# The Roots of Liberty

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## Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law

Edited and with an

Introduction by Ellis Sandoz


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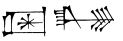

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*Salus populi suprema lex est, et libertas popula summa salus populi*
(The welfare of the people is the supreme law and the liberty of the people the greatest welfare of the people).
—John Selden

It is an undoubted and fundamental point of this so ancient common law of England, that the subject hath a true property in his goods and possessions, which doth preserve as sacred that *meum et tuum* that is the nurse of industry, and mother of courage, and without which there can be no justice, of which *meum et tuum* is the proper object.
—Sir Dudley Digges

There is one nation in the world whose Constitution has political Liberty for its direct purpose.
—Montesquieu

The Rights of Magna Charta depend not on the Will of the Prince, or the Will of the Legislature; but they are inherent natural Rights of Englishmen: secured and confirmed they may be by the Legislature, but not derived from nor dependent on their Will.
—Philalethes [Elisha Williams]

# Contents

# Preface to the Liberty Fund Edition

It is with pleasure that I write a few prefatory lines for Liberty Fund's reissue of *The Roots of Liberty* just twenty years after the symposium at Windsor Castle, which first elicited the scholarly studies the book contains. The devotion to liberty under law that is a hallmark of Anglo-American civilization and free government is nowhere symbolized with greater authority than in Magna Carta and the ancient constitution of which it is the noblest monument. The American constitutional tradition of which we so admiringly speak is grounded in the words and deeds brought together in this abiding centerpiece of our heritage as free men, the very *liber homo* announced by Magna Carta.

As conference director, discussion leader, contributor, and editor of the book, I take satisfaction in seeing a new edition appear. Furthermore, the conference itself spurred participants to renewed examination of the complex subject matter we addressed.

The impetus of our discussions can be traced in numerous publications since we deliberated at Windsor in 1988. Representative among these is Sir James Holt's new edition of *Magna Carta* (2d edition; Cambridge University Press, 1992), with its sustained attention to the meaning of *nullus liber homo,* a point of our puzzlement in discussion; and there is John Phillip Reid's *The Ancient Constitution and the Origins of Anglo-American Liberty* (Northern Illinois University Press, 2005), which expands chapter four of the present volume. My own efforts in the meanwhile directly continue the analysis begun then in chapters six and seven of *The Politics of Truth* (University of Missouri Press, 1999), which deal with Sir John Fortescue and with American religion and higher law.

This new edition is both valuable in itself and timely. With our millennial institutions of freedom and unique devotion to individual human worth and dignity under unremitting assault, we face an ideological and international conflict whose end and outcome lie nowhere

in sight, beyond a horizon bounded by the iron curtain of the future. *The Roots of Liberty* can be one small help in guiding our passage through the perplexities of these treacherous times.

Ellis Sandoz
September 11, 2007

# The Roots of Liberty

# Editor's Introduction: Fortescue, Coke, and Anglo-American Constitutionalism

The law of liberty as it rose to maturity in the British seventeenth and American eighteenth centuries forms the great theme and subject matter of the present volume, with Magna Carta and the ancient constitution the focal symbolisms under consideration. It is a study in history, constitutionalism, and political theory.

## I

The emphasis of our study lies in disclosing the roots of liberty, not as some vague ideal, but as it endures into the present as the pulse of effective governing institutions. Such liberty is inseparable from rule of law, and its rise must be sought particularly in patterns and traditions of medieval and Renaissance England's public order. The great chronological remoteness of this period from our late-twentieth-century world belies the sense in which an ancient cause may yet be our own—if love of liberty under law and resistance to despotism can still be found among us as compelling convictions. The gist of the matter, to enlarge upon the metaphor of the "Tree of liberty," was given by the earl of Bolingbroke in reflecting on the periodic rise and fall of liberty in British experience since Saxon times through such minor episodes as the arrival of a Norman king in 1066 and the pretensions of the Stuart kings in the 1600s:

> Tho' the Branches were lopped, and the Tree lost its Beauty for a Time, yet the Root remain'd untouch'd, was set in a good Soil, and had taken strong Hold in it; so that Care and Culture, and Time were indeed required, and our Ancestors were forced to water it, if I may use such an Expression, with their Blood; but with this Care, and Culture, and Time and Blood, it shot again with greater Strength than ever, that we might sit quiet and happy under the Shade of it; for if the same Form was not exactly restored in every Part, a Tree

> of the same Kind, and as beautiful, and as luxuriant as the former, grew up from the same root.[1]

The passage evidently impressed Thomas Jefferson, who echoed it in the familiar maxim that "the tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is it's [*sic*] natural manure."[2] And the old figure of the Tree of liberty also brings to mind a favorite Bible verse of eighteenth-century Americans asserting liberty and evoking *salus populi,* the security of person and property claimed by free men: "And Judah and Israel dwelt safely, every man under his vine and under his fig tree, from Dan even to Beersheba, all the days of Solomon."[3]

The genesis of this book was a conference on the subject conducted in St. George's House, Windsor Castle, in June 1988, in observation of the 773d anniversary of the signing of Magna Carta. The inspiration of the exchange joined there and resumed here is a thesis that can be stated roughly as follows: Anglo-American liberty and constitutionalism rest essentially on a continuity with the Lancastrian con-

1. [Henry Saint John, viscount Bolingbroke], *A Dissertation Upon Parties: In Several Letters to Caleb D'Anvers, Esq.* 2d ed. (London, 1735), 194–95; as quoted by John Phillip Reid, herein, 284–85.

2. Letter of Thomas Jefferson to William S. Smith, from Paris, November 13, 1787, in Thomas Jefferson, *Writings: Autobiography, A Summary View of the Rights of British America, Notes on the State of Virginia, Public Papers, Addresses, Messages, and Replies, Miscellany, Letters,* ed. Merrill D. Peterson, Library of America (New York, 1984), 911.

3. 1 Kings 4:25 (King James Version). Thus, William Henry Drayton of Charleston, S.C., in 1769: "And I hope, in every circumstance of my life, that I shall act with consistency, with loyalty to my king, reverence to this my native country, and with charity to all men; and, that all the inhabitants of this colony, may not only possess these sentiments, but live always in the *practice* of them.—Then shall every man sit in peace under the cool shade of his fig-tree; possess his wanted liberty; enjoy the blessings of his vine; and in the gladness and thankfulness of his heart, sing—TE DEUM LAUDAMUS!" Quoted from *The Letters of a Freeman, Etc.: Essays on the Nonimportation Movement in South Carolina, Collected by William Henry Drayton,* ed. Robert M. Weir (Columbia, S.C., 1977), 32–33. For the "Tree of Liberty" see also Hugh Alison, *Spiritual Liberty: A Sermon* (Charleston, S.C., 1769), 5–6, and innumerable related references in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730–1805* (Indianapolis, 1991).

stitution propounded by Sir John Fortescue in the fifteenth century as that was revived and enlarged upon by the common law lawyers led by Sir Edward Coke (1552–1634) in the seventeenth-century struggle with the early Stuart kings, James I and Charles I. This ancient constitution (also called Gothic and Saxon) of Edward the Confessor, Magna Carta, Petition of Right, and Glorious Revolution, then, was substantially eclipsed and modified in Britain during the course of the eighteenth century only to be powerfully reasserted in America as part of the struggle leading up to independence, the American Founding culminating in the Declaration of Independence, the framing of the Constitution, and the ratification of the Bill of Rights.

Hence, the tenor of the book is to explore Magna Carta and ancient constitution in context but with an eye on the rise of liberty and rule of law as these came to maturity and their issues sharpened during the eighteenth-century conflict leading to American independence, the framing of the Constitution, and ratification of the Bill of Rights in 1791. One effect of this study will be to further illuminate the groundwork of modern politics by demonstrating the central place of the common lawyers, and the common law tradition as herein delineated, in the fabric of politics over several centuries, especially its powerful presence in the debates leading to the founding of the American republic. Room will have to be made, not merely for a new voice in the historiographic choir, but for a new soloist at center stage in the drama of the rise of free government.

It may be said that the core of the underlying thesis has been advanced by such earlier students of the subject as Frederic W. Maitland, William S. Holdsworth, and Edward S. Corwin. Thus, to indicate matters briefly, Holdsworth writes: "Coke preserved the medieval idea of the supremacy of the law, at a time when political speculation was tending to assert the necessity of a sovereign person or body, which was above the law." Maitland is quoted by Holdsworth as saying, "Coke's books are the great dividing line, and we are hardly out of the Middle Age till he has dogmatized its results." The latter then continues to explain that, in the seventeenth century, Parliament helped Coke to maintain the "medieval conception of the supremacy of law, and to apply it to the government of a modern state. In this matter also England became a model both to the framers of the Constitution of

the United States and to the framers of the constitutions in continental states. The Supreme Court of the United States is a body which safeguards, more effectively than any other tribunal in the world, Coke's idea of the supremacy of the law."[4] Holdsworth further states, "It is largely owing to the influence of [Coke's] writings that these medieval conceptions have become part of our modern law . . . *they preserved for England and the world the constitutional doctrine of the rule of law.*"[5] Edward S. Corwin summarizes "Coke's contributions to the beginnings of American constitutional law" in part as follows:

> Coke came forward with . . . the doctrine of a law fundamental, binding Parliament and king alike, a law, moreover, embodied to great extent in a customary procedure of everyday institutions. From his version of Magna Carta, through the English Declaration and Bill of Rights of 1688 and 1689, to the Bills of Rights of our early American constitutions the line of descent is direct. . . . Lastly, Coke contributed the notion of Parliamentary supremacy *under* the law, which in time, with the differentiation of legislation and adjudication, became transmutable into the notion of *legislative* supremacy within a law subject to construction by the processes of adjudication.[6]

While it was neither Holdsworth nor Corwin who directly stirred more recent scholarly interest in these matters, it is worth pausing as we quote them to reflect that our subject matter relates to more than mere antiquarian and academic debate. Rather, it goes in certain vital aspects to the core of the political order concretely present in Britain and America and called by such familiar names as free government, rule of law, liberty under law, constitutional and representative government, republicanism, and the like. This is to suggest that, behind and, one must suppose, through the veil of symbols, modes of discourse, legalistic and historiographic collisions, distinctions, and

4. Sir William Holdsworth, *Some Makers of English Law: Tagore Lectures of 1937–38* (Cambridge, England, 1938), 113, 126–32.

5. Sir William S. Holdsworth, *History of English Law,* 13 vols. (London, 1923–1952), 5:493, italics added; cf. Ellis Sandoz, *A Government of Laws: Political Theory, Religion, and the American Founding* (Baton Rouge, 1990), chap. 7.

6. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (1928–1929; rpt., Ithaca, N.Y., 1955), 56–57.

polemics, a living tradition of personal, social, and historical reality finds articulate embodiment. To some unascertainable degree, while we are indeed considering words, often they are more than merely words or rhetorical configurations and linguistic patterns. They are winged words that at least some representative men of our civilization over a millennium or more have lived and died by as articulating basic truth. They have been taken as expressing the heart of the matter in evocative and meaningful symbols.

If language is the way to truth, it may be remembered that truth not only provides intelligibility and knowledge but conveys reality, or luminous *Being* in the comprehensive sense of that term as used by the old philosophers influential throughout the period under study here. Put otherwise, speech partakes of being no less than of thought.[7] This is to raise the possibility that the self-interpretation of existence in a substantial strand of Anglo-American historical reality unfolds in the materials we are considering, whatever else they may signify. Perhaps this may even be a part of their attraction. Why else one may wonder would they command such determined interest and, sometimes, fascination in the late twentieth century among solid historians and lawyers, as well as among such airy speculators as political philosophers?

To universalize the claims of fundamental law is the very essence of the matter when justice and truth are at issue, as they ever are in politi-

7. In the words of Étienne Gilson: "The most tempting of all the false first principles is: that *thought,* not *being,* is involved in my representations" (*The Unity of Philosophical Experience* [New York, 1937], 316). The philosophical issues can only be hinted here. They are pertinently discussed from the perspective of medieval scholasticism in Étienne Gilson, *The Spirit of Medieval Philosophy,* trans. A. H. C. Downes (New York, 1940), chaps. 3, 9, 10, 11; and from the equally pertinent perspective of fifteenth-century Platonism of Ficino in Paul Oskar Kristeller, *The Philosophy of Marsilio Ficino,* trans. Virginia Conant (New York, 1943), chaps. 3–7, thus (quoting Ficino): "'The most common of all things . . . seems to be Being itself. It is divided into two classes: the one exists by itself; the other is inherent in something else. The former is substance; the latter, attribute. Substance, again, is either corporeal or incorporeal. In like manner, attribute is either quality or quantity'" (p. 37). And Kristeller writes a bit later on: "In the act of thinking the mind is . . . united with the object through its inherent form, and in so far as the object as being in itself precedes the act of knowing, it follows that through this act the mind is formed by the object" (p. 50).

cal philosophy. Thus, the premier authority on the subject, Sir James Holt, has written of Magna Carta and its career in America that there natural law and ancient constitution became so mingled as to embody "two streams of thought" that, by contrast, in "England . . . had been inimical."

> The Charter only survived alongside natural law by being raised to the same universal terms. Cap. 29 [guaranteeing due process of law and carried over into the Bill of Rights of state after state] had become a convenient formulation of a natural right. This was as far removed from Coke's thoughts as Coke had been from the Great Charter itself.
>
> The history of Magna Carta is the history not only of a document but also of an argument. The history of the document is a history of repeated re-interpretation. But the history of the argument is a history of a continuous element of political thinking. In this light there is no inherent reason why an assertion of law originally conceived in aristocratic interests should not be applied on a wider scale. If we can seek truth in Aristotle, we can seek it also in Magna Carta. The class and political interests involved in each stage of the Charter's history are one aspect of it; the principles it asserted, implied or assumed are another. Approached as political theory it sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law. If the matter is left in broad terms of sovereign authority on the one hand and the subject's rights on the other, this was the legal issue at stake in the fight against John, against Charles I and in the resistance of the American colonists to George III.[8]

## II

Some sense of the horizon of experience and thought that inspired especially Sir Edward Coke's resistance to royal excesses and his revival of Magna Carta and ancient constitution in the seventeenth century may usefully be recalled in this introduction. Perhaps this can best be done through a glance at Coke's master in the law of the constitution, Sir John Fortescue (ca. 1385–ca. 1479). Thomas Littleton and

8. J. C. Holt, *Magna Carta,* 2d ed. (Cambridge, England, 1992), 18–19.

Fortescue were major figures in the fifteenth-century revival of native English law, the former by his treatise on land law, the latter by his exposition of the constitution, both of them different from Roman law, with which depreciating comparison is made. If, for Coke, Littleton's *Tenures* is "the ornament of the common law, and the most perfect and absolute work that ever was written in any human science," Fortescue's *De Laudibus Legum Angliae* (written during 1468–1471) he finds to be of such "weight and worthiness" that it should be "written in letters of gold."[9]

Fortescue was admitted to Lincoln's Inn before 1420, served in parliament from 1421 for several terms over the next fifteen years, became Chief Justice of the King's Bench in 1442 under Henry VI, and was knighted in the following year. During the War of the Roses (1455 onward), Fortescue adhered to the House of Lancaster against the Yorkists and fled to Scotland with the king and queen in or after 1461, which was also the time of his appointment as Lord Chancellor. In 1463 he was exiled to France (Bar) with Queen Margaret and returned with her to England in 1471. He submitted to Edward IV after his capture and the final defeat of the Lancastrians at the battle of Tewkesbury and served as a member of the king's council until 1473. Fortescue died after May 1479.[10]

Cast as a dialogue between the "Chancellor" and a young "Prince" (Edward, only son of King Henry VI), *De Laudibus* has as a central point the supremacy of law: "all human laws are sacred, inasmuch as law is defined by the words, *Law is a sacred sanction commanding what is honest and forbidding the contrary.* . . . Law may also be described as that which is the Art of the Good and the Just. . . . Moreover, all laws that are promulgated by man are decreed by God."[11] "The laws . . . not only invite

9. Sir Edward Coke, *Coke on Littleton* [1628], *The First Part of the Institutes of the Laws of England* (1628), Preface (n.p.). Sir John Fortescue, *De Laudibus Legum Angliae,* ed. and trans. S. B. Chrimes, General Preface by Harold D. Hazeltine (Cambridge, England, 1942), xlix; for the date of composition see lxxxviii. *De Laudibus* was first printed ca. 1546 and became a legal classic with the publication of John Selden's edition in 1616 (see xcix, cvii).

10. A detailed chronology is given by Chrimes in Fortescue, *De Laudibus,* lix–lxvii.

11. Ibid., 7–9 (chap. 3); italics as in original.

you to fear God and thereby be wise . . . , but invite you also to their study, that you may obtain happiness and blessedness so far as that is obtainable in this life . . . the *Summum Bonum.*"

> Human laws are none other than rules by which perfect justice is manifested. But . . . the Justice which the laws disclose is not the kind that is called commutative or distributive or any other sort of virtue, but is itself the Perfect Virtue that is called by the name of Legal Justice, which . . . is perfect because it eliminates all vice and teaches every virtue, so that it is in itself justly called [the whole of excellence or] Virtue. . . . This justice, indeed, is the object of all royal administration, because without it a king judges unjustly and is unable to fight rightfully. But this justice attained and truly observed, the whole office of king is fairly discharged. Therefore, since happiness is the perfect exercise of virtues, and human justice, which is not perfectly revealed except by the law, is not merely the effect of virtue, but of all virtue, it follows that he who is in enjoyment of justice is made happy by the law. Thereby he becomes blessed, for blessedness and happiness are the same in this fleeting life, and through justice he attains the *Summum Bonum* of this world. Not, indeed, that law can do this without grace, nor will you [as king] be able to learn or to strive after law or virtue, without grace.[12]

This striking passage equating law and perfect justice, and distinguishing the latter from commutative and distributive justice, while obviously referring to a distinction given in book V of Aristotle's *Nicomachean Ethics,* may plausibly be read as going considerably beyond that rather cryptic text to imply Plato's cardinal teaching in the *Republic* that Justice (*Dike*) is the perfection of all virtue in a man no less than in a polity. This, by Plato's account, is the condition of the soul of a man who lives a well-ordered life, so that a man can be said to be just in himself. Indeed, it is the characterological embodiment of such

12. Ibid., 11–13 (chap. 4). The bracketed words in the second sentence interpolate a translation of Aristotle, *Nicomachean Ethics* V.1.19–20 1130a8–9, evidently the place in the ultimate text paraphrased by Fortescue; cf. Aristotle, *Nicomachean Ethics* VI.8.1–2 1141b23–30 where a parallel discussion of *phronesis* occurs. For Fortescue's sources see Chrimes's notes and cautions in *De Laudibus,* 148–49, and the more general discussion, lxxxix–xcv.

transcendent justice that forms the order of excellence to be imparted to the best polis through the rule of philosopher-kings or by the inspired lawgivers through the rule of true law.[13] However this may be, it is evident that Fortescue's argument equates ancient English law as it structures the living constitution of the realm with Justice and divine and natural law, at least as far as grace permits this to be concretely

13. Cf. Aristotle, *Nicomachean Ethics* V.11.9 1138b6; Plato, *Republic* III–IV culminating in the great passage at 443c–444a. Paul Shorey remarks of this passage, "Aristotle . . . would regard all this as mere metaphor," in Plato, *Republic,* ed. Shorey, 2 vols. (Loeb Classical Library Edition; Cambridge, Mass., & London, 1930), 2:415n. Fortescue and his sources need not have thought so, however, and the suggested conflation is not implausible on the ground suggested by Shorey. See also Plato, *Laws* IV.714a–716c where the understanding of rule of true law as divine reason is given; cf. Aristotle, *Politics* III.11., esp. 1287a35–b7.

The surge of interest in and translation of Plato's dialogues during Fortescue's lifetime is a prominent part of the backdrop of the work under consideration and possibly inspired the form of *De Laudibus* as a dialogue. The rediscovery of Plato was led by Florentines, Leonardo Bruni Aretino (1369–1444) among the earliest of them and with important English contacts, anticipating Marsilio Ficino in that respect. The "Leonardus" of *De Laudibus,* Bruni's *Introduction to Moral Philosophy* (dated 1421–1424) is, after the Bible, which is quoted fifty-two times, one of Fortescue's more prominent literary sources, as Chrimes shows (xc–xci). Ficino began the translation of Plato into Latin under the aegis of Cosimo de' Medici's Platonic Academy nearly twenty years after Bruni's death, in 1463 (having completed translation of the *Corpus Hermeticum* in the same year), and completed translation of the dialogues in about 1468 (see Kristeller, *The Philosophy of Ficino,* 16–17). And Platonism was widely available to Fortescue otherwise, including from such other sources as Boethius and a compilation from which most of his classical quotations are believed to have come entitled *Auctoritates Aristotelis, Senece, Boecii, Platonis* (see *De Laudibus,* lxxxix).

No detailed tracing of sources is possible here, of course, but a general point may be suggested. This is that the work of Fortescue is imbued with the understanding of reality reflected in Aristotle and Plato as presented by Renaissance scholars recovering the writings of these Greek philosophers in an atmosphere *pervaded* by the Christian faith experience and assumptions and by scholastic theology; hence the importance of placing Fortescue's work in this rather than in some other primary context. See the remarks of Charles Plummer in Sir John Fortescue, *The Governance of England: Otherwise Called The Difference between an Absolute and a Limited Monarchy,* ed. Plummer (Oxford, 1885), 102–5. Cf. Étienne Gilson, *La philosophie au moyen âge* (Paris, 1944), 736–38; also Gilson's *History of Christian Philosophy in the Middle Ages* (New York, 1955), 541–42, 803–4.

achieved on earth by human laws promulgated and administered by human magistrates. Thus, the historically *ancient* and the ontologically *higher* law—eternal, divine, natural—are woven together to compose a single harmonious texture in Fortescue's account of English law.[14]

To his noble medieval Christian synthesis of jurisprudence and philosophy, resting theoretically especially upon Plato, Aristotle, and Thomas Aquinas, Fortescue adds the authority of "Holy Scripture," citing two maxims: "Be instructed, ye who judge the earth" and "Love justice, ye who judge the earth."[15] He thereby brings together from Revelation the knowing of truth and the love of Justice whose combination enables the courageous king to act justly in ruling. The result is equivalent to Aristotle's insistence that the ethical and political philosophical science of human affairs is not so much concerned with knowing as with doing, thereby evoking by implication the potential-actualization theory central to classical and medieval philosophical anthropology.[16]

The great merit and distinction of the ancient constitution of England, Fortescue continues, is that

14. This line of analysis is borne out by Fortescue's earlier work, *A Treatise Concerning the Nature of the Law of Nature,* where the debts to Aristotle, Augustine, Boethius, and, most especially, Thomas Aquinas are much more explicit than in *De Laudibus.* See Thomas (Fortescue) Lord Clermont, ed., *The Works of Sir John Fortescue, Knight,* . . . (London, 1869), 194, 205–6, 215–16, 219–22, and *passim.* It may be stressed that it would be odd in the fifteenth century if this were *not* so. The kinds of law mentioned are those, in addition to human law, identified and analyzed by Thomas Aquinas in the *Treatise on Law* of the *Summa Theologica* I–II.Qq.90–108. Thus, in answer to whether there is eternal law, Thomas writes: "a law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community. Now it is evident, granted that the world is ruled by divine providence . . . that the whole community of the universe is governed by divine reason. Wherefore the very Idea of the government of things in God the Ruler of the universe has the nature of a law. . . . [T]he end of the divine government is God Himself, and His law is not distinct from Himself" (Q.91.A.1 [trans. D. Bigongiari]).

15. Fortescue, *De Laudibus,* 13–15 (chap. 4), quoting from the Vulgate, Psalms 2:10 and Wisdom 1:1.

16. Cf. Aristotle, *Nicomachean Ethics* I.3.6: "the end of this science is not knowledge but action [*praxis*]." For *peri ta anthropina philosophia* see X.9.22. 1181b15–16.

> the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only regal but also political. If he were to preside over them with a power entirely regal, he would be able to change the laws of his realm, and also impose on them tallages and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state [in *lex regia*] that *What pleased the prince has the force of law* [*Quod principi placuit legis habet vigorem*]. But the case is far otherwise with the king ruling his people politically, because he is not able himself to change the laws without the assent of his subjects nor burden an unwilling people with strange imposts, so that, ruled by laws that they themselves desire, they freely enjoy their properties, and are despoiled neither by their own king nor any other.[17]

This constitution of double majesty, of a political people represented in parliament and of a kingship bounded by law, in something more than merely a directive sense (*dominium politicum et regale*), is the heart of England's ancient constitution.[18] Its emphasis lies in secur-

17. Fortescue, *De Laudibus,* 25–27 (chap. 9); italics as in original.

18. The Thomasic distinction between coercive and directive senses of being bound by law may be a useful starting point for understanding Fortescue's conception of the ambiguous relationship of king to law of the realm, since the king seems to be above law in certain discretionary and prerogative respects by the account given in *De Laudibus* (e.g., pp. 86–87 [chap. 36], 136–37 [chap. 54]). With a full cognizance of the realities of medieval political power that would certainly be matched in Fortescue, Thomas writes to this effect: "The sovereign is said to be 'exempt from the law,' as to its coercive power, since, properly speaking, no man is coerced by himself, and law has no coercive power save from the authority of the sovereign. . . . But as to the directive force of law, the sovereign is subject to the law by his own will. . . . Hence, in the judgment of God, the sovereign is not exempt from the law as to its directive force, but he should fulfill it of his own free will and not of constraint.—Again the sovereign is above the law in so far as, when it is expedient, he can change the law and dispense in it according to time and place" (*Summa Theologica* I–II.Q.96.A.5. *ad* 3 [trans. D. Bigongiari]). This position softens the force of Roman law doctrines that Fortescue himself largely rejects, *viz.,* "Whatever pleases the prince has the force of law [*Quod principi placuit legis habet vigorem*]" (*Digest* I.4.1) and "The prince is above the law [*Princeps legibus solutus*]" (I.3.31).

Especially in the English background of these matters, of course, lies not only a reliance on the *conscience* of the monarch to direct him by reason to obedience