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**THE ORIGINS OF ACCOUNTABILITY:
EVERYTHING I KNOW ABOUT THE SOVEREIGN'S IMMUNITY, I
LEARNED FROM KING HENRY III**

GUY I. SEIDMAN*

*That the king can do no wrong, is a necessary and fundamental principle of the English Constitution.*¹

*Princeps Legibus Solutus Est.*²

I. INTRODUCTION

Throughout the history of Western civilization, one central question of political organization concerns the limits of sovereign power: Whether the sovereign, formerly the king, is accountable to man's law and judgment. One of the principal aims of modern representative governments has been curbing the authority of absolute monarchs. The fundamental question of *how* effectively to curb the excesses of public officials, however, remains. This question lies at the core of administrative and constitutional law even if the sovereign who we now seek to control no longer wears a crown or carries a scepter.

The basic question posed throughout history, which still puzzles us today, concerns the availability of effective remedies against wrongdoing by government officials: If the government unlawfully refuses to honor obligations, what remedies are available to the subjects/citizens? What forum can address their grievances? Which judges, if any, will review the government's actions and what machinery of government will enforce verdicts

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1. See 3 WILLIAM BLACKSTONE, COMMENTARIES *254, available at <http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm>.

2. Literally, "the emperor is not bound by statute" DIG. 1.3.31 (Alan Watson ed. & trans., 1985).

handed down against the sovereign, especially when the result is not to the sovereign's liking?

An enormous volume of writing examines mechanisms for assuring the *political* accountability of the ruler, including what steps subjects may legitimately take in order to bring change in government when the government wrongs the people. Modern democratic regimes have elaborate mechanisms to ensure political accountability,³ though the sheer size of the modern administrative state raises serious questions about the actual effectiveness of these mechanisms of political control. Apart from political mechanisms, other means exist for promoting government accountability, including monetary liability for "private law" based wrongs. The most notable of these means are private actions in tort and breach of contract actions. In modern American legal culture, the effectiveness of these private-law legal remedies is directly affected by a seemingly undemocratic vestige of ancient times, the doctrine of sovereign immunity.

Sovereign immunity, and its later-developed companion doctrine of official immunity, is a legal principle that sharply limits the use of the court system to control government conduct. Sovereign immunity, as applied to the federal government,⁴ does not allow suits against the government without its consent.⁵ Official immunity, as embodied in modern American law, confers similar, though in some respects more limited, immunity on individual government actors.⁶ These immunities have long been thorns in many a

3. In the United States, for example, these mechanisms are based on at least three principal premises: first, that sovereignty lies in the people, for whose benefit government is constructed and by whom the government is elected; second, that the enumerated powers of government are divided between three separate institutions; and third, all government officers are, in principle, accountable for acts and omissions conducted in their official capacity, which flows from the lofty but ill-defined idea of a government subject to the rule of law. That is clearly the case with elected and impeachable officials. The accountability of the modern administrative bureaucracy requires complex oversight mechanism. See BERNARD ROSEN, *HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE* (3d ed. 1998). For more on the origins of impeachment, see *infra* Part III.C.

4. That is the immunity of the federal government from suit, as distinguished from the question of state sovereign immunity.

5. See generally 1 WILLIAM BLACKSTONE, *COMMENTARIES* *230–270. Sovereign immunity is defined as

[a] judicial doctrine which precludes bringing suit against the government without its consent. *Founded on the ancient principle that "the King can do no wrong,"* it bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment.

BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) (emphasis added).

6. See Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 *YALE L.J.* 2195 (2003); Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 *VAND. L. REV.* 583 (1998).

commentator's side. Sovereign immunity, in particular, is one of the most consistently criticized doctrines in American law.⁷ It is easy doctrine to attack and hard to defend. On its face, it seems clearly inconsistent with democratic government. It has nonetheless withstood both the withering criticism and the trials of time and remains valid law.⁸

The origins, scope, and constitutional pedigree of federal sovereign immunity in the United States lay among the greatest mysteries of the early republic.⁹ In a subsequent work, this author hopes to explore the basic question whether and to what extent either sovereign or official immunity were properly part of the original design of American government. In this Article, this author lays the groundwork for that inquiry and clears away some interfering debris by exploring the development of the concept of governmental accountability in pre-eighteenth-century English law. The Americans of the late 1700s, after all, were very familiar with English legal and historical events in the late 1600s, most notably the so-called Glorious Revolution of 1688.¹⁰ Those events, in turn, can be understood only in light of developments that began four centuries beforehand in the thirteenth and

7. Generations of legal scholars have engaged in examining, and mostly criticizing, all aspects of sovereign immunity, often calling for its abrogation. "Since the end of the last century, learned members of the legal profession have been continuously attacking the roots and branches of [sovereign immunity's] judicially planted growth." Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From The Public-Lands Cases*, 68 MICH. L. REV. 867 (1970). See *id.* at 867 n.1-2 for a long list of critical articles. An eminent scholar declared "[y]es, sovereign immunity must go." Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 383 (1970) (providing a detailed rationale for such conclusion). Indeed, as one prominent scholar observed, "[n]o scholar, so far as can be ascertained has had a good word for sovereign immunity for many years." Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 419 (1970). This opinion seems equally valid today: "Sovereign immunity is a rotten idea." David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 548 (1997). For a recent concerted attack on sovereign immunity, see Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

8. True, over the past two centuries Congress has waived sovereign immunity in a wide variety of contexts. Each of these statutes raises, in turn, questions concerning the scope of the waiver. For general discussion see RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 18.6 & ch. 19 (4th ed. 2002) (tort liability of governments and their employees). Congress has never entirely abolished the doctrine and neither has the U.S. Supreme Court. Both seem unlikely to do so anytime soon.

9. "There are ghosts that haunt the early republic. . . . Sovereign immunity is one of the most infamous." Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383 (1998).

10. They were also very familiar with Blackstone's COMMENTARIES, published between 1765 and 1769. The COMMENTARIES synthesized the state of English law on the eve of the American Revolution in a compact and accessible form. On Blackstone's COMMENTARIES and their influence on the Founding Fathers, see *infra* Part IV.D.

fourteenth centuries. The concept of governmental accountability has a long, distinguished, and fascinating genesis in English law. Understanding that genesis is a necessary first step toward understanding the mechanisms for accountability that were likely to have been constructed, or assumed, by the founding generation in America.

In particular, this Article explores the ancient, and often misunderstood, maxim that “the king can do no wrong.” The maxim proves to have played a vital role in the development of governmental accountability in England, sometimes serving precisely the opposite function that a casual reading of the maxim might suggest. The maxim has actually stood for four different propositions at various points in English legal history.¹¹ The first is that the king is literally above the law and cannot do wrong by definition. This understanding of the maxim reached its zenith in the seventeenth century under the banner of the “divine right of kings.”¹² A second meaning is that even if the king’s actions are not lawful by definition, there is no remedy for royal wrongdoing through ordinary legal channels.¹³ One might term this a procedural or remedial understanding of the maxim. A third meaning, which actually represents the true historical origin of the maxim, is that the king has no power or capacity to do wrong.¹⁴ This was literally the case with Henry III, who assumed the kingship while in his minority.¹⁵ The fourth meaning is precisely the opposite of the first. It means that the king is eminently *capable* of doing wrong but cannot do so *lawfully*.¹⁶ One can meaningfully combine this understanding with the second, procedural understanding to yield a legal regime in which royal acts can meaningfully be described as unlawful but are not subject to remedies by the ordinary law courts. In such a scheme, however, subordinates who follow the king’s orders may act at their peril.

One can develop a good understanding of England’s struggles with governmental accountability, and therefore the background understandings that would have been available to America’s founding generation, by tracking the differing interpretations of the maxim as they appeared at various points in English legal history. For much of its life, the maxim actually served as an essential tool in wresting powers away from the Crown and in establishing the rule of law in England.¹⁷ The maxim “that the king can do no wrong” helped define the shifting borders of governmental accountability in Anglo-American

11. See generally 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459–65 (3d ed. 1923).

12. See *infra* Part IV.D.1.

13. 3 HOLDSWORTH, *supra* note 11, at 465.

14. CLAYTON ROBERTS, THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND 4–5 (1966).

15. See 3 HOLDSWORTH, *supra* note 11, at 464.

16. *Id.*

17. See *id.* at 459.

history: the expansion of government functions, the transformation from personal to constitutional monarchy, the transfer of powers from king to Parliament, and the rise of judicial review of government action through civil and administrative litigation.

A number of important factors complicate our contemporary understanding of this story, which sweeps across five centuries. The terminology employed by actors at those various times does not necessarily correspond well to modern legal categories. And perhaps most importantly, many of the key terms that are essential to the telling of this story are equivocal. For instance, the seemingly simple (at least to modern American sensibilities) term “the king” (or “the Crown”) had two distinct meanings during much of the relevant period of English legal history.¹⁸ It could mean either the royal person, that is, a concrete individual, or it could mean the abstract sovereign powers invested in a government. The phrase “the king can do no wrong” takes on very different significance depending upon what precisely “the king” means. Similarly, the concept of immunity can mean either the personal immunity of the individual who is king or the immunity of the institution. This roughly corresponds to the modern distinction between official (personal) and sovereign (institutional) immunity. Finally, one must always keep clear the distinction developed above between political accountability and accountability through legal mechanisms arising out of or derived from private law remedies. There are numerous threads to keep distinct while weaving this tableau, but the inquiry is vital in order to understand the appropriate role of governmental immunity in the American constitutional order. This Article contains three distinct parts.

Part II introduces the thirteenth-century legal and historical landscape in England, from which the basic concepts of government structure and accountability grew. As a matter of history, the early years of the thirteenth century presented English kingship at an extreme low point. Faced with great pressures, England’s weak King John suffered enormous losses in terms of both lands and royal powers in favor of his foes, internal and external. By the time John died, in 1216, England had lost its vast territories in France, while both the papacy and the English barons had gained a direct hold over royal power.¹⁹ King John had sworn fealty to the pope and placed his signature on Magna Carta.²⁰ Worse yet, the minor new King Henry III had no legal authority; the barons and a papal legate held all powers of the realm. This was a troubling state of affairs because of the intensely personal nature of early

18. See *infra* Part IV.B.

19. See COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 111–12 (1962).

20. *Id.* at 112–13.

English government. The entire government developed out of the royal court, financed out of the king's pocket.²¹

As English citizens sought to limit and harness the earthly powers of the king—thirteenth-century English history made this a realistic political policy to achieve—they could find somewhat differing solutions in each of the four different legal traditions that flourished in medieval England: Roman, Canon, Tribal and Feudal laws.²² These legal traditions, of course, existed elsewhere in Europe, but England's unique constellation of social forces allowed for meaningful struggles over political power between the king and his subjects. Such struggles initiated with the barons and were engaged by an increasingly representative Parliament. The early English kings, unlike many of their continental counterparts, had to learn the art of compromise, which has obvious implications for royal accountability.

Part III begins with the medieval origins of sovereign immunity, suggesting that it originated in feudalism, under which feudal lords and vassals agreed to litigate at the court provided by the feudal lord's overlord. The king did not have a feudal overlord in England. It was illogical to expect the king to allow cases into his court against his will. Also, allowing such would have been immoral because it would make the king potentially a judge in his own case. At the same time, the English believed their king was capable of wrong and expected the Crown to provide remedy for its wrongdoings.²³ Feudalism was also the basis for the Crown's fiscal constraints. The king had to apply to Parliament to increase the funding available for his personal and public activities. In the thirteenth and fourteenth centuries we can observe several other attempts to constrain royal powers and make public ministers accountable to Parliament and "the nation" rather than to the king alone. With the increase in government activities and the advent of the ministerial responsibility doctrine, royal agents carried out all the work of government.²⁴ Whereas the king was immune from suit, his agents were not, and they could be held accountable for alleged wrongdoings either before a court of justice or in Parliament, through impeachment proceedings.²⁵

In the fifteenth and sixteenth centuries, the tools developed in medieval days to contain royal power and make government bureaucracy accountable mostly fell into disuse. The Tudor kings used the royal prerogative carefully. They cooperated with Parliament, combining royal authority with popular consent. The growth of government administration increased the Crown's

21. See *infra* note 217 and accompanying text.

22. The development of English legal history, said Maitland, had been continuous and "there has been no violent breach between 'folk-law and jurist-law.'" FREDERIC WILLIAM MAITLAND, TOWNSHIP AND BOROUGH 14 (1898).

23. See *infra* Part III.A.

24. See *infra* Part III.C.

25. See *infra* Part III.C.

financial needs and royal dependence on Parliament, which held the power over the purse strings.²⁶ Things changed in the sixteenth century, when the Stuart kings sought to increase royal powers and steer the English constitution towards absolute monarchism.²⁷

Part IV examines three aspects of the tumultuous seventeenth-century England. First, this author suggests that by the seventeenth century the doctrine called “the king’s two bodies” had established that the king, in person and the government, were two separate entities. This development had many beneficial effects. There was now continuity in government when the king died. Government bureaucracy would in time become accountable to Parliament, not the king. Finally, it is possible to observe two different sovereign immunities in English law—that of the royal person and that of the English government, accountable to Parliament.

Second, this author suggests that Parliament and the common law jurists resurrected the medieval constructs in their struggles against the Stuarts. The Magna Carta was rediscovered and interpreted as a bill of rights, while Parliament revived the practice of impeachment after centuries of neglect. After the seventeenth century, the doctrine of ministerial responsibility was greatly developed. A cabinet headed by a prime minister would lead the administration of England. Completing the process that began with the personal monarchy and the growth of government from the royal household, the English kings gradually became uninvolved in English government, as the ministers became fully accountable to Parliament.

Finally, this Commentary discusses the “divine rights of kings” theory. This author suggests that the theory did not generally apply in England. Rather, the Stuart kings raised it in support of their claims of greater royal powers. A coalition of common law jurists and parliamentarians rejected the idea of divine rights of kings in favor of popular sovereignty and the more balanced regime of a constitutional monarchy.

In Part V, this Commentary notes that a generally accurate state of English law regarding sovereign immunity and the accountability of government was available to the Founding Fathers through Blackstone’s *Commentaries*, which were enormously popular in North America.

II. MEDIEVAL FOUNDATIONS OF GOVERNMENTAL ACCOUNTABILITY

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the

26. LOVELL, *supra* note 19, at 172.

27. *Id.* at 172, 231.

grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²⁸

A. Introduction

England was not the only country in the fourteenth century that faced basic questions of governmental organization, such as who is the rightful ruler of the land and who has the final word in law.²⁹ Social and political conditions in England presented unique opportunities for limiting royal power. Accordingly, governmental accountability was a livelier topic in England than on the continent because those seeking limitations on royal power in England had a genuine chance to succeed.³⁰

In England, an island at the edge of the European continent, power struggles were mostly between the king and his barons (and later Parliament). Continental princes had also to contend with strong claims of authority from the Church in Rome, from neighboring rulers, and from the Holy Roman Emperor, who from the tenth century claimed jurisdiction over a broad band of Western Europe.³¹ Consequently, England managed to produce a working model of government that eluded its continental counterparts, one that has a powerful and effective government to improve the nation's predicament while not surrendering to it all sovereign powers and still keeping effective checks over it, thus limiting royal ability for misdeeds. The seeds of this process, completed in the seventeenth century, are clearly present in the thirteenth century.³² Indeed, references were famously made (rightly or wrongly) during

28. OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920). Is this the case with the maxim "that the king can do no wrong" and the doctrine of sovereign immunity? This is another way to view the issues discussed in this article (and in paper II, relating to American jurisprudence).

29. 2 S.E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES 1024* (1997).

30. Precisely how and why England became a democracy is the subject of voluminous literature and is well beyond the scope of this article. Instead, this article attempts to present some of the legal tools, developed around the fourteenth century and revived in the eighteenth century, that were used in the service of efforts to place constitutional limitations on royal powers. More specifically, this author wishes to explain the role, positive for the most part, played by the concept of sovereign immunity and the maxim "that the king can do no wrong" in England's path to constitutional monarchy, then to parliamentary democracy.

31. See SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* 116 (1999).

32. That the king is below the law is a doctrine which even a royal justice may fearlessly proclaim. The theory that in every state there must be some man or definite body of men above the law, some 'sovereign' without duties and without rights, would have been rejected. *Had it been accepted in the thirteenth century, the English kingship must have become an absolute monarchy*, for nowhere else than in the person of the king could the requisite 'sovereignty' have been found.

1 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 181-82* (2d ed. 1911) (emphasis added).

the seventeenth century Parliamentary struggles with the king to such thirteenth-century instruments as the *Magna Carta*.³³ Also, the standoff between Lord Coke and the monarch was compared to that of Bracton with Henry III.³⁴ Many of the tools employed in the seventeenth century, and since, in the struggle between the legislative and the executive branches, such as impeachments and ministerial responsibility, have their origins in the thirteenth century. Some basic notions of administrative review over the executive are similarly traceable to this period.

Most significantly, the thirteenth century presented England with a constitutional crisis that forced serious consideration of questions of royal power and accountability. The key elements in this story are the emergence of the *Magna Carta* as a concrete manifestation of the principle of limited royal power and the “kingship” of Henry III, who assumed the throne at the tender, and legally incapacitating, age of nine.³⁵ To understand the importance of these developments, one must first understand the basic historical events and then grasp the diverse array of legal sources available to thirteenth-century legal actors trying to cope with an unprecedented series of events redefining the course of English constitutionalism and establishing the national identity of the English people.

In this part of the commentary, this author describes the historical and intellectual circumstances of this constitutional crisis and then identifies the legal framework that was employed to address it. Section B sketches the legal-historical background of the *Magna Carta* and its aftermath in the minority of Henry III. These events of the early thirteenth century are uniquely important as it is possible to trace back to them the tools subsequently developed to ensure royal accountability. Section C presents the essential legal thinking that medieval English jurists would have been familiar with when considering the limits of royal powers. Linking the historical events with the intellectual background, this author will, in the following part, show how the English doctrine of governmental accountability was formed. This doctrine, which re-emerged in the seventeenth century to form the basis of the English tradition, would have been most accessible to the American founders.

33. See generally WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 120–21* (2d ed. 1914).

34. See generally GORDON, *supra* note 31, at 253.

35. Shael Herman, *Legacy and Legend: The Continuity of Roman and English Regulation of the Jews*, 66 TUL. L. REV. 1781, 1825 (1992).

B. *Royal Accountability—A Sketch of Medieval History*

1. King John

The classic starting point for English Medieval history is 1066 A.D., when Norman Duke William “The Conqueror” took over the English throne. A century later, the Norman-Angevin line came to power.³⁶ The dominant King Henry II, the first of Angevin kings (1154–1189) took the title of “King of England” and stabilized the throne.³⁷ However, both he and his heirs remained essentially French dukes, vassals of the French king, steeped in French traditions and language.³⁸ England provided the Angevins a base of operation and rich resources, but they prized their vast domains in France, considering them of paramount importance.³⁹ Fabled English King Richard I the Lion-Hearted, like his father, was a French prince. He had little interest in England, save for its money.⁴⁰ Richard’s protracted absences from England, when he occupied himself with the Crusades, put royal powers in the hands of his brother John.⁴¹ In this position of power, John conspired against Richard. Ultimately, his coup attempts failed.⁴² In 1199, however, Richard I died, and John became King of England, Duke of Normandy and holder of all other Angevin possessions.⁴³ John’s reign (1199–1216) was a dismal failure, as he failed to uphold royal power and assets.⁴⁴ It had, however, profound and long-lasting implications on English legal history.

King John’s reign was troubled on three fronts: His misjudgment of feudal law and politics allowed the French king to forfeit English land holdings in France; in need of papal support, John agreed to become vassal to Rome; and his mishandling of relationship with the barons brought England to the brink of

36. See generally ANDRÉ MAUROIS, *THE MIRACLE OF ENGLAND* 82–84 (Hamish Miles trans., 1937); BRYCE LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 228–30 (2d ed. 1980).

37. See generally MAUROIS, *supra* note 36, at 82–84; LYON, *supra* note 36, 228–30.

38. MAUROIS, *supra* note 36, at 83.

39. The Angevin English kings, as vassals to the French king, possessed more land and wealth than their overlords. See LOVELL, *supra* note 19, 53, 71–73; LYON, *supra* note 36, 119–22, 138–39, 228–33 (2d ed. 1980).

40. In his ten-year reign (1189–1199), Richard I visited England twice, for a total of six months, and only to secure money for his wars. LOVELL, *supra* note 19, at 99–100; LYON, *supra* note 36, at 229, 234–235; 1 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 534, 550 (6th ed. 1903); see also *Richard I Coeur de Lion*, at <http://www.britannia.com/history/monarchs/mon27.html>.

41. LOVELL, *supra* note 19, at 99.

42. LYON, *supra* note 36, at 236–37.

43. E.g., *Richard I Coeur de Lion*, at <http://www.britannia.com/history/monarchs/mon27.html>; *Richard the Lion-Hearted*, at <http://www.carpenoctem.tv/military/lionhearted.html>.

44. PERCY ERNST SCHRAMM, *A HISTORY OF THE ENGLISH CORONATION* 54–55 (Leopold G. Wickham Legg trans., 1937).

civil war and forced him to provide written assurances of his subject's rights, the Magna Carta. The following section explains these developments and their impact in detail.

In 1202, John was summoned to stand trial in the feudal court of Paris in a dispute with one of his French vassals.⁴⁵ John ignored the summons, and French King Philip Augustus seized the opportunity, declaring the royal vassal a traitor and pronouncing the forfeiture of all his fiefs.⁴⁶ John made no spirited defense when the lands were physically invaded. By 1206, almost all Angevin domains in France were lost.⁴⁷ This episode led to centuries of dispute and animosity between England and France, but it also nurtured a sense of individual nationhood in both lands.⁴⁸

The loss of lands in France firmly centered the kingdom in England. As England became territorially defined, the residents of England began to consider themselves different from the French. They were becoming Englishmen. From now on, they would expend their energy primarily upon insular projects. As England was becoming a nation-state, the king became a national leader, the *King of England*.⁴⁹ John returned to England in 1206 and remained there almost continuously until his death.⁵⁰ His successors would devote, thereafter, most of their time to England. The barons who held fiefs in both England and France now had to choose between them, and their decisions determined whether they became English or French.⁵¹

The origin of papal claims toward the English king was in promises made by John's predecessors when in need of Rome's support.⁵² But from the conquest until the reign of King John, the Norman and Angevin kings of England firmly held their ground against papal claims.⁵³ It was John's misfortune to have stood against Innocent III (pontiff 1198–1216), arguably the greatest pope of the middle ages, who was pursuing the idea of supporting

45. LYON, *supra* note 36, at 238.

46. *Id.*

47. *Id.* at 238–39; LOVELL, *supra* note 19, at 111.

48. See J.M. ROBERTS, A HISTORY OF EUROPE 174, 177 (1997).

49. As Englishmen they “entered upon that stage of development that was to differentiate their institutions from others of Western Europe.” LYON, *supra* note 36, at 239; 1 STUBBS, *supra* note 40, at 557–58. *But cf.* NORMAN DAVIES, EUROPE: A HISTORY 357 (1996) (noting that at this point it was “doubtful whether England or France had any sense of their later national identities”).

50. LYON, *supra* note 36, at 239.

51. *Id.*

52. In need of papal support for his claim of the English throne, William the Conqueror was obliged to recognize the supremacy of the pope, yet later refused to pay feudal homage and fealty to the pope. SCHRAMM, *supra* note 44, at 34; LOVELL, *supra* note 19, at 68, 70; DAVIES, *supra* note 49, at 339. In 1171 Henry II promised Pope Alexander III that Ireland would pay, from that time on, ‘Peter’s pence.’ SCHRAMM, *supra* note 44, at 34, 53. Conquest and lordship over Ireland was confirmed by papal bull. LYON, *supra* note 36, at 304–05.

53. SCHRAMM, *supra* note 44, at 54.

the Church's universal position by a system of subordinate fiefs.⁵⁴ Until his death in 1205, Hubert Walter, Chancellor and Archbishop of Canterbury, helped the king maintain an alliance with the clergy.⁵⁵ The election of a new archbishop sparked a battle between John and the pope.⁵⁶ Royal plunder of Church property and the driving of clergy into exile were met with a papal interdict that, in 1208, theoretically suspended all ecclesiastical services in England and a 1209 papal excommunication that absolved subjects from allegiance to the king.⁵⁷ Until 1212, John enjoyed general support of his subjects, especially the barons, who were relieved of taxation while John lived off the Church and temporarily relaxed the pressure on his feudal tenants.⁵⁸ The tide then turned. Faced with baronial revolt, the threat of deposition by the pope, and the prospect of a French invasion, John surrendered in 1213. He accepted the papal candidate for Archbishop of Canterbury, reinstated the exiled prelates, and compensated the Church for all its losses. More alarmingly, the king handed over England and Ireland to the pope and received them back as fiefs upon the performance of homage and fealty.⁵⁹

The barons who chose to live in England were unlikely to forget who was responsible for their enormous land losses. After 1206, King John had often prepared to lead an expedition to win back his lands in France, but he repeatedly postponed the mission.⁶⁰ The barons alleged various other royal infringements on their rights and privileges. Toward the end of John's reign, the Church and the barons joined forces against the king.⁶¹ The barons swore that if the king delayed the restoration of laws and liberties any longer, they would withdraw their (feudal) allegiance and make war upon him until he would confirm the concession by a sealed charter.⁶² The barons wanted to force the king to sign a document that would stipulate in specific terms the

54. *Id.*; LYON, *supra* note 36, at 306; 1 STUBBS, *supra* note 40, at 558.

55. LYON, *supra* note 36, at 306.

56. *See id.* at 240, 306; LOVELL, *supra* note 19, at 111–12; 1 STUBBS, *supra* note 40, at 558–59.

57. LYON, *supra* note 36, at 240–41.

58. *Id.* at 240–41, 306–07.

59. This meant making an oath of homage to the pope, which he made binding on both himself and his heirs. John also agreed to pay an annual tribute to the Holy See, in addition to “Peter’s pence.” *See* SCHRAMM, *supra* note 44, at 54–55; LYON, *supra* note 36, at 240, 306–07; LOVELL, *supra* note 19, at 112; 1 STUBBS, *supra* note 40, at 559–61; *see also* MCKECHNIE, *supra* note 33, at 24.

60. *See* LYON, *supra* note 36, at 240–41; 1 STUBBS, *supra* note 40, at 557, 560, 562–64; MCKECHNIE, *supra* note 33, at 27–28.

61. 1 STUBBS, *supra* note 40, at 568.

62. The bishops did not take part in the baronial oath; “they were one in counsel with the barons, but had not been compelled to break off relations with the king.” 1 STUBBS, *supra* note 40, at 567–68; *see also* MCKECHNIE, *supra* note 33, at 31–32.

laws and customs by which he would govern.⁶³ The king finally set the great seal of the realm in 1215 to the Magna Carta. Thus, King John came to be unwittingly credited with the great Charter of Liberties, which would limit the royal prerogative and serve as the cornerstone of modern democracy and with the start of statutory law in England.⁶⁴

The reason why the barons found it necessary to take severe steps to secure the Magna Carta seems clear. Feudal law made the king accountable to overlords in Paris or Rome but not in London. As we have seen, it is quite possible that no court was available in England for the barons to pursue their claims against the king.⁶⁵ It soon turned out that King John was no more likely to keep his promise, written and sealed, than he was to fulfill his feudal obligations to the French king or the pope. Soon the barons, aided by the French king, and John, supported by the pope, were aligning themselves for a civil war.⁶⁶ As the clouds of war gathered, both Pope Innocent III and King John died in 1216.⁶⁷

2 The Minority of King Henry III

Henry III was only nine years old when he ascended the throne in 1216.⁶⁸ John left his son a kingdom in great disarray. The three major conflicts John had opened with the French king, the pope, and the barons were left unresolved and would take centuries to run their course.⁶⁹ Even more significantly, the

63. In reality, they wanted to turn the clock back to the days of Henry I. John's plan was to dodge this commitment through the support of his ally, the Church, but he was bitterly disappointed to find that not even his bribes could "bring over the Church from the barons' side to his own." See LYON, *supra* note 36, at 241–42; 1 STUBBS, *supra* note 40, at 568–69; MCKECHNIE, *supra* note 33, at 32–33.

64. See F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND—A COURSE OF LECTURES DELIVERED 15 (1919) [hereinafter A COURSE OF LECTURES]; 1 POLLOCK & MAITLAND, *supra* note 32, at 179; J.C. HOLT, MAGNA CARTA AND MEDIEVAL GOVERNMENT 289 (1985); LOVELL, *supra* note 19, at 118.

65. For in that hierarchical world of medieval England, the king wielded almost omnipotent power. He was under the law insofar as he was morally obliged to obey the law, but he was not legally bound to do so: 'the king can do no wrong.' That is, the king could not be sued, prosecuted, nor punished by anyone. If he broke the law, punishment must be left to God.

HENRY J. PERKINSON, FLIGHT FROM FALLIBILITY: HOW THEORY TRIUMPHED OVER EXPERIENCE IN THE WEST 37–38 (2001).

66. LYON, *supra* note 36, at 242.

67. Pope Innocent III died on July 16. *Pope Innocent III*, at <http://historymedren.about.com/library/who/blwinnocent3.htm>. His death was followed, on October 19, by the death of King John. MCKECHNIE, *supra* note 33, at 46–47.

68. Herman, *supra* note 35, at 1825.

69. In brief: (a) *territorial claims*: English monarchs maintained claims for French lands for centuries. The height of the conflict was reached in the 1420s. After its victory in Agincourt, in 1415, England controlled large parts of Northern France; fortunes turned in 1429, when a maiden,

young king was left defenseless against baronial and papal claims for dominance over royal powers. For the first time since the Norman Conquest, the personal government was formally in the hands of a minor.⁷⁰

The new pope found himself at an unusually strong position of influence at this time. Before his death, King John implored the pope to grant his heir and his kingdom papal protection.⁷¹ Young Henry III had little choice but to renew his father's obligations to the pope, whose protection he needed against France.⁷² In addition, the unprecedented minority raised unique legal questions about which the pope's opinion was persuasive.⁷³

King John's request of the pope meant that wardship of the underage heir *legally* belonged to the papacy. The pope, however, allowed the appointment of a baron, William Marshall Earl of Pembroke as *rector regis et regni*, allowing him to become the principal force in the kingdom during Henry's early minority, while the papal legate was recognized as the presumptive head of the government.⁷⁴ The barons and the papal legate then attempted to stabilize their joint regime. The Magna Carta really took hold during the minority as it was reissued under the king's name and papal sanction.⁷⁵ This step brought in greater baronial support for Henry and secured his throne in 1217 against a bid by the French crown.⁷⁶

The minority brought England into intimate contact with Rome, as Henry's legal capacity to govern was judged by traditional Roman legal standards.⁷⁷

Jeanne d'Arc led the Dauphin into military action and to his coronation at Reims. England's fortunes would never be revived, and the conflict then gradually waned, coming to an end in 1453. See ROBERTS, *supra* note 48, 176–77; DAVIES, *supra* note 49, at 420, 426, 545; (b) *Magna Carta*: the document was repeatedly reissued and reconfirmed after 1215, yet it did not play a major role in English public life until the seventeenth century. MCKECHNIE, *supra* note 33, at 120–21, 139, 155–59; LOVELL, *supra* note 19, at 118; LYON, *supra* note 36, at 310; A COURSE OF LECTURES, *supra* note 64, at 15; (c) on papal influence in England, see *infra* notes 72–76 and accompanying text.

70. D.A. CARPENTER, *THE MINORITY OF HENRY III* 123 (1990).

71. Herman, *supra* note 35, at 1825.

72. Henry did so in the most public manner on his coronation day, when, after taking the traditional oath, he did homage for England and Ireland to the papal legate, and promised to pay the annual tribute in future. See SCHRAMM, *supra* note 44, at 55; Herman, *supra* note 35, at 1825; 2 STUBBS, *supra* note 40, at 18–19 & n.2 (1906).

73. The pope's opinion was also possibly even dispositive. Thus, only the papacy could determine the age at which the king would acquire full capacity to govern the fiefdom. See Herman, *supra* note 35, at 1825–26.

74. See *id.* at 1826; 2 STUBBS, *supra* note 40, at 20.

75. This was tantamount to an official declaration that the minority had ended. See CARPENTER, *supra* note 70, at 2 (footnote omitted).

76. The French prince was supported by a foreign army and a large faction of the English barons. The papal sanction brought over clergy and barons to the royal side. See MCKECHNIE, *supra* note 33, at 140–41, 145; 2 STUBBS, *supra* note 40, at 22–26.

77. Herman, *supra* note 35, at 1826.

Under these, the king was in *pupilage*, a tutor's youthful charge, until he was fourteen and was to attain his full majority at the age of twenty-five.⁷⁸ Yet under the third clause of the Magna Carta, inserted in 1216, barons came of age at twenty-one, "and the consensus was that this rule should also apply to the king."⁷⁹

Henry assumed full regal powers in January 1227 at age nineteen and three months.⁸⁰ The Council authorized Henry to issue writs stating that, from that time on, royal grants must be confirmed under the king's seal.⁸¹ There was wide support for the recovery of royal power because many expected a moderate form of kingship that the elites could limit and control, a compromise implicit in the Magna Carta itself.⁸² While now nominally in power, the young king proved unable to shake off the control of the governing council. He was heavily influenced by the rivalry between its two dominant figures, Peter des Roches, the French-born bishop of Winchester, and Hubert de Burgh, a native of Burgh in Norfolk.⁸³ Both were former servants of King John.⁸⁴ Between 1232 and 1234, Des Roches presided over a regime that threatened to restore many of the worst practices of King John, including seizure of private properties.⁸⁵ A baronial rebellion resulted. In 1234, des Roches was toppled.⁸⁶ For the first time since his accession and now aged twenty-seven, Henry III was free to wield undisputed sovereignty. However, his chosen advisors

78. At age fourteen Henry was recognized as having exceeded the age of a pupil and was free from the custody of his tutor, the Bishop of Winchester. In Roman law terms, he had passed from *puertia* to *adolescentia*. Besides limiting the power of the king, his coming of age had major property implications, for at that moment the tenure of offices and custodies would come up for cancellation or renewal. It is also reported that William Marshal felt barred from making grants in perpetuity as long as Henry was under the age of majority. See Herman, *supra* note 35, at 1826 n.154–55; CARPENTER, *supra* note 70, at 123, 257. On Roman law, see, e.g., JANE F. GARDNER, *FAMILY AND FAMILIA IN ROMAN LAW AND LIFE* 146–48, 165–69, 172 (1998).

79. See Herman, *supra* note 35, at 1827 (quoting CARPENTER, *supra* note 70, at 123).

80. *Id.* at 1827.

81. If the pope had not considered Henry mature enough to govern, he could have stood in his way, yet he did not. *Id.* By letters dated April 1223, Pope Honorius declared his ward to be of full age, under certain reservations, and a bull of Gregory IX of April 1227 confirmed that the minority had ended. MCKECHNIE, *supra* note 33, 153, 156 n.1. The king was appreciative of the early papal support, and this allegiance sometimes placed him at odds with his magnates. See Herman, *supra* note 35, at 1827 n.159.

82. Magna Carta sought to limit rather than destroy the king's sources of revenue, and expand rather than contract the king's role as the dispenser of justice. Even the barons realized that unless the rights and revenues of the crown were secure, the king could not guarantee and safeguard his subjects' rights and would lack the power and authority to maintain peace and dispense justice. See CARPENTER, *supra* note 70, at 3.

83. See Herman, *supra* note 35, 1828; Nicholas Vincent, *Henry III*, *HISTORY TODAY*, June 2002, at 12.

84. Vincent, *supra* note 83, at 12.

85. *Id.*

86. *Id.*

continued to dominate him for many years.⁸⁷ The matter of papal influence remained dormant for some time, until Parliament put an end to papal claims of homage in 1366 A.D.⁸⁸

C. Legal Landscape at 1215: Endless Possibilities on the Horizon

1. Introduction: Four Vectors Tugging in All Directions

The basic legal issue in the thirteenth century was (and in some sense still is and has always been) whether the prince is subject to man's law, i.e., could limitations be set on powers of government? One might expect that the thirteenth-century answer would be simple and perhaps Hobbesian: There are no limitations and the king's will is supreme. That supposition is wrong, or at least overstated. In order to understand the theories of government employed by thirteenth-century English thinkers, however, one must identify the sources of law on which they drew.

Those sources were quite diverse. In medieval England, and on the European Continent, we can identify at least four distinct and relevant legal traditions, each of which made its own distinctive contribution to theories of governmental power and responsibility. To the modern mind, of course, the idea that four different legal regimes might be applicable to the same problem seems like a blueprint for chaos. The medieval legal mind, however, did not sharply differentiate these sources of law and structured them hierarchically.⁸⁹ Thirteenth-century legal actors were quite content to have overlapping legal systems, each with its own distinctive sphere of application. In the Middle Ages, especially on the Continent, a multi-jurisdictional legal structure was common and familiar.⁹⁰

Two of these sources of medieval law are referred to as the "learned laws": Roman law, which enjoyed a revival since the mid-twelfth century rediscovery of the Justinian Code, and Church law, the law of the Catholic Church, which infused Judeo-Christian and Roman traditions.⁹¹ Roman and Church law had a weaker influence in England than on mainland Europe, but, as shall be seen in the discussion of the Magna Carta, by 1215 they both had advocates and influence in England.

87. "From 1234 to 1258, Henry was to become notorious for the way he allowed policy to be dictated by whichever faction at court he was . . . inclined to trust" at any given time. *Id.* at 13.

88. During the reign of Edward III, Parliament unilaterally renounced the obligation and declared it unlawful because the people had not given their consent to it and because it was a breach of the royal coronation oath. By this time, the position and fortunes of the church had been significantly changed. *See* SCHRAMM, *supra* note 44, at 55–56, 61.

89. *Cf.* GORDON, *supra* note 31, at 116–18.

90. *Cf. id.*

91. *See* HOLT, *supra* note 64, at 167.

Two other sources of legal norms were less learned in nature but perhaps more humane and practical. One was the traditional-customary-tribal law, the conventions by which the European tribes ruled themselves from the fall of Rome in the sixth century until the re-emergence of Roman law in the eleventh century.⁹² The other was the law of the feudal system, which reflected medieval socio-economic realities of governance and were applied in England by the Norman Kings.⁹³ The four sources of law are interconnected, sharing ideas and influencing one another. They offer rich and varied sources of norms, all of which were relevant and applicable at medieval times,⁹⁴ yet they may lead to possibly divergent solutions to problems of defining and controlling royal power.

2. The Learned Laws: Pope and Emperor

The conflict between the papacy and the Holy Roman Emperor dominated European politics for centuries, but it also enriched (if not fully clarified) medieval Europeans' concepts of kingship and sovereignty. Sometimes these conflicts were played out on the battlefield; other times they were fought by lawyers, who both popes and emperors employed to further their claims to power.⁹⁵ The laws most frequently invoked during these struggles stemmed from ecclesiastical and Roman law.⁹⁶ This author will briefly introduce each source.

a. Ecclesiastical law

It is difficult to understate the importance of the Catholic Church in European legal history. One author described the medieval Church as “a quasi-state” that “comprised the nations of the present European Union.”⁹⁷ Another suggested “medieval Europe” and “Christendom” were essentially fungible terms.⁹⁸ The Church played an enormously important role in European public life in at least two forms.

92. See LOVELL, *supra* note 19, at 3–7; see also LYON, *supra* note 36, at 185.

93. The question whether the Normans had in fact introduced feudalism to England or whether England was about to reach feudalism of its own accord is unclear and subject to academic discourse. See *infra* note 183.

94. Cf. 1 POLLOCK & MAITLAND, *supra* note 32, at 116 (rewriting Roman law on marriage and divorce, adding some Germanic elements in the ecclesiastical system).

95. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 86–87 (1983).

96. See *id.* at 85.

97. See R.C. VAN CAENEGEM, *EUROPEAN LAW IN THE PAST AND THE FUTURE* 15 (2002); see also 1 POLLOCK & MAITLAND, *supra* note 32, at 116 (“The Medieval church was a state.”); George L. Haskins, *The First American Reform of Civil Procedure*, in *PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT* 212 (Roscoe Pound et al. eds., 1964).

98. Robert S. Wood, *History, Thought and Images: The Development of International Law and Organization*, 12 VA. J. INT'L L. 35, 38 (1971) (“In effect, Christendom and Europe became

First, it provided *religious* leadership and guidance and a singular form of unified common law applicable all across Europe.⁹⁹ The vehicle for promoting its values and imposing some measure of order was ecclesiastical law, or canon law, as it is sometimes called. Ecclesiastical law claimed subject matter jurisdiction across Europe, particularity over marriage and family law, and personal jurisdiction over all cases involving Church personnel.¹⁰⁰ The Church discharged its justice “through a refined system of canon law and ecclesiastical courts.”¹⁰¹ It is significant to note that, in the twelfth century, canon and Roman law were very close, with canon law borrowing much in form, language, spirit and substance from the civil law.¹⁰² Yet unlike the codified Roman law, canon law did not constitute a closed corpus but continued to grow by both legislation and judicial decision.¹⁰³ In the thirteenth century, “canon law began to think that she could shift for herself and to give herself airs of superiority.”¹⁰⁴

Second, the Church was a potent *political* force. While the Church was “not really a state”—with no army, citizenship or fixed territory—it was an organization of enormous power and resources, with an “aim . . . to guide the faithful to salvation.”¹⁰⁵ As a major political actor, power broker in European politics, and significant property owner across the continent, the Church found itself in a position to challenge the great secular authorities. During the eleventh through fourteenth centuries, a series of conflicts occurred between kings and popes, rulers who aspired to supreme spiritual and temporal powers.¹⁰⁶ The most famous episode of this struggle is the investiture

increasingly interchangeable and the center of Europe’s political gravity came to rest in Western Europe.”).

99. Cf. John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of “International” Law*, 42 U. KAN. L. REV. 605 (1994) (stressing the nature of religious law as an international “law of nations”).

100. See 1 POLLOCK & MAITLAND, *supra* note 32, at 125–27.

101. John Witte, Jr., *A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion*, 42 EMORY L.J. 523, 553 n.91 (1993) (“After the sixteenth century, jurisdiction over marriage and family life shifted to the [increasingly strong national] state, yet the church retained a formidable formal role in marriage and family law.”). See also Head, *supra* note 99, at 610–11; VAN CAENEGEM, *supra* note 97, at 14–16; Haskins, *supra* note 97, at 213 (claiming jurisdiction over all questions of church organization, administration and property, over matters concerning family law including wills and contracts based on good faith and over some aspects of criminal law); Sarah Hanley, “*The Jurisprudence of the Arrêts*”: *Marital Union, Civil Society, and State Formation in France, 1550–1650*, 21 LAW & HIST. REV. 1 (2003).

102. See 1 POLLOCK & MAITLAND, *supra* note 32, at 111.

103. *Id.* at 112–13.

104. See *id.* at 215–17.

105. VAN CAENEGEM, *supra* note 97, at 16. It is this trait that most clearly distinguishes between the Church and “a state.” *Id.*

106. See BRIAN TIERNEY, *THE CRISIS OF CHURCH & STATE 1050–1300*, at 1 (1964) [hereinafter *THE CRISIS*].

controversy. It lives in memory as the tableau of the German Holy Roman Emperor Henry IV, humbly standing in the snows of January 1077 in the Italian stronghold of Canossa, before Pope Gregory VII finally relented, receiving the king back into the communion of the Church.¹⁰⁷ The next episode, when the king had revenge, forcing the pope into exile, is less familiar. What is of profound import is not the fact that kings and popes clashed, and not even the precise details of their battles,¹⁰⁸ but the nature and contents of the claims made by both sides for plenary legal supremacy. Both sides expounded the arguments supporting their mutual claims of supremacy. This affected the Church's position in both its religious and political capacities, for what it would preach in its moral/religious form would affect its political ambitions.

The starting point was the Church's staunch backing of monarchy, the dominant form of government in medieval life. The Church supported this political structure by adopting a strongly theocratic view of the kingship. Modeled on Biblical kingship, the Church recognized and consecrated the coronation ceremonies.¹⁰⁹ The doctrine held that by the consecration the

107. *Id.* at 54–55.

108. In a thumbnail, the investiture controversy began with the appointment, in 1049, of Pope Leo IX by Emperor Henry III. The pope began a cleansing reform of the Church. At the core of the reform lay an ideal of an independent Church free from lay interference. Thus began a fierce struggle over the hitherto uncontested lay interference in the appointment and promotion of clergymen, even the pope, within the Church. It was this that gave its name to the long quarrel over lay “investiture,” namely over who rightfully appointed a vacant bishopric or abbacy—the temporal ruler or the Church. The famous conflict took place in 1075, when, after twenty-five years of agitation and propaganda by the papal party, Pope Gregory VII—himself elected *without* Imperial assent—declared the political and legal supremacy (in both legislative and judicial power) of the papacy over the entire church and the independence of the clergy from secular control. Pope Gregory was the German monk called Hildebrand, who was a leader of the papal party in the period after 1050; as pope he also asserted the ultimate supremacy of the pope in secular matters, including the authority to depose emperors and kings. The emperor—Henry IV of Saxony—responded with military action. Initially, the pope had the upper hand. Aware of his powerful enemies in Germany, Emperor Henry IV (ruler 1056–1106) came in humiliation to Canossa, yet Henry soon returned to his habit of lay investiture, and after a long civil war in Germany and Henry's second excommunication, a synod of imperial bishops elected an “antipope,” Clement III. The imperial party then captured Rome, forcing the pope to escape with the help of his Norman allies into exile, where he died. Civil war between the papal and imperial parties raged sporadically throughout Europe until 1170. *See* UTE-RENATE BLUMENTHAL, *THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY* (1988); 4 SIR R.W. CARLYLE & A.J. CARLYLE, *A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST* 49–60 (1921); ROBERTS, *supra* note 48, at 126–28; 2 FINER, *supra* note 29, at 889–90, 941.

109. Not only did the king receive his insignias and the crown from the bishop, he was also anointed by him with consecrated oil. All anointed kings thereby became new “King Davids,” consecrated by new “Samuels.” 2 FINER, *supra* note 29, at 884. This model of kingship, significantly, had little in common with the Germanic notions of monarchy based upon popular

Church marked the prince as God's vicar on Earth, a divinely ordained magistracy.¹¹⁰ The Church thus advocated obedience to the king and provided legitimacy to his rule.¹¹¹ Yet the resultant expectations of Church and king were different. The Church expected royal gratitude and was of the opinion that the king, while not subject to any secular law, was accountable to God and his servants, the pope and the bishops.¹¹² After all, it was the Church that elevated the king to his royal station. Surely, the Church would argue from the mid-eleventh century onward, the anointer was superior to the anointed.¹¹³

Kings viewed the situation differently. First, for the most part their claim to the throne lay in tribal law—through blood ties with the ruling family or selection by the elders.¹¹⁴ Second, they had the physical power to rule their world, Church agreement notwithstanding. Finally, a point of simple logic: If the king possesses sanctified powers, as argued by the Church itself, how could this power possibly be limited to secular matters only? Surely, the king has authority over the Church and all of its interests.

The New Testament specifically provided ample theological sanction to the doctrine that the divinely sanctioned king “can do no wrong.”¹¹⁵ Yet, similar to Judaic faith, the Church viewed the state as existing *for the purpose* of transforming ethical rightness into binding positive law. Hence, the true ruler can be recognized only by his fitness to fulfill the divine mission of the state and rule according to the law.¹¹⁶ The Church's prime concern—whether

election and blood-right. See S.B. Chrimes, *Introduction* to FRITZ KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* xviii–xix; KERN, *supra*, at 7–11, 34; 2 FINER, *supra* note 29, at 861–62.

110. See KERN, *supra* note 109, at 26–27.

111. See Chrimes, *supra* note 109, at xix.

112. *Id.*

113. See 2 FINER, *supra* note 29, at 884–85.

114. Cf. KERN, *supra* note 109, at 27–28 & n.15, 33–34, 50 (explaining legitimacy on the basis of kin-rights, election, and Church consecration).

115. MORRIS ADLER, *THE WORLD OF THE TALMUD* 136 (2d ed. 1963) (“*The Powers that be Are Ordained of God*’ (Romans 13.1 ff.)”). The idea is “repeated many times in the New Testament (Titus 3.1; I Peter 2.13 ff.; Matthew 22.21).” *Id.* Judaic law provides kings with extensive powers, but the general view is that the king is *not* above the law; like all men, he is subject to the law and “‘must not stray from the commandment, to the right or left’ (Deuteronomy 17.15 ff.)” *Id.*

116. The Church, in approving a ruler, was thus less concerned with his legitimacy than his suitability, that is, in his possession of both “the goodwill and the power to put God’s law into practice.” See KERN, *supra* note 109, at 28–34. This explains the Church’s objection to the right of minors and illegitimate children to the throne. *Id.* at 29. Next to the baptismal vows, it became the first requirement in a ruler’s eligibility for the throne. *Id.* at 29, 33. Early in Christian Rome, from the tenth century, birth in wedlock became the second canonical requirement of kingship. *Id.* at 28–34. For the theory and its application to how theocratic principles often defeated the secular right of the mediaeval ruler to the throne, see *id.* At the height of papal theocracy, in the twelfth through thirteenth centuries, it was even alleged that a prince’s descent from a dynasty hostile to the Church was sufficient to destroy his eligibility to the throne. See

political or religiously mandated—was that kings be subject to some form of legal code of restriction, and if not the one legislated by humans, then the law variously termed natural law, faith or conscience, or a legal and moral check on royal behavior authoritatively interpreted by God’s emissaries on Earth.¹¹⁷ The revival of Roman law in the eleventh and twelfth centuries only reinvigorated this argument.

Ecclesiastical law thus provided ammunition for those who would limit royal power by identifying moral and legal limitations on the authority of temporal rulers.¹¹⁸ If kings could be accountable to popes, why could they not be accountable to other institutions as well?

b. Roman law

After the fall of Rome in 476 A.D.,¹¹⁹ the Catholic Church enjoyed a virtual monopoly over culture and literacy in western Europe and served as perhaps the single tie to Europe’s civilized, unitary past. In Constantinople, the eastern Roman Empire, Emperor Justinian produced in the 530s A.D. the *Coprus iuris civilis*, the great compilation of Roman law.¹²⁰ However, it had only limited influence for many centuries.¹²¹ During the early Middle Ages, no serious study or development of the Justinian compilation was undertaken in the West. Knowledge of Roman law had mostly disintegrated into tribal memories as customary law.¹²² In England, a remote province even at the height of the Roman Empire, knowledge of civil law “seems to have been of a minimal and crude sort.”¹²³

All this began changing in the late eleventh century. The rediscovery of the Justinian Code around 1076 in Bologna came at a time of economic

WILLIAM A. CHANEY, *THE CULT OF KINGSHIP IN ANGLO-SAXON ENGLAND: THE TRANSITION FROM PAGANISM TO CHRISTIANITY* 24 (1970) (stating that in the eighth century the Church paralleled, in effect, the royal office with the priestly, into which only one born in wedlock could enter).

117. 2 FINER, *supra* note 29, at 861–63.

118. See ADLER, *supra* note 115, at 136.

119. This conventional date, suggested by Edward Gibbon, is when the Germanic Odoacer deposed the last emperor ruling from Rome. It marks the end of classical history of the beginning of the Middle Ages in European history. At the same time, the date 476 A.D. marks the final stage of a centuries long process during which Rome was weakening. See 3 EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 258 & n.125 (1845).

120. 1 R.H. HELMHOLZ, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S*, at 82 (2004).

121. In the eastern empire, the main obstacle was language: The code is written in Latin, while most people in the Byzantine empire over which Justinian ruled spoke Greek. *Id.* at 82–83. In the West, the collapse of Roman imperial institutions limited the impact of the code. *Id.*

122. *Id.* at 83.

123. *Id.*

awakening, political consolidation, and movement and discussion in Italy.¹²⁴ A new and more sophisticated law was required. This was, therefore, more than the revival of a neglected text—it was a revival of jurisprudence.¹²⁵ Moreover, the sentiment was widely shared: In the following years, universities where secular studies became possible were established all across Europe.¹²⁶ English ecclesiastics also studied law in Bologna in the twelfth century, and they brought their knowledge home, but their influence was limited because of an initial royal ban on the study of Roman law and the rejection of Roman law by the royal courts.¹²⁷

Study of Roman law brought about the reformulation and codification of canon law.¹²⁸ Roman law also armed the papacy with a political theory of Church supremacy. On the other hand, perhaps as early as the time of the Norman Conquest, canon law had lost some of its affinity for Roman law, and popes were beginning to question that part of Roman law that made the will of the secular emperor supreme.¹²⁹ Yet, the treasures of Roman law were extensive enough to allow imperial and royal Roman lawyers to produce opposing arguments.¹³⁰ “Roman law,” as Professor Haskins remarked, “was to prove a strong bulwark of absolutism”¹³¹ and would serve lawyers on both

124. See Haskins, *supra* note 97.

125. That is, a revival and extension of Roman system and Roman methods of thought. Historians no longer accept the legend of a miraculous discovery of the Digest. See *id.* at 194–98, 207.

126. The most significant development occurred in the lay school of the commune of Bologna, where pupils began to study Roman law. 2 FINER, *supra* note 29, at 860–61. The Church regarded this venture suspiciously, at first, but then realized its importance and began to sponsor the revival of the study of Roman law. *Id.*; Haskins, *supra* note 97, at 21–23, 193–222 (revival of culture in Italy; revival of Roman jurisprudence), 368–96 (the beginnings of universities).

127. So the study of Roman law “led to no career.” 1 POLLOCK & MAITLAND, *supra* note 32, at 122. Moreover, Roman law in England had no independent existence apart from canon law—indeed, their close association seems to have been the cause of its original disfavor with the English king; English common law was disadvantaged by not being taught at universities. See Haskins, *supra* note 97, at 210–12, 219–20; see also 1 POLLOCK & MAITLAND, *supra* note 32, at 117–25.

128. Commentators especially note Gratian’s synthesis of canon law in the mid-twelfth century. GORDON, *supra* note 31, at 116–17. One historian of late medieval political theory believes that Gratian “aimed at nothing less than establishing a basis for a Church-dominated society.” *Id.*

129. LOVELL, *supra* note 19, at 70 (“For a time the papacy actually forbade clerics to study Roman law, in spite of the canon law debt to the principles of Roman law.”).

130. See 2 FINER, *supra* note 29 at 861.

131. See Haskins, *supra* note 97, at 208; cf. 5 GIBBON, *supra* note 119, at 222 (“The recent discovery of the Pandects had renewed a science most favorable to despotism . . .”), available at <http://www.worldwideschool.org/library/books/hst/roman/TheDeclineandFallofTheRomanEmpire-5/Chap1.html>; see also KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200–1600:

camp—papal and imperial. The century between 1150 and 1250 was marked by a series of clashes between the papacy and the emperors, but now the issues at stake are more overtly political than those involved in the investiture contest, and the terms of engagement more legalistic.¹³²

Throughout the twelfth century, the popes attempted to establish that they were the overlords of the emperors, the latter being mere vassals of the papacy.¹³³ Some emperors were receptive to this idea.¹³⁴ Holy Roman Emperor Frederick Barbarossa (1152–1190), “vigorously resisted such pretensions by the popes.”¹³⁵ Barbarossa, whose empire was the most powerful state of twelfth-century Europe, became interested in Roman law.¹³⁶ “The first emperor to recognize the importance of Roman law and the jurists for shaping a theory of empire,” in justifying his rule, in serving the imperial administration, and in defining his powers, Barbarossa took interest in the law school of Bologna.¹³⁷ He called upon professors of law to participate in his government and awarded the law school in Bologna special privileges.¹³⁸ The Bolognese jurists, in turn, “busied themselves with twelfth-century imperial ideology,”¹³⁹ and proved Roman law amenable to claims of royal superiority.¹⁴⁰

Justinian’s *Corpus Juris* contains numerous statements appearing to support the doctrine that the emperor had absolute and unlimited power. In particular, two fragments from the Digest, both attributed to the great jurist Ulpian, are often cited as reflecting Roman law. The first is “*Princeps legibus*

SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 10–11 (1993) (analyzing Gibbon’s statement).

132. THE CRISIS, *supra* note 106, at 97. Professor Kenneth Pennington develops these themes in his seminal work. He perhaps overstates the case in suggesting that, “[i]n the twelfth century, the Roman and canon lawyers, the most important political theorists of the time, confronted an *uncharted terrain*: the relationship of the prince and the law. Gradually they mapped it . . .” PENNINGTON, *supra* note 131, at 2 (emphasis added); *see also* Charles J. Reid, Jr., “*Am I, by Law, the Lord of the World?*”: *How the Juristic Response to Frederick Barbarossa’s Curiosity Helped Shape Western Constitutionalism*, 92 MICH. L. REV. 1646 (1994) (book review). The debate did raise the level of intellectual debate and bring about extreme claims of supremacy.

133. THE CRISIS, *supra* note 106, at 99.

134. *Id.* at 99–100.

135. *Id.* at 100.

136. *See* PENNINGTON, *supra* note 131, at 9–10 (“[H]is court, his chancellors, his poets, and his jurists were the most sophisticated of their time.”); THE CRISIS, *supra* note 106, at 99–101.

137. *See* PENNINGTON, *supra* note 131, at 12–13.

138. *Id.* at 13.

139. *Id.* at 14; *see also* Haskins, *supra* note 97, 207–08 (explaining that Barbarossa was quick to use the arguments of ‘our Roman laws’).

140. “The emperor,” claimed the notary and chaplain for the court of Frederick Barbarossa, the greatest emperor of the twelfth century, “was the living law; he could grant, abrogate, and establish laws.” PENNINGTON, *supra* note 131, at 11.

solutus est,” meaning “The emperor is not bound by statute,”¹⁴¹ and the second is “*Quod principii placuit legis habet*,” meaning “What pleases the prince is law.”¹⁴²

The glossators, the interpreters of the Justinian Code after its rediscovery, read these phrases as meaning that the ruler of the land is not subject to any law. If an accurate interpretation, this could be attributed to the shortcomings of classical Roman law that is notoriously thin on public law and to the fact that it rose to its supreme heights—like the Empire itself—in the second and third centuries, which were times of absolutist imperial control and growing unrest.¹⁴³ Yet these views of Roman law never stood unopposed. In medieval jurisprudence the latter statement stood for an understanding of the law as the law of king, or the law of the kingdom, and this was contrasted with other views of the “law of the land.”¹⁴⁴ In its entirety, Ulpian’s second statement reads, “The will of the Emperor has the force of law, because by the passage of the *legis regia* the people transfers to him and vests in him all its own power and authority.”¹⁴⁵ This fragment can be linked to other sources in the digest that suggest that the people are the source of political authority, such as the maxim “*Quod omnes tangit ab omnibus approbetur*,” meaning “What touches all must be approved by all.”¹⁴⁶ Indeed, the maxim was cited in the royal writ by which King Edward I (1272-1307) summoned England’s first parliament in 1295.¹⁴⁷

Moreover, some of the glossators shied from an interpretation of Roman law as providing the emperor with absolute and unlimited power. Noted jurist Accursius (1182–1260) construed the code as meaning that there was no superior magistrate who could force the prince to respect the laws and customs of the community, but he was still “internally” bound by conscience and

141. DIG. 1.3.3 (Ulpian, *Ad Legum Iuliam Papiam* 13); GORDON, *supra* note 31, at 117.

142. DIG. 1.4.1 (Ulpian, *Libro Primo Institutionum*); GORDON, *supra* note 31, at 117.

143. For an overview of Roman law and classical jurisprudence, see PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 12–22 (1999).

144. Jeremy Waldron, *Legislation by Assembly*, 46 *LOY. L. REV.* 507, 517 (2000). Medieval jurists referred to that concept of “law” “as something held in common among the more important inhabitants of the land, law as something that structured and articulated the relations of relatively independent centers of power and authority on the ground.” *Id.*

145. Johan D. van der Vyver, *State-Sponsored Proselytization: A South African Experience*, 14 *EMORY INT’L. L. REV.* 779, 779 & n.1 (2000).

146. GORDON, *supra* note 31, at 117. The question, in Roman law, whether the people have permanently ceded their political authority to the prince predates similar, and perhaps presently more familiar, debates in seventeenth-century scholarship. The point, however, is that the question was under contention. *See id.* at 117–18.

147. *Id.* at 118 (“It also played an important role in the development of the movement, within the church, to increase the power of the general councils vis-à-vis the papacy.”). *See also* BRIAN TIERNEY, *ORIGINS OF PAPAL INFALLIBILITY 1150–1350* (1972).

recognition of the divine origin of all law.¹⁴⁸ Modern commentators have been more critical. One legal historian has argued that the glossators had perverted a doctrine of classical constitutional law that merely exempted the emperor from the observance of certain legal rules into a general principle of irresponsible absolutism.¹⁴⁹

Finally, it is interesting to note that the question whether the king is “the lord of the world” troubled jurists schooled in Roman law particularly in the context of private property, which some believed was beyond the purview of the royal powers because the origins of private rights were derived from natural law.¹⁵⁰

Roman law, as understood by medieval scholars, thus tended, albeit equivocally, towards absolutism. It was less clear about precisely whose power was absolute, but it was not supportive of claims for governmental accountability.

148. See GORDON, *supra* note 31, at 117 & n.4.

149. Esmein suggested that French constitutional lawyers of the sixteenth century struggled against this doctrine, yet its acceptance allowed for various abuses in French public life. See A. ESMEIN, *La Maxime Princeps Legibus Solutus Est Dans L'ancien Droit Public Français*, in *ESSAYS IN LEGAL HISTORY* 201 (Paul Vinogradoff ed., 1913). The English experience has been, of course, different, and, as Tierney put it—“Esmein accordingly took advantage of the occasion [an address to an international conference in London] to congratulate his English hosts on having escaped the glossators’ baneful influence.” Brian Tierney, “*The Prince Is Not Bound by the Laws.*” *Accursius and the Origins of the Modern State*, 5 *COMP. STUD. SOC’Y & HIST.* 378, 378 (1963). For a comprehensive study of Ulpian (193–235 A.D.) and his legal scholarship, see TONY HONORÉ, *ULPIAN: PIONEER OF HUMAN RIGHTS* 76 (2d ed. 2002) (stating Ulpian’s work was rooted in his ideology that was cosmopolitan and egalitarian). The term “glossators” refers to the group of schoolmen who annotated law books, mostly Roman and Canon, with brief marginal notes. They flourished chiefly in twelfth-century Italy. See, e.g., <http://www.ku.edu/~medieval/melcher/20000301/msg00351.html>.

150. See PENNINGTON, *supra* note 131, at 24; Reid, *supra* note 132, at 1650–51. To round up, the point observes: *first*, that since “the American Revolution was [waged mostly] against perceived abuses of public power (the British government and colonial authorities).” Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 *ME. L. REV.* 21, 23 (1997). The U.S. Constitution provides for the taking of private property by the government provided it is needed for public use and just compensation is paid. U.S. CONST. amend. V. *Second*, that “the French Revolution [of 1789] was directed primarily against private oppression (the remnants of the feudal system and the power and privileges of the Church and aristocracy) and the judicial class that was its bulwark.” Rogoff, *supra*, at 23. *Third*, it is interesting to note that under Islamic law everything is God’s property, and God has deliberately created the disparities in the distribution of goods in this world. Hence, no one may claim more than he has earned. The results are most significant. Property rights are sacred; theft is an interference with the divine plan and is punished very severely. At the same time, God urges people to do charity, and some trade practices such as usury are forbidden. FRANK E. VOGEL & SAMUEL L. HAYES, III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN* 53–69 (1998).

3. Customary and Feudal Law: King and Tribe

Against this backdrop of Roman, and to a lesser extent ecclesiastical, authoritarian legal doctrine, it is important to note the influence in medieval Europe of customary and feudal law, which provided considerably less succor to defenders of royal absolutism. These sources of law could hardly be called “democratic,” but they envisioned some degree of accommodation between kings and other actors and thus contained the seeds from which principles of royal accountability could grow.¹⁵¹

a. Tribal-Traditional-Customary law:

“Law, of course, there always existed, even in the darkest of the so-called Dark Ages.”¹⁵² For more than five centuries, the great tradition of learned law in Europe was reduced to local folk memories and some preservation in the high forts of the Church.¹⁵³ Yet even in this long period, from the fall of Rome to the rediscovery of Roman law, the so called “Dark Ages,” the tribes that occupied western Europe developed some form of law, which is known as tribal or traditional law or customary law, and formed a third layer in pre-medieval European legal consciousness.¹⁵⁴ This customary law largely disappeared on the continent following the re-emergence of Roman law. However, it had a more lasting influence in England, where Roman law never took firm hold.

While every tribe had its own laws, the legal orders that they developed from the sixth to the tenth centuries were remarkably similar, based on kinship and trust within tribal households.¹⁵⁵ At the peak of their sophistication in this period, the tribes converted their customs into the so called “barbarian codes,” compilations of tribal laws produced across western Europe during the second half of the first millennium.¹⁵⁶ The codes were written and administered by jurisprudential laymen and had no claims of universal applicability—merely of provincial validity.¹⁵⁷ In private law, the codes took their influence from

151. ERNST H. KANTOROWICZ, *Kingship Under the Impact of Scientific Jurisprudence*, in *SELECTED STUDIES* 151, 151 (1965).

152. *Id.* “Indeed, at no time in their history did the peoples of Western Europe lack a legal order.” BERMAN, *supra* note 95, at 49. “The early centuries of the Middle Ages had plenty of law . . .” Haskins, *supra* note 97, at 194.

153. The closer the territory to Rome, the greater the retention of Roman laws in customs. England, of course, was a far outpost even at the height of the Roman Empire. *See* Haskins, *supra* note 97, at 195–96.

154. BERMAN, *supra* note 95, at 52.

155. *See id.*

156. *See id.* at 53.

157. Among the most famous are the Doms of the Anglo-Saxon kings, the Lombard edicts, the Visigoths law collections, and the *Capitularia* of the Carolingians. KANTOROWICZ, *supra* note 151, at 151; Jeremy D. Weinstein, Note, *Adultery, Law and the State: A History*, 38

Roman law (to the extent that it remained in memory and local customs).¹⁵⁸ In public law, the influences of tribal customs and church doctrine are much more prominent. It is particularly worthwhile to look at the traditions of the Germanic tribes of Europe because of these tribes' dominance in Europe and because the unbroken continuity of English constitutional history would begin with the Anglo-Saxons, rural Germanic tribes that came from central and western Germany.¹⁵⁹ When we look at Germanic customs and codes, we can make several observations pertinent to the role of the king in society.

The first concerns the political status of the king in the tribe. The social organization of Germanic tribes was probably a primordial form of kingship. Germanic law was acutely aware of the centrality of its own local leadership, the leader/king and a council of elders around him.¹⁶⁰ "Primitive" states were essentially families, and their original bond of union was real or feigned blood relationship.¹⁶¹ By the sixth century, tribal leaders considered themselves not just tribal chiefs, but *kings*.¹⁶² Yet Germanic kings were not all that powerful.¹⁶³ Moreover, they customarily owed their position to an act of the community or its representatives,¹⁶⁴ the crown being, very often, elective and not fully hereditary.¹⁶⁵ That said, in most cases, kin-right was undeniably supported by the vastly superior power and wealth of the royal house, and by considerations of political expediency, counseling against a purely elective

HASTINGS L.J. 195, 207–10 (1986); Haskins, *supra* note 97, at 195–96; *see also* Henry Mather, *The Medieval Revival of Roman Law: Implications for Contemporary Legal Education*, 41 CATH. LAW. 323 (2002).

158. *See* BERMAN, *supra* note 95, at 53.

159. "Few if any traces of the old Celtic Society survived their invasions, and the 350 years of Roman occupation failed to introduce into England any forms of government or law strong enough to withstand the impact of Anglo-Saxons in the fourth and fifth centuries." LOVELL, *supra* note 19, at 3. *See also* J.E.A. JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND: FROM THE ENGLISH SETTLEMENT TO 1485* (1937).

160. BERMAN, *supra* note 95, at 52.

161. *See* WOODROW WILSON, *THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS* 3–5, 7 (1892). It is only in modern times that one can state, that as a form of polity, the tribe was an "evolutionary dead end." Patricia Crone, *The Tribe and the State*, in *STATES IN HISTORY* 67 (John A. Hall ed., 1986); *see also* 1 FINER, *supra* note 29, at 2.

162. On the transformation of migratory tribal chief to kings, *see* WILSON, *supra* note 161, at 154–55.

163. The Germanic king was far from an autocrat; his powers were neither unlimited nor arbitrary. *See* CHANEY, *supra* note 116, at 7–10, 14–15, 28–33; KERN, *supra* note 109, at 9, 14, 25.

164. Thus, in principle, he was never established only by divine right or grace, but always also by the people. *See* KERN, *supra* note 109, at 12, 60. *Cf.* BERMAN, *supra* note 95, at 62–67 (Christianity appealed to Germanic tribes as it supported tribal kingship).

165. *See* KERN, *supra* note 109, at 12.

monarchy.¹⁶⁶ By the fourteenth century, the old Germanic elective idea had sunk into insignificance as the hereditary principles rose to prominence.¹⁶⁷

The second observation concerns the social function of the king in tribal settings. Kings provided tribal society with an integrating principle. As Professor Berman explained, “in Europe, until the latter part of the eleventh century, the basic contours of the folklaw remained tribal and local, with some feudal elements. The kinship bond continued to provide the primary definition and the primary guarantee of a person’s legal status.”¹⁶⁸ “Where the kingship was powerful, a coherent political system emerged,” such as in England, Sicily, and France.¹⁶⁹ “Where it was weak, the *regnum* dissolved into a congeries of petty principalities, free cities, and even city republics: such was the fate of ‘Germany’ and Italy.”¹⁷⁰ England’s history as a nation state owes much to its heritage of powerful centralized kingship.

The third, and most critical, observation concerns the relationship between the king and the law. Looking at tribal codes, we find notions that seem remarkably like “the rule of law” over the Crown: The king did not have the legal power to do “wrong.” This is the impression we get from looking at one of the most evolved codes, the seventh-century Visigothic Code. It blends local traditions of that Indo-Germanic tribe that settled in southern France and Spain, with Roman law and fierce Roman Catholic faith. The Visigoth Crown, long elective and unsuccessfully attempted to be made hereditary, was first bestowed by the votes of the entire people but then became dependent upon the choice of the clergy.¹⁷¹ The Code contains a rule stating that “The Royal Power, as well as the Entire Body of the People, should be Subject to the Majesty of the Law,”¹⁷² even when another section clearly states that “The Business of the King shall First be Considered, then that of the People.”¹⁷³

In the tribal law setting, the leader was mostly unable to make serious claims to unlimited power or political superiority, as would the Holy Roman Emperor or the pope in the early Middle Ages. The tribal king seems more like a “first among equals” than an absolute monarch.

166. KERN, *supra* note 109, at 14–15. But this does not entirely explain the strength of the belief in such notions as royal magic, royal blood, and the exalted character of the ruling line. *Id.*

167. *See id.* at 25–26. For in early medieval times, the ruler, as heir of the family, received his mandate from God and, as an elected prince, also received it from the community. *Id.* Yet, as Chaney points out, “the tribal election of the sacral ruler was not a ‘democratic’ institution, as nineteenth-century constitutional historians” portrayed it. CHANEY, *supra* note 116, at 16–17.

168. BERMAN, *supra* note 95, at 68.

169. 2 FINER, *supra* note 29, at 896.

170. *Id.*

171. *See* THE VISIGOTHIC CODE: FORUM JUDICUM (S.P. Scott trans. & ed., 1910); *see also Bibliography of the Visigothic Laws and their Context*, at <http://www.nipissingu.ca/departement/history/muhlberger/orb/vglaws.htm> (last updated Jan. 18, 2001).

172. THE VISIGOTHIC CODE, *supra* note 171, at 12.

173. *Id.* at 13.

b. Feudal Law

Feudalism was the basis for the social and economic structure of early medieval Europe. By this time, the tribes were well-settled in their territories, land ownership was the determinant of social order, and agriculture was the basis of the economy. Feudalism provided a mechanism for financing the government. It is important to understand that Feudalism was a two-way agreement under which the feudal overlord granted rights in return for food, military service, or religious support.¹⁷⁴ The vassal was required to swear obedience and loyalty to the lord, in return for obligations of protection of maintenance. This mutual contract was binding for life and renewed generation after generation; neither side could change or vary it in any way.¹⁷⁵ Both parties could denounce and terminate the relationship if they felt the other failed to keep his end of the deal, but although “*defiance* and *divestment* were a matter of legal right, it [could] (and often did) take military power to enforce the right.”¹⁷⁶ Remedies were available in feudal courts in case of infringed feudal contracts between overlord and vassal.¹⁷⁷ In England, this meant that the great barons were at a disadvantage in any dispute with the king because no court in the land was available in which they could bring their contentions against the king’s behavior.¹⁷⁸ Although there was a time when both the king of France and the pope were the feudal overlords of the English king and could provide remedy for his feudal wrongs, for the most part the barons were without recourse against the king.¹⁷⁹ This state of affairs brought about, in part, the Magna Carta in 1215, as described in detail below.

The explanations for the emergence of feudalism are varied. Feudalism compensated for the fragmentation of political authority, the absence of centralized administration, low literacy rates, and extremely limited bureaucratic resources—all assets that the Roman Empire had that allowed it to rule directly over large territories. Feudalism thus reduced kingship to the simple role of overlordship. The king was not an absolute monarch, having “had no immediate subjects except the greater barons and the vassals on his own baronial estates.”¹⁸⁰ Only in his own personal estates did the king

174. *See Id.*

175. LOVELL, *supra* note 19, at 53.

176. 2 FINER, *supra* note 29, at 866. In addition, the economy was not money-based at that time; feudalism was also favored because it made use of ingrained customs of the Germanic peoples. *See* WILSON, *supra* note 161, at 156–57; LOVELL, *supra* note 19, at 53; *see also* LYON, *supra* note 36, at 128–29, 133 (describing a method “of obtaining service from land rather than from money”).

177. 2 FINER, *supra* note 29, at 865.

178. *See* discussion *infra* notes 266–77 and accompanying text.

179. *Id.*

180. “And the greater barons were obedient only when he had armed power sufficient to compel them to obey.” WILSON, *supra* note 161, at 158–59.

exercise direct rule in such secular matters as defense, law and order, taxation, justice, and general regulation of the community through his own appointed and revocable agents.¹⁸¹ In due course, England and Sicily would become notable exceptions to this state of affairs, as they developed particularly strong kingships.¹⁸²

The extent to which England was prepared for an onslaught of feudalism in 1066 is a fascinating, if very academic, question.¹⁸³ What is clear is that the Normans established a feudal system in England,¹⁸⁴ that English feudalism was different from its European counterpart, and the system was never absorbed into English law in its entirety.¹⁸⁵ Perhaps this was because continental feudalism was generated more directly by *territorial* connections independent of leadership and following, while in England the polity was based on personal allegiance and relations of the leader with the great barons.¹⁸⁶

Feudalism, as it developed in England, had various features that were vital to the development of the English constitution, paving the road to the accountable government. The first critical feature is the idea that the feudal relationship, while unequal, was a contract. It required some form of consent to participate and provided a two-sided relationship. This promised a measure of fairness because both sides enjoyed some rights and were subject to some obligations and neither was allowed to change the contract.¹⁸⁷

181. 2 FINER, *supra* note 29, at 865.

182. *Id.* at 896. Elsewhere matters lay in the hands of territorial magnates and others down the feudal chain could only be reached through *their* immediate masters. Feudalism, in its essence, was a system of personal obedience and subordination, founded on land-ownership, not of general obedience to a common law. *Id.* at 865.

183. The question is whether feudalism was a foreign system imposed in England or whether England was approaching a feudal system on its own. There is disagreement on this as a matter of constitutional history and as a measure of the strength and continuity of the Anglo-Saxon communal traditions in the face of the Norman invasions. See LOVELL, *supra* note 19, at 16–17, 19–21, 25–35, 52–53 (discussing feudalism as foreign imposition); LYON, *supra* note 36, at 138 (claiming Normans adopted and evolved the Anglo-Saxon kingship); CHANEY, *supra* note 116, at 7; JOLLIFFE, *supra* note 159, at 51, 56–57, 78–79, 99–100 (taking a middle ground position). Modern researchers increasingly discount the “long-accepted assumption that the land tenure system was imposed by the Normans,” suggesting that most of the “basic elements” of this were already in place at the time of the conquest. Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439, 1442 n.7 (1994).

184. Cf. LOVELL, *supra* note 19, at 52–53.

185. Feudalism had a most enduring effect over land law, but many feudal rules, such as taxation and much of the administration of justice, were rejected by English law. See A COURSE OF LECTURES, *supra* note 64, at 154–55, 161–64.

186. See WILSON, *supra* note 161, at 149, 156–57; 1 STUBBS, *supra* note 40, at 273–80; LYON, *supra* note 36, at 136–37. “Speaking generally then, . . . ideal feudalism . . . pretty completely realized in France . . . was never realized in England.” A COURSE OF LECTURES, *supra* note 64, at 163.

187. See 2 FINER, *supra* note 29, at 866.

The second feature concerns remedies for infractions. There were, at least in theory, some remedies available for infringements of a feudal contract in feudal courts.¹⁸⁸ Providing a court for the settlement of legal disputes was part of the feudal obligation of an overlord to the people under his protectorate. The overlord, however, was not subject to suit in his own courts.¹⁸⁹ Under the feudal agreement, overlord and tenant agreed that a remedy should only be sought in the court provided by the overlord's feudal master. The king, of course, generally had no feudal master.¹⁹⁰ This meant that persons holding directly of the king—specifically the barons—uniquely had no judicial recourse for claimed violations of the feudal contract, unless the king consented to a suit in his court.¹⁹¹ The barons thus had a strong incentive to seek out alternative mechanisms for addressing disputes with the king.

Third, the unique development of the English common law courts comes from the king's breach of the feudal structure. Royal courts started providing legal services to the entire population, which placed them in (largely successful) competition with the local seigniorial courts.¹⁹² By authorizing this extension of royal jurisdiction into baronial affairs, the king was violating feudal rules and enraging his vassals, mostly in an effort to increase his revenues. The perhaps unintended result, as royal courts became dominant, was the creation of a single law, common to the entire kingdom, and a direct jurisdictional link between the king and the general population.¹⁹³

Fourth, English government developed out of the household of the king, in his capacity as a feudal lord. This last feature requires some detailed discussion.

4. English Feudalism and the Personal Nature of the Crown

The development of English government demonstrates well the contribution of English feudalism and tribal-customary kingship to the evolution of the accountable government. The personal nature of the medieval English Crown is one feature of its history that seems particularly foreign to American legal thinkers. Of course, the whole notion of a monarch as head of government is anathema to American constitutionalism. American authors often note that the President of the United States is not a king. Unlike the English king, the President *can* do wrong and is accountable for his actions.¹⁹⁴

188. *See id.* at 870.

189. *See* Ludwik Ehrlich, *Proceedings Against the Crown (1216–1377)*, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 24 (Paul Vinogradoff ed., 1974).

190. *See id.*

191. *See* Ehrlich, *supra* note 189, at 23.

192. *See* 2 FINER, *supra* note 29, at 902–03.

193. *See id.*

194. “‘A government of laws and not of men’ was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be

The founding generation was particularly familiar with the eighteenth-century English kings, monarchs who shared power over government with Parliament. The medieval and personal origins of national government would surely have alarmed them; government administration began as part of the royal household and grew from the tribal and medieval powers of the king.¹⁹⁵ In the remainder of this section, I wish to explain why English government developed out of the king's estate and the essential results of this evolution.

The personal nature of the monarchy meant that the institutions of English government bureaucracy evolved out of the royal administration, initially developed for the specific purpose of maintaining the royal household.¹⁹⁶ By the end of Henry III's reign (1216–1272) there was already an administrative machine in operation.¹⁹⁷ The entire administration was under the control of the crown. It was for the king to appoint, pay, discipline, and dismiss.¹⁹⁸ The struggle to limit the royal power—described in more detail below—essentially meant that the barons wanted to have greater say in the appointment of officers as they began to see that king and government were not necessarily one and the same thing.¹⁹⁹

Nevertheless, in the thirteenth century, the personal and the official capacities of the crown were yet undivided and were both vested in the royal person.²⁰⁰ The reason for this lies in the feudal nature of early medieval kingship. On the one hand, the English kings were already by far the most powerful actors in the territory, and they would later use their power to break feudal restrictions and form the national kingship, at the helm of a central government. On the other hand, the medieval English king was considered

challenged by an appeal to law, as finally pronounced by this Court.” *United States v. United Mine Workers of America*, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring).

195. See 2 *FINER*, *supra* note 29, at 899–900.

196. See *LYON*, *supra* note 36, at 254–56.

197. Ehrlich, *supra* note 189, at 19–20.

198. See *id.*

199. See Gaillard Lapsley, *Some Recent Advances in English Constitutional History (before 1485)*, 5 *CAMBRIDGE HIST. J.* 119 (1936); see also JAMES CONWAY DAVIES, *THE BARONIAL OPPOSITION TO EDWARD II: ITS CHARACTER AND POLICY: A STUDY IN ADMINISTRATIVE HISTORY* (1967). Interestingly, the coronation oaths of both Henry III and Edward I, probably contained a “non-alienation clause” by which the king swore not to alienate the rights of the Crown and to revoke what had been alienated, this not being part of the standard oath. ERNST H. KANTOROWICZ, *Inalienability: A Note on Canonical Practice and the English Coronation Oath in the Thirteenth Century*, in *SELECTED STUDIES*, *supra* note 152, at 138, 138–39 (1965).

200. Indeed, the unique national role of the king was not fully developed and recognized for several centuries. By the thirteenth century, there was already the beginning of a “sense of an institutional, as contrasted with the personal, character of kingship.” Ehrlich, *supra* note 189, at 18.

“very like a feudal lord writ large,”²⁰¹ with vassals below him and overlords above.

Given the personal nature of government, the English expected the king to carry out his public duties as *protector regni* from his own pocket; the king had to bear the full cost of administering his territories, imposing his peace, and conducting measures of “public weal.”²⁰² There was initially no distinction between national and royal revenue; it was *all* the king’s pocket money, to spend or save as he pleased.²⁰³ By the end of Henry II’s reign, there was already a nascent distinction between public and private funds.²⁰⁴ These conventions were the source of great tension between king and Parliament in the following centuries as it became apparent that the king was no mere feudal nobleman but the head of an extensive government.²⁰⁵

Even as the Crown’s role expanded, English law disregarded the very public nature of the royal undertakings. The king was treated like any other nobleman who provided various services in his province.²⁰⁶ Like everyone else, the king was expected to “live of his own,” even if that meant financing the entire government.²⁰⁷ Fourteenth-century legislation repeatedly incorporated this principle.²⁰⁸ At the same time, the king’s public role was greater than that of any feudal baron, including his position as the “author of justice,” head of the legal system, supreme judge and lawgiver of the realm, and of course an active chief executive.²⁰⁹

201. 3 HOLDSWORTH, *supra* note 11, at 460. “His powers were the powers of other feudal lords magnified” and “[t]he organization of the average manor was the organization of the kingdom in little.” *Id.*; see also 1 POLLOCK & MAITLAND, *supra* note 32, at 512 (commenting on the “ordinariness” of royal powers).

202. No one was prepared to admit, even as late as the seventeenth century, that there might be expenses for the king in his public capacity beyond those of an ordinary lord. LOVELL, *supra* note 19, at 13, 248. See also 2 FINER, *supra* note 29, at 887; F.W. Maitland, *The Crown as Corporation*, 17 L. Q. Rev. 131, 132 (1901) [hereinafter *Corporation*].

203. A COURSE OF LECTURES, *supra* note 64, at 94. Only much later was there any “machinery for compelling the king to spend his money upon national objects.” *Id.*; 1 POLLOCK & MAITLAND, *supra* note 32, at 518 (stating that there was no line drawn between proprietary rights of the king as king from those which he has in his private capacity).

204. See Martin Loughlin, *The State, the Crown and the Law*, in *THE NATURE OF THE CROWN* 33, 51–52 (Maurice Sunkin & Sebastian Payne eds., 1999).

205. See LOVELL, *supra* note 19, at 174.

206. See RALPH V. TURNER, *THE KING AND HIS COURTS: THE ROLE OF JOHN AND HENRY III IN THE ADMINISTRATION OF JUSTICE 1199–1240*, at 235 (1968).

207. 2 STUBBS, *supra* note 40, at 543.

208. This principle originated in 1311 and has been described as “constantly recurring.” 2 STUBBS, *supra* note 40, at 543 & n.1.

209. TURNER, *supra* note 206, at 235. In addition, the king was also a private person with vast powers and resources. *Id.* In more florid terms:

The king was . . . the wielder of primæval quasi-priestly magic, the Lord’s anointed and the transmitter of the wonder-working blood royal, the tribal leader and protector in time

This situation was not the result of legal oversight or of keeping antiquated practices. It was the result of carefully considered policy by the English Parliament.²¹⁰ Control over taxation was a prime method to attain royal accountability. The reason was quite simple; while the king had considerable income,²¹¹ it was not unlimited, and the cost of the royal household—financing both private and public expenditure of the king—was very significant. The king could not really afford to impose his will on his barons without reliance on the goodwill of others, as he simply could not afford to keep an army big enough to quell all opposition.²¹² Moreover, the king needed the consent of his barons for any change in the terms of the feudal contract—that is, for an increase in his income.²¹³ At the same time, the king lacked the power to force the barons to consent to increases in taxes. In fact, it was generally true that “no medieval monarch was ever fiscally absolute. Indeed, precisely the reverse.”²¹⁴ By the eleventh century, it was already established that the king could not take the property of any freeman without his consent—or at least that of the magnates, who were generally assumed to speak for their inferiors.²¹⁵ The king could not impose taxes unilaterally; he had to ask the barons—later, Parliament—for any additional income.²¹⁶ The result was that English monarchs were constrained in terms of monies available to them, and their need of money to finance their government provided Parliament with a practical and efficient restraint on royal powers.

The personal nature of early English government had significant consequences. First, this phenomenon explains the very personal link between the king and the royal court system. These were, in every sense of the word, the king’s courts, staffed by *his* employees, operating at *his* expense.²¹⁷ These institutions fulfilled the king’s feudal obligations, even when the king used them as a vehicle to both enhance his revenues and replace feudalism with a

of war, the feudal overlord of all the land, the fountain of justice and of honour, the guardian of “the king’s peace”, the sovereign giver or declarer of the law, the bearer of the secular sword on behalf of [the] Holy Church, and . . . the main switch in an administrative machine that was later to be called the State.

CHRISTOPHER MORRIS, *POLITICAL THOUGHT IN ENGLAND: TYNDALE TO HOOKER* 12 (1953).

210. See LYON, *supra* note 36, at 550.

211. See 2 FINER, *supra* note 29, at 887; LOVELL, *supra* note 19, 54–59, 75–76, 83; LYON, *supra* note 36, at 129–30.

212. 2 FINER, *supra* note 29, at 887.

213. See *id.*

214. *Id.* “This is [the] central feature of the medieval kingship.” *Id.* (emphasis omitted).

215. *Id.*

216. By 1340, Parliament passed a statute that abolished extra-parliamentary taxation of every kind. For the history of the requirement of Parliamentary consent for taxation, see *id.* at 887; A COURSE OF LECTURES, *supra* note 64, at 92–94; LOVELL, *supra* note 19, at 13, 69–71, 75, 83–84, 100, 111, 249; LYON, *supra* note 36, at 118, 135; 2 STUBBS, *supra* note 40, at 544–49.

217. See 2 FINER, *supra* note 29, at 886–87.

central, national government.²¹⁸ This lends a deep logic to the notion that under feudal law, the king was not suable in his own court against his will.²¹⁹ The king was immune before his courts not because he was not under the law, but because royal courts were not a forum that could act against the king's interests. Any attempt to hold the king accountable before his own courts against his will was simply impractical. It was also legally unacceptable, for it would make the king the judge of his own case.²²⁰ It is true that medieval English kings used the royal courts well beyond the feudal constraints. Royal courts extended their jurisdiction to the entire country, challenging the feudal seigniorial courts, increasing the Crown's revenues and producing a law common to the entire kingdom—the common law.²²¹ At the same time, the feudal origins of the royal courts gave rise to the doctrine of sovereign immunity. The king could not be sued in his central courts of law, “for no feudal lord could be sued in his own court.”²²² Indeed, the Supreme Court of the United States has recognized that “[t]he [k]ing's immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the [k]ing could do no wrong.”²²³

Second, the personal monarchy had very serious shortcomings, and circumstances such as the minority of Henry III made these inadequacies abundantly clear. Because medieval English government operated as part of the king's personal business, the king's death or other legal incapacity had a destabilizing effect on English law and government.²²⁴ Upon the king's death, government administration ground to a halt as appointments expired.²²⁵ The king's death would bring about the dissolution of Parliament and adversely affect private law transactions requiring royal approval.²²⁶ Perhaps most problematically, criminal cases would expire. This was because in early medieval times the basis for royal courts' general jurisdiction was the need to maintain “the [k]ing's [p]eace,” referring to the peace of the actual royal

218. *See id.*

219. Given that the king could actually sit in judgments in his own courts, some sources suggested that the real objection was that of not having the king rule in a case to which he was a party.

220. And so, while the English king is the “fountain of justice” and is presumed—so the fiction goes—to be present in all his courts—“he cannot per[s]onally di[s]tribute ju[s]tice. His judges are the mirror by which the king's image is reflected.” 1 WILLIAM BLACKSTONE, COMMENTARIES *260.

221. *See generally* LYON, *supra* note 36, at 432–46.

222. 3 HOLDSWORTH, *supra* note 11, at 465. *See also* 1 POLLOCK & MAITLAND, *supra* note 32, at 516.

223. *Nevada v. Hall*, 440 U.S. 410, 415 (1979).

224. *See generally* SIR MAURICE AMOS, THE ENGLISH CONSTITUTION 90–96 (1930).

225. *See id.* at 94–95.

226. *See id.*

person.²²⁷ Continuity of legal acts would have been beneficial, but “[t]he medieval king was every inch a king, but just for this reason he was every inch a man You did not ascribe to him immortality . . . or such powers as no mortal can wield.”²²⁸ This explains, for example, why the Magna Carta, signed by King John, had to be repeatedly reissued and confirmed by later monarchs, as each had to make his own personal commitment to uphold the grants and promises contained in the document.²²⁹

The case of Henry III demonstrates another hazard of personal government, as the underage royal figurehead lost government powers to unaccountable ministers and Rome’s representative. During the minority, Henry III could not utilize the enormous powers that the English kingship wielded at his time. Others in his stead and under his banner and name used these powers. This was a matter of major legal concern, not merely an anecdote of history.²³⁰

As the powers of the national government grew, it became clear that it was both costly and dangerous for the kingdom to have the continued operation of the administration depend on the well-being of a single human being.²³¹ There

227. *Id.* at 94–96.

[T]he [k]ing’s death dissolved Parliament, his writs of summons having lost their virtue, the commissions of the judges and the appointments of Privy Councillors [sic] terminated, all judicial proceedings fell to the ground, and there was apparently at one time a prevalent opinion that charters granted to boroughs, and legislative proclamations (when the [k]ing still had power to make them) lost force at his death, and required to be renewed by his successor. The “King’s Peace” also came to an end, and, until it was proclaimed anew by the new Sovereign, it was said that “every man that could forthwith robbed another.”

Id. at 94–95.

228. *Corporation*, *supra* note 202, at 132.

229. Originally sealed in 1215, the document was reissued three times by John’s successor, Henry III, in 1216, 1217, and 1225, with some revisions and changes made to the charter’s contents. GEORGE BURTON ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 141–43 (1934). After the close of Henry’s minority, the charter ceased to be reissued but rather came to be confirmed; Henry III republished the charter in 1253 and reconfirmed it in 1265, and his successor Edward I affirmed the charter by statutes in 1267 and did so several more times. By the time of Edward III (k. 1326–1377), it became customary to confirm the charter at the opening of every Parliament. 1 POLLOCK & MAITLAND, *supra* note 32, at 15; MCKECHNIE, *supra* note 33, at 139, 157–59; LOVELL, *supra* note 19, at 118; SCHRAMM, *supra* note 44, at 202–03.

230. The time was one of grave national crisis, civil war, and foreign enemy presence in the land—“not a time for constitutional dissertations.” 1 POLLOCK & MAITLAND, *supra* note 32, at 15. *But cf.* 3 HOLDSWORTH, *supra* note 11, at 464 (“It was recognized in Henry III.’s reign that the king could be under age, and was entitled to the privileges of minority.”). Pollock & Maitland suggested that the coronation of “[a] child but nine years old” must have “put the old theory of the kingship to a severe strain,” in that it “showed that a king capable of ruling was no necessity; all that a king could do might be done by a regent and a council in the name of an infant.” 1 POLLOCK & MAITLAND, *supra* note 32, at 522.

231. *See generally* 1 POLLOCK & MAITLAND, *supra* note 32, at 518–22.

were various ways by which the king could be legally incapacitated—death, minority, or mental disturbance for example—and it was necessary to secure the continued operation of government in all these cases.²³²

This author explains in detail *infra* the main method used to achieve this result was the concept of “the king’s two bodies,” recognizing the crown’s dual legal capacities: the natural person of the king and the government of the kingdom. English jurists of the fifteenth and sixteenth centuries developed the concept of the “king’s two bodies” to explain why the king can never die and “the king is never a minor.”²³³ The American Founding Fathers were most likely familiar with these conventions of English law, well-established by the eighteenth century, as carefully described in Blackstone’s *Commentaries*.²³⁴

These changes, however, came much after the times of Henry III. In the thirteenth century, the minority presented very real hardships. During the eighteenth and nineteenth centuries, English law provided a more effective measure for controlling government ministers; the English cabinet became accountable to Parliament, that is to the nation, not the king.²³⁵ Modern English kingship has come full circle then, from the times of Henry III, because the monarch has no powers in matters of government, only a formal role as head of state.

Significantly, the hardship brought upon government during the minority of Henry III had some positive doctrinal results. Ministers’ unaccountability during the minority evolved into a system of significant and effective constraints on the royal administration.²³⁶ During the minority, acts taken under the name of the king were clearly those of his ministers.²³⁷ Hence, any mistakes and wrongdoings were clearly theirs.²³⁸ This factual situation allowed for a significant conceptual step forward; action taken on behalf of the Crown could be in error (and as we shall see, the king was not permitted to do wrong), and royal blunders could be ascribed to his ministers and would be under the nascent theory of ministerial responsibility.²³⁹

D. *The Legacy of Henry III: Lessons from Early Medieval England*

English jurists of the thirteenth century were familiar with at least four legal traditions from which they could draw ideas about the extent and limits of royal power. The scholastic Roman and Church law seemed to point to

232. See generally *id.* at 524–26.

233. 3 HOLDSWORTH, *supra* note 11, at 464.

234. See *infra* Part IV.D (on Blackstone’s *Commentaries* and their influence on the Founding Fathers).

235. See *infra* Part III.C.

236. See *infra* Part III.C.

237. *Id.*

238. *Id.*

239. See *id.*

theoretical extremes of authoritarianism. The more “grounded” Feudal and tribal traditions, however, recognized the reality that the medieval kings simply could not go it alone.²⁴⁰ Feudal law essentially limited the king’s jurisdiction to his personal possessions and the barons, his immediate vassals. Tribal traditions required some form of popular—i.e. baronial—support for royal decision making.²⁴¹ The reigns of King John and his minor son were patently unsuccessful in that they exposed the limitations of royal powers. In failing to maintain a firm hold over government, John and Henry established constitutional conventions that would make the English government increasingly accountable.²⁴² King John placed his seal on the Magna Carta, a baronial effort to force the king to acknowledge his feudal obligations under the prevailing law.²⁴³ It is during the minority of Henry III that we find the earliest English record of the maxim “that the king can do no wrong,” a statement of factual truth during the minority, as the king had no legal powers and could do neither good nor evil.²⁴⁴ From its humble beginning, the maxim grew “by degrees . . . until it became a cardinal principle of the [English] constitution.”²⁴⁵

III. MAKING THE KING ACCOUNTABLE

If one sets out to make a king in some way legally accountable for his actions, there are two methods for achieving this goal. First, one can make the powers of the king subject to direct legal limitations and enforce those limitations through review, preferably by an independent (court) system. Second, one can pry powers away from the king and vest them in other legal entities, which in turn are subject to some form of legal review and control.

There are foreshadows of both methods in the history of democratic evolution generally.²⁴⁶ English legal history pursued an especially complex strategy for controlling royal power. The processes that developed in the thirteenth and fourteenth century only came to fruition in the seventeenth

240. *See supra* Part II.C.3.a.

241. *See supra* notes 161–65 and accompanying text.

242. *See supra* Parts II.B.1–2.

243. *See supra* notes 63–64.

244. *See* 1 A. LAWRENCE LOWELL, *THE GOVERNMENT OF ENGLAND* 27 (1908).

245. *Id.*

246. The research of Brian Tierney suggests “that the canonists of the twelfth and thirteenth centuries developed sophisticated theories of rights . . . that had far reaching, if little noticed, influence on the development of western jurisprudence.” Reid, *supra* note 132, at 1661–62. These rights “needed protection from arbitrary deprivations[,]” which was fully available in the twelfth and thirteenth centuries; only when the pope grounded litigants’ rights in natural law could the claim be made that the sovereign is powerless to remove such rights. *See id.* *See* PENNINGTON, *supra* note 131, at 145, 147–60, 189–200; *see, e.g.,* GORDON, *supra* note 31 for more extensive treatment.

century, but they signify quite clearly the path that England would take towards democracy. The initial debates concerned whether the king was subordinate to law and whether legal limitations on the king were cognizable in royal courts. The final resolution, reached by the fifteenth century, was that the king is immune from suit in his own courts, though that resolution had more to do with feudal principles than with an ideology of royal absolutism. In addition, even after the principle that the sovereign is immune from suit was established, equitable remedies were mostly available. At the same time that English law recognized the king's direct immunity from suit, the king gradually lost the power to carry out the affairs of state in his own name, as ministers became the main actors of administration. Those ministers were not immune and could be subject to challenge in both court and Parliament. The maxim that "the king can do no wrong" played a central role in the development of this regime of ministerial accountability.

To understand this complex development, and to assess its significance for seventeenth and eighteenth century understandings of governmental accountability, we must turn once more to the formative thirteenth and fourteenth centuries.

A. *Origins of Medieval Sovereign Immunity*

It is stated . . . [t]hat until the time of Edward I the [k]ing might have been sued in all actions as a common person.²⁴⁷

Could the king of England, not a minor and in full control of royal powers, be sued in his own courts? The literature offers two contrasting views on this question.

One important view comes from the thirteenth-century English judge, clergyman, and scholar Henry Bracton.²⁴⁸ Bracton attempted to blend elements of Roman and common law in his treatise *The Laws and Customs of England*.²⁴⁹ The difficulty for this synthesis, as we have seen, was that the two

247. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 437 (1793) (Iredell, J., dissenting). Edward I (1239–1307) was the eldest son of Henry III; he was King of England from 1272–1307.

248. Henry Bracton, also known as Henry of Bratton or Bretton (Henricus de Brattona or Bractona), lived from 1210 to 1268. Harvard Law School Library, *Bracton Online*, at <http://hls.law.harvard.edu/bracton> (last reviewed April 2003) [hereinafter *Bractin Online*]. Biographic information is sketchy; it suggests that in part of his career Bracton was part of the king's immediate circle between 1248 and 1257. See 2 HOLDSWORTH, *supra* note 11, at 231–36. Bracton apparently heard pleas before the king himself, and his signature attests that he witnessed the signing of royal charters. *Id.*

249. In the original: *De Legibus Et Consuetudinibus Angliæ*. EDWARD S. CORWIN, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 & 365 (1928–1929), reprinted in EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 27 (1955). Maitland described this work as "the crown and flower of English jurisprudence." *Bracton Online*, *supra* note 248. The outstanding importance

were pulling in different directions. Also, like other medieval legal scholars working in England and on the Continent,²⁵⁰ Bracton had to find a way to deal with the legacy of Roman law's dictum "*Princeps Legibus Solutus Est*."²⁵¹ As a royal judge in the king's court he could reasonably and conveniently have incorporated into English law "Roman authorities, and hold the view that the common law was the king's law."²⁵² He could also have, as Holdsworth terms it, gone for "the older Teutonic traditions, adapt them to the new situation created by the grant of Magna Carta, and so strengthen the old idea that law is a rule of conduct independent of the king."²⁵³ Indeed, "[o]ne of the maxims of medieval English political theory was that the king was *under* the law."²⁵⁴

Bracton's starting point was the theory of the "two swords," dividing jurisdiction between two vicars of God: the pope, the spiritual ruler, and the king, the temporal ruler.²⁵⁵ These "divine rights" give the king "an exalted position but impl[y] clear duties: the king had only such powers as were conferred on him by the law; for it was the law that gave him his position."²⁵⁶ Bracton differed from predecessors and contemporaries in his positivistic concept of law that rests on "the common sanction of the body politic."²⁵⁷ "[T]he king is supreme in his realm" and cannot be held accountable in his courts except at his pleasure—yet "royal power should be exercised subject to the law . . . and . . . the law should be passed by the counsel and consent of the

of the work rests in the fact that for the first time it brought the rising common law into direct contact with Roman and medieval Continental ideas of a higher law. Holdsworth admitted that "[i]t is from Bracton that we get almost all our knowledge of this critical period in the history of our law." 2 HOLDSWORTH, *supra* note 11, at 231.

250. Bracton lived a generation after of Frederick II Barbarossa, who, legend has it, posed the question "Am I, by law, the lord of the world?" to his legal advisors while riding horseback with them. See discussion *supra* note 132 and accompanying text.

251. See *infra* Part II. Roman law influence on Bracton's writing is substantial. See 2 HOLDSWORTH, *supra* note 11, at 267–86; HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 79 (1864), available at <http://www.yale.edu/lawweb/avalon/econ/mainea04.htm> (suggesting that what Bracton presented "as a compendium of pure English law [was] a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris").

252. 2 HOLDSWORTH, *supra* note 11, at 252.

253. *Id.* at 253 (footnote omitted); see also Ehrlich, *supra* note 189, at 39 (discussing political pressures Bracton had to contend with).

254. TURNER, *supra* note 206, at 235 (emphasis added). The conception was at the heart of Magna Carta and was clearly expressed by Bracton. *Id.*

255. Ehrlich, *supra* note 189, at 40.

256. *Id.* This early theory of divine rights of kings is not quite that suggested in the seventeenth century and discussed below.

257. CORWIN, *supra* note 249, at 28. "It embraces various elements: customs (unwritten laws), decisions of prudent men, which in like cases should be treated as precedents—'[i]t is good occasion to proceed from like to like'—and finally the law made by the King in Council." *Id.*

‘the magnates’ after due deliberation and discussion.”²⁵⁸ The rationale is that only the almighty cannot err, and it is only *befitting* that the king should respect the law. Furthermore, the law gives the king his royal estate, and so he and his servants rule according to a law that binds all members of the kingdom, whether high or low.²⁵⁹

It is unclear to what extent Bracton’s model of royal accountability means that the king can be sued. It is possible to read Bracton, as has Professor Ehrlich, to say that “the king can do no wrong” means “the king must not, was not allowed, not entitled, to do wrong.”²⁶⁰ The problem then becomes one of remedy. Most scholars read Bracton as saying that it is not for the king’s courts to provide a remedy²⁶¹ and that, in the final analysis, the sole redress against tyranny is reliance on divine vengeance.²⁶²

Modern critics call Bracton’s work “scholastic and unworkable,”²⁶³ noting the seemingly self-contradictory concept of a kingship at once *above* and *below* the law,²⁶⁴ and the lack of clarity as to which authority can apply the checks on the king.²⁶⁵ Nonetheless, Bracton’s work is a landmark in English legal history and reflects the tension and ambivalence in thirteenth-century thought about royal accountability.

Ehrlich suggests that Bracton, even given his ambivalent understanding of royal amenability to suit, was “rather apt to err on the side of exaggerating the king’s exemption from human judgment.”²⁶⁶ Professor Ehrlich has argued that

258. 2 HOLDSWORTH, *supra* note 11, at 253 (footnote omitted). This clearly follows the Teutonic traditions. *Id.*

259. Significantly, “[t]he king’s servants did their work not merely as royal deputies depending solely on the king, but as the dispensers of a law which binds all within the realm—king and subject alike.” 2 HOLDSWORTH, *supra* note 11, at 254.

260. Ehrlich, *supra* note 189, at 42.

261. According to Bracton, “ordinary remedies are not available against royal injustice” in the royal courts. CORWIN, *supra* note 249, at 29. Moreover, if the king “orders an official to do wrong, the official can plead the royal order . . . and shares the royal immunity from jurisdiction.” *Id.* English law developed very differently in later centuries, as we shall see. “Bracton has, in brief, no idea of the modern concept of the ‘rule of law.’” *Id.*

262. *Id.* (“[T]hough doubtless this might operate through human agency.”).

263. ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* 143 (1957) (citation omitted).

264. The famous passage is translated as:

The [k]ing himself . . . ought not to be subject to man, but subject to God and to the law, for the law makes the [k]ing. Let the [k]ing then attribute to the law what the law attributes to him, namely, dominion and power, for there is no [k]ing where the will and not the law has dominion.

CORWIN, *supra* note 249, at 27; Loughlin, *supra* note 204, at 49 (calling this “paradoxical reasoning”).

265. See summary of critique. Loughlin, *supra* note 204, at 49–51 (providing a summary of modern critiques).

266. Ehrlich, *supra* note 189, at 9.

in thirteenth-century England the king was clearly *under* the law,²⁶⁷ even though the king clearly had special rights and prerogatives both as a feudal overlord and as the center of the nascent government.²⁶⁸ According to Ehrlich, the king's claims were, as a rule, judged according to law, and furthermore, "[t]he lawyers of the thirteenth century did not shrink from declaring that the king, either by himself or through his servants, had committed a wrong."²⁶⁹ At the same time, even Ehrlich suggests that the king could not be sued against his will for such wrongs and recognized that his broad view of the king's amenability to suit was decidedly temporary.²⁷⁰ Soon after the thirteenth century, even on Ehrlich's reckoning, English medieval law developed the idea that the king is not amenable to suit.²⁷¹ Yet he emphasizes that this development of royal immunity did not result from a strong reading of the maxim "that the king can do no wrong." English law at that time had no difficulty viewing the king as a potential wrongdoer.²⁷² Ehrlich traces the use of the maxim to the reign of Edward I and its initial legal meaning to be that the king was under the same obligation as his subjects to act lawfully.²⁷³ Holdsworth similarly explained that, to the authors who argued in the thirteenth to fifteenth centuries that law was a rule of conduct binding all members of the state including the king, this limitation was no diminution of the royal power. "It merely limited the king's power to do evil, and this was no limitation—an idea which is perhaps one of the roots of the later doctrine that the king can do no wrong."²⁷⁴ Thus, the immunity that even Ehrlich acknowledges was to develop shortly after the thirteenth century must have stemmed from some source other than a belief in royal infallibility. In the thirteenth and fourteenth centuries, "Englishmen . . . believed that their [k]ings

267. Ehrlich concludes that "[f]rom the study of the original documents of the time we derive an impression of a legality, real or pretended, pervading the whole system of relations between the king and his subjects." *Id.* at 12.

268. *Id.* at 18–19. Ehrlich concedes that royal powers were tremendous and that recovery against the king was carried out by the king's officials, hence, at his pleasure. *Id.*

269. *Id.* at 14 ("On the contrary, the wrong which we should consider the one most corresponding with a modern tort . . . punishment was inflicted in the case of ordinary persons, was recognized, in very many cases, as the king's act.").

270. On the contrary: Ehrlich identifies an early medieval concept that "where the king's interests were involved, recourse must be [made] to him"—in person—and that "made ordinary suits against the king impossible. But alongside of it, stood the principle that a wrong committed by the king or his servants remained a wrong." The king "would seldom openly defy a request for justice simply on the ground that he had the power to do what he pleased." *Id.* at 25–26.

271. *See id.* at 14.

272. *Id.*

273. Ehrlich, *supra* note 189, at 61–62, 139–40 (stating that "the king was no more allowed to do it, than a subject was allowed to commit a trespass or a felony").

274. 2 HOLDSWORTH, *supra* note 11, at 435.

could do, and often did, wrong.”²⁷⁵ Article Sixty-One of the Magna Carta, permitting the barons to take action to secure their rights is surely a crowning piece of evidence.²⁷⁶ As late as the fifteenth century, the council found it within its power to remonstrate the king for his wrongdoings.²⁷⁷

It is commonly understood that the king’s immunity from suit ultimately came instead from another basic doctrine governing the legal position of the crown—the notion that “as the apex of the feudal pyramid, the [k]ing could not be sued in his own courts.”²⁷⁸ As a seventeenth-century commentator put it— “[t]he [k]ing cannot be sued by [w]rit, for he cannot command himself.”²⁷⁹

It is difficult to draw firm conclusions about thirteenth-century law on these matters. There is some historical authority suggesting that until the reign of Edward, the king might have been sued in all actions as a common person.²⁸⁰ At the same time, many scholars doubt whether “even Saxon England was so democratic as to admit of the king’s being sued *in the same way* as a subject, but it is practically certain that there was always some legal remedy for injuries due to the act of the crown.”²⁸¹ Holdsworth calls these suggestions simply a fable;²⁸² Pollock & Maitland describe such ideas as “a pious legend of Westminster Hall.”²⁸³ It is more likely that what happened in fact was that a remedy—an effective and useful one—evolved in cases of claims against the Crown; this is the general cause of action called the petition

275. ROBERTS, *supra* note 14, at 4. *See also* 3 HOLDSWORTH, *supra* note 11, at 465.

276. *See* ROBERTS, *supra* note 14, at 4. For a time after Magna Carta, the barons were still contemplating forcibly correcting the king’s wrongs. A 1308 declaration suggests that “‘when the king cares not to remedy an error and remove that which is harmful for the [c]rown and obnoxious for the people,’ the error must be removed by coercion.” KANTOROWICZ, *supra* note 263, at 364–65; *Cf.* 3 HOLDSWORTH, *supra* note 11, at 465 & n.11.

277. 3 HOLDSWORTH, *supra* note 11, at 464–65 (referring to the reign of Henry VI; 1422–61; 1470–71).

278. Tom Cornford, *Legal Remedies Against the Crown and its Officers Before and After M*, in *THE NATURE OF THE CROWN*, *supra* note 204, at 233, 235.

279. JOHN COMYNS, *A DIGEST OF THE LAWS OF ENGLAND* 457 (London 1785). In contemporary words, “the courts, being the king’s own, could have no jurisdiction over him.” 12(1) HALSBURY’S LAWS OF ENGLAND, *Crown Proceedings and Crown Practice*, ¶101 (4th ed. Reissue 1998) [hereinafter HALSBURY’S LAWS OF ENGLAND].

280. 1 POLLOCK & MAITLAND, *supra* note 32, at 516. *Cf.* Ehrlich, *supra* note 189, at 60. Borchard strongly supports Ehrlich’s study, suggesting that the maxim “was misunderstood even by Blackstone and Coke.” Edwin M. Borchard, *Government Liability in Tort*, 34 *YALE L.J.* 1, 2 n.2 (1924).

281. Charles Chauncey Binney, *Origin and Development of Legal Recourse Against the Government in the United States*, 57 *U. PA. L. REV.* 372, 376 (1909).

282. 3 HOLDSWORTH, *supra* note 11, at 465 (refusing to believe “that there had been a time when the king was sued in his own courts like an ordinary person.”).

283. 1 POLLOCK & MAITLAND, *supra* note 32, at 516 & nn.4–6 (citing Bracton to the effect that writs do not run against the king).

of right, in which the king consented to have a case against the Crown heard in royal courts.²⁸⁴

Eminent British historian Holdsworth suggested that the maxim “that the king can do no wrong” was finally settled as shielding the king from personal liability only as late as 1485.²⁸⁵ It was admitted that there were certain acts, which the king could not do, but “if he did wrong, the subject would have no remedy.”²⁸⁶

So, could a thirteenth-century English king be sued? Perhaps. By the fifteenth century, however, the king was clearly unaccountable in his courts and action could only proceed against the Crown under royal permission.²⁸⁷ This was not the result of any theories of governmental infallibility, but rather a result of remedial considerations arising from the structure of the court system. But did these remedial considerations apply as well to suits against agents of the king? This raises the profound question of whether royal officers performing the king’s business were immune. The attempts of English law to answer that question form the next chapter in the unfolding saga of governmental accountability.

B. The Accountability of Royal Agents: Policy Considerations

If the king is immune from suit simply because of the conceptual structure of the feudal court system, there is no reason to think that the king’s agents should also be immune. They, after all, do not stand at the top of the feudal pyramid. However, once the king is granted a measure of immunity from suit, that immunity takes on, so to speak, a life of its own independent of its original rationale. Even if sovereign immunity originates solely in a procedural oddity of feudal law, there may be ripple effects from that immunity that reach beyond the person of the king. Thus, to determine whether royal agents should be accountable, English law had to address the nature of royal immunity and royal agency.

It made a great deal of difference whether English law viewed royal immunity as a personal attribute, attaching to the royal person alone, or as a characteristic of government, immunizing all people acting (legally) under an official capacity. We are today familiar with the latter view, but an argument in favor of the former was quite a plausible argument in medieval times. If one

284. And it became an almost automatic consent to suit because “it was admitted that the king, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects.” 9 HOLDSWORTH, *supra* note 11, at 8. For more detailed discussion of the petition of right, see Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739 (1999); for further elaboration of petitions against the king, see TURNER, *supra* note 206.

285. 3 HOLDSWORTH, *supra* note 11, at 465.

286. *Id.*

287. *See supra* notes 266–77 and accompanying text.

takes this “personal” view of immunity, it is relatively easy to justify immunity for agents who serve the king in a private or personal capacity, such as his chambermaid, his stable-keep, or his accountant. Those people are essentially extensions of the royal person. The practical problem in the early medieval period is that the king’s agents did not have tasks or functions that could clearly be defined as “governmental” rather than “personal.” Were the royal judges “governmental” or “personal?” On feudal principles, the line is not easy to draw. Government was, in essence, the personal business of the king, whose personal finances effectively paid for government.²⁸⁸

Once one begins to draw a distinction between the king’s person and his public functions, however, the legal world gets considerably messier. At that point, battles over the accountability of royal agents become battles for control over the operations of government. He who can control the agents, whether through political or legal means, effectively controls the state. The parties to these battles were well aware of these stakes.²⁸⁹

C. Royal Agents and Parliament

Starting in the thirteenth century, Parliament made various efforts to hold royal ministers accountable using the related doctrines of ministerial responsibility and impeachment. Admittedly, the efforts to transfer power from the king, marginalize his position in government and make ministers accountable to Parliament—possibly at the price of immunizing the royal person—proved successful only much later in time,²⁹⁰ yet the thirteenth-century antecedents are remarkable and noteworthy and proved useful when revived in the seventeenth and eighteenth centuries.

288. See *supra* note 217 and accompanying text.

289. They were also aware that if the principal enjoys immunity, attacks against the agent could wholly undermine that immunity. Legal action against royal agents could effectively *limit* the immunity to acts the king carries out *in person*. Royal actions carried out by agents may be subject to *review* by some forum (judicial, legislative or other) that would have the power to second-guess the policies the royal orders reflect. Royal discretion would come under scrutiny, which may not be acceptable. Potential suits against royal operatives might have a chilling effect, and the king may have difficulty obtaining the services of the most qualified individuals where they may be personally accountable. Royal agents held accountable are likely to pass on losses sustained to the king either by raising their fees or by asking for reimbursement. Royal immunity is thus undermined. Similar logic brought about the government contractor defense. Cf. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1987).

290. Ministerial accountability to Parliament became so well-entrenched that when the “administrative state” was created in nineteenth-century Britain, Parliament gave new powers to ministers—not to the Crown—to whom powers were normally given. This was “a vital constitutional safeguard, since the ministers had none of the immunities of the Crown.” William Wade, *The Crown, Ministers and Officials: Legal Status and Liability*, in *THE NATURE OF THE CROWN*, *supra* note 204, at 23, 26.

The term “ministerial responsibility” stands for two separate propositions. First, it represents the concept that ministers, as agents, are accountable to their principal. For the greater part of English history that master was the king. From the seventeenth century on, the liability shifted toward Parliament as the result of major struggles discussed below. Second, it reflects the doctrine of the “legal responsibility of every Minister for every act of the Crown in which he takes part.”²⁹¹ The origins for both of these distinct—but related—connotations of the term ministerial responsibility are traceable to the crisis of 1340–1341, discussed shortly.²⁹²

In its path to government accountability, English law used the maxim “that the king can do no wrong,” and to a lesser degree, the concept of “ministerial responsibility,” in a highly sophisticated way. The mechanism contained three essential principles: (1) the idea that the king cannot himself act in an official capacity but must always act through a servant, which would effectively limit the king’s immunity to his personal affairs; (2) “that a servant of the [k]ing should refuse to execute an unlawful command[,]” i.e., that the king “can do no wrong” because the king is not empowered to order a wrong; (3) “that a servant cannot plead the [k]ing’s command to justify his unlawful act”—if he carried out such act, he may be liable in law.²⁹³ The result was that for every government wrongdoing there existed, at least in principle, an accountable, i.e., non-immune, government official.²⁹⁴ “Together these three principles free the King from all legal responsibility for the acts of his government and place that responsibility on his ministers.”²⁹⁵ But at a hefty price, as history suggests, to royal authority.

291. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 321 (8th ed. 1920) (explaining the distinction between the two meanings of ministerial responsibility).

292. GAILLARD T. LAPSLEY, CROWN, COMMUNITY AND PARLIAMENT IN THE LATER MIDDLE AGES: STUDIES IN ENGLISH CONSTITUTIONAL HISTORY 262 (Helen M. Cam & Geoffrey Barraclough eds., 1951).

293. ROBERTS, *supra* note 14, at 4. The corollary of the maxim that “the king can do no wrong” in the thirteenth through the fifteenth centuries was “that the King’s servants could not rely on royal orders as a defence, even where they in fact acted on royal authority.” *In re M. 1* A.C. 377, 390 (H.L. 1994).

294. See R.K. GOOCH, THE GOVERNMENT OF ENGLAND 130 (1937). Assuming there was some forum available to plaintiffs, the historical answer is that the forum was to be the royal courts, but this depended on the strength of the constitutional principles and the impartiality of the judiciary. *Id.*

As a matter of fact, a beginning was made when the Common Law Courts asserted, as a corollary of royal immunity, that a minister could none the less not plead a command of the King as justification for his own wrongful act. The House of Commons possessed in the institution of *impeachment* an ultimate sanction for such ministerial accountability.

Id.

295. ROBERTS, *supra* note 14, at 4–5. Roberts believes this multifaceted understanding of the maxim was fully developed in the fifteenth century. *Id.* at 4. Other sources, as suggested below, trace its elements to earlier periods. See Edwin M. Borchard, *Governmental Responsibility in*

The strategy chosen was the targeting of individual officers of the Crown. The king could do no wrong—but his men could, and did. They could be sued in private law action for tort or breach of contract, impeached by Parliament, and held officially accountable through the doctrine of ministerial responsibility.²⁹⁶ Thus came about the new theory of ministerial responsibility, explained in terms of the maxim that “the king can do no wrong”—if the king is in error, “the guilt lies only with the Minister who ought to have enlightened him; and this minister, even if approved by the King, deserves the impeachment formerly reserved for traitors.”²⁹⁷

The tools of ministerial responsibility and impeachment vested in Parliament were designed to secure parliamentary control over the king’s ministers, mostly his prime agents, who did not enjoy such protection as the royal person. Parliament wanted to influence key appointments and have the power to impeach government officials. The latter, a judicial stratagem, secured that only legal orders of the king be obeyed because he had no power to make illegal orders (“the king can do no wrong”), and it would be illegal (beyond the powers, *ultra vires*) for his agents to carry them out. In an age before official immunity for executive branch personnel, “rogue” agents exceeding their legal powers could face personal liability.

The minority of Henry III was the starting point for these doctrines that shifted blame from the Crown and demanded accountability from royal ministers. During the minority and for some years afterwards, this blame-shifting clearly made sense: The high officers of the realm, not the king, were responsible for policy decisions.²⁹⁸ Later they came to be held to account simply because they were easier targets than the king, who enjoyed a comprehensive immunity.²⁹⁹ “No matter what the dictum, it now *was* the king who was doing wrong in [the barons’] eyes. Nevertheless, they persisted in the fiction that the fault lay with ‘evil’ and ‘foreign’ advisers.”³⁰⁰

The medieval doctrines were *clearly* efforts to undermine the Crown’s prerogative immunity. The personal nature of early English government meant ministers were part of the royal household, and their action was closely

Tort, VI, 36 YALE L.J. 1, 30–31 (1926) [hereinafter Borchard VI]. Having a liable agent is better than facing a fully immunized government. Borchard’s critique reminds us that prior to the fifteenth century, perhaps *both* king and advisors were held liable. *See id.*

296. In later times, further developments included review of administrative action by the judiciary. For this final stage, see EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY (1963).

297. MAUROIS, *supra* note 36, at 270 (discussing this point in the context of the 1620s impeachments).

298. LOVELL, *supra* note 19, at 121.

299. *Id.*

300. *Id.* at 122. This was a fiction the barons found useful in justifying their efforts to control the government, as they had grown accustomed to during the minority of Henry III. *Id.* at 121.

indicative of the king's wishes; any interference with ministerial action was tantamount to interference with royal policies, without directly attacking the royal person. On the flip side, ministers were accountable *only* to the king, and Parliament would try to advance the novel idea that the public administration was not merely part of the royal-feudal machinery and that royal officeholders had a duty to "the nation," not just to the king. Parliament attempted to alter ministers' loyalties, making them accountable to Parliament. All of this was part of the early constitutional struggles between Parliament and the king.

It is easy to expose the legal maxims utilized as the fictions that they are, or to note their Realpolitik implications. As one author explained, the maxim that "the king can do no wrong" does not mean that the king is "incapable of sinning," but rather it signifies the Realpolitik observation:

[B]ecause the king is the indispensable axis upon which the whole realm revolves, he cannot be punished for the acts of his government—not if the bed of justice and the defense of the realm are to be maintained. It is the king's ministers who will be punished for encroachments upon liberty . . . they can do wrong. So "the king can do no wrong" is a useful fiction—which does not mean that it is false.³⁰¹

Thomas Paine was essentially right in suggesting that the maxim that "the king can do no wrong" puts the monarch in the same league as people of limited legal capacity and passes the liability to the ministers.³⁰² Yet this was precisely the political intention for which this immunity was constructed. Similarly, the distinction between the Crown's immunity and its servants' liability is criticized as highly artificial—a legal fiction—"but in the [English] system of remedies, evolved as it was from feudal origins, it was indispensable for reconciling the immunity of the Crown with the rule of law."³⁰³

301. RUSSEL KIRK, *THE ROOTS OF AMERICAN ORDER* 403 (1974).

302. THOMAS PAINE, *RIGHTS OF MAN* 163 (Penguin Books 1969) (1794). Ministers, in turn, may be able to avoid responsibility for political actions through Parliament. Paine stated:

When it is laid down as a maxim, that *a King can do no wrong*, it places him in a state of similar security with that of idiots and persons insane, and responsibility is out of the question with respect to himself. It then descends upon the Minister, who shelters himself under a majority in Parliament, which, by places, pensions, and corruption, he can always command; and that majority justifies itself by the same authority with which it protects the Minister. In this rotatory motion, responsibility is thrown off from the parts, and from the whole.

Id.

303. Wade, *supra* note 290, at 26. A similar fiction exists in American law; the *Ex parte Young* doctrine makes it possible to maintain the semblance of state sovereign immunity and permits personal suits against state officials who act unconstitutionally. 209 U.S. 123, 159–60 (1908).

D. Ministerial Responsibility Comes of Age

McKechnie and many others describe the reign of Henry III as the starting point for the gradual rise in parliamentary influence over the appointment of the king's ministers.³⁰⁴ At the time of his majority, the common council of the realm made a new claim, that of "the right of nominating or confirming the nomination of the great officers of state, the justiciar, the chancellor, and the treasurer."³⁰⁵ One consequence was that the council became a "neutral ground," where the "conflicting interests of King and baronage might be discussed and compromised."³⁰⁶ Another more significant development was that "[t]he King's own ministers, backed by Parliament, became an adequate means of enforcing the constitutional restraints embodied in royal Charters. The problem was thus, for the time being, solved."³⁰⁷ The solution found before the close of the thirteenth century was "in the conception of a King ruling through responsible ministers and in harmony with a national Parliament."³⁰⁸ As the Bishop Stubbs summed up the point:

It is probable then that the events of Henry's minority had a considerable effect in creating the idea of limited monarchy, which almost immediately springs into existence. It is in all events not improbable that the constitutional doctrine that the king can do no wrong, and that his ministers are responsible to the nation, sprang up whilst the king was a child, and the choice of his ministers was actually determined by the national council.³⁰⁹

304. See MCKECHNIE, *supra* note 33, at 163. Lapsley notes how the early government administration—the royal household organization—was politically used first by high officials then by the king himself, resulting in the effective exclusion of magnates "from what they considered their due share in the control of administration and the determination of policy." Lapsley, *supra* note 201, at 139. This resulted in thirteenth-century baronial schemes and wars. *Id.* at 139–41.

305. 2 STUBBS, *supra* note 40, at 41. Stubbs offers: "In previous times, although new appointments would no doubt be announced in the meetings of the great council, there is no trace of such a claim." *Id.*

306. MCKECHNIE, *supra* note 33, at 163.

307. *Id.* This is what schemes such as the Magna Carta's chapter 61 failed to achieve. *Id.*

308. *Id.* McKechnie states: "The ultimate triumph of the principles underlying Magna Carta was assured not through any executive committee of rebellious barons, but through the constitutional machinery devised by Edward Plantagenet." *Id.* at 164.

309. 2 STUBBS, *supra* note 40, at 41. And things did not end with the power of appointment: Is not the power to vest accompanied by the power to divest? And so Parliament went on to acquire the powers of removal from office, i.e., the powers of impeachment, of which James Wilson had the following to say:

The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the constitution and the laws: every one should be secure while he observes them.

This description may well be too generous, and it was certainly not an irrevocable state of affairs. With the king regaining his powerful position, the barons were looking for a more permanent solution to the tough question of taming the king. How could the king's commitment to uphold the Magna Carta be certified? How could the barons turn royal promises into law, which both the king who made them and his successors would have to obey? The Magna Carta was a major achievement, but its enforcement mechanism was crude and extreme; further advances were made during the reign of subsequent kings through the fourteenth century, in several steps.³¹⁰ McKechnie credits Edward I with starting the constitution on this line of development.

Edward I (b. 1239, k. 1272–1307) followed the long reign of his father, Henry III (k. 1216–1272). The solution devised was quite ingenious: a doctrinal use of the king's elevated (and immune) legal position to distance him from the daily acts of government—in essence, purposefully creating an “agency problem,” in modern parlance, where it did not previously exist.³¹¹ Royal agents now carried out *all official action*, yet did not enjoy immunity; the barons (and later, Parliament) found them easier to influence and control than the king.³¹² The solution found was that the barons used the king's own administrative machinery and the king's own servants to control him.³¹³ As a tool of democracy, whether intended or not, the maxim would be “made to mean that the king in his own name can do nothing at all. For every wrong done by the executive, a minister may be punished.”³¹⁴

1 THE WORKS OF JAMES WILSON 425 (Robert Green McCloskey ed., 1967). He also notes that impeachments were known in Athens, among the ancient Germans, and in England. *Id.* It is about England that he makes the following comment, without citing any authorities:

Previous to [the separation of the two houses of Parliament], the national council was accustomed to inquire into the conduct of the different executive officers, and to punish them for malversation in office, or what are called high misdemeanors. The king himself was not exempted from such inquiry and punishment: for it had not yet become a maxim—that the king can do no wrong.

Id. at 426. Cf. 1 FINER, *supra* note 29, at 346–47, 363–67 (1997) (discussing impeachments in ancient Rome).

310. See Lapsely, *supra* note 199, at 139 (explaining that the Magna Carta was a forerunner of future, periodic reforms).

311. See MCKENCHIE, *supra* note 33, at 475.

312. See *id.*

313. MCKECHNIE, *supra* note 33, at 475.

The principle was slowly established that the sovereign could perform no single act of prerogative except through the agency of a particular officer or organ of the royal household; while very gradually the doctrine of ministerial responsibility grew up, compelling each officer of the Crown to obey not only the law of the land, but also the *Commune Concilium*, fast changing into the modern Parliament.

Id.

314. Jesse Macy, *The English Crown as an Aid to Democracy*, 7 POL. SCI. Q. 483, 487 (1892) (reflecting the nineteenth-century understanding of English constitutional law).

At the center of Edward I's scheme was the "national king, achieving national ends, [with] the funds necessary . . . contributed by the nation."³¹⁵ The system of taxation that he devised for this purpose, and that was meant to fill the Exchequer while avoiding unnecessary friction with the taxpayers, involved broadening the basis of Parliament.³¹⁶ It was under his reforms that the feudal *Commune Concilium* of the Angevin kings, attended only by Crown tenants, matured into the "nobler ideal of a national Parliament containing representatives of every community and every class in England."³¹⁷ A third body, the permanent council, or inner royal council—the future Privy Council—now emerged as the link between the king and Parliament, allowing for the peaceful daily administration of the land.³¹⁸ "The king's personal advisers [now began] to have a recognized position as a distinct and organized body, of which the administrative officers, the judges, and other ministers of state and household form[ed] only a part."³¹⁹ "The council had long been increasing in power, in prestige, and in independence" and the minority of Henry III only quickened the process.³²⁰ McKechnie depicts this council as supported by the powerful Parliament, usually acting in alliance with the leaders of the baronial opposition, and recruited of Parliament's members.

When, in 1301, Parliament made a special demand for the removal of the treasurer—the precursor of impeachment—King Edward I firmly rejected any notion of ministerial responsibility to Parliament, stating "[t]hey might as well take his Kingdom as interfere with his choice of his servants."³²¹

Throughout the troubled reign of Edward II (b. 1284, k. 1307–1327, son of Edward I) "the problem of controlling the king pressed for a solution."³²²

Instead of the twenty-four barons of *Magna Carta* to compel the monarch to do right, there is the thoroughly established principle of the constitution that every royal act which can affect the rights of the citizen or the well-being of the nation must bear the name of a minister; it must be advised by a minister, and the minister is held responsible for the act. That ancient legal phrase, "the king can do no wrong," which had its origin with the notion that the king, being the source of law, was above the law, is now made to mean that the king in his own name can do nothing at all. For every wrong done by the executive, a minister may be punished.

Id. But cf. PAINE, *supra* note 302, at 163 (noting reservations on whether such accountability exists in fact).

315. MCKECHNIE, *supra* note 33, at 162.

316. *Id.*

317. *Id.* (noting that "[t]his implied no sudden dramatic change, but a long process of adjustment, under the guiding hand of Edward").

318. *Id.* at 163.

319. 2 STUBBS, *supra* note 40, at 40–41.

320. MCKECHNIE, *supra* note 33, at 163.

321. JAMES H. RAMSAY, *THE DAWN OF THE CONSTITUTION: OR, THE REIGNS OF HENRY III AND EDWARD I (A.D. 1216–1307)* 476 (1908).

322. Lapsley, *supra* note 199, at 141

As before, the opposition put administrative reforms in the first rank, but new tendencies [were] observable. The baronage began to show a definite political ambition, and from 1316 onward sought to realize it by securing a permanent position in the council, enlisting the support of representative parliaments and seeking to deprive the king of the control of the civil service which he exercised through the household.³²³

The central department of government, the Chancery, was itself “a pioneer in the development of government.”³²⁴ “From being simply the king’s secretariat, the chancery became also a great office of administration and a great court of equitable jurisdiction, working in both capacities without immediate contact with the king.”³²⁵ During the thirteenth century, the Chancery developed a system of written authorizations for departmental action; this almost completely displaced the prior system of informal verbal administrative commands, paving the way for the development of “clear notions of ministerial responsibility” and rise of a professional bureaucracy.³²⁶ The myriad services that the Chancery provided the public meant that it no longer could be physically at the king’s side.³²⁷ The combined effect of Chancery reforms and parliamentary efforts to control the executive—especially using statutes—was very significant. Many early statutes reflect Parliament’s displeasure with royal action and policies; others attempt to restrain illegal practices on the part of royal officers.³²⁸ The effect of such statutes was limited until later times, but the statutes did bring about “the common law principle that executive officers who act beyond their powers are *personally* liable to an action at law.”³²⁹ “This principle was not applied to all royal officers in the thirteenth century; but . . . it was consistently and constantly applied” against relatively lower-ranked officials.³³⁰ Holdsworth stresses that once the doctrine of ministerial responsibility reached its zenith, centuries later, it was applied to all officials—high and low alike.³³¹ There

323. *Id.*; *see id.* at 139–41 for Lapsley’s summary of the period.

324. 3 B. WILKINSON, CONSTITUTIONAL HISTORY OF ENGLAND (1216–1399) 16 (1958).

325. *Id.* at 114.

326. *Id.* at 16.

327. *Id.* at 16–17. This is why, in addition to the “great seal” of the nation, kept in Chancery, a “privy seal” was created by the twelfth century and kept within the royal household. *See id.* At this time in history (but not for long), both seals signed documents representing the king’s will. *Id.* at 17.

328. 2 HOLDSWORTH, *supra* note 11, at 449.

329. *Id.* (emphasis added).

330. *Id.* These officials included sheriffs, holders of franchises, and collectors of subsidies—and not the “more exalted servants of the crown.” *Id.*

331. *Id.* at 449. As Chief Justice Wilmot said in 1769, when awarding heavy damages against the Secretary of State: “the law makes no difference between great and petty officers. Thank God they are all amenable to justice.” Wade, *supra* note 290, at 26.

was, however, one more weapon that Parliament could use against the kings' closest and favorite servants: impeachment.³³²

E. Impeachment

Why impeachment? The need for the procedure of impeachment arose because the actual battles were fought between Parliament and the king's ministers. Simply put: "The king ruled the courts and judges did his bidding. Impeachment—after Parliament gained sufficient strength to employ it independently—was an instrument by which the legislative branch could rid the government of lawbreaking ministers or of judges who sheltered them at the king's behest."³³³

As a matter of history, we must look first at an episode that occurred in the 1340s. The next steps came in the administrative crisis of 1340–1341 and in the crisis of 1376, both occurring during the long reign of Edward III (b. 1312, k. 1327–1377).³³⁴ King Edward III prepared to depart for the continent with his entire household.³³⁵ Administrative arrangements, made by form of ordinances, would make the king and his immediate advisors supreme and invest the household with executive control over all offices of state.³³⁶ The unity of command might have been advisable from an administrative standpoint, but this was politically and constitutionally problematic: It perpetuated the old tradition, or rather the old aim of governing the country by

332. The link between the two is well-established: "The practice of impeachment rested clearly upon the doctrine of ministerial responsibility, as does modern cabinet government . . ." GEORGE BURTON ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 209 (1921). See also LAPSLEY, *supra* note 292, at 31; MAUROIS, *supra* note 36, at 135 (stating that "[t]his rudimentary form of Ministerial responsibility was to be styled 'impeachment'").

333. IRVING BRANT, IMPEACHMENT: TRIALS AND ERRORS 10–11 (1972).

334. *King Edward III*, at <http://www.history-uk.com/england/monarchs/edwardiii.htm>. The son of Edward II, Edward III, became king in his minority under troubling circumstances. Edward II let a knight named Piers Gaveston run England, antagonizing the barons. *Edward II (1307–27 AD)*, at <http://www.britannia.com/history/monarchs/mon31.html> [hereinafter *Edward II*]. In 1310, the barons forced Edward II to accept the rule of a twenty-one member council of Lords Ordains. *King Edward II (1284–1327)*, at <http://www.stonewallsociety.com/famouspeople/king.htm> [hereinafter *King Edward II*]. The Council immediately banished Gaveston; in 1321 they had Gaveston killed. *Id.* The barons were led by the king's cousin Thomas of Lancaster, who wielded real power in England until 1322, when King Edward II regained control of the country. *King Edward II, supra*. The king recalled his new favorite, Hugh la Despenser the Young, who was exiled by the barons. *Id.* Edward's queen Isabella then joined the exiled barons and, having secured possession of the young Prince Edward, landed in England in 1326. *Id.* The queen and her lover, Baron Roger Mortimer, took control of the land. *Id.* They had Hugh captured and executed. *Id.* As for the king—he fled but was captured and forced to resign the crown; in 1327 he was murdered in prison. *Id.*

335. Lapsley, *supra* note 199, at 143.

336. *Id.*

the king's will and in his interest, like a private estate.³³⁷ However, it could not be carried out as an administrative measure, and it was seriously challenged.³³⁸

Spurred on by Archbishop Stratford, in 1341 Parliament demanded that ministers of state answer to it for their conduct in office.³³⁹ State papers exchanged between the king and the archbishop suggest Stratford first argued that ministers are only responsible to the king collectively when there has been no departure from a policy framed in council and authorized by Parliament.³⁴⁰ It seems the opposition, led by the archbishop, then wished to go further: requiring that royal ministers and officers be appointed by the consent of the magnates, take an oath in Parliament, and be answerable to Parliament for their conduct during their term in office.³⁴¹

With this unprecedented demand, Parliament made clear the political alliance formed between Lords and Commons³⁴² and had "launched into English constitutional history a claim that it was to pursue with inconstant but undiminishing zeal for five centuries."³⁴³ During this time, "progress towards ministerial responsibility was uneven."³⁴⁴ As history recalls, the baronial effort of 1341 culminated in a statute, which provided that the king's ministers and officers should be appointed by the consent of the magnates.³⁴⁵ This the king accepted under political duress and later repealed.³⁴⁶ The next major step came in 1376, when a new method was employed to secure Parliament a means of control over the conduct of ministers in office: impeachment.³⁴⁷

The process of impeachment gave the House of Commons a way to control royal ministers through a judicial process conducted outside the regular royal courts. It breathed life into the doctrine of ministerial responsibility. Over the long run, it brought about the modern English constitutional structure: The English cabinet, led by a Prime Minister, is accountable to the sovereign Parliament and operates through its parliamentary majority.

337. *Id.*

338. *Id.* Other researchers identify an episode of 1330 as the first instance of impeachment. See BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT 1-3* (1998).

339. Clayton Roberts, *The Growth of Ministerial Responsibility to Parliament in Later Stuart England*, 28 *J. MODERN HISTORY* 215, 215 (1956).

340. Lapsley, *supra* note 199, at 143-44.

341. *Id.* at 144.

342. And it made clear the break in their alliance with the Crown. See 2 WILKINSON, *supra* note 324, at 204-05 (discussing the political background).

343. Roberts, *supra* note 339, at 215.

344. It was "precarious and halting." *Id.*

345. Lapsley, *supra* note 199, at 144.

346. *Id.*

347. *Id.*

The idea of the responsibility of the king's ministers to the nation as well as to the ruler, probably rejected or evaded in the 1340s, became effective (despite royal opposition) in the 1370s when impeachment was used by Parliament in a direct attack on the ministers and advisers of the Crown.³⁴⁸ The conceptual basis of this parliamentary attack was twofold: the supremacy of the *lex parliamenti* by which ministers could be tried and loyalty to an *impersonal* Crown.³⁴⁹

That Parliament had a judicial function was a given. In the fourteenth century, a principal function of the House of Lords (the upper house of Parliament and the successor of the feudal great council) was the dispensation of justice.³⁵⁰ The House of Lords, as the High Court of Parliament, was the supreme court of the realm.³⁵¹ As such, it had a supervisory jurisdiction over all inferior courts in common law, but it was also a court of first instance in any case that the king decided to lay before it.³⁵² It was as a *feudal* court—"a court where royal vassals were triable under feudal law, that the House of Lords was most prominent."³⁵³ Toward the end of the fourteenth century, Parliament acquired a significant privilege, when "the House of Lords became a court where royal ministers were impeached."³⁵⁴ Members of Parliament realized that they could impeach—indict, accuse—royal ministers and other royal officers for public misconduct, i.e., for offenses against the crown that constituted high treason.³⁵⁵

The procedure consisted of an indictment by the Commons and trial by peers in Parliament. The impeachments of 1376 were a daring novelty, and their appearance had much to do with the unusual social and political circumstances of the time, especially Parliament's dominance during the minority of Richard II.³⁵⁶ In 1376, the Commons laid before the Lords a series

348. 2 WILKINSON, *supra* note 324, at 53.

349. 3 *id.* at 120 (second emphasis added).

350. LYON, *supra* note 36, at 541.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. LYON, *supra* note 36, at 558. *See also* LOVELL, *supra* note 19, at 184–88 (explaining the division of Parliament in the fourteenth century into two houses and their functions); CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 109–256 (1910) (giving general information on the Parliament as a court); 2 WILKINSON, *supra* note 324, at 258 (stating that the impeachment proceedings of 1376 and 1386 were "the first formal and public definition of the High Court of Parliament."); ROLAND YOUNG, THE BRITISH PARLIAMENT 182–84 (1962) (discussing how Parliament objected to King Edward III's demand that his chancellor, the Archbishop of Canterbury, be tried in royal courts and stating that peers, whether ministers or not, can only be tried in Parliament before their peers).

356. In addition to the minority, the social and economical ravages of the Black Death were very significant. LOVELL, *supra* note 19, at 192. From 1377 to 1389, during the minority of

of charges against eight or nine persons, all in some way concerned with the king's business.³⁵⁷ It proved a significant constitutional advancement, another step toward the ultimate goal—securing Parliament's sovereignty.³⁵⁸ High-profile impeachments followed in 1386 and 1397. In the first instance, Parliament convicted five of the king's closest advisors for treason under pressure from five magnates (called the "Lords Appellant"); in the latter, it was the king who coerced Parliament to sentence three of the Lords Appellant to death, banishing the other two.³⁵⁹ Also in 1397, "the commons stated 'before the king in full parliament that they intended by his leave to accuse and impeach any person or persons, as often as seemed to them good in the parliament then sitting.'"³⁶⁰

It is important to note that medieval impeachments were far from an impartial trial; often the Commons "were tools of the king or powerful barons in their efforts to bring down political opponents."³⁶¹ Some commentators

Richard II (k. 1377–1399), Parliament essentially had control over government. *Id.* Determining how impeachments came about "is still a considerable problem." 2 WILKINSON, *supra* note 324, at 205. Wilkinson discusses impeachments possible origins, including the "petition of right." *Id.* at 205–209. For biographical information on Richard II, see generally *Richard II (AD 1377–1399)*, at <http://www.britannia.com/history/monarchs/mon33.html> [hereinafter *Richard II*].

357. *Richard II*, *supra* note 356.

358. See Lapsley, *supra* note 199, at 145. See also RONALD BUTT, A HISTORY OF PARLIAMENT: THE MIDDLE AGES 349 (1989) (suggesting that "the Commons acting as one . . . were therefore not vulnerable to a countercharge of false accusation as an individual might have been."); 2 WILKINSON, *supra* note 324, at 209 (discussing the events of 1376 and whether the trial of King's ministers was a concern of Parliament because it "touched the welfare of the whole kingdom"). In 1376, two royal ministers were "accused of financial malversation and found guilty by the House of Lords." LYON, *supra* note 36, at 558. "[Lord] Latimer was imprisoned, fined, and deprived of his position as king's chamberlain and councillor. Richard Lyons was condemned to imprisonment and forfeiture of goods." *Id.*

359. *Richard II*, *supra* note 356.

360. LYON, *supra* note 36, at 558. In 1386 the Commons impeached Michael de la Pole, the chancellor of Richard II. *Id.* The older nobility was "resentful of the high places attained by the upstart merchants of the De La Pole family." LOVELL, *supra* note 19, at 192. The king was powerless to help, and the earl was convicted and jailed. *Id.* at 192–93. The Lords Appellant had acted against the king's ministers until 1389. *Id.* at 193. "When Richard II came into power in 1397, he arranged for his supporters in the House of Commons to impeach his old enemies the Lords Appellant." LYON, *supra* note 36, at 558. He may have been too generous—"[o]ne of the exiles was Henry Bolingbroke, the future Henry IV." (k. 1399–1413). *Richard II*, *supra* note 356. Henry returned to England in 1399 and was elected king by Parliament. *Id.* Richard was deposed, captured, and murdered while in prison, "the first casualty of the War of the Roses between the Houses of Lancaster and York." *Id.* For further background, see also BUTT, *supra* note 358, at 385–86, 397–98, 432–35; 2 WILKINSON, *supra* note 324, at 205–14, 252–69 (giving a legal-historical account of the 1386 crisis and a discussion of the various techniques used by Parliament against royal advisors); *The Tragedy of King Richard the Second (A History)*, at <http://www.online-literature.com/shakespeare/richardII/> (summarizing Shakespeare's famous literary account).

361. LYON, *supra* note 36, at 559.

stress the lack of principle and illegality behind the fourteenth-century impeachments,³⁶² while others have termed the new procedure “little better than lynch law.”³⁶³ For better or worse—the barons were making a new kind of law that was “not the king’s law . . . [but rather] was intended to be the law of parliament.”³⁶⁴ In this sense, the barons were not imposing a regime of lawlessness but refusing the dominance of the king in law; moreover, they were making clear the distinction between the crimes against the person of the king and those against the welfare of the realm.³⁶⁵

A process of political trial had been devised that was to be used ruthlessly in the future as a means of getting rid of politicians who could not be removed in any other way.³⁶⁶ “It would be some time before the commons would act independently when they impeached royal officers before the House of Lords.”³⁶⁷

Clayton Roberts suggests that medieval parliaments sought to enforce ministerial responsibility by

impeachments, lords appellants, and acts of attainder, but their efforts led not to a precocious constitutionalism but to a Tudor despotism that denied parliament any control over ministers of state.

Yet the efforts of these medieval parliaments were not wholly in vain. When the Eliots and Pymms of early Stuart England set out to enforce ministerial responsibility anew, they seized two chief weapons from the medieval arsenal: the doctrine that the king can do no wrong and the right of the impeachment. The doctrine that the king can do no wrong had become the law of the land in the fourteenth century, when successive parliaments sought to make ministers, who could be punished, responsible for criminal acts ordered by a king, who could not be touched. The parliament of 1376 devised the power of impeachment in order to prosecute ministers of state whom the king refused to prosecute.³⁶⁸

362. Wilkinson concludes that “personalities, not principles, dominated the struggles of 1388.” 2 WILKINSON, *supra* note 324, at 254.

363. ANTHONY STEEL, RICHARD II 152 (1962). The barons “departed, in 1388, from any existing legal system. They adopted dangerous and unconstitutional methods . . . in imposing their new concept of law upon the king.” 2 WILKINSON, *supra* note 324, at 257.

364. 2 WILKINSON, *supra* note 324, at 257.

365. *Id.* at 257–58.

366. This could “equally be used against any other of the king’s subjects.” BUTT, *supra* note 364, at 349. *See also* LYON, *supra* note 36, at 559.

367. LYON, *supra* note 36, at 559.

368. ROBERTS, *supra* note 339, at 215. But both of these devices “proved inadequate for the purposes of early Stuart parliamentarians.” *Id.*

IV. THE ENDGAME: THE CONSTITUTIONAL MONARCHY

A. *Bridging the Gap Between the Thirteenth and Seventeenth Centuries*

The advances made in the thirteenth and fourteenth centuries fell by the wayside of history. Magna Carta was almost forgotten, the impeachment procedure fell into disuse, and the king had significant control of government, with ministers being appointed by the Crown and being accountable to it.³⁶⁹ Then, in the seventeenth and eighteenth centuries, everything changed. England struggled through the turmoil of war and revolution. The result was a new constitutional order, with a greatly strengthened Parliament and a much-weakened king. The means included a revival of ancient documents and practices, favorable to Parliament's claims—such as Magna Carta, impeachment, and ministerial responsibility.³⁷⁰

Most American scholars are particularly familiar with this period in English legal history, and for good reason. The English civil war is portrayed as the heroic struggle between Parliament, fighting on behalf of the people, and the reactionary kings, fighting for a “divine rights”-based absolutist monarchy. Americans could sympathize with the anti-monarchist sentiment and with the notion of a struggle for popular rights, especially as it mirrors their own fight for independence a century later. At the same time, Americans, especially the Founding Fathers, could define their constitutional beliefs by comparison to the English regime.

A full account of the English constitutional struggles of the seventeenth and eighteenth centuries is beyond the scope of this article. Part V therefore revisits three essential themes of government accountability developed in earlier parts. The author develops each theme, explaining the main changes that have occurred in each since the fourteenth and fifteenth centuries and the position in eighteenth century English law, a period contemporary and familiar to the Founders.

First, this Article examines the changing legal status of the English Crown. The medieval perception of the personal kingship gave way in the sixteenth century to a dual concept of the Crown containing both the personal attributes of the king and the corporate function of government. This duality explains why English law developed two forms of sovereign immunity: that of the royal person and that of the government.

Second, the Article examines how seventeenth-century anti-monarchists resurrected documents and practices originating in medieval times in an effort to curb the excesses of royal powers. Magna Carta was presented as an

369. See generally MCKECHNIE, *supra* note 33, at 120.

370. Magna Carta's appeal re-emerged during Parliament's struggle with the first two Stuart kings, “as a fundamental law too sacred to be altered—as a talisman containing some magic spell, capable of averting national calamity.” MCKECHNIE, *supra* note 33, 120–21.

authority on royal accountability, and the newly revitalized doctrines of impeachment and ministerial responsibility were employed in a form similar to their medieval antecedents. The question of whether the seventeenth-century actors were faithful in reviving the old documents and practices is intriguing. Modern historians suggest that Magna Carta owed much of its “greatness” to its revivers and interpreters of the seventeenth to nineteenth centuries, rather than to its thirteenth-century origins.³⁷¹ It is possible that the seventeenth-century parliamentarians only mistakenly found that Magna Carta “put the king under the law, limited his actions by the collective will of the nation, provided that there would be no taxation without parliamentary consent, and guaranteed . . . that all men of England should have due process of the law and trial by jury.”³⁷² But this is a moot question. The historical document and doctrine proved successful and had long-lasting effects. Royal powers were limited, and government became accountable to a representative Parliament.

Third, the Article examines to what extent the “divine rights” theory was valid in English constitutionalism. The short answer is that this theory never took hold in England. The Stuart kings advanced this theory in support of their claims of political supremacy, but it was rejected by English legal scholars, then soundly defeated by Parliament. While some commentators associate the doctrine of sovereign immunity (and the maxim that “the king can do no wrong”) with the divine rights theory, this is unwarranted. Divine rights is clearly a failed theory in England, a rejected blueprint for English government.

371. Until the late nineteenth century, Magna Carta was held in great esteem. LYON, *supra* note 36, at 311. Blackstone called it the “bulwark of English liberties[.]” and the elder William Pitt referred to Magna Carta as the “Bible of the Constitution.” *Id.* Bishop Stubbs wrote that “[t]he whole of the constitutional history of England is little more than a commentary on Magna Carta.” 1 STUBBS, *supra* note 40, at 571. Some twentieth century historians, however, think differently. See generally Edward Jenks, *The Myth of Magna Carta*, 4 INDEP. REV. 260 (1904); LOVELL, *supra* note 19, at 112 (calling Magna Carta “one of the most notoriously misinterpreted documents in English history,” due to succeeding generations reading into it “meanings relevant to their own times”); HUBERT LISTER PARKER, MAGNA CARTA AND THE RULE OF LAW: AN ADDRESS BY LORD PARKER OF WADDINGTON, JAMESTOWN, VIRGINIA, JUNE 15, 1965, at 3 (1965) (suggesting that Stubbs “perhaps exaggerated”); DORIS M. STENTON, AFTER RUNNYMEDE: MAGNA CARTA IN THE MIDDLE AGES, at v (1965) (referencing the modern view of “the myth of Magna Carta”).

372. LYON, *supra* note 36, at 311.

Such interpretation was inaccurate; it was based upon what the common law lawyers and parliamentarians wanted to find in Magna Carta rather than on what it actually said. In effect, these men so modernized and so transformed Magna Carta to make it work for them in the seventeenth century that it became a document quite unlike that of 1215.

Id.

B. *The King's Two Bodies and the Two "Sovereign Immunities"*

Seventeenth-century English kings were very powerful and essentially immune from legal liability. Had the Stuart kings stood unopposed, England might well have become an absolute monarchy, where the king enjoys unchecked personal powers and is completely unaccountable. However, this was not to be. By the early seventeenth century, when James I Stuart became King of England, Parliament and its supporters were strong enough to block royal attempts to expand royal powers. Moreover, the legal position of the Crown had changed significantly. English law was moving away from the medieval "personal monarchy" model to a dual model of the Crown, holding the real person of the king and the corporate function of the national central government. The reasons for this change and its implications in terms of the accountability of the Crown are explored in this section.

The starting point was that medieval English common law was quite literal in its treatment of legal subjects. The king, though he was the head of state, was regarded as a natural man.³⁷³ He could be under age, and he could die. "You did not ascribe to him immortality . . . or such powers as no mortal can wield."³⁷⁴ Contemporary canonists had no difficulty in turning the kingship into an abstraction, but "English lawyers were not good at work of this kind; they liked their persons to be real."³⁷⁵ The powers of the thirteenth-century king, explain Pollock and Maitland, were not an institutional or theoretical matter, but those powers that the king could wield in fact. However, in "time we see the beginnings of a doctrine of public or official capacities."³⁷⁶ There was a growing realization in English law that there was something to "government" that was more than the legal capacity of the actual people partaking in it. In 1365, we already find reference suggesting that Parliament

373. 3 HOLDSWORTH, *supra* note 11, at 468.

374. *Corporation*, *supra* note 202, at 132. "And there was little cause for ascribing to him more than one capacity." *Id.*

375. *Id.* (noting a canonist notion from the time of Edward II that the king's crown is *always* under age and adding that most of the historical evidence suggests that the king was treated "strictly and literally" as a man, "an Edward or a Henry"). The idea of double capacity was not unfamiliar in England—but its application was very limited. 3 HOLDSWORTH, *supra* note 11, at 467. For example, the theory was put forward that the Archbishop of Canterbury has one capacity as a cleric and another as an ordinary person. *Id.* at 467 n.2; *see generally id.* at 469–90 (explaining the concept of the "incorporate person" in England); 1 POLLOCK & MAITLAND, *supra* note 32, at 523–24 (discussing the idea of the king's "dual personality"); Loughlin, *supra* note 204, at 52 (discussing the idea that the Church's conception of Christ's two bodies—where the Church was the mystical body of Christ—referred less to the ancient distinction between human and divine and more to that between "the individual and collective, the personal and the corporate, and the natural and the mystical body."); *id.* at 59 (blaming centuries of difficulty in the development of a coherent nature of the crown to "the traditional antipathy of English common lawyers towards abstract thinking").

376. 1 POLLOCK & MAITLAND, *supra* note 32, at 523.

“represents the . . . whole realm.”³⁷⁷ By the sixteenth century, we begin to see indications of the recognition in English law of a possible difference between the person and the office of the king; we find statements suggesting that “the parliament of the king and the lords and the commons are a corporation” wielding public power.³⁷⁸ What is lacking is an admission that the corporate realm may be the subject of private rights.³⁷⁹

Holdsworth suggests that Englishmen would not let go of their vision of the king as a natural man until “feudal ideas . . . ceased to influence politics” and Englishmen began “to think of their ruler as the national king of a modern state.”³⁸⁰ Recognizing that the king had a dual capacity—natural and politic—helped in the sixteenth century to express “his new position as head and representative of the state.”³⁸¹

There was another difficulty with the concept of king as a natural person. As noted earlier, in time it became very apparent that the personal nature of kingship, while deeply rooted in common law tradition, had detrimental effects on English governance.³⁸² With the king’s death ending legal acts begun during his reign, jurists were looking for a legal way to allow for continuity of legal action, royal commission, etc. One way was to provide for such effects by statute,³⁸³ another, was to make the Crown—if not the royal—immortal.³⁸⁴ This explains, in part, the unusual terminology and analysis employed by English jurists from the Tudor period explaining “the king’s two bodies.”³⁸⁵ For example, Blackstone writes that the common law ascribes the king “*in his political capacity*, absolute perfection. The king can do no wrong . . . [and is] incapable of . . . ever . . . thinking wrong . . . in him is no folly or weakness . . . in the king is no minority.”³⁸⁶ This language seems unusual and

377. *Corporation*, *supra* note 202, at 133.

378. *Id.*

379. *Id.*

380. See 3 HOLDSWORTH, *supra* note 11, at 468.

381. 4 *id.* at 203.

382. Cf. *Corporation*, *supra* note 202, at 136. “The purely natural way in which the king was regarded in the Middle Ages is well illustrated by the terrible consequences of . . . a demise of the Crown.” *Id.*

383. *Id.* at 136 & n.4 (this process beginning when Edward VI came to power in 1547); 3 HOLDSWORTH, *supra* note 11, at 468 (explaining that in the reign of Henry VII Tudor (k. 1485–1509) “a statute was needed to make it clear that faithful service to a reigning king was no treason to a successful claimant to the throne”).

384. Maitland observes that the legal difficulties arising from the demise of the king were still relevant when Queen Victoria came to power in 1837—military commissions needed to be renewed. *Corporation*, *supra* note 202, at 136.

385. *Id.* at 134.

386. 1 WILLIAM BLACKSTONE, COMMENTARIES *238–41 (emphasis added). The king is also invisible. See KANTOROWICZ, *supra* note 263, at 4–5. Many of the Blackstonian statements are as applicable, in some part, in contemporary English law. See 12(1) HALSBURY’S LAWS OF ENGLAND § 48.

is easy to ridicule and criticize, but it is more subtle and complex than is immediately apparent and full appreciation of it requires some preparation.³⁸⁷

It is in the mid-sixteenth century that we observe the first distinctions between the king's "body natural and [his] body politic together indivisible . . . these two bodies are incorporated in one person and make one body."³⁸⁸ The distinction between the natural and political capacities of the king were elaborately stated in the several cases reported by Edmund Plowden. The famous case of the *Duchy of Lancaster* (1562), concerned the validity of acts made by King Edward VI when under age.³⁸⁹ The Crown lawyers all agreed that the royal act was valid. The reason: the king "has in him two bodies."³⁹⁰ His natural body is mortal and subject to infirmities and old age; his "Body politic . . . cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People, and the Management of the public weal."³⁹¹ "[T]his body is utterly void of Infancy, and old Age, and other natural Defects . . . which the Body natural is subject to."³⁹² As reported by Plowden, in a 1559 case, Justice Southcote explained that the so called "body politic" is a corporation containing both the royal subjects and the king as their head.³⁹³ Lord Coke provided us with more familiar terms, classifying

387. Maitland does this in his essay, pointing out the odd results of this perception of the king. See generally *Corporation*, *supra* note 202. But Kantorowicz refutes this in his book. See KANTOROWICZ *supra* note 263, at 3–6. On the difficulty of reading Blackstone, see Brian A. Snow & Willian E. Thro, *The Significance of Blackstone's Understanding of Sovereign Immunity for America's Public Institutions of Higher Education*, 28 J.C. & U.L. 97, 105 (2001) (noting Blackstone's "use of tautology, such as the 'king could do no wrong' for the 'the king is incapable of doing wrong' as a method for establishing legal maxims under a closed system of logical peculiar to the law [and] his dependence upon legal fictions for the reconciliation of obsolete legal practices with a more democratic system of justice").

388. *Corporation*, *supra* note 202, at 134 (quoting EDMUND PLOWDEN, COMMENTARIES OR REPORTS 213 (1816)).

389. During the reign of Queen Elizabeth I (q. 1558–1603), the legal question concerned the validity of a lease of lands of the Duchy made by King Edward VI (b. 1537; k. 1547–1553) while under age. See KANTOROWICZ, *supra* note 263, at 7.

390. *Id.* (quoting PLOWDEN, *supra* note 388, at 212).

391. *Id.* (quoting PLOWDEN, *supra* note 388, at 221). The body politic is often also referred to as the king's "mystical body," which is the politico-ecclesiastical terminology. *Id.* at 15–16.

392. KANTOROWICZ, *supra* note 263, at 7 (quoting PLOWDEN, *supra* note 388, at 213). Holdsworth notes that jurists were applying the terminology that they were familiar with when applying to the king the distinction between natural and corporate personality. See 4 HOLDSWORTH, *supra* note 11, at 202–03; KANTOROWICZ, *supra* note 263, at 7–9; Loughlin, *supra* note 204, at 55.

393. *Willion v. Berkley*, 75 Eng. Rep. 339, 356 (K.B. 1559). With the king's demise—the body politic is removed "from one body natural to another." *Id.* For this and other cases see Loughlin, *supra* note 204, at 52.

persons as either “natural” or “artificial,” the latter possessing the very qualities missing in a “natural person” and so detrimental in a human king.³⁹⁴

Having made this distinction,³⁹⁵ however complex and inaccurate,³⁹⁶ sixteenth-century jurists attempted to give it content, that is explain what powers the king had in each of his capacities and what limitations were placed on his authority to exercise such powers.³⁹⁷ Some royal prerogatives, such as the right to appoint justices of the peace and pardon crimes were termed “inseparable,” meaning a right or power peculiar to the king and to the king only.³⁹⁸ Similarly, while the king’s prerogative was subject to the law, “there was a wide sphere within which the king could act as he pleased.”³⁹⁹ Seventeenth-century monarchist lawyers deduced from this distinction a theory that the king had, inseparably attached to his person, a general absolute prerogative to act as he pleased—but this, suggests Holdsworth, is not what sixteenth-century jurists and statesmen had in mind. The king had a political capacity as head and representative of the state; to that capacity, certain powers inseparably attached (“they were . . . implicit in the idea of kingship, and therefore inseparable from the person of the king”).⁴⁰⁰ The exercise of these “absolute” powers—unlike the king’s “ordinary” powers—could not be called in question in law court.⁴⁰¹ At the same time, note that it was typically the “ordinary prerogative” that was involved in conducting the government, and those powers were regulated and bound by the rules of law. “The absolute

394. See *Sutton’s Hospital Case*, 77 Eng. Rep. 960, 973 (K.B. 1612). “[F]or a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law They cannot commit treason, nor be . . . outlawed, nor excommunicate, for they have no souls, neither can they appear in person but by attorney. A corporation aggregate . . . is not subject to imbecilities, death of the natural body, and divers other cases.” *Id.* (citations omitted).

395. The distinction is itself foreshadowed by doctrines of political theology referring to the human and divine parts of kingship. The issue is discussed, in part, in this Article in the sections regarding the power struggle between the papacy and princes and in part in the section on the “divine rights of kings” theory. See KANTOROWICZ, *supra* note 263, at 87–97.

396. There is a great deal of scholarly critique about the concept of the “king’s two bodies.” See, e.g., Loughlin, *supra* note 204, at 53–54.

397. Cf. 1 POLLOCK & MAITLAND, *supra* note 32, at 511.

398. The details are a lot more complex. See 4 HOLDSWORTH, *supra* note 11, at 204–05.

399. *Id.* at 206–07. The terms used for this distinction were “absolute” and “ordinary.” *Id.*

400. *Id.* at 207.

401. *Id.* “The English king therefore was far from being the sovereign power in the state.” *Id.* at 208. On the current state of English law, see Wade, *supra* note 290, at 30 (explaining that under current case law, reviewability of an administrative action does not depend upon the source of the power but upon its nature and that prerogative power is reviewable, provided it is not non-justiciable for some special reason).

prerogative was unsuitable for everyday use and should be held in reserve for unusual occasions.”⁴⁰²

In the sixteenth century, the king’s two “bodies” were usually deemed inseparable.⁴⁰³ In *Calvin’s Case*, the court stated that while the king has “two bodies,” the king has only one *person*. Therefore, any attempt to separate the king’s political capacity from “the person of the king” is a “damnable and damned opinion” which could lead to “execrable and detestable consequences.”⁴⁰⁴

The seventeenth-century struggles accentuated the artificiality of the king’s “two bodies” and the split between the two became apparent when Parliament was fighting the king’s natural body by name of his body politic. Now, it was Parliament that revived the medieval view of the king as a natural person and the king who stressed his position as head of state and high authority through the absolute prerogatives. In May of 1642, the Lords and Commons went as far as to issue a declaration to the effect that the king’s body politic was retained in and by Parliament whereas the king’s body natural “was, so to say, frozen out.”⁴⁰⁵ The constitutional convention that was established from that time on was that of the “King in Parliament”: The king—if only in his seal image—together with the Lords and Commons constitute the political body of the realm.⁴⁰⁶ Similarly, in 1649 when Parliament succeeded in having King Charles I (k.1625–1649) convicted of treason and executed, they clearly meant to execute the king’s natural body—“without affecting seriously or doing irreparable harm to the King’s body politic.”⁴⁰⁷

The resulting constitutional convention is that the king, the House of Lords, and the House of Commons acting together—and described as “King in

402. CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, *SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND* 11–12 (1981).

403. However, in political terms, the political body was superior. *Id.* at 11.

404. *Calvin’s Case*, 77 Eng. Rep. 377, 390 (K.B. 1608); Loughlin, *supra* note 204, at 57.

405. KANTOROWICZ, *supra* note 263, at 21; *see also* MCILWAIN, *supra* note 355, at 352. For more detail, *see* WESTON & GREENBERG, *supra* note 402, at 47 (describing the 1642 action by the Long Parliament of “first separating the king’s two capacities and then claiming to control one of them, namely his political capacity”). The two houses asserted the right and power to bind the king in his political capacity despite opposition from his natural person. *Id.* (discussing further the sufficiency of symbolic presence of the king and the royalist claim that Parliament cannot act without the physical presence of the king).

406. KANTOROWICZ *supra* note 263, at 21–22. “[A]nd, if need be, even against the king body natural.” *Id.* This would later be mirrored in the Puritan slogan “fighting the king to defend the king.” *Id.* at 23.

407. *Id.* at 23 (noting the clear contradiction to the events in France when Louis XVI was executed in 1793).

Parliament”—constitute Parliament.⁴⁰⁸ Moreover, Professor Loughlin suggests that modern constitutional scholars have grossly distorted history in emphasizing parliamentary sovereignty; the sovereignty of the State, suggests Loughlin, is more accurately represented as the sovereign authority of the Crown acting through Parliament.⁴⁰⁹ Loughlin suggests that English jurists were unable to develop a concept of the Crown that was disentangled from the person of the monarch, which is why the maxim “that the king can do no wrong” was extended to the Crown in its political capacity, thereby creating immunity for the actions of government ministers,⁴¹⁰ despite the motto’s deeply personal language and original function.⁴¹¹

Moreover, the questions at hand are not historical; English law, to this day, is unclear about the precise nature of the Crown. In 1608, Sir Edmund Coke called the Crown “an hieroglyphic of the laws,” whose role it is “to do justice and judgment, to maintain the peace of the land etc.”⁴¹² This places the king as a legal symbol of public power but provides little detail of the exact contents of such a position.⁴¹³ In the late Victorian age, we find Maitland’s aphorism that “the crown does nothing but lie in the Tower of London to be gazed at by sight-seers,”⁴¹⁴ and the question has only become more complicated in the twentieth century as the administrative state became dramatically extended, as

408. The other branch of the English government, says Blackstone, is the executive, “consisting of the king alone.” 1 WILLIAM BLACKSTONE, COMMENTARIES *143; cf. DICEY, *supra* note 296, at 37, 424.

409. Loughlin, *supra* note 204, at 47.

410. *Id.* at 47–48. One possible legal solution would have been to characterize the Crown as a corporation aggregate rather than as a corporate sole, thereby including the wider government beyond the monarch within the Crown; such ideas were employed in the 1978 case of *Town Inv. Ltd. v. Dep’t of the Env’t*, 1978 All E.R. 359, 380 (H.L.) but were not widely adopted. See Maurice Sunkin & Sebastian Payne, *The Nature of the Crown: an Overview*, in THE NATURE OF THE CROWN, *supra* note 204, at 3–5.

411. Cf. Sunkin & Payne, *supra* note 410, 3–5. “Nothing seems more clear than that this immunity of the King from the jurisdiction of the King’s courts was purely personal.” Borchard, *supra* note 280, at 4. In a congressional debate, controversial politician Henry Clay (1777–1852) ironically referred to the maxim as signifying the *personal immunity* of the king. “The sacred person of His Majesty must not be attacked, for the learned gentlemen on the other side are quite familiar with the maxim, that the King can do no wrong.” Henry Clay, *Why America Had to Fight*, 5 AMERICA, 131–32. For more on Clay, see <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000452> and <http://odur.let.rug.nl/~usa/B/hclay/hclay.htm>.

412. Calvin’s Case, 77 Eng. Rep. 377, 390 (K.B. 1608).

413. *Id.*

414. A COURSE OF LECTURES, *supra* note 64, at 418 (suggesting the concept of the Crown was merely “a convenient cover for ignorance” that “saves us from asking difficult questions”). In another instance Maitland suggested that the Crown should be equated with the Commonwealth—a corporation composed of the king and all his subjects together. See also Wade, *supra* note 290, at 24–25.

the Crown lost many of its traditional immunities,⁴¹⁵ and as the king has wielded little influence over the governance of England.

Sir William Wade suggested recently that the Crown means, “in truth . . . simply the Queen, though the term is usually confined to her in her political or constitutional capacity.”⁴¹⁶ In modern case law, the House of Lords attempted to clarify matters. In a 1978 case, Lord Diplock made the case for updated vocabulary in public law; in the past, the term “the Crown” was convenient to denote and distinguish the monarch “when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will.”⁴¹⁷ In reality, the monarch’s role in legislation has been restricted to advice and acquiescence. Therefore, instead of speaking of “the Crown,” it is better to speak of “the government,” a term that embraces both collectively and individually all the ministers of the Crown and the parliamentary secretaries who direct the administrative work of the civil service.⁴¹⁸ In a more recent case, Lord Woolf stated that the Crown “does have legal personality as a corporation sole or possibly a corporation aggregate,”⁴¹⁹ but while this statement goes some way to solve very ancient legal questions, Professor Wade is probably correct in wondering how the Crown can be *both* types of corporation.⁴²⁰

Taking into account the increasing gap between the “king’s two bodies,” it seems very clear that current English law affords two separate “sovereign immunities,” even if they are couched in similar terms, and seemingly applying to the same entity—the Crown. The first is to the monarch in her personal capacity. *Halsbury’s Laws of England* is quite clear on the matter. The monarch’s person is regarded as inviolable and is, in principle, immune from all suits and actions at law, either civil or criminal;⁴²¹ this means, for example, that the monarch and members of her household cannot be arrested. The monarch is also not bound by custom and is only bound by legislation “by

415. Loughlin, *supra* note 204, at 35. And, especially as a result of the gradual emergence of a concept of public law, the situation has become more confused. *Id.* at 61 & n.131. *See also* TERENCE DAINITH & ALAN PAGE, *THE EXECUTIVE IN THE CONSTITUTION* 12–13 (1999).

416. Wade, *supra* note 290, at 24 (footnoted omitted). For the process that led to this conclusion, see Loughlin, *supra* note 204, at 36–37 & nn.11–13.

417. *Town Inv. Ltd. v. Dept. of the Env’t*, 1978 All E.R. 359, 381 (H.L.).

418. *Id.* Other Lord Justices had similar views in the same case. *See id.* at 386; for analysis, see Loughlin, *supra* note 204, at 62–63.

419. *M. v. Home Office*, [1994] 1 All E.R. 377, 393 (H.L.). The case is noteworthy for many reasons, one of them the suggestion of the Court of Appeal judges that no case could be brought against the Crown because it lacked a legal personality—a view the House of Lords denied. *See id.*

420. *See* Wade, *supra* note 290, at 25.

421. 12(1) HALSBURY’S LAWS OF ENGLAND § 47.

express mention or clear implication."⁴²² Nor is the monarch's personal property subject to the laws applicable in the case of a citizen.⁴²³ The explanation given emphasizes the public nature of the monarch ("[a]s befitting the person of the Head of State") and is heavily indebted to Blackstonian terminology ("[t]he law clothes the monarch's person with absolute perfection; hence the common law maxim that 'the King can do no wrong', and no remedy lies against the monarch" because "the courts were her own and they could have no jurisdiction over the monarch").⁴²⁴ At the same time, it seems that English law does provide remedies against the Crown in its personal capacity.⁴²⁵

Under English law, the monarch "remains legally central" to the powers of government, as she is formally the head of the executive.⁴²⁶ However, her personal functions are now "restricted principally to attaching her signature to various executive documents" prepared by government ministers, and constitutional conventions "minimise the scope of her discretion."⁴²⁷ Up until the Crown Proceedings Act of 1947, the only methods to obtain redress against the Crown in the courts were the ancient "petition of right," which depended on royal permission or suits against the attorney general for a declaratory remedy, or actions against government agencies that had been declared liable to suit by statute.⁴²⁸ The Crown—in this context, the British government, not the royal person—long enjoyed extensive immunities and privileges, in particular immunity from liability for damages for torts committed by Crown servants. The 1947 statute substantially altered both law and procedure. Subject to certain exceptions, it abolished the special forms of procedure that previously applied in civil suits by and against the Crown, and, for the most part, the same rules now apply as in proceedings between private persons.⁴²⁹ Similar rules now permit suits against the Crown for breach of contract.⁴³⁰

422. *Id.* at §§ 47, 49 (emphasis added).

423. *Id.* at § 49.

424. *Id.* at §§ 47–48, 56.

425. *Id.* at §§ 47–49, 52–53, 56. *See also id.* at § 48 n.1 (noting that these statements are more of historical than legal value). Section 56 suggests that several methods of redress that formerly existed against the Crown *presumably* continue to apply in relation to the monarch in her private capacity. *Id.* § 56.

426. 8(2) HALSBURY'S LAWS OF ENGLAND § 351.

427. *Id.* §§ 351–354.

428. 12(1) *id.* at § 101.

429. *Id.* at §§ 101, 102, 110–114. *See also* 8(2) *id.* at §§ 381–393. For text of 1947 Act, see http://www.dwp.gov.uk/advisers/docs/lawvols/greenvol/pdf/g_0101.pdf.

430. 8(2) *id.* § 388.

C. *Ministerial Responsibility, and Impeachments, Again*

“James [I, Stuart], like the Tudors before him, chose ministers and favourites as seemed best to him; by the early eighteenth century ministers could not govern without a Parliamentary majority.”⁴³¹

1. Re-Introduction

Medieval English law produced doctrines and tools that could serve to limit royal powers and require government officials to act for the interest of the entire nation and be responsible to a representative Parliament. However, this is not to say these tools were used at any time soon afterward, or that they were utilized in a fair and “democratic” manner, as we understand these terms today. The seventeenth-century dispute between Parliament and the monarch was not a purely idealistic struggle between supporters of democracy and a king’s claim of a “divine right” to rule. This was a power struggle. It was deeply personal. It was over money, fame, and glory.

The propertied classes who dominated Parliament and the local administration opposed the development of a strong centralized government and were reluctant to assume the additional financial burdens imposed by the rising cost of government. By the early seventeenth century, it was no longer possible for the king to “live of his own.”⁴³² Hence, the impeachment of royal ministers was not only a criticism of royal policies but also had more personal and less-informed overtones, even when complaints were couched in terms of protecting religious freedom or the common law.⁴³³ It was Parliament’s way to protest a royal policy that did not admit Parliament a role in the appointment of officers and in the framing of national policies.⁴³⁴ As for royal finances: “the parliamentary opponents of the king during the reign of Charles I [(k. 1625–1649)] insisted . . . that the finances of the monarchy be placed under

431. Steve Bachmann, *Starting Again with the Mayflower . . . England’s Civil War and America’s Bill of Rights*, 20 QUINNIPIAC L. REV. 193, 197 (2000).

432. D.L. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN 1485–1937*, at 159 (9th ed. 1969). In the 1660s, Charles II paid into the Exchequer the cash portion of his wife’s dowry and the proceeds of the sale of lands. *Id.* at 248. See also LOVELL, *supra* note 19, at 365–66 (explaining that “the crown was utterly dependent upon Parliament financially”).

433. KEIR, *supra* note 432, at 159. “Personal and professional rivalries mingled their baser alloy with the metal of their resistance.” *Id.*

434. *Id.* at 159–61. In Tudor days the practice existed of having privy councilor in the House of Commons relay its “sense” to the king. LOVELL, *supra* note 19, at 298. “Certain of the more able of James’s councilors, notably Sir Francis Bacon, . . . urged the King at least to consider the views of the Commons.” *Id.* By 1621, “the House had little faith that the crown would act in this manner, and it turned on those advisers of the king who seemed to be encouraging him to flout the views” of the House. *Id.* In reviving the process of impeachment, the commons “acquired a very dangerous weapon.” *Id.*

parliamentary control. This principle was in part conceded at the time of the Restoration in 1660.”⁴³⁵

2. Impeachment, Again

Under the Tudors, the process of impeachment, the attempt to impose on ministers a responsibility towards the nation as well as the Crown, fell into disuse.⁴³⁶ But in the seventeenth century, after a century and a half of desuetude, and as part of a comprehensive power struggle between the Stuarts and Parliament, the “antiquated” procedure of impeachment was reintroduced.⁴³⁷

In 1610, King James I denied a petition by both Houses of Parliament that he allow his servants be arrested and sued as all other men.⁴³⁸ This was an unprecedented, almost revolutionary request, and when the king denied the submission, it became a watershed event in the relations between the Crown and Parliament.⁴³⁹ Parliament resorted to an old weapon, long unused: impeachment. The first instance of parliamentary impeachment in the seventeenth century was directed in 1621 against two private individuals who were monopolists (monopoly being a royal grant that had become a favorite device of governmental finance).⁴⁴⁰ Once revived, the procedure was immediately applied to the ministers of the Crown beginning with the 1621 impeachment of the Lord Chancellor.⁴⁴¹ This most clearly signified that unlike the Tudors, the Stuart kings could no longer protect their royal ministers; Lord Chancellor Bacon had supported King James I’s views on the supremacy of the monarchy and persuaded the king to ignore some demands of the Commons.⁴⁴²

435. VERNON BOGDANOR, *THE MONARCHY AND THE CONSTITUTION* 183 (1995).

436. KEIR, *supra* note 432, at 39. “When ministers fell from power . . . it was only because the royal protection was withdrawn from them.” *Id.*

437. *Id.* at 160.

438. ROBERTS, *supra* note 14, at 1.

439. *Id.* at 1–2.

440. KEIR, *supra* note 432, at 192–93. The monopolists, Michell and Mompesson, were degraded from knighthood, fined, and imprisoned. *Id.* at 193. “Their patent, derived though it was from an ancient prerogative, was resolved by the House to have been bad in law.” *Id.* In 1624, the prerogative to grant monopolies was restricted by statute. *Id.* See also ROBERTS, *supra* note 14, at 25–42.

441. KEIR, *supra* note 432, at 193. The basis was his conduct as a judge, not a minister. *Id.* Lord Chancellor Bacon (1561–1626, jurist, philosopher, and by some accounts the true author of Shakespeare’s work) was accused of accepting presents from litigants in Chancery. *Id.* This conduct was within the standards of the time and it could not be proved that the gifts in any way influenced his decision. *Id.* See generally W.G. THORPE, *THE HIDDEN LIVES OF SHAKESPEARE AND BACON AND THEIR BUSINESS CONNECTION; WITH SOME REVELATIONS OF SHAKESPEARE’S EARLY STRUGGLES 1587–1592* (1897).

442. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1670 (1994). “[P]hilosopher and scientist Francis Bacon, King James’ faithful Attorney General argued—like Bodin—that monarchy” is a product and a requirement of *nature*;

Now the king proved unable to persuade Parliament to spare his faithful minister or that he be tried by a special commission; “[h]e was impotent except to use his prerogative of pardon to alleviate the sentence of fine and imprisonment which completed his Chancellor’s overthrow.”⁴⁴³

Next came the Lord Treasurer, Middlesex, impeached in 1624, and Lord Buckingham in 1626.⁴⁴⁴ A favorite of both James I and Charles I (k. 1625–1649), Buckingham was impeached on charges concerning acts done or ordered by King Charles such as grant of titles and officers and measures taken in connection with English wars.⁴⁴⁵ Allowing Parliament to conduct a trial over the king’s apparently legal—if mistaken or unfortunate—actions would allow the lords to pass judgment on the king, second-guess royal judgment, and significantly lessen the king’s control over his ministers. Charles then dissolved Parliament to prevent the trial.⁴⁴⁶ Impeachment continued to play a major role in the tumultuous seventeenth century. In a clear effort to gain control over governmental activity, Parliament used the impeachment process against a series of royal advisors throughout the reign of the Stuarts.⁴⁴⁷ Parliament had the Earl of Strafford executed in 1641⁴⁴⁸ and brought ruin on the Earl of Clarendon in 1667.⁴⁴⁹

the monarch thus is the final source of positive law—to which he himself is not subject. *Id.* In 1610, Bacon told Parliament that the absolute monarchy is the only stable form of government. *Id.* Bacon avoided a trial by pleading guilty. LOVELL, *supra* note 19, at 299. He received a hefty fine and a humiliating bar from holding public office. *Id.* See also EDWIN. A. ABBOTT, FRANCIS BACON: AN ACCOUNT OF HIS LIFE AND WORKS 139–43, 296–97 (1885).

443. KEIR, *supra* note 432, at 193.

444. *Id.* at 193–94.

445. *Id.* at 194.

446. *Id.* at 195. Buckingham had supported previous impeachments by Parliament to prevent action into his own abuse of monopolies; he had lost his popularity in England for, among other things, advocating royal marriage with a Catholic princess. See *id.* at 193–94; <http://www.britishhistory.ac.uk/report.asp?compid=3468> (the 1626 proceedings); <http://www.infoplease.com/ce6/people/A0809306.html> (biographical information). The romantic aspects of the Duke’s career figure largely in Alexander Dumas’s historical novel, *The Three Musketeers*. See generally ALEXANDRE DUMAS, TWENTY YEARS AFTER (David Coward ed., Oxford Univ. Press 1998) (1845).

447. Essentially—James I (1603–1625); Charles I (1625–1649), and after the restoration, Charles II (1660–1685); James II (1685–1688); William III, Orange and Mary II Stuart (1689–1702); Anne (1702–1714). See *Monarchs*, at <http://www.britannia.com/history/h6.html>.

448. The charge against Thomas Wentworth, the Earl of Strafford (1593–1641), perhaps the king’s ablest and most influential advisor, was clearly couched in political terms—that he allegedly planned to bring in an Irish army to crush Parliament. See KEIR, *supra* note 432, at 212–13. Strafford defended himself so well that the charges could not be established. *Id.* Parliament passed a bill of attainder declaring Strafford guilty of treason without trial, and with the king’s treacherous consent to the measure, Strafford was executed. *Id.* The king also approved a law forbidding the dissolution of Parliament without its consent, turning this into the “Long Parliament,” legally in existence until 1660, when it finally dissolved itself. *Id.* at 212–14; LOVELL, *supra* note 19, at 316–17; *The Earl of Strafford, Thomas Wentworth, 1593–1641*, at

In the 1660s, the king and his ministers still carried out the day-to-day work of administration. In an effort to retain control, the Crown sought a minister who would be a fine executive and a better parliamentary tactician than his predecessors were; in the 1670s, the king found such skills in the Earl of Danby.⁴⁵⁰ A capable financial administrator endowed with tact and social gifts, the earl improved the financial situation of the Crown and to some extent, won parliamentary confidence, even if, by 1675, his impeachment was proposed.⁴⁵¹ He also made the Lord Treasurer the most important position in the government.⁴⁵² By 1678, when it became clear that the minister preferred the king's interest over that of Parliament, Parliament attempted to impeach Danby, and would not rest until he wound up jailed in the Tower of London.⁴⁵³ It did not seem to matter which advisors the king relied on; they all seemed unable to protect the royal prerogative from parliamentary assaults and encroachment. The struggle was for the ultimate prize—supremacy in the land, “even over the Crown itself.”⁴⁵⁴ In the 1670s, the king had, overall, preserved the royal prerogative against parliamentary encroachments. Some of

<http://www.british-civil-wars.co.uk/biog/strafford.htm>. For great detail of the trial *see generally* JOHN H. TIMMIS III, *THINE IS THE KINGDOM: THE TRIAL FOR TREASON OF THOMAS WENTWORTH, EARL OF STRAFFORD, FIRST MINISTER TO KING CHARLES I, AND LAST HOPE OF THE ENGLISH CROWN* (1974).

449. *See* KEIR, *supra* note 432, at 249–50. Clarendon was the Lord Chancellor and the leading figure in the government. LOVELL, *supra* note 19, at 365. The case is somewhat different here because the earl (1609–1674), who was considered by Parliament responsible for various misfortunes, found it difficult to control royal policies for which Parliament held him responsible; by 1667 he fell out of royal grace. *See* KEIR, *supra* note 432, 249–50. Dismissed by the king and impeached by Parliament for high treason, the earl fled to France—at the advice of the king—rather than face trial. *See generally* LOVELL, *supra* note 19, at 365–66, 373–74. While in exile in France he wrote his classic account of the English civil war—*History of the Rebellion and Civil Wars in England*. For biographical information, *see* http://en.wikipedia.org/wiki/Edward_Hyde,_1st_Earl_of_Clarendon. With Clarendon's departure, the office of Chancellor, while still important, ceased to be the dominant one in the government. LOVELL, *supra* note 19, at 373–74.

450. KEIR, *supra* note 432, at 253–54.

451. *Id.* at 254–55.

452. *See generally id.*

453. *Id.* at 256. Strapped for cash, King Charles II made secret bargains with the French king for neutrality in return for financial aid; at the same time, the Commons favored an “actual war” against France. *Id.* at 255. When Parliament became aware of the royal action, they impeached Danby (1631–1712); the lords refused to convict Danby, and the king intervened with a dissolution, granting the minister—who had now resigned—a pardon. *Id.* at 256. In the next Parliament, the pardon was declared invalid and Danby was sent to the tower for an imprisonment that lasted five years (1679–1684). *Id.* at 256; *Danby, Thomas Osborne, earl*, at <http://www.bartleby.com/65/da/Danby-Th.html> (noting Danby's influence during the Reign of William and Mary (1689–1702) and Danby's impeachment again in 1795 in connection with a bribe from the East India Company); *see also* LOVELL, *supra* note 19, at 380–84.

454. KEIR, *supra* note 432, at 257.

his greatest surrenders concerned impeachment: first, his pardon of Danby was set aside; second, the lords had resolved that an impeachment was not terminated by a prorogation or dissolution.⁴⁵⁵

In 1688, James II left England, leaving Parliament to declare the throne vacant, then offer the Crown to William (III of Orange) and Mary II, with strict conditions attached.⁴⁵⁶ Parliament then issued the Bill of Rights; a joint royal assent made it a statute.⁴⁵⁷ Parliament has come a long way from its origins as an agency of the Crown, summoned by sovereign.⁴⁵⁸ The procedure of impeachment was never formally abolished but clearly went again into desuetude. Last invoked in 1806, in light of the ministerial responsibility to the Commons, it seems unlikely to be applied any time soon.⁴⁵⁹

3. Ministerial Responsibility

The Bill of Rights of 1689 reduced the powers of the Crown; nonetheless, those powers remained substantial and no politician could afford to ignore the wishes of the sovereign.⁴⁶⁰ The appointment of ministers remained the right of the Crown within the royal prerogative, as were many other powers, such as foreign and colonial affairs and the administration generally, to which Parliament paid remarkably little attention.⁴⁶¹ Yet “in the exercise of the

455. *Id.* at 256–57. By the 1670s Parliament had extended its control over state expenditures and various ecclesiastical powers and sought to extend it over diplomacy and issues of war and peace. *Id.* “Prorogation” is “[t]he act of putting off to another day; esp., the discontinuance of a legislative session until its next term.” BLACK’S LAW DICTIONARY 1236 (7th ed. 1999).

456. LOVELL, *supra* note 19, at 392–93.

457. *Id.* at 394.

458. *See id.* at 394–95. Mary was the daughter of James II, and William, her cousin, was son of Mary Stuart, daughter of Charles I; both were, thus, grandchildren to Charles I. *William III and Mary II (1689–1702 AD)*, at <http://www.britannia.com/history/monarchs/mon51.html>. The text of the Bill of Rights of 1689 is available at <http://www.yale.edu/lawweb/avalon/england.htm>.

459. LOVELL, *supra* note 19, at 187 n.14; KEIR, *supra* note 432, at 290; YOUNG, *supra* note 355, at 184 (explaining that “Parliament has held some seventy trials for impeachment, a quarter of which were held in the years 1640–1642.”). Dicey explains that there is no longer a need for this (and other) extraordinary measures to enforce the authority of Parliament because obeying “the will of the nation as expressed through Parliament” is a basic constitutional principle, the will of Parliament being, in essence, the law. DICEY, *supra* note 291, at 450. Also,

in the course of time, Parliament acquired the power and means to control the ministers *politically* as well as *legally*. Indeed, when its control became political, its legal control was almost altogether supplanted. If ministers must resign when their political actions are unacceptable to Parliament, clearly they are extremely unlikely ever to reach the point where they violate the law and become impeachable. Abundant evidence of this is to be found in the fact that there has been no case, in more than two hundred years, of a minister impeached for a matter related to his political duties.

GOOCH, *supra* note 294, at 130–31.

460. LOVELL, *supra* note 19, at 415.

461. *Id.*

prerogative the crown would never act contrary to basic parliamentary opinion.”⁴⁶² Furthermore, Parliament alone could amend or amplify the law, on which the validity of governmental action depended, and Parliament supplied the bulk of the revenue required by the executive to perform its work. Parliament could and did criticize government acts and policy, and in extreme cases could impose responsibility through impeachment, but it could not go further without transgressing the king’s control over the administration and violating the principle of separation of powers.

In the eighteenth and nineteenth centuries, the doctrine of ministerial responsibility evolved in two ways, eventually becoming the cornerstone of British constitutionalism.⁴⁶³ First, between 1714 and 1841 English ministers, who came to operate within a cabinet headed by a prime minister, became increasingly independent of the Crown.⁴⁶⁴ Second, the cabinet became the central force in English politics. The cabinet was the center of government, the executive, yet reliant on a parliamentary majority. English constitutional law developed various methods to ensure ministerial responsibility, including conventions governing the conduct of ministers, accountability to Parliament and parliamentary oversight, and judicial review of administrative action.

Change was subtle, occurring gradually over time. While the royal prerogative remained almost intact and the eighteenth-century sovereign was clearly “no mere figurehead in the aristocratic constitution,” by 1830 no one believed in the king’s independent exercise of real authority.⁴⁶⁵ Something had changed significantly after 1689. The king had lost his personal rule in favor of a more diffuse concept termed ‘the Crown,’ which had a wider meaning, with the person of the sovereign being merely part of it.⁴⁶⁶ For one thing, it was now clear to all that the king himself is replaceable, as well as his dynasty.⁴⁶⁷

462. *Id.*

463. See Vernon Bogdanor, *Geoffrey Marshall*, in *THE LAW, POLITICS, AND THE CONSTITUTION: ESSAYS IN HONOUR OF GEOFFREY MARSHALL 1*, at 8–9 (David Butler et al. eds., 1999) (stating ministerial responsibility is still considered one of the basic elements of English constitutionalism).

464. See BOGDANOR, *supra* note 435, at 9.

The “preserving revolution” of the seventeenth century established the principle of the supremacy of parliament. But, under the eighteenth-century “mixed constitution”, power came in practice to be shared between the sovereign and parliament. “Content with its practical assertion of the ultimate supremacy of Parliament, it left to the tact and self-interest of subsequent monarchs the avoidance of any constitutional deadlocks that might arise from unwise insistence on the letter of the prerogative.” The precise balance of power depended upon the political vicissitudes of the day.

Id. (quoting JOHN B. OWEN, *THE RISE OF THE PELHAMS* 35 (1957)).

465. LOVELL, *supra* note 19, 416.

466. *Id.*

467. See *id.*

In the early eighteenth century, the sovereign retained wide powers, which he could exercise without parliamentary approval.⁴⁶⁸ “He or she retained, in particular, the right to appoint and dismiss ministers and to determine general policy.”⁴⁶⁹ Indeed, until the accession of George I in 1714, it could still be said that the “sovereign governed the country, even though required to govern through ministers.”⁴⁷⁰

Following the 1714 death of Queen Ann, the last Stuart monarch, Prince George I of Hanover ascended to the throne.⁴⁷¹ The establishment as king “of an elderly and unprepossessing German prince,” ignorant of the language and character of England, “ushered in an age of almost unbroken internal tranquility and external progress,” and in no small part, “precisely because of the Prince’s disinterest in the land’s politics.”⁴⁷² It was under this monarch that the office of prime minister developed. From 1717 the king began to absent himself from cabinet meetings.⁴⁷³ When he attended he was disinclined to preside over the meeting. The senior minister took his place, and that position became the “prime minister.”⁴⁷⁴ This high office was first acquired in 1721 by Robert Walpole and held by him for almost 21 years.⁴⁷⁵ These were significant changes. Since the time of George I, the sovereign has attended cabinet meetings “only on a very small number of formal occasions, or to consider pardons, and since 1837, the sovereign has not attended cabinet at all.”⁴⁷⁶ The sovereign role in the general determination of policy thus gradually diminished, and a clear distinction was drawn between the head of state, the sovereign, and the head of government, the prime minister.⁴⁷⁷ “It followed that, if the sovereign was not primarily responsible for the determination of policy, he or she ought not to be held responsible for the outcome.”⁴⁷⁸ The developments in the eighteenth century gave rise to the important convention of the responsible government⁴⁷⁹—to be responsible for

468. BOGDANOR, *supra* note 435, at 9.

469. *Id.*

470. *Id.* at 9. It is said that before 1714 “the King or Queen governed through ministers; now ministers govern through the instrumentality of the Crown.” 2 WILLIAM R. ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION*, pt. 1, at 54 (4th ed. 1935).

471. See KEIR, *supra* note 432, at 289.

472. *Id.* Queen Ann (1665–1714) was James II’s second daughter. After her death George I (1660–1727), prince elector of Hanover, ascended the throne, his mother being the granddaughter of James I. See generally LOVELL, *supra* note 19, at 416; *George I (1714–27 AD)*, at <http://www.britannia.com/history/monarchs/mon53.html>.

473. KEIR, *supra* note 432, at 318.

474. BOGDANOR, *supra* note 435, at 14.

475. See generally LOVELL, *supra* note 19, at 442–43, 445; KEIR, *supra* note 432, at 320.

476. BOGDANOR, *supra* note 435, at 14.

477. *Id.*

478. *Id.*

479. *Id.* at 14.

all government action and accountable before Parliament and to royal courts of law.

During the eighteenth century, the powers that the “sovereign retained enabled him or her to exercise considerable, and sometimes a determining influence on policy.”⁴⁸⁰ However, “these powers had to be exercised within a framework of constitutional rules, which precluded arbitrary government.”⁴⁸¹

The sovereign’s powers depended upon getting a responsible minister to defend him or her in parliament. Within this framework, sovereigns still sought to secure governments which could carry out their policies, but they had to achieve this through methods of political management. They could no longer interfere with elections, but they could seek to influence them. . . . Similarly, sovereigns could no longer ignore parliament.

They could seek to influence Parliament, but they had to persuade it. “They could not, in the last resort, overcome it.”⁴⁸² During the eighteenth century, “the position of the prime minister . . . came gradually to rest not so much on royal support, as upon the support of the Commons” as the power and influence of the monarch declined.⁴⁸³ During the early nineteenth century, the king lost his remaining power on policy determinations. Such decisions were left in the hands of the government of the day with the sovereign having no option but to accept it. There were many royal attempts to effect the election of prime ministers. The final point was probably finally achieved in 1841 when Sir Robert Peel, “with no protest from the nation, formed a government that did not possess the confidence of” Queen Victoria (1837–1901).⁴⁸⁴ The principle of ministerial responsibility, or the responsible government, had finally come to apply.⁴⁸⁵

The modern concept of ministerial responsibility builds on the medieval notions but has much further-reaching ramifications. The British constitutional convention is then, that the acts of the monarch *must always be done through a minister*, and that all orders given by the Crown must be countersigned by a minister when expressed in writing—as they generally are.⁴⁸⁶ In order that an act of the Crown may be recognized as an expression of the royal will and have any legal effect whatever, it must in general be done with the assent of, or

480. *Id.* at 9.

481. BOGDANOR, *supra* note 435, at 9.

482. *Id.* at 10; *see also* ROBERTS, *supra* note 14, at vii.

483. BOGDANOR, *supra* note 435, at 11.

484. ROBERTS, *supra* note 14, at vii.

485. ROBERTS, *supra* note 14, at vii–viii. “Yet the lateness of the achievement of responsible government does not preclude the antiquity of its beginnings. As early as the year 1341 Parliament demanded that ministers of the King answer to it for their conduct in office. Five centuries later it secured its demand.” *Id.*

486. *See* DICEY, *supra* note 291, at 322–23.

through some minister or ministers, who will be held responsible for it.⁴⁸⁷ The counter-signature feature of ministerial responsibility, “as the distinguishing characteristic of the English Cabinet, made it possible for the traditional position of the King to be left largely unaltered in theory, in spite of the victory, at the end of the seventeenth century, of Parliament over the King.”⁴⁸⁸ Thus, “in the end, the position of the King became a formal one, and his ministers became the Real Executive.”⁴⁸⁹

With the monarch’s declining control over *his* government came the realization that “if the sovereign was not primarily responsible for the determination of policy, he or she ought not to be held responsible for the outcome.”⁴⁹⁰ At the same time, it was also clear that, “*in the long run*, no self-respecting minister would consent to accept the consequences of royal acts, unless the decision should be actually his own.”⁴⁹¹

Thus, we have come full circle to the initial meaning of the maxim “that the king can do no wrong” in the days of Henry III. The monarch simply has no control over government action. British Prime Minister Lord Palmerston explained in this principle in 1859 in these terms:

The maxim of the British Constitution is that the Sovereign can do no wrong, but that does not mean that no wrong can be done by Royal authority; it means that if wrong be done, the public servant who advised the act, and not the Sovereign, must be held answerable for the wrongdoing.⁴⁹²

In contemporary terms, the doctrine of ministerial responsibility means that the government must command support in Parliament,⁴⁹³ yet the doctrine also means that Parliament is content with allowing the government to be in control of the executive, in effect forfeiting its chance to take independent action.⁴⁹⁴

The modern age brought difficulties in maintaining the doctrine, the prime difficulty being that legal rules governing the English government focus almost exclusively at the ministerial level. Ministers of the Crown “are ubiquitously

487. *Id.* at 322.

488. GOOCH, *supra* note 294, at 130.

489. *Id.*

490. BOGDANOR, *supra* note 435, at 14.

491. GOOCH, *supra* note 294, at 130.

492. 3 THE LETTERS OF QUEEN VICTORIA 449 (Arthur Christopher Benson & Viscount Esher eds., 1907).

493. See YOUNG, *supra* note 355, at 182. Prime Minister Robert Walpole was defeated by a majority of one vote in 1742, then again by sixteen votes, whereupon he reigned after 21 years in office. See generally LOVELL, *supra* note 19, at 443–44. This incident was one of the early attempts to enforce ministerial responsibility by compelling the minister to resign when he no longer enjoys the support of the majority.

494. *Id.* at 188. “The Government is often prepared to modify its position to meet the wishes of Parliament, yet the Government alone decides whether to accept the criticism, to reveal certain types of information requested, or to conduct an inquiry.” *Id.*

responsible for almost everything that is done in the name of Government.”⁴⁹⁵ “Not only is the Government as a whole held responsible for policy but each Minister . . . is responsible within the orbit of his jurisdiction.”⁴⁹⁶ This means that extensive civil service, or professional bureaucracy,⁴⁹⁷ is shielded from the public discourse. This principle, also referred to as “civil service anonymity,” means that any transgressions of the civil service must be explained to Parliament by the responsible minister.⁴⁹⁸ In the age of the administrative state this principle became almost impossible to maintain. Ministerial responsibility was useful because it cleared the ambiguity of the word “government” by providing it the narrow meaning of only elected politicians holding office, namely, ministers. After all, “government” could have a much broader range, including public organizations and civil servants.⁴⁹⁹

In an effort to increase efficiency and accountability, large ministerial departments were reorganized into smaller agencies, and the provision of some functions and services was privatized or based on private-sector business methods.⁵⁰⁰ In this aspect, the British and the American models of government share similar concerns. The English principle of “ministerial responsibility,” essentially the linkage of accountability between the executive and the legislature, was not admitted into American public law and has no immediate equivalent in American constitutionalism. The modern difficulty of both the legislative and the executive branches in maintaining effective oversight over the administration is a shared concern, whether we discuss it under the caption of “ministerial responsibility” or the non-delegation doctrine.⁵⁰¹

495. YOUNG, *supra* note 355, at 185.

496. *Id.*

497. See RODNEY BRAZIER, *MINISTERS OF THE CROWN* 63–64 (1997).

It is an axiom of the British constitution that Ministers must sit in Parliament in order that the doctrine of ministerial responsibility to Parliament can be maintained. Only by being present in Parliament can Ministers adequately defend their policies in the face of Opposition attacks and, in the end, win parliamentary approval for what they are doing.

Id.

498. See YOUNG, *supra* note 355, at 185–88. See also 1 *INTERNATIONAL ENCYCLOPEDIA OF PUBLIC POLICY AND ADMINISTRATION* 418–19 (Jay M. Shafritz ed., 1998) [hereinafter Shafritz]; Gordon, *supra* note 31, at 343–48 (regarding the British civil service). Civil servants cannot publicly defend their actions. 3 Shafritz, *supra*, at 1411.

499. FIDELMA WHITE & KATHRYN HOLLINGSWORTH, *AUDIT, ACCOUNTABILITY AND GOVERNMENT* 4 (1999).

500. See 3 Shafritz, *supra* note 498, at 1411 (describing that chief executives of agencies have ceased to be anonymous civil servants, even if they do not have quite the same authority as their American counterparts). See DAINTITH & PAGE, *supra* note 415, at 2, 5, 29–31, 39, 52, 231, 325–26, 332, 340, 396; BOGDANOR, *supra* note 435, at 78–130.

501. See 1 Shafritz, *supra* note 505, at 498. In the U.S., “the principle of separation of powers and the omission of public service in the Constitution leads to uncertainty as whether civil servants are ultimately responsible to Congress or the president.” *Id.*

D. The “Divine Rights” Theory in England

1. Origins of the “Divine Rights” Debate

Critics often intimate a link between sovereign immunity and the “divine rights of kings” theory. The argument is that, in England, the divine rights theory precluded government accountability by holding that the king can literally do no wrong.⁵⁰² Such an argument is incorrect for several different reasons.

First, as suggested in earlier parts of this article, the origins of sovereign immunity were in a procedural bar from the result of feudal conventions. English common law did not believe the king to be infallible but did view sovereign immunity as a doctrine of substantive law.

Second, it is, of course, true that monarchy “has always required close ties with divinity,” and even English law retained vestiges of ecclesiastical influences.⁵⁰³ The fictions that were required in order to produce the theory of the king as two bodies suggest some “godlike” features vested in the English king.⁵⁰⁴ However, as explained in previous sections, this was not the result of divine rights theories. These were concepts that enabled continuity in government while retaining the monarch as the head of state.

Third, the divine rights theory was a familiar issue in European discourse since early medieval times. Yet the conventional account suggests that the

502. See, e.g., Chrystal Bobbitt, Comment, *Domestic Sovereign Immunity: A Long Way Back to the Eleventh Amendment*, 22 WHITTIER L. REV. 531, 543–44 (2000); THEODORE R. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION* 7–8 (1970); see also David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 3 (1972); *Echols v. DeKalb County*, 247 S.E.2d 114, 116 (Ga. Ct. App. 1978) (Deen, J., dissenting) (“Sovereign immunity is a hybrid form of inherent power or divine rights of kings, the bureaucracy, the despot or ruling power.”); Borchard, *supra* note 285, at 5 (wondering how the king’s “alleged . . . infallibility, the apotheosis of absolutism, have by evolution devolved upon the democratic American people”); Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349, 350 (1925) (noting that “an ancient convention based upon the denial of [citizen’s legal] rights has been preserved and still flourishes under the protection of our laws[.]” and while well aware of the English history of sovereign immunity, suggesting that the doctrine is fit for a regime where “the reigning monarch possessed autocratic and unrestricted powers, claimed divine origin and was the source of all governmental powers . . . [T]he act of the monarch, however wanton and arbitrary, was not a matter for redress.”); Harold J. Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447, 447–48 (1919). *But cf.* *Weldon v. United States*, 845 F. Supp. 72, 76 (N.D.N.Y. 1994).

503. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 17 (1988) (“[A]nd, in the Western world at least, politics have mingled promiscuously with theology.”).

504. *Id.* (suggesting the fictions that established the corporate nature of the Crown, such as continuity (i.e., immortality of the Crown) and the maxim that “[the king] could do no wrong” endow the king with “all the attributes of divinity”). This does not mean that these attributes established the divine rights of kings as a normative theory of government in England.

divine rights theory never took hold in English law. Bracton and his contemporaries manifestly rejected it in the thirteenth century, and only in the seventeenth century was the divine rights theory advanced as an operative scheme of government by the Stuart kings. In the ensuing confrontation, Parliament and its supporters defeated the proponent of divine rights theory, and laid their claim to rest.⁵⁰⁵ This account is perhaps too generous toward the House of Tudor, at the expense of the Stuarts.

The historic and intellectual origins of the divine rights debate are in the conflicts of the papacy and empire. Imperialist writers had produced counter-contentions to papal claims of sovereignty whereby the emperor, not the pope, is truly sovereign, and he is so by God's direct appointment.⁵⁰⁶ Similar arguments resurfaced from time to time, especially during the Reformation, in response to papal claims of supremacy. It also served Tudor King Henry VIII in his struggle with Rome.⁵⁰⁷ Complementing this argument, some researchers find the origins of the seventeenth-century struggles between the king and Parliament in the changing English monarchy during the Tudor reign (1485–1603). Professor Borchard notes that the legal obligations of the sovereign changed after the fifteenth century as the regime grew more autocratic.⁵⁰⁸ Such changes occurred, suggests Borchard, “during the Tudor despotism when much nonsense about the immaculate king of transcendental prerogatives and goodness was purveyed.”⁵⁰⁹ Those changes were “probably to be associated with the growth of the prerogative, the strengthening of the kingship, the ideas of divine right and of the absolute sovereign.”⁵¹⁰

2. The Troubles of the House of Stuart

It is true that the tension in the relationship between king and Parliament was rising in the Tudor era, but both sides kept working together. “[The] Tudor government had been highly successful in combining the principles of

505. See Bachmann, *supra* note 431, at 197. The divine rights theory did not take hold in England as a matter of law and politics. The seventeenth century, which “began with James I lecturing Parliament about the divine right of Kings,” ended with Parliament firmly in control. *Id.*

506. See J. NEVILLE FIGGIS, *THE THEORY OF THE DIVINE RIGHT OF KINGS* 14–15 (1896); see also LOVELL, *supra* note 19, at 284.

507. FIGGIS, *supra* note 506, at 91 (noting “[t]hat compete sovereignty is to be found in some person or body of persons in the State is a necessity of effective anti-papal argument”).

508. Borchard VI, *supra* note 295, at 30–31. In this period the maxim “that the king can do no wrong” attained a meaning “that the king could do no wrong, in the sense that he was incapable of doing wrong.” *Id.* at 31. How and when this transition in the meaning of the maxim occurred is difficult to know. Professor Borchard points to the Tudor period. *Id.*

509. *Id.* (finding this change “directly contrary to the cultural tradition and constituted a perversion of older views of the king’s responsibility”).

510. *Id.* Cf. 6 HOLDSWORTH, *supra* note 11, at 20–23 (suggesting the Tudors built on and extended the royalist theories of the royal prerogative).

royal authority and popular consent.”⁵¹¹ The change came only after the House of Stuart came to power in 1603, when the conflict between king and Parliament became public. In fact, the struggle over the structure of the English government, the powers of king and Parliament, and the religion of the realm lasted throughout all of the seventeenth century.⁵¹² The Stuart kings raised the divine rights question at the beginning of the seventeenth century as a theory justifying their efforts to expand royal powers against Parliament. It then became a major question in English political life of that period.⁵¹³

There are three things of particular interest in the divine rights debate. First, while the Stuart kings were the blood-heirs to the Tudors, they were not Englishmen. Born in 1566, James I became King of Scotland in 1567 and ascended to the English throne when his cousin, Queen Elizabeth I, died in 1603. By that time, James had a fully developed theory of kingship and an inclination toward a conception of enlightened absolutism. The opposition the Stuart kings encountered prevented English constitutionalism from falling into royal absolutism of the Continental pattern. While Charles II Stuart was struggling to consolidate his power, his cousin Louis XIV “was establishing the most absolute regime in French history.”⁵¹⁴

Second, it is misleading to view the conflict between the Crown and Parliament as one between royal tyranny and popular liberties. It is true that James I was a fervent monarchist and his son, Charles I, was probably not fully qualified for the throne that he inherited in 1625.⁵¹⁵ A deeply religious man, Charles I pursued his belief in the divine right of kingship with solid

511. KEIR, *supra* note 432, at 154. “Tudor government . . . reposed on a tacit understanding that neither would be pressed to an extremity.” *Id.*

512. To summarize the events of the seventeenth century: James I Stuart came to power in 1603, after Elizabeth I Tudor died; he was succeeded in 1625 by his son Charles I; the latter, defeated in the civil war that took place in the 1640s, was tried and executed in 1649. The “Commonwealth,” a republic, was established and dominated by Oliver Cromwell until his death in 1658; the monarchy was restored in 1660, when Charles II, son of Charles I, ascended to the throne. Upon his death in 1685, his brother James II became King. James II was unpopular because of his attempts to increase the power of the monarchy and restore the Catholic faith. Deposed in the “Glorious Revolution” of 1688–1689, James II fled to France, and was succeeded by his daughter and son in law who reigned as Queen Mary II and King William III (1689–1702). See generally ROBERTS, *supra* note 48, at 248–55.

513. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 12 (1968) (explaining why, in England, the divine right of kings was a sixteenth-century idea).

514. MORGAN, *supra* note 503, at 96; see also HOLDSWORTH, *supra* note 11, at 6–11; Cf. FIGGIS, *supra* note 506, at 135–36 (stating the background reasons to James I’s belief in the divine rights theory).

515. See KEIR, *supra* note 432, at 157–58 (explaining that Charles was James’s second son, who became heir upon the death of his elder brother and was not bred for kingship).

conviction, considering the defense of royal authority his sacred trust.⁵¹⁶ However, neither James I nor Charles I regarded the divine rights theory as justifying cruel and tyrannical rule, and they likewise did not believe that the theory allowed them to flout the law. Moreover, opposition to the Stuarts was based in great part on self-interested motives.⁵¹⁷ The propertied classes who dominated Parliament and local administration were unsympathetic toward the development of a centralized government that might challenge their predominance, a process that began in Tudor days.⁵¹⁸ In addition, criticism of royal policy was often the result of personal and professional rivalries and, at times, religious zeal.⁵¹⁹ “Above all, [opponents of the Stuarts] were reluctant to assume the additional financial burden imposed by the rising cost of government.”⁵²⁰ The history of early Stuart government “is largely concerned with unavailing attempts of an impoverished government to bring home to its subjects the duty of providing adequately for its reasonable requirements.”⁵²¹

Third, in seventeenth-century England, “divine rights” was not a question of legal theory discussed among scholars. It was one of national policy, demanding resolution. The divine rights argument was a clash between contrasting legal cultures. Stuart ideas of divine rights and royal prerogative were raised in direct response to the competing theories of popular sovereignty and the rule of law. Confronted with divine rights theories, “common law lawyers and parliamentarians marshaled out Magna Carta” and gave the modernized reading with which we are familiar.⁵²² The constitutional debate of the seventeenth century as to where the ultimate sovereignty in the nation-state was situated produced a great number of theories on the nature of the state and its government. These included books written by King James I, who forcefully advanced his views on royal powers.

In his book *True Law of Free Monarchies*, written in 1598, while James I was king of only Scotland, the king presented his philosophy of royal powers in a coherent form.⁵²³ He also told the English Parliament his view on several occasions during his reign.⁵²⁴ James rejected the view that it is the law that

516. *See id.* at 158. His father, James I, is described as a good-natured, peaceable and more practical person. *Id.* at 157.

517. KEIR, *supra* note 432, at 158.

518. *Id.*

519. *Id.* at 159.

520. *Id.* at 158.

521. *Id.* at 159. “The Tudors had led the country out of the Middle Ages into modern times in most respects, but they had omitted to modernize their financial arrangements.” LOVELL, *supra* note 19, at 283. “Even Elizabeth, with all her parsimony, had been obliged to sell crown lands, and had died in debt.” HOLDSWORTH, *supra* note 11, at 6.

522. LYON, *supra* note 36, at 310.

523. JAMES I, *THE TRUE LAW OF FREE MONARCHIES* (1598), *reprinted in* JOSEPH ROBSON TANNER, *CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, 1602–1625*, at 187 (1930).

524. *See* Berman, *supra* note 442, at 1667.

makes the king, who thus is subordinate to the law.⁵²⁵ Monarchy was a divine institution. God appoints monarchs to carry out his will on earth.⁵²⁶ “Kings [thus] derive their political power directly from God and not through a social contract with their people.”⁵²⁷ Therefore, no mortal, not even the king, can diminish royal powers.⁵²⁸ Any resistance to the king is a sin against God. Yet such views were not exceptional. At the close of the sixteenth century, many serious thinkers in Europe supported the divine rights theory as the ethical justification for royal absolutism.⁵²⁹

3. “Divine Rights” of King Debate – Resolution

The conventional wisdom that posits the Stuarts as authoritarian kings against Parliament, the protector of Englishmen’s rights, is probably tilted in favor of the winning faction. What is quite clear is that the English rejected the political theory the Stuarts advanced. Legal history records incidents that demonstrate the rejection of the divine rights of kings doctrine.⁵³⁰ One such event concerns King James I and the eminent jurist Edward Coke. Another concerns the trial and execution of King Charles II.

It is unusual enough to have a philosopher king who outlines his political theory. It is even more unusual to find one of the king’s own legal team attempt to refute his master’s ideas in open court. Yet, such accounts on an interaction between James I and Coke exist. Coke was ever loyal to James I personally, yet this loyalty was not unlimited.⁵³¹ As royal judge and member of Parliament, Coke argued that “Parliament and the Common Law remained the sole sources of the law and that all things must be done by law, particularly the defining of crimes, the levying of tax, and the judgment of cases.”⁵³²

525. *Id.*

526. *Id.*

527. *Id.*

528. *See id.*

529. *See* Berman, *supra* note 442, at 1668. *See also* 6 HOLDSWORTH, *supra* note 11, at 11–14 (discussing TRUE LAW OF FREE MONARCHIES, *supra* note 523, and James I’s previous book, BASILIKON DORON (1598)). Holdsworth finds the king’s political views to have been “not only sensible but even in advance of his age.” *Id.* at 12.

530. *See generally* FIGGIS, *supra* note 506, at 138–74 (suggesting that some aspects of the divine rights theories persisted much longer, finding place in later theories of natural rights and sovereignty).

531. Steve Sheppard, *Introduction* to 1 THE SELECTED WRITINGS OF SIR EDWARD COKE, at xxv (Steve Sheppard ed., 2003).

532. Sheppard, *supra* note 531, at xxv. Coke referred to King James as “the fountain of justice (as opposed to the fountain of law).” *Id.* Coke considered himself, to use Professor Berman’s term, “his majesty’s loyal opponent.” Berman, *supra* note 442, at 1673. Coke (1552–1634) was called to the bar in 1578 and was considered a brilliant lawyer and acquired a high reputation. *Id.* at 1674. He entered public service in the final years of Queen Elizabeth’s reign. Coke became solicitor-general in 1592 and attorney-general in 1594, and in those roles was known as a champion of the Crown and its prerogative powers, prosecuting Essex, Raleigh, and

Reports by Coke and others suggest that in a series of instances, Coke objected to royal efforts to expand the Crown's prerogatives.⁵³³ In some of these cases, Coke was stating his mind directly to the king. In 1607, Coke and his fellow judges informed the amazed king that he does not have the privilege to sit in person and decide a case at law.⁵³⁴ In essence, Coke was making the case for an independent judiciary and for the rule of law. In his own account, Coke tells the king that the law was a golden standard, used to try the causes of the subjects and protect "his Majesty in safety and peace."⁵³⁵ Because the implication that the king is under the law of man was treasonous, Coke carefully repeated Bracton, "the King 'is not subject to any man, but to God and the law.'"⁵³⁶ Several similar incidents occurred in the following years. In 1616, King James I chastised the twelve common law judges for exceeding their power.⁵³⁷ The judges refused to honor a royal request to stay proceedings and consult with the king in a pending case involving the royal prerogative over Church appointments.⁵³⁸ All judges but Chief Justice Coke swore never again to flout the royal will. For this insult, Coke was removed from the bench.⁵³⁹ In 1621, Coke became a member of Parliament, and there he played a

others. *See generally id.* In 1593, Coke was elected speaker of the House of Commons and showed considerable skill in carrying out royal policies. Coke held this position until 1606 when King James I appointed him chief justice of the Court of Common Pleas, then chief justice of the King's Bench. *Id.* Holdsworth suggests that once appointed to the bench, Coke found himself able, for the first time, to freely pronounce his ideas about the position of the common law in the state. 5 HOLDSWORTH, *supra* note 11, at 428. Coke's opposition to royal claims of power began to become clear. *Id.* His views resulted in temporary removal from the judicial office in 1616 and in his imprisonment in 1622, two years after he entered Parliament. Berman, *supra* note 449, at 1673. Coke's fame also lies on his published case reports, treatises and speeches. These were influential in both England and in the colonies, where they influenced many of the Founders. *See id.*

533. 5 HOLDSWORTH, *supra* note 11, at 428–29.

534. *Id.* at 430.

535. *Id.*

536. ABRAHAM, *supra* note 513, at 12. *See also* 5 HOLDSWORTH, *supra* note 11, at 428–31 (noting that "according to James I.'s view the judges were, like other civil servants, the officers of the crown" and could be superseded by the crown in person). The notion that the king cannot sit in judgment in royal court in person is conceptually significant. It makes the distinction between the king's powers as an individual and the corporate powers of the Crown quite clear. It also eliminates one of the feudal rationales for sovereign immunity—that the king should not be judge in his own case.

537. Berman, *supra* note 442, at 1675.

538. *Id.*

539. *Id.* at 1675–76; 5 HOLDSWORTH, *supra* note 11, at 439–41. There were several other cases where Coke's judgment stood in sharp contrast those of the king. In 1610, Coke and the judges of the Common Pleas found that the ecclesiastical courts did not have the power to imprison for adultery, thereby giving "a new turn to the theory of subordination of church to state expressed" by Henry VIII Tudor. This was against the will of James I, but the King was at that

prominent role in terms of both sheer activity in the House and in leadership and advocacy of Parliament's cause.⁵⁴⁰

Another indication of English opposition to Stuart monarchism took place during the English Civil Wars of 1642–1660. By the 1640s, Parliament was powerful enough to challenge the English king and take full control over the government of the nation.⁵⁴¹ Parliament proved stronger, and, in the unusual circumstances of the time, was willing to allow for the unprecedented measure of the trial and execution of King Charles I.⁵⁴² In January 1649, Parliament established a High Court of Justice. The trial of Charles I was held in Westminster from January 20 to 27 before some seventy commissioners. Accused of “a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people,”⁵⁴³ the king reaffirmed his belief in his divine right to rule “and that a King cannot be tried by any superior jurisdiction on earth.”⁵⁴⁴ Yet he also warned against the tyrannical nature of the new regime and the danger it poses to fundamental rights and freedoms of Englishmen.⁵⁴⁵ Charles I was beheaded January 30, 1649, in Whitehall.⁵⁴⁶ The king-less regime become lawless and then crumbled; the Crown, in a more benign form, was reinstated after the interregnum with the invitation of Charles I's son back to England as King Charles II in 1660.⁵⁴⁷

Coke's strong opposition to the Stuart views of royal supremacy was a clear indication that the Stuart theories of royal supremacy could not overcome obdurate opposition of Parliament and common law jurists.⁵⁴⁸ The trial and execution of King Charles I was an even more obvious indication of the Stuarts' inability to enforce their views on governance. The gruesome event prompted one commentator to quip that “[t]he axiom that the King can do no

time still wary of Coke, so Coke was made Chief Justice of another division of the royal courts—the King's Bench. *See id.* at 436–38.

540. STEPHEN D. WHITE, SIR EDWARD COKE AND “THE GRIEVANCES OF THE COMMONWEALTH,” 1621–1628, at 27 (1979). *See also* SELECTED WRITINGS OF SIR EDWARD COKE, *supra* note 325, at 1206–09 (discussing Coke's view on the King's power over penal laws), 1213–14 (discussing limitations of royal power regarding marriage), 1264–65 (discussing a report of conference with Lords).

541. *See generally* LOVELL, *supra* note 19, at 315–24.

542. *Id.* at 324.

543. SAMUEL RAWSON GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660, at 372 (1936).

544. *Charles I*, at <http://www.britannica.com/eb/article?tocId=1274>.

545. *See* GARDINER, *supra* note 543, at 374–76.

546. *Charles I*, at http://en.wikipedia.org/wiki/Charles_I_of_England#Trial_and_execution.

547. *See generally* J.G. MUDDIMAN, TRIAL OF KING CHARLES THE FIRST (1928); *see also* www.royal.gov.uk.

548. *See generally* GORDON, *supra* note 31, at 223–83; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 48–52 (Little, Brown and Co. 1956) (1929).

wrong received a rude shock in the days of Charles the First.”⁵⁴⁹ The “divine rights of kings” theory did not take permanent hold in England. The settlement reached in the English polity several decades after the execution of Charles I limited royal powers even further. By the early eighteenth century, sixty years or so before the American Revolution, the old doctrine of divine rights was finally extinguished.⁵⁵⁰

V. FINAL WORD GOES TO BLACKSTONE

In the three preceding parts, this Article has explored some of the main legal-historical steps that England took on the road to democracy and to an accountable government. We looked at various techniques and unique legal doctrines developed in English law to curb royal powers. We observed how they were first introduced in the thirteenth century and then reintroduced and used most effectively during the seventeenth century. We saw the barons, and then Parliament, effectively control state finances. We observed Parliament develop the technique of impeachment to gain control over the government ministers and noted how the legal doctrine of ministerial responsibility served to distance the king from the active workings of government bureaucracy and make ministers accountable to Parliament for government action. Finally, we saw the “divine rights” theory resolutely rejected in favor of popular government theories that won the day.

All of this background information was available to the Founding Fathers. Blackstone’s *Commentaries* summarized and explained the legal doctrines concerning government accountability. The *Commentaries* make several substantive references to the doctrine “that the king can do no wrong.”⁵⁵¹ Blackstone begins his comprehensive discussion of the king’s prerogative explaining that “one of the principal bulwarks of civil liberty . . . was the limitation of the king’s prerogative.”⁵⁵²

What is an English subject to do “in case the crown should invade their rights, either by private injuries, or public oppressions?”⁵⁵³ The English common law, suggests Blackstone, provides remedies in both cases.⁵⁵⁴ As for private injuries his answer is double. First, there is a remedy in the petition of right, and while it is only as “a matter of grace” that the king provides the compensation requested, he is most likely to permit this charity.⁵⁵⁵ Second, Blackstone cites Locke to the effect that the king is unlikely to inflict much

549. 1 DAVID LLOYD GEORGE, *THE TRUTH ABOUT THE PEACE TREATIES* 438 (1938).

550. See 10 HOLDSWORTH, *supra* note 11, at 53–54.

551. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *68.

552. *Id.* at *237.

553. *Id.* at *243.

554. *Id.*

555. *Id.*

damage *personally*, and immunizing him is a fair price to pay for the benefits of the regime.⁵⁵⁶

As for “public oppression,” in most cases the answer is clear: “a king cannot misuse his power, without advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished.”⁵⁵⁷ Such persons could be indicted or impeached by Parliament so “that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong” because, simply stated, there is no redress against the king.⁵⁵⁸ The results are less clear in the most severe cases as they tend “to dissolve the constitution, and subvert the fundamentals of government,” where the branches of government are in clear dispute.⁵⁵⁹

Speaking specifically of the king’s *political capacity* Blackstone famously stated that the law ascribes to the king “absolute *perfection*”:

The king can do no wrong. Which ancient and fundamental maxim is not to be understood, as if everything transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy the constitutional independence of the crown, which is necessary for the balance of power, in our . . . compounded constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

556. 1 WILLIAM BLACKSTONE, COMMENTARIES *243 (citing JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT §205 (1690), available at www.4lawschool.com/lib/locke18.htm).

In all other cases the sacredness of the person exempts him from all inconveniencies, whereby he is secure, whilst the government stands, from all violence and harm whatsoever, than which there cannot be a wiser constitution. For the harm he can do in his own person not being likely to happen often, nor to extend itself far, nor being able by his single strength to subvert the laws nor oppress the body of the people, should any prince have so much weakness and ill-nature as to be willing to do it. The inconveniency of some particular mischiefs that may happen sometimes when a heady prince comes to the throne are well recompensed by the peace of the public and security of the government in the person of the chief magistrate, thus set out of the reach of danger; it being safer for the body that some few private men should be sometimes in danger to suffer than that the head of the republic should be easily and upon slight occasions exposed.

LOCKE, *supra*, at § 205.

557. 1 WILLIAM BLACKSTONE, COMMENTARIES *244.

558. *Id.*

559. *Id.*

The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong: he can never mean to do an improper thing: in him is no folly or weakness.⁵⁶⁰

The language may seem archaic, the terms technical, and the fictions it describes mystical. Yet the *Commentaries* represented the better part of the founding generation's legal education, and they were quite fluent in Blackstonian. Blackstone's *Commentaries* were a comprehensive and authoritative summary of the English common law.⁵⁶¹ English critics scalded Blackstone for his pretension to freeze the entire 'living' common law.⁵⁶² But this quality made the books popular with the settlers of the North American colonies. In addition, the books' language was approachable for the colonists with limited legal skills but a great thirst to learn of their legal rights. Finally, the *Commentaries* were a timely publication for the colonists, as they were first issued in the decade preceding the American Revolution (1765–1769). By 1776, American lawyers and many of the Founding Fathers were well-versed in English law and practice through Blackstone.⁵⁶³ The *Commentaries*, in short, were widely known in America and had an enormous influence on American legal thought.⁵⁶⁴

This Article has attempted to explain the English legal-historical foundations of sovereign immunity, with the myriad constraints on royal power and with the requirement for government accountability in English public law.

560. *Id.* at *246. "Yet still, notwithstanding this personal perfection, which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both houses of parliament; each of which, in its turn, has exerted the right of remonstrating and complaining to the king." *Id.* at *247.

561. *See generally* HAROLD GREVILLE HANBURY, *THE VINERIAN CHAIR AND LEGAL EDUCATION* (1958) (discussing that Blackstone was the first professor of common law studies in Oxford, and the *Commentaries* sum up his entire course). *But see* 12 HOLDSWORTH, *supra* note 11, at 716 (explaining that there are, of course, critics who suggest inaccuracies in Blackstone's analysis but, on the whole, he codified English law quite accurately and, moreover, his interpretation of English law carried some weight in its own right).

562. *See* 12 HOLDSWORTH, *supra* note 11, at 155–56.

563. *See* Greg Bailey, *Blackstone In America: Lectures by An English Lawyer Become The Blueprint for a New Nation's Laws and Leaders*, EARLY AM. REV. (1997), available at <http://www.earlyamerica.com/review/spring97/blackstone.html> (discussing "the American Revolution [Blackstone] unintentionally inspired."). This concise overview of Blackstone's career and influence notes the familiarity that Thomas Jefferson, James Wilson, Alexander Hamilton, John Marshall, and many others had with the *Commentaries*. *Id.*

564. *See* LAWRENCE M. FRIEDMAN, *AMERICAN LAW* 58 (2d ed. 1998) ("Americans—laymen and lawyers alike—seized eagerly on the book"); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996) (stating the *Commentaries* were "the most influential law book in Anglo-American history"); Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 553 (1997); DAVID A. LOCKMILLER, *SIR WILLIAM BLACKSTONE 177* (1938) (noting that before 1900, almost every American Lawyer read at least part of Blackstone's *Commentaries*).

These principles of English law, summarized in Blackstone's *Commentaries*, were widely read by the founding generation of the United States. They significantly influenced the Founders' knowledge and understanding of government work. The principles of the English constitution are essential for a serious analysis of the Founders' understanding of the core concepts of sovereignty and sovereign immunity and the accountability of government.