A research trip in January, 1990, by Beatrice Terrien-Somerville and Robert Somerville to the Aveyron and the Tarn-et-Garonne makes possible the following notes.

i) References can be added to: J.-L. Rigal, Notes pour servir à l'histoire du Rouergue (Rodez 1926) 42-46, who notes the bulls for St Antoninus found in the Dot Collection; and C. Couderc, Bibliographie historique du Rouergue 2 (Rodez 1934) 488, where the twelfth-century papal bulls for St Antoninus are listed on the basis of printed sources.  

ii) The original of JL 5430 survives today in the Archives Départementales de Tarn-et-Garonne in Montauban. Robert Latouche pointed to this in a "Rapport" published in 1912 (Bulletin archéologique . . . de la Société archéologique de Tarn-et-Garonne 40 [1912] 130), although no shelfmark was given, and it is unclear from the note whether the document was an original or a copy. Fuller discussion of this text is planned in a future study by the authors of l'abbé Victor Lafon and the "lost" papal bulls for St Antoninus.

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Quod omnes tangit
ab omnibus approbari debet:
The Words and the Meaning

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Human beings are governed by two things, namely, by natural law and moral conventions.
Gratian

The sovereign, bearing only one single and identical aspect, is in the position of a private person making a contract with himself, which shows that there neither is, nor can be, any kind of fundamental law binding on the people as a body, not even the social contract itself.
Rousseau

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I

At the level of greatest simplicity, intellectual historians can be divided into two groups: those who deal with words and those who deal with thoughts. Because thoughts are the more interesting of the two, much attention is focussed on understanding the origin, evolution, and influence of, in an ascending order of complexity, ideas, theories, the thought of single individuals, and the thought of communities that are united by their adherence to the rules of certain disciplines, such as jurisprudence, philosophy, and theology. The study of "objective spirit," i.e., the thought of communities not united by any discipline, was once most prominently advocated by Hegel, and then seems to have fallen somewhat out of favor. More recently, French intellectual historians have succeeded in reviving it under
the name *mentalité*, and in extending its scope to include people at the lower end of the social scale, to whom previous historians would only reluctantly have attributed the possession of mind at all—or so it is believed.

The historian of thoughts, however, faces a predicament. On the one hand, thoughts can only be identified by the words with which they are expressed. On the other hand, it is by no means necessary to use the same words to express the same thoughts. Especially if thoughts are complicated, or expressed in more than one language, the words used to express an identical thought may be very different indeed. This makes it difficult to be sure that the thought under investigation is a single object, and not many different ones. Is it, for example, really possible to say that such different thinkers as Aristotle and Thomas Aquinas were discussing the same idea when they spoke about justice? Is there such a thing at all as “the same idea”? Is there a “theory of the state,” which unites the writers discussed in the textbooks of the history of political thought? How does one ascertain that there is something specific to which the terms “objective spirit” and *mentalité* can meaningfully refer, not to mention the difficulty in finding out the moment at which one *mentalité* may change into another? The point here is not to deny the possibility of positive answers. It is rather that the mere possibility of asking the questions confronts the historian of thoughts with extraordinary methodological difficulties.

This gives the historian of words a distinct advantage. Precisely because he can always refer his questions to a material object, something consisting of audible or visible signs, rather than of invisible thoughts, it is less difficult for him to be sure of the identity of his object. The history of words is almost as easy to write as it is to read and date the documents in which they are found. Historians of words are able to achieve results which would make others blush. Unlike the history of an idea, which is often difficult to trace even within a single language, the history of words may sometimes be pursued across the boundaries of several languages and over many centuries. The word “paradise,” to give a simple example, can be traced from modern Western European languages to Latin, Greek, Hebrew, Arabic and Avestan. In some cases, such as the language, or languages, from which the various Indo-European dialects arose, it even seems possible to infer the existence of words in the past of which, excepting the words which descended from them, no trace exists in the present. Undoubtedly these matters are subject to questions of their own. But which historian of thoughts would not love to be able to infer the ancestry of present ideas and theories, not to mention anything more complex, with an equal degree of certainty?

To separate the history of words from that of their meaning in this way is, of course, simple-minded. No etymological investigation can afford to ignore the meaning of the words concerned, and since there is no meaning where there are no words, no historian of thought can get along without studying words. The point of the distinction is rather to highlight the extraordinary advantage accruing to intellectual historians who enjoy the privilege of dealing with thoughts enshrined in words which keep recurring over long periods of time without significant changes. Given the extraordinary number of possible combinations of words, the probability that two different writers would completely by accident choose the same words to express a certain thought is remote enough in practice to be considered negligible as soon as the text concerned approaches anything like the length of a sentence. Different writers who write the same words do not do so by chance. Whatever the particular channels may have been by which the text was transmitted, there is that real continuity of thought which is called a tradition.

The advantage of studying textual traditions is, however, not that the same text always corresponds to the same thought. If that were the case, the historian could do no more than compile a complete chronicle of the various occurrences of the text and the corresponding thought in question—not a particularly revealing exercise, and not really a history in that sense of the word which implies the understanding of change. It is rather exactly the opposite, namely that the same text does not always correspond to the same thought. Just as the same thought may be expressed with different words, the same words may express different thoughts. When sufficient time has elapsed, one can be virtually certain that the meaning of a particular text will no longer be what it once was.

Textual traditions thus are unique among the many sources on which historians can draw, because they preserve the record of changing thoughts in the form of identical, easily recognizable texts. Once the existence of a tradition has been established by the preliminary, but essential, exercise of recording where and when a particular text was quoted, the study of such a tradition permits the intellectual historian to understand the changing fortunes of the thought transmitted by it. As Aristotle pointed out, change cannot be understood unless there is something which is subject to it without itself changing. Prime matter is what he called the ultimate substratum of all change. Textual traditions, one might say, are the prime matter of intellectual history.

These are the reasons which account in large part for the peculiar fascination of studying the history of law. Laws, as well as the commentary given on them by jurists, because of the weight of the interests they carry, have a way of changing their wording much more slowly than is usually the case in the more strictly "intellectual" disciplines, in which no other
interests than those of the intellectuals concerned determine the choice of words. Accordingly they represent a particularly fruitful field of investigation for historians interested in the rules which govern the history of thoughts in general, and of the idea of justice in particular.

In addition to these considerable advantages, however, the stability of legal traditions presents interpretive dangers of its own. Whereas differences in wording make it difficult to perceive an underlying continuity of thought, identical wordings, on the contrary, make it difficult to perceive a change of thought. Because historians are trained to discover continuities, they are by definition predisposed to assume a continuity of thought where only a continuity of wording has been demonstrated. The temptation to suppose that the meaning associated with certain words on one occasion must be the same on others is a danger to which all of them are sometimes exposed. For students of legal traditions, however, the risk of failing to probe the depths of historical change by rashly imposing the same interpretation on the same text in different contexts is peculiarly great. The only way to guard oneself against it is to interpret every occurrence of the text concerned separately from the others. Unfortunately, this makes the task of unravelling the vicissitudes of a tradition rather cumbersome. Ultimately, however, there is no other way to reach a real understanding of how changes in thought occur.  

II

The remainder of this essay is intended to illustrate the difficulties incumbent on the study of textual traditions with a specific example which is taken from the history of the idea of popular sovereignty. It is the use made of the famous maxim that *quod omnes tangit ab omnibus approbari debet*, "what touches all must be approved by all," henceforth referred to in abbreviation as QOT, by William Durant the Younger, bishop of Mende from 1296 to 1330.  

On the one hand, QOT forms the subject of a particularly venerable tradition. In spite of minor changes in the specific wording, the number of instances in which the maxim's key terms *tangere*, *omnes*, and *approbare* or *comprobare* are identical, not to mention explicit references to the original source of the text, is large enough to establish a continuity extending from the period of classical Roman law down to the end of the middle ages and into early modern times.

On the other hand, the danger of confusing the stability of this text with that of its meaning is unusually great. The reason is easy to understand. Most modern readers, historians included, are citizens of representative democracies. At first sight, they will find it hard to imagine that "what touches all must be approved by all" could mean anything other than that the right to make the final decisions in the body politic belongs to the people. In this way QOT is given the meaning of the idea of popular sovereignty.

This is a perfectly reasonable reading. It can be a particularly pleasing one, too, because it not only affords historical precedents for democracy, thus indirectly supporting the justice of the democratic state, but also seems to exonerate from the charge of illiberality the times at which QOT is prominently used. These are powerful attractions for anyone who feels respect for medieval men and modern democracies at the same time. They may only too easily provoke even the most careful analysts to impose the democratic interpretation, or one of its variants, on QOT in contexts in which they are not justifiable. That is precisely why the democratic reading of QOT is the most suspect. The cases in which it may be accepted can only be determined by the kind of detailed analysis which will be provided on the following pages.

There is no point in duplicating the considerable effort which has been expended for the sake of illuminating the origin, transmission, and significance of QOT in the many contexts in which it has appeared. But in order to understand the issues raised by Durant's text, it is necessary at least to give a brief summary of the results of that research.  

The basis of the textual tradition which is here at issue can be found in Roman law. According to the traditional Roman view, as enshrined in the formula *senatus populusque Romanus*, the Roman people played a considerable role in the exercise of public power. Famous laws, like the *lex de imperio*, also known as the *lex regia*, according to which the power of the emperor was conferred upon him by the people, continued to endorse that democratic tradition even during the times of the rather undemocratic Roman empire.

The danger of misreading QOT as a Roman principle of democracy is nevertheless quite remote. The purposes for which it was used in Roman law are designed to prevent even unsuspecting readers from seeing more than is there. The Justinian law which forms the *locus classicus* on which later references to QOT rely, for example, is concerned with a rather technical aspect of the rules governing the administration of a tutelage held by a group of tutors. It establishes equality between four different kinds of tutors by arguing that, for all four kinds, a single member of the group may act for his pupil on behalf of all the others, provided their rights of tutelage are identical and not distinguished according to geographic region or substance. It then makes an exception by suggesting that, when tutelage is to be ended, every member of the group of tutors must give his consent. QOT
provides the reason for this exception. Without using the same words, Ulpian and Papinian invoke it in the matter of water rights. The idea is similarly present in a few other texts dealing with the rights of groups of plaintiffs and defendants. The communities of which QOT speaks are thus never the people, but only groups of individuals tied together by the possession in common of certain rights which are restricted to the sphere of private law.

The meaning which QOT has in the context of Roman law can be defined still more precisely by focussing on a sentence of Paulus. It states that, in lawsuits concerning more than one person, one must judge in the presence of all who are touched by it, because the decision of the judge will bind only those who are present. That decision could be appealed, of course, but in the end it would still be made by a judge, and not by the group of individuals concerned. QOT did thus not grant ultimate authority over any rights to the group holding them. It merely protected the members of a group of individuals by imposing a certain procedure on the judge who decided the point at issue when their rights were contested. So long as the proper procedure had been followed, no one was free to withhold his consent from the decision.

In general, the meaning of QOT in Roman law must thus be carefully distinguished from the idea of popular sovereignty. It can be characterized as a principle of private law used to prove that, when the rights of a group of individuals were in question, a certain procedure had to be followed in order to arrive at a judgment binding the entire group. The consent of which it spoke must equally carefully be distinguished from the "political" or "sovereign" consent implied by a principle of democracy. Terms that have been suggested for this purpose are "judicial," "procedural," and "compulsory" consent. All of them are useful. "Procedural consent" is probably best suited to express the substantive point at issue, and "compulsory consent" is recommended by the power of an oxymoron to impress upon the memory that QOT in itself has little, if anything, to do with popular sovereignty.

At the same time, however, it should be underlined that the rights established by QOT were not only significant in themselves, because they imposed limits on the power of a judge, but also capable of considerable extension in a political system in which the borderline separating private from public law was no longer as clear as it had been in Roman times, and in which the supreme political authority was defined as primarily that of a judge. Under such circumstances, it could very well be transformed so as to become, if not the principle of democracy itself, at least its root.

Such a political system came into existence in the middle ages. The ground was prepared in the centuries following the demise of the Western Roman empire by the establishment of a society which, for the lack of a better word, may still be referred to as feudal. There, the exercise of public authority was so closely related to the possession of private, especially landed, property that the distinction between public and private became all but meaningless. Medieval rulers, moreover, considered the right to render final judgment in all cases concerning the people under their control as an essential, if not the essential, characteristic of their power. This may be said of the pope as well as of the emperor, the kings and the local lords.

Such conditions help to explain why, as soon as the general revival beginning in the 10th century permitted a revival of legal science, QOT, benefiting from a general trend, began to extend to matters to which it had not been applied in antiquity. Not unnaturally, the lead was taken by the institution which had the deepest roots in the late Roman empire: the church. Long before its use was formally endorsed by Pope Lucius III, Roman law may have played a part in Gregory VII's plan to establish the church on what he considered to be its true foundations. Because he referred to it on several important occasions and specifically recalled its origin in Roman law as a reason for the respect it could command, the pontificate of Innocent III marks an important stage in the history of QOT. His bull of convocation for the fourth Lateran council, issued in 1213, deserves particular attention in this regard.

The church thus opened the channels by which QOT entered the realm of medieval public law and politics. During the period following the pontificate of Innocent III, it was applied to a variety of new subjects, even while its ancient use as a principle of procedural law remained in force. English lords and prelates thought it entitled them to reject demands for taxation made by the papacy. The French used it similarly. Its meaning was subjected to subtle jurisprudential analyses. The consent of a group qua group, which could be given by the decision of a majority, was distinguished from that of a group qua all of the individuals concerned, which could only be given unanimously.

The culmination came during the last decades of the thirteenth and the first of the fourteenth century. It was during those years that rulers like Edward I quoted QOT to Boniface VIII as the reason why the English convoked parliaments when the state of their kingdom was to be discussed, that it was relied upon by Philip IV when he gathered those assemblies which have a certain right to be considered as the first of the general estates, and were to form such an important element in French constitutional history, and, finally, that it was given a new authority by its incorporation as nr. 29 among the rules of law with which the code of canon law issued by Pope Boniface VIII closes.
Given such powerful evidence, it is hardly surprising to find general agreement among scholars who have considered the question that, towards the end of the thirteenth century, QOT took on a much more important role than it had had in antiquity. Everyone also seems to agree that this role lay in the sphere of public law. But whether or not it had now fully shed the qualities which had characterized it in ancient Roman law, and had become a principle of democracy instead, is a matter of much contention.

There are those, on the one hand, whose reading of QOT can only be understood as part of a general theory about the origin of the modern idea of popular sovereignty. The roots of that idea, they argue, can be found in the communities formed by the primitive tribes who invaded the Roman empire during late antiquity and the early middle ages. The communal spirit believed to be typical of the societies formed during those centuries is for them the ultimate and lasting basis of the modern idea of democracy.

The absence of a clear distinction between private and public law, however, embroiled the common good with interests that were essentially private. The resulting confusion prevented the primitive idea of popular sovereignty for a long time from being given adequate expression. The obstacle was removed by the progress made during the 11th, 12th, and 13th centuries. Renewed familiarity with Roman law, the recovery of the political theory of Aristotle, with its fully developed doctrine of the common good, and last, but not least, the maturing of secular states directed by increasingly sophisticated structures all over Europe provided the needed insight. Towards the end of the 13th century, these developments culminated in the elaboration of constitutional theories and representative institutions, which combined to give proper form to the idea that public power derives from the people.

According to such interpreters, it was thus no accident that QOT was applied to matters of public law. Its new uses were rather the result of a logical development of medieval political thought, searching for a means to combine the Roman idea of the state with the German idea of popular power. QOT, distinguished by its brevity, provided a perfect formula. It stated the essence of what may, in the terminology of one such interpreter, be called the ascending theory of power. It had become a principle of democracy and a form of the idea of popular sovereignty.

Dissenting voices, as is only fitting for critics of a general theory, usually restrict themselves to pointing to the particular weaknesses of this interpretation. They do not deny the magnitude of the change signified by the transference of QOT to the realm of public law, which they agree was completed around the year 1300. But they suggest that Germanic concepts of popular rule may be less important for an understanding of medieval representative institutions than the procedures of Roman law. That clerics, who were familiar with the Roman law, led the way in introducing QOT into medieval political discourse is for them a crucial factor. It explains why the meaning which QOT had had in Roman procedural law effectively determined its meaning in medieval politics. True, it was now for the first time used to prove that the people should consent to the decisions of the supreme magistrate. At the very least, this shows that a community of the people had come into existence. But the consent of those national and ecclesiastical assemblies which QOT was now used to endorse was still "procedural," "judicial," and "compulsory." The time for democracy had not yet come.

The point at issue must be underlined. It is not the principle of equality. All sides concur that "the people" of medieval times differ remarkably from the electorate of modern democracies. In fact, it was almost invariably only their "weightier part," in the form of clerical, noble, or urban aristocracies, which came to take the place of the whole. It is not the absence of any limitations on sovereignty either. Medieval men never abandoned their respect for the authority of the laws. Popular and monarchial governments alike were expected not to violate such laws without good reason. On the whole, the debate is thus not about absolute sovereignty, even though there may be some disagreement on the precise extent to which sovereigns were bound by the laws. The concept of "the community of the realm" and the development of representative institutions, moreover, most certainly stand for momentous changes in medieval politics which allowed the people to play a much more important role than had previously been the case. Provided the presence of considerable inequalities among the members of the body politic and the limited nature of medieval government in general are kept in mind, the argument is thus not even about the participation of the people in the political process itself.

It is rather about the nature of the consent which the people were entitled to give to decisions concerning the fate of the body politic. According to the democratic view, it was within the rights of the people to grant or withhold their consent as they saw fit. According to those who subscribe to the term "compulsory consent," such was precisely not the case. The reason why they reject the concepts of democracy and popular sovereignty is that they imply the existence of a right of the people to determine their fate themselves. Such a right, they argue, did not exist. The authorities merely came to be obliged to convene the people when decisions affecting the common good had to be taken, but they were not therefore subjected to the popular will.
by means of general councils, must be asked for their consent. Durant apparently took it for granted that general councils were qualified to represent the approval of all, so that his proposal may with equal justice be called conciliar and democratic. It seems to provide exceptionally convincing evidence for the theory according to which QOT had by about 1300 become a principle of democracy. A closer look at the evidence, however, suggests that matters are rather more complicated.

Earlier in his treatise, William Durant the Younger had said that "provisions need to be made to prevent the laws from being assailed with impunity." His proposal for the reform of church and secular society was intended to answer to this need. One general observation must therefore be made about it before all others. It was precisely a proposal. He declared nowhere that according to already existing laws or principles the supreme authorities were obliged to consult with general councils. He rather considered this to be a new obligation which still needed to be ratified. He submitted it to the consideration of the council in the hope that his suggestion would be adopted. In a real sense it may, therefore, be called a bill for constitutional reform.

On the one hand, this is enough to account for at least some of the apparent inconsistencies which have been exploited by more than one interpreter to reject a radical interpretation of Durant's views. It is true, that, as far as existing law was concerned, he quite definitely stopped short of denying to the papacy the power to modify even such laws as touched on the state of the church. He never went further than to say that certainly the papacy should not alter such laws and that "perhaps" never more than "perhaps," for "it could not even do so." He thus implicitly acknowledged the possibility that the pope actually could alter such laws. But the freedom with which this power had been exercised in the past was precisely what his proposal was intended to limit. Durant's ideas must, therefore, quite definitely be considered radical. On the other hand, however, he was radical only in intention. He quite clearly thought that the limitations imposed on the rulers by existing law were insufficient. That alone explains the need he evidently felt for "further limiting and regulating" the power of the ruler.

It therefore seems that he did not consider QOT as a principle equipped with the kind of prescriptive force capable of subjecting popes and kings to popular sovereignty.

Another observation increases this likelihood. A careful reading of the text cannot but reveal a remarkable fact. The council's right to consent, as supported by QOT, appears in a subordinate clause of Durant's proposal. In the main clause, he merely insists that councils should be convoked or consulted. He does not really demand a right of consent for them at all.
Neither does he anywhere directly address the question where in the body politic supreme political authority was to be found. In other words, there is a rather obvious logical gap between QOT, which may seem to give ultimate authority to the people, and the proposal which is based on it.

It may be countered that there is no logical inconsistency, because the mere convocation of councils could, in practice at least, have established the equivalent of a formal right of consent. This is perfectly plausible and may very well render Durant’s intentions correctly. The history of the council of Vienne itself provides a case in point. Because of the refusal on the part of the assembled clergy to grant their consent, Pope Clement V found it impossible to issue the formal conciliar judgment condemning the order of the Templars which he so much desired. He was forced to resort to a kind of executive order instead. The will of general councils could not be simply ignored by the papacy, even without Durant’s ideas having been adopted. But, on the other hand, the council of Vienne also provides an example that the pope could choose quite frankly to override the council if he thought it proper to do so. In the last analysis, however, the argument on the grounds of practice fails to address the theoretical point at issue. Even if, in practice, Durant’s demand would have given the council the right of consent, he did not actually ask for it, so that the logical inconsistency is not accounted for.

Somewhat more to the point, it might also be suggested that QOT must not be so sharply separated from what has been called Durant’s demand, because the consent expected by QOT forms an integral part of it. This solution must be rejected out of hand. The distinction between the obligation to obtain the advice of a corporate body and that to obtain its consent was well known. It had been carefully elaborated and can be shown to have been presupposed by any number of texts relating to such issues. The lack of logical consistency in a sentence which, on the one hand, demanded merely consultation with general councils and, on the other, their consent, had to be obvious. Nevertheless to insist that the inconsistent parts of his proposal served an identical purpose is asking for more than can be granted in the case of a statement which was not only carefully crafted in the technical language of an expert in the canon law, but also central for the success of the entire program outlined in the Tractatus.

If Durant merely demanded the convocation of general councils, the reason can thus only have been that he did not mean to demand their consent. Councils which were not explicitly entitled to withhold their consent from the decisions of the supreme magistrate and to enforce their own, however, can hardly be considered as institutions designed to realize the idea of popular sovereignty. The essence of that idea is precisely that the question where the supreme political authority resides is explicitly addressed and answered in favor of the people so as to prevent the monarch from overriding the will of a dissenting people. The conclusion that, in Durant’s mind at least, QOT did not yet support an idea of popular sovereignty seems unavoidable.

This conclusion can be corroborated by three further observations. First, it is worth remembering that Pope Boniface VIII had only recently given QOT the formal status of a rule of law. Rules of law, however, were not laws themselves. They were rather interpretive principles used to guide canonists through the difficulties encountered in resolving what might appear to be conflicts among the laws. While they were capable of resolving difficulties arising from the laws, they lacked prescriptive force. The relative weakness of a rule of law may thus explain in part why Durant could not have established a democratic position on such grounds alone.

The significance of rules of law, however, is a technical point, which is debated now and was debated then. Much greater weight may therefore be attributed to the second observation. It is that the need to convene general councils is clearly restricted to cases in which existing legislation is to be changed contra dicta concilia et iura. Such a restriction conflicts with the idea of popular sovereignty. A sovereign people must be asked for their consent to all measures touching upon their affairs, and not merely to measures changing existing laws. Perhaps it is true that no new laws can avoid affecting old laws. The point, however, is that it does not seem to be the issuance of new laws in itself, but their effect on existing laws, which mattered to Durant. This suggests that he sought the legitimation of his ideas, not in popular sovereignty, but in the reverence to be accorded to existing laws.

The most important observation by far is the third. Durant himself clearly indicated that his attempt to limit the supreme power of popes and kings was based on something other than the idea of popular sovereignty. In the words of his proposal, the power of the "administrators of the republic" was to be limited by reason. The arguments supporting this position had been given in the previous chapters. The purpose of his conciliar proposal was merely to suggest a specific course of action by which reason could be enabled to exercise its limiting function. Reason, and not popular sovereignty, therefore provided the standard which justified the convocation of general councils.

The main results which this analysis has reached so far may be summed up as follows. Durant did not state that popes and kings were bound by existing law, including the maxim QOT, to obey decisions made by the people or by assemblies representing them. He neglected to deal with the question whether ultimate authority over the body politic resided with popes.
and kings or the people. He suggested that henceforth no general laws should be changed without the convocation of general councils, but he stopped short of demanding a right of consent for them. Because of its status as a rule of law, QOT may technically have been insufficient to support such a right. What justified the role envisioned by Durand for general councils was, finally, that he considered them capable of enabling reason to limit the power of the supreme authorities, but not that they represented the people.

Our main conclusion so far is, therefore, essentially negative. It consists in the discovery of a number of facts in Durand’s text which conflict with the idea of popular sovereignty, and thus make the view according to which he considered QOT as a principle of democracy rather unlikely. Because there had been good reasons to consider such an interpretation well-founded, even a purely negative result is not altogether superfluous.

Instead of knowing what he did not think, however, one would much prefer to know what he did think. The evidence which makes it possible to do that is found in the chapters to which Durand referred the reader for the arguments supporting his theory that the power of the rulers was to be limited by reason. It consists in a general statement about the essence of good government:

If, therefore, the two who, as Pope Gelasius wrote to Emperor Anastasius (Decretum 196.10), govern humankind like servants of God, namely, ecclesiastical and royal authority, wish to aim at reform and a beneficial government of humankind, they must follow the aforesaid course, namely, govern themselves and humankind according to the contents of the Law [i.e., Deuteronomy], the Gospel, the councils approved by the Holy Spirit (Decretum 1.166), and other approved laws and rights. 56

In other words, the conduct expected of the authorities was not really open to choice. On the contrary, the norms of justice governing them were already in existence. They could be found in a clearly identifiable body of divine and human laws. Good government consisted in the faithful execution of these laws. In principle, it was therefore as unnecessary to consider the will of the rulers as that of the people. The function of government was rather like that of judges, who judge according to existing laws, but not about them; 57 of administrators, who are responsible for their decisions to an authority other than their own; 58 and of servants of God, rather than lords over the body politic, to use some of the terms found in the Tractatus. 59

These convictions formed the basis of William Durand the Younger’s political thought. They also conflict directly with the idea of popular sovereignty and, for this very reason, provide the key to an understanding of the meaning he associated with QOT. In order to discover that, however, it is necessary to take account of an additional factor.

Because of their general nature, laws alone are in principle insufficient to provide precise guidance for every question of justice. Often they need to be interpreted, but do not point to the interpretation which would permit their being properly applied to a doubtful case. Changing circumstances, moreover, are enough to lead to the emergence of a considerable number of situations in which the rulers will find themselves at a loss how to arrive at the proper decision. 60

In order to resolve this difficulty, Durand, drawing on established canonical theory, argued that, besides the laws, there were principles of justice, of which the laws were merely an expression. Utility, equity, the highest good, justice, and reason are examples of such principles. 61 In practice this solution suffered from the obvious weakness that concepts like “justice” and “reason” are abstract. They can hardly impose unequivocal obligations on the conduct of government.

This was precisely the difficulty which his conciliar proposal addressed. 62 As he pointed out by quoting from civil law: “The more men are heard, the more manifestly the truth is discovered.” 63 The number of the individuals assembled in general councils alone, therefore, was an argument in their favor. It overcame the inability of the authorities to pay sufficient attention to all of the matters within their competence. 64 Equally important, the members of general councils were seniores and sapientes who could give more reliable answers to such difficult questions than the many, who lacked their training and experience.

These ideas are important for an appreciation of the extent to which confidence in the ability of the papacy to provide guidance to the “republic” faded during the later middle ages. They also indicate how closely the emergence of “reason” can be related to the interpretation of conflicting or inconclusive textual traditions. For our present purpose, however, it is more pertinent to note that, having travelled the route from the letter of the laws to that objective reason from which they took their authority, Durand arrived at a conclusion which maintained without change the fundamental conviction that government was bound to obey existing norms.

This explains the peculiar features of his theory which were discussed above. As far as his failure to consider the locus of authority in the medieval republic is concerned, the question never emerged, simply because the answer had already been given. Supreme authority did not reside in either the ruler or in the council, but in the laws, and, in the case of their failure to provide adequate answers, in their reason. Because, on the whole, laws could be presumed to express the norms of justice well, changes in existing
laws entailed a greater risk that such norms would be violated than any other measure. That is why councils were convoked precisely when existing laws were to be changed.

The logical difficulty raised by QOT's mention of consent and its absence from Durant's demand can now also be removed. The basis of his proposal has been shown to consist of a general theory of law. He asked for the convocation of general councils because he thought that they were best qualified to provide the kind of proof required to justify changes in existing laws. Since, in matters of justice, proof is established by juries, the meaning of QOT can be clarified by comparing general councils with juries.

When a jury is convened, there are only two possible results: either the desired proof is found, or it is not. If it is, it must be considered a verdict, i.e., a true statement, verum dictum. If not, there is no verdict. Dissent from a verdict is thus impossible by definition, because the existence of dissent negates the existence of the verdict. When, on the other hand, a verdict has been reached, consent to it has by definition already been given. The demand for the consent of a jury is therefore implicit in that for its convocation. That such consent, furthermore, differs fundamentally from the consent of a sovereign people hardly needs to be underlined.

It may of course be objected that a jury can fail to reach a verdict, either because it cannot come to any agreement or because the judge declares a mistrial. But here the analogy with juries breaks down. General councils were occupied with fundamental questions of justice which could neither be denied nor referred to another institution. The general council's duty to reach a verdict was absolute. Nor could disagreement between council and pope be tolerated. As was agreed by all, Durant included, the pope could not be judged by anyone. The vicar of Christ had the last word in matters of justice. So long as disagreement between council and pope continued, there was, therefore, no certainty that the truth had been discovered. To prefer the decision of the council to that of the pope would merely have meant to prefer one possible falsehood to another. In the case of general councils, in other words, there was no middle way between the extremes of complete agreement or an irredeemable failure of justice.

The very success of Durant's proposal was thus predicated on the assumption that, once convoked, the council would automatically reach an agreement with the pope. Merely raising the question what to do when it did not would have cast a disastrous doubt on the conviction that the command of justice could be discovered. To go beyond asking for the convocation of councils and that consent which followed from it automatically, and to demand a right for the council to have its will enforced even against that of the pope instead, would therefore have been self-defeating, to say the least.

In this context, the terminology of QOT itself is suggestive. The key term of QOT is approbare. Because present usage fails to distinguish between "approval" and "consent," both terms have so far been indiscriminately used to translate approbare. But it may be an error to do so without further qualifications. Approbare is etymologically related to "proof," whereas "consent" is related to that "sentence" which is properly pronounced by a judge. The "approval" which was demanded by QOT and expected by Durand is thus more likely to have been the kind which was implicit in the duty to reach a verdict and followed automatically from the convocation of general councils.

This makes it possible to understand the meaning which Durant associated with QOT. It had lost none of the procedural qualities which it had characterized since the beginning. True, it was now applied in the area of public law, but without granting ultimate authority to the people as represented by councils. The maxim rather served a different purpose. It supported the thesis that, when general laws had to be changed by concessions made against their tenor, or by the issuance of new laws, it was not enough to consult with the small councils made up by cardinals or good men, much less to rely on the decision of the papacy or secular rulers alone. Reliable evidence to prove that such changes were in fact justified could only be obtained by convoking general councils, because they consisted of seniores and sapientes. "What touches all must be approved by all" therefore meant that the people had a duty to assist in determining the proper course of action to take in fundamental questions of justice. That duty may be said to have corresponded to a right, but merely a right to be consulted, and not to be obeyed. The reason why Durant could not have considered QOT equivalent to the idea of popular sovereignty has also been identified. It consisted of his faith that the body politic as a whole was subject to existing norms which were exempt from human control and could be found either in existing laws or that objective reason from which they derived their power.

IV

What had been thought to be a particularly clear instance for the use of QOT as a principle of democracy has, on the contrary, been shown to supply evidence for the more moderate of the two competing theories which were discussed above. The ideas of William Durand the Younger thus provide additional grounds for a presumption against the view that by about 1300 medieval political thought had developed a concept of popular sovereignty. Because of the limited attention that is paid to the Tractatus in the history of the conciliar theory, and the still more limited one
in that of medieval political thought in general, it may be worthwhile to
discuss the relevance of his work somewhat more explicitly than would other-
wise be called for.

First of all, it is necessary to stress the distorting effect exercised on
the history of medieval political thought by the separation of church and
state which characterizes modern history. In spite of recent achievements
in recovering the political theories of medieval ecclesiastical thinkers, there
continues to be a powerful prejudice working to relegate the results of such
research to the history of the church alone. The separation of the history
of the conciliar theory from that of the rise of medieval parliaments is only
one effect of this deplorable tendency. The language used in medieval times
suggests that no essential difference was perceived between ecclesiastical
and secular assemblies. The same terms are frequently used for representa-
tive institutions in both of the spheres which constituted the medieval polity.
They should therefore be treated at the same time.66 Durant's proposal itself,
with its balanced attention to the papacy and secular rulers, is good evidence
to show that "conciliar ideas" were no less applicable in the one than in the
other. It should not be forgotten, moreover, that the bishop of Mende was
also count of the Gévaudan;67 that the city which he ruled sent representa-
tives to the assemblies of Philip the Fair;68 and that some of the missives
in which Philip the Fair relied on QOT were sent to the sénéchal of Beaucaire,
the administrative district in which Mende was situated.69

The proper historical context for the ideas of an "ecclesiastical" like Durant
is thus not the church, but that "republic," both secular and ecclesiastical,
of which he himself spoke. The distinction between temporal and spiritual
magistrates merely reflected that between temporal and spiritual concerns,
but not a separation of church and state. The two kinds of administrators
were responsible for two different matters both of which needed to be taken
care of for the well-being of what was only one body politic. Provided the
difference between temporal and spiritual concerns is not suppressed
altogether, Durant's ideas may therefore surely be considered to be no less
revealing of the history of secular than of ecclesiastical representative assem-
bly.

Second, and for similar reasons, it is necessary to underline that, within
the medieval republic, the church played a, if not the, leading role in the
development of representative institutions. The frequency with which the
papacy assembled general councils in the 12th and 13th centuries is a factor
which is as often forgotten in the histories of parliaments as it is important
for an understanding of their development.70 Innocent III's use of QOT when
calling the fourth Lateran council has already been mentioned.71 One
should point out, moreover, that the same council of Vienne which provided

the institutional setting for Durant's initiative was also a gathering which
could hardly be paralleled by contemporary secular assemblies in its
European scale and the sophisticated procedures which it employed in order
to assure the proper representation of all those concerned by its proceedings.72

Third, William Durant the Younger was not only the nephew of one
of the greatest canonists of the middle ages, the so-called speculator, who
preceded him as bishop of Mende, but a great canonist in his own right.73
Where he was educated is not known, but it is generally agreed that his
expertise in the canon law was hardly surpassed by any of his contem-
poraries, and, in the opinion of an expert in the field, rivalled only by Guido
de Baysio.74 His ideas were firmly embedded in the best available legal
scholarship. They had a respectable claim on the attention of all who accepted
their authority, which is to say, almost everybody.

Fourth, few documents of the time are more harshly critical of the state
of the church and of secular society than Durant's Tractatus.75 Among a host
of moralizers who exposed the vices of their times, he stands out because
of the bitterness of his analysis, his frontal assault on the papacy, barely
mitigated by conventional expressions of reverence, and the comprehensive
sweep of his precisely worded suggestions for reform. Using, perhaps even
coining, a formula which was to reverberate throughout the later middle ages,
he argued that only reform "in head and members" could remove the cause
of the ills he enumerated.76 The passage in which he relied on QOT suggested
a remedy in the form of a generalized system of councils. It was intended
to limit the power of the vicar of Christ himself, a power believed to be
greater than that held by any other human being—whatever the precise
delimitations made between the spiritual and the temporal sphere, which
were so hotly contested at exactly that time, may have been. Given such
radical goals, it is not unreasonable to suppose that his interpretation of QOT
was as radical as was conceivable at the time.

Here it might be objected that the church's submission to Christ's divine
authority would have made it impossible for Durant to give as extensive an
interpretation to QOT as those secular thinkers could whom no religious
awe prevented from demanding obedience to the popular will from royalty
or the magistrates of city republics. The point is surely worth being given
careful attention. It seems, however, to be debatable on at least two general
grounds. On the one hand, it presupposes that very distinction between a
"spiritual" church and a "secular" state whose misleading features were
just mentioned. On the other, it begs the question, which is precisely if the
interpretation given to QOT in the secular realm really was as radical as
it is made out to be.

No doubt, a powerful interpretive tradition may be led into battle to
challenge the view that the church stood at the forefront of developments generally considered to be part of the emergence of the secular state. But, just as the church was first in a number of other accomplishments, it may have been so in that of giving shape to a secular frame of mind. It was that most catholic king, Philip IV, after all, who raised the charge of heresy against Pope Boniface VIII, and it was Boniface who is reported to have compared fonication to the rubbing of hands. At a later time, Machiavelli pointed out that the nearer the people came to Rome, the less religious were they. Perhaps he should be taken more seriously than seems generally to be the case. The possibility that our notions of the relative strength of secular ideas in the temporal and the spiritual spheres may have to be reversed is thus not as far-fetched as traditional views imply.

The weight to be attributed to the case of William Durant the Younger should thus not be underestimated. Nevertheless, it alone is obviously not enough to decide the issue at stake. The most valuable result to be obtained from the preceding analysis therefore consists in that it permits the formulation of an hypothesis which is certainly suited to guide further investigations and may even prove to account more successfully for the origin of the idea of popular sovereignty.

In order to develop this hypothesis it is best to focus on the reason which prevented Durant from seeing in QOT a principle of democracy. It has been found to consist of the faith that everybody, including the rulers, is required to obey norms which are already in existence. The consequences following from the presence and the absence of such a faith should now be given in more detail.

When it is present, the central business of politics will be identified with the task of interpreting existing norms. Because the question who is best qualified to do so may be answered in many different ways, many different ways can also be devised to allocate political power. It may be given to the one, the few, or the many. But these are merely variations on a single theme. In every one of these cases, the supreme authorities are limited by principles which are exempt from human control. The authority of the laws is identified with that of a transcendent God. The characteristic which distinguishes the supreme political office from all others may then be defined as the right to have its decisions in fundamental questions of justice considered as invariably correct. There is no intrinsic reason why such a right should not be referred to by the term 'sovereignty.' But one should remember that it is dependent on the duty to abide by norms independent of the will of the ruler. It must thus be carefully distinguished from the power of that sovereign whose right to rule is limited by nothing but his arbitrary will.

Under such conditions, reason, not will, is the fundamental category of political discourse, and the truth, not force, the primary instrument of political success. The purpose of negotiations by parties conflicting over political issues will not be to discover what the parties want and to formulate a compromise on that basis, but rather to discover who is right and to decide accordingly. Representative institutions will not be intended to give expression to the will of the people, but to let them say what they know to be true. Whether a decision is made with or against anybody's will is irrelevant. What matters is merely whether or not it agrees with the truth.

Government is considered a duty, rather than a right, and justice, not liberty, is the highest goal which it is asked to pursue.

If, on the other hand, there is no such faith in pre-existing norms, the highest office held by human beings has a different character. Those who rule can now be considered as sovereigns properly speaking. They come to acquire those divine qualities which were previously reserved to God. They are limited by nothing but their own will. Decisions emanating from their will ipso facto have the force of laws. Because there is no transcendent authority to which they are responsible, they can exercise their power as they wish. Again, the rule of law may be given to the one, the few, or the many. But, again, these are merely variations on a theme. Anyhow, the fundamental category of politics is will, and the primary instrument of political success, force. Conflicts between contending parties can no longer be resolved by reference to the truth, but must result in a compromise. The distinction between decisions which are based on the truth and those which are not loses force. What matters is rather whether they realize the will of those who own the right to rule. Government is considered a right to have one's will obeyed under any circumstances, and liberty, not justice, is the highest goal to be pursued.

This comparison should prove that the faith under consideration can be used to distinguish two different species of political thought. The question is whether or not they can be identified with any historical periods. Unless certain qualifications are made, this is obviously impossible. One wonders if any community ever really subscribed to that extreme of fatalism according to which all human conduct is totally subject to pre-existing norms. The saints who did are few and far between. Sovereigns as absolute as those characterized above, on the other hand, do not seem ever to have existed either. The so-called absolute monarchs of early modern times, who explicitly derived their right to rule from the divinity, rather appear to be a secularized kind of papacy. Those who are usually considered to be the villains of the history of political thought, because they came, or seem to have come, close to denying the existence of predetermined norms, such as Machiavelli, Hobbes, and especially Nietzsche, are still rarer than the saints.
Even the progress made in the 20th century towards the establishment of governments guided by nothing but arbitrary will, whether it be that of the Führer, the party, or the people, fell short of establishing legitimacy without invoking any pre-existing norms at all—however little such norms may seem to have to do with justice in its conventional sense.

It is, in other words, not enough to distinguish merely between the presence and the absence of a faith in pre-existing norms. There are as many such faiths as there are norms and people to believe in them. As has just been pointed out, Boniface VIII himself repeatedly denied that there were any divine laws at all. This may be an extreme example. But even if the charge is untrue, Boniface's accusers must have been familiar with the idea itself. Some areas of human life, moreover, will probably always be considered to be subject to purely arbitrary decisions. Others are perhaps permanently exempt from them.

Notwithstanding the need for such qualifications, it does seem defensible to argue that the transition from medieval to modern political thought was made by dismissing increasing numbers of norms from the realm of immutable justice and incorporating them in that of human freedom instead. The quotations with which this essay has been prefaced are intended to point in an exemplary way to the contrast which separates the medieval from the modern way of thinking. Gratian's words express the faith which has been characterized as the basis of Durant's program. As is only suitable for words of such importance, they are the first of the Corpus Iuris Canonici. They were so frequently repeated that they may be considered representative of the mainstream of medieval political thought. The quotation taken from Rousseau's Social Contract, on the other hand, says as clearly as could be desired that the people as a body cannot be limited by any fundamental laws. They are as free as someone making a contract with himself. Here it is worth noting that, when he quoted the words of Gratian, William Durant the Younger added a revealing qualification: "In the beginning of the Decretum it is written that human beings are governed by two things, namely, natural law and moral conventions—that is to say, they ought to be governed by them." With this almost touching admission that perhaps the world was not governed by laws, he took his place exactly between Gratian and Rousseau, doubting the words of the former, but not ready to draw the conclusions of the latter.

Such evidence may support the claim that the hypothesis developed above has some merit. If it does, the real issue in the history of medieval and modern political thought is not whether supreme power is given to the one or the many, but rather the extent to which that power came to be seen as unimpeded by existing norms. The communal spirit of early medieval societies might then be best understood as an essentially religious faith in the existence of transcendent norms, and perhaps one more extensive than that characteristic of the high middle ages. That, given the absence of written law and the prevalence of custom, the people should have been considered the best available source of information concerning questions of justice, is easily understood. It may also be granted that the ideas of Germanic tribes conflicted with the Roman tradition which gave to a single judge the power to define justice for all and lived on in the medieval church. But to consider them democratic seems perverse—unless, of course, the modern idea of democracy itself rests on religious foundations.

Two specific factors may then be suggested to account for the origin of the idea of popular sovereignty. One is the kind of argument developed in an exemplary way by William Durant the Younger, but hardly unique to him. The procedure which it established prevented legislation without the participation of the people in that qualified sense which was discussed above. The other is the waning of the faith in pre-existing norms. It was the latter which permitted the people's duty to reach a verdict to be transformed into the people's right to impose their will on the authorities.

There may seem to be a difficulty in arguing that popular participation in government would be continued, and even occupy a more exalted station, after precisely those grounds lost their validity on which it had originally been justified. But practices, once established, become a habit. When the reasons which brought them into existence have long been forgotten, they can still be continued and even be imbued with purposes which they never possessed before.

In order to understand the origin of the idea of popular sovereignty, it would then be necessary to determine the reasons justifying a faith in the power of pre-existing norms and the motives which could have inclined medieval men to abandon it. From a general point of view, answers can easily be suggested. With respect to the former, they will most likely come from an understanding of the role of religion in primitive societies. With respect to the latter, such motives are not hard to discover. When a society gains in complexity, its members increasingly often conflict with each other. In the natural course of things a point will be reached at which given norms will no longer permit the resolution of such conflicts without hurting the interests of at least one of the parties concerned. Faith in their justice is then bound to weaken. When, moreover, a society as mature as that of Europe in the thirteenth century is subjected, as it was in the fourteenth, to the suffering caused by the exhaustion of available economic resources, prolonged war, and recurring epidemics, it may even disappear altogether.
The purpose of the preceding pages has been to illustrate with a specific example the value of textual traditions for an understanding of the history of thought. In conclusion, it may be worthwhile to formulate three methodological observations of a general kind.

First, it is from a logical point of view, purely accidental that William Durant the Younger believed in the truth of predetermined norms and also that of QOT. It is possible to hold either one of the two without the other. Their connection in his mind could thus not have been discovered by any other means than a careful reading of his text. But it is precisely their connection which defines the meaning of QOT. This may explain why, in spite of the tedium associated with it, painstaking textual analysis is both necessary and valuable for intellectual historians. There is no other means available to discover an accidental combination of heterogeneous convictions. Such combinations are the stuff of intellectual history.

Second, results derived from the study of a single text, especially if they are used as an excuse for speculations so shameless as to make it necessary to ask the reader's forgiveness, are hypothetical in nature. They must be refuted, or at least modified, if conflicting evidence demonstrates their falsehood. But that is no argument against their value. Every attempt to understand the past is hypothetical by definition, regardless how large the amount of evidence on which it is based. So long as it does not parade in the garb of established conclusions, the value of an hypothesis is therefore commensurate, not with the extent of the evidence on which it is based, but with that which it is able to organize in an intelligible pattern. Under favorable circumstances even a very limited amount of evidence can yield hypotheses which throw a revealing light on matters far removed from the context in which they originated. The few examples from the history of political thought which could be given above without exploding the scope of this study should be sufficient to show that here such a possibility exists.

Third, the thesis that the transition from medieval to modern political thought was made by abandoning the faith in pre-existing norms can be considered from an abstract perspective. It then suggests that the development of particular intellectual phenomena is not sufficiently understood so long as one merely considers those of their predecessors out of which they were formed. It may be more instructive to study those which perished.
aut gentium aut civilibus: 'Digesta' 1.1.1.2.

*See e.g., Brunner, Land und Herrschaft n. 8 supra, esp. 120-146, with a critique of the application of 19th-century terminology to medieval conditions. M. Bloch, *La société féodale* (Paris 1939) esp. 495-516, is also pertinent.


*Post, 'A Romano-Canonico Maxim' 248f. and Hall 'Quod omnes tangit' 144, for example, agree that the clergy, especially Stephen Langton, are responsible for the popularity of QOT in 13th-century England. On the other hand, Congar, 'Quod omnes tangit' 212f. points to the role of the university of Bologna in an attempt to explain the earliest political uses of QOT in Italy.


*Innocent III, dealing with the nomination of rural deans by bishop and archdeacon, stated that 'quum juxta imperii imperialis sanctitoris auctoritatem ab omnibus quod omnes tangit approbari debeat, et quum commune seu deorum officio exercatur, communitatem et eligendus, vel etiam amovendus.' *Liber Extra* 1.233.75. Cf. Post, 'A Romano-Canonico Maxim' 202f.; Congar, 'Quod omnes tangit' 210-212.

*Speaking of his reasons for calling the council, Innocent referred to the idea of QOT without using the term: 'Habito superius cum fratibus nostri et alieni viri prudentibus frequenti ac diligentia tractatu, prout tanta sollicitudo propiis exigit, hoc tandem ad exsequandum praedicta de ipso universi consilio possidendo faciemus. ut quia haec universorum fidelium communi statum responsione, generale concilium juxta priscam sanctorum Patrum consuetudinem convocemus.' Pl. 216B24. Cf. Congar, 'Quod omnes tangit' 215.

*On the use of QOT as a principle of procedural law in the thirteenth century, Post, 'A Romano-Canonico Maxim' 200-209; Congar, 'Quod omnes tangit' 212-215. For 13th-century public law, especially in the context of taxation, see Post, 'A Romano-Canonico Maxim' 209-215; Congar, 'Quod omnes tangit' 215-239.

*A particularly important precedent for the use of QOT by William Durant the Younger can be found in a letter by Bishop William of Amiens and Archbishop William of Rouen of 1282 which was provoked by the disagreement between the mendicants and the French bishops over the privilege *Ad fructus ubere* granted to the mendicants by Martin IV. It suggests that every metropolitan should hold a provincial council and raise money so that the bishops could finance an embassy to Rome 'ut communi omnium consilio, cum dictum negotium omnes tangit, via communi et utili eligatur ad obviandum periculis memoratus et omnes prosequendi negotium praedictum ab omnibus supportetur.' Cited by K. Schleyer, *Anfänge des Gulikonsimmon im 13. Jahrhundert* (Berlin 1937) 53. Cf. P. Gruizeau, "Prélats français contre religieux menditains: Autour de la bulle Ad fructus ubere* [1281 - 1290];' *Revue d'histoire de l'Église de France* 11 (1925) 485 and n. 40; Congar, 'Quod omnes tangit' 221. According to Congar, 'Quod omnes tangit' 237 n. 107, 108, 239f. Henry of Ghent, Godfried of Fontaine, and their allies among the French secular clergy invoked QOT rather rarely, and Marsilius never, because, as an Aristotelian, he avoided references to Roman law.

*Post, 'A Romano-Canonico Maxim' 205f.; Congar, 'Quod omnes tangit' 214; Marongiu, 'The Theory of Democracy' 405.
In 1300 Edward I wrote to Boniface VIII that "consuetudo est regni Angliae quod in negotiis tangentiis statum ejusdem regni requiratur consilium omnium quos res tangit." Quoted by Congar, "Quod omnes tangit" 237 n. 106; in 1295 Edward I's famous parliament referred expressly to QOT; see Congar, "Quod omnes tangit" 235f.

Super pluribus arduis negotiosis, in statum, libertatem nostrorum, ac regni nostri . . . non mediocri hibertibus, cum prelati, baronibus et aliis nostris et ejusdem regni fidelibus et subjectis, tractare et deliberare volentes, mandamus . . . ut dicti consules et universitates, . . . per duos aut per tres de majoribus et pericuriosis . . . plenam potestatem habentes, . . . haec instanti die dominica ante Regis palmarum intreant Parisius, nobiscum tractaturi et deliberaturi super hibi, audituri, recepturi ac facturi omnia et singula, suumque, nomine consulis et universitatis predictorum praebuitur assensum in omnibus et singulis que super presmissa et ea tangentiis per nos fuerint ordinata." This is the very first document in C. Gicot, ed. Documents relatifs aux états généraux et assemblées réunis sous Philippe le Bel (Paris 1901) 1f., a letter of convocation for the assembly meeting in Paris in April 1302. It invokes the spirit, if not the exact words of QOT. Cf. Congar, "Quod omnes tangit" 237-239.

"Quod omnes tangit debet ab omnibus approbatur." Liber Sextus. De regulis urbis 29.


E.g. A. Marongiu, Il Parlamento 42, n. 8 supra: "In linea politica, il commune consenso sulla necessità e pratica delle grandi assemblee è evidente espressione di democrazia: democrazia, s'intende, in senso relativo giacché il popolo con il quale i sovran i avevano da trattare non era la somma degli individui, dell uno e dell altro sesso, delle democrazie moderne a suffragio universale; ma solo l'insieme dei non molti nutriti dotati di capacità giuridiche di diritto pubblico particolari." W. Ullmann, Political Thought esp. 145-158, 200-228; much more moderately C.H. McIvor's old, but still classic, essay "Medieval Estates" 665-715; Brian Tierney, Foundations and Constitutional Thought may be seen as part of the democratic tradition.

R.W. and A.J. Carlyle, A History of Medieval Political Theory in the West 5 (London 1928 = 1971) 45-63, 128-140, esp. 140: "It is much more reasonable to recognise that the rise of the representative system was the intelligible and logical development of the fundamental principles of the political civilisation of the Middle Ages."

Ullmann, Political Thought 11-18, esp. 12f.

As the title implies, Marongiu, "The Theory of Democracy" maintains this view. It is revealing that the Italian reprint of 1979 changes democrazia to partecipazione: see n. 8 supra.

Gaines Post has strenuously argued in this fashion. See esp. Studies 111, 116f., 160-162, and "A Romano-Canonical Maxim" 190, 214f., 247-251; Congar, "Quod omnes tangit" 222-231; J.B. Morrall, Political Thought in Medieval Times (New York 1962) 65: "The tag Quod omnes tangit ab omnibus approbetur [What concerns all, should be approved by all] was not an assertion of embryonic democracy so much as a device of the monarchy to obtain a guaranteed assent of the realm to its demands." F. Oakley, "Celestial Hierarchies Revisited" 20 has attacked Ullmann for failing to take stock of Post's results.

The best introduction to the life and works of William Durant the Younger is P. Vidélot, "Guillaume Durant le Jeune, évêque de Mende:" Histoire littéraire de la France 35 (Paris 1921) 139. The standard account of the council of Vienne is by E. Müller, Das Konzil von Vienne 1311-1312 (Münster 1934). More recent, but brief, is J. Lecker, Vienne (Paris 1954). The best edition of the Tractus de modo generalis concilii celebrandi is by J. Crespin. Lyons 1531. It will be referred to by folio and page standing for columns on the recto and c. and d. the verso. For the flaws of this and other editions, and especially for the distinction between the Tractus Maior and Tractus Minor, see my "A New View of William Durant the Younger's 'Tractus de modo generalis concilii celebrandi';" Traditio 37 (1981) 291-324, with further references. Durant's citations of canon and civil law have been given in the form used throughout this essay.

"Videretur esse salutare consilium pro re publica et pro dictis administratoribus rei publice quod sic sub ratione, ut premissum est in rubricis proximis, liminariter potestas eorumdem quod absque certo consilio domini cardinalium dominus papa, et reges ac principes absciper aliorum consiliis, sicut hactenus in re publica servabatur, non uleriter prorogatvia huysmodi potestatis, potissime aliquid concedendo contra concilia et contra iura approbata communiter, et contra dicta concilia et iura nihil possent de novo statuere vel concedere [sic] nisi generali concilio convocato, cum illud quod omnes tangit secundum iuris utrisque regulum ab omnibus debeat communiter approbato." Tractatus Maior 1.4 (74 Crespin).

"Quod Romana ecclesia nulla iura generalia deinceps conferre nisi vocato concilio generali quod de decemnio in decemnario vocatur." Tractatus Maior 2.96 = 327 in the printed edition (59a Crespin).


"Chronologically speaking the first authoritative fourteenth-century acknowledgment of Quod omnes tangit seems to have been the reference to it by William Durandus the Younger . . . In his hands the principle became exceptionally important; it became the justification and foundation of conciliar theory in its broadest sense. The supreme power in the field of Christian doctrine and Church discipline would be entrusted to an ecumenical council, superior to the Pope, kings, and princes . . . Such a clear statement of the democratic principle was truly exceptional. It was to remain so" Marongiu, "The Theory of Democracy" 405f. In a contrary sense, Congar, "Quod omnes tangit" 245.

"Et providetur ne in contrarium [i.e. contra quod in lege et in evangelio et in concilii Spiritus Sancti instituto probatis (D.I.166.) et in aliis universalibus et comprobatis legibus et iuribus continet] impune attemptetur:" Tractatus Maior 1.2 (54-5a Crespin).

"Note that the text of his proposal is designated as a salutare consilium and given in the subjunctive mood.


"Dealing with the exemptions which the papacy had granted to the religious orders, and which Durant considered an intolerable alteration of the general state of the church, he concluded: "Unde cum dominus papa tantum et talis observationem mutate non debit, nec forte velat, ergo nec generales exemptiones, privilegia, libertates, et immunitates derogantes et praediscolas honoris, potestatis, statui, ordinacione, et ordini dictionum episcoporum et ordinacionum contra predictam generalem ordinacionem sic passim concedere non debeat, nec etiam forsan valet." Tractatus Maior 1.4 De exemptionibus (8c Crespin). My italics. The variant mutare, instead of the edition's imitari, is taken from Bibliothèque Nationale MS lat. 1443 fol. 8v.
Thus there is no qualifying forsan added to the quod ... nihil posse de novo statuere vel concedere in his proposal. See above n. 37.

"Quarto specicatur amplius de limitingo et regulando exercicio potestatis dictorum presidentium monarchiae" Tractatus MAior 1.4 (7b Crespin).

B. Tierney seems to have gone too far in stating that "in the first part [of the Tractatus, Durant] was content to establish the principle that a Pope alone could not override the legislation of previous Councils ... [He] seems to have overstepped the bounds of Decretist thought in thus applying the Quod omnes tangit principle to the general legislative authority of the Papacy, for Joannes Teutonicus had maintained in a quite contrary sense that to deny the Roman See's right of establishing law for the whole Church was heresy." Foundations of the Conciliar Theory (Cambridge 1955) 195 with reference to the gloss of Joannes Teutonicus on Decretum 1.195. Even though Durant did apply QOT to the general legislative authority of the papacy, he seems to have done so without contradicting the doctrine accepted by the gloss. See n. 66 infra. Among the authors who share the view that Durant actually subjected the pope to conciliar authority are J. Haller, P Apostolicae Sedis 6 (1898) 35; E. Stumpf, Die Conciliarlehre des Konzils von Constance (Gutersbühl 1904) 151; H. Schmid, Die Politik des französischen Staates (Berlin 1910) 76; and E. Schürle, Die Politik des französischen Staates (Berlin 1910) 76. The order was abolished "per modum provisionis seu ordinis apostolici;" see Müller, Viennae 197-199. The relevant bull, Viom in excelso, explains that proceeding "per dictam ministram sententiam canonice" was impossible because only a minority of the council was in favor; ibidem 211-213. Another wonderful example for the relationship between pope and council can be found in cardinal Stefanek's account of Clement V's renewal of the constitution Super cathedram in the final session of the council of Vienna. Because it granted a fourth of mendicant income to the bishops, it was understandably opposed by the mendicants. The pope addressed the bishops thus: "Et illum Super cathedram innovavit seu renovavit; rogavit tamen prelatos ter diversas viciss in eadem termino sessiones [concilii]; quod aliqii beati et sancti, ut et oportet quod dicatur in illa Super cathedram, maxime circa quattuor; nam non possent alias vivere. Nicholosini tamen, si non consentiret prelati in aliqua mutatione illius Super cathedram, ipsae papae sequatur voluntatem ipsorum et ipsam, ut predictum est, renovavit" Müller, Viennae 678 ff.

Even though the pope had resigned himself to forging a formal sentence on the Templars, he insisted that, regardless of the council's wishes, he would have possessions assigned to the Hospitallers, as reported by the Aragonese ambassadors of Jayme II on April 22nd, 1312: "Finalium dei lex pop.pas prelat, qui, si ells consenysau, que fae la dita aplicato al Espital, a ell plauria, que poques fer de conseyl deill. Si no quel ell ho faria e ho ensens a fer, volgasses ells o no" H. Finke, P Apostolicae Sedis 6 (1898) 359; the reference is in Müller, Viennae 222.


While exact respect the council of Constance's famous decrees Hanc sancta goes beyond Durand's suggestion by demanding obedience from the pope while restricting that requirement to matters of faith, schism, and reform; see Conciliorum Oecumenicorum Decreta (3rd ed. G. Alberigo et al., Bologna 1973) 408.

The relevant parts of the Tractatus MAior 1.2-3 especially the Rubrica de limitanda potestate superiorm (5d-7a Crespin). Chapter 3 is entitled "Quod predictum modus correctionis et reformations ecclesiae et christianiarum sit conveniens rationi et iuri, maxime quantum ad presidentes spirituali et temporalis potestatii, et quod non debeat transgressi iura." Tractatus MAior 1.3 (5a Crespin).

Chapter 4 is entitled "Quarto specicatur amplius de limitingo et regulando exercicio potestatis dictorum presidentium monarchiae, ne in agendis absque constilio proborum proprium utatur arbitrio, nec sine generali concilio agant contra ea quae sunt in concilios sancis patribis provide constituta in dispensationibus, privilegiis, et exemptuonisibus, et alis excrescendis; quod revocet et revocare debent exemptiones in contradistinctione concessas, cum hoc esse utile et rationabile videtur." Tractatus MAior 1.4 (7a-b Crespin). My italics. This shows that the conciliar demand was merely an expansion of the previously considered principles. The readings concilio proborum et agent, instead of the editions concilio proborum et agent, is taken from Bibliothèque Nationale MS lat. 1443 fol. 6b. On the confusion between concilium et consilium, Congar, "Quod omnes tangit" 229. 245 n. 132; P. Michaud-Quintin, Universitas: Expressions du mouvement communautaire dans le moyen-âge latin (Paris 1970) 135-141.

Si itaque duo quibus regitur humanum genus sicut a ministri Dei, videlicet ecclesiasticae authority et regalis potestas, sicut Celsius papae scribit Anastasii imperatori (Decretum 196.10) vellent intendere ad dicta reformationem et salubre regimen humani generis, habebant viam amplecti predicatam, ut videlicet seipsum et humanum genus regerent secundum quod in lege et in evangelio et in concilii Spiritus Sancti instinctu probati (Decretum 1.166) et in aliis humanis et comprobatis legibus et iuribus continuatoribus: Tractatus MAior 1.2 (4d Crespin). Note the significant alteration in the text of Decretum 196.10, which has autoritas saecula postea instead of ecclesiasticae authority, and principaliter instead of scilicet a ministrae Dei.


For the term administratores, see n. 37 supra; cf. H. Hofmann, Repräsentation: Studien zur Worf- und Begriffsgeschichte (Berlin 1974) 116-190.

For the term ministri Dei, see n. 56 supra.

Non enim debet irreprehensible iudicari, si secundum varietatem temporum statuta quandoque varietatem humanum, presentim cum urget necessitas vel evidens utilitas id expositi, cum Ipse Deus ex his quae in veteri testamento statuerat nonnulla mutaverit in novo, sic habetur ex concilio generali [Laterana IV]; Tractatus MAior 1.4 (8b Crespin), with references to Decretum 1.4.2, 2.258.14, 2.23.46, 2.32.47, et Liber Extra 1.36.11, 4.148. S.395. Durant did not even exempt concessa laws from revocation or change at human hands. This is evident from the words with which he submits his list of such laws to the consideration of the council of Venice: "Si aliqua in dicta specificatianum casum [canonum] perientur utilia et
universalis ecclesie proficuis, quod sacri provisione concilii super eorum observantia vel revocatione aut immutatione vel declaratio deliberatio, si visum fuerit, habeatur. "Tractatus Major 2 profero (Jud Crippen). The variant "immunatio" instead of the edition's "immunitas" is taken from Bibliotheca Nationale MS 1443.

"Porro, si pretendatur quod licium est dispensare supra iura, respondi potest quod, cum dispensatione, sic iuris tutare tradatur, sit provida iuris communis relaxatio, ut siue necessitate pensata per eum ad quem spectat, canonice facta (Decretum 2.1.75), non est secundum iurisconsilium dispensatio sed dissipatio si aliter fiat, cum ius vulneraret ex ea (Decretum 2.234.24)." Tractatus Major 1.4 (7d Crippen). "Non enim debent nasci iuris nº iura nascuntur, sic Innocentius tertius scribit . . . . Cum itaque summum bonum in rebus sit iustitiam colere atque sua cuique iura servare, et in subditis non sine quod potestatis est fieri, sed quod eum est custodiri, sic Gregorius ad Constantiun regnum Francie scribuit (Decretum 2.12.29), ad hoc debent dominus papa et omnes reges anhelare." Tractatus Major 1.3 (5d-6a Crippen).


The classic text quoted by Duranti is Decretum 1.203. This canon explains which written sources should be consulted, and in which order, if Scripture proved insufficient to give the desired answers. Crucial for an understanding of Duranti's use of it is the procedure it recommends if no answer at all is found in any written source: "Quod si omnibus inscriptum huius quaestionis qualitas non lucide investigatur, seniores provinciae congreget, et eos interroga. Facilius nunc deminuit, quod a pluribus senioribus quaeritur. S. v. senioris, the gloss explains: "id est sapienter." S. v. potestas, it refers to Codex Iustinianus 6.42.32.1, 7.143, the two passages from civil law which Duranti, too, quotes (see n. 63 infra). Decretum 1.203 is thus the basis of his conciliator proposal. There was nothing revolutionary in this doctrine itself, based, as it was, on Christ's promise: "Si dux eum vocis vel tres convenient super terram in nomine meo, de omni re, quamcumque petierint, iustus a patre meo." This is the formulation of Duranti's source. Decretum 1.203. The original is in Matt. 18.19-20. Huguccio had already suggested the convention of sapientes as a means of last resort providing access to reason when existing texts were insufficient to resolve certain difficulties. On the role of reason in law, see, in addition to Post, 'Ratio publica utilitatis' n. 8 supra, G. Le Bras, C. Lefebvre, J. Rambaud, "Lage classique, 1140-1378: Sources et théorie du droit (Paris 1969) 397-402; C. Lefebvre, Les pouvoirs du juge 26-68; J. Balon, "La 'ratio' fondement et justification du droit avant Gratien?" Studia Gratiania, 9 (1966) 11-25; E. M. Meijers, "Le conflit entre l'expérience et la loi chez les premiers glossateurs," Etudes d'histoire du droit 4 (Leiden 1964) 143-166; P. Michael-Quintin, Etudes sur le vocabulaire rhétorique du moyen age (Paris 1970) 195-211; P. Caron, "Acquis et Interpretationi dans la doctrine canonique aux XIIe et XIIIe siècles," Proceedings of the Third International Congress of Medieval Canon Law, 1968 (Vatican City 1971) 131-141.

"Lex dicit quod per ampliores homines manifesta veritas revelatur (Codex Iustinianus 6.42.32.1, 7.143): Tractatus Major 1.4 (7b Crippen)."

"Nulla etiam dubium est quin pluribus intentiis minor sit ad singula sensae. Unde, quamquam [presidentes spirituali et temporali potestati] sunt dignitate ceteris aitiores, interdum eventur niwm majym preoccupationem negotiorum sicut Gregorius in Pastorali ait, quod non sunt in agendis et in iudicis ceteris certiora." Tractatus Major 1.4 (7d Crippen). The reading "nimium" instead of the edition's "minimam" is taken from Bayerische Staatsbibliothek MS lat. 6605 fol. 5b.

"Unde prudenter aetum dominus papa si in dispensationibus et aliis servit consilium Leonis pape in prealegato canone Sicut (Decretum 1.14.2). Dicit enim quod siqum quidem sunt quod nulli possunt ratione convelli, ita multa sunt quae aut pro necessitate temporum aut pro consideratione etiam oportet temperari, illa consideratione semper servata ut in his quod vel dubia fuerunt aut obscura in nostrum sequendum quod nec preceptis evangelicis contrarium nec decretis sanctuarum patrum inueniatur adversum: Tractatus Major 1.4 (8a Crippen).

"Duranti referred both to Decretum 1.21.7, which stated that 'prima sedes non indicabitur a queaque' and, in the very chapter which developed his conciliator proposal, to Decretum 1.406, where the famous formula that 'cunctos ipse iudicaturus a nemine est iudicandus, nisi deprehendatur a fide dievis' is found; Tractatus Major 1.3. 1.4 (6d, 7c Crippen). It thus seems impossible to argue that he contradicted the teaching of the famous gloss on Decretum 1.43, according to which the 'sententia' of the pope should prevail over all others, 'nam etiam error principis ius facit.' Note that he did not concern himself with the possibilities opened by papal heresy. He was interested in developing a conciliator theory applicable to church government under ordinary circumstances. Papal heresy was an exception which would have been ill-suited to serve his purposes. On conciliar arguments based on the need to remove heretical popes, see Tierney, Foundations, passim; idem, 'Pope and Council: Some New Decretist Texts,' Medieval Studies 19 (1957) 197-218.

"This should, however, not lead anyone to believe that assentire or consentire could not have been used by medieval writers in place of approbato. They most definitely could and were. It means that the etymology of approbat seems better suited to denote the kind of consent which resulted from the duty to reach a verdict, rather than the right to utter a wish. It does not mean that consentire or assentire could not have served the same function.

"Ps. 28. 28f. supra.

"See the literature given in nn. 50, 55 supra.


"See Picot, Documents 715f.

"The very first document in Picot, Documents 1f., cited n. 28 supra, is addressed to the sénéchal de Beaucaire. It explicitly asks him to ensure that, among others, the consuls of Mende would send representatives to the planned council from 1123 to 1311 amount to the respectable average of one every 27 years.

"See n. 23 supra.

"See Müller, Vienn 13-26, 68-84, 92-121.

"The standard account of the life and works of the Speculator is I. Falletti, "Guillaume Durand," CDC 5 (1953) 1044-1075.


"Per sich nun die besonders Reformen auf, ohne welche die Kirche immer mehr in Corruption versinken müsse: aber sie sind im Grunde gegen das ganze päpstliche System, wie es seit 200 Jahren geworden war, gerichtet!" Janus = J.J.V. Döllinger, Der Papst und das Concil (Leipzig 1869) 241f. "Indeed this sprawling ill-designed work . . . strikes for the first time the authentic note of the Conciliar Movement properly so called." Tierney, Foundations 196.
The frequently repeated impression that Durant's work is poorly arranged is produced by errors in the early modern printed editions and thus unfounded; see my 'A New View' 315.


"In 1303, William of Plaisians, Philip IV's counsellor, publicly charged Boniface VIII with heresy. Philip IV endorsed William's demand for a general council 'to fervorem tamen catholicë fidei.' Picot, Documents 36f., 47-47. The possibility that Boniface was a heretic, moreover, provided the basis for Philip's appeal to a general council; see H.-X. Arquillière, 'L'appel au concile sous Philippe le Bel et la génese des théories conciliaires,' Revue des questions historiques 89 [1911] 23-55. The reports on Boniface VIII's views come from his opponents, but cannot therefore be simply dismissed. See, e.g., the amusing one according to which he consideredforkation no worse a crime than the rubbing of hands: "Fertur dicere fornicationem non esse peccatum, scit nec fregiacionem manuum." Picot, Documents 37. Particularly interesting from our present point of view is the charge, made against him in the investigations during the council of Vienne, according to which at the time of Pope Celestine V, when he was still Cardinal Benedict Gastani, Boniface stated that there was no divine law and insisted on the human origin of all laws, and especially of eternal punishments: "Nulla lex est divina, sed omnes leges advenae sunt per homines, et postea sunt ibi multae poenae aeternales solum, ut homines metu poenae retrahantur a malis." P. Dupuy, Histoire du différend entre le pape Boniface VIII et Philippe le Bel (Paris 1655) 531, cited by J. Mundy, Europe in the High Middle Ages, 1150–1300 (New York 1973) 522.

"La quale religion [cristiana] se ne principi della repubblica cristiana si fusse mantenuta secondo che dal datore dessa ne fu ordinato, sarebbero gli stati e le repubbliche cristiane più unite, più felici assai che ne sono. Non si può fare altra meglio conseguenza della declinazione dessa, quanto è vedere come quelli popoli che sono più propinqui alla Chiesa romana, capo della religione nostra, hanno meno religione. E chi considerasse i fondamenti suoi, e vedesse l'uso presente quanto è diverso da quelli, giudicherebbe essere proprio senza dubbio o la rovina o il fragilissimo Machiavelli, Discorsi 1.12 (Opera. ed. M. Bonfantini, Milan 1954, 127). Machiavelli is usually placed at the forefront of the emergence of secular reason. Note, therefore, his anger at the church for having strayed from the path prescribed for it by its founder, and his conviction that, had it not done so, the Christian states and republics would be 'more united and happier'—a pious hope if ever there was one.

"See n. 80 supra.

"See n. 1 supra.

" See n. 2 supra. It should be added that, as firmly as Rousseau denied that the general will could be limited by any fundamental law, as explicitly did he declare that 'toute justice vient de Dieu, lui seul en est la source; mais si nous savions la recevoir de si haut nous n'aurions