiscence of Ps. 62:12 (Vulgate): 'But the king shall rejoice in God; all they shall be praised that swear by him: because the mouth is stopped of them that speak wicked things.'

appears above in what I said about [X 3.8.4], and this is to be understood so far as transgression of the law of Ten Commandments is concerned and all other things the commission or omission of which is regarded as mortal sin by divine law, either in the new or the old testaments, as is apparent above and is noted in [X 5.19.4][3] and [X 1.4.11].[4] It is otherwise in those things that are mortal sins by canon law, for in all of those anything is permissible [to the pope], as is apparent in [X 3.8.4]. Although, however, according to the aforesaid all things are permissible to the pope, I ask whether all these things are fitting for him? I reply either there is sufficient cause for him to deviate from the written law or there is not. If there is such a cause, everything that is permitted is fitting, and whatever is fitting is permitted, argument [X 5.1.18]. If, on the other hand, there is no cause, or there is one but it is not sufficient, it is not fitting for him in any way to deviate from the law. [C.1.14.4; C.11 q.1 c.39; X 3.35.7] The utility of the state and especially the church of God and the salvation of souls is always to be preferred to private utility ... . In this place I put down this rule: When it is asked whether something is expedient, always excepting a perversion of justice, a greater is always preferred to a lesser utility provided that it is licit.

6. **X 3.32.7**

(Alexander III, *Ex publico instrumento*)
(1159–81, dated in Donahue, "Dating" 78 as c.1173 X c.1176)

Alexander III to the bishop of Brescia:

By a public instrument we are informed that when the bishop of Verona took up a marriage case that was pending between the man A. and the woman M. to determine it, he approved the marriage by judicial sentence and ordered the woman to return to the man and treat him with conjugal affection. When she refused, he bound her with the bond of excommunication. Further, because, although she was espoused by the aforesaid man, she is still, as she asserts, unknown by him, we command that if the aforesaid man has not known her, and the woman wishes to transfer to religion, taking from her sufficient surety that she will either transfer to religion or return to her husband within the space of two months, you should absolve her from the sentence with which she is bound in such a way that if she goes to religion each will restore to the other what he or she is determined to have received from the other. Clearly, what the Lord says in the Gospel, that it is not permitted to a man to dismiss his wife except for the cause of fornication, is to be understood according the interpretation of holy writ concerning those whose marriage is consummated by carnal coupling, without which it cannot be consummated.

Consummated (Hostiensis, Pennington 65–7) [There are two recensions of this gloss. The second contains the material set off in diamond brackets. The printed edition combines the two.] Since the marriage has not been consummated, a couple may part with papal permission ... because an equal good has been substituted for the marriage ... but after consummation, this is no longer possible. ... I understand that when the pope permitted the wife to enter a monastery without her husband's permission, he exercised his absolute, not his ordained power, unless there were another [here not expressed] reason for his action. Alexander did not issue this decretal without cause. <But most likely it can be said that since the church has the power of restricting or relaxing impediments to marriage ... it can legislate that a spouse can enter a religious order, even though the other spouse is opposed, and, at the same time, permit the other to remarry, the impediment of the first marriage notwithstanding. Cardinal deacon Matteo Rosso Orsini argued this position in my presence. If you would ask, from where does this great power of the church come, see [X 1.7.1–3].> Therefore, the pope might have promulgated this constitution even with his ordained power.

[3] In X 5.19.4 (*Super eo vero,* Alexander III to the archbishop of Palermo) the archbishop had asked for a dispensation so that money could be placed out at usury (i.e., interest) and the proceeds used to redeem Christians enslaved by the Saracens. Alexander replies: 'Since the crime of usury is condemned in the pages of both testaments, we do not see how any dispensation can be made about this, because, since holy scripture prohibits lying to save the life of another, even more is someone to be prohibited from engaging in the crime of usury, even to redeem the life of captive.'

[4] X 1.4.11 (*Cum tanto,* Gregory IX): 'Since the greater the sin the longer it holds the unhappy soul bound, no one of sound mind understands that it is possible to derogate in any way from the natural law, the transgression of which leads to peril for the soul [a probable reference to mortal sin], by any custom, which is more truly to be called in this respect a corruption. Although longstanding custom is not a bad authority, it is not good enough that it ought to generate prejudice to the positive law unless it is reasonable and lawfully prescriptive.'

<When therefore there has been no joining of bodies, we do not offend God. And in this case, we can make laws, insofar as we please, with our absolute power, that is plenitude of power. This is true. But it is not expedient that we loosen the reins too much; it is not safe.>

7. **X 3.35.6**

(Innocent III, *Cum ad monasterium*) (1202)

Innocent III to the abbot and convent of Subiaco:

[This long decretal calls the monks back to ancient rule, commanding them to give up fine clothing, abandon private property, keep silence, not eat meat, and obey their abbot and prior. The final sentence is what interested the commentators:] Nor should the abbot think that he can dispense any monk so that he may have private property, because the abdication of property, like the keeping of chastity, is so annexed to the monastic rule, that the supreme pontiff cannot grant license against it.

Annexed (Hostiensis, Pennington 68, 71): Others say that, although the monastic vow is part of the very substance of the monastic life, nevertheless, the pope can do this with his plenitude of power, as if one would say that he acts not with ordained, but with his absolute power. With this power he can change the substance of a thing ... and make something out of nothing. ... And one may not object that this is contrary to Innocent's statement, because when the pope says that he cannot, this is understood as "it is not appropriate that he do this." <These things are annexed to the order [of monks] as a matter of positive law, which I prove thus: A monk is nothing other than one who is solitary and sad. [C.16 q.1 c.8] Anything therefore that is added to this is imposed by positive law. From which it appears that the pope can dispense a monk to have private property or take a wife, since no one doubts that he could take away entirely the religion or order and nature or substance which he gave to the order, as my master [Innocent IV] says.> [In the printed edition the material from the second recension was substituted for that from the first.]

The supreme pontiff (Hostiensis, Pennington 69) [From the second rescension]: Except for cause. Although the pope could dispense, if there were no just cause, the pope granting the dispensation sins and so does he whom he dispensed. A dispensation of the pope granting property to a monk and like sort is never valid, although for cause he can grant to a monk that he go on a pilgrimage and take expenses for the journey with him. These, however, he possesses in the name of his monastery not in his own, and he can never make a testament about them. And these things are true unless a great and true cause is present. But what if the pope dispenses a monk in a situation where he ought not to have dispensed him, for example that he take a wife, and there is no necessity or utility in the dispensation? I reply that if the woman whom he marries believes the dispensation well and lawfully made, the marriage stands, and the monk is bound to render the debt, but he cannot require it without sin. If, on the other hand, the pope concedes to some monk that he have private property and there is no cause, the dispensation is entirely void, nor does it excuse him. The reason for the difference [in result in the two situations] is this: because no one is prejudiced by the dispensation to have private property and no one gains or loses except he who has the dispensation. Therefore the dispensation is not valid for him unless there is cause. It is otherwise in the case of marriage, where the dispensation benefits or prejudices another, specifically the spouse. And therefore it is to be said that the marriage stands, lest she who contracted it with the authority of the prince might seem to be deceived, argument [C.2.44.1; X 3.24.5]. It does not benefit the monk, however. He always sins in requiring the debt. Some people say, and indeed not badly, that just as a dispensation of the pope against an express or tacit vow or against the Gospel does not profit unless there is cause made, so too it is to be understood if he dispenses in those things which are against the general state of the church ... . This, however, is not true in those dispensations which are only against the positive law, as appears in those statutes promulgated concerning orders to be taken within a certain time ... or that someone cannot have two cures of souls ... . In these dispensations the will alone of the dispensor suffices even without cause. Out of this is shown that if only the constituted will is the cause why something is prohibited, by consequence only the contrary will is the cause why the prohibition is relaxed, for it belongs to him to destroy the law who makes it and interprets it. The prince is also not bound by his laws although it is fitting that he observe them [C.1.14.4] and a thing easily returns to its nature ... . Others than the pope cannot dispense with the laws without cause, and if they do the dispensation is invalid and revoked and the dispensors punished. ... But for

cause the pope can dispense a monk to have private property. For what if all Christianity or a large part of is were in danger unless a monk became king, perchance that there is no one else who knows how to and can govern the realm? Would you not say that the monk should be king in this case? Should he not offer himself entirely as a sacrifice to God to serve him who chose him to serve in a matter that pleases him more? But it pleases God above all else to preserve his rational and bodily creation for which he himself laid down his life. The greater good is to be preferred to the less and the common utility to the private ... . Further, if for common utility a monk can be made a bishop ... and even a clerk or rector with care of souls, ... why in the same manner can he not be king? What if Christianity would not be safe unless he took the kingdom as his own and left it to his sons whom he had before he became a monk? What if those who had the power to give the kingdom, the heir to which was a girl, said to him 'we are ready to give you the girl and the kingdom, but if you refuse we will give it to a tyrant or to some infidel'? In such a case do you place such value on the contemplation of one monk or the continence of one man, and do you think God so cruel that he would not provide by the dispensation of his vicar for such a multitude of Christians? Should it not be said that the pope can dispense in such a case, since greater power than this seems to be given to him ... . Surely, it is to be believed that it would please God more if what was useful for the community was chosen.

8. **X 5.31.8**

(Clement III, *Sicut iure*) (1191–8)

Clement III to the bishop Faustinus:

Just as the uniting of bishoprics and subjecting them to the rule of others is known to pertain to the supreme pontiff, so does the union of churches of his diocese and the subjection of same pertain to the bishop. Since, therefore, the prior of Grandi subjected or united his monastery, which is in your diocese and ought to be ordered by your consent, to the monastery of Accato, without obtaining your assent, you are permitted to strike down by our authority what was done without your being consulted, notwithstanding the assent or confirmation which the metropolitan is said to have interposed. Since he ought not attempt anything contrary to the canonical sanctions in the diocese of his suffragan without the latter's consent, we also decree that it is void.

Bishop (Hostiensis, Pennington, 72–3): But not in the same way, because the pope can do this without consulting the churches [C.9 q.3 c.17 and c.21] ... . But a bishop cannot do this without the approval of the clerks and the consent of both churches. [X 3.10.1; X 3.13.1] ... But the pope is not wont in these cases and in others specially reserved to him, as in the preceding verses, to proceed without the advice of his brethren, that is, the cardinals. Nor can he do this of his ordinary power, as in [X 1.10.1], although it is otherwise of his absolute power, as in [X 3.8.4].

C. PRINCEPS LEGIBUS SOLUTUS, DIGNA VOX, POTESTAS ABSOLUTA

1. **D.1.3.31(30)**

(*Princeps legibus solutus* with the Accursian gloss)

Ulpian, *Lex Julia et Papia, book 5*. The emperor is not bound by statutes. And though the empress is bound by them, nevertheless, emperors give the empress the same privileges as they have themselves.

By statutes. Whether made by another [D.4.8.4] or by himself [D.4.8.51], by his will, however, he subjects himself [to them]. [C.1.14(17).4; JI.2.17.8] and [C.6.23.3; 6.61.7; D.32.[1].23.] are relevant.

Code 1.14(17).4. See below.

Institutes 2.17.8: And there are numerous rescripts of the Emperors Severus and Antoninus to the same purpose [refusing to accept an inheritance under a legally-deficient will]: "for though," they say, "the laws do not bind us, yet we live in obedience to them."

Code 6.23.3: Alexander Severus to Antigonus [232]: It has frequently been laid down that not even the emperor can vindicate an inheritance from an incomplete will. Although the law of *imperium*

frees the emperor from the solemnities of the law, nothing nonetheless is so proper to *imperium* than to live according to the laws.

Digest 32.1.23: Paul, *Sentences, book 5*: For the emperor to vindicate legacies or *fideicommissa* under an imperfect will is shameless. For it is proper that so great a majesty should observe the laws from which he is deemed to be himself exempt.

2. **JI.1.2.6**

(*Quod principi placuit* with the Accursian gloss)

Again, what pleases the prince has the force of law, the people having conferred on him and in him all their *imperium* and power by the *lex regia*.

Pleases. To wit, for the purposes of making a common law, otherwise it is not a common law, as follows, and [C.7.45.7], <for it is said there: not every word of a judge is a sentence, and thus not every word of the prince is law.> [The matter in diamond brackets is not in all the manuscripts.]

Has the force. That is, it is a *lex* and is to be observed as a *lex*.

Lex. Which we do not have.

Regia. By this law it was provided that the power of making law be transferred from the people to the prince, as this and [D.1.2.2.8] <and this *lex regia* we do not have because it was made about transferring regality, that is *imperium*.>

Imperium. To be transferred from the people to the prince.

On him. So far as honor is concerned.

In him. So far as responsibility is concerned.

Conferred. That is, handed over, so that the people itself no longer has this right, as [C.1.17.2.21; C.1.14.12]. But others say that even now the people can make laws, and that it is said that the prince alone can do this, this is true, "alone" being understand as no one else can do it alone, according to Azo. [Some manuscripts add:] And these things were true so long as *imperium* was with the Romans; today, however, it can be said to the contrary, according to everyone.

3. **C.1.14(17).4**

(*Digna vox* with the Accursian gloss)

The emperors Theodosius [II] and Valentinan to Volusianus pretorian prefect (429)

It is a cry worthy of the majesty of the one who reigns for the prince to profess himself bound by the laws, so much does our authority depend on the authority of the law. And in truth it is greater in *imperium* to submit the principate to the laws. And by the oracle of the present edict we indicate that we will not tolerate what we do not allow to ourselves.

Cry worthy. But how is it a worthy cry when it is false? As [D.1.3.31(30); D.32.[1].23; Nov. 105.4; C.6.23.3] I reply, it is worthy if he says that he wills, not that he is. ... Others say that here he is permitted to lie. ...

So much. That is, so much on the authority of the law does our authority, i.e., *imperium*, depend so that it is a cry worthy of the majesty of the one who reigns.

On the authority. This is the reason for the first statement, and what he says of law, understand of the *lex regia*, which concerns the transfer of *imperium* from the people to the prince ... .

Principate. Understand than the laws to the principate or to the *imperium*, which is to say, greater is the honor and greater the convenience, since *imperium* comes from fortune. Whence it is said, if fortune wills you will become a consul, when you were an orator, and if the same fortune wills, you will become an orator when you were consul. But the laws come forth from the divine nod ... and are immutable. Accursius.

Oracle. That is, example. And where he says "edict," here it means "general law"; otherwise edict is taken for the edict of the praetor. Or you can say that oracle is what is granted by the speech or prayers of someone. Or oracle is the divine will declared in the mouth of man. ...

What. To wit, that we are not bound by the laws.

Indicate. To wit, to our successor, and he does not say "we command," because an equal does not have power over an equal. ...

4. **Pierre de Mornay, *Quaestio***

(Pennington, 99–101) (1278)

The third question was this [the first two are irrelevant here]: There was a custom in Brittany that if anyone of the jurisdiction of the count [?duke] of Brittany was called before the count in either a civil or a criminal case, he could complain or appeal to the king of France, and thus the count could not further lay hands on the matter. Then the king of France wished to remit this right to the count, indeed we put it that he did so *de facto*, without calling the barons. Query whether this remission is valid or not? And the doctor discussed this question briefly. First, he argued that is valid according to the law, [C.1.19(22).2] Since the king of France is reputed not to have a superior to himself in his lands, and hence by a certain error he reputes himself to be the prince. He can grant whatever rescript he wishes to in his subordinates, so long as the right of an adversary is not totally damaged or taken away. By this remission the right of the barons was not taken away entirely nor that of any other subordinates, therefore, etc. But the doctor in determining to the contrary said: Now something which would be tolerated in the persons of other lesser persons is reputed a great error and great iniquity [reading *iniquitas*] [when done to] many persons or those of a given province. [D.28.6.43; C.8.53(54).34] and especially by [D.1.16.6]. Sir Peter Mornay disputed these question in 1278 on the Friday before Christmas.

5. **Guido of Suzzara on D.1.3.31(30)**

(Pennington, 106) (c. 1275)

Again, when he submits himself to the laws as is proved in the laws now alleged, which at the beginning is a matter of will, to wit that he submit himself to the laws, becomes afterwards a matter of necessity. As we say in a compromise, what in the beginning is voluntary, afterwards is of necessity, as [D.4.8.3.1], so [also] is it apparent in *commodatum* [D.13.6.17?] and in like matters [C.4.10.5]. Who will be the judge in such a question? I reply: the proctor of Caesar, as in [C.3.26.5] and [C.2.36(37).2]. G.

6. **Marinus de Caramanico on the *Liber Augustalis* (c. 1278)**

(Pennington, 103–5)

[Note: This work was written as a prologue to the *Liber Augustalis*, also known as the *Liber consitutionum*, the collection of statutes promulgated by Frederick II for the kingdom of Sicily in the mid-13th century. Although Frederick was the Holy Roman Emperor, he promulgated the statutes in his capacity as king of Sicily. The work of Marinus is available in a number of early printings of the *Liber Augustalis*, but the extracts translated here are from a modern edition, done from the manuscripts by Francesco Calasso, and printed as an appendix to his *I Glossatori e la teoria della sovranità*, 2d ed. (Milano, 1951), 181–208.]

§ 1. ... This consitution of the prince is law and is observed as law in our kingdom of Sicily, as [D.1.2.2.12; I.1.2.6.] § 2. And no one should think that the aforesaid Roman laws only apply to the prince, that is the Roman emperor, as [Nov. 143; C.1.14.12; C.1.17.2]. ... § 3. But we say the same thing about a free king, who is subject to the power of no one, to wit, that the king himself can make law, as [D.49.15.7.1], such as the king of Sicily, as we shall expound below. Therefore we say boldly that a king can make a constitution for the subjects of his kingdom, and that he can even make law contrary to the common Roman law, as appears in [D.49.15.19]. ... § 5. [Kings made laws before there was a Roman emperor.] And on account of this, the legislator frequently recalls the royal laws, as [D.11.8.2] and in many other places, [and thus] both the laws and the decrees agree that royal like imperial dignity prevails in temporal things and has the plenitude of power. ... § 6. ... Again, elsewhere [we read] that earthly things are possessed by the laws of kings, that is by human law, which is in the power of kings and which is in the laws [*legibus*] of kings and emperors, because God passes on to human kind human laws through the emperors and kings of the world,

as [D.8 c.1]. From which it appears that as we say that all things belong to the emperor, as [C.7.37.3], so we can say also about a king about everything in his kingdom. ... § 10. ... Indeed, the curious reader will well note, how the legislator not mysteriously, where he recites how it came about recently that it was necessary that there be one consul for the republic, calls that one prince, as [D.1.2.2.11], and both the *Digest* and the *Code* have a title "Concerning the constitutions of princes" [C.1.14; D.1.4], and in all of of law he is for the most part called prince. The name prince is common to both king, as [Nov. 47], and emperor, as [D.1.4.1] and to anyone else who is monarch, by whatever name he is called. § 11. For the prince is called etymologically "first head," and thus is given to understand that all laws that speak of the prince are to be understood of the king or the emperor or anyone else who has monarchy over his subjects living according to Roman law. ... § 20. ... Moreover it is clear that the crime of treason [*lese maiestatis et perduelionis*] is committed in the kingdom of Sicily, although some people with too much subtlety are tempted to say to the contrary, alleging that majesty belongs only to the emperor, as appears in [C.9.8.6] and in the prologue to the *Institutes* at the beginning it says "The imperial majesty" and does not say "royal." But they speak rashly, because for majesty is also said to be in the king, as [C.2.15(16).1; C.1.14.4], where it speaks of the "majesty of one who reigns." ... For majesty means nothing other than superiority, and therefore even a people which is superior is said to have majesty, as [D.49.15.7.1]. ... § 21. ... It is clear by the same reasons that appeal cannot be taken from the king of Sicily, for, since he is a prince, it is foolish and vain to say that it is proper [*fas*] to appeal from a prince, as [D.49.2.1]. ...

7. **Beaumanoir on kingship**

([before 1296], [Pennington, 92] trans. [with modifications] from F.R.P. Akehurst, *The* Coutumes de Beauvasis *of Philippe de Beaumanoir* [Philadelphia, 1992])

§ 1103. ... It is also the king's right, notwithstanding any waiver that anyone has put into writing, whether general or special, that the king may, if the debtor is joining the king's army or going on crusade against the enemies of the faith, have the debt postponed [*aterminer*], according to the needs of those going with him, or who are going on some necessary business at his command, for what he wants to do should be taken for law. But this can be done by no one but him in the kingdom of France.

§ 1510. There are exceptional times when you cannot and should not do what has been lawful [*pour droit*] by long custom and practice, for example anyone can know that there are two kinds of times: war and peace. And it is reasonable for peace time to be dealt with according to the usage and custom which has been habitual and developed [*usees et acoustumees*] over a long period for life in peacetime ... . But in times of war or fear of war, kings and princes, lords who hold directly from the king [*barons*] and lower ones, have to do many things which, if they were done in times of peace, would be wrongs towards their subjects; but the emergency [*tans de necessité*] excuses them, so the king can make new laws for the common good of the kingdom: for example, when he thinks he will have to defend his land or attack someone who has wronged him, he is accustomed to order that gentlemen who are squires be all made knights, and the rich men and poor should furnish armor, each according to his position and that towns should repair their fortifications [*services*] and their fortresses, and that everyone be ready to move when the king gives the order. The king can give all such laws and others which seem right to him and his counsel in time of war, or fear of war to come; and the barons can do the same in their lands, provided it is not in order to take arms [*emprendre*] against the king.

§ 1512. No one can make a new law [*establissement*] which will be enforced as such [*pour droit*], or a new market, or new customs, except the king in the kingdom of France, save in times of emergency [*necessité*], for in those times every baron can force the sale of his subject's goods, as we have said above; but they cannot make new markets, nor new customs [*coustumes*] without the king's permission. But the king can do this when he likes, and when he sees it is for the common good, for example, we see the king giving new customs every day to certain towns which are his own or to certain lords among his subjects, for example to repair bridges or roads, or churches, or various other public words [*aaisemens communs*]; in such cases the king can act, but not others.

§ 1513. You should know that if the king makes some new law for the common good, it does not affect things done in the past, nor things which will happen in the future, until observance of the law has been ordered. ...

§ 1515. Although the king can make new laws, he must take great care to make them for reasonable causes and for the common good, and after much consultation [*par grant conseil*], and especially they must not be made against God or against morality [*bonnes meurs*]; for if he did (which will never happen, with God's help), his subjects should not permit it, for each person should above all things love and fear God with all his heart and for the honor of Holy Church, and after that his earthly lord. And everyone should obey the commandments of our Lord in the hope of the reward of heavenly treasures [*des biens celesiaus*], and after that obey his earthly lord according to what one should do for one's temporal goods [*les possessions temporeus*]. *Here ends the chapter on laws and times of emergency.*

8. **Bracton on kingship (c. 1230?)**

(Pennington, 92–3)

[What follows is derived from the translation by S. E. Thorne; matter included in diamond brackets indicates what Thorne believes to have been glosses by a later author, which were incorporated into the text; matter included in square brackets are additions by Thorne. The citations are provided by Thorne and are not, as they are in previous extracts, in the text itself.]

[fol. 5a] The king has no equal within his realm, <Subjects cannot be equals of the ruler [cf. D.4.7.3.pr], because he thereby lose his rule, since equal can have no authority over equal.> nor *a fortiori* a superior, because he would then be subject to those subjected to him. The king must not be under man but under God and under the law, because law makes the king, <Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power.> for there is no *rex* where will rules rather than *lex*. Since he is the vicar of God, <And that he ought to be under the law appears by the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. [Cf. Gal. 4:5.] For He did not wish to use force but judgment. [Cf. Leo the Great in P.L. 54:196.] And in that same way the Blessed Mother of God, the Virgin Mary, Mother of our Lord,, who by an extraordinary privilege was above law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established law. Let the king, therefore, do the same, lest his power remain unbridled.> there ought to be no one in his kingdom who surpasses him in the doing of justice, but he ought to be the last, or almost so, to receive it, when he is plaintiff. If it is asked of him, since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend this act; if he does not, it is punishment enough for him that he await God's vengeance. No one may presume to question his acts, much less contravene them.

[fol. 107a-107b] Since nothing pertaining to the clerical estate is relevant to this treatise, we therefore must see who, in matters pertaining to the realm, [has ordinary jurisdiction, and then who] ought to act as judge. It is clear that it is the king himself and no other, could he do so unaided, for to that he is held bound by virtue of his oath. For at his coronation the king must swear, having taken an oath in the name of Jesus Christ, these three promises to the people subject to him: In the first place, that to the utmost of his power he will employ his might to secure and will enjoin that true peace shall be maintained for the church of God and all Christian people throughout his reign. Secondly, that he will forbid rapacity to his subjects of all degrees. Thirdly, that he will cause all judgments to be given with equity and mercy, so that he may himself be shown the mercy of a clement and merciful God, in order that by his justice all men may enjoy unbroken peace. To this end is a king made and chosen, that he do justice to all men <that the Lord may dwell in him, and he by His judgments may separate> and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. The king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*, equity from iniquity [D.1.1.1.], that all his subjects may live uprightly, none injure another, and by a just award each to be restored to what which is his own [I.1.1.3; D.1.1.10.1]. He

must surpass in power all those subjected to him, <He ought to have no peer, much less a superior, especially in the doing of justice, that it may truly be said of him, "Great is our lord and great is his virtue etc.," [Ps. 146:5] though in suing for justice he ought not to rank above the lowliest of the kingdom.> nevertheless, since the heart of a king ought to be in the hands of God, [Prov. 21:1; C.1.1.8.3] let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice. For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure*, <despite the statement that the will of the prince has the force of law, [I.1.2.6; D.1.4.1pr] because there follows at the end of the *lex* the words 'since by the *lex regia*, which was made with respect to his sovereignty'; nor is that anything rashly put forward of his own will, [I.1.2.6, gloss on *placuit* "not every word of a judge is a sentence just like not every word of the prince is law."] what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.> His power is that of *jus*, not *injuria* <and since it is he from whom *jus* proceeds, from the source whence *jus* takes its origin no instance of *injuria* ought to arise, [C.8.4.6] and also, what one is bound by virtue of his office to forbid to others, he ought not to do himself. [D.8.5.15]> as vicar and minister of God on earth, for that power only is from God, <the power of *iniuria* however, is from the devil, not from God, and the king will be the minister of him whose work he performs,> whose work he performs. Therefore, as long as he does justice he is the vicar of the Eternal King, but the devil's minster when he deviates into injustice. For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. [John of Salisbury, *Policraticus*, 8.17] Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, [D.2.2; D.2.2.1] and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws. [C.1.14.4] Nothing is more fitting to the sovereign than to live by the laws, [C.6.23.3] nor is there any greater sovereignty than to govern according to law, [C.1.14.4] and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.

D. NATURAL LAW, POSITIVE LAW, PROCEDURAL RIGHTS

1. **Guido of Suzzara on D.1.3.31(30)**

(see above, C4)

2. **Johannes Monachus on Extrav. com. 2.3.1**

(Boniface VIII, *Rem non novam*) (1303; gloss written before 1313)

Boniface VIII:

A matter not new do we approach, nor are walking on an unaccustomed road, but one trod with the footprints of preceding law, we confirm with the undoubted strength of this present constitution, [and] we make it stable with unbroken strength. It is indeed already sanctioned that an edict of public citation having been put forth binds him who impedes and hides himself so that the citation cannot come to him and that he appears contumacious, who so behaves, and that in the album of the praetor such edicts put forward bind those who are subject to his jurisdiction and they bind more than if they [the defendants] are cited by the crier's voice, which is known to few, or by letters. For the law which puts forward such a method for citations is believed violently to have presumed, that what is open to be read in the same album by the eyes of so many people frequenting the public place of the same album will come to the notice of the person cited. Whence to give full reading and notice to all who are sanctioned it is commanded that a law be sculpted on tablets or stones be written and affixed to the porches of the most holy church. Having taken the aforesaid into due consideration and weighed them in the scales of irrefutable reason, who are known to be above all people by the disposition of the Lord, wishing by this new constitution something to be more specifically discovered about the aforesaid statutes, declare with the advice of our brethren, and nonetheless confirm and by this edict to be forever valid, that citations by apostolic authority of any persons whencesoever and wheresoever they are, of whatever status, dignity or preeminence, whether ecclesiastical or worldly, even if they shine with imperial or regal dignity, especially if they impede or see to it through

themselves or others in any way that these citations do not come to them, making it that for any reason the domiciles of those cited cannot be safely or freely approached (since, as is written, we ought to judge whether it is possible for him [the ?summoner] to go where the citation is to be made); in like manner on the example of the aforesaid edicts put forward in the album of the praetor, even outside the solemn days in which the Roman pontiffs are accustomed to make general processes, citations publicly made by our special and knowing order in the audience of our letters or in the hall of our palace to be affixed to the doors of the church of the place in which the common Roman curia of all nations of Christian people resides, so that they can be apparent to all and thus brought to those cited shall be so valid and so bind those cited after the lapse of a term (a competent one of which we wish to be placed on the citations themselves, considering the distance of the places) as if they had come to them personally, notwithstanding any privileges, indulgences and letters apostolic both general and specific, granted to whatsoever persons endowed with pontifical, imperial, royal or other ecclesiastical or worldly dignity or to other inferior churches, monasteries, places, colleges and corporations in whatever form of words, even if it is necessary that special mention be made in our letters by which they are granted of them or of their entire contents word for word, or of the specific names of their persons, monasteries, churches, or of those places.

Notwithstanding any privileges: On the evidence of the foregoing, I ask whether the pope could proceed against someone without citation? And it would seem that he could, because he is above the law. [X 3.4.8] Again because the prince is freed from the laws. [D. 1.3.31(30).] Again the pope has plenitude of power. [C.2 q.6 c.11; X 5.38.14; X 1.8.4.] But on the other hand: The citation is the beginning of the judicial process, as is noted above, and as you find in [X 2.19.11], and it is not possible to proceed to the end of the judicial process, which is the sentence, without the beginning. ... No one can be above the law which he has not laid down, but [the law that the pope makes] presupposes what has been laid down. But the pope or a simple man laid down none of the said laws [*iurium*, perhaps "rights"] [C.25 q.1 c.6], therefore he has power over none of them. The major [premise] is apparent; the minor is also apparent so far as eternal law [*lex*], or eternal *ius*, or divine or natural, and so far human *ius* derived from natural [is concerned] ... . The conclusion therefore follows, to wit, that the pope has power over only of the law that is said to be of the fifth mode, to wit law purely positive. It remains, however, to see if citation is of natural law or of human law derived from natural, so that the conclusion follows from the premise, since if the pope has no power over such laws as appears in what preceded, the consequence is that he can proceed against no one without having issued a citation ... . Since it is not possible to understand or to know fully a fact or justice or injustice without the presence of the person against whom the judgment is to be rendered, [C.30 q.5 p.c.9; X 2.27.18; C.11 q.3 c.76], then it is necessary that he be cited or called. And the pope cannot omit this, nor any lesser judge, because thereby he would omit the *cognitio* [a play on words, literally "understanding," but also the technical term for a judicial hearing], which is of necessity required for a judgment ... . And thus both the second and the third appear at the same time, to wit, that citation is of the natural law, and by consequence that the pope cannot proceed against anyone without having issued a citation. And this constitution proves this evidently. This is also plain in notorious matters in which, though the *iuris ordo* is not to be observed completely, it is to be observed in citation and sentencing. [X 2.24.21; C.2 q.1 c.7; X 4.19.13; C.2 q.1 c.15; note X 5.1.17] And Genesis 18, where the fact was notorious, nevertheless God wanted to proof before he judged. Nor does [X 5.1.9] stand in the way, for neither citation nor sentence is taken away there, because Genesis 3 proves them both necessary. Again, anyone is presumed innocent unless he is proved guilty. [X 2.23.16; X 1.12.1; D.40.4.20] And the law is quicker to absolve than to condemn. But perhaps you might say that the pope or another judge knows the cause and the truth of the matter in secret, in his capacity as a private person, but as a public person and therefore publicly the truth ought to be known to him, to wit by laws public, divine or human, together. ... To the third [objection; perhaps "second" is meant] it ought to be said that the will of the prince has the force of law if it is ruled by reason and comes about in the spirit of laying down law according to form of which it has been passed on, [C.1.14(17).8], for will is not a secure rule, as the Philosopher says in Politics 2. When moreover the prince judges or renders sentence without discussion and examination of the cause he does not have a will regulated according to the right judgment of reason. To the fourth [objection; perhaps "third" is meant] it ought to be said that according to the Philosopher in Politics 1 there are two kinds of principate, despotic and political. The first is of the owner over a slave who does not have the right to resist, because he is the slave of his

owner entirely according to this manner. The second is the principate over children, who have the right of resisting in anything [?], and such is the principate of the church over her subjects. It is not plausible that the principate of the church is despotic. We are not the children of the slave woman but of the free woman for which liberty Christ freed us, Galatians 4[:31, reading *nos* for *non*]. Johannes Monachus, Cardinal.

E. A GLIMPSE AT THE LATER MIDDE AGES

1. **Marsilius of Padua, *Defensor pacis*** †

(Discourse 3, cap. 2)

[For a writer whose influence has been so great, we know remarkably little about Marsilius of Padua. His full name was Marsilio dei Mainardini, and he tells us that he came from Padua. He was probably born between 1275 and 1280. He is not known to have obtained an advanced degree in any discipline, but he speaks of himself as a physician, and he may have obtained a doctorate in medicine some place in Italy or France. He was rector of the university of Paris in 1313 (a relatively minor position) where he was associated with Peter of Albano and other leading Averroists. He tells us that he finished the *Defensor pacis*, his only major work, in 1324, though one family of manuscripts suggests that he made some later additions. The papal condemnation of the work in 1326 forced him to flee to the court of Ludwig of Bavaria (King of the Romans from 1314; Holy Roman Emperor 1328–1347). At the court of Ludwig in Nuremberg, Marsilius probably encountered William of Ockham, who was there for the same reason, but any influence probably runs from Marsilius to Ockham's political writings rather than the other way. Marsilius died in 1342, having just published an abridgement of his great work, known as the *Defensor minor*.

[The *Defensor pacis* is a large and sprawling work. It is divided into two main parts, called 'discourses' with a brief third, concluding, discourse at the end. What separates the two main discourses is not easy to discern. By and large, the first discourse deals the normal and the natural, in the sense that Revelation is not required to reach the conclusions. The second discourse deals with the abnormal, the corruption, in a sense, of the natural, and is full of quotations of Scripture, by and large designed to show that what is going on is not right. We reprint here only Marsilius' list of conclusions, derived from the translation of Alan Gewirth, whose complete English translation may be found online by subscription.]

CHAPTER II: IN WHICH ARE EXPLICITLY INFERRED CERTAIN CONCLUSIONS WHICH FOLLOW NECESSARILY FROM THE RESULTS SET FORTH IN THE FIRST TWO DISCOURSES. BY HEEDING THESE CONCLUSIONS, RULERS AND SUBJECTS CAN MORE EASILY ATTAIN THE END AIMED AT BY THIS BOOK

OF the conclusions to be inferred we shall place this one first:

1. For the attainment of eternal beatitude it is necessary to believe in the truth of only the divine or canonic Scripture, together with its necessary consequences and the interpretations of it made by the common council of the believers, if these have been duly propounded to the person concerned. The certainty of this is set forth in, and can be obtained from, Discourse II, Chapter XIX, paragraphs 2 to 5.

2. Doubtful sentences of divine law, especially on those matters which are called articles of the Christian faith, as well as on other matters belief in which is necessary for salvation, must be defined only by the general council of the believers, or by the weightier multitude or part thereof; no partial group or individual person, of whatever status, has the authority to make such definitions. The certainty of this.is to be had in Discourse II, Chapter XX, paragraphs 4 to 13.

3. The evangelic Scripture does not command that anyone be compelled by temporal pain or punishment to observe the commands of divine law: Discourse II, Chapter IX, paragraphs 3 to 10.

4. For eternal salvation it is necessary to observe only the commands of the evangelic law, and their necessary consequences, and the dictates of right reason as to what should be done and not done; but not all the commands of the Old Law: Discourse II, Chapter IX, paragraph 10 to the end.

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5. No mortal can dispense with the commands or prohibitions of the divine or evangelic law; only the general council or the faithful human legislator, and not any partial. group or individual person, of whatever status, can prohibit things which are permitted by that law, by obliging transgressors of this prohibition to incur guilt or punishment for the status of the present or of the future world: Discourse I, Chapter XII, paragraph 9; Discourse II, Chapter IX, paragraph 1, and Chapter XXI, paragraph 8.

6. Only the whole body of citizens, or the weightier part thereof, is the human legislator: Discourse I, Chapters XII and XIII.

7. The decretals or decrees of the Roman or any other pontiffs, collectively or distributively, made without the grant of the human legislator, bind no one to temporal pain or punishment: Discourse I, Chapter XII; Discourse II, Chapter XXVIII, paragraph 29.

8. Human laws can be dispensed with only by the human legislator or by someone else acting by its authority: Discourse I, Chapter XII, paragraph 9.

9. An elective ruler, or any other official, is dependent only upon election by the body having the authority therefor, and needs no other confirmation or approval: Discourse I, Chapter XII, paragraph 9; Discourse II, Chapter XXVI, paragraphs 4 to 7.

10. The election of any elective ruler or other official, especially if such office carries coercive force, depends upon the expressed will of the legislator alone: Discourse I, Chapter XII; Chapter XV, paragraphs 2 to 4.

11. The supreme government in a city or state must be only one in number: Discourse I, Chapter XVII.

12. Only the faithful ruler in accordance with the laws or approved customs has the authority to appoint persons to the offices of the state and to determine their quality and number, as well as all other civil affairs: Discourse I, Chapter XII; Chapter XV, paragraphs 4 and 10.

13. No ruler, and still less any partial group or individual person of whatever status, has plenitude of control or power over the individual or civil acts of other persons without the determination of the mortal legislator:[1] Discourse I, Chapter XI; Discourse II, Chapter XXIII, paragraphs 3 to 5.

14. A bishop or priest, as such, has no rulership or coercive jurisdiction over any clergyman or layman, even if the latter be a heretic: Discourse I, Chapter XV, paragraphs 2 to 4; Discourse II, Chapters IV, V, IX, and X, paragraph 7.

15. Only the ruler by authority of the legislator has coercive jurisdiction over the person and property of every individual mortal person, of whatever status, and of every group of laymen or clergymen: Discourse I, Chapters XV and XVII; Discourse II, Chapters IV, V, and VIII.

16. No bishop or priest or group of them is allowed to excommunicate anyone without authorization by the faithful legislator: Discourse II, Chapter VI, paragraphs 11 to 14; Chapter XXI, paragraph 9.

17. All bishops are of equal authority immediately through Christ, nor can it be proved by divine law that there is any superiority or subjection among them in spiritual or in temporal affairs: Discourse II, Chapters XV and XVI.

18. By divine authority, accompanied by the consent or concession of the faithful human legislator, the other bishops, collectively or distributively, can excommunicate the Roman bishop and exercise other authority over him, just as conversely: Discourse II, Chapter VI, paragraphs 11 to 14; Chapters XV and XVI.

19. No mortal being can give a dispensation with respect to marriages prohibited by divine law, while those prohibited by human law pertain only to the authority of the legislator or of him who rules through the legislator: Discourse I, Chapter XII, paragraph 9; Discourse II, Chapter XXI, paragraph 8.

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[1] See Vol. 1, p. 257.

20. Only the faithful legislator has the authority to legitimize illegitimate children so that they may succeed to their inheritances and receive other civil and ecclesiastic offices and benefits: same passages as immediately above.

21. It pertains only to the faithful legislator to exercise coercive judgment with regard to candidates for church orders and their qualifications, and no priest or bishop is allowed to promote anyone to these orders without authorization by this legislator: Discourse I, Chapter XV, paragraphs 2, 3, and 4; Discourse II, Chapter XVII, paragraphs 8 to 16.

22. Only the ruler in accordance with the laws of the believers has the authority to regulate the number of churches or temples, and of the priests, deacons, and other officials who are to minister therein: same passages as immediately above.

23. Only by the authority of the faithful legislator can and should separable church offices be bestowed and taken away, and similarly benefices and other things established for religious purposes: Discourse I, Chapter XV, paragraphs 2 and 4; Discourse II, Chapter XVII, paragraphs 16 to 18; Chapter XXI, paragraphs 11 to 15.

24. No bishops, as such, collectively or distributively, have the authority to appoint notaries or other civil public officials: Discourse I, Chapter XV, paragraphs 2, 3, and 10; Discourse II, Chapter XXI, paragraph 15.

25. No licence for the public teaching or practice of any art or discipline can be bestowed by any bishop, collectively or distributively, as such; but this pertains only to the legislator, at least the faithful one, or to the ruler by its authority: same passages as immediately above.

26. Persons appointed to the diaconate or priesthood, and others who are irrevocably dedicated to God, must be given preference in church offices and benefices over persons who are not thus dedicated: Discourse II, Chapter XIV, paragraphs 6 to 8.

27. Ecclesiastic temporal goods which remain over and above the needs of priests and other gospel ministers and of the helpless poor, and which are not needed for divine worship, can lawfully, in accordance with divine law, be used in whole or in part by the legislator for the common or public welfare or defense: Discourse I, Chapter XV, paragraph 10; Discourse II, Chapter XVII, paragraph 16; Chapter XXI, paragraph 14.

28. All temporal goods which have been set aside for religious purposes or for deeds of mercy, such as legacies bequeathed for overseas crossing to resist the infidels, or for the redemption of captives, or for the support of the helpless poor, and for other similar purposes, are to be distributed only by the ruler in accordance with the designation of the legislator and the intention of the donor: same passages as immediately above.

29. Only the faithful legislator has the authority to grant exemption to any group or religious body, and to approve or institute such exemption: Discourse I, Chapter XV, paragraphs 2, 3, 4, and 10; Discourse II, Chapter XVII, paragraphs 8 to 16; Chapter XXI, paragraphs 8 and 15.

30. Only the ruler in accordance with the designation of the human legislator has the authority to exercise coercive judgment over all heretics, criminals, and other persons subject to temporal pain or punishment; to inflict on them penalties in person, to exact penalties in property, and to dispose of these latter penalties: Discourse I, Chapter XV, paragraphs 6 to 9; Discourse II, Chapter VIII, paragraphs 2 and 3; and Chapter X.

31. No one who is subject and obligated to someone else by lawful oath can be released by any bishop or priest without reasonable cause, which cause is to be judged by the faithful legislator by a judgment in the third sense; and the opposite of this is contrary to sound doctrine: Discourse II, Chapters VI and VII; and Chapter XXVI, paragraphs 13 to 16.

32. Only the general council of all the faithful has the authority to designate a bishop or any metropolitan church highest of all, and to deprive or depose them from such position: Discourse II, Chapter XXII, paragraphs 9 to 12.

33. Only the faithful legislator, or the ruler by its authority in communities of believers may assemble through coercive power a general or partial council of priests, bishops, and other believers; and if a council is assembled in a different way, then decisions made therein have no force or validity, and no one is obliged under temporal or spiritual guilt or punishment to observe such decisions: Discourse I, Chapter XV, paragraphs 2, 3, and 4; Chapter XVII; Discourse II, Chapter VIII, paragraph 6 to the end; and Chapter XXI, paragraphs 2 to 8.

34. Fasts and prohibitions of food must be imposed only by the authority of the general council of believers, or of the faithful legislator; if divine law does not prohibit the practice of mechanical arts or the teaching of disciplines on any day, then these can be forbidden only by the aforesaid council or legislator; and only the faithful legislator or the ruler by its authority can enforce the observance of such prohibitions by temporal pain or punishment: Discourse I, Chapter XV, paragraphs 2, 3, 4, and 8; Discourse II, Chapter XXI, paragraph 8.

35. The canonization and worship of anyone as a saint must be established and ordained only by the general council: Discourse. II, Chapter XXI, paragraph 8.

36. Only the general council of believers has the authority to make decrees forbidding bishops, priests, and other temple ministers to have wives, as well as other ordinances with regard to church practice; and such decrees may be dispensed with only by that group or person to whom the authority for this has been given by the aforesaid council: same passages as immediately above.

37. From the coercive jurisdiction granted to a bishop or priest a litigant may always appeal to the legislator or to the ruler by its authority: Discourse I, Chapter XV, paragraph 2 and 3; Discourse II, Chapter XXII, paragraph 11.

38. A person who is to maintain the evangelical perfection of supreme poverty can have no chattels in his power without the firm intention of selling them as soon as possible and giving the price received to the poor; of no thing, movable or immovable, can he have the ownership or power, that is, with the intention of laying claim to that thing before a coercive judge from anyone who seizes or wishes to seize it: Discourse II, Chapter XIII, paragraphs 22 and 30; Chapter XIV, paragraph 14.

39. Communities and individuals are obliged by divine law to contribute, so far as they can, the food and clothing which are needed, at least on each successive day, by the bishops and others who minister the gospel to them; but they are not obliged to give tithes or anything else over and above the needs of the aforesaid ministers: Discourse II, Chapter XIV, paragraphs 6 to 11.

40. The faithful legislator, or the ruler by its authority in a province subject to it, can compel bishops and other gospel ministers, who have been provided with sufficient food and clothing, to perform the divine functions and to minister the ecclesiastic sacraments: Discourse I, Chapter XV, paragraphs 2, 3, and 4; Discourse II, Chapter VIII, paragraph 6 to the end; Chapter XVII, paragraph 12.

41. Appointments of the Roman bishop and of any other ecclesiastic or temple ministers in accordance with divine law to separable ecclesiastic offices, as well as suspensions and removals therefrom because of delict, must be effected only by the faithful legislator, or the ruler by its authority, or the general council of the believers: Discourse I, Chapter XV, paragraphs 2, 3, 4, and 10; Discourse II, Chapter XVII, paragraphs 8 to 16; Chapter XXII, paragraphs 9 to 13.

42. We might infer many other useful conclusions which necessarily follow from the first two discourses; but let us be content with those deduced above, because they afford a ready and sufficient entering wedge for cutting away the afore-mentioned pestilence and its cause, and also for the sake of brevity.

[The following sentences taken from Marsilius of Padua and John of Jandun[2] were condemned by Pope John XXII, 1327:[3]

[2] John fled with Marsilius to the court of Ludwig of Bavaria. He is sometimes thought to have been the co-author of the *Defensor pacis*, but that does not seem to be the case.

"(1) When Christ ordered the coin which was taken from the fish's mouth to be paid to the tax collector, he paid tribute to Caesar; and he did this not out of condescension or kindness, but because he had to pay it. From this it is clear that all temporal powers and possessions of the church are subject to the emperor, and he may take them as his own.[4]

"(2) That St. Peter had no more authority than the other apostles, and was not the head over the other apostles; and that Christ left behind no head of the church, and did not appoint anyone as his vicar.

"(3) That the emperor has the right to make and depose popes and to punish them.

"(4) That all priests, whether pope or archbishop or simple priest, are, in accordance with the appointment of Christ, of equal authority and jurisdiction.

"(5) That the whole church together can not punish any man with coactive punishment, without the permission of the emperor.

"The above articles are contrary to the holy scriptures and hostile to the catholic faith and we [John XXIII] declare them to be heretical and erroneous, and the aforesaid Marsilius and John [of Jandun] to be open and notorious heretics, or rather heresiarchs."]

2. **Jean Gerson, *De potestate ecclesiastica*†**

(Considerations 10, 11, and 13)

[Jean Gerson (1363–1429) was one of Europe's most influential churchmen of the early fifteenth century. The pupil of Pierre d'Ailly at Paris, he became chancellor of the university in 1395, a position he held until 1429. He wrote numerous pastoral and mystical works and was a preacher of renown, delivering sermons both to clerics (in Latin) and to the laity (in the vernacular). He is probably best known, however, for his efforts to end the Great Schism. The complex and difficult situation created by this schism led Gerson to produce a number of writings in which he strove to define the exact position and power of the papacy in the ecclesiastical hierarchy and its relationship to a general council. His views, in fact, shifted as the concrete situation changed, and it was by almost reluctant stages that he carne to embrace a conciliarist position. In the period before and during the Council of Pisa (1409), one of his chief arguments in favour of the power of a general council was based on the principle of *epikeia* (or *aequitas),* according to which, he argued, the law, in cases of necessity, should be interpreted not according to the strict literal sense, but rather according to the underlying intention of the lawgiver. By the time of the Council of Constance (1414–18), Gerson had become a fully committed conciliarist – committed not only to the doctrine that if there was no true pope or if there were rival claimants (a case of necessity), the entire power of the Church could be exercised by a general council, but also ultimately to the doctrine that a council had a part to play even when there was a single true pope. His mature doctrine appears in both *Ambulate,*[1] the sermon he preached in March 1415 after John XXIII's flight from Constance, and in the treatise *Concerning Ecclesiastical Power,* read by Gerson to the council on 6 February 1417. By this time, John XXIII had been deposed by the council (May 1415), Gregory XII had abdicated (July 1415), and preparations were underway for the deposition of the sole remaining pontiff, Benedict XIII. It was with these controversial events in mind that Gerson wrote the treatise, which centres on the relationship of pope to council and of both to the Church.]

TENTH CONSIDERATION

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† © 1997 by the Syndics of the Cambridge University Press. From *Cambridge Translations of Renaissance Philosophical Texts. 2: Political Philosophy,* Jill Kraye, ed. (Cambridge 1997) 3–11. The selections and the translation are by the late D. Catherine Brown as are the notes. Our introduction is taken directly from that in *id*., at 1. The Latin text of *De potestate ecclesiastica* found in Jean Gerson, *Oeuvres complètes,* ed. P. Glorieux, 10 vols. (Paris 1960–73), 6:210–50; the passages translated here are at 227–33, 247–8.

[1] Translated in C. M. D. Crowder, *Unity, Heresy and Reform 1378–1460: The Conciliar Response to the Great Schism* (London, 1977), pp. 76–82; see also the translation of the decree 'Haec sancta' (p. 83), fully supported by Gerson, which declared that councils were superior in authority to popes.

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[3] Translated in Oliver J. Thatcher, and Edgar Holmes McNeal, eds., *A Source Book for Medieval History* (New York: Scribners, 1905), pp. 324–325.

[4] The reference is to Discourse 2, chapter 4, paragraph 10 (Gewirth trans., at 119–120). The Biblical passage is Mt 17:23–26. The remaining propositions that were condemned can be derived from Marsilius' conclusions, listed above.

Ecclesiastical power in its fullness resides formally and as to its subject in the Roman pontiff alone.[2] Therefore, we may take it for granted in the first place that, although someone who is not a priest can be elected pope, just as such a person can be elected bishop, nevertheless he cannot and should not be called supreme pontiff unless he has been consecrated priest and bishop. And although he can have a certain jurisdiction as a result of election, he cannot enjoy the fullness of ecclesiastical power – whether the power of order or that of either kind of jurisdiction[3] before consecration to the episcopacy. This is clear from the meaning of the terms employed.

But here a not inconsiderable ambiguity arises, thanks to the master jurists, who, when they speak of the plenitude of papal power, appear to be speaking only of the power of jurisdiction; and from this way of speaking the absurd consequence seems to follow that a mere layman – indeed, even a woman – could become pope and enjoy the plenitude of ecclesiastical power.

We may further take it for granted from what has already been said that, in accordance with the institution of Christ, no one in the Church ought to bestow, or receive, the grades of the hierarchy, which are to purge, illuminate and perfect, unless the authority of the supreme pontiff or sole ruler [*monarcha*] in the Holy Church of God plays a part either expressly or by implication. This is so that confusion may be avoided in the Church and that it may be ruled by the best form of government according to the model of the Church triumphant. For this reason John says in Revelation [21 :2] that he had seen the new city of Jerusalem descend from heaven; and to Moses it was said: 'As it hath been shewed thee in the mount, so shall they make it.'[4] Again, we may take as true the doctrine of Aristotle that all actions are the actions ofindividuals.[5] And finally, from these and the preceding arguments, we can offer the following discursive definition: the fullness of ecclesiastical power is the power of order and of jurisdiction which was supernaturally conferred by Christ on Peter as his vicar and first monarch, to be used by him and his legitimate successors until the end of time for the building up [*aedificatio*] of the Church militant towards the goal of eternal happiness.

The term 'supernaturally' in this definition is used to distinguish this power from the power and jurisdiction which may well have accrued to Peter's successors in accordance with the civil and political laws of human society; or from that dictate of the natural law which decrees that the head of every society should enjoy many honours and privileges denied to others; or by special endowment or gift from princes and other laymen; or, finally, by favourable concessions from the Church itself or its general councils such as any perfect society[6] might naturally grant to its head. There was one reason for such a concession which had merit insofar as it arose from the need for interpretation of the laws and from day-to-day problems about Church government: recourse to the pope and his Curia is easier than to a general council. This was the motive for setting up kings in the first place and giving them the power to establish and interpret laws.

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[2] Gerson is thinking in terms of the four Aristotelian causes. In the first section of the treatise he states (p. 211) that 'ecclesiastical power is the power which has been supernaturally and specially granted by Christ to his apostles and disciples and to their legitimate successors until the end of the world, for the building up of the Church militant in accordance with the evangelical laws, for the sake of the achievement of eternal happiness'. He then notes that the efficient cause is denoted by the words 'granted by Christ', the material or subjective cause by 'to his apostles etc.', the formal cause by 'in accordance with the evangelical laws, for these laws provide the model or form for the exercise of the power', and the final cause or end by 'for the building up of the Church militant for the sake of the achievement of eternal happiness'.

[3] Earlier in the treatise Gerson defined the power of order as that of consecrating the real body of Christ and administering the sacraments. The power of jurisdiction he divides in two. The first operates in the external forum and is coercive, that is, it can be exercised against subjects even against their will, as in the cases of excommunication, the decreeing of laws and the punishment of those who disobey these laws. The second aspect of the power of jurisdiction, which is based on the power of priestly and episcopal order, operates in the internal forum of conscience and is not coercive, but rather voluntary on the part of those who subject themselves to it – for example, the power of absolution – for no one, as Gerson says, can be absolved against his will.

[4] Exodus 27:8.

[5] For Aristotle's doctrine of the individual see, e.g., *Metaphysics* VII.13.

[6] That is, 'self-sufficient' as opposed to domestic societies, as Gerson explains in the thirteenth consideration.

But some people have disregarded this distinction and have fancied that every privilege which is now accorded to supreme pontiffs belongs to them by virtue of Christ's original institution and is of immutable divine ordinance. But this is quite false, since it would remain the case that a man was a true and perfect pope even if he actually lacked many such privileges and honours; for it is not these which constitute the plenitude of ecclesiastical power, such as we have described as vested in Peter, and which no human being except Christ and hence not even the whole Church could confer, or, by the same token, remove, as we noted already in the ninth consideration.[7]

There are some learned scholars who now maintain that, after rules about the holding of elections and the conferment of benefices by ordinaries were introduced by general councils, according to the intention of the founders (a principle observed in the case of the law of patronage among the laity), it was by no means legitimate for the pope to annul such rules, especially so generally and indiscriminately, by reservations and other means, as has been seen this past century and more. It was not legitimate, moreover, for him to issue the number and type of waivers about matters decreed by general councils as has been customary in papal bulls – to the point, indeed, where Alexander V was led in certain of his supposed bulls to allow waivers with respect to that very salutary and widely observed statute *Omnis utriusque sexus. . . .*[8]

But others reply to the above argument not by addressing the question of the origin of ecclesiastical power as it was established by divine law, but rather by confining their considerations to decretals with the glosses, arguments and countless concordances of doctors, one following the other like a flock of sheep. They answer, in point of fact, with this single argument: that general councils have always understood that an exception was made of the authority of the supreme pontiff in all their decrees of whatever sort because, doubtless, they held papal authority to be above the council, or at least not beneath it; and it is obvious to them that equals have no authority over equals or lower ranks over their superiors.

But blessed be God, who, by means of this sacred Council of Constance, enlightened by the light of divine law, which gave it understanding through the trial of the present schism, has freed his Church from this dangerous and most pernicious doctrine whose persistence would have perpetuated the schism which it had nurtured. Indeed, it has been declared and decreed that a general council can be convened without the pope and that in certain cases a pope can be judged by a council and, moreover, that a general council has the authority to prescribe laws or rules according to which the plenitude of papal power is to be restrained and regulated – not, to be sure, in itself, for in itself it remains always the same, but in its use. Furthermore, it should not be thought that general councils have exempted papal authority from their decrees in such a way as to permit the pope an unbridled liberty to destroy so lightly what has been established so weightily and with the seasoned maturity of the wise.

The exception made for papal authority, then, is understood to have been provided to the extent that temporary necessity or evident utility demanded it, on occasions when recourse to a general council was not open; under any other circumstances it would constitute nota use of the plenitude of papal power but a gross abuse of it. Whether anything which resulted from such an abuse would be valid or lawful, I do not presume to determine under any single generalization. I do know that many things are wrongly done, many inexpediently and many to the disfigurement of the Church, which nevertheless, once done, retain their force. It seems, however, that some declaration should be added by this sacred general council through which it may become clear in what sense, and to what extent, papal authority is recognized as exempt either from decrees already issued or, since (as they say) the law does not address itself to the past, from decrees to be issued in the future. And finally, the quashing or annulment of every ill-conceived act of past times would seem plainly to be difficult, of questionable validity and inexpedient.

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[7] Jean Gerson, *Oeuvres complètes*, ed. P. Glorieux, 10 vols. (Paris, 1960–73), 6:225–7.

[8] This decree of the Fourth Lateran Council in 1215 commanded yearly confession to 'one's own priest'. Gerson is here probably referring to *Regnans in excelsis*, a bull issued by the antipope Alexander V (1409–10), which affirmed the right of the Mendicants to hear confessions. He saw this as an infringement of the rights of parish priests: see Gerson, *Oeuvres,* VII, pp. 985–6.

The following rules should be noted as an aid to understanding what has been said here about the interpretation of laws and decrees.

First rule. Human laws are framed with a view to what happens in the majority of cases. It would be impossible fora human legislator to enumerate all particular cases or to offer the remedy of a special law for them, since they are infinitely variable. Indeed, it would not be desirable, for the outcome of such a multiplicity would be a disorder as distasteful as it would be confusing. On the other hand, according to Isidore, a law should be worthy of respect, just, capable of being observed and appropriate to the place and time in the light of the customs of the country; furthermore, it should be necessary, useful and clearly expressed, so that it contains nothing which misleads through obscurity; and it should be framed not for private advantage but for the common benefit of the citizens.[9]

Second rule. Human laws which are construed generally can and should admit of exceptions when the reason for the law does not apply in a particular case, when, that is, the legislator if present, or any prudent man if asked, would except from the general rule a particular case which might arise under such and such circumstances. This sort of exception is given a variety of names: sometimes it is called 'equity' [*epikeia*], as by Aristotle; sometimes 'interpretation of the law', as by jurists; sometimes 'dispensation', as by canonists; sometimes 'good faith', as by statesmen who say that it is good faith when one does not pretend to do one thing while in fact doing another; and sometimes it is called 'equity' [*aequitas*], as when the prophet says to the Lord: 'thy commandments are equity'[10] that is, equity demands their performance.[11]

Third rule. We find three types of interpretation of or exception to a law. One belongs to the judicial power and is the province of the legislator and the judges, according to the well-known saying: 'The person who is responsible for establishing legislation is also the one responsible for interpreting it.' A second type belongs to doctrinal authority and is the province of those who, by authority of the supreme pontiff, have received a licence to give scholarly interpretations of the law. It is also the province of those who are well equipped, by skill or experience, with the knowledge of interpretation in these matters, on the principle: 'The expert in his field should be believed'; and again: 'Each person judges well in the area of his experience.' A third type of interpretation is based on unavoidable necessity. It can fail to anyone at all who sees with certainty an imminent danger to himself if he does not repel force with force and act in opposition to the general letter of the law. In this case a man is blameless before God, although he ought to regret that he has fallen into such a necessity. And provided he is able to make his case with legitimate witnesses before a human judge, he will be acquitted – though not otherwise; for what is not apparent before the judge in these matters is no different from what is not the case.

Fourth rule. The interpretation, dispensation or exception which belongs to judicial power operates in such a way that someone who disobeys the letter of the law is not punished before men in the extremal forum. But before God, in the forum of conscience, both the person who dispenses and the person to whom the dispensation is given will sin, unless the one who dispenses fits the description given by Christ: 'faithful and wise'.[12] Faithful, so that he does not abandon the divine or the common good and seek personal advantage, favour or honour; and wise, so that he may consider from all angles the reasoning behind the law and the intention of the legislator; for a dispensation is a fair distribution of the common good – as indeed is the law itself – to individuals in accordance with the law's intention, taking into account the variety of circumstances which arise. A dispensation which is not faithfully and wisely made is said by Bernard to be a

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[9] Isìdore of Seville, *Etymologiae* II.10.6.

[10] Psalms 119:172. The Revised Version has 'righteousness' instead of 'equity'.

[11] Gerson, like Thomas Aquinas (in *Summa theologiae* IaIIae, q. 96, art. 6; IIaIIae, q. 120, art. I), uses the terms *epikeia* (the Latinized spelling of the Greek word *epieikeia)* and *aequitas* interchangeably. *Epikeia,* in Aristotle, involves an alteration of the law in cases where the circumstances are different from those for which the law was originally instituted: see, e.g., *Nicomachean Ethics* V.10. *Aequitas,* a term drawn from Roman law, strictly means the justness of law, but it can also refer to an interpretation of a law that corrects whatever in that law is contrary to justice, and in this sense it is close in meaning to *epikeia.*

[12] Luke 12:42.

dissipation [*dissipatio*] of the common good rather than a dispensation [*dispensatio*][13] that is, as far as God and conscience are concerned, if it is a case about which there is, or should be, general agreement. But very often, in the eyes of men who judge according to externals, such a dispensation holds, unless it contains a glaring error or is prohibited by a higher law. This latter point is added because of the statutes that can be made by a general council about the use of papal power.

Fifth rule. The interpretation of law, or exception to it, which belongs to doctrinal authority affords most relief to those not obeying the bare letter of the law, in that it applies both to external judgements, insofar as it frees [those who break the law] from penalties, and also to divine judgements in the forum of conscience. This is especially the case when the majority of doctors are men of repute, experienced in their craft and of proven integrity; otherwise iniquity will often betray a man under the influence of entreaty or reward, for 'a gift doth blind the eyes of the wise'.[14] And if we are to believe Aristotle, speaking the words of experience, malice can cause error not only in conclusions far removed from first principles but at the very threshold of moral principles themselves.[15] Thus, theft was formerly thought to be licit among the Germans, as Julius Caesar bears witness in his *Gallic War* [VI.23.6]; and foul and unnatural sins were thought to be licit among the Romans, as the apostle records in his epistle to them.[16] 16 The same is true with many men given over to pernicious ideas on account of the variety of faults encompassed by their depravity.

Sixth rule. The interpretation of law, and exceptions and dispensations, when they occur in either of the previously mentioned modes, judicial or doctrinal, demand that we adopt a double point of view: one which looks to the divine and public good, the other to the particular advantage of the person on whose behalf the interpretation or dispensation is granted. Therefore, it quite often happens that when the rigour of the law is indiscriminately relaxed, out of a certain compassion (so it is imagined) and merciful condescension towards particular individuals subject to the law, the stability and strength of discipline decays correspondingly – strength which should especially be preserved in all law. The Romans taught us this lesson when they put even their own sons to death and turned the rigour of the law against themselves in order that military discipline and obedience to the law should remain inviolate. The Carthusian brethren teach us the same lesson. They never, or very rarely, receive a dispensation for the eating of meat, and accordingly monastic discipline flourishes among them;[17] whereas one would be amazed and saddened to see how much it has deteriorated among certain other orders which make indiscriminate use of dispensations. It was about this very thing, happening even in his own time, that Bernard's complaint arose.[18] What then are we to say about the dispensations, as they call them, so easily granted by pope and prelates, from lawful oaths and reasonable vows? What shall we say about the unlimited plurality of benefices, about the modifications of the decrees of general councils or about the granting of privileges and exemptions which weaken the common law? Could anyone count up all the acts by which at present the strength of ecclesiastical – and, indeed, evangelical – discipline has almost universally weakened, withered and disappeared? May this holy Council of Constance give attention to all these things.

The stability of the laws is based upon this root principle: that custom is the best interpreter of positive law – provided that it is contrary neither to divine nor to natural law. The same principle is the basis of Aristotle's view, presented in his political treatise, that no reward should be given to those who introduce new laws, even though these may in themselves be improvements, since frequent change to the laws causes instability and does not allow them to grow strong upon the firm root of custom.[19] Note should be taken of

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[13] St Bernard, *De consideratione libri V* III.18.

[14] Deuteronomy 16:19.

[15] For Aristotle's views on malice see, e.g., *Nicomachean Ethics* II.6 (1107a8–27).

[16] Romans 1:18–32.

[17] The Carthusian Order was founded by St Bruno in 1084. A strictly contemplative order, known for the austerity and self-denial of its monks, it was not seriously affected by the late medieval decline of monasticism.

[18] See n. 13.

[19] Aristotle, *Politics* II.5 (1268b22–5).

this by those who, when any notion comes into their heads, or when they imagine that anything might be worth doing, busy themselves with the making of new laws, piling penalties on penalties, as if it would be good and expedient to enforce by a penal law anything at all which, if it were done, would be a good thing. But this is no way to govern a state.

Based on the same principle is the reasonableness of quashing or repealing certain positive laws where they conflict with those customs of the subjects which depend on nature. The reasonableness of permitting certain evils, not for the sake of approving them, but so that their punishment does not make matters worse, is based on a similar foundation. The same applies to the law of prescription, which, in order to prevent titles becoming uncertain, punishes those who neglect their own property by rightly even in the sight of God and conscience – transferring such titles to possessors who are in good faith and have a legitimate prescriptive claim.

ELEVENTH CONSIDERATION

Ecclesiastical power in its fullness resides in the Church as its end, and also as the body which regulates the application and use of this sort of plenitude of ecclesiastical power, either through its own agency or through a general council adequately and legitimately representing it. And so it is established that the plenitude of ecclesiastical power was given by Christ to Peter for the building up of his Church, just as the definition, in conformity with the apostle,[20] lays down. Moreover, Augustine, with certain others, says that the keys of the Church were given not to one man but to the community, and in fact to the Church itself.[21] And this can be appropriately understood in the ways that this consideration explains, since the keys were given for the sake of the Church and its unity. And so this plenitude of ecclesiastical power may be said to reside in the Church or a council, not so much merely formally and of itself, as in two other ways: namely, with regard to its application to this or that person and with regard to the regulation of its use, in case there was an attempt to abuse it.

It is agreed that in these three ways the plenitude of ecclesiastical power resides in the Church and in a general council acting in its stead. There is to be sure no difficulty about the first and second ways, and likewise not about the third either, if we consider the definition of the plenitude of ecclesiastical power at the point where it lays down that it is given for the building up of the Church. Since therefore the supreme pontiff, who possesses this power as its proper subject, is capable of sin and could want to use it for the destruction of the Church, and if similarly the sacred college, which was given to him so that it could work together with him as an aristocratic body, is not strong in grace and faith, the only alternative is that there should be some other standard [*regula*], incapable of deviation or error, set up by Christ, the best of all legislators, by which abuses of this sort of power can be restrained, directed and controlled. But this standard is precisely the Church or the general council. And so, since the mean of virtue can only be found in the judgement of the wise, the final appeal will be to this wisdom, to the Church, where there is wisdom incapable of error, or to a general council. This is the basis of the many decrees and resolutions of this holy council, as for example that the pope may be judged and deposed by the council, that he is subject to the council for the regulation of his power as far as its use is concerned and that he is open to question about the motive for his actions. And so on with regard to the many matters that are discussed in the sermon ‘Prosperum iter’. . . .[22]

THIRTEENTH CONSIDERATION

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[20] Cf. Ephesians 2:19–22; I Corinthians 14:12.

[21] See, e.g., Augustine, *De doctrina Christiana* I.18.

[22] This sermon was delivered by Gerson at Constance on 21 July 1415, on the occasion of the Emperor Sigismund’s departure for Aragon to negotiate for the abdication of Benedict XIII. In it he argues that the pope must obey the council in all matters pertaining to faith, extirpation of schism and reformation in head and members; that he can be deposed for the good of the church; that his decrees can be annulled by conciliar authority; and that his power can be limited, though not abolished, by a general council. For the text see Gerson, *Oeuvres*, V, pp. 471–80. See also J. B. Morrall, *Gerson and the Great Schism* (Manchester, 1960), pp. 97–100.

. . . Finally, now that we have discussed justice, right, law, jurisdiction and authority, let us say something about the polity. It may be defined as a community organized with a view to some perfect end. Organization or order, however, is an arrangement of like and unlike elements which accords to each his due. And so order is thoroughly in accord with justice, which gives to each his own; hence the divinely inspired utterance of the prophet that the work of justice is peace.[23] Why is this so? Clearly because peace is nothing other than the tranquillity which comes from order. But justice creates this tranquillity of order by according to each his due; on which subject it is said: 'Justice and peace have kissed each other'.[24]

One sort of polity is celestial, about which we shall say nothing at present, while the other is human, the polity of wayfarers upon earth. And this latter is of two types, one of which, to use the usual and proper term, is called 'ecclesiastical', the other 'secular'. Now, the secular polity is divided by Aristotle in his political treatise into three. The first he calls 'kingship', the second 'aristocracy', and for the third he uses in a specific sense the general term 'polity',[25] which we may refer to as 'timocracy'. Kingship is defined as a community under one good man, or more explicitly, as the gathering of a perfect community under one man, in accordance with his laws which are for the good of the commonwealth. This one good man is called 'king' or 'emperor' or 'monarch', and in his dominion he strives principally not for his own but for the common good. Aristocracy is defined as a polity under a few good men, or more explicitly as the gathering of a perfect community under a few men, whose principal aim through their laws is the good of the commonwealth; a senate would be an example. What is called in a specific sense a polity, or a timocracy, is defined as a polity under many good men, or more explicitly as the gathering of a perfect community under many good men, whose principal aim through their laws is the benefit of the commonwealth.

The community here is called 'perfect' to distinguish it from the domestic way of life, which is not perfectly self-sufficient. We say 'in accordance with his laws' since the sovereignty of the ruler is seen to consist in this: that he is found to rule the polity on his own initiative under his own laws, without the constraint of foreign laws. Every ecclesiastical polity, therefore, whether the ruler is one good man or a few or many, is properly called 'divine', because, whichever type it is, it is bound to accept regulation according to supernatural law. And so it is clear that the three types of polity we have spoken of are united in the Church, as they are not in a civil polity, by the unity of divine law. It is quite clear also, as a consequence, that the question of whether in the ecclesiastical realm theology ought to be preferred to another science, natural or human, smacks of blasphemy and the Pelagian heresy.[26] The Church is not to be taken as a material temple, which a stonemason would better know how to build than a theologian or jurist; nor should discussion about the Church be only for the sake of revenues and rents and ecclesiastical jurisdictions oriented to temporal rights and the secular life. This would be to think just like the heathen.

But this is just the way in which brutish people generally conceive of the Church, at least as far as their words and deeds imply. They praise to the skies any bishop or abbot who labours to see walls and estates well established along with his jurisdictions, while letting his subjects go to perdition down the byways of error with regard to the Catholic faith and good morals. This is why, moreover, one expert secular manager might frequently be judged of more use in the government of the Church than a theologian or jurist. Therefore, we should reflect on the Church as it was instituted by Christ on the firm rock of faith to pursue its supernatural end, according to the law of the Gospel and of the divinely revealed Holy Scriptures. It is by this law that judgement about the faith and morals of subjects should be regulated, since what is upright is the judge both of itself and of what is awry. And if, for the preservation of this faith, judges who are highly skilled in theology and free of moral corruption ought to be appointed in the Roman Curia to hear those cases concerning the faith which everyone says should be referred to the Apostolic See (though this is

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[23] Isaiah 32:17.

[24] Psalms 85:10. The Revised Version has 'righteousness' instead of 'justice'.

[25] Aristotle, *Politics* III.5 (1279a32–9).

[26] Pelagius (c. 354–c. 419) was accused of exalting human free will at the expense of divine grace. The Pelagian heresy holds that man can take the first steps towards salvation by means of his own unaided efforts.

usually interpreted too widely), we should see if this could be done in as reasonable a way as judges in secular cases are appointed, in an orderly and collegial fashion.

Corresponding to Aristotle ‘s threefold distinction of types of polity in the natural order which we mentioned earlier,[27] we may also divide the ecclesiastical polity into three types: the papal, the collegial and the synodal or conciliar. The papal constitution is modelled on the kingly; the collegial, embodied in the college of cardinals, on the aristocratic; and the general council is modelled on the polity or timocracy. But the perfect constitution is instead that which involves a combination of all three. By contrast, we have those polities, if they deserve special names, which, unlike the foregoing, are not led by a free and, so to speak, fatherly regime but are instead dragged along under a despotic and servile yoke, either because, through their own fault, it is permitted by God, who makes ‘the godless man reign’, according to Job [34:30], to ‘ensnare the people’, or for some other reason by a just judgement of the same God. Aristotle calls the first of these ‘tyranny’, the second ‘oligarchy’ and the third ‘democracy’.[28] In a tyranny, one man rules, seeking only his own good, wishing his subjects to be powerless, ignorant and divided among themselves; in an oligarchy, a few men of similar character rule over the others; while in a democracy the corrupt multitude rules itself, each man seeking his own ends and not those of the community. The attentive reader will recognize for himself from these remarks whether any such phenomenon, with analogous threefold distinction, can be found in the ecclesiastical polity. . . .

[Although not found in Gerson’s *De potestate ecclesiastica*, a phrase that seems approprate in the context of the Great Schism is *salus populi supreme lex esto*, ‘let the salvation of the people be the highest law’. The phrase come from Cicero’s *De legibus* 3.3.8, and in context it is describing an ideal Roman constitution in which this principle should guide the praetors, judges, and consuls. Take it out of context, and it can become a kind overarching maxim of the law. (It is found in many early modern thinkers, is the motto of the state of Missouri, and is found inscribed over the door of parliament of Switzerland.[29]) Take *salus* as meaning ‘salvation’ in way that Cicero almost certainly did not intend it, and one can see its applicability to the the schism. The purpose of the church is the salvation of the people. The schism is destroying the church; therefore, any law can be overcome to prevent the church from being destroyed. CD]

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[27] See n. 25.

[28] Aristotle, *Politics* III.5 (1279b4–6).

[29] [Wikipedia, https://en.wikipedia.org/wiki/Salus_populi_suprema_lex_esto. CD]