GOVERNMENTAL RESPONSIBILITY IN TORT, VI

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HISTORY AND THEORY (Continued)

_The State Subject to Law_

When we turn to history for evidence of the cultural tradition of the State and of its relation to law, we find the overwhelming weight of authority opposed to the absolutistic view of sovereignty and of the State and denying the alleged independence of both from the limitations embodied in the conception of law. The meaning assigned to "law" is of course not always uniform. It will be found that human society from the days of Plato to those of Bodin was dominated by certain fundamental ideas concerning the nature of man and of government, of the source of authority and of the limited power of rulers. The Athenian city-state, the Roman law and the Teutonic tradition all contributed to strengthen the theory of popular control; and while the influence of the Church for the most part nourished the claims of divine right of kings and thus aided absolutism, still the prevailing doctrines and conceptions of justice, of the equality of men and of natural law as universal forces dominating all political institutions, left of absolutism, sporadically advanced, mainly a theory and a claim, and never a political fact.

The analytical jurist, not unaware of the fact that all human authority or power is restricted and that the psychological force of two thousand years of political theory exerts a serious limitation upon what his conceived sovereign law-making authority may in practice do, contents himself with the assertion

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1 See Justice Holmes in _The Western Maid_, 257 U. S. 419, 422, 42 Sup. Ct. 159, 161 (1922). "The sovereign does not create justice in an ethical sense, to be sure, and there may be cases in which it would not dare to deny that justice for fear of war or revolution. Sovereignty is a question of power, and no human power is unlimited."
that the control thus exercised upon his theoretically unlimited sovereign is moral and ethical in its nature, and not legal. His concern is with form and method. His narrow definition of law and his restricted view as to its source in legislative enactment or tacit approval permit him to regard the State, the postulated creator of the law, as indispensable to law and necessarily above it and free from its control. That the problem is largely one of definition is evidenced by the fact that he is uncertain whether enunciation or declaration is sufficient to establish law, or whether enforcement is necessary.\footnote{See Willoughby, Fundamental Concepts of Public Law (1924) 138, 145 \textit{et seq.}, who differs from Austin by regarding enforcement as unnecessary. Willoughby, it may be inferred, would thus regard the Volstead Act as law, even in certain eastern sections of the United States, where the Act is manifestly not enforced; Austin presumably would not. On the element of enforcement, see Borchard, \textit{Governmental Responsibility in Tort} (1927) 36 Yale Law Journal 770, 780.}

The historical as well as the sociological jurist, if those terms may be permitted to describe schools of thought, approaches the relation between State and law from different premises. His concern is with substance and the content of rules of conduct. From that point of view he sees law as an evolutionary process, existing in primitive society eons before the territorial State was known. He sees the content of positive law in society fashioned by the prevailing \textit{mores} and by the postulates of that society, and finds that western civilization has been nurtured under the conceptions of justice, civil equality and natural law. He finds current evidence of this fact in every modern governmental constitution. He therefore concludes that positive law and the modern State, its professed but unadmitted creator, is necessarily bound by these \textit{soi-disant} constitutional limitations, which it dare not and does not transgress. To the limitations, moulded by history and social phenomena, and sometimes translated into written constitutions, he is willing to give the name of law, and he concludes that the State and all its agents are necessarily bound by law.

If we are to attempt to reconcile these two conceptions, we find that their differences revolve around their point of view and their varying definitions of the concept law. The task of the analytical jurist is the easier, for he is concerned with the intellectual process of segregating the conception of positive law from other rules of human conduct and of explaining the form and machinery of government. The sociological jurist seeks to explain the behavior of society and its institutions, and for him form is subordinated in importance to substance. It is possible that the restricted objective of the analytical jurist leaves his conclusion sterile, except within the narrowest limits, because
incapable of throwing light on human relations or forecasting evolutionary tendencies, and that in his professed discovery of "sovereignty" he manifests the elemental instinct to seek a First Cause behind the chain of human phenomena. Hence the accusation of scholars like Duguit that sovereignty and the State are akin to theological and metaphysical conceptions, which, though merely scientific hypotheses, have lived so long as to be mistakenly regarded as scientific truths. Yet the analytical jurist does furnish us with tools of precision for legal reasoning in the form of an exact terminology. The sociological jurist, with a wider objective, serves us in a different way by explaining our social institutions. He at least claims that he is guided by scientific method in studying the data of observed phenomena and in reaching his conclusions, not through a philosophy founded on such an abstraction as sovereignty, but through the historical stages of hypothesis, theory and scientific truth, tempered by the admission that truth is relative and not absolute. Inasmuch as the anti-absolutist political theories which prevailed in Europe throughout the Middle Ages and after the Reformation are prominently identified in the judicial and legislative conception of the responsible State, as expounded in the nineteenth century, it will be of interest to take a cursory view of the historical development of these theories in so far as they affect the State in its relation to law or as controlled by moral and other limitations. It is significant that one of the principal defenders of the historical theory of the limited State, Gierke, is also the spiritual father of the far-reaching German legislation, now embodied in the Constitution, which finally made the State responsible for the torts committed by its agents in the performance even of governmental functions.

**POLITICAL THEORY**

*Ancient Civilization.* Primitive political ideas have but little to offer for the understanding of the modern State. The distinguishing feature of primitive society is the failure to differentiate religion, custom and law. The bond of unity in the group was religious and the authority behind group rules is the "will" of the gods. Primitive law is made up mostly of taboos and no dis-

3 We have had occasion to observe the interesting analogy drawn by Kelsen between the conceptions of God and the State. Borchard, *op. cit.* supra note 2, at 771.

4 See the view of Proudhon: "All ideas of truth are false, that is, contradictory and irrational, if one attaches to them an exclusive and absolute meaning; they are all verities, that is, susceptible of realization and utility, if they are viewed in relation to others, or in evolution." *La Philosophie du Progres* (1868) 22. The absolute character of sovereignty and of the State in the Austinian conception encounters this very danger.
tinction between law and morals is conceived. From the standpoint of behaviorism, perhaps the modern emphasis on this distinction is too often artificial.

So in oriental empires. Notwithstanding a highly developed social organization, the identification of family, church, state and industry prevented the development of a systematic political philosophy. Tradition and dogma were the postulates of society; individualism, seemingly necessary to political theory, was unknown to oriental paternalism. Moral and religious codes, unchangeable by human agencies, handed down from early times and assumed to have divine inspiration, embody the community conception of law. Thus again, law, morals, custom, religion, are more or less interchangeable terms. The worship of common gods constitutes the bond of unity. The State, vaguely realized, and its human governors, king, aristocracy or oligarchy, are not law-makers; but on the contrary, all human members of the State, rulers and ruled, are bound by the codes and traditions which are the common heritage of all.

The Hindu political philosophy is apparently based on the conception that man is essentially wicked and selfish, that the state of nature is one of violence, injustice and the rule of might, and that authority, law and punishment were necessary to prevent these evils. Thus the State arose, a conception entertained by the church fathers as well as by Hobbes and the forerunners of the modern conception of sovereignty. But whereas Hobbes made his sovereign irresponsible, Hindu political thought, which personified authority in the ruler, subjected him to restraint and punishment. Resistance to arbitrariness was openly advocated. In India, we find early support for the limited monarchy, for popular and democratic institutions, for the ideal of the natural

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6 Fustel de Coulanges, The Ancient City, trans. by W. Small (11th ed. 1901) bk. 1, 3, particularly c. 11; Tozzer, Social Origins and Social Continuities (1925) c. 6; Gettell, History of Political Thought (1924) c. 1; Kocourek and Wigmore, Sources of Ancient and Primitive Law (1915) pt. 1 and 3; ibid. Primitive and Ancient Legal Institutions (1915) c. 5; Hartland, Primitive Law (1924) c. 1, 2, 6, 8; Maine, Early Law and Customs (1881) c. 2, 7; ibid. Ancient Law (5th ed. 1873) c. 5; ibid. Early History of Institutions (1875) Lectures 11, 12, 13; Bryce, Studies in History and Jurisprudence (1901) Essay 13. Sumner, Folkways (1911) c. 1, 15; Willoughby, Political Theories of the Ancient World (1903) c. 1; ibid. op. cit. supra note 2, c. 11.

6 Breasted, Development of Religion and Thought in Ancient Egypt (1912) Lectures 1, 7, 9; Gettell, op. cit. supra note 5, c. 1; Gumplovicz, 1 Geschichte der Staatslehren (1905), §§ 1-4; Berolzheimer, The World's Legal Philosophies (1912) c. 1; Johns, Babylonian and Assyrian Laws, Contracts and Letters (1904) c. 5-7; Willoughby, op. cit. supra note 5, c. 2; Pound, Interpretations of Legal History (1923) c. 1, 2.

7 Sarkar, Hindu Political Philosophy (1918) 33 Pol. Sci. Q. 482, 488, 495, 498.
equality of man and human brotherhood, ideas which have exerted so great an influence in modern times.\(^8\) In Chinese philosophy also, we find the doctrine that law is necessary to restrain the innate depravity of man. The people's aspirations reflect the will of Heaven and popular consent was deemed inherent in government. It was a public duty to depose a wrong-doing king,\(^9\) an idea which found admiration in eighteenth century France.

The ancient Hebrews also entertained a theocratic conception of the State. Though political authority, like law, was deemed divine in origin, and sanction was derived from the will of the single God, Jehovah, and was therefore absolute, permanent and binding on rulers and subjects alike, nevertheless the idea of popular and voluntary consent to these laws was also prominent in Hebrew political philosophy. The kings were not only subject to the general law, but were subject to criticism and to the decision of the priests interpreting the law. Codification of the law and secular courts were adopted as a further means of control.\(^10\)

To the ancient world, therefore, the modern conceptions of the State and sovereignty are unknown. Law, however, embodying rules of conduct having a social sanction, is raised to a place of preeminence in the community. As among all ancient civilizations, the alternative to anarchy is not the State, but law.\(^11\) The identification of law with morals and religion baffles and disturbs the modern analytical jurist. Law was found in custom and tradition, and controlled all human governors, kings, oligarchies, nobles. Popular consent as an ingredient in government seems to have been a common notion. Family and group-life were highly integrated, and the law was administered largely through family or group agents. It is, of course, analytically possible to conceive of these local units of self-government as states, as is more readily apparent in the city-states of early Greece. Absolutism and deliberate legislation are strangely


\(^{10}\) Gettell, _op. cit. supra_ note 5, at 30; Kent, *Israel's Laws and Legal Precedents* (1907) 8 et seq.; 1 Michaelis, _Commentaries on the Laws of Moses_ (1814) bk. 1.

absent from these conceptions. The State is a vague and rudimentary abstraction. It is for these reasons that Sir Henry Maine finds the Austinian view of the source of positive law in the State unacceptable, for he concludes that law is to be found in the most primitive forms of social life, does not depend on the State and prevails among nomadic tribes with and without definite chiefs, like the Eskimos. The Hobbesian conception of sovereignty is utterly inapplicable to ancient society.

Greek political thought first developed a clear distinction between law and religion, and between morals and law. This was due in part to the realization that the individual was a factor in society, and though in the Spartan, as in the modern Hegelian and Fascist conception, the individual was absorbed in the State, the Sophists emphasized the importance of the individual in his relation to the group and thus laid the foundation for political theory and public law. The Greeks also developed the city-state, and through Aristotle conveyed to the modern world practical ideas of governmental arrangements which still prevail.

Perhaps the greatest contribution of the Greeks to political thought is the substitution of reason for superstition and the subordination of religious to social and psychological explanations of government, law and the State. Nature and the universe were deemed susceptible of rational interpretation. The State was the product of nature, and man was, by nature, a political and "social animal." Law was not the creation of any legislative organ. The later Greeks believed that law (or right) was to be found, as a complete system, in reason itself, an embryo of the nineteenth century French conception of the sovereignty of reason.

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12 Legislation has been the last stage and possibly the least important in the growth of law. See Pound, Legislation as a Social Function (1912) 7 PROCEEDINGS OF AMERICAN SOCIOLOGICAL SOCIETY, 148, 155. Nor was force regarded as a sanction of the law in early society. It is for these reasons that sovereignty in the sense of Hobbes and Austin could not be conceived in ancient times. That conception is only possible in the territorial State of the west, yet Hobbes and Austin seem to have regarded it as of universal application. This seems to have no historical justification.

13 MAINE, INSTITUTIONS, Lecture 13; WILLOUGHBY, op. cit. supra note 2, at 134. Maine shows that even at the present time in India and other Asiatic countries, the Austinian law-making authority does not exist. Cf. the creation of law in a mining camp. COSTIGAN, AMERICAN MINING LAW (1908) § 2.

14 MERRIAM, HISTORY OF SOVEREIGNTY (1900) c. 5. In the early nineteenth century, after the restoration of Louis XVIII in France, it was difficult to locate sovereignty, as the source of power. Then arose the school which maintained the sovereignty of reason, not unlike the modern school which insists on the sovereignty of law. That school, whose ablest exponent was Cousin (COURS D'HISTOIRE DE LA PHILOSOPHIE MORALE AU 18° SIECLE [1839]) maintained that sovereignty is the same as absolute right. Whence comes that? Three theories have been defended, says Cousin, namely, force, will and reason. Rejecting force and will as a test of right, he selects reason—
The State applied, but did not create, law. Yet Greece went through various stages, from theocracy to aristocracy, through tyranny to democracy. Homer, indeed, portrayed a theocratic organization of the State, in which custom and tradition governed, law and religion were one, and the will of the Gods, revealed through the king, was the source of authority. But the theocratic idea, and its deduction, were weakened when aristocracy replaced monarchy, and codes were introduced to secularize law and control the nobles. The highest function of the State was the judicial. Even in theocratic times, the duties of kings were emphasized and the acts of rulers were judged by the same standards as those of other men.

The Sophists, in promoting individualism, in denying fixed rules of conduct and attacking the rationality of nature, in basing political authority on might, in distinguishing law from morality, in identifying law with political authority, which often forced men to act contrary to the dictates of reason, introduced into political thought a distinctly modern note and swept away many ancient dogmas. These sceptical views of the Sophists are said to have undermined ethics and law. The disorder of Athenian democracy gave rise to the moral postulates of Socrates, Plato and Aristotle. Socrates believed that the fundamental principles of right and justice could be discovered, that the State is a necessary result of human needs and that its laws, if wise, will correspond to universal reason. He restored the connection between political and ethical theory.

Plato's State was as ideal as, in its different way, is that of Austin. Assuming that the mass of individuals should be subject to the guidance of the few, Plato pictured in The Republic the ideal State in which justice prevailed. He refutes the Sophist contention that might makes right. Plato finds the origin of the State in the diversity of men's desires and in the necessity of cooperation in satisfying them. If an ideal ruler could be

absolute reason—as the controlling power. As absolute reason is superhuman, no fallible man or men can possess sovereignty. Cousin thus eliminated sovereignty from his conception of political science.
found, he maintained, there would be no need for laws, since such a man should be free from all restraint; but since there is none such, written laws and customs are necessary as restraints on all, including the ruler. Conformity to law, therefore, is of the essence of the State. While denouncing tyranny, as did all Greeks, and while not enamored of democracy, Plato makes his preference as to forms of government depend on the extent of legal restraint exerted upon them. \(^{20}\) Plato conceived justice as the cornerstone of the ideal State.

Aristotle did not, like Plato, confuse political and ethical ideas. Aristotle favored popular government in which all citizens took part. He denied the Sophist doctrine that the laws of the State are essentially arbitrary; he believed that the State was a natural and necessary institution for the satisfaction of human needs, that the fundamental principles of right and justice are found in nature and are susceptible of discovery by human reason and that it was the State's duty to adapt this natural law to practical human needs, modifying it when necessary. As man can only live effectively in society, Aristotle views the State, as an idea, as prior to rational man. \(^{21}\)

Though concerned with the welfare of the individual, Aristotle did not regard his approved limitations on State action as dictated by any idea of unassailable individual rights. He regarded the State as justified by utility to secure the welfare of the aggregate of its citizens, for which end a certain amount of individual liberty was indispensable. The State he deemed the collective body of citizens, and was among the first clearly to distinguish State and government. He is the father of the doctrine of separation of powers. He first perceived the interrelation between politics and economics, and suggested that forms of government might well vary to suit the needs of different peoples and locali-

\(^{20}\) Plato's view of form was this: if the government is subject to law, monarchy is best, democracy worst, and aristocracy holds an intermediate position. If unrestrained by law, democracy is best, tyranny worst, and oligarchy intermediate. See Gettell, op. cit. supra note 5, at 46.

ties. Though positing the natural inequality of men and the observation that government is the expression of the superiority of some men over others, he nevertheless realized that men crave equality and that a sense of injustice arises through inequality of privileges. Though believing slavery natural, by reason of the postulated superiority of some men—especially Greeks—over others, he nevertheless maintains that one of the main functions of the State is to secure justice to all. Though favoring a limited individual freedom, he never actually conceived of civil rights; and while hinting at the conception of sovereignty, he never considered the State as the ultimate source of law. This was hardly possible, perhaps, in view of his belief in the essential identity of State and individual and of his conception of a law of nature.\(^\text{22}\)

The Epicurians and especially the Stoics are not without their influence on Roman and medieval political thought. Though but little concerned with political affairs, they nevertheless had views on law and the State which historically are important. Individual happiness they deemed the aim of life. The connection between individual and social welfare was minimized, and the State was regarded as not necessary to the philosophical good life.\(^\text{23}\) The Epicurians based the State on individual self-interest and defined law as an agreement among individuals to be secured against violence and injustice. Thus the social-contract theory of the State was foreshadowed. The Stoics conceived of nature as universal law, and of reason, as the creative source of law, as its revealer.\(^\text{24}\) The eternal character of right and justice as a dominant force was a concomitant of their pantheistic conception of nature. The law of nature as fixed, immutable, reflecting the process of nature, in harmony with reason, the divine element in the universe, was the Stoic idea of natural law handed down to medieval political theory through the Roman law. The natural brotherhood of man, a universal natural law and a common world citizenship are Stoic ideals.\(^\text{25}\) Universal law, universal citizenship, became practical facts in the Roman Empire, and the idea of principles of justice common to all men was also adopted in Roman law. The idea of universal brotherhood, expanded through Christianity, affected strongly the political movements of the eighteenth century.

The Greek civic ideal, as exemplified in the city-state, notably Athens, embodies the beginnings of western political theory and developed it to a high degree. Its law found its source in a conceptual supreme reason and covered the entire field of morality.

\(^{22}\) GETTELL, op. cit. supra note 5, at 55.

\(^{23}\) Ibid. 56; WILLOUGHBY, op. cit. supra note 5, c. 12.

\(^{24}\) For a modern view of the alleged sovereignty of reason see MERIAM, op. cit. supra, note 14, c. 5.

\(^{25}\) GETTELL, op. cit. supra, note 5, at 57.
The State was not based on the relation between sovereign ruler and people, but on the relation between the community and the individual, much as Duguit now maintains in his conception of "public service" and social solidarity. Yet the individual as an end in himself was an idea hardly suggested, nor the notion of an independent sovereign as the source of power. Final authority was vested in the laws rather than in persons—a forerunner of the modern conception of "the sovereignty of law." 27

Roman Political Theory. Ancient and modern political thought is bridged by the political conceptions of the Middle Ages. These conceptions were woven from the strands of the political theory of the Roman jurists and the Christian fathers and in turn were passed on to the Renaissance and Reformation. They find their modern reflection in the English and French Revolutions and in the bills of rights of modern constitutions.

The Romans did not formulate any system of political philosophy, as did the Greeks. Yet in their practical administration of a world State over a period of centuries, they developed certain ideas which mark an advance toward modernity. Perhaps the most important of these advances over Greek thought are the conception of positive law, of legislation, of an abstract State as distinct from society in general, the idea of legal personality and possibly of sovereignty. Politics and ethics became independent conceptions. The State and the individual were distinct and their respective obligations and claims were the subject of legal regulation, practical administration and theoretical speculation. The State was deemed necessary to law and to social existence; but the individual and his protection, even against the group, was the principal raison d'être of the State—an idea which is the basis of public law and of modern democracy. For us, perhaps the most important of the Roman contributions to our subject are the raising of the individual to an independent status as the subject of legal rights, the limitations placed upon the State and its governors, and the protection of the individual by legal process against any governmental encroachment beyond or trangression of these limitations.

For the period of Roman history down through about the

26 Fustel de Coulanges states that man did not enjoy liberty in ancient cities. He had no rights against the city. The political right to vote was called liberty. LA CITÉ ANTIQUE (26th. ed. 1920) 265. Hermann says that freedom consisted merely in knowing that he was dependent on no power, since each of his fellow-citizens is on an equality with him under the law. LEHRBUCH DER GRIECHISCHEN RECHTSALTERTHÜMER (Thalheim's ed. 1884) 28; cf. 2 VINOGRADEFF, op. cit. supra, note 15, c. 6. This is analogous to Rousseau's theory of the individual in his relation to the general will and the State. Duguit, The Law and the State (1917) 31 HARV. L. REV. 1, at 37, (quoting Fustel and Hermann).

27 Infra. p. 1089.
second century A. D. the idea prevailed that the power of the governors—king, magistrate or emperor—was granted by the people, as the ultimate source of authority, and that the power was limited by the terms of the supposed contract under which it had been granted. It was only toward the end of the Empire that the assumed irrevocable nature of the grant, strengthened by the notion that the authority was of divine origin, was used, as in the case of Hobbes, to justify autocratic government.

The theory of the creation of law experienced an autonomous evolution. At first, as in the ancient world generally, it was regarded as traditional popular custom, with a large element of religious injunction and prescription, with a theological sanction. Then came the codification of the people's customs in the Twelve Tables, and with it the recession of the religious element and of the idea that custom was the chief source of law. About 200 B. C. the idea gained support that the State and the human beings who managed it were the source of law and legislation. But even so, it was not conceived as an imposed command by superior to inferior, but as a contract between magistrates and people.

The Roman conceptions of the philosophy and purpose of law in their relation to the State are most clearly expressed by Cicero (106–43 B. C.) who in his works followed the form adopted by Plato. We learn from the writings of Cicero, notably in fragments of De Republica and of De Legibus, that in the Roman view the ultimate principle behind all positive law and behind the State itself, was justice. Justice is the foundation of law and of organized society, and has the character of natural law existing independently of the consent of man. Where there is no justice, there can be no jus, no State, no populus, but only a multitude of disorganized people. There appears to have been no definite view of the source of justice and how it was made known, a problem which gave rise to numerous theories, including theological postulates of revealed and divine origins.

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28. Gettell, op. cit. supra note 5, at 63; Dunning, op. cit. supra note 19, at 106 et seq.; Fowles, City-State of the Greeks and Romans (1893), c. 7 et seq.; Coker, Readings in Political Philosophy (1914) c. 3; 2 Mclem- sen, Römisches Staatsrecht (2d ed. 1877) 728 et seq.; Willoughby, op. cit. supra note 5, at 215 et seq.

29. Cicero's Republic is in part known to us through St. Augustine, De Civitate Dei (426) c. 2, 21 (1 Dods' transl. (1871) under the title of The City of God, 74); Cicero, De Re Publica, (Pascal's ed. 1916) c. 43, 44. See for the political theories of Cicero the excellent work of the Carlyle's 1 Carlyle, A History of Medieval Political Theory in the West (1900–1922) 4 et seq.; Dunning, op. cit. supra note 19, at 122. See also Featherstonhaugh, The Republic of Cicero (1829) bk. 2; Willoughby, op. cit. supra note 5, c. 19. On St. Augustine and Medievalism see Murray, op. cit. supra, note 19, c. 2.

Nevertheless, the view that justice—as the *mores* then conceived that ethical injunction—underlay all civil law, and that this was a universal truth of natural law, influenced permanently the Roman law and the modern law, notwithstanding occasional suggestions that expediency or force alone determines those adjustments represented in positive law.\(^3\)

Cicero's view, derived from the Stoics, of the universality, supremacy, and binding character of natural law, which antedates every state, as against a contrary rule of civil law, is reflected by Grötius, Spinoza and Locke and by the modern Duguit and Krabbe in their view as to the relation of the laws of "social solidarity" or men's "sense of right" to positive law. Cicero regarded civil law which was not derived from natural law as having the formal character of law only but not its true character.\(^3\)

It was not *jus*.\(^3\) So Duguit and Krabbe, to the mystification

\(^{31}\) This was the view of Hobbes, *Leviathan*, c. 26. A late expression of this criticism is to be found in the work of the Swedish jurist Lundstedt, *Superstition Or Rationality In Action For Peace* (1925) Preface. There appear to have been even in Cicero's time opponents of the view that justice has a relation to law or that there is such a thing as justice or *jus naturale*. They maintained, on the contrary, that justice is foolishness, that laws are based solely on expediency and that the only source of virtue is human agreement. See Carneades, cited by Cicero, Book III, 5, 8; Featherstonhaugh, *op. cit. supra* note 29, Intro., 29; 1 Carlyle, *op. cit. supra* note 29, at 5. Cicero speaks of the "common sense of right" (see Krabbe's like conception, *infra*) and "community of interest" as that which unites a multitude into a people or commonwealth. *I de Republica*, 25, and Dunning, *op. cit. supra* note 19, at 120.

\(^{32}\) *De Legibus*, libri tres. (Feldhügel's ed. 1852) I, 6, 19, 20; 10, 28; 15, 42; 16, 45, cited by 1 Carlyle, *op. cit. supra* note 29, at 6. The canon lawyers, like Gratian, took much the same view of the relation of natural law to positive law. They identified natural law with divine law, and human law with custom (mores). *Gratian, Decretum*, D. I, quoted in 2 Carlyle, *supra*, at 98. This is directly traceable to Cicero's view that the law of nature is the law of God. See passages cited in 1 Carlyle, *op. cit. supra*, at 5, 6. See also Austin's identification of the law of God and the law of nature (so far as these words have a meaning) with the rules required by the theory of utility. *Province Of Jurisprudence Determined* (1863) Lectures 2, 3, and 4. Maine, *Early History Of Institutions* (1875) 369, criticizes the attempted identification as "gratuitous and valueless for any purpose."

\(^{33}\) Even in those days the varying uses of the term law created confusion. In Greek philosophy the distinction between right (δικαιον) and law (νόμος) had been recognized. Right was deemed superior to and independent of law. Right involved (a) abstract goodness and (b) a group of enforceable privileges. The Greeks were concerned primarily with (a); the Romans with (b). Cicero was not always clear as to what he meant by natural rights (*jus naturale*). In Book I of *De Legibus* he argues that rights (*jus*) are subordinate to and dependent on law (*lex*), and that the *lex naturale* is the source and limit of all rights, even natural (*jus naturale*). It is hard to tell what he means by "nature." Dunning, *op. cit. supra* note 19, at 124. Gaius did not limit his theory of law to positive law, but based it on universal and rational principles—an ideal "law."
of the analytical jurist, deny the quality of law to statutes violating the principles of social solidarity and "sense of right." How we are to tell when statutes fail to meet the standard set or how the consequences of disobedience are to be avoided neither Cicero nor Duguit nor Krabbe make clear. Yet the philosophical system which gave such a preponderant position to natural law and identified it with justice lies at the basis of the social structure of the Christian era and cannot be lightly disregarded.

Willoughby, *The Juristic Theories of Krabbe* (1920) 20 Am. Pol. Sci. Rev. 509, 519. Willoughby surmises that Krabbe would deny the ethical force of such statutes, but would not suggest that they be disobeyed. Willoughby concludes that if Krabbe merely denies their ethical, but not their formal, validity, the analytical jurist has no occasion to quarrel.

That the content of natural law was varyingly conceived does not militate against the importance of this theory. Ulpian conceived it as a system common to the entire animal world. Reason, as an element of natural law, was a later conception. Gaius viewed the *jus naturale* as practically the same as the *jus gentium*. Ulpian did not. Ulpian's view probably ultimately prevailed, though Grotius drew on both for his system of international law. Cicero thought of natural law as part of the eternal law of God, and that seems to have been Gaius' view of the *jus gentium*. Both Cicero and Gaius regard law as a rational and just principle of life, not enacted by men, but the expression of universal and natural reason and sense of justice. See 1 Carlyle, *op. cit. supra* note 29, at 33; Eckstein, *Das Antike Naturrecht* (1926); *cf.* Krabbe, *Modern Idea of the State* (1922) c. 2, 3; see chapter on "The History of the Law of Nature," in Pollock, *Essays in the Law* (1922) 31; Bryce, *op. cit. supra*, note 5, Essay 11.

The views of other Roman lawyers as to the relation between *jus naturale*, *jus gentium* and *jus civile* are set forth in 1 Carlyle, *op. cit. supra* note 29, c. 3. The Christian fathers viewed natural law as a body of principles ideal in nature and adapted to a state of innocence, hence not related to man's actual world. They identified it with the law of God, much as Cicero had, in terms, done. 1 Carlyle, *op. cit. supra*, note 29, c. 9. Yet they conceived it as a guiding rule of conduct for all men. Through St. Isidore, this view passed into Gratian's Decretum and the Canon law. St. Thomas Aquinas did not regard the *lex naturalis* as immutable; on the contrary, it could be enlarged by provisions for human welfare, e.g., private property and slavery. Dunning, *op. cit. supra* note 19, at 195; E. F. Jacob in Crump and Jacob, *Legacy of the Middle Ages* (1926) 525 et seq.

William of Ockham in the fourteenth century presented views quite different from Ulpian's. *Jus naturale*, he said, could be taken in three senses; (1) universal rules of conduct dictated by natural reason; (2) rules which would be accepted as reasonable and are, therefore, binding, in a society governed by natural equity, without positive law or custom; (3) rules justified by deduction or analogy from the general precepts of the law of nature, but modifiable by positive authority. *Dialogus* III, tr. II, L 3, c. 6, p. 932 cited by Pollock, *op. cit. supra*, at 38. See also Dunning, *op. cit. supra*, at 244; Sauter, *Das Naturrecht im Idealismus des Mittelalters* (1927) 6 Ztschr. f. Öff. Recht, 381. It was only after the Reformation, with its loss of respect for authority, that philosophers were able to detach natural law from God and to transfer it to impersonal human reason. See, on the rise and decline of natural law, Berolzheimer, *op. cit. supra* note 6, c. 5. In more recent times, it has been denied that volitional quality deemed by
Cicero's view of the equality of human nature plays an important part throughout political history. For the Greek view of natural inequality, the Romans substituted that of natural equality. The Christian doctrines carried on the ideal of human equality; it was strengthened for medieval political theory after the fall of Rome by the Germanic conception of equality and popular control of government.\(^3\)

The natural organization of society in the State is a direct consequence of the view, expounded by Cicero, of the natural equality of men. The State must be founded on law and on justice, and must exist for the promotion of the common wel-

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\(^3\) Both Roman lawyers and the church fathers proceed from the postulate that God made man free and equal. They had no easy task to explain the actual inequality they saw about them and notably the institution of slavery, which the theologians justified as a remedial punishment for sin. Slavery was contrary to nature, and yet it existed. Here was a great field for rationalization. See 1 Carlyle, op. cit. supra note 29, c. 2, 10.

But natural equality also contradicts any subjection of man to man in government. Coercive government is therefore not natural, but is also deemed to have been made necessary through sin. The Church fathers represented government as a divine institution, and by commanding obedience, even to an unjust government, did much to strengthen royal authority. \(\text{i}d\text{b}d.\ c. 11;\) Dunning, op. cit. supra note 19, at 176–178. Their views as to obedience were not always followed by writers after the sixth century. See also Radin, \textit{Roman Concepts of Equality} (1923) 38 Pol. Sci. Q. 262.
fare, otherwise Cicero denied it the character of a State.37 Yet
the realization that man is often corrupt and depraved and that
society needs protection laid the ground for a theory of the State
based on its remedial functions to correct evil. Cicero was aware
of this view and made a place for it, but sympathized with the
larger view of natural equality which was so strikingly revived
by the philosophers of modern democracy. The form of govern-
ment, king, a small group, or the people, was not to Cicero so
important as the end which all government must serve—the
general welfare. Cicero also identified liberty with a share in
political power and thus again discloses both his debt to Greece
and his essential modernity. Though Cicero was no friend of
popular government, his successors Ulpian and Gaius knew no
other foundation of political authority than the consent of the
whole people, an idea which was employed effectively to challenge
the later claims of absolutism. The commonwealth was for
the early Romans an organic development from the natural as-
sociation of men in the family and in groups, and at the same
time the expression of the common consent, founded on law and
justice and designed to promote the general welfare.

The canonists and civilians of the early Middle Ages conceived
this State as a sacred institution designed to establish a measure
of justice and order in a corrupt world, a conceptual character
not widely different from that with which Hobbes endowed his
metaphysical sovereign.

It is also worthy of note that the theory of the civil law of the
Roman lawyers whose views were embodied in Justinian's In-
stitutes, and the theory of the medieval lawyers, related positive
law to the limitations of a guiding principle, sometimes called
justice, reason, *jus* or *aequitas*. These terms were not always
understood in the same sense, but it is noteworthy that down
to the fourteenth century, the civilians considered law (*jus*)
as the embodiment of the principle of justice and that positive
law was the result of the application of these principles to daily
life. *Jus* was derived from *justitia*, and meant, for Ulpian (Dig.
I, 1, 11) *ars bonâ et aequî*. If positive law was too harsh, it was
modified by a judge applying *aequitas*, just as the English courts
of equity built up a system ameliorating the rules of the strict
common law. Irnerius, the great scholar of Bologna, whose
writings have been rescued by Fitting, maintained that laws
which are contrary to equity should not be enforced by the
judge.38 Views naturally differed as to what should be the fate
of a law deemed unjust or contrary to equity, but one thing

37 De Rep. I, 26, 41, 42; De Rep., III, in St. Augustine, De Civ. II. 21,
cited in 1 Carlyle, op. cit. supra note 29, at 15.
38 The canon lawyers, regarding natural law as divine law, also regarded
it as superior in dignity and permanence to certain positive forms of the
seems clear—law was not deemed an expression of sovereign will, as Bodin and his successors maintained, but the application to actual conditions of certain fundamental principles of justice commonly accepted by the learning of the period and by popular conceptions. The civil law was deemed subject to those universally controlled moral principles which passed under the name of natural law, though it was necessarily admitted that certain institutions, like slavery, existed and were recognized, though contrary to natural law. The important fact to remember, however, is that no law-maker was deemed to have an uncontrolled power over legislation, that legislation was deemed subject to conformity with certain equitable and moral principles which were in most cases enforced by the courts, and had the authority of the jurists and the support of the people. Such ideas must have exerted an important influence throughout the Middle Ages, by emphasizing the limited power of the law-maker and the qualified authority of legislation, even if the system of judicial or popular control was only rudimentarily developed.

There seems but little doubt that the Roman jurists down to Justinian regarded the Roman people as the source of political authority and as the ultimate law-making power. Notwithstanding the fact that the Emperor, both with and without the Senate, was given the power to declare the law, this was deemed a delegated power only. Ulpian's well-known phrase Quod prin-

law of God, and of course superior to all authorities in Church or State, including positive law and custom. See Gratian, Decretum, D. III, pt. II, quoted in 2 Carlyle, op. cit. supra note 29, at 105.

39 The canon lawyers had an especially difficult time explaining why the supposed immutable natural law of their conception, which decreed equality of all men and ownership of all things in common, could be changed by such flourishing institutions as slavery and private property, which were, according to them admittedly created by the law of the State. The difficulty was overcome to their satisfaction by assuming that such conventional institutions of society are the results of sin and are intended to control sin. See the canon law theory of natural law. Ibid. c. 3.

40 1 ibid. c. 5; 2 ibid. c. 1–3; Dunning, op. cit. supra note 19, at 127 et seq. See commentary of Bartolus on Codex, (I, 14, 4) p. 87 (I, 22, 6) p. 112 quoted in Woolf, Bartolus of Sassafarato, His Position in the History of Medieval Political Thought (1913) 46.

41 1 Carlyle, op. cit. supra note 29, c. 6, cites Ulpian and others to this effect. Marcianus (Dig. I, 3, 2) states: "This is law which all men should obey for many reasons, and especially because every law is a thing found and given by God, a judgment of wise men, a correction of voluntary and involuntary transgressions, a common agreement of the State, in accordance with which all those who are in the State should live." 1 Carlyle, op. cit. supra, at 69. This, at the height of the Empire, hardly supports a theory of absolute law-making power in the emperor. Others affirmed that the emperor, through irrevocable grant, had the sole power to make general laws. Woolf, op. cit. supra not 40, at 36 et seq., quoting Bartolus' commentary on the Code.
cipi placuit, legis habet vigorem is followed by words distinctly showing the qualified nature and the source of the power. Custom had the force of law, because it was derived like all law, from the authority of the people. The Twelve Tables were compiled, in order that the State might be founded on laws (leges). Law is also described as an agreement of the whole State and Theodosius and Valentinian declare that the prince is bound by the laws, for his authority is drawn from the authority of law, a statement followed by Bracton eight centuries later.

The Church Fathers and the Civilians. Although the Church had in the centuries from the sixth to the thirteenth achieved considerable support for the view that government and kings rested on divine authority, and that the law was similarly inspired, there is yet must evidence that the kingly law-making authority was regarded as part of a compact of delegation from the people and that deposition of an arbitrary king was deemed proper. The civilians of the twelfth and thirteenth centuries, drawing their inspiration from the Roman law, were unanimous in recognizing that the people were the ultimate source of political authority and of the law. This also was the Teutonic conception, so that both learned authority and popular conviction supported the theory of delegated authority of the ruler as a lawmaker, his responsibility to the people and, as we shall see, his

42 DIG. I, 4, 1; Borchard, op. cit. supra note 2, at 791.
43 "Utopote cum lege regia, quae de imperio ejus lata est, populus ci et in eum omne suum imperium et potestatem conferat." See Pomponius' historical development of the source of legislation, quoted in 1 CARLYLE, op. cit. supra note 29, at 67, notes. Bracton apparently did not fully understand Ulpian's phrase, for he uses it ambiguously to support both unlimited and limited authority. The first part of the phrase, standing alone, was often used to sustain arbitrary royal power. The erroneous interpretations placed upon this familiar phrase, notably in giving it an unrestricted meaning, are pointed out by Amos in his note (p. 125) to ch. 34 of his edition of FORTESCUE, DE LAUDIBUS LEGUM ANGLIÆ (1825).
44 The canon lawyers of the early Middle Ages went even further. They regarded all laws, properly speaking, as custom, and taught that legislation, where it existed, must be confirmed by and could be rendered void if in conflict with custom. See quotations from St. Isidore and Gratian quoted in 2 CARLYLE, op. cit. supra note 29, at 98, 100, and c. 8. See, however, the ambiguities in Gratian disclosed ibid. 156. In the DECRETALS (Gregory IX) I, 4, 11, it is said that custom overrides all law except that of nature and reason; but it had to be an old custom. See quotation in 2 CARLYLE, op. cit. supra, at 158, n. 1.
45 A rescript of 429, found in the famous Digna vox passage of the Code, CODEX I, 14, 4, quoted by 1 CARLYLE, op. cit. supra note 29, at 69, n.
46 Infra, p. 1060.
47 1 CARLYLE, op. cit. supra note 29, c. 20.
48 See the authority of Azo, Hugolinus and Irnerius cited 2 ibid. c. 7. But see Bartolus, quotations in WOOLF, op. cit. supra note 40, at 36–40.
subjection to law—though what quality of law is not always clear. It should not be overlooked, however, that the civilians were not altogether unanimous as to the extent to which the people had parted with their original authority. Some asserted that the grant had become irrevocable. Yet Carlyle, after a full consideration of the opinions of the leading jurists of the time, concludes that this was a minority view and that a permanent, unresumable delegation of power was not generally deemed to have been made.49

The direct source of the irresponsible sovereign of Hobbes' conception is probably to be traced to the political theory of several of the Christian fathers, notably St. Gregory. We have already observed that they regarded Government as a divine institution, a divine remedy for man's sin, and the ruler as the representative of God who must be obeyed in the name of God, even when he acts wickedly or violently. He is to be reverenced as the "Vicar of God," said some of these ecclesiastics. In St. Gregory, the doctrine is worked out to its ultimate end. Good subjects do not criticize a bad ruler; to resist him is to offend God. The seventeenth-century apologists for Divine Right and monarchical sovereignty thus drew their inspiration for the absolute and irresponsible authority of the ruler from a theological argument which, though strongly contested by the legal writers of the Middle Ages, nevertheless survived because it became helpful to certain rulers and certain Churchmen on occasion to invoke it.

Carlyle suggests that the motives and grounds for thus exaggerating and misstating the divine authority of the ruler arise out of (a) the need of correcting the anarchical tendencies which threatened the primitive church, as well as the need of disarming the hostility of the Empire; (b) the relation between Church and Emperor after the conversion of Constantine; and (c) the alleged sacred character of the authority and person of the King of Israel. The danger of disintegration and the need for unassailable authority led to similar exaggerations of the absolutists in the sixteenth and seventeenth centuries, who again seek in an unchallengeable First Cause that authority they wish to strengthen—though in effect an authority which is derived, even from God, can hardly be ultimate. The history of medieval political theory represents largely a struggle between the lawyer's view that the people are the source of authority in the State and the theologian's view that God, through his agent, the ruler, is the source of authority. Yet it is curious to note that the advocates occasionally change sides, for, from the eleventh to the fourteenth centuries, the Imperialist party de-

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49 Bartolus seems to believe that the grant was irrevocable. Ibid.
fends the theory of Divine authority of the ruler, and the ecclesiastical, the theory of popular authority. Feudalism introduced new ideas of the contractual nature of authority and subjection, presently to be considered.

It must also be observed that many Christian fathers had a conception of the State and of authority quite different from that of St. Gregory. While they regarded coercive government as not natural, but conventional and useful for the punishment of sin, they conceived the State as an instrument for securing justice. A king who failed to maintain justice was deemed no king, though they differed in their views as to the consequences of injustice by the king. Some threatened him with the judgment of God, some denounced his title to the kingship, others merely deplored the fact without counselling disobedience or resistance. Justice, however, they maintained, is the raison d'être of the State and distinguishes it from a band of robbers. Clement defines a king as one who rules according to law and is willingly obeyed by his subjects; St. Ambrose regarded the king as bound by the laws, and argues that the emperor who makes the laws is also bound to obey them. St. Isidore of Seville also urged the propriety of the prince respecting his own laws. Subjects will learn obedience when they see their rulers observing the laws. Yet the suggestion that the emperor is legibus solutus tended to confuse ideas. St. Augustine, one of the most influential of the Christian fathers in the development of political theory, is not always clear. At one place, he adopts the Ciceronian view that there can be no true State without justice; where there is no justice, there can be no jus. Yet he also admits that a State may exist, though corrupt, provided it consists of a multitude of people agreeing to associate. From this conception, the elements of law and justice, so important to Cicero, the Roman lawyers and many of the Church fathers, are omitted. This may have influenced St. Gregory in his opinion as to the unrestricted authority of the ruler. The divine authority of government and that of the personal ruler became confused, so that an evil king also was deemed to derive his authority from God. Cassiodorus exhibits this confusion of ideas. While maintaining that justice is the keystone of the State, he also appears to regard the king not only as the source of law, but as one who normally stands above it; that he is accountable to God alone, but cannot be said to sin against others.

50 See the extracts from St. Gregory quoted by Carlyle, op. cit. supra note 29, c. 13.
51 See the quotations from St. Ambrose Ep. XXI, 9, ibid. 164.
52 St. Isidore in Sent. III, 51, quoted ibid. n. 5.
53 Borchard, op. cit. supra note 2, at 791 et. seq.
for there is none who can judge him. St. Isidore, however, reemphasizes the essential character of justice both to the State and to the ruler, and denies the legitimacy of the unjust ruler. His view that it is proper for a prince to obey his own laws passed into Gratian's Decretum.

Thus, with the possible exception of St. Augustine, St. Gregory, and Cassiadorus, it would seem that the Church fathers conceived the end of the State as the maintenance of justice and regarded justice as essential to the legitimacy of government. This view counteracts the tendency of those churchmen who upheld the absolute and divine authority of the ruler, with the consequence of unquestioned obedience. Both views are reflected in the polemics of the Middle Ages. In the seventeenth century we find Hobbes asserting the doctrine that the only test of law is utility and expediency, and Grotius maintaining that there is an essential justice and morality founded in the nature of things, and controlling both men and nations.

In the period between the ninth and thirteenth centuries we are again impressed with the patristic conceptions, not unlike those of the lawyers, of the natural equality of all men. Carlyle informs us that in a collection of capitularies issued by the Emperor Lewis the Pious, he recognizes his equality in condition with other men.

The Teutonic Tradition. In this period, the Teutonic tradition made itself felt in political literature. To the divine and unlimited authority of State and king, which to some extent the patristic tradition had taught, there was opposed, often in the same man, the Teutonic conception of the limited and restricted authority of the ruler. The difficulty of setting the limits of the ecclesiastical and civil powers also produced a certain friction which tended to destroy any unqualified theory of the absolute power of the State. The rupture between the Bishop of Rome and the iconoclastic emperors tended to neutralize the tradition of St. Gregory of the divine authority of State and king.

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54 CASSIODORUS, EXP. IN PSALT., Ps. 1, 5, quoted in 1 CARLYLE, op. cit. supra note 29, at 171, n. 4. The resemblance of this argument to that of Blackstone as to why the king can do no wrong, and to that of the Austinians as to why the State is irresponsible, is striking.
55 ST. ISIDORE, SENTENTIAE III, 51, quoted ibid. 173, n. 6.
56 Ibid. c. 14.
57 GROTIIUS, (Whewell's ed. 1853) I, 1, 10; ibid. I, 1, 12; HOBBES, op. cit. supra note 31, c. 26; GETTELL, op. cit. supra note 5, at 190.
58 See quotation from MON. GERMAN. HIST. LEG. § 2, v. I, No. 137 in 1 CARLYLE, op. cit. supra note 29, at 201. Slavery is still recognized, paradoxically, but it is explained as a necessary and wholesome discipline, as is coercive government, Ibid. 210.
59 Ibid. 211, and c. 17.
The uneducated and semi-barbarous Teutonic kings did not invite the ascription to them of Godly omnipotence and unqualified obedience; and as the churchmen were in large part themselves Teutons accustomed to government by common counsel of the king with his wise men or with popular assent, the direct opposite of unlimited authority, it is not unnatural that the theory of the sacred and unlimited authority of the ruler was considerably weakened.60

Although the limitation of royal power by the necessity of doing justice appears to have been part of the cultural tradition of the ninth century and of those immediately following, it is not easy to circumscribe the concept justice. Respect for the existing law, however, seems one of the essentials of justice, and the notion that the king was bound by the laws and was not superior to them seems fairly universal in that period.61 This conclusion is justified from another point of view. In Justinian's Rome, the emperor was regarded as the source of law, the sole legis-lator, though it is true that his authority was in theory regarded as delegated by the people. Yet he did legislate and the force of law attached to his decrees. Whatever the obscure legibus solutus may really have meant,62 it is certain that the king in Charlemagne's time was not the sole legislator. He was a part of the law-making authority, but the consent of the council and, in a larger sense, of the people, was also deemed a necessary factor in the creation of positive law.63 Moreover legislation constituted only a small part of the community's law, the major part consisting of custom, tribal law and the systems of modified Roman law prevailing in the several portions of the Empire. Over the latter, king or emperor had little control, and it is easy to believe that by these laws he was deemed bound.

Feudal Conceptions. In the feudal period from the tenth to the thirteenth centuries, it is hard to see any authoritative foundation for a belief that governmental authority was regarded as irresponsible and unlimited. The essence of the feudal system of government was contractual. Authority, therefore, was

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60 The ecclesiastical writers of the ninth century continually set up the standard of the just king as the only king fit to rule. They look on justice as essential to the character of a true ruler. Without justice he is a tyrant and not a king. See the authorities quoted ibid. c. 18.

61 Carlyle quotes at length from the works of Hincmar of Rheims and others to show that the consensus of opinion made the king subject to the laws. Ibid. c. 19. There are, however, certain ambiguities in Hincmar which might indicate that while the king was subject to the divine law, he was not necessarily subject to the positive laws of his own creation, though in fact the king alone did not legislate. Cf. ibid. 231 et. seq.

62 Borchard, op. cit. supra note 2, at 791 et. seq.

63 Stubbs, Constitutional History of England, (5th ed. 1891) 141 et. seq.
sharply defined and limited. Carlyle points out that if medieval society seems to oscillate between arbitrary despotism and anarchical confusion, this is not because of uncertainty as to the rights and duties of rulers and subjects, but is due to the absence of effective administrative instrumentalities of government. To the men of the Middle Ages the justification of the authority of State and ruler was the maintenance of the principle of justice. This conception lies at the foundation of feudal law. We have already observed that Bracton conceived of the king as the authority to do justice, that he can do nothing except that which he can do lawfully, and that the phrase Quod placuit principe habet legis vigorem is followed by the words cum lege regi, quae de imperio lata est, meaning that not his arbitrary will makes law, but only his will to make law, with the counsel of his magistrates and after due deliberation and discussion. The authority is the authority of law (or right) not of wrong. When the king does justice he is the vicar and servant of God; when he does wrong, he is the servant of the devil. The king has his title from the fact that he governs well and not from the fact that he reigns. Let him therefore restrain his authority by the law, which is the bridle of authority, let him live according to law, for it is the principle of human law that laws bind him who makes them.

In this passage Bracton summarizes the feudal tradition. The views expressed have their roots in the Roman law and in certain phases of the patristic doctrine. Authority was supportable only to the extent that it represented the principle of justice, of which an essential element was the observance of the community's law; to the medieval mind the law embodied the practical form of justice, and to the feudalist, law is the foundation of authority, so that Bracton could say, "There is no King where will rules and not law." While Bracton asserts that the king is under no man, but only under God, he also affirms that the

64 3 CARLYLE, op. cit. supra note 29, at 31.
65 See the quotation from the Assizes of the Court of Burgesses of Jerusalem, ibid. 32, to the effect that the authority of the lord is only "to do law or justice", but not an authority de faire tort, which Carlyle translates, "to behave unjustly."
66 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, III, 9, 2, fol. 107 b. (2 Woodbine's ed. (1922) 304); 3 CARLYLE, op. cit. supra note 29, at 35; EHRLICH, PROCEEDINGS AGAINST THE CROWN (1921) 40 et. seq.
67 BRACTON, op. cit. supra note 66, I, 8, 5, fol. 5 b; see also 3 CARLYLE, op. cit. supra note 29, at 35. In Bracton's view the king was bound to redress wrongs done by himself or on his behalf, and he was also bound to discharge other obligations as would a private person. A person having a claim against another, would have a like claim against the king, if the latter was the wrongdoer. "Since he is subject to [the law] he ought firmly to observe it." fol. 171 b. (3 Twiss' ed. 95). "And it is to be known that to say that I cannot answer without the king is nothing else than to
king is under the law, for the law makes the king, and he should be as the least in receiving the judgment of the law. The obligations incidental to the principle of personal loyalty and protection embodied in feudalism were also conditioned on reason and justice, and negatived anything like absolutism. When the conception of loyalty was transferred from the individual lord to the State, it was not deemed to alter the nature of the subjection from limited to unlimited.

It must also be observed that to the feudal period the notion that law is made and the conception of sovereignty, as now understood, were entirely foreign. The law was primarily custom, handed down as a part of the national life, and legislation was deemed merely an embodiment of existing law. The relative place of legislation and custom, or whether legislation contrary to custom could be recognized, is not always clear. By the thirteenth century, legislation was acknowledged as a distinct source of law. It was conceived as promulgated by the king, with the advice of a council of wise men, and with the assent and for the welfare of the people. The laws cannot be abrogated or changed without the consent of all those by whose counsel and consent they were made. This is not unlike the views prevailing in the ninth century. What happened if the laws thus promulgated were not conducive to the general welfare is not certain, but contemporary political theory justifies the conclusion that the people were under no duty to observe them and were deemed warranted in resisting.

63 Bracton, op. cit. supra note 66, I, 3. 5, fol. 5b, and Borchard, op. cit. supra note 2, at 21–23; 3 Carlyle, op. cit. supra note 29, at 38, n. 1. Carlyle also quotes from the Assizes of Jerusalem and other feudal law books, including the Sachsenspiegel, to show that this subjection of the king and of the state to law was a common notion of the feudal period. Ibid. c. 2, 3; see also Borchard, op. cit. supra note 2, at 19, n. 15; ibid. 733, n. 116; ibid. 799, n. 119.

64 Bracton, in a passage based on Glanvil, claims that while other countries use leges and jus scriptum, England alone uses unwritten laws and custom. Op. cit. supra note 66, I, 1, 2, fol. 1; 3 Carlyle, op. cit. supra note 29, at 42, and c. 3. St. Thomas Aquinas made a considerable contribution in segregating divine law, natural law and positive law, and establishing the element of legislation in the latter. Though he thought that written law lost binding force if in conflict with natural justice (Summa Theolog. II, 2, 58, 1) he nevertheless conceded a large measure of unrestricted authority to the prince. He was influenced mainly by Aristotle and St. Augustine. Dunning, op. cit. supra note 19 at 192–204; Chump and Jacob, op. cit. supra note 35, at 525.

65 Bracton, op. cit. supra note 66, I, 2. 6, fol. 1. Carlyle concludes that the law in England was not something which the king makes or unmakes at his pleasure, but that is represents an authority which even the king cannot override. 3 Carlyle, op. cit. supra note 29, at 69.

66 Gratian supported the view that no law was valid unless accepted by
Moreover, important evidence of the supremacy of the rule of law is to be found in the judicial arrangements established for the maintenance and enforcement of the mutual obligations of lord and vassal. Neither lord nor vassal could unilaterally interpret the feudal contract and act upon his view; that was the function of the lord's court, which was composed both of lord and vassals. There is no doubt that the court could pronounce judgment against the lord and that if he did not carry out the judgment, the whole body of vassals was empowered to enforce it. The enforcement appears to have taken different forms in different sections and times, for example, by the vassal holding his fief free from the lord or overlord, by all the vassals renouncing service to the lord until he had carried out the judgment or even by taking armed measures against him. Beaumanoir states that in France, in a dispute as to feudal obligations, an appeal lay from the lord's court, in which vassals

the custom of the people. Decretum, D. IV, cited in 3 Carlyle, op. cit. supra note 29, at 48. See also 2 ibid. at 155. This doctrine was also maintained by some of the civilians of the twelfth and thirteenth centuries. 2 ibid. at 61-63. Cf. Bracton, op. cit. supra note 66, I, 1, 2, quoted in 3 Carlyle, op. cit. supra, at 48, n. 3, and the views of Beaumanoir, ibid. 49 et. seq., who is sometimes cited in support of a more unlimited authority of the royal legislator. The right of resistance, which was emphasized by the Monarchomachs from the sixteenth to the early nineteenth centuries exerted a powerful influence on the development of the limited and constitutional state.

1 Von Möhl, Die Geschichte und Literatur der Staatswissenschaften (1855) 321; Wolzendorff, Staatsrecht und Naturrecht (1916) pt. 1, 6 et seq.

22 See Jean d'Ibelin, Assizes of Jerusalem, quoted in 3 Carlyle, op. cit. supra note 29, at 53, n. 1-4. The composition of the court is not altogether certain; for example, it has been doubted by some whether the lord himself could sit in it. Ibid. 54.

73 Jean d'Ibelin, quoted ibid. 58, n. 2, and 59. See the extracts from the Consuetudines Feodorum, the Sachenspiegel, Le Conseil De Pierre de Fontaines, and the Etablissements de St. Louis, and from Beaumanoir, showing that in the twelfth and thirteenth centuries it was the common conception that the feudal lord could be impleaded in the lord's court and that appropriate measures were available to the vassal to enforce the judgment. In the Etablissements de St. Louis it is stated that the remedy of armed measures is available even against the king of France if he refuses to do justice in his court. 1, 53, quoted in 3 Carlyle, op. cit. supra note 29, at 63, n. 2; 2 Viollet, Les Etablissements de St. Louis (1881) 75; also 1 ibid. 18. See generally the quotations from these feudal law books in 3 Carlyle, op. cit. supra c. 4; Wolzendorff, op. cit. supra note 71, at 6-23. Crump and Jacob, op. cit. supra note 35, 521; Von Frisch, Die Verantwortlichkeit der Monarchen (1904) 100 et. seq., asserts that the Middle Age and feudal theory—in contrast to the Roman theory—maintained the responsibility of King and lord in special courts, civil or ecclesiastical, but that in practice it is difficult to establish uniformity of rule. It was largely a question of physical power, whether the lord would submit to courts. There appears to have been more general submission in civil cases than in criminal matters.
sat, to the overlord. It is noteworthy that the judges in the lord's court are vassals and that they administer the customary law of the land and not the lord's will, caprice or desire.

In Bracton's time the feudal system was being gradually replaced by a national monarchy. Disputes as to feudal obligations go from the lord's court to the county court and thence, if the king consents, to the "great court". We have already observed that in Bracton's view the king was under God and the law, for it is the law that makes him king and his authority depends on the authority of law. His divine authority as the vicar of God is not an argument for unlimited or uncontrollable authority, but an additional reason for his submission to the law and for governing according to law, which sets a bridle to his power.

It seems therefore fairly certain that the principle that the king is such only if he administers justice according to law and that he himself is bound to the rule of law is an elementary principle of the medieval theory of government. Political speculation and controversy were rife from the eleventh to the thirteenth centuries, so that there is no lack of evidence from which to draw conclusions as to the political thought of the time. One of the distinctive conceptions of the medieval period seems to be the difference between the king who obeys the law and who therefore can properly claim to rule and exact obedience from

\footnote{See quotations in 3 Carlyle, op. cit. supra note 29, at 65.}

\footnote{Bracton, op. cit. supra note 66, III, 7, 1, fol. 105, quoted in 3 Carlyle, op. cit. supra note 29, at 66, n. 3.}

\footnote{Bracton, op. cit. supra note 66, I, 8, 5, fol. 5. It is interesting to observe that although Bracton quotes Theodosius' phrase from the Code I, 14, 4, the Digita vox, that the Emperor's authority depends on the authority of law, he makes no reference to the famous "legibus solutus," evidently believing it unsuitable to his purpose. Digest I, 3, 31.}

\footnote{Bracton, op. cit. supra note 66, III, 9, 3, fol. 107 b. On the other hand, Bracton also states that a complaint against the king can only be made by way of supplication to him, for no writ runs against the king, and if he will not correct what is complained of, he must be left to the judgment of God. Ibid. I, 8, 5, fol. 5b, quoted in 3 Carlyle, op. cit. supra note 29, at 70. Yet Bracton concludes this passage by saying that while the king has no equal in administering justice, in receiving justice he is like the humblest in his kingdom. The passage in Bracton, op. cit. supra note 66, II, 16, 3, fol. 34, to the effect that the counts and barons in the king's court are his associates, and he who has an associate has a master, and that if the king should be without a bridle, i. e., without law, they should impose a bridle on him, is regarded by Dr. Woodbine as an interpolation in Bracton's text. Cf. 1 Maitland, Bracton's Note-Book (1887) 28 et seq.; Bracton (1 Woodbine's ed. 1915) 252, 332; 3 Carlyle, op. cit. supra note 29, at 72. Carlyle thinks that whatever the source, Bracton would not have repudiated the words, for his general thesis maintains that the king is under the law, and that the Universitas Regni and the Baronagium could correct the king's unjust action. Bracton, op. cit. supra note 66, IV, 10, 7, cited in 3 Carlyle, op. cit. supra note 29, at 73. Carlyle adds that the words represented the thought of the time.}
his subjects, and the unjust ruler or tyrant who violates the law and to whom his subjects are therefore under no obligations. It may well have happened that a tyrant, so-called, might occasionally have compelled the obedience of unwilling subjects by violence and cruelty, but this was regarded as contrary to law and to his oath, and to evidence merely the power of physical force occasionally to set aside the reign of law. Theory and tradition were clearly against sustaining the legitimacy, legality or propriety of such authority, and one gets the impression that it was not common. Carlyle suggests that the distinction between legal and just authority and violent and unjust power, was well recognized even among the strongest upholders of the royal or imperial authority, who drew upon St. Gregory for their view of the divine and therefore presumably uncontrollable power of the ruler. The latter view was exceptional and found little support in practice. To medieval writers like John of Salisbury, one of the most important, the authority of the law and State is the authority of justice and reason, and no ruler is deemed legitimate unless he obeys the law. The supremacy of law over

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77 Carlyle, op. cit. supra note 29, c. 5; Wolzendorff, op. cit. supra note 71, c. 1.
78 Supra, at 1056.
80 Carlyle quotes John of Salisbury in "POLICRATICUS" (about 1155) IV, 1, as perhaps the most important medieval writer on contemporary political theory. The meaning of "POLICRATICUS" is not clear. It has been called "THE STATESMAN'S BOOK." For the several possible meanings and an analysis of the work, see Poole, ILLUSTRATIONS OF THE HISTORY OF MEDIAEVAL THOUGHT (2d ed. 1920) 176, 190 et seq. John declared, after stating the traditional difference between prince and tyrant, that the prince obeys the law and governs according to law and the tyrant does not. The will of the prince is never contrary to justice. While his authority is derived from God, he concludes that the authority of the prince depends upon the law, and "that it is a thing greater than empire to submit the princely authority to the laws." 3 Carlyle, op. cit. supra note 29, at 137 et seq. In explaining the phrase that the prince's will has the force of law, John of Salisbury says that this is not because he may do unjust things, but because his character should be such that he follows equity and serves the commonwealth, for love of justice. The prince may not desire anything but what law and equity and the common good require; his will in these matters has indeed the force of law, but only because it in no way departs from equity. Ibid. 139. Carlyle suggests that John of Salisbury is evidently concerned to find a fair meaning for such phrases as that the prince is legibus solutus and quod principi placuit legis habet vigorem, inasmuch as these phrases had apparently been used to defend the conception that the prince was not subject to law and that even his capricious desires might override the law. John of Salisbury considered these conceptions preposterous and impossible. John suggests that to withdraw the prince from the authority of law is to make him an outlaw, i.e., a person to whom all legal obligations cease. Ibid. 140; 4 ibid. c. 2; of. Dunning, op. cit. supra note 19, at 186–187.
kingly authority, and obedience to law as the only justification for such authority, is the keynote of medieval political theory.54

Bartolus, the great postglassator, writing in the fourteenth century, had a high regard for the theoretical omnipotence of the emperor. Though his authority was in fact denied in many parts of Europe, Bartolus considered the Roman law as binding and superior to all local laws and statutes, for de jure he conceived all Europe as still incorporated in the Roman Empire. Yet the legal omnipotence of this powerful emperor was limited, Bartolus admitted, by law. Not only the emperor, but his own laws, the jus commune et imperiale, and all other human laws, are dependent upon higher laws, the jus divinum, the jus naturale and the jus gentium. And with reference to the clause legibus solutus, although the Emperor submits to his own laws “de voluntate” and not “de necessitate”, it is still “acquum et dignum” that he should be bound by them. Compacts he is bound to observe by the jus gentium.55

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54 John of Salisbury maintained that a tyrant has no rights against the people and may rightfully be slain. 3 CARLYLE, op. cit. supra note 29, at 143; POOLE, op. cit. supra note 80, at 208; WOLZENRODFF, op. cit. supra note 71, at 8. The right of resistance against oppression is firmly maintained by the individualist school of the seventeenth and eighteenth centuries. The French Declaration of Rights of 1789 characterized it as among “the natural and indefeasible rights of man.” Duguit, op. cit. supra note 26, at 19. See also Declaration of 1793, arts. 27, 28-33; LENZ, FRANZÖSISCHE STAATSLEHREN IM 17. U 18. JAHRRUNDERT (1925) 26 c.q.

55 BARTOLUS on CODEX, pt. 1 (C. I, 14, 4) 87; WOOLF, op. cit. supra note 40, at 45-46. See also quotation from the same work in Zane, A Legal History (1919) 13 ILL. L. Rev. 431, at 454 to the effect that the prince cannot take away unjustly my control over my property, because he has no authority to do wrong. This cannot even be done by a law of the State, says Bartolus. BARTOLUS, op. cit. supra pt. 1 (C. I, 22, 6) 112, § 2; WOOLF, op. cit. supra note 40, at 46.

Another fourteenth century publicist, Marsigio (d. 1342), interested in supporting the authority of the emperor as necessary to maintain order, nevertheless insists on popular sovereignty, regards the legislator as the people, and the executive, including the monarch, as the pars principis. The latter's authority, as in the Roman theory, if not in the practice, was limited; he could be punished by the legislator for violations of law. DEFENSOR PACIS, bk. 1, c. 18, analyzed in DUNNING, op. cit. supra note 19, at 240. See also EMERTON, THE DEFENSOR PACIS (1920) 27 ct. sqq.

William of Ockham (d. 1349?), in the same century, much like Bartolus, while regarding the emperor or any other monarch as bound by the jus naturale and the jus gentium, says of the positive laws enacted by the emperor or monarch himself, that he is not bound by them of necessity, but propriety requires that he respect them. This is the construction placed on the phrase, Imperator legibus solutus. See citation to DIALOGUS mentioned by DUNNING, op. cit. supra, at 243; Perry's ed. of Trench's translation (1925) 2, 12 et seq. Both Marsiglio and Ockham adhere to a conception of limited sovereignty. GIERKE, POLITICAL THEORIES, (Maitland's transl.) 35 and notes. Prof. Dunning adds: “Throughout all the centuries down to the eighteenth, limitation was presumed in all the think-
In the fifteenth century, Fortescue, in his famous work on the laws of England, written to instruct the young prince of Lancaster, states that English law does not sanction the Roman maxim, *quod principi placuit habet legis vigorem*, or anything like it, for while in a political sense the king rules over his people, “he is bound to the observance of the laws” as he swears at his coronation.  

We may say, then, that medieval political theory, evidencing a natural evolution from earlier times, emphasized as constitutional doctrines the principle of the equality and freedom of man, the conviction of the sanctity of the political order, the principle of the supremacy of the law or custom of the community, and the idea of the king as responsible under the law and bound to govern according to law. Whatever defects there may have been in the practical administration of these principles, they nevertheless manifest a cultural tradition in which the conception of sovereignty as irresponsible power can find no serious support. Machiavelli, Bodin and Hobbes indicted polemics in advocacy of absolutism, which even when written reflected no existing political fact. Efforts to act on such absolutist theories not only proved impractical to monarchy, but helped to revive the historical doctrines of equality, natural rights and the rule of law which lie at the foundation of modern democracy.

*The Individualist Theory.* The approach to more modern times displays a growing aversion to absolutist theories. In England, the reaction from the Restoration of 1661 which led to the Revolution of 1688, and, in France and America, a reaction against an oppressive monarchy produced political theories which led to the promotion of the rights of the individual against the State and necessarily, to constitutional limitations on the power of the sovereign. That these attacks on the actual power of the sovereign still left the theory of sovereignty—now usually popular sovereignty—so largely immune, is a manifestation of the dominance of metaphysics and of abstract conceptions in human thought.

The conceptions through which the individualist school, whose views both in politics and economics perhaps still dominate the existing order, reached its goal were the doctrines of the law of nature and the social contract.  

83 *Fortescue, De Laudibus Legum Angliae* (Amos ed. 1825) c. 34 (Amos' transl. 1775). See the critical note by Amos, page 125, in which he discusses the curious meanings attributed to the Roman maxim by Bracton, Fleta and others. Amos, on the authority cited, denies the sweeping interpretation sometimes given to the maxim.

84 *Gettell, op. cit. supra* note 5, at 216, 261; *Duguit, op. cit. supra* note
of nature had experienced many vicissitudes since Greek and Roman days. From its antithesis to the law of the Greek city to its identification by the Stoics with the moral law and by the Romans and others with the *jus gentium*, or with the law of God, it became in the seventeenth century the rule of reason, a connotation, historically and socially interpreted, which it still has in the due process clause of American constitutions. Grotius stressed this interpretation of natural law; and its application to the State, as exemplified notably by Locke, was emphasized in the obligation to protect the so-called natural rights of man, rights which he was deemed to possess as a human being anterior to his assumed voluntary association with other men in organized society. This was, of course, an unhistorical postulate, but it served to deduce a political structure of society centered around the rights of the individual and a State designed to secure them. The French Declaration of Rights of 1789 asserted that “the end of all political association is the conservation of the natural and indefeasible rights of man.”

It is interesting to observe that Hobbes and Locke, whose conclusions were so sharply opposed, both postulated a state of nature and a social contract. But whereas Hobbes saw in nature a condition of strife and violence which men agreed to terminate by vesting unlimited authority in a sovereign whom it was unlawful to resist—an unsuccessful effort to sustain absolutism by a social contract—Locke regarded the state of

26, at 10, 27 et seq. The social contract theory, which took many forms, made its appeal for a variety of reasons—as a contrast to the doctrine of divine right, as a method of limiting arbitrary royal authority, as a basis for rational instead of theological interpretation, as a justification of the conscious human will in the evolution of society, and because it promoted the claims of the individual as the essential factor in society. See Rousseau’s theory of the social contract, *infra*, note 88; cf. Lichtenberger, Development of Social Theory (1924) c. 8. After Rousseau, the theory of the social contract survived in Germany and in America, in the writings of Kant and Fichte, who tested laws by an assumed popular consent, and in the Declaration of Independence and the writings of Jefferson and Madison.

85 See the learned exposition of these theories in 4 Gerke, Das Deutche Genossenschaftsrecht (1913) §§ 16, 17, 18.

86 Coker, *op. cit.* supra note 21, c. 14, 16, quoting from Hobbes *op. cit.* supra note 31, and Locke, Two Treatises of Government (1690) bk. 2, c. 2, 7 (Everyman’s ed. 118, 154). Dunning, Political Theories from Luther to Montesquieu (1919) c. 8, 10; Gooch, History of English Democratic Ideas in the Seventeenth Century (1898) c. 10; Graham, English Political Philosophy from Hobbes to Maine (1900) 50–87; Lamphere, The Moral and Political Philosophy of John Locke (1918) bk. I, c. 1; *ibid.* bk. III, c. 1, 2; Laski, Political Thought from Locke to Bentham (1920) c. 1–2; Pollock, *op. cit.* supra note 35, at 80, 102; Willoughby, Nature of the State (1896) 62–79.

87 Merriam, Hobbes’ Doctrine of the State of Nature (1906) 3 Proceed-
nature as one of simplicity, peace and reason, much like Rous-
seau, and the political association—not a single sovereign—as
vested by agreement with a limited authority to assure to the
individual the protection of his natural rights to life, liberty
and property. The divine right of kings and of the "gov-
ernmental contract" between people and king, rooted in feudalism,
were repudiated by both Hobbes and Locke, whose "social con-
tract" was deemed one among peoples. In Locke, as in certain

INGS OF AMERICAN POLITICAL SCIENCE ASS'N 151. Spinoza shared Hobbes' view of the state of nature as the rule of the stronger over the weaker. TRACTATUS THEOLOGICO-POLITICUS, c. 16; GIERKE, op. cit. supra note 85, at 380. Yet he differs from Hobbes in believing sovereignty never absolute, and that while the sovereign power might not be bound by the civil law, it was bound by the natural law. POLLOCK, SPINOZA, HIS LIFE AND PHILOSOPHY (2d ed. 1889) c. 10; DUFF, SPINOZA'S POLITICAL AND ETHICAL PHILOSOPHY (1903) c. 12, 19, 22.

86 Rousseau, though a strong individualist, who also presupposed natural man free and independent and endowed at birth with certain natural rights, nevertheless conceived of the group as the dictator of the relation-
ship. By the "social contract" man surrenders a part of his natural in-
dependence, but in return acquires a guaranty of his rights. But the
sovereign, now the people, determines the extent of the rights surrendered and retained. This is quite a different conception from that of Locke. Both Locke and Rousseau agreed on popular sovereignty, but Locke con-
ceived it as passive, exercisable only in extreme cases of revolution, what
we would now call political sovereignty, whereas Rousseau conceived it as
active, as the source of the expression of the "general will" of the people
through their agents, the government, in law-making. Duguit, op. cit. supra
note 26, at 27; GETTELL, op. cit. supra note 5, at 261; DUNNING, HISTORY
OF POLITICAL THEORIES, ROUSSEAU TO SPENCER (1920) 27. Rousseau seeks to reconcile the contradiction which he himself posits between the naturally free man and the limitless sovereignty of the State vested in the people. His argument was that the sovereign will is exerted by individuals (the general will) against themselves, to the extent deemed necessary. By
the operation of the social contract, which creates the general will, the
individuals, obeying this collective will, obey only themselves. There is
a certain sophistry in this. In 2 CONTRAST SOCIAL (Harrington's ed. 1896),
Rousseau limits the State's claim upon the individual to those only which
serve the community. But in c. 6 and 7 of Book I he posits the unlimited
sovereign, who cannot be bound by law. He is guilty of strange contradic-
tions. Rousseau also propounded the view that the general will is always
right, a doctrine that the analytical school would approve. An act of
sovereignty is law. The prince, as a member of the State, is not above the
law. Yet the laws must be equal for everybody, otherwise they are invalid,
apparently an admitted limitation on the general will and the State. But
he also regards the State as omnipotent and sovereign power as unlimited.
The absolutist theories of Rousseau have been repudiated generally, yet
an erroneous conception of his views as an advocate of limited government
long prevailed. COKER, op. cit. supra note 28, c. 18; Dunning, Political
Theories of Jean Jacques Rousseau (1909) 24 Pol. Sci. Q. 377; chapter
on "The Social Contract Theorists" in LICHTENBERGER, op. cit. supra
note 84; POLLOCK, HISTORY OF THE SCIENCE OF POLITICS (1890) 76 et. seq.; Ritchie, Contributions to the History of the Social Contract Theory (1891)
6 Pol. Sci. Q. 656; WILLOUGHBY, op. cit. supra note 86, c. 5.
of his forerunners, government was founded on popular consent. Like practically all the individualists, Locke regarded the legislature as an organ whose powers were limited by the natural rights of the individual and of the community, a fact which is today exemplified in constitutional states and especially in the United States where constitutional limitations are enforced by judicial control. The right of popular resistance to usurpation by civil authority was deemed inherent.

The influence of Locke’s theories on modern political development was profound. In emphasizing natural liberty and the social compact as opposed to absolutism and divine right, he laid the foundation for individualism. His ideas accorded with the desires of men of the time and with the practical notions of lawyers, economists and conservatives generally, who sought an intellectual basis for the binding force of contract and of the right of property to which contract led. The utilitarians, like Paley and Bentham, sought to reconcile these individual privileges with the claims of society, the greatest happiness of the greatest number. Rousseau expanded Locke’s social contract into the “general will”. In both cases, the equilibrium and adjustment between individual well-being and social good is explained by emphasis on the doctrine of equality, though it be derived from a state of nature, as in Rousseau, from the will of God, as in the early churchmen and in Paley, or from a mathematical law of indifference, as in Bentham. The philosophy of the early nineteenth century, the apotheosis of laissez-faire, perceived a natural and divine harmony between private advantage and the public good. Laissez-faire, the non-interference of government with private initiative, the merits of free competition, the Darwinian conception of the survival of the fittest, Spencer’s organic conception of societal evolution and the limited State, rounded out that individualist conception which lies at the foundation of the prevailing modern political and social theory.

89 Bentham (1748–1832) was the intellectual leader of English utilitarianism. He argued that man had no duty to abstractions, such as State and Church, but only to other human beings. He attacked Blackstone’s pompous generalizations in his anonymous FRAGMENT ON GOVERNMENT (Montague’s ed. 1891). He denied the theory of the social contract, asserting that the State was based on a habit of obedience. It existed because of its obvious utility. Bentham also denied the existence of natural law and natural rights. Like Austin, he viewed law as the expression of the “sovereign will” of a political society in the form of a command. Individuals had no legal rights against this authority. GUTHELL, op. cit. supra note 5, at 342–344; ATKINSON, JEREMY BENTHAM (1905); DAVIDSON, POLITICAL THOUGHT IN ENGLAND, THE UTILITARIANS FROM BENTHAM TO MILL (1915) c. 1; DICEY, LAW AND PUBLIC OPINION IN ENGLAND (2d ed. 1914) 125 et seq.; POLLACK, op. cit. supra note 88, at 93 et seq.; WALLAS, JEREMY BENTHAM (1923) 38 Pol. Sci. Q. 45.

90 See the brilliant essay of John Maynard Keynes, The End of Laissez-
That these are essentially hypotheses, founded on certain preconceptions of private and public good, is not always perceived. The nineteenth and the twentieth centuries with their industrial revolution and organization of society have developed challenges to the complacent hypotheses of the extreme individualists; and modern social and political struggle centers about the assumed conflict between individual and social advantage—for the two are no longer regarded as in the long run necessarily identical. The result, in the widening of the social vision, has been an enlargement in governmental enterprise and an ever greater social control in the form of police power legislation. Our study as

Faire (1926) 48 THE NEW REPUBLIC, No. 612, Aug. 25, 1926, p. 13; ibid. No. 613, Sept. 1, 1926, p. 37. See Dunning's generalization that "Milton had excluded government from interference with the citizen's expression of opinion, Locke had excluded it from interference with the citizen's material property, Voltaire and a host of others had excluded it from interference with his religious worship, the Physiocrats and economists had excluded it from interference with his industrial and commercial life." Op. cit. supra note 88, at 155. On the theory of individualism, political and economic, and the views of some of its major exponents, see Gettell, op. cit. supra note 5, at 371–374; Basu, op. cit. supra note 35, Lectures 2 and 3; Brown, UNDERLYING PRINCIPLES OF MODERN LEGISLATION, (3d ed. 1914) c. 6; RATIONAL BASIS OF LEGAL INSTITUTIONS (1923) 1–51 (Laissez-faire), 52–91 (Competition); Dunning, op. cit. supra note 88, at 395. On solidarity of interests of society and individual, see Jhering, LAW AS A MEANS TO AN END (1913) 415.

The reaction against laisser-faire, which was held responsible for destitution and economic oppression, was expressed in a demand for greater state control, a renewed faith in the State, an abandonment of the mechanistic conception of free individuals and a "social contract". The State determined how far individual freedom was consistent with social well-being. Ethics and politics were not deemed inconsistent, but one. The main champions of this idealist conception are to be found in Germany and England. Not all abandoned the social contract as a conception. The Doctrinaires in France, led by Royer Collard (1763–1845), influenced by the German idealists like Kant and Fichte, worked out the compromise between monarchy and people and between society and the individual, by emphasizing the sovereignty of reason, which admitted the claims of both. Gettell, op. cit. supra note 5, at 359.

Kant (1724–1804) distinguished innate rights and acquired rights of the individual. The latter alone he owed to the State. The social contract is the basis of the State, and Kant follows Rousseau in holding that the omnipotence of the State does not exclude the liberty of the individual. The sovereignty of the State, as in Rousseau, manifests itself through law. But Kant's State, unlike Rousseau's, is divine, because irreproachable, i.e., infallible, and because people cannot inquire into its origin. People must always obey government. The supreme power in the State has only rights and no duties toward the subject. But see Brown, THE AUSTRIAN THEORY OF LAW (1906) 104; Wenzel, JURISTISCHE GRUNDPROBLEME (1920) 209; Borchard, op. cit. supra note 2, at 787, n. 79. The executive's functions are, however, deemed limited. Yet the executive power is irresistible and cannot be disobeyed. Limited monarchy was an inconsistency. A political constitution was an expedient to present an illusion of popular rights,
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but it was not a legal limitation. Yet, we might suggest, political limitations it clearly embodied, and their denial as legal is mainly verbal. In a constitutional State, said Kant, revolution is illegitimate, yet if revolution succeeds and establishes a government, it must be obeyed. Duguit, who thus analyzes Kant, fails to point out that Kant was dealing at once with an ideal and with a practical State, and was inevitably led into confusion. Op. cit. supra note 26, at 40–56. His ideal State was formed by voluntary agreement and its sovereignty was derived from the will of all the people, where men were free and equal, forming the State by a constitution. His practical State, derived from historical conditions, was based on force and reason, its sovereignty resting with those who had the actual power.

Fichte (1762–1814) in his Grundlage des Naturrechts (1796) (Kroeger’s transl. 1869, under the title The Science of Rights) emphasized the rights of the individual and the sovereignty of the people, though he later advocated a wide authority of the State. For the maintenance of the constitution against invasion by government he suggested the creation of a board of Ephors or supervisors, as a check on government. Gettell, op. cit. supra note 5, at 318; Dunning, op. cit. supra note 88, at 137, 147; Berolzheimer, op. cit. supra note 6, at 192.

Hegel (1770–1831) carried to an extreme the curious dogma of Rousseau that the more powerful the State the greater the freedom of the individual. He conceived the individual and society both as antithesis and synthesis, the individual realizing himself in the State. Grundlinien der Philosophie des Rechts (1821) (Dyde’s transl. 1836, under the title Hegel’s Philosophy of Right). Hegel rejects the social contract. To him, there is something divine about the State. Yet Hegel’s prince was a constitutional monarch. To Hegel the State was a natural organism, not a collection of separate individuals each possessing natural rights and a share of the general will or sovereignty. It was to him a real person; sovereignty resided in it, not in the people. It found its expression in the monarch, who personified the State. The political philosophy of Kant and Hegel and their schools was based on pure and abstract thought, rather than on observation and experience. To them the will was the ultimate element in politics. But at all times, the glorification of the national State found opposition in Germany. See Humboldt’s individualist doctrines in his Ideen zu einem Versuch die Grenzen der Wirksamkeit des Staats zu Bestimmen (1831) (Coulthard’s transl. 1854, under the title Sphere and Duties of Government). For a summary of Humboldt’s ideas see Dunning, op. cit. supra note 88, at 143, 154. On Hegel’s political theory see Duguit, op. cit. supra note 26, at 57–102; Morris, Hegel’s Philosophy of the State and of History (1887); Dewey, German Philosophy and Politics (1915); Gettell, op. cit. supra note 5, at 318–320; Dunning, op. cit. supra note 88, at 134; Berolzheimer, op. cit. supra note 6, at 215.

In England several of the Oxford group, though more disposed to emphasize the importance of the individual, were nevertheless primarily neo-Hegelians. The State was an end in itself, an ultimate moral being, an organism with a personality and will of its own. Bosanquet, in particular, in his Philosophical Theory of the State (1899) c. 9, 10, adopts Hegel’s view that the State cannot be bound by rules of individual morality, or by any system of rights and duties. We are reminded of Hobbes and Austin.
to whether the State should repair the injuries which its agents inflict in the performance of public duties involves, from the viewpoint of political theory, an examination of the balance of private and public advantage in making or not making compensation for such injuries. It is, however, proper to observe that the individualists, whose views found expression in the constitutions of the eighteenth and nineteenth centuries, regarded the legislature as subject to the control of law, that positive law must heed the fundamental constitutionally protected rights of the individual, and that the State is thus not only bound not to transgress these rights of the individual, but that the State, for the same reason, is also bound by the positive laws which it enacts. Thus the individualists, from their postulate of the natural rights of man, whether or not expressly embodied in constitutional provisions, arrived at the conclusion that the State was limited by its own positive laws, so long as these were in force.92

See Gettell, op. cit. supra note 5, at 321–324; Barker, Political Thought in England from Spencer to To-Day (1915) c. 2, 3; Hobhouse, The Metaphysical Theory of the State (1918); Hoernlé, Bosanquet’s Philosophy of the State (1919) 34 Pol. Sci. Q. 609; Waddington, Development of British Thought (1919) c. 2, 9, 10; cf. Rocco, The Political Doctrines of Fascism (Oct. 1926) International Conciliation, No. 223.

92 Duguit, op. cit. supra note 26, at 10 et seq. Benjamin Constant was among those who found a legal limitation upon sovereignty in the constitutional rights of the individual. Cours de Politique Constitutionelle (1819); see Duguit, op. cit. supra 105. He attacked Rousseau’s dogma that the “general will” cannot err. He not only denied the alleged unlimited power (sovereignty) of society over its members, but combatted Rousseau’s belief in the omnipotence of the majority. He denied the whole alleged basis and terms of the social contract, and particularly denied that the individual surrenders all his rights to the community, and that the community and its agents cannot in theory injure its members collectively or individually. As every organ, every societal agent, of the State was legally limited in authority, Constant held that sovereignty must necessarily be limited. In the control of the State by justice he perceived moral limitations; in its recognition of natural and individual rights, he perceived legal limitations. Constant, while admitting the necessity for a sanction for these legal limitations, finds it in political institutions. This may not be acceptable generally, but is possibly as convincing as Duguit’s sanction in the necessity for conformity with the principles of “social solidarity”. Constant denies the necessity of obedience to laws transcending the limited powers of the legislature, whereas Duguit denies the character of law to rules defying the principles of social solidarity. How we are to identify these “illegal” laws and how courts are to deal with them, Duguit does not make clear. Had Constant identified his alleged legal limitations, arising out of recognition of individual rights, with those enforced by courts, even against the State, there could be no legitimate objection to considering them as legal. Constant denies the character of law to retroactive legislation, class legislation, legislation commanding acts contrary to morals, i.e. those laws which, among others, would to-day in the United States fall outside the limitation of “due process of law.”

Esmein (1848–1913), one of the ablest jurists of modern France, posits
necessarily, also, the State is bound by its contracts with private individuals, as are individuals by their contracts inter se, and is bound to repair damages when it unduly or wrongfully invades the rights of the individual, as are private individuals. The civil law countries, not disturbed by such conceptions as kings above the law, absolute sovereignty and other dogmatic inventions, found no trouble in subjecting the State to the rules of law whenever the State entered into relations with individuals which could be assimilated to those relations into which other corporations might enter and which could be deemed governed by principles of private law. The State as a fiscus in Germany, in an activity fure gestionis in France and elsewhere, was deemed by the courts subject to the rules of municipal law, without express legislative consent. Difficulty and doubt arose in the extension of the principle to the more distinctly governmental functions of the State. The twentieth century marks the evolution of public law so as gradually to bring within the domain of legal rules the relation between the individual and the State in its character as a governmental agency.

Duguit can hardly be gainsaid when he characterizes the individualist conception of the natural rights of isolated man anterior to his entrance into social relations as a bit of metaphysics. Rights, natural or other, presuppose a social organization. Nor do the natural rights of man explain the limitations on legal sovereignty. Absolute sovereignty, however, is as much a metaphysical conception as the natural rights of man, and its historical and intellectual foundation is less solid. We do know that in the constitutional State in the United States, the legal system places judicially enforceable limitations on the State and the group for the benefit of the individual and on the individual for the benefit of the group.\(^3\) The history of political and social thought furnishes the key to the content of these limi-

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\(^3\) These conceptions coincide with the theory of constitutional democracy in all western countries. They were given their greatest impetus by the ideas of the American and the French Revolutions, which promoted written constitutions, representative government, popular sovereignty, national unity and individual rights, with a growing development of social control through the police power. The liberalism of the nineteenth century, reacting on the economic doctrine of laissez faire, produced a popular conviction that individual freedom equally promoted social welfare. Forms of government in Europe favored the limited monarchy rather than the republic; the Int-
tations. The existence of legal limitations in the United States is verified by the fifth and fourteenth amendments of the federal constitution. The denial of their legal character must be left to the dialectics of the analytical school, founded on their ideal and metaphysical postulates.

THE CONSTITUTIONAL AND LEGAL STATE

Ever since the Middle Ages, political theory has been struggling with two diametrically opposed conceptions of the relation between the State and law. The Germanic conception of the Rechtsstaat, the State and ruler limited by law, competed with the so-called Roman conception of the legally unlimited State and ruler. To the aid of the former conception came, among others, (a) the Monarchomachs of the late sixteenth century, with their doctrines of the fiduciary and contractual origin of political authority and the consequent right of popular resistance and of
disobedience to unlawful commands, (b) the defenders of popular sovereignty, (c) the eighteenth century disciples of the school of natural law, with their renewed emphasis upon the sanctity of vested rights and the so-called inalienable rights of man, and finally, (d) the philosophy of democracy which gave these doctrines a political and constitutional framework in the modern state. The most recent exponents of these theories postulate what they call the “sovereignty of law,” a conception presently to be examined.

The conception of the unlimited monarchy, free from the control of law, was fostered (a) by the distinction, posited by Bartolus, between communities which do and those which do not recognize a superior, (b) by the successful efforts of the Church and its scholastic protagonists to place the Church outside the law, and (c) by the publicists supporting ruler sovereignty against popular sovereignty, such as Machiavelli, Bodin and Hobbes, all of whom relied much on Roman maxims and insisted that the State alone created law. Freedom from the restraint of law was deemed an inherent characteristic of sovereignty. When, in the late eighteenth century, the Rousseau school transferred to the people that unlimited power which the Hobbesian school had postulated in the ruler, and when with it natural law as a legal system lost favor, the ground was laid for the modern analytical jurist who sees in the democratic, as in the autocratic, State that legally unlimited sovereign who *ex hypothesi* creates the law and changes it at will, and is, hence, above it. Recognizing the existence of a constitution, he is perforce driven to assert that its supposed limitations are not legal in character, but moral only, because changeable by the authority that imposed them. The doctrine of auto-limitation or self-restraint, as he calls it, he refuses to admit as a legal restraint.

The historical antinomy between the State's postulated freedom from and its subjection to law, which occupied the publicists of the Middle Ages and those of more modern times, was in a measure reconciled by the view that the precepts of natural law bound the State and the ruler or government, but that the rules of positive law emanating from the State did not bind it to any greater extent than it chose. This compromise, which plays an important part in the evolution of the modern State, was aided by several significant developments. In the first place, the emancipation from legal restraint was claimed by the philosophers for the true monarch only, not for the head of a republic. Again, the adherents of popular sovereignty predicated the binding character of laws on the consent of the governed and insisted upon the subjection to law and legislation of the governing head

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94 TREUMANN, DIE MONARCHOMACHEN (1895) c. 4.
95 GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (Maitland's ed.) 77.
of the State. The admitted distinction between legislative and executive power proved to be highly important for the development of the constitutional State in the eighteenth century. Legislative supremacy was conceded to the popular or ecclesiastical legislative assembly and rights flowing from legislative grant were admitted to be of a less unchallengeable character than those derived from natural law, which embraced now the *jus gentium*, now the *jus divinum* and *jus naturale*. Finally, after the doctrinal conflict between the emperor's supposed *dominium* of all the property in the State and his *imperium* or sovereign control for the public good only—sometimes known as *dominium eminens*—there emerged the doctrine admitting the institution of private property as a definitely recognized human (natural) right prior to and independent of the State. The ruler's or State's privilege of expropriating this private property was strictly limited to public purposes, *ex justa causa* and the payment of compensation. This admission laid the ground for the recognition of the doctrine that there were certain natural rights of the individual which no sovereign could impair. Some of these rested on a supra-state natural law, some on a supposed contract with the sovereign which, according to natural law, was binding upon him. These so-called natural rights were not always clear, nor were their limitations easily defined. But that they are important is evidenced in the Declaration of Independence, in the Declaration of the Rights of Man in France, and in the constitutions of the United States and of other states of the western world. Of these rights, that of private property occupies uniformly a prominent place, and it is in the constitutional limitations on the right of eminent domain in France and elsewhere that the main support was found for positing the pecuniary responsibility of the State for invasions of other private rights.

We have already observed the Middle Age conception of natural law as a set of rules binding on all earthly powers, including sovereigns and peoples. The State itself by hypothesis owed its existence and its legal powers to natural law. While positive law

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90 Gierke, Johannes Althusius, 295 et seq. and authorities there quoted and cited; 2 Locke, Two Treatises on Civil Government (1924) c. 2, 5 (of property); c. 7, 9, § 131; c. 11, § 134; chapter on "Locke's Theory of the State," Pollock, op. cit. supra note 35, at 90 et seq. Locke reflected the ancient view of property as a "natural right" as formulated by St. Thomas Aquinas and accepted by Grotius, Puffendorf, Wolff, and others in the eighteenth century; against this theory Montesquieu, Bentham, Mill and others, following St. Augustine, contended that property was a mere creature of positive law. Romieu, La Propriété (1923) 78–161. Cf., the various theories of property in Rational Basis of Legal Institutions, (by various authors, 1923) pt. 2; Ritchie, Natural Rights (1924) c. 5, 13.

97 Ritchie, op. cit. supra note 96, c. 1 and Appendix, 289–297; Korkunov, General Theory of Law (1909) c. 3.
could amplify, modify and apply the precepts of natural law, it could not change them. With the growing recognition of the sphere of the individual as an end in himself, it became established in jurisprudence and philosophy that individual rights which flow from natural law were equally inviolable by positive law. If positive law did purport to violate these limitations, legal doctrine, as early as Bartolus, regarded the statute as null and void and the individual released from the duty to obey. Against the effort to compel obedience, some publicists even approved armed resistance.

The supporters of absolute sovereignty denied the legitimacy of these conceptions, the historical and practical importance of which are obvious in every modern constitutional state. These publicists maintained the complete supremacy of the sovereign ruler in the legal field and at most regarded the precepts of natural law as the demands of moral justice without binding force upon the sovereign will. If they were disregarded by the sovereign, there was no remedy and of course no privilege of disobedience or resistance. Machiavelli shocked the publicists of his time when he thus declared his Prince free from the restraints of natural law.

The history of law reflects the struggle of jurisprudence and political theory to determine the appropriate force and place of natural law. Its distinction from positive law is recognized down to the nineteenth century. But the effort was frequently made to unite the two or to find a basis for their reconciliation in the State. Doubts arose as to the nature of positive law, especially as to whether it was confined to legislation and recognized custom, whether it was a creation or a historical growth and adoption of natural law, whether justice or moral rightness was a material element of law, whether force alone could characterize a command as law, and whether enforcement by a superior or whether a "sovereign will" were essential elements.

58 See the views of Grotius. 1 DE JURE BELLi AC PACIS, c. 1, § 10; GIEKKE, op. cit. supra note 96, at 298, and critical summary in HEARNHAW, THE SOCIAL AND POLITICAL IDEAS OF SOME GREAT THINKERS OF THE 16TH AND 17TH CENTURIES (1926) 145-152.

59 WOLZENDORFF, STAATSRECHT UND NATURRECHT (1916) pt. 2; GIEKKE, op. cit. supra note 96, at 305 et seq., citing authorities.

On the theory that statutes contrary to natural rights or "common law" were void, see Coke's decision in Dr. Bonham's Case, 8 Co. 114a (C. P. 1610); Plucknett, Bonham's Case and Judicial Review (1926) 40 HAN. L. REV. 30. Mc ILwAIN, THE HIGH COURT OF PARLIAMENT (1910) 105; c. 3, esp. 147, and 286. Vinogradoff, Reason and Conscience in Sixteenth Century Jurisprudence (1908) 24 L. Q. REV. 373, discussing largely ST. GERMAIN, DOCTOR AND STUDENT (1523). CRUMP AND JACOB, op. cit. supra, note 35, 527.

100 GIEKKE, op. cit. supra note 96 at 312 et seq.

101 GIEKKE, ibid. 298; KORKUNOV, op. cit. supra note 97, c. 2; MIRAGLIA,
Even where the doctrine of the sovereign will as the creator of law prevailed, it was deemed to be limited by natural law, though there was much difference as to whether it was of coercive or merely directive influence. This control upon positive law led to the eighteenth century theory of abstract reason, the forerunner of that "rule of reason" which guides modern courts in the constitutional interpretation of legislation. There was doubt as to how the ruler could be controlled and compelled by governmental machinery to remain within the bounds of law. The adherents of popular sovereignty, for whom the ruler was no sovereign, insisted on the power of control, just as the Monarchomachs had held even the people bound by positive law. Some undertook to free the sovereign only from the civil law, not from the constitutional laws. Yet Bodin and his school, who refused to recognize any such distinction, strengthened by theory the actual claims of many monarchs to absolute and unlimited power, and, by insisting that any limitations on sovereignty destroyed sovereignty itself, were able to defeat at certain periods the arguments of the protagonists of limited power.

These divergent streams of theory found something like a common mouth in the jurists who concluded that the leges fundamentales were not properly laws, but contracts between ruler and ruled, which by natural law were unequivocally binding on the ruler. Grotius was an eminent representative of this group. He announced the important proposition, which has indelibly influenced western public law, that the sovereign's freedom from the civil laws was a fact only in his character as a sovereign, but that acts undertaken as a private person, made the ordinary private law applicable to him. While this doctrine exercised influence, the lack of enforcing machinery for any constitutional restraints led to its characterization as obligatio imperfecta. When then there arose the belief that the constitutional contract could be breached ex causa, that salus publica was causa, and that the ruler was the judge of the public weal, not much more than an appeal to the conscience of the ruler was left of constitutional limitations. The supporters of the legal State concentrated their attack on the excessive extension of the salus

Comparative Legal Philosophy (1921) c. 7, 8, 10; Lévy-Ullmann, Elements d' Introduction Générale. . . La Definition du Droit (1917) pts. 1, 3; Somlé, Juristiche Grundlehre (1917) §§ 17, 41; Jenks, Law and Politics in the Middle Ages (1913) 3.

102 The doctrine reached its apotheosis in Kant. cf. Duguit, op. cit. supra note 26; Gierke, op. cit. supra note 96, at 304.

103 2 Grotius, op. cit. supra note 98, c. 14, §§ 1, 2.

104 Puffendorf, De Jure Nat. et Gent. (Kennett's ed. 1703) VII, c. 5, § 8, and other authorities cited in Gierke, op. cit. supra note 96, at 287 et seq.
publica or against the ruler's power to constitute himself the exclusive judge of its scope. ¹⁰⁵

The attention of the adherents of both absolute and limited power was thus directed to the determination of the nature and binding character of natural law. The promoters of popular sovereignty, like Milton and Locke, were led to abandon the doctrine of the Monarchomachs that the people were bound by law, like the ruler; and instead raised the so-called sovereign popular will above all positive law, including constitutions, though all governmental agents were deemed bound by law. Actually, this forced popular sovereignty into an absolute mould, the ultimate consequences of which Rousseau drew. The concession left an agreement that sovereignty was unlimited, leaving open only the question as to where this unlimited power resided. But the constitution was deemed binding on state agents of every description, including rulers. These political theorists were unconsciously laying the foundation for the modern distinction between political and legal sovereignty, but obscured that distinction and created confusion. Their contribution lay in giving the constitution binding force, subject to the sanction of active resistance, and in erecting for every state, on the foundation of natural law, a tacit constitution by which, under all circumstances, the majestas or ruling power was bound, to the same extent as by express contract, to respect and safeguard the rights of individuals. Locke's legislature was limited by the constitution, and even his people, though above the constitution, were deemed bound by the rights of the individual. ¹⁰⁶

The bridge to the modern constitutional state was supplied by the doctrine of separation of powers. Confined by Montesquieu to a reciprocal limitation of the powers inter se, it developed later into a limitation upon the State (the organized people) and its agencies. Though long familiar with the separation of the legislative and executive power, it was only in the eighteenth and nineteenth centuries that there developed fully the distinction between the executive and the judicial power, and notably the doctrine that the executive or administrative power was subject to judicial control. ¹⁰⁷ Judicial control for the protection of the individual replaced physical resistance in the theory of the supporters of the legal state, and its growth in the nineteenth century evidences the development of the legal and constitutional State. In the United States this judicial control extends even to legislative acts, but by a strange historical quip

¹⁰⁵ GIERKE, ibid. 288.

¹⁰⁶ LOCKE op. cit. supra note 96, c. 11, §§ 130–141. On the varying conceptions of natural law, in history and at the present time, see the literature cited supra, note 35.

its control over administrative acts falls short of enabling pecuniary compensation to be obtained by the individual from the State for tortious injuries arising out of a defective or illegal operation of the public service.

Judicial Control. The transition from the absolute to the constitutional or legal State was very gradual. In all countries, it probably consisted first in diminishing the royal prerogative by transferring to parliamentary institutions control over general legislation. Down to the nineteenth century, however, notwithstanding the increasing constitutional protection for acquired or vested rights, the ruler and executive in most monarchical countries had an important residuum of dispensing power, which escaped legal control. It was the contribution of the nineteenth century to diminish this dispensing and ordinance power to narrow limits. Even where the king or ruler was left with a certain measure of prerogative, it was largely personal in nature. In democratic states the exercise of the so-called political powers of the executive, which escaped judicial control, is nevertheless subjected to popular control at the polls. But other executive and administrative boards and officers are kept within the bounds of their jurisdiction and powers by judicial control.

The jurists of the school of natural law in the eighteenth century helped to effect this change on the continent. It was manifested in the change from what is known as the legally uncontrolled or police State (Polizei-Staat) to the so-called legally or judicially controlled or “legal” State (Rechtstaat). The term “legal State” has been used in three different senses: (a) as the opposite of the absolute State. For this conception and final result the school of natural law, notably Althusius, Puffendorf, Locke, Kant and Humboldt, are largely responsible; it is marked by the limitation of the functions of the State to the administration of justice and the adjustment of the relations between the governors and the governed by law; (b) the constitutional State, in which the form and content of government is determined by representatives of the people; (c) the subjection of the government and administration to the statute and to 

1 Mayer, Deutsches Verwaltungsrecht (3rd ed. 1924) 38, 54; Hutschek, Lehrbuch des deutschen u. preussischen Verwaltungsrechts (3rd ed. 1924) §§ 1, 3; Gneist, Der Rechtsstaat (1872) 6, 39; Bähr, Der Rechtsstaat (1864); 1 Stein, Verwaltungslehre (2d ed. 1869) 297; Schüelle, Die Lehre vom Rechtsstaat in geschichtlicher Darstellung (1925) (Tübingen dissertation); Graziano, Lo Stato Giuridico (1919) Introduction and c. 1; 2 Duguit, Droit Constitutionnel (2d ed. 1923) c. 3. By Duguit, the “rule of law” binding on the State is conceived as independent of the State, a creation of the social conscience and binding on all persons in the State, including governors and governed. Ibid. 90; cf. Vingradoff, The Juridical Nature of the State (1924), 23 Mich. L. Rev. 138, at 148.
judicial control, with administrative discretion limited or to some extent reviewable.\textsuperscript{109} These are general principles and few concrete problems are solved by them. Yet the development of the “rule of law”, a notable feature as a world phenomenon of the nineteenth century, marks a definite transition from the absolutist conceptions of the seventeenth century in favor of the guaranteed protection of the individual against undue encroachment by the government or by the group.

In England, this development begins as far back as Magna Carta and is marked by such stages as the Petition of Right, the Habeas Corpus Act, the Bill of Rights and the Act of Settlement. The main standard of protection of the individual against the administration lay in the \textit{judicium parcium} and \textit{per legem terrae} exercised and interpreted by the courts. Though the king was theoretically the head of all branches of the government, the system of ministerial responsibility to parliament, the growing personal responsibility of officers in tort before the regular courts, the effective independence of the courts and a large measure of self-government, with constitutional safeguards politically protected, served to keep all branches of the administration within legal bounds.\textsuperscript{110} The development of the jurisdiction of the justice of the peace, with appeals to the judges of assize and later to the Privy Council and the King’s Bench, was an important factor in this extension of judicial control. In France the constitutional recognition of the separation of powers, and the development, after 1793, of independent judicial and administrative courts, building up a case-law with ever-growing protection for the rights of the individual against invasion by administrative acts, served the same purpose. In Central Europe, without any openly admitted doctrine of the separation of powers, there developed gradually the rules that the administration was bound by its own decision, which had to be regularly published, that the ordinance power was strictly limited by law and legislation, and that individual rights were to be guaranteed by the creation of a widespread system of administrative courts. Not that the individual was without protection in the so-called “police State”. The Prussian civil code of 1754 had placed the territorial ruler as a private person under the jurisdiction of the ordinary courts, governed by the common law, though the judicial channel was of no avail against the exercise of so-called “sovereign” powers—what the French

\textsuperscript{109} \textsc{Steier-Somlo, Justiz und Verwaltung in 1 Handbuch der Politik} (3rd ed. 1920) 299; see also \textit{ibid.} 49, 97; \textsc{Stein, Grenzen und Beziehung Zwischen Justiz und Verwaltung} (1912) §§ 2, 8, 13; \textsc{Mayer, Justiz und Verwaltung} (1902).

\textsuperscript{110} \textsc{Adams, The Origin of the English Constitution} (1912) 157 et seq.
call "actes de gouvernement". Moreover, it was possible to sue the territorial ruler or State before the ordinary courts when acting in the capacity as a fiscus engaged in corporate acts and as an owner of property, or when failing to pay in eminent domain.

In France and Germany, as contrasted with England, the criterion of the legal State was the separation of the administration from the judiciary. In pre-revolutionary France the old independent parliaments (courts) had deemed themselves protectors of the legal order and sought to keep the king’s officials within their judicial supervision. One of the first results of the constitutions following the Revolution was to deny the courts any power to intervene in the administration. Administrative jurisdiction was created as a power co-equal with the judiciary, and to this day the Conseil d’État exercises jurisdiction over suits against the State arising out of injuries inflicted upon individuals in the administration of the public service. In Germany, the separation took a somewhat different direction. Not only were the administration brought within legal forms and administrative courts created to insure legality, but the demand arose for the extension to public, or sovereign, or governmental acts that same regulation and control by law that already existed in the case of private law or corporate acts of the State (fiscus). This has largely been accomplished by legislation in 1909 and 1910, and particularly in the Constitution of 1919, to an extent not yet known in other countries. In France the Council of State by its decisions has broadened greatly the conception of actes de gestion, private and public, and correspondingly narrowed the conception of actes de gouvernement, sovereign acts. But judicial control is exercised in Germany over acts of the administration both in administrative and ordinary courts. Both, in practice, have been independent of the executive. Appeals by individuals challenging the legality or correctness of administrative acts go to the administrative courts, but suits against officers and against the State for compensation, go as of old to the ordinary courts. When, therefore, Dicey extolled the English “rule of law” as affording the individual

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112 HATSCHEK, op. cit. supra note 108, at 3; MAYER, op. cit. supra note 108, at 49 et seq.; VON FRISCH, VERANTWORTLICHKEIT DER MONARCHEN, 109 et seq.
113 MAYER, THEORIE DES FRANZÖSISCHEN VERWALTUNGSRECHT (1886) 87 et seq.
114 HATSCHEK, op. cit. supra note 108, § 3; MAYER, op. cit. supra note 108, at 60.
115 BÄHR, op. cit. supra note 108, at 54, 57.
116 German Constitution of 1919, art. 191.
protection against official wrongdoing by suits against officers before the ordinary courts, and correspondingly deprecated the weak protection afforded by French and German administrative law to the injured individual, because this was not deemed to assure a reliable and independent application of law, he was not very accurate. Although he modified his views in later editions and finally admitted that the French Conseil d'Etat was in actual effect as independent as any other court and gave broad protection to the individual, he seems to have misconceived the German law, which controls the administrative act by recourse to administrative courts, independent as any other courts, but permits suit against the officer and State before the ordinary courts to an extent unknown in England. Professor Morgan is authority for the statement that Dicey did not adequately take account of the privileged and exceptional position which the officer, who in most tort cases is alone suable, occupies in the English courts. Such an exceptional position he does not enjoy in either France or Germany.

In the United States, officers may be sued in the ordinary courts, without the exceptional defenses which they have in England. The United States can be sued in a limited class of cases in the District Courts and in the Court of Claims, and in tort to a limited extent by an administrative proceeding before the Departments. Probably this will be extended by pending legislation. It would be rash to infer from the mere nature of the forum whether the individual's relief is effective or not. Administrative courts may be as independent as ordinary courts and are so in France, Germany and the United States. Whether judicial control over acts of the administration is exercised by the ordinary courts, as in Belgium, Italy, England and the United States, or by administrative courts, as in France and Germany, is also inconclusive as to the effectiveness of the remedy. The important fact is that during the nineteenth and twentieth centuries the range of official arbitrariness has been gradually narrowed, and increased stress has been laid upon limiting discretion by rule and enforcing by judicial control conformity with law. If by statute and occasional judicial construction wide

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See also Barker, The "Rule of Law" (1914) No. 2, The Political Quarterly, 117.


119 Morgan, op. cit. supra note 117, at xlvi, xlix.

120 Borchard, Governmental Responsibility in Tort (1924) 34 Yale Law Journal, 1, at 28.
powers of discretion have since the war been vested in executive and administrative officials this may be either a temporary departure, due to emergency, from the trend of the nineteenth century, or else may evidence the fact that the modern industrial state by its very complexity and in the interests of efficiency is compelled to vest larger discretionary powers in administrative officers. But governmental responsibility for the wrongful acts of officers is a doctrine growing steadily and is but one evidence of the present popular demand for the limitation of the State by law.

*The Doctrine of Auto-Limitation.* Certain German jurists, notably Bergbohm, Jhering and Jellinek, postulating the dogma that the State creates the law, were nevertheless obliged to concede that court decisions often subjected the State to ordinary rules of law. For example, when the State was sued in Germany in *fiscus* or corporate matters, the courts, without special legislative authority, applied to the State the rules of private law. This phenomenon of the "legal State" required explanation. The explanation was found in the so-called doctrine of auto-limitation or self-limitation of the State, according to which it voluntarily places itself under the law it creates. Jellinek suggested that the law binds the "organs" of the State, through whom alone it can act, and that thus the State, of which the "organs" are an integral constituent element, is necessarily also bound. The result of State subjection to law was defended as ethically justifiable and necessary, promotive of the best interests of society and of confidence in the State's law. Questioned as to how the State's coercive power to enforce law could be used against itself, the answer was made that there are other elements in law enforcement beside physical force, and that psychological and cultural factors are of equal value in assuring obedience to law. Constraint as an admitted element in positive law may be supplied by less tangible elements than force; the guaranty of execution, by whatever means, not merely force, is the essential element in establishing a rule of conduct as a rule of law.

Against this doctrine of auto-limitation, a strong protest is levelled by Duguit, Kelsen and other advocates of the supremacy of law over the State or of its identification with the State. Duguit calls the doctrine illusory and a bit of sophistry. He says, with superficially devastating logic, that if the State is

121 BERGBOHM, JURISPRUDENZ U. RECHTSPHILOSOPHIE (1892); JHERING, DER ZWECK IM RECHT (1880) 318, 344; *ibid.* LAW AS A MEANS TO AN END (1913) 267 et seq., 314; JELLINEK, ALLGEMEINE STAATSLAHRE (1900) 303, 330, 332.

There was a certain modification of this doctrine in Germany, according to which the monarch, being bound only voluntarily, could set aside the limitations. It had little practical effect, but Kelsen contests its validity.
bound only when it so desires, how can it be deemed bound at all? How can either individual or State impose a duty on himself or itself and how can such duty be enforced by him or it? Austin asked similar questions. Kelsen, who regards State and law as "in essence" theoretically and conceptually identical phenomena, challenges the legitimacy of the assumed priority of State to law or of the supremacy of law over the State and concludes that the doctrine of auto-limitation is metaphysical. He asserts that as the State is the law (the legal order), it is of course subject to law and the effort to personify the State as independent of law and to distinguish juristic from physical persons has led to the prevailing confusion. As the State is the law, he denies the possibility of a State wrong or illegality (Staatsunrecht), a possibility which Jellinek freely concedes, though he thereby is constrained to admit that the law has in addition to variable elements, certain constant or constitutional elements, which cannot legally be transgressed.

The doctrine of auto-limitation as an attempt to reconcile the omnipotent and the legally limited State may thus be deemed but one form of explanation for the constitutional State. While it may be conceded that no single individual can give law to himself, why can not the group, the community, through appointed agents, elect and agree to govern themselves according to a prepared or traditional body of rules, which are enforced by the group (State) against individuals and by individuals against the group (State). We have seen this process in action since at least the time of feudalism. If societal agencies, such as courts, are established, to which complaints of group violation of the established or agreed rules can be brought and from whom decisions against the group based on the rules can be obtained, why is it not proper to characterize such rules as law? Merely because the group established the rules for its own guidance, or because the societal agent cannot enforce the rules against the group? So-called constitutional law is less subject to declaration by societal agents in England than in the United States, but if predictable governmental action is an acceptable criterion of law, why deny to constitutional law self-imposed by the group—or wrung from a monarch, if one will—the character of law? Cer-

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122 JELLINEK, op. cit. supra note 121, at 303-306.
123 Duguit, op. cit. supra note 26, at 124, 137.
124 Kelsen’s conception of “pure” law will be explained infra.
125 Kelsen, Der Soziologische u. Juristische Staatsbegriff (1922) §§ 22, 23.
126 JELLINEK, op. cit. supra note 21, at 337. On the subjection of the State to law and legal duties, cf. Somló, Juristische Grundlehre (1917) § 94; Rühl, Zur Konstruktion der Rechtsbeziehungen zwischen staatlichen Behörden (1926) §§ 4, 8, 13, 14; Borchard, op. cit. supra note 2, at 757, n. 79.
tainly in the United States, where the courts are continually invoking constitutional limitations against legislation and administrative action, it would seem strange to deny these decisions the character of law. And even if it may theoretically seem difficult physically to enforce some of the decisions, they are in practice uniformly executed. Possibly there are other sanctions or guarantees than physical force in an organized community which supply the element of constraint so insistently demanded by the Austinians. Most human conduct, whether of individuals or groups, is mainly compounded of self-restraint, the essential mark of civilization. Sanction is only one of the elements of law; a declaration of legal relations, the rule of law, is more important than a formal executive sanction. And there are other sanctions than force. Public opinion, the normal habits of the community as a whole, and the legally organized association or State, exert a constant restraint over the government, the delegated interpreter of the constitution, to keep it within the bounds of the instrument. A definition of law which would exclude constitutional law would seem to be too narrow for practical utility.

International Law. If international law is entitled to be characterized as law—a question of definition—it must necessarily limit the omnipotence or sovereignty of the State. Austin was thus more consistent than Jellinek in denying the qualification of "law" to international law, for while both proclaim the ultimate sovereignty of the State as the source of law, Austin considers the law of nations as international morality only, whereas Jellinek explains its controlling character as resting solely on the will of the State, on auto-limitation. Inasmuch as Austin demands of law that it be declared by a determinate sovereign, international law by definition could not be law to him, but only moral precepts presumably not binding on the state when found inconvenient. The Austinians assume that rules which rest on consent and agreement cannot be law, for only a sense of moral obligation makes them binding—merely another way of saying that they are not legally binding.

The fault is with the major premise. Only new international law, derived from international legislation, rests on consent or agreement to be bound, and even then probably only for a comparatively restricted period would the unwilling state be able to deny the force of a rule generally accepted. But in the matter

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127 Vinogradoff, op. cit. supra note 108, at 152.
128 MAC IVER, THE MODERN STATE (1926) 272, 278. Cf. Jenks, Recent Theories of the State (1927) 43 LAw Q. Rev. 186, at 190, who prefers to consider the State an institution rather than an association.
129 Borchard, op. cit. supra note 2, at 789.
130 Borchard, ibid. 780.
of customary international law, which embodies the bulk of the rules, neither consent nor agreement of states is necessary. No state could under ordinary circumstances successfully resist the enforcement of such a rule. Even Bodin, the first of the modern writers on the theory of the state, while an absolutist in the internal aspect of sovereignty, viewed external sovereignty as subject to the law of nations. Unfortunately, many of his successors reversed the process for, with their acknowledged constitutional limitations on internal (legal) sovereignty, they appear to regard sovereignty, viewed as a symbol of the state in international relations, as absolutely free from external restraint.31 But, when the President or Secretary of State on the demand of foreign nations, invoking a rule of international law, releases an alien from the military service32 or releases a rum-runner seized outside the three-mile limit, and thereby in effect overrules a statute of Congress and a supporting decision of a municipal court,33 he is acting as a societal agent of the American people and State and is recognizing the binding character of international law in the United States and everywhere else. When foreign nations refused to permit Russia in the Russo-Japanese War to make food-stuffs contraband or in other respects to violate the rights of neutrals;34 when foreign nations deny to the countries of Latin-America the privilege of unilaterally defining the term “denial of justice”35 or by contract with their citizens of exacting a waiver of the privilege of demanding diplomatic protection,36 they are invoking international law as a rule of law superior to any contrary rule of municipal law.37 It was not by invoking mere rules of morality that the British-American arbitration tribunal under the treaty of 1871 in effect

31 See chapter by Borchard, on “Political Theory and International Law” in HISTORY OF POLITICAL THEORIES, RECENT TIMES (Merriam and Barnes ed. 1924); Garner, Limitations on National Sovereignty in International Relations (1925) 19 AM. POL. SCI. REV. 1; POLITIS, LA PROBLEME DES LIMITATIONS DE LA SOUVERAINETÉ, 6 ACADÉMIE DE DROIT INTERNATIONAL (1926) Intro. and c. I.

32 Ex parte Larrucea, 249 Fed. 981 (C. D. Calif. 1917) commented on in (1918) 28 YALE LAW JOURNAL 83.


34 See FOREIGN RELATIONS OF THE UNITED STATES, 1904, 727 et seq.; ibid., 1905, 742 et seq.

35 Mr. Bayard, Sec'y of State, to Mr. Hall, Nov. 29, 1886, FOREIGN RELATIONS, 1887, 80-81. Borchard, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915) 847.

36 Mr. Bayard, Sec'y of State, to Mr. Buck, Minister to Peru, Feb. 15, 1888, 6 Moore, DIGEST OF INTERNATIONAL LAW, 294; Borchard, op. cit. supra note 135, at 797 and authorities there quoted and cited.

37 In an instruction by Sec'y of State Bayard to Mr. King, Minister to Colombia, Oct. 13, 1886, it is said:
overruled the decisions of the United States Supreme Court in certain prize cases. 138

These cases, cited only by way of illustration, evidence the fact that no state can posit its freedom from the rules of international law. No state so professes. The mere fact that violations of international law occur and occasionally go unrepressed is no evidence that the rules violated are not law, any more than the no less frequent violation of municipal law is evidence of its non-legal character. International law is often uncertain; so is municipal law. The sanctions are somewhat different, but they are probably none the less effective and the interpretive agencies none the less active. International courts do not "enforce" international law; no more do municipal courts "enforce" municipal law. But the declaratory and binding decisions of international courts are observed and carried out with a uniformity equal to that of municipal courts. The agencies for the enforcement of international law are not necessarily courts, but other constitutional organs, usually the executive. The weakness of the system, which attracts a disproportionate amount of attention, consists in the inability to compel nations to submit their differences to a court and the physical power of states, exercised on occasion without regard to law, to constitute themselves plaintiff, judge and sheriff in their own cause. The belief that international law is not necessarily binding on states, purveyed by various theorists and jurists, though founded on essential error, can only aggravate this weakness in the system and postpone the maturity of that international legal order for which most of them profess to be working. In fact, not only theory but an abundant practice supports the conclusion that international law is binding on states, quite independently of their consent, and unless they have and desire to exert the physical power successfully to violate the law, they cannot and rarely seek to escape its control. Its rules constitute a distinct limitation on sovereignty and on municipal law, whether denominated morality or law. This supremacy of international law over a professed contrary rule of municipal law is the best evi-

"It is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subjects." 2 Moore, op. cit. supra note 136, at 4.

138 The Hiawatha, 2 Black, 635, Moore, International Arbitrations, 3902 (U. S. 1865); The Circassian, 2 Wall. 135, Moore, op. cit. 3911 (U. S. 1865); The Springbok, 5 Wall. 1, Moore, op. cit. 3928 (U. S. 1867); The Sir William Peel, 5 Wall. 517, Moore, op. cit. 3935 (U. S. 1867); The Volant, 5 Wall. 179, Moore, op. cit. 3950 (U. S. 1867); The Science, 5 Wall. 178, Moore, op. cit. 3950 (U. S. 1867). For other illustrations where municipal law was obliged to yield to international law, see Borchard, op. cit. "para note 136, at 340 et seq."
dence that the State is subject to and limited by international law as a sort of universal constitutional law, explicit or implicit in the municipal law of every State.139

The Supremacy of Law. A number of jurists in recent years, in the course of their attack on state sovereignty, have posited a complete separation between the State and the authority of law, as well as the independence of law from the State. Notable among these theorists are Duguit and Krabbé.140 The secret of their unusual conclusions as to the supremacy of law lies in their peculiar view of the nature of law. To the continental jurists, confusion in conceptions of “law” is even easier than to the Anglo-American lawyer, for the word droit, Recht, derecho, diritto, combines an ethical or moral significance of “right” or “justice” with the element of “rule”. One cannot always be sure whether the moral or the legal element of the term is under discussion, and their frequently varying and interchangeable emphasis adds to the confusion. Duguit regards State and law as independent phenomena. Both are facts. The State is a community in which certain individuals rule others by force or persuasion, under penalty for disobedience. Law, on the other hand, is the name for certain rules of conduct binding on men in society regardless of their political relations. Such rules are conditions of social life; they must be obeyed for the preservation of society. Rules of conduct which promote this end of “social solidarity” are alone entitled to be characterized as rules of law. Their sanction is not organized coercion, but psychological and social approval of the rules' conformity with the tenets of social solidarity. Such consciousness of approval or disapproval exists in every society. The rule of law, as thus defined, is superior and anterior to political organization, the State. It is “objective law”, limiting and determining both the positive and negative duties of the political authority. If the State, whether through the government or its subordinate

139 VERDROSS, DIE EINHEIT DES RECHTLICHEN WELTBILDES (1923), c. 1; Kelsen, DAS PROBLEM DER SOVEREIGNITAT UND DIE THEORIE DES VÖLKERRECHTS (1920) 102 et seq.

140 See Duguit, TRAITE DE DROIT CONSTITUTIONNEL (2d ed. 1923) especially v. 2 and 3; ibid. L'ÉTAT, LE DROIT OBJECTIF ET LA LOI POSITIVE (1901); ibid. L'ÉTAT, LES GOUVERNANTS ET LES AGENTS (1903). Bonnard, LA DOCTRINE DE DUGUIT SUR LE DROIT ET L'ÉTAT (1926) 1 REV. INT. DE LA THÉORIE DU DROIT, 18; Duguit, Objective Law (1920) 20 Col. L. Rev. 817; (1921) 21 ibid. 17, 126, 242; Duguit, The Concept of Public Service (1923) 32 Yale Law Journal 425, 429 et seq. Duguit maintains that the problems of the rights of man and the State, whether force creates law or whether law prevails over force, consider only “subjective law” and hence they are insoluble.

For interpretations and criticisms of Duguit's theories see the articles cited by Borchard, op. cit. supra note 2, at 763, n. 17 and Jandon, LAS TEORIAS POLITICAS DE DUGUIT (1919); also Wilde, The Attack on the State (1920) 30 INT. J. OF ETHICS, 349.
agencies, violates any of the rules of social solidarity, it acts "unlawfully". Law being objective, the validity of any rule, even legislation, depends not on its origin or source but on its end, on its legitimacy of purpose in promoting or serving social solidarity. The rules of law, as thus defined, are superior to the individual and to the State. Legal limitations on the State are thus deduced, while denying both the personality and the sovereignty of the State. Those invested with public power are not "organs" of a sovereign collectivity. But as both they and the people are subject to law, necessarily the State is subject to law. The possibility of individual rights existing anterior to society or to the State, Duguit denies, and he condemns the German school which posits "subjective rights" of the individual against the State.

Krabbe also places "law" above the State and deems it independent of the State. No sovereign authority declares law, but he denies Duguit's assertion that the State is only a fact unrelated to law, in which the stronger control the weaker. He rejects Duguit's criterion of law in rules promoting social solidarity. He regards the State as the servant of law; "the authority of the State is nothing except the authority of law." He power is not the essential feature of the State, but law. The State is a legal community, governed by law. The State administers distributive justice to various interests according to this higher law. This law is determined not by objective tests, as Duguit believes, but, according to Krabbe, from a subjective source in the community's, or the majority's "feeling or sense of right." Statutes may thus not be "law", if they do not reflect this community "sense of right"; the decision of the legislature may be modified by the unwritten law and by agencies applying it which better reflect the community or majority "sense of right."

Both Duguit and Krabbe thus establish independent tests and criteria for their "rule of law", the one, objective social solidarity, the other, "men's feeling or sense of right". The formal character of a rule declared by societal agents does not satisfy their definition of "law"; they demand an ethical content for "law". One can find evidence that much formal law is rejected by the people to whom it is to be applied, like the Dred Scott decision and the prohibition law. Whether one denies to these unenforced

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141 KRAEBE, op. cit. supra note 35, and the valuable introduction by the translators, Sabine and Shepard; WILLOUGHBY, op. cit. supra note 34. See Cohen's review of Krabbe in (1923) 32 PHILOSOPHICAL REV. 97, and the interchange between the translators and the reviewer. Ibid. 347. See Kelsen's criticism of Krabbe in his PROBLEM DER SOVERÄNITÄT (1920) 22-31; and op. cit. supra note 125, § 30.

142 This closely resembles Kant's natural-law definition of a State, "a community of individuals governed by law."
or unenforceable formal rules the character of "law" again depends on definition. Juries acquit and occasionally determine law against instruction from the court. Judicial and administrative discretion produces law ad hoc which defies systematization or analysis. Judicial interpretation makes law according to subjective views of precedents, or of standards of justice or reason. No "sovereign" or political organization "makes" such law. Nor does "social solidarity" or the community's "sense of right" produce it. Human beings who are placed in a position of authority produce it, and they reflect the mores, the folkways, the opinions and prejudices of time and place and person. The criterion of "social solidarity" and community "sense of right" is an idealization which does no harm; but the application of the alleged standard would be personal and subjective. It affords no basis for distinguishing "law" from other forms of social control or for denying to legislative, judicial or administrative rules or decisions the character of law. While the community's sense of justice and expediency are necessarily reflected in much of our formal law, it does not seem to serve any practical purpose to apply the criteria advanced by Duguit and Krabbe. Again we have ideal systems for the delectation of the political theorist, but it is hard to say whether the solution of any pressing problem is thereby advanced. The "sovereignty of law" is as mystical a postulate as the "sovereignty of the State."

These efforts to develop a concept of law by processes of abstract reason reflect an elemental human idealism transcending the results of actual experience. Certain value-standards are posited which an ideal system is supposed to produce. A rule of conduct or law is thus tested by a standard external to itself. The standard exists in the mind of the writer who makes the assumption. It was in this sense that one branch of the eighteenth century school of natural law, exemplified by Rousseau and Kant, formulated a standard of "right law" against which to test and criticize rules of positive law. It cannot be denied that idealization of conduct exercises an important influence in moulding rules of law; but it cannot be overlooked that the construction of philosophical legal systems based upon some theory of justice or end of law is a pure hypothesis and crypto-idealism. "Objective law," "social solidarity," man's "sense of right," like the "natural law" which has dominated men's thinking and moulded legislative and judge-made law, are value-standards which embody an implicit dogmatism transcending experience and expressing both an ideal and the quest for and supposed need of perfection and the absolute.144

143 Cohen, Positivism and the Limits of Idealism in the Law (1927) 27 Col. L. Rev. 237, 244.
144 Cf. Rottschaefer, Jurisprudence: Philosophy or Science (1927) 11
There are others who conceive of the law as the condition precedent to the State, and of the State as a particular subordinate type of legal organization. Some of these dispense with force as an essential condition of law or else posit a distinction between natural law or some other ideal system and the positive law created by state agencies. This new school of natural law maintains that the ideal postulated does not involve immutable rules, as did the old school, but that it furnishes a universal method by which positive law can be measured and criticized. In the language of Stammmer and Saleilles, it is a "natural law with variable content," reflecting, as Charmont puts it, "the relativity of natural law". Others still conceive the State as a special legal relation, in various connotations. The supposed distinction between the State as a social phenomenon and as a

145 The most prominent among these are Stammmer and the sociologist Wundt. Stammmer's theory will be found in his Theorie der Rechtswissenschaft (2d ed. 1923) 176, 233, 239, 265; Wirtschaft und Recht (3rd ed. 1914) 100 et seq.; The Theory of Justice (1925) (translation of Lehre von dem Richtigen Rechte). See also his article, Fundamental Tendencies in Modern Jurisprudence (1922) 21 Mich. L. Rev. 623. See the excellent critique of Stammmer's views by Gény in the Appendix I to Stammmer, Theory of Justice, supra, 493. Lorimer also entertained the belief that only just or natural law was law at all. Op. cit. supra note 35.

Wundt's views will be found in his Völkerpsychologie (1918) v. 7, 8, 9. Criticisms of Stammmer's and Wundt's hypotheses will be found in Kelsen, op. cit. supra note 125, §§ 25, 26. See also Cohen, op. cit. supra note 143, at 241. The school of natural law deemed the State an association of people living under law. Kant, Metaphysische Anfangsgründe (1796) § 45. Resting on contract, it was thus a legal relation, which presupposed a legal system.

146 Stammmer, Theory of Justice, 90, 515; see also Saleilles, Ecole historique et droit naturel (1902) 1 Rev. trimestrielle de Droit Civil, 80, 92, 97, 98; Charmont, La Renaissance du Droit Naturel (1910) 167, transl. in Modern French Legal Philosophy (1921) 106.

147 Loening conceives the State as a force relationship limited by rules of law, as distinct from other force relationships, parents, teacher, ship captain, etc. See Vinogradoff, op. cit. supra note 108, at 148.
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legal organization 145 is disputed by Binder 142 and by Kelsen,143 who posit their own theories. Binder conceives the State as a factual group of human beings held together by certain rules of law determining the legal relations between the group and individuals and between individuals inter se.151 But while conceiving the State as impossible without law, he does not admit the interchangeability of these conceptions, as so many jurists do, or their identification, as Kelsen and others do. It must be confessed that many of the theorists are not always consistent, as, for example, the Swiss Affolter,142 who, while positing the superfluity of the conception of “State”, and hence of the element of force, in the conception of law, nevertheless discusses the law “of a State”. So he maintains, almost like an Austinian, that by the internal law of the State the State itself becomes neither legally entitled nor bound, but only the organs and the members of the State individually or inter se.152 But, says Kelsen,144 in agreement with others, organs, as the parts, cannot be bound without the State, the whole, being bound, and the very word “organ” posits the entity which it represents.

State and Law Interdependent. There are a number of theorists who deny the validity of the proposition that the State is above the law or that the law is above the State. They regard State and law as two independent conceptions, with differing origins, and, again in contradiction to Kelsen, always in the plane of factual existence.155 Their definition of law visualizes a rule declared or applied, if not necessarily physically enforced, by state agents. Thus, by definition, to their conception of law the State becomes necessary. In this they differ from the school of natural law, from Grotius to Kant and from their modern successors who, like Duguit and Krabbe, erect some external value-standard as a criterion of law to which the State itself is

149 This is the so-called dual-faced (Zwischten) theory of the Germans, whose principal advocate is Jellinek. LEHRE VON DEN STAATENVERBINDUNGEN (1883) 262; ALLGEMEINE STAATSLEHRE (3rd ed. 1922) 168, 232 et seq.; cf. SEDLLE, DAS JURISTISCHE Kriterium des staates (1905) 17, 19, 49.
145 Binder, Philosophie des Rechts (1924) 485. Cf. SOMLO, JURISTISCHE GRUNDBLLEHRLE (1917) § 86.
146 KELSEI, op. cit. supra note 125, §§ 18, 19.
147 Binder, op. cit. supra note 149, at 483 et seq. Binder distinguishes “State” from “State law,” in contrast to Kelsen’s identification of State and law.
151 Binder, op. cit. supra note 149, at 483 et seq. Binder distinguishes “State” from “State law,” in contrast to Kelsen’s identification of State and law.
152 Affolter, Studien zum Staatsbegriff (1903) 17 Archiv F. Öffentl. Recht, 114 et seq. On Affolter, see Sander, Alte und new Staatsrechtstlehre, (1931) 2 Ztschr. F. Öffentl. Recht, 176 at 133 et seq; KELSEI, op. cit. supra note 125, § 29.
153 Affolter, op. cit. supra note 152, at 132.
154 KELSEI, op. cit. supra note 125, at 182; cf. RÜHL, op. cit. supra note 126, §§ 5, 8.
155 Infra at 1095.
subject. They admit the close affinity in origin between morals, ethics and law, and distinguish the rules of law by their declaration, application or enforcement by societal agents. They deny, however, the Austinian conception that the State is alone the creator of law. They find the origin of law, possibly a matter of definition, in three sources—an act of state power, in the sense of Bodin, Hobbes and Spinoza; in a rule-producing power of the individual living in society, in the rationalistic sense of Grotius, Locke and Kant; and in the inter-relation of the individual with the social consciousness and spirit, in the historical sense of Hume and Savigny. Yet to the establishment of rules of law, the State, in their view, is essential. Contrary to the postulate of Hobbes, Austin and Holmes, however, they assert that the State is not only the guarantor and sanction of the law, but that, as a juristic association, the State is itself a part of the legal order and subject to the law like any other association or institution. Necessarily, state agents are equally subject to law.

The leading exponent of this point of view is Richard Schmidt. In conceiving the State as itself a subject of the legal order, the theory in question espouses the doctrine of the Rechtstaat or legal state, already considered, and encounters the objection of those who contest the doctrine of auto-limitation.

Variations of this doctrine are common. While denying the natural-law postulate that the State is the product of pre-existing law or that law is merely a product of the State, it is asserted that the two are mutually interdependent—that, as Seidler expresses it, the State is not only born with and in the law, but can live only in the law. Evidently, constitutional law is here included. So one will find remarks that “the State is in the law”. As these theorists assume the postulate that the rule of law alone is binding, they dispense with the necessity of auto-limitation as an explanation of the State's subjection to law. In the matter of legislation, they deem the State and all its organs constrained to recognize it and hence bound by it until repealed, and judge-made law similarly controlling. The fact that the legislature could except from the application of a law the State or State agents would, in their opinion, not militate against the validity of these propositions, in which they are supported by

156 SCHMIDT, ALLGEMEINE STAATSLEHRE (1901) c. 3; cf. the theories which regard law and State as two sides of the same subject-matter. SOML6, op. cit. supra note 149, 251 et seq.; RADBRUCH, GRUNDZÜGE DER RECHTSPHILOSOPHIE (1914) 82 et seq.; See Kelsen, op. cit. supra, note 125 § 32.

157 SEIDLER, DAS JURISTISCHE KRITERIUM DES STAATES (1905) 44, 49 et seq.

the long-established practice of courts in subjecting public corporations, including the State, to the jurisdiction of the courts and to legal responsibility in a great variety of corporate and, in some instances, governmental activities.

Vinogradoff, like Gierke, deems the question of superiority as between State and law futile. These jurists regard State and law as two aspects of the same thing, State as the organization of society through an aggregate of rules called law. Both are original and one a condition of the other, as form is to content. Both jurists deem the State, the organized society, necessarily subject to rules of law.

Kelsen. Kelsen's identification of State and law cannot be overlooked. His effort to segregate law as a formalistic science is explained by the fact that the sociologists of Germany, in the earlier part of the twentieth century, had, by a naturalistic approach, envisaged law as a social phenomenon, and a part of the science of sociology. The methods of natural science were applied to law, in the effort to find certain natural "laws" which governed it. Kelsen asserted the claims of jurisprudence to determine the scope and function of legal science. The sociologists, he said, dealt with empirical facts; the jurist must deal with rules, not of what people actually do, but of what they ought to do in an ideal relation. He thus separates the realm of law (Sollen) from the realm of fact or natural existence (Sein) founded on the Kantian theory of the a priori which exerted so great an influence on German philosophers. Hence his assumed antithesis between "is" (Sein) and "should be" (Sollen), actuality (Wirklichkeit) and value-standards (Wer), facts (Faktizität) and rules (Normativität) and their respective disciplines. Law, says Kelsen, lies in the plane of "essence" (Sollen); as such, it is an original category, like quantity, quality, being, thinking, and is incapable of definition. It is thus exclusively a formalistic and logical science, like mathematics. Kelsen's theory consists of a series of postulates and logical deductions and is thus another contribution to the several other systems of "pure law" or analytical jurisprudence.

159 Vinogradoff, op. cit. supra note 15, at 84; ibid. op. cit. supra note 108, at 147.
160 Gierke, op. cit. supra note 96, at 384.
161 Other variants may be noted. Hold-Ferneck, while considering State and law interdependent, regards law as having logical priority. Der Staat als Übermenschen (1926) 59, 67.
162 Kelsen's principal works are his HAUPTPROBLEME DER STAATSLEHRE (1911); DAS PROBLEM DER SOUVENÄRTät UND DIE THEORIE DES VÖLKER-RECHTS (1920); DER SOZIOLOGISCHE Ü. DER JURISTISCHE STAATSBEGRIFF (1922); ALLGEMEINE STAATSLEHRE (1925).
163 See the discussion of Austin and of Roguin, LA RÈGLE DE DROIT (1889), and of the works of other logicians in TOURIOLON, PHILOSOPHY IN THE DEVELOPMENT OF LAW (1922) 445 et seq. Roguin's ideas are set forth in
The "rule of law" is for Kelsen a hypothesis on the probable conduct of state officials upon the occurrence of certain events or of acts on the part of individuals. Yet his system professes not to be concerned with the content of rules or conduct; this, he says, is the business of sociology. Thus his sharp distinction between the sociological view of the State, the phenomena of organized life, and the juristic view. Postulating his ideal system of "pure law" he concludes that "the State" is "the law." The two are identical in a legal sense; only in a sociological sense, which Kelsen regards as dissociated from law, are they otherwise. The State is thus necessarily a "subject of law," though not under the law; it is the law. It is binding on State organs and only thus do we know that the State is bound.

Space considerations forbid a more exhaustive analysis of the theories and ideology of Kelsen. He has become the founder of a philosophical school. That his work is not without great intellectual merit is evidenced by its inclusion in the standard German modern encyclopedia of legal treatises. As a conceptual a priori ideal of formal logic in the relation of law and state it deserves consideration; as a solution of the problem, it may be regarded as another system of postulates intrinsically neither true nor untrue. Few will admit the validity or practical value of the postulates. As a Kantian excursion into the realm of knowledge it has great merit; as a criticism of other theories and ideologies it is of exceptional value; as a solution of a complex issue, possibly insoluble, it presents but another ideology. It is subject to certain obvious criticism. The distinction between positivism and idealism in the law is well-known; the effort to make the former conform to the latter is a constant factor in human affairs.

It is quite possible to recognize a difference between rules as they are and as they ought to be without invoking the concept of law in "essence" or Sollen; this was one of the main objections raised by Kelsen's disciple Sander. Both sets of rules would seem to lie in the realm of an elaborate work, La Science Juridique Pure (1923). Stammler's is a system of "pure law." See also Picard, Le Droit Pur (1910), especially bk. 9.


The pages of the Zeitschrift für öffentliches Recht, edited by Kelsen since 1920, contain many of the writings of this "Vienna school."

165 See Cohen, op. cit. supra note 143, at 237.

existence. It appears unprofitable to regard all the social sciences in the realm of "should be"; and positive law, as commonly understood, deserves to be and can be studied with apparatus other than that of sociology or categorical philosophy. And perhaps Kelsen is not always consistent. Law, like State, is used in several senses; and when he speaks of the State as a Zwangsapparat (enforcing machine) is he not dissolving the conceptual identity between State and law? What kind of rules are rules without substantive content? Law is continually changing and it is evolved pragmatically in the daily work of the courts. Does the State also follow each change? How about conflicting rules evolved by different courts sitting at the same time? If Kelsen's conception is that of a static ideal system of rules, who determines when changes in the ideal are necessary or have taken place? Are not the conceptions of law and the State themselves sociological? Can they be defined in terms of law? Many theorists have conceived of rules of law, existing or ideal, quite independently of the element of enforcement or application. But unenforced or unapplied rules make little appeal to a community in action, and it seems preferable to consider the machinery of government, the enforcer of law, as one aspect of the State, if that term is desired. Unenforced law may be more nearly natural law, yet Kelsen regards enforcement, necessary to his postulated system, as accomplished by state organs. It may be possible to conceive of law as a set of rules of conduct growing out of custom, as among the Eskimos or in an isolated mining camp, without a politically organized society, but it seems hardly possible to conceive of a geographical or political State without law. Before Kelsen can consider "the State" as a subject of law, must he not conceive it as a social and political fact?

These are some of the obvious questions raised by the postulates, propositions and conclusions of Kelsen. They have been criticized on many hands but they deserve credit not only for their intrinsic perspicacity as deductive logic but for the universal interest in legal and political theory which they have again aroused.

CONCLUSIONS

This lengthy examination of conflicting views on the relation between State and law indicates the abstruseness of the subject, and exhibits the processes of advocacy and rationalization. We have found that the absolute sovereignty of the State is a name

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307 See the critical work of Hold-Ferneck, op. cit. supra note 161, directed against the work of Kelsen; Binder, op. cit. supra note 149, at 183 et seq.; Heller, Die Krisis der Staatslehre (1920) 55 ARCHIV FÜR SOZIALWISSENSCHAFT, 289, at 300 et seq.
for a postulate, but is not necessarily a fact in life. We have found that the claim for the legally unlimited State is qualified by the admission that no human power is unlimited, and that while the assumed sovereignty is unlimited, the exercise of sovereignty is not. What does this mean in the realm of fact? Even if we were to admit that there are no formal limitations on the governmental power to legislate, in a State not having a written constitution, would that help us? We may assume that the State is one associational aspect or an institution of the community as a whole organized under certain legal forms. We know that this organization possesses certain functions and not others, and that there are individual and social demands with which it would not dare to interfere. Instead of being the source of all legal rights, it is the trustee or delegate of certain powers designed to preserve order in the community, to perform public services of various kinds and to adjust conflicting interests externally manifested. Its peculiarity is that it acts or purports to act in the common interest. Perhaps it may be deemed the guarantor of the legal rights of members of the community. It is entrusted with the power to enforce its decisions, legislative and judicial. It represents one form of corporate interest of its members, perhaps the highest of all. Law, itself a term assigned to a variety of conceptions, goes back to the earliest forms of society and the law of any modern State has its sources deeply rooted in the past. With the bulk of it, the legislature does not interfere; its statutes are limited to passing and current matters designed to keep in modern condition the social structure. Hence the habit of courts, even where they have no power to set legislation aside, of interpreting it in the light of certain value-standards reflected in the history and moses of the community. These external value-standards have received various names, such as Providence, divine law, reason, a "higher law", natural law, due process of law; and most of these terms have been differently interpreted in different periods. They represent now an ideal or critical standard which operates to test and mould positive law.

While all history testifies to the common conception that no governing authority is unlimited, often manifested in the vague axiom that the king is under the law, the social development of the nineteenth century, following the limitations set upon governing authority by natural law, turned attention to the nature of sovereignty in a democratic State. The single all-comprehensive authority of the unitary State was weakened both in theory and fact. The complexity of social organization pointed to limitations of power and function in all groups and in the State, the legal organization of the community. The synthesis of the traditional doctrine was weakened not only by the realization that there are corporations in the State, religious, econo-
mic and ethical, which command vigorous individual allegiance and which are uncontrolled by the State, but that there are many functions of society into which the State does not and may not enter. Its formal omnipotence is an illusion. Hence the study of its limitations. The cultural tradition establishes a social consciousness of limitations. Whether these social controls, which exist in all forms of group life, are called legal, political, moral or ethical becomes largely a terminological and ideological issue. If the State is a corporation, it is such by virtue of legal conceptions and would seem to be controlled by those conceptions. If it owns property, it can hardly function in a modern State without being bound by the law governing property relations. So, if it enters into contracts. All this vast body of controlling law was not created by any modern State, but is a growth of centuries. Can any modern State completely escape it, and if it accepts it, is this entirely due to legislative fiat? Perhaps the question admits of no categorical answer. If it is subject to the control of constitutional law and international law, are we not justified in considering those limitations legal? For practical purposes, no authority in the State is outside the domain of law, a fact which would be true even though the authority were vested with wide discretionary powers; some one must make decisions in any State. To the individual, the State acts only through organs, or agents, whose powers are determined by law. If the community, by its authorized agents, can change that law, we may assign to this power of decision the name of political sovereignty, if we like, subject to all the necessary qualifications on "unlimited" power. But those to whom legal power is entrusted are themselves subject to law, and it is in this sense that the theorist and the citizen are justified in deeming the organ and the State as part to whole, agent to principal, and in identifying their power and action. Government and State are thus both legal terms as distinguished from the community or society as a whole. The community, if one will, is subject to social, ethical, moral, political controls; the government and State, in addition, to controls which may properly be termed, it is submitted, legal limitations. Language is a form of shorthand for ideas, and our legal terminology is inadequate because the same word is often used to clothe a variety of ideas. The important point is, to overcome the deficiencies of our linguistic shorthand, to recognize and define assumed postulates and conceptions, and not to become lost in verbal and metaphysical mazes. The whole course of history, with slight though frequent interruptions, has been toward responsible government, that is, responsible toward those for whose benefit and needs it presumably exists. If this has gradually tended toward evolving legal conceptions by which to judge the acts of those in authority,
this is a reflection of modern political development. Force and arbitrariness are thus limited by rule, rule administered by societal agents, usually courts, judicial or administrative. This uniformity, regularity and predictability of decision governing the relations between the government and the governed may, without undue demands on credulity, receive the name law; and the term "public law" has thus found its way into universal use. If, in property and contract relations, definite rules have been evolved in most states for determining the relations between the government and the governed, and if foreign countries, for the most part, bring tort relations into the same legal orbit, there seems no valid reason why the United States should continue to employ antiquated postulates as if they constituted reasons in order to escape what the rest of the world regards as both moral and legal obligations.

Nor is the exemption of the United States or of a state from suit believed to be explainable, as Mr. Justice Holmes suggested, by any analytical formula of superiority to law. More convincing is the explanation that the courts in this country, ostensibly supported by certain misunderstood historical maxims and for practical conservative reasons, concluded, after the Eleventh Amendment, that they would require legislative consent to suit before assuming jurisdiction over the State. On the Continent, steeped in legal tradition and juristic conceptions of corporate-ness, that consent was assumed. We adopted a rule of jurisdictional immunity; they did not. Both are rules of law to which the State is subject. The problem in Europe is pragmatic—how far does public policy and social theory require that the State and other public corporations shall assume responsibility for the injuries inflicted by its agents on private individuals, a problem which requires no metaphysical speculations into the nature of sovereignty, of law, and of the State. Is it expecting too much to invoke such emancipation from dogma and metaphysics for the United States?