

THE SPIRIT OF THE LEARNED LAWS

THE SPIRIT OF ROMAN LAW. By Alan Watson. Athens, GA: University of Georgia Press, 1995. Pp. 235.

THE SPIRIT OF CLASSICAL CANON LAW. By R.H. Helmholz. Athens, GA: University of Georgia Press, 1996. Pp. 514.

*Reviewed by Charles J. Reid, Jr.**

I. INTRODUCTION

Montesquieu, when he wrote of the “spirit of the laws” two and a half centuries ago, meant to identify the relationship of a nation’s law with its national character.¹ Necessarily implicating law in its three fundamental aspects—the natural or the moral, the historical, and the pragmatic or political²—Montesquieu strove for a synthetic understanding that would allow him to explain how and why legal systems and governments came into being, flourished, and passed away.³

Alan Watson, probably the greatest living Roman legal historian, has striven for a similar understanding of law with this fine series on the “spirit of the law” published by the University of Georgia Press. Watson’s goal in producing this series is to provide not merely a review of the rules and regulations operative within particular legal systems, but to present the unity underlying a given system, thereby laying bare the philosophy,

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1. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. 28, at 532-601 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans., Cambridge Univ. Press 1989) (1748).

2. On these three fundamental characteristics of all law and their integration, see Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988).

3. See MONTESQUIEU, *supra* note 1, at xliii:

I began by examining men, and I believed that, amidst the infinite diversity of laws and mores, they were not led by their fancies alone.

I have set down the principles, and I have seen particular cases conform to them as if by themselves, the histories of all nations being but their consequences, and each particular law connecting with another law or dependent on a more general one.

history, and political process that brought it into being and sustained it throughout its natural life.

Watson's ambition with this series is global in reach. In addition to the two books under review in this essay, other volumes in the Spirit of the Laws series focus on Japanese law,⁴ traditional Chinese law,⁵ Islamic law,⁶ and Biblical law.⁷ Fundamentally, the goal of the series is to capture the essence of the human experience of law, from the earliest available records onward.

The two books under review seek to widen our understanding of the animating forces that led to the growth and development of the ancient Roman law and the medieval canon law.⁸ The two systems are related. Canon law, in its classical period of roughly the twelfth through fourteenth centuries, depended greatly on the revival of Roman legal studies that occurred at the University of Bologna and elsewhere in Western Europe beginning at the close of the eleventh century.⁹ The Roman law, for its part, awakened from a kind of dormancy due to this new scholarly interest and acquired a renewed life that carried it forward into the modern era. Together, Roman and canon law have exerted considerable influence over the shape of modern legal systems in Western Europe, in North and South America, and elsewhere in the world. It is therefore fitting that these two books be reviewed together in the pages of a law review dedicated to global studies.

II. ALAN WATSON'S THE SPIRIT OF ROMAN LAW

As a young scholar, Alan Watson published a series of important studies that transformed our knowledge of law in the Roman Republic.¹⁰ He subsequently devoted years of his scholarly life to the study of the

4. JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* (1998).

5. GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* (1995).

6. BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* (1998).

7. CALUM M. CARMICHAEL, *THE SPIRIT OF BIBLICAL LAW* (1996).

8. ALAN WATSON, *THE SPIRIT OF ROMAN LAW* (1995) [hereinafter *ROMAN*]; R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* (1996) [hereinafter *CANON*].

9. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 120-64* (1983).

10. See ALAN WATSON, *THE CONTRACT OF MANDATE IN ROMAN LAW* (1961); ALAN WATSON, *THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC* (1965); ALAN WATSON, *THE LAW OF PERSONS IN THE LATER ROMAN REPUBLIC* (1967); ALAN WATSON, *THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC* (1968); ALAN WATSON, *THE LAW OF THE ANCIENT ROMANS* (1970); ALAN WATSON, *ROMAN PRIVATE LAW AROUND 200 B.C.* (1971); ALAN WATSON, *LAW MAKING IN THE LATER ROMAN REPUBLIC* (1974); ALAN WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* (1975).

nature of law and the phenomenon of legal change,¹¹ and has, more recently, dedicated himself to understanding the historical events of the New Testament, particularly as related to law.¹² In the midst of all of this scholarly output, Watson has continued to write deeply original monographs on aspects of Roman legal history as well as other topics.¹³

In the work under review, Watson seeks to identify the time and circumstances of the birth of the “spirit” of Roman law. He identifies the time as the fifth century B.C. and the circumstances as the conflict between patricians and plebeians that gave rise to the ultimate adoption of the Law of the Twelve Tables.

This conflict was one of the defining moments of the Roman Republic, as described by the chronicler of early Rome, Titus Livy. Tarquinius Superbus—Tarquin the Proud—had by the year 510 B.C. ruled for a quarter century and had worn out his welcome as Roman king. He had come to the throne in a bloody coup,¹⁴ and had maintained his hold on power through foreign wars and bloody purges.¹⁵ As Livy tells the story, the Tarquinian dynasty finally was toppled when Sextus Tarquinius, the Proud Man’s son, raped Lucretia, the daughter of Spurius Lucretius, and the wife of Tarquinius Collatinus, a near relative of the king, but one who had fallen afoul of him.¹⁶ Lucretia, to preserve her honor, revealed to her father and husband that she had been raped, swore her men to avenge her, and then committed suicide.¹⁷ Collatinus and Lucretius, joined by Lucius Iunius Brutus, promptly brought about an uprising, exiled Tarquin the Proud and his family, and installed in place of the king two consuls who were to share all the traditional power of governance.¹⁸ Henceforward,

11. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974); ALAN WATSON, *THE NATURE OF LAW* (1977); ALAN WATSON, *THE EVOLUTION OF LAW* (1985); ALAN WATSON, *FAILURES OF THE LEGAL IMAGINATION* (1988); ALAN WATSON, *LEGAL ORIGINS AND LEGAL CHANGE* (1991).

12. See ALAN WATSON, *JESUS AND THE JEWS: THE PHARISAIC TRADITION IN JOHN* (1995); ALAN WATSON, *THE TRIAL OF JESUS* (1995); ALAN WATSON, *THE TRIAL OF STEPHEN: THE FIRST CHRISTIAN MARTYR* (1996); ALAN WATSON, *JESUS: A PROFILE* (1998).

13. See ALAN WATSON, *THE MAKING OF THE CIVIL LAW* (1981); ALAN WATSON, *ROMAN SLAVE LAW* (1987); ALAN WATSON, *SLAVE LAW IN THE AMERICAS* (1989); ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* (1991); ALAN WATSON, *THE STATE, LAW, AND RELIGION: PAGAN ROME* (1992); ALAN WATSON, *JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS* (1992); ALAN WATSON, *ANCIENT LAW AND MODERN UNDERSTANDING: AT THE EDGES* (1998); ALAN WATSON, *LAW OUT OF CONTEXT* (2000).

14. See TITUS LIVY, *AB URBE CONDITA* [FROM THE FOUNDING OF THE CITY] bk. I.46-48.

15. *Id.* at bk. I.49-57.

16. *Id.* at bk. I.57-58.

17. *Id.* at bk. I.58.

18. *Id.* at bk. I.59-60. See also MICHAEL CRAWFORD, *THE ROMAN REPUBLIC 22-23* (2d ed. 1993) (describing the nature of consular power).

consuls were to be elected annually by the leading elements of Roman society, with only rare exceptions.

Livy recounts that the Roman Republic that grew up in succeeding years was one dedicated to political liberty, at least for those who controlled the levers of state power.¹⁹ Indeed, it would be a struggle over who should be allowed a say in the exercise of that power that, Alan Watson argues, set in motion a train of events that conferred on Roman law its distinctive spirit.²⁰

In early Rome, a large social gulf separated patricians—the Roman ruling class—from the plebeians, or common folk. Livy, in describing the social origins of the plebeians, stated that they were “nomads and refugees from their own nation” unfit to participate in governance, at least during the monarchy.²¹ Regardless of their social origins, by the middle decades of the fifth century B.C., sufficient numbers of plebeians had acquired the wealth and status needed to make a claim to share in the governance of the state.²² This claim, Watson notes, quickly resolved itself into an insistence that plebeians be given a share in the lawmaking function.²³

This conflict coincided with a short-lived experiment in Roman governance. In 452 B.C., Rome briefly abandoned the consular system (whereby two men shared the full authority of the state) in favor of government by “ten men” (*decemviri*).²⁴ It was precisely at this time that the struggle over the law reached a climax. A senatorial delegation had been sent to Athens two years before to study the laws of Solon.²⁵ The *decemviri* now redacted the recommendations into actual legislation and forwarded the finished document to the *comitia centuriata* for ratification.²⁶ As originally conceived, the laws consisted of ten tables, but

19. LIVY, *supra* note 14, at bk. II.1.

Liberi iam hinc populi Romani res pace belloque gestas, annuos magistratus imperiaque legum potentiora quam hominum peragam. Quae libertas ut laetior esset, proximi regis superbia fecerat [I shall recount here the deeds of the free Roman people in peace and in war, their annual magistracies, and the imperial reign of their laws, more powerful than men. Which liberty was made more blessed because of the overbearing of the last king].

Id.

20. See ROMAN, *supra* note 8, at 34-37.

21. LIVY, *supra* note 14, at bk. II.1.

22. See ROMAN, *supra* note 8, at 35.

23. *Id.* at 36.

24. See LIVY, *supra* note 14, at bk. III.33.

25. *Id.* at bk. III.31.

26. *Id.* at bk. III.34. On the *comitia centuriata*, one of the earliest and most comprehensive of the Roman popular assemblies, see ANDREW LINTOTT, *THE CONSTITUTION OF THE ROMAN REPUBLIC* 55-61 (1999).

subsequently another two were added, and the final collection came to be known as the Law of the Twelve Tables.²⁷

“Such were the historical events,” Watson asserts, “that . . . determined the spirit of Roman law.”²⁸ The law that emerged from the *comitia centuriata* fundamentally reflected the wants and prejudices of the patrician class.²⁹ The patrician class, furthermore, maintained a monopoly over the interpretation of the law that would last for centuries.³⁰ These basic social facts Watson takes as fundamental for understanding both the topics that Roman law addressed and the matters that are omitted from legal analysis.³¹

The essentially patrician character of the law caused it, first and foremost, to be weighted heavily in favor of private law concerns at the expense of public law, understood as the law establishing and delineating governmental powers and responsibilities.³² Furthermore, the desire of the patricians to control the state religion led paradoxically to the pronounced secular character of Roman law.³³ It was not that the Romans were unconcerned with matters of religion, but rather that the leading classes, who controlled the rituals of the state religion and their interpretation, had concluded that it was best to exclude religious law “as a subject for which the plebs were unfit.”³⁴

Watson also emphasizes the importance of legal interpretation remaining in the hands of the patrician class.³⁵ Pomponius, whose historical account of the Twelve Tables is preserved in the *Digest*, records that following the adoption of this law, the College of Pontiffs retained the right of interpretation and would designate one of its members every year to explicate the law of civil actions.³⁶ The College of Pontiffs, or priests, itself also was charged with the task of interpreting the Roman state religion.³⁷ Membership among the College was the prerogative of the aristocratic classes; it was held for life and often was exercised in tandem with civil magistracies by those eager for advancement.³⁸ Watson explains

27. See ROMAN, *supra* note 8, at 37.

28. *Id.*

29. *Id.* at 37-38.

30. *Id.* at 37.

31. *Id.* at 37-38.

32. *Id.*

33. *Id.* at 38-39.

34. *Id.* at 38.

35. *Id.* at 37-39.

36. DIG. 1.2.6 (Theodor Mommsen et al. eds., 1985).

37. See LINTOTT, *supra* note 26, at 183-85.

38. *Id.* at 183.

the significance of this retention of interpretive responsibilities by the leading men:

The original role of interpretation given to the pontiffs and the choice of one of their number to give authoritative rulings are the basis of two other characteristic features of the system: the importance subsequently attached by gentlemen [i.e., the jurists] to the giving of legal opinions, and the acceptance by the state of the individual's important role in lawmaking. Because to become one of the (originally) four pontiffs was an important step in a political career and because giving authoritative rulings in law was a significant pontifical function, it was valuable for a gentleman to have legal knowledge and provide legal opinions When the College of Pontiffs lost its monopoly of interpretation, tradition ensured that men of the same class regarded the task as important.³⁹

Much of the remainder of Watson's book explores and explains the singular qualities of Roman law by reference to these original features. Gaius' *Institutes*, dating to the second century A.D., proclaimed three basic divisions to law: persons, actions, and things.⁴⁰ These are preeminently private law concerns. There is little room here for concerns of a public law nature. Indeed, although Gaius' work makes mention of the powers of the popular assemblies, the praetors, and the emperors, little space is given to analyzing them in any detail. We learn merely that the law recognized distinctions between the force of laws (*leges*), plebiscites (*plebiscita*), opinions of the senate (*senatusconsulta*), and imperial edicts (*edicta*) issued in the emperor's capacity as the ultimate sovereign.⁴¹ We learn that the decrees of the praetors count as a source of law, and that imperial governors and quaestors could exercise these powers in the provinces.⁴² Other mentions of public law are even more limited and incidental.⁴³

The other principal didactic work of Roman law, Justinian's *Institutes*, provides little more in the way of analysis of public law. The *Institutes* declared in Book I, Title 1, that legal study consisted of two subjects: (1)

39. See ROMAN, *supra* note 8, at 39.

40. *Id.* at 42.

41. See G. INST. 1.2-6 (E.A. Whittuck ed., Edward Poste trans., 4th ed. 1904).

42. *Id.* at 1.6-7.

43. Watson cites to two brief mentions of public property that occur in the course of Gaius' treatment of the law of things. See ROMAN, *supra* note 8, at 43-44. Watson adds: "Public property is not further described: what it is, how it is constituted or acquired, particular privileges attaching to it, its alienability or otherwise, responsibility for its upkeep, actions against violators of it—these topics are entirely missing." *Id.* at 43.

public law, which pertained to the Roman state, and (2) private law, which looked toward the welfare of individuals.⁴⁴ Further distinguishing between written and unwritten law, the *Institutes* went on in a few paragraphs of Book I, Title 2, to define the scope of plebiscites, *senatusconsulta*, imperial decrees, the edicts of magistrates, and the responses of jurists.⁴⁵ The remainder of the four books were dedicated to private law. Watson notes that of the other works of Justinian, the *Digest*, consisting of excerpts from the principal jurists of the second and third centuries A.D., and the *Code*, consisting of imperial decrees from the second through fifth centuries, are somewhat more detailed, but that even these works make only infrequent mention of public law concerns while private law matters predominate.⁴⁶

A second enduring characteristic of Roman law that is traceable to the early conflict between classes that produced the Law of the Twelve Tables is its secular quality.⁴⁷ Watson takes the example of marriage and divorce to illustrate this point.⁴⁸ Marriage and divorce, in pre-Christian Roman law, was preeminently a matter for the parties themselves to arrange. Marriage was made by the consent of the parties, although typically the head of the household had much influence over the choice of the marriage partner.⁴⁹ Since marriage was brought about by choice, it also could be dissolved by choice.⁵⁰

Christianity, however, ushered in a far different view of the marriage relationship. Where Roman law and practice viewed marriage as a private matter affecting the management of the household (conceived largely in economic terms),⁵¹ Christian theology, by the fourth and fifth centuries, had come to define marriage as an indissoluble union that served to fulfill

44. See J. INST. 1.1 (Thomas Collett Sandars trans., 7th ed. 1962) (“Huius studii duae sunt positiones, publicum et privatum. Publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet”).

45. See *id.* 1.2.3-9.

46. See ROMAN, *supra* note 8, at 46-47.

47. See *supra* notes 33-34 and accompanying text.

48. See ROMAN, *supra* note 8, at 46-47.

49. See PERCY ELLWOOD CORBETT, THE ROMAN LAW OF MARRIAGE 55-57 (2d ed. 1969).

50. See JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 38-39 (1987). As a matter of social practice, divorce was rare in the Roman Republic, particularly early in Republican history. The first recorded divorce was that of Spurius Carvilius Ruga. See Alan Watson, *The Divorce of Carvilius Ruga*, 33 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 38 (1965).

51. “In classical Latin, the word *familia* carries equivalent meanings. It designates everything and everybody under the authority [*patria potestas*] of the household head.” See DAVID HERLIHY, MEDIEVAL HOUSEHOLDS 2 (1985).

certain spiritual ends, including the creation of an unbreakable union that represented Christ's own love for the Church.⁵²

Despite this vastly changed understanding of the meaning and purpose of marriage, the Roman lawyers of the later Christian Empire retained the old understanding of matrimony as a dissoluble consensual relationship. Justinian's *Institutes* was silent on the subject of divorce.⁵³ Constantine, Roman Emperor and Christian convert, placed restrictions on the right to divorce,⁵⁴ but his legislation and successive enactments by later emperors, it has been persuasively demonstrated, were not principally motivated by a Christian vision of marriage.⁵⁵ "From Constantine to Justin II there was in Roman divorce law no assertion that marriage was indissoluble or irrevocable by the law of God, nature or man; no assertion that marriage was a mystery or a sacrament; no assertion that a valid first marriage was any barrier to a valid second marriage."⁵⁶ The secular ideal, established early in Republican history, still can be found exerting its influence many centuries later, in the very different context of a Christianizing empire.

Watson also explores in depth two other enduring features of Roman law: (1) the continuing responsibility of jurists to interpret, and thus to make, the law, and (2) the isolation of legal analysis from other social, political, economic or other considerations. From an early stage in Roman Republican history, jurists enjoyed a "right of responding" (*ius respondendi*) which actually allowed them to make law by means of cogently reasoned opinions.⁵⁷ Although the emperor Augustus narrowed this right and made its possession an imperial prerogative that only he or his successors could bestow, he took this step in order to preserve the old Republican practice.⁵⁸ "Augustus' idea was that the *responsum* of an authorized jurist should carry higher *auctoritas*. . . ."⁵⁹

52. St. Augustine, for instance, wrote of an unbreakable "order of love" (*ordo caritatis*) that prevailed between husband and wife, and declared this fidelity to be greater even than bodily health. See ST. AUGUSTINE, DE BONO CONIUGALI, DE SANCTA VIRGINITATE secs. 3-4 (P.G. Walsh ed. & trans., 2001).

53. Book I, Title 10, which addresses marriage, deals with issues of eligibility to marry as well as impediments to marriage, particularly among close family members. That divorce was contemplated as an option is revealed incidentally, as in the provision that offspring from a former spouse's second marriage following divorce should not count as stepchildren. See J. INST. 1.10.9.

54. See THE THEODOSIAN CODE AND NOVELS, AND THE SIRMONDIAN CONSTITUTIONS 3.16.1 (Clyde Pharr trans., 1952).

55. See John T. Noonan, Jr., *Novel 22*, in THE BOND OF MARRIAGE 41, 71 (William W. Bassett ed., 1968).

56. *Id.*

57. See FRITZ SCHULZ, ROMAN LEGAL SCIENCE 112 (1946).

58. *Id.* at 112-13.

59. *Id.* at 113.

It is the survival of this sort of institution that Watson finds in need of explanation. “[F]or a state to give weight to opinions expressed outside of some official context is startling.”⁶⁰ It is all the more startling, Watson continues, in a secular legal system.⁶¹

It is not in the least surprising in a system based on religion, such as Jewish or Islamic law, that expounding the law will bring great prestige and attract scholars. Law as religion is law as truth, and to be recognized as uncovering the truth is always to obtain prestige.⁶²

Once again, Watson traces an institution both fundamental and peculiar to Roman law to the particular circumstances of its birth. Interpretation of the law had belonged to the College of Pontiffs and, even after this task had become the responsibility of others, it was still the prerogative of the aristocracy.⁶³ This prerogative endured: “Tradition dies hard and even when this monopoly of interpretation [held by the Pontiffs] was ended, skill in giving legal opinions was a mark of great distinction, and juristic views were accepted by the state for the development of the law.”⁶⁴ In addition, the survival of this prerogative explains other peculiarities of Roman law, such as the low status accorded to judicial opinions:

In other systems judicial decisions may contribute to legal development in various notable ways: a judgment may be treated as binding precedent, or two or three similar judgments may be seen as marking a tradition from which judges will not readily depart, or the judgments of a court may be regarded as the best evidence of what the custom is. But in Rome, judges would follow the interpretation of jurists, who themselves were the best, authoritative, source of evidence of the law.⁶⁵

60. ROMAN, *supra* note 8, at 57.

61. *Id.*

62. *Id.*

63. See *supra* notes 29-30 and accompanying text. See also Francis de Zulueta, *The Science of Law*, in *THE LEGACY OF ROME* 192-96 (Cyril Bailey ed., 1923).

64. See ROMAN, *supra* note 8, at 58.

65. *Id.* at 60. Watson continues:

Still, in any society judicial decisions must have some importance, even if only as statements of what the law seems to be. It then becomes significant that so little mention is made of them at Rome. There is nothing at all in the legal sources, whether juristic, statutory, or rulings of the emperors, and in the literary sources we have only the slightest indications that orators might refer to previous decisions in their speeches.

Id.

Retention by the aristocracy of the responsibility of authentically interpreting the law led to yet another peculiar feature of Roman legal science: its intellectual isolation from outside influences. As Watson puts it, “[w]hole legal institutions, such as usufruct, which must have had particular social and economic implications, are set out with no hint on the face of the texts of their social realities.”⁶⁶

Watson pays particular attention to the impact this “legal isolationism” had on patterns of reasoning about the law. Legal reasoning was internal to itself. One might call it conceptualistic, or even formalistic. It was improper to introduce factors external to the law, such as economic or political considerations, when arguing about a particular rule, and whether it should be applied in a given case or extended to an analogous set of circumstances, or whether it should be limited or avoided altogether.⁶⁷

Watson provides numerous examples of this type of reasoning. One such example might be selected for examination. An excerpt from Paulus, found in the *Digest*, preserves a debate between members of the Sabinian and Proculan schools regarding whether a contract of sale is formed where the medium of exchange consists of things rather than money.⁶⁸ Sabinus and his followers asserted that such an exchange did amount to a contract of sale, while the Proculans maintained that it did not.⁶⁹

In support of their contentions, each side cited competing passages from Homer.⁷⁰ Citing to the *Iliad*, Sabinus and his disciple Cassius sought to justify the extension of the contract of sale to cover cases where the exchange was in something other than money.⁷¹ “The long-haired Achaeans,” Homer recorded, “procured wine, some for bronze, some for gleaming iron, some for hides, some for whole cattle, and some for slaves.”⁷² This passage was countered by Proculus and his follower Nerva, who cited to a competing passage from Homer. In Book VI of the *Iliad*,

66. *Id.* at 64.

67. *Id.* at 66.

68. See DIG., *supra* note 36, at 18.1.1.1. The Sabinians and the Proculans were the two major schools of thought in ancient Roman jurisprudence. Peter Stein sees the two schools as distinct from one another on questions of legal method, with the Proculans favoring “a strict, objective interpretation of the words used” in statutes, contracts, or other legal documents, and the Sabinians endorsing “a looser and less rigid approach to the interpretation of texts.” See Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1545-46 (1995). Cf. Peter Stein, *The Two Schools of Jurists in the Early Roman Principate*, 31 CAMBRIDGE L.J. 8 (1972) (setting out Stein’s arguments at greater length).

69. See DIG., *supra* note 36, at 18.1.1.1.

70. *Id.* See also David Daube, *The Three Quotations from Homer in Digest 18.1.1.1*, in 1 COLLECTED STUDIES IN ROMAN LAW 341 (David Cohen & Dieter Simon eds., 1991).

71. See DIG., *supra* note 36, at 18.1.1.1.

72. HOMER, *ILIAD* bk. VII, 472-75. Cf. Daube, *supra* note 70, at 341 (translating the passage).

Glaukus, his judgment blinded by Zeus, is recorded as exchanging his golden armor for the bronze armor of Diomedes.⁷³ The Greek verb *ameibo*, used by the Poet, carried the sense of trading, or bartering, but not of buying or selling.⁷⁴ In reply, Sabinus cited to a phrase repeated at several points in the *Odyssey*: “He purchased with his possessions.”⁷⁵

Watson’s point in reviewing this debate is to call attention to what was omitted by the jurists debating this issue.⁷⁶ Agreements that could be classified as contracts of sale were subject to “very satisfactory . . . contractual remedies. The defendant who lost his case would be adjudged to pay the plaintiff a sum of money equal to what he ought to give or do in accordance with good faith.”⁷⁷ At the time this debate occurred, however, there was no contract for barter, and an aggrieved party

who had performed his part of the bargain would be restricted to using the general action known as *condictio*, specifically on the ground of “*causa data causa non secuta*” (a consideration given but no consideration followed). All that this remedy would grant him would be a sum of money equivalent in value to what he had given.⁷⁸

In fact, Watson makes clear, what the Sabinians were advocating was an expansion of the remedy available in a contract of sale to cover situations “where one thing was promised for another and neither prestation was to be in coined money.”⁷⁹ But no justification for such an expansion was offered on social or economic grounds.⁸⁰ “The only explanation is that arguments from economic and social realities were not acceptable.”⁸¹

Much of the remainder of Watson’s volume develops or qualifies these basic themes. We learn, for instance, that the jurists, although their

73. HOMER, *supra* note 72, at bk. VI, 232-36.

74. See HENRY GEORGE LIDDELL & ROBERT SCOTT, 1 A GREEK-ENGLISH LEXICON 80 (9th ed. 1940).

75. DIG., *supra* note 36, at 18.1.1.1 (citing to HOMER, ODYSSEY bk. I, 430; bk. XIV, 115, 452).

76. ROMAN, *supra* note 8, at 66.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Watson connects this isolation to the jurists’ origins in the College of Pontiffs:

Though the pontiffs . . . kept religion out of law and did not make legal forms so rigid as those of religion, still they did, probably subconsciously, introduce pontifical modes of reasoning into their interpretation of private law. . . . One cannot permit the answer to an issue of sacred law (law as truth) to turn upon an argument of equity or justice, usefulness or economic efficiency, or advantage to the state.

Id. at 82.

reasoning was largely self-contained, were not altogether divorced from social realities. They were willing to make adjustments in the law of theft and contract of mandate when circumstances warranted, but their method was to make exceptions to otherwise general rules.⁸² The seeming paradox—and Watson stresses that it is only a seeming paradox⁸³—of a body of law that featured both a high degree of conceptualization and a lack of systematization also is explained by reference to the peculiar origins of the Twelve Tables and the interpretive monopoly enjoyed by the College of Pontiffs. The Pontiffs were charged with the task of interpretation. They were neither innovators nor systematizers.⁸⁴ The jurists who succeeded the College shared in this prejudice and this limitation of functions.⁸⁵ Yet another seeming paradox—the Roman reluctance to define terms and to resolve definitively controverted points of law—also is resolved by reference to the historical origins of the juristic profession.⁸⁶ As the jurists were fundamentally interpreters of law, they wished to see their ideas triumph because of their persuasiveness and inner logic. Where consensus could not be attained, it was preferable to allow a dispute to linger than to seek definitive statutory resolution from the emperor.⁸⁷

Watson's book is an extraordinarily important work by the leading scholar in the field. It is a triumph of massive knowledge of the sources in combination with profound historical imagination. Seeming anomalies about Roman law—its lack of concern with public law, its seemingly secular nature, the leading role played by jurists, its simultaneous high degree of conceptualization and lack of system—all are explained by the peculiar circumstances of its birth. For those who wish to understand the

82. *Id.* at 98-110.

83. According to Watson, a simultaneous lack of systematization and the presence of conceptualization

[D]o not present a paradox. The conceptualization was the result of the jurists working within the Roman system of actions: the boundaries of an institution had to be delineated so that it could be known whether an action (or other remedy), and which action, would lie. This was very much within the scope of the jurists' primary interest, interpretation.

Id. at 146.

84. *Id.* at 123.

85. *Id.*

[T]he Romans were not interested in systematizing the law, nor in law reform, nor in legal innovation as such. But they were interested in legal interpretation. And the historical reason for that takes us back almost to the beginning of this book, namely, the granting of a monopoly of interpreting the civil law to the College of Pontiffs . . .

Id.

86. *Id.* at 146-57.

87. *Id.* at 155.

spirit animating the birth and development of Roman law, Watson's book is indispensable reading.

III. R.H. HELMHOLZ'S THE SPIRIT OF CLASSICAL CANON LAW

R.H. Helmholz is among the greatest of living historians of medieval canon law. After earning a Bachelor of Law at Harvard, he did graduate work under the direction of John Noonan at the University of California, Berkeley. His dissertation, examining procedure in matrimonial cases in medieval England (published by Cambridge University Press in 1974), is a model of exacting scholarly research, exploring the application of canonistic marital doctrine to lived reality.⁸⁸ Following the completion of this work, Helmholz embarked on a long series of articles to demonstrate the deep interconnections shared by the canon law and the English common law. Collected in book form in 1987, Helmholz's work persuasively shows that canon law did indeed constitute part of the law of England prior to the Reformation.⁸⁹

In more recent works, Helmholz has continued to engage in path-breaking studies of canon law. In *The Bible in the Service of the Canon Law*, he examined a surprisingly neglected corner of medieval canonistic research—the central role played by Scripture in shaping the canon law.⁹⁰ In an article in a Festschrift dedicated to Robert Summers, Helmholz studied the formation of the doctrine of prescription, an important aspect of the canon law of property roughly analogous to adverse possession in the common-law tradition.⁹¹ Recently, he even has begun exploring the relationships of English canon law with the canon law of other regions of medieval Europe, such as Spain.⁹² Finally, in *The Roman Law of Blackmail*, Helmholz studied the ancient and medieval development of this crime.⁹³

In his recent work, Helmholz has continued as well to study the flowering of canon law on the peculiar soil of Britain, both before and after the Protestant Reformation. In *Magna Carta and the ius commune*,

88. See R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND (1974).

89. See R.H. HELMHOLZ, CANON LAW AND THE LAW OF ENGLAND (1987).

90. See R.H. Helmholz, *The Bible in the Service of the Canon Law*, 70 CHI.-KENT L. REV. 1557 (1995).

91. See R.H. Helmholz, *Legal Formalism, Substantive Policy, and the Creation of a Canon Law of Prescription*, in PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 265 (Werner Krawietz et al. eds., 1994).

92. See R.H. Helmholz, *Spanish and English Ecclesiastical Courts (1300-1550)*, in 28 STUDIA GRATIANA 415 (Peter Linehan ed., 1998).

93. See R.H. Helmholz, *The Roman Law of Blackmail*, 30 J. LEGAL STUD. 33 (2001).

Helmholz was the first to investigate in a systematic fashion the powerful influence Roman and canon law exerted on the drafting of this foundational document of Anglo-American constitutional history.⁹⁴ In his contribution to the volume *Canon Law in Protestant Lands*, and his book *Roman Canon Law in Reformation England*, Helmholz examined the survival of canonistic modes of reasoning in Protestant England.⁹⁵ A series of shorter studies considered specialized aspects of this relationship, such as “children’s rights” and sex offenses.⁹⁶ A pair of important studies assess the contributions of other great scholars to the development of a historiography of Western law.⁹⁷ Finally, in an important work of distillation, Helmholz explored various ways in which the law of England and the *ius commune*, the “common law” of Europe, interacted over the centuries.⁹⁸ He closes this work by endorsing the idea of a Western legal tradition, embracing both England and the Continent, which has run continuously from the twelfth century to our own, although it has “admitted a good deal of variety within it.”⁹⁹

Helmholz’s scholarship recently has branched into yet other areas of inquiry. Two articles consider the contribution of the common law of Europe—the learned canon and Roman law that took root in the twelfth through sixteenth centuries—to the development of the rule against self-incrimination, mistakenly thought by many Anglo-American lawyers and judges to be a uniquely common-law institution that developed in reaction to the oppressive techniques of Continental law.¹⁰⁰ The second of these

94. See R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999).

95. See R.H. Helmholz, *Canon Law in Post-Reformation England*, in *CANON LAW IN PROTESTANT LANDS* 203 (R.H. Helmholz ed., 1992); R.H. HELMHOLZ, *ROMAN CANON LAW IN REFORMATION ENGLAND* (1990).

96. See R.H. Helmholz, *And Were There Children’s Rights in Early Modern England? The Canon Law and “Intra-Family” Violence in England, 1400-1640*, 1 INT’L J. OF CHILDREN’S RIGHTS 23 (1993); R.H. Helmholz, *Harboring Sexual Offenders: Ecclesiastical Courts and Controlling Misbehavior*, 37 J. BRITISH STUD. 258 (1998). Another important essay of Helmholz’s on the relationship of English Protestant thinkers and the larger pre-Reformation legal tradition is R.H. Helmholz, *Richard Hooker and the European ius commune*, 6 ECCLESIASTICAL L.J. 4 (2001).

97. See R.H. Helmholz, *The Character of the Western Legal Tradition: Assessing Harold Berman’s Contributions to Legal History*, in *THE INTEGRATIVE JURISPRUDENCE OF HAROLD J. BERMAN* 29 (Howard O. Hunter ed., 1996); R.H. Helmholz, *The Learned Laws in ‘Pollock and Maitland,’ in THE HISTORY OF ENGLISH LAW: CENTENARY ESSAYS ON ‘POLLOCK AND MAITLAND’* 145 (John Hudson ed., 1996).

98. See R.H. HELMHOLZ, *THE IUS COMMUNE IN ENGLAND: FOUR STUDIES* (2001).

99. *Id.* at 240.

100. See R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European ius commune*, 65 N.Y.U. L. REV. 962 (1990); R.H. Helmholz, *The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 17 (R.H. Helmholz et al. eds., 1997).

articles appeared in an anthology that Helmholz himself edited and that comprehensively reviews the history of this privilege,¹⁰¹ a volume that in only four years has been cited twice by the U.S. Supreme Court.¹⁰²

Helmholz also has conducted important research into the history and function of property law in the Western world. Two articles explore the actual behavior of the courts when confronted with claims of adverse possession.¹⁰³ Other articles deal with judicial enforcement of joint tenancies,¹⁰⁴ the law of property that has been lost and found,¹⁰⁵ and the liability of bailees.¹⁰⁶ Helmholz has distilled much of this learning into case book form with the publication of *Fundamentals of Property Law*.¹⁰⁷ Furthermore, a second casebook of a very different sort puts on display Helmholz's gifts as a careful student of arcane legal manuscripts. *Select Cases on Defamation to 1600* seeks "to discover, and to present, the action as it appeared in ordinary civil litigation."¹⁰⁸ An historical introduction of over one hundred pages explains the rise of defamation as a cause of action, drawn from an amalgam of royal law and canon law, as mediated through the particular circumstances of English legal development.

Helmholz is also the rarest of legal historians in yet another respect: his work has been taken seriously by the courts. Helmholz's contention that the common law's failure to provide support in bastardy cases was because this responsibility belonged to the ecclesiastical courts has been cited by the Supreme Judicial Court of Massachusetts in the course of its discussion of the rights of illegitimate children under state law.¹⁰⁹ His historical account of the canonistic origins of the grand jury similarly have

101. See Helmholz, *The Privilege and the Ius Commune*, *supra* note 100.

102. See *United States v. Hubbell*, 530 U.S. 27, 52-53 (2000); *Portuondo v. Agard*, 529 U.S. 61, 66 (2000).

103. See R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. L. REV. 1221 (1986); R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65 (1986).

104. See R.H. Helmholz, *Realism and Formalism in the Severance of Joint-Tenancies*, 77 NEB. L. REV. 1 (1998).

105. See R.H. Helmholz, *Equitable Division and the Law of Finders*, 52 FORDHAM L. REV. 313 (1983).

106. See R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. KAN. L. REV. 97 (1992).

107. See BARLOW BURKE, ANN M. BURKHART, & R.H. HELMHOLZ, *FUNDAMENTALS OF PROPERTY LAW* (1999).

108. See *SELECT CASES ON DEFAMATION TO 1600* (R.H. Helmholz ed., 1985).

109. See *C.C. v. A.B.*, 550 N.E.2d 365, 368 n.3 (Mass. 1990). Cf. R.H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431 (1977) (setting out Helmholz's evidence). A Texas court that cites to this study seems confused as to its implications for understanding the evolution of the common law. See *In the Interest of J.W.T.*, 872 S.W.2d 189, 191, 191 n.8 (Tex. 1994).

been referred to by the courts,¹¹⁰ as has his treatment of lost chattels.¹¹¹

In *The Spirit of Classical Canon Law*, one of four large works of synthesis on canon law published in the 1990s,¹¹² Helmholz seeks to discover the animating principle of canon law through a rigorously inductive method:

It occurred to me that it might be possible to choose a number of subjects covered by the classical canon law and work through at least their most salient features. If the parts chosen were diverse enough and if they could be taken from representative areas of the law, the more general nature of the canonical system might emerge from their cumulation. Some overall conclusions about the canon law might become apparent. In other words, the choice of several suitable areas from the canonical system might uncover enough about the nature of the larger subject to make the project worthwhile.¹¹³

Helmholz has succeeded in this ambition in a thorough and comprehensive way. His work is both an elegant and a learned summary of research in a number of fields of investigation within the discipline of medieval canon law, and a remarkably fruitful effort at uncovering its inner spirit. Before evaluating Helmholz's work, however, a few words are in order about what is meant by the term "classical canon law."

The essential precondition to the birth and development of classical canon law was the Gregorian Revolution of the late eleventh century.¹¹⁴ The Church as late as the middle decades of the eleventh century was in large parts of Europe dominated by lay authority.¹¹⁵ This was the case even in Rome. Emperor Henry III, who was an ally of the reform movement then taking hold in ecclesiastical circles, took for granted in the

110. See *Oliverson v. West Valley City*, 875 F. Supp. 1465, 1473 n.3 (D. Utah 1994); *State v. Doliner*, 475 A.2d 552, 556 (N.J. 1984); *Hennigan v. State*, 746 P.2d 360, 378 (Wyo. 1987) (Urbigkit, J., dissenting). Cf. R.H. Helmholz, *The Early History of the Grand Jury and Canon Law*, 50 U. CHI. L. REV. 613 (1983).

111. See *In re Seizure of \$82,000 More or Less*, 119 F. Supp. 2d 1013, 1020 (W.D. Mo. 2000). Cf. Helmholz, *supra* note 105.

112. See CANON, *supra* note 8. See also JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* (1995); JEAN GAUDEMET, *ÉGLISE ET CITÉ: HISTOIRE DE DROIT CANONIQUE* (1994); JOHN T. NOONAN, JR., *CANONS AND CANONISTS IN CONTEXT* (1997). Cf. Charles J. Reid, Jr. & John Witte, Jr., *In the Steps of Gratian: Writing the History of Canon Law in the 1990s*, 48 EMORY L.J. 647 (1999) (evaluating these works).

113. See CANON, *supra* note 8, at xi-xii.

114. See generally BERMAN, *supra* note 9.

115. See COLIN MORRIS, *THE PAPAL MONARCHY: THE WESTERN CHURCH FROM 1050 TO 1250*, 21-28 (1989).

1040s that it was his responsibility to make and unmake popes.¹¹⁶

These arrangements were shattered during the pontificate of Gregory VII. Hildebrand, who was elected pope in 1073 and took the name Gregory VII, was himself a member of the papal reform party,¹¹⁷ and soon tangled with the German Emperor Henry IV over who was responsible for filling the vacant see of Milan.¹¹⁸ Beginning in 1075 the controversy turned into violent civil war that affected both Germany and Italy.¹¹⁹ Larger issues also came to be implicated. The Gregorian party sought to achieve the *libertas ecclesiae*—the liberty of the Church from secular domination.¹²⁰ Indeed, some theorists among the pro-papal party even sought to subordinate the secular to the ecclesiastical powers.¹²¹

Conventionally, the classical period is said to have begun in 1140, sixty-five years after the commencement of the Gregorian Revolution, with the appearance of Gratian's *Concordia discordantium canonum* ("Concord of Discordant Canons"), a title soon changed to the *Decretum* ("Decree").¹²² This work represented a qualitative advance over the collections that had gone before.¹²³ Its basic method was dialectical.¹²⁴ By questions, answers, careful distinctions, and shades of contrast, Gratian sought to harmonize a thousand-year tradition of ecclesiastical law and regulation that featured some large discordances.¹²⁵

Gratian's *Decretum* found a receptive audience. Within a few years, it was being studied and commented upon in all corners of Europe: from northern Italy, to France, to Anglo-Norman England, to the German

116. See BERMAN, *supra* note 9, at 93-94.

117. On the Gregorian platform, see BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE 1050-1300*, 45-52 (1964).

118. *Id.* at 53.

119. *Id.* at 53-55.

120. See BERMAN, *supra* note 9, at 118.

121. Gregory VII was himself a strong proponent of such a subordination. In his *Dictatus Papae* ("Sayings of the Pope"), he included such propositions as: "That the pope alone is the one whose feet are to be kissed by all princes;" "[t]hat he may depose emperors;" "[t]hat no judgment of his may be revised by anyone, and that he alone may revise [the judgments] of all;" and "[t]hat he may absolve subjects of unjust men from their [oath of] fealty." *Id.* at 96.

122. The *Decretum* is reproduced in 1 CORPUS IURIS CANONICI (Emil Friedberg ed., 1879). Cf. CANON, *supra* note 8, at 6-10. For a review of what can be known about Gratian's life and career, see John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 TRADITIO 145 (1979).

123. Helmholz explains Gratian's project: "[Gratian] organized the texts around discrete topics or questions, and he analyzed them in order to harmonize them where they seemed to conflict. He thereby brought 'harmony to dissonance.'" See CANON, *supra* note 8, at 8.

124. See John T. Noonan, Jr., *Catholic Law School—A.D. 1150*, 47 CATH. U. L. REV. 1189 (1998); Stephan Kuttner, *The Father of the Science of Canon Law*, 1 JURIST 2 (1941).

125. See STEPHAN KUTTNER, *HARMONY FROM DISSONANCE: AN INTERPRETATION OF MEDIEVAL CANON LAW* (1960).

Rhineland.¹²⁶ The school of commentators that dedicated itself to this work has become known as the “decretists,” or literally, “students of the *Decretum*.”¹²⁷ They saw their goal as twofold: (1) to illuminate the seeming inconsistencies and ambiguities that might be found in Gratian’s work, and (2) to fill in gaps discernible in Gratian’s tome.¹²⁸ Some of these writers have exercised enormous influence on the shape of western constitutionalism, even though their works are barely known today outside of a select circle of specialists. Rufinus (ca. 1160), for instance, played a crucial role in the development of the western vocabulary of natural rights,¹²⁹ while Huguccio (fl. 1188-1190) contributed greatly to the creation of other basic structures of constitutional thought.¹³⁰

By the latter decades of the twelfth century, one also witnessed an exponential growth in the numbers of decretal letters issued by the popes.¹³¹ Decretal letters were literally decrees of the pope. Modeled on the old Roman law rescript,¹³² decretal letters featured elements both of case law—they often were intended to resolve pending litigation—and of legislation in the degree to which they were used to propound often quite detailed sets of rules and principles to govern future action.¹³³

By the end of the twelfth century, decretal letters were being assembled into collections.¹³⁴ These collections were sometimes private endeavors, launched by ambitious practitioners who sought an awareness of the latest developments in the law.¹³⁵ However, several were official products, issued by the pope as rules meant to bind all of Christendom.

The most important collection for the purposes of understanding the development of canon law during the classical period is the *Liber extra*, which was the principal decretal collection issued by Pope Gregory IX in 1234.¹³⁶ Called “extra” because it was intended to embrace the law that had been promulgated since the appearance of Gratian’s *Decretum* and

126. See BRUNDAGE, *supra* note 112, at 49-51.

127. See CANON, *supra* note 8, at 25.

128. See Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37, 43 (1991).

129. See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625*, 62-63 (1997).

130. See generally WOLFGANG P. MÜLLER, *HUGUCCIO: THE LIFE, WORKS, AND THOUGHT OF A TWELFTH-CENTURY JURIST* (1994).

131. See BRUNDAGE, *supra* note 112, at 53.

132. See CANON, *supra* note 8, at 11.

133. See BRUNDAGE, *supra* note 112, at 53.

134. *Id.* at 53-55.

135. *Id.*

136. See CANON, *supra* note 8, at 10-14.

hence was “outside” that collection,¹³⁷ *Liber extra* became the focal point for commentaries on the law during the thirteenth century, including those by Hostiensis (ca. 1200-71),¹³⁸ Pope Innocent IV (reigned 1243-54),¹³⁹ and Bernard of Parma (d. 1266).¹⁴⁰ *Liber extra* was followed at the close of the thirteenth century by *Liber sextus*, issued by Pope Boniface VIII in 1298, the Clementine Constitutions, a collection of Pope Clement V’s decrees promulgated in 1317, and the *Extravagantes Johannis XXII* (literally, “the wandering decrees of John XXII”), privately published between 1325 and 1327.¹⁴¹

Helmholz’s intention is to understand the animating spirit of this body of law during its years of flowering in the twelfth through fourteenth centuries. He goes about this task as an investigative scientist might by assembling data, which he culled from a careful examination of the sources in a series of thirteen discrete fields of study—from ordination, to provision for the poor, to baptism, to blasphemy, to double jeopardy, to excommunication, and other topics in-between. To gain a sense of Helmholz’s method and his success, one might select for closer scrutiny three of the topics he considers in the course of his study: canonical elections; the position and powers of the papacy in canon law; and the relationship of the clerical and lay powers.

Election had been the ancient means by which leaders in the Church were chosen.¹⁴² The third-century North African bishop Cyprian of Carthage borrowed from Roman electoral vocabulary to ascribe to the entire ecclesial community a role in the selection of the community’s leadership.¹⁴³ Pope Celestine I (422-432) wrote that “no bishop should be imposed on those unwilling to have him. The consent and ardent desire of the clergy, the people, and the nobility are required [for episcopal election].”¹⁴⁴ Pope Leo the Great (440-461) declared that “one who is to

137. *Id.* at 12-13.

138. Author of a *Summa* and a *Lectura* on the *Liber extra*, as well as some shorter works. See BRUNDAGE, *supra* note 112, at 214.

139. One of the greatest legal minds of his or any time, Innocent wrote his *Apparatus* on the *Liber extra* during what spare time he had during his tumultuous pontificate. *See id.* at 225-26.

140. A professor at the University of Bologna, Bernard authored the *Glossa ordinaria* to the *Liber extra*. The “ordinary gloss” was a kind of semi-official commentary on the law in that it usually was copied together with manuscripts of the law itself. *See id.* at 210.

141. *See id.* at 197-99.

142. *See* Charles J. Reid, Jr., *Roots of a Democratic Church Polity in the History of Canon Law: The Case of Elections in the Church*, 60 PROCEEDINGS OF THE CANON LAW SOCIETY OF AMERICA 150, 153-60 (1998).

143. *Id.* at 155.

144. *Id.* at 159.

govern over all ought to be chosen by all.”¹⁴⁵ Mass outpourings of popular support played key roles in the election of leading bishops, such as St. Martin of Tours (elected ca. 370-372) and St. Ambrose of Milan (elected 374).¹⁴⁶

This ancient pattern remained a part of the lived experience of the Church and was part of the ecclesial heritage the reforming party gathered around Gregory VII wished to restore. The reformers, however, while desirous of re-establishing the old practice of ecclesial election, also sought rigorously to liberate this process from “any secular desire.”¹⁴⁷ Secular influence, in the context of the eleventh and twelfth centuries, meant selection by princes, and the reformers most certainly did not wish to open the door to that possibility.¹⁴⁸

Helmholz relates in careful detail the story of how secular influence came to be excluded from the election process in the twelfth and thirteenth centuries.¹⁴⁹ When Gratian turned to organize the election law that had grown up over the preceding thousand years of ecclesial life, he was confronted with some conflicting principles and ideas. He dealt first with the suggestion that a bishop might be able to designate his own successor,¹⁵⁰ demonstrating through a series of careful distinctions that texts that seemingly suggested a bishop might take such a step were really the result of singular occurrences. In this way, the norm—bishops were to be rigorously excluded from taking such an action—was not only upheld but reinvigorated.¹⁵¹

Gratian dealt as well with the proposition that princes might have the final say in naming bishops. True, Gratian conceded, such events had taken place historically, but they also were the result of unique factors—princes, in particular times and places, had been given the privilege of filling episcopal vacancies, but these privileges had been abused and were now lost to the lay authority.¹⁵² Although the method Gratian employed in resolving these contradictory experiences and ideas—an intense preoccupation with contextualization and an effort to distinguish conflicting sources as singular instances deviating from an unchanging norm—might be criticized today, Helmholz notes that “Gratian’s

145. *Id.*

146. *Id.* at 157-59.

147. *See* CANON, *supra* note 8, at 36.

148. *Id.*

149. *Id.* at 33-60.

150. *Id.* at 39-41.

151. *Id.*

152. *Id.* at 42-45.

technique . . . was unquestionably one of the common ways in which he and other canonists were able to reconcile conflicting and inconvenient texts.”¹⁵³

Helmholz continues to pursue his story of the evolution of election law in the thirteenth century. Thirteenth-century election law was preoccupied intensely with establishing rules to prevent the secular order from intruding on an ecclesiastical function. Indeed, the right to vote—the *ius eligendi*—itself was conceptualized as a spiritual right the possession and exercise of which was barred entirely to lay persons.¹⁵⁴ Helmholz examines the further elaboration of the rule against lay participation and considers a variety of other issues as well, such as the necessity of actually gathering the electors in a single place, the proper forms of election, and the methods to be used in voting and in counting the votes.¹⁵⁵

Helmholz further reviews two special issues: the problem of the *maior et sanior pars* and postulation to the Holy See. The rule that election had to be by the *maior et sanior pars*—“the greater and sounder part”—of the electoral body was a countermajoritarian rule that had been a part of canon law from the early middle ages.¹⁵⁶ The idea was that one had to win not only the “greater part” of the electoral body’s support, but also the approval of the group’s “sounder part.” Helmholz cautions that a modern reader may find the rules for discovering who constituted the sounder part “exasperating.”¹⁵⁷ It was not a simple matter of measuring and counting numbers, but a process of determining who possessed greater “authority,” “zeal,” and “merit.”¹⁵⁸ One could expect this sort of subjectivity to introduce grounds for controversy into the law, and, in fact, the number of electoral disputes found in the *Liber extra* testifies to the intense struggles that must have taken place.¹⁵⁹

Postulation also presented special problems. Where a suitable candidate could not be found, an electoral body had the authority to

153. *Id.* at 45.

154. See, for instance, Bernard of Parma, *Glossa ordinaria*, X.2.1.3, v. *connexa* (distinguishing among three large categories of rights: (1) spiritual rights that were proper only to the clerical order, (2) temporal rights, which were to be enjoyed by the lay order, and (3) rights connected to the spiritual, which might be enjoyed by both orders). On the *ius eligendi* as a spiritual right, see, for instance, X.1.6.51 (ruling illegal as an infringement on the liberty of the Church an arrangement by which a lay patron might select one of two candidates presented to him for office).

155. See CANON, *supra* note 8, at 46-52.

156. See Reid, *supra* note 142, at 167-68.

157. See CANON, *supra* note 8, at 54.

158. *Id.* at 53.

159. See the decretals in DECRETALES GREGORII IX, Liber I, Tit. VI, in 2 CORPUS IURIS CANONICI, *supra* note 122, cols. 48-96.

postulate—essentially, ask permission of one’s superior—that someone not otherwise eligible to be elected be named to the vacant post.¹⁶⁰ The principle at work, Helmholz notes, was that in postulation “the superior exercised a power to dispense from the canons that dealt with the elector’s qualifications.”¹⁶¹ The decision whether to honor the postulation, usually on the basis of the utility of the Church, or to reject it, rested not on the rights of the postulant but on the good grace of the superior.¹⁶²

The larger point Helmholz is making in his treatment of election law is to demonstrate the victory of Gregorian reformist ideals. Election was chosen as the means by which offices were filled in imitation of the ancient Church, but this would be election in which secular influence was to be excluded rigorously. Gradually, as the rules grew complex and subjective, the way was opened to greater centralization of the nomination process.¹⁶³ Being the court of last resort in resolving such disputes, it was only natural that the papacy would come to claim the power to fill vacancies.¹⁶⁴

The papacy as a lawmaking institution also came to occupy an exalted status as the result of the Gregorian Revolution. From the earliest days of the Church, Rome had occupied a privileged place in the governance of the Church in virtue of the ministry and martyrdom in that City of both St. Peter and St. Paul.¹⁶⁵ For instance, when the Corinthian Church fell into dispute at the end of the first century, it was the Roman Church that took it upon itself to try to repair the breach.¹⁶⁶ Pope Leo the Great, in the fourth century, dressed these ancient Roman prerogatives in legal language when he argued that the pope occupied the position of the “unworthy heir of St. Peter.”¹⁶⁷ In this way, Leo both laid claim to the special place filled by St. Peter and thereby established to his satisfaction the preeminence of Rome in the governance of the Church, although he also distanced himself from the Apostle’s personal merits—the latter an impossible role to fill.¹⁶⁸

Leo’s lofty vision for the papacy was not always realized in the course

160. See CANON, *supra* note 8, at 56-58.

161. *Id.* at 57.

162. See Charles J. Reid, Jr., *Thirteenth-Century Canon Law and Rights: The Word ius and Its Range of Subjective Meanings*, 30 *STUDIA CANONICA* 295, 333-40 (1996).

163. See CANON, *supra* note 8, at 58-60.

164. *Id.*

165. See WILLIAM J. LA DUE, *THE CHAIR OF SAINT PETER: A HISTORY OF THE PAPACY* (1999).

166. See First Epistle of Clement to the Corinthians, *translated in* 1 *THE APOSTOLIC FATHERS* 3 (T.E. Page & W.H.D. Rouse eds., Kirsopp Lake trans., 1912).

167. See generally Walter Ullmann, *Leo I and the Theme of Papal Primacy*, 11 *J. THEOLOGICAL STUD.* 25 (1960).

168. *Id.* at 33-35.

of the early Middle Ages. Indeed, for much of the ninth and tenth centuries, the papacy sank into a kind of feudal squalor, as competing Roman families found it to be one more object to fight over in their seemingly endless struggles for advantage and power.¹⁶⁹ It was to drain this swamp that the papal reform movement, led by Pope Gregory VII, was launched.¹⁷⁰

The reform movement in turn promoted an even more lofty vision of the papacy. In his *Dictatus Papae*, the “sayings of the pope,” Gregory VII declared that “the Roman bishop alone is by right called universal,” that “to him alone is it permitted to make new laws according to the needs of the times,” and that “no judgment of his may be revised by anyone, and . . . he alone may revise [the judgments] of all.”¹⁷¹ In the course of the twelfth and thirteenth centuries, popes and canonists built a structure of papal sovereignty that at once exalted the authority of the pope—in the fullness of his power (*plenitudo potestatis*), he might even turn circles into squares, went one maxim¹⁷²—but that also set some constitutional limits on his authority.¹⁷³

Helmholz takes for granted this historical background and focuses his own analysis on the development of one aspect of papal authority: the pope’s power to issue privileges dispensing from the ordinary operation of the law, thereby, in effect, creating special rights possessed by given individuals or entities in derogation of the law.¹⁷⁴ Indeed, privileges were defined variously as a “private law” (*privata lex*),¹⁷⁵ or “a special or private right contrary to the common law” (*et quidem privatum sive singulare ius contra commune indultum*).¹⁷⁶

Helmholz commences his analysis of papal privileges with the treatment found in Gratian’s *Decretum*.¹⁷⁷ Gratian saw the question, in the first instance, as implicating the papal power to alter the ancient law of the Church.¹⁷⁸ He mustered a series of sources that suggested popes should

169. See EAMON DUFFY, *SAINTS AND SINNERS: A HISTORY OF THE POPES* 82-87 (1997).

170. *Id.* at 87-99.

171. See BERMAN, *supra* note 9, at 96. For other sayings of the Pope, see *supra* note 121.

172. For this maxim, see CANON, *supra* note 8, at 314.

173. An important study of the constitutional limitations the canonists set on the papal office is BRIAN TIERNEY, *FOUNDATIONS OF THE CONCILIAR THEORY: THE CONTRIBUTION OF THE MEDIEVAL CANONISTS FROM GRATIAN TO THE GREAT SCHISM* (enl. ed. 1998).

174. See CANON, *supra* note 8, at 312-13.

175. See HOSTIENSIS, *SUMMA*, lib. I, tit. “De rescriptis et eorum interpretatione,” sec. 13.

176. *Id.* at lib. V, tit. “De privilegio,” sec. 1.

177. See CANON, *supra* note 8, at 316-21.

178. See C. 25, q. 1, cc. 1-16.

rarely, if ever, take this step.¹⁷⁹ Gratian, however, was not content with this recitation of authority, and proceeded, in his usual fashion, to answer the authorities he had compiled. Fundamentally, he noted, “[t]he Roman Church was the ‘heart and head’ of all churches. It was the organ of the Church that God had designated as possessing the power to establish *statuta*.”¹⁸⁰ Gratian proposed to model the legislative authority of the pope on the power that Jesus Christ claimed over the law.¹⁸¹ The Gospel of Matthew declared that Jesus taught as one who had authority over the law.¹⁸² Other passages, however, made it clear that Jesus “had come to fulfill the law, not to destroy it, and he had shown this to be true by his own voluntary obedience to the law.”¹⁸³

The pope, Gratian asserted, occupied the same position with respect to the canon law. The pope was not obliged to obey the law, although through his obedience “the law itself would be exalted by his example.”¹⁸⁴ However, by conceding that the pope had power over the law, and that he might vary the law’s applicability in individual instances to promote the cause of justice, Gratian opened the door to the development of a law of papal privileges.¹⁸⁵

The decretalists of the thirteenth century further developed the claim of the pope to issue privileges. The decretalists, in particular, were required to confront an essential tension in the nature and function of papal privileges:¹⁸⁶ privileges were an expression of papal fullness of power and created exceptions to the general law, but it also was taught that the pope, the source of all law and right, was not to be a source of injury to others.¹⁸⁷ What if a papal privilege, in conferring special benefits or status on one group, simultaneously had the effect of injuring the rights of third parties?

179. See, for instance, C. 25, q. 1, c. 6 (in which it is stated that while the papacy has the power to make new laws, it is the obligation of the pope to defend what has been laid down, “even at the expense of his spirit and blood” (*usque ad animam et sanguinem*). Cf. CANON, *supra* note 8, at 317.

180. See CANON, *supra* note 8, at 317.

181. *Id.* at 317-18.

182. See *Matthew* 7:29.

183. See CANON, *supra* note 8, at 317.

184. *Id.* at 318.

185. *Id.* at 318-20.

186. *Id.* at 323.

187. See, e.g., Bernard of Parma, *Glossa ordinaria*, X.1.2.12, v. *confirmatio*: “Per tales confirmationes non intelligit Papa iuri alicuius derogare . . . Quia inde non debet nasci iniuria unde iura oriuntur” [“Through such confirmations the Pope is not understood to derogate from another’s right . . . Because injury ought not to arise from the source of laws/rights”]. See also X.1.31.12, v. *ne esse debuit*: “Ne inde nascuntur iniuriae, unde iura nascuntur” [“Injuries are not to arise from the source of law/rights”].

Helmholz studies this issue at length.¹⁸⁸ In practice, Helmholz makes clear, the canonists worked out a detailed set of rules that was systematized only gradually in order to protect both papal power and the settled rights and expectations of third parties.¹⁸⁹ Papal privileges, Helmholz makes clear, was a vehicle by which “the popes were expressing sweeping claims to universal sovereignty over the government of the church . . .”¹⁹⁰, but also a means “for building up the good order of the church, not for tearing it apart.”¹⁹¹

At the same time canonists and popes collaborated to build an elaborate structure of papal sovereignty, powerful temporal rulers like Henry II of England and Philip Augustus of France also were using the law to bind together disparate corners of their kingdoms.¹⁹² The claims of popes and kings during this time often came into conflict. The conflict was not new; indeed, it is built into Christianity itself. Jesus Christ, after all, was recorded as saying “[r]ender therefore unto Caesar the things that are Caesar’s, and unto God the things that are God’s.”¹⁹³

This dualism has been at the heart of the relationship between the Christian movement and the temporal world from the very beginning. It gained classic expression in the artfully ambiguous letter of Pope Gelasius I to the Emperor Anastasius at the end of the fourth century: “Two there are, august emperor,” Gelasius began, “by which this world is chiefly ruled, the sacred authority [*auctoritas*] of the priesthood and the royal power [*potestas*].”¹⁹⁴

This view of the relationship of secular and spiritual powers, however, came to be challenged frontally in the course of the Gregorian Revolution.¹⁹⁵ The *Dictatus Papae* represented the spirit of the reformers who came to dominate the writings of Church leaders in the late eleventh and twelfth centuries.¹⁹⁶ This view was worked into a well-refined theory in the course of the thirteenth century. Pope Innocent IV’s commentary on the decretal *Quod super his* can be taken as an example of the exalted view the papacy took of itself during this time.¹⁹⁷ This commentary rightfully is

188. See CANON, *supra* note 8, at 322-38.

189. *Id.*

190. *Id.* at 312.

191. *Id.* at 331.

192. On England, see BERMAN, *supra* note 9, at 434-59; on France, see BERMAN, *supra* note 9, at 461-77.

193. *Matthew* 22:21.

194. See TIERNEY, *supra* note 117, at 13.

195. See CANON, *supra* note 8, at 339-43.

196. *Id.* at 340-41.

197. See Innocent IV, *Apparatus super libros quinque decretalium ad X.3.34.8 v. pro defensione*.

praised as creating the doctrine that non-Christians as well as Christians have a basic right of self-governance.¹⁹⁸ However, it also must be pointed out that Innocent also made the pope the ultimate judge of whether Christian and non-Christian societies and regimes alike conformed to the dictates of the natural law.¹⁹⁹

Helmholz is careful to point out that the hierocratic view that came to predominate in the twelfth and thirteenth centuries never vanquished the older Gelasian dualism. Rather, the two principles forged a kind of coexistence, although the dualistic view occupied the weaker position.²⁰⁰ In a world in which the canon law taught that any bishop might excommunicate a king, however, quite clearly, “it must follow as a matter of logical deduction that all kings held their positions subject to oversight by the priestly power.”²⁰¹

It is in this context that Helmholz wishes to pursue the implications of a question of both practical and theoretical import, namely:

[T]he question of the extent to which temporal courts were bound to respect and, when necessary, actually to enforce the sentences of ecclesiastical courts. Were the rulers of the world required to wield the secular sword at the bidding of the church?

The more exact legal question was whether the canon law required a temporal ruler and his courts to obey the decisions of an ecclesiastical court.²⁰²

198. See JAMES MULDOON, *POPES, LAWYERS, AND INFIDELS: THE CHURCH AND THE NON-CHRISTIAN WORLD 1250-1550*, 6-14 (1979).

199. See Innocent IV, *supra* note 197, at X.3.34.8 v. *pro defensione*: “Sed bene tamen credimus, quod Papa qui est vicarius iesu Christi, potestatem habet non tantum super Christianos, sed etiam super omnes infideles, cum enim Christus habuerit super omnes potestatem . . . [“But we nevertheless believe, that the Pope who is the Vicar of Jesus Christ, has power not only over Christians but also over all infidels, since Christ has power over all . . .”].

200. See CANON, *supra* note 8, at 342. Helmholz describes the relationship between the two viewpoints:

By the time the classical canon law was being formulated in the twelfth century . . . the Gelasian position had become distinctly the weaker alternative from the vantage point of high fliers within the church. It was not dead, of course. It had tradition and currency within the canon law itself; it retained its hold within the society of literate laymen; and it continued to be useful for many purposes to the canonists themselves. But the rise of theocratic ways of thinking about affairs of church and state had put a different complexion on the whole subject.

Id.

201. *Id.*

202. *Id.* at 343.

The medieval Church, Helmholz makes clear, claimed for itself the power to pronounce coercive sanctions against wrongdoers, and premised this claim on scriptural authority.²⁰³ “Had not Moses rightly put to death those who worshiped the golden calf [*Exod. 32:27-29*]?”²⁰⁴ At the same time, the canonists limited the extent to which the Church might rely upon coercion. The Church might never directly impose the death penalty,²⁰⁵ and, so far as other coercive sanctions were concerned, spiritual measures always should be applied before any resort to temporal sanctions.²⁰⁶ The imposition of temporal sanctions, in turn, required the cooperation of the secular realm.²⁰⁷

Helmholz commences his analysis of the issue of cooperation at the level of theory: on what basis did the Church seek the assistance of the secular “arm,” as it was frequently called?²⁰⁸ Even the Gelasian “two powers” model of church/state relations permitted the Church to call upon the state where required. Helmholz traces this tradition back to Roman law sources, such as a provision of Justinian’s *Codex* that called on imperial officials to enforce the decisions of episcopal courts, where litigants had freely sought a hearing before the bishop.²⁰⁹ The medieval canonists viewed this text as a “confirmation of the principle that the temporal sword had been instituted so that it might come to the assistance of the spiritual.”²¹⁰

The hierocratic model of church/state relations, much in vogue in the thirteenth century, moved even more forcefully in the direction of requiring the state to come to the aid of the Church in the imposition of coercive sanctions. Explaining the logic at work, Helmholz states:

Assuming that the spiritual power had really delegated its temporal sword to the state, as the “Gregorian” theory held it to have done, the conclusion followed that the temporal judges had a duty simply to enforce the ecclesiastical court’s judgment. They were agents. To

203. *Id.* at 346.

204. *Id.*

205. *Id.* at 348.

206. *Id.*

207. Helmholz explains: “[C]ourts could not normally invoke corporal sanctions, and they could never themselves issue a sentence of death. It might easily happen that stronger medicine would be required than spiritual sanctions and that the secular powers would have a monopoly on that medicine.” *Id.* at 350.

208. *Id.* at 351-56.

209. See CODE JUST. 1.4.8. Cf. CANON, *supra* note 8, at 352 (citing this text).

210. See CANON, *supra* note 8, at 352.

them belonged nothing but “the pure and simple execution” of the decisions of the ecclesiastical tribunals.²¹¹

This theoretical claim was simply too great for European monarchs and princes to swallow.²¹² Helmholz notes that because European rulers could not accept this assertion efforts were made to temper the logic of the unadulterated hierocratic view.²¹³ Helmholz notes, however, that “[n]o definitive consensus” on a variety of theoretical compromises was ever achieved.²¹⁴

In actual practice, Helmholz continues, ecclesiastical and secular courts reached a *modus vivendi*. In various parts of Europe, secular courts agreed to provide the necessary teeth for ecclesiastical courts seeking to enforce their decrees.²¹⁵ Thus in England, which Helmholz considers in detail, the bishop was allowed to seek a Chancery writ, known as a *significavit*, against anyone who remained excommunicated more than forty days.²¹⁶ According to the terms of the writ, the miscreant was to be imprisoned until such time as the ecclesiastical authority determined that the excommunication should be lifted.²¹⁷ Remarkably, this was a system that remained in regular use into the sixteenth and seventeenth centuries, long after the Protestant Reformation had run its course.²¹⁸

The hierocratic theory associated with Pope Gregory VII received a severe reality check at the close of the thirteenth century in the confrontation between Pope Boniface VIII and King Philip the Fair of France.²¹⁹ In a pair of decrees, known as *Clericis Laicos* and *Unam Sanctam*, Boniface boldly proclaimed the full measure of the hierocratic theory in asserting the Church’s prerogatives in the French kingdom.²²⁰ Philip responded with economic sanctions directed against Rome,²²¹ a defense of his rights as a ruler predicated on Roman law,²²² and, ultimately, with force, holding the pope briefly as a prisoner and

211. *Id.* at 352 (quoting Panormitanus, *Commentaria*, X.1.31.1, no. 12).

212. *Id.* at 353.

213. *Id.* at 354-55.

214. *Id.* at 355.

215. *Id.* at 358-60.

216. *Id.* at 358.

217. *Id.*

218. *Id.*

219. See TIERNEY, *supra* note 117, at 172-92.

220. See *id.* at 175-76, 188-89 (providing translated excerpts from these two decrees).

221. The king simply cut off the precious metal trade between his kingdom and Rome, a trade on which the pope was dependent. *Id.* at 174.

222. *Id.* at 181-82.

“roughing him up.”²²³ A few years after Boniface’s death, the papacy in fact would move to Avignon, in what is now southern France, where it could be kept under the watchful eye of the French king to the north.

Despite this blunt challenge to the hierocratic theory, as Helmholz’s treatment makes clear, courts of canon law in many parts of Europe could continue to call upon the secular arm for the enforcement of decrees until the Reformation, and sometimes even later.²²⁴ The survival of the system, however, came to rest upon a compromise between canonists, who could not fully implement in practice their own most ambitious theories, and the monarchs of Europe who, at best, accepted Gelasian dualism, but who still looked to the Church as being crucial to the security of their crowns and essential to the vitality of their states.²²⁵

The remainder of Helmholz’ work continues in this precise inductive manner, searching for the spirit of classical canon law in the elaborate structure of rules and rights, principles, and maxims which the canonists created and attempted to implement. His is a triumph of patient and exacting historical investigation. And what is that spirit of classical canon law? Helmholz finds it manifested in three overarching themes: “the independence of the clergy from secular control,”²²⁶ “the concern for *salus animarum*” [salvation of souls],²²⁷ and the requirement “to secure full justice for the unfortunate and to establish a system capable of enforcing their rights,” a task that was accomplished through the creation of a sophisticated body of poor relief law.²²⁸ These were the accomplishments of the system of canon law that was conceived in the papal revolution of the eleventh and twelfth centuries and that would endure for centuries.

CONCLUSION

John Maxcy Zane, Chicago lawyer, legal scholar, and narrator of the story of law,²²⁹ wrote in 1927 of “the traditions of Rome [that] govern our institutions today.”²³⁰ These traditions, Zane observed, have conferred on

223. *Id.* at 183-84.

224. *See* CANON, *supra* note 8, at 358-64.

225. *Id.* at 365.

226. *Id.* at 394.

227. *Id.* at 395.

228. *Id.* at 395-96. *Cf. id.* at 116-44 (examining the law of poor relief); BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* (1959).

229. *See generally* JOHN MAXCY ZANE, *THE STORY OF LAW* (2d ed. 1998). For biographical details, see Charles J. Reid, Jr., *Foreword to ZANE, supra*, at xiii-xviii.

230. *See* JOHN MAXCY ZANE, *THE GRANDEUR THAT WAS ROME* 1-2 (1927).

the West such basic legal forms as corporations and partnerships, the whole judicial process, including such elementary components as causes of actions and pleadings, and the whole basic constitutional order including “the state, the republic, [and] the people itself . . .”²³¹ This Romanist tradition, embracing both the classical period and the middle ages, Zane concludes grandly, “continues to live in us, and will live among enlightened nations forevermore.”²³² It is the force that gave life to the learned laws of the West, and its power remains alive today. We are in the debt of Alan Watson and Richard Helmholz for their own learned expositions of this subject.

231. *Id.* at 14-15.

232. *Id.* at 75.