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Law and Sovereignty

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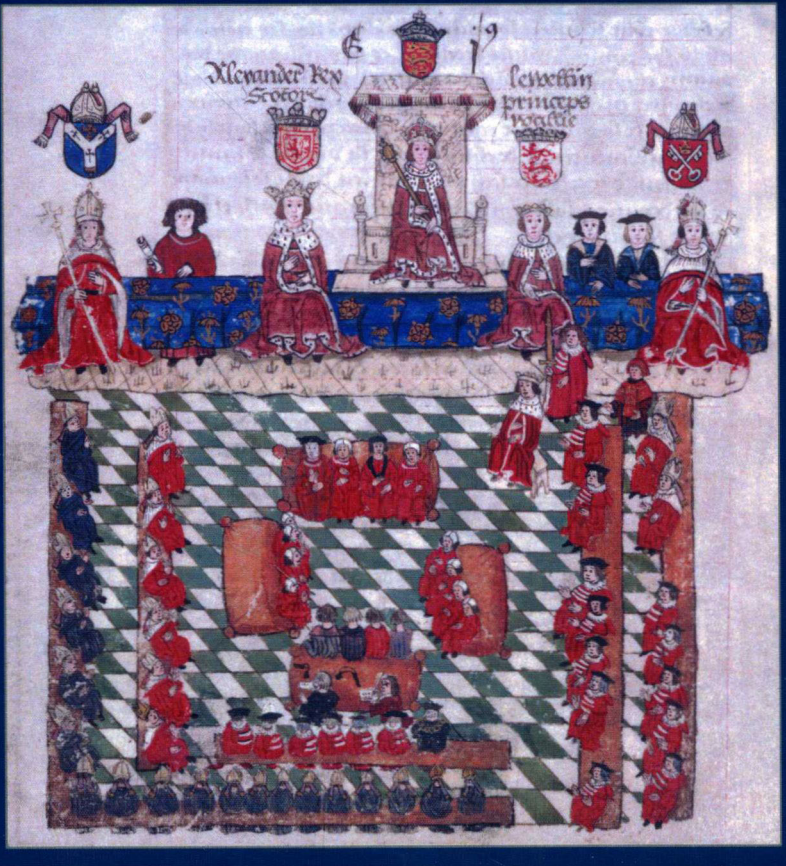

Edited by Robert S. Sturges

LAW AND SOVEREIGNTY
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edited by

ROBERT S. STURGES

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Law and Sovereignty
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ARIZONA STUDIES IN THE MIDDLE AGES
AND THE RENAISSANCE

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General Editor

Robert E. Bjork

In memory of Barbara Ann Johnson
1952–2006

Acknowledgments

Except for the Introduction, all of the contributions to this volume are revised and expanded versions of material presented at the annual conference of the Arizona Center for Medieval and Renaissance Studies in Tempe, Arizona, in February of 2008. I owe my first thanks to the Director of ACMRS, Robert E. Bjork, for the opportunity to edit this volume, and to him and everyone else at ACMRS for making the conference a success, especially William Gentrup, Assistant Director, and Audrey Walters, Program Coordinator.

Working on this project has made me appreciate, once again, just how much generosity and good will characterize the international community comprised of scholars in medieval and Renaissance studies. I would like to thank the conference's session chairs who provided thoughtful recommendations of papers to consider for inclusion in this volume (though not all of them could be included), as well as the many eminent, though anonymous, readers who took time from their own schedules to read and comment on the submissions—including those who, if they were unable to read submissions themselves, recommended other appropriate referees. All of them remain anonymous here, but they know who they are, and they have my deepest gratitude. Additional thanks are due to all the contributors to this volume for their patience and cooperation.

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Finally, I thank my partner, Jim Davidson, for making all my tasks easier.

Robert S. Sturges

Introduction: Laws and Sovereignties in the Middle Ages and the Renaissance

Robert S. Sturges

The Kindly Ones, Robert Littell's recent, chilling novel about the Holocaust, is narrated in the first person by a fictional German SS officer, Max Aue, who at one point engages with Adolf Eichmann in a theoretical conversation about the concepts of law and sovereignty under Nazism:

> We all agree that in a National Socialist State the ultimate foundation of positive law is the will of the Führer. That's the well-known principle *Führerworte haben Gesetzeskraft*. Of course, we realize that in practice the Führer cannot take care of every single thing, and so others must also act and legislate in his name. In principle, this idea should be extended to the entire *Volk*.[1]

Later, reflecting on this conversation, Aue elaborates on his ideas:

> . . . Law must refer to an authority outside of man, must be founded on a power that man feels is superior to himself. As I had suggested to Eichmann during our dinner, this supreme and imaginary reference point was for a long time the idea of God; from that invisible, omnipotent God, it shifted to the physical presence of the king, sovereign by divine right; and when that king lost his head, sovereignty passed to the People or to the Nation, and was based on a fictive "contract," without any historical or biological foundation, and thus just as abstract as the idea of God. German National Socialism sought to anchor it in the *Volk*, a historical reality: the *Volk* is sovereign, and the Führer expresses or represents or embodies this sovereignty. From this sovereignty the Law is derived . . . .[2]

[1] Jonathan Littell, *The Kindly Ones* (2006), trans. Charlotte Mandell (New York: Harper Collins, 2009), 566.

[2] Ibid., 591.

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Aue thus situates Nazism teleologically as the endpoint toward which medieval and early modern notions of law and sovereignty should be seen as tending, simplifying the historical past to the point of parody as he does so: in the Middle Ages, according to Aue, law derives from the sovereignty of an invisible deity, and in the early modern period from the divine right of kings. Both the twentieth-century historical moment represented in the novel and the twenty-first-century novel itself thus bring theories of law and sovereignty, and their historical development in the Middle Ages and the Renaissance, to the forefront of modern political thought, and emphasize the sometimes horrifying real-world consequences of misunderstanding them.

Indeed, the related questions of law and sovereignty are among the most pressing concerns in modern political and intellectual life for philosophers and historians as well as for novelists. In practical terms, ethnic and territorial disputes, foreign interventions in the internal affairs of nation-states, the globalization of the economy, and the growth of electronic communications, among other factors, constantly raise questions about the validity of the concept of state sovereignty in the modern and postmodern world. As one political scientist has recently pointed out, "[e]thnic wars, transnational concerns for human rights, the Internet, financial crises, multinational corporations, international trade, and more generally, globalization have given rise to the sentiment that sovereignty as it has conventionally been understood is eroding or even withering away."[3] These practical threats to sovereignty suggest that a post-sovereign world may be developing, one in which alternative political arrangements may be necessary and, indeed, desirable.

Sovereignty in these terms is closely linked to law, especially international law regarding legal state sovereignty. But modern theories of sovereignty find that it is inseparably connected to domestic law as well. For Giorgio Agamben, a highly influential theorist of sovereignty, sovereign power becomes visible precisely in its ability to suspend law in a "state of exception," or to remove individuals in its power from the protection of law, a situation that in his view became to some extent normative in the twentieth century, with its frequent examples of such removal: the concentration camp, the gulag, the prison.

> The *puissance absolue et perpétuelle*, which defines state power, is not founded . . . on a political will but rather on naked life, which is kept safe and protected only to the degree to which it submits itself to the sovereign's (or the law's) right of life and death. . . . The state of exception, which is what the sovereign each and every time decides, takes place precisely when naked life—which normally appears rejoined to the multifarious forms of social life—is explicitly put into question and revoked as the ultimate foundation

[3] Stephen D. Krasner, ed., *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001), vii.

of political power.[4]

In this view, sovereign power, far from withering away, has actually been extending its reach. Such confusion may be traced to the multiple implications of the concept of sovereignty itself, at least in the way modern thinkers have defined it: according to Stephen D. Krasner, it may refer to the mutual recognition of juridically independent states, to the exclusion of external authority within a state's boundaries, to domestic political authority and control, or to the regulation of borders.[5] Thus, for example, the state's sovereign power may exert ever-increasing control over its subjects in the fashion suggested by Agamben while yet remaining vulnerable to external interference as Krasner suggests.

The concept of sovereignty, however defined, thus appears, for modern political thinkers, to require a concept of the state, a set of geographical boundaries within which sovereign political power, whether centered in a monarch, a group, an entire people, or some other entity, exerts "supreme dominion, authority, or rule."[6] Sovereignty, it is asserted, "is an idea of authority embodied in those bordered territorial organizations we refer to as 'states' or 'nations' and expressed in their various relations and activities, both domestic and foreign."[7] It is precisely this state-centered idea of sovereignty, common among modern political practitioners and theorists, that may make the title of this volume, with its historical emphasis on the medieval and early modern periods (especially the medieval), seem surprising: can there be sovereignty before the emergence of the modern nation-state?

Some current histories of sovereignty suggest not. Robert Jackson, echoing a widely held belief, claims that sovereignty "is one of the constituent ideas of the post-medieval world: it conveys a distinctive configuration of politics and law that sets the modern era apart from previous eras"; in his view, the "idea of sovereignty was expediently arranged in the sixteenth and seventeenth centuries by European rulers in the course of their rivalries and struggles, religious and secular."[8] Indeed, for Jackson, sovereignty is not only post-medieval, but "anti-medieval," partly because of the universalizing, international nature of medieval religious authority, with Europe's constituent *regna* united in a single "Christendom," partly because of the fragmentation of medieval political power, and partly, in a related point,

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[4] Giorgio Agamben, "Form-of-Life," in idem, *Means without End: Notes on Politics*, trans. Vincenzo Binetti and Cesare Casarino (Minneapolis: University of Minnesota Press, 2000), 3–12, at 5–6. See also idem, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005) and *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).

[5] See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 3–4.

[6] *Oxford English Dictionary*, s.v. "sovereignty."

[7] Robert Jackson, *Sovereignty: Evolution of an Idea* (Cambridge: Polity Press, 2007), ix.

[8] Jackson, *Sovereignty*, 1.

because levels of authority above and below the king "contributed to the weakness rather than the strength of kings and kingdoms."[9] (This system he calls "feudalism," with no recognition of the extent to which the concept of feudalism itself has been contested and even abandoned by historians of the Middle Ages.)[10] Furthermore, it is not unusual for modern historians to date the concept of sovereignty to the Peace of Westphalia (1648)—thus removing most of the early modern period from consideration as well.[11]

Nevertheless, Jackson, like other modern theorists, acknowledges that the medieval period did possess the idea of a supreme authority of the sort that the *OED* defines as sovereign, as well as subordinate or metaphorical sovereignties, what we might term forms of "micro-sovereignty," which may have been located in God, the pope, "'a husband in relation to his wife,' 'a mayor or provost of a town,' 'the Superior of a monastery,'" etc.[12] Additionally, the work of twenty-first-century medievalists calls for a more nuanced conceptualization of the medieval and the modern, especially with regard to sovereignty and law. One recent historian of ideas interrogates the division between the periods, and suggests that

> [e]arly feudal historiography fully relies on medieval law and commentary, yet it also constitutes the narrative and conceptual basis of modern politics. The cut of periodization not only obscures this history, but also redistributes its terms—the subjected and the sovereign, the enslaved and the free—across the medieval/modern divide.[13]

Others, including some of the essayists included in this volume, insist that something more closely resembling the modern concept of sovereignty was also pioneered in the later Middle Ages. One recent study, boldly titled *Medieval Sovereignty*, similarly holds that "sovereignty is a problem that cannot be confined to one particular period or society," and contends that "political and legal fragmentation denote ongoing struggles for sovereignty, and not the absence of the latter."[14] In the words of one contributor to the present volume,

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[9] Jackson, *Sovereignty*, 6; 24–48, at 32.

[10] See Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Clarendon Press, 1994) for an influential discussion.

[11] Daniel Philpott, for example, in *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001), 30–33, places the Peace of Westphalia at the beginning of his "system of sovereign states." And comare Krasner's discussions of "Westphalian sovereignty" in *Sovereignty: Organized Hypocrisy*, 3–4, 6–7.

[12] Krasner, *Sovereignty: Organized Hypocrisy*, 20, citing the *Oxford English Dictionary*, s.v. "sovereign."

[13] Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia: University of Pennsylvania Press, 2008), 8.

[14] Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Delft: Eburon, 2007), 286, 287.

> [t]heories of sovereignty today divide the world into political bodies through the geographical borders of national governments, yet both the term and its modern usage derive from the controversies of the late Middle Ages over the proper relationship among emperors, popes, and kings in Christendom as a whole.[15]

Far from standing in opposition to the possibility of sovereignty, the metaphysical orientation of the medieval and early modern periods is thus actually a precondition for it: ". . . any constituted power, including the power to establish the lawful—*ordo ordinatus*—presupposes a superior constituent order—*ordo ordinans*"; from that perspective, sovereignty may be regarded as "the fundamental postulate of medieval constitutional order."[16] For Maiolo, the fourteenth century is an important moment in this history, in that it produced sophisticated theories of sovereignty in the works of Marsilius of Padua and Bartolus of Saxoferrato, but he also demonstrates their debts to earlier medieval traditions; we may wish to add the Dante of *Monarchia* to his list as well,[17] and a recent discussion of William of Ockham's opposition to the papacy's claim of universal dominion also implies a theory of sovereignty.[18] Such thinkers challenge papal claims to jurisdiction over secular princes, and thus challenge the modern understanding of religious authority as necessarily inimical to sovereignty. Sovereignty may thus be regarded as an evolutionary concept, one that indeed challenges the traditional periodization that separates the Middle Ages and the Renaissance from the fully modern world.

And if sovereignty is closely linked to law, law may also be conceptualized in its connection with sovereignty: according to the twelfth-century English legal treatise known as Glanvill, "What pleases the prince has the force of law,"[19] the legal principle parodied in Max Aue's fictional speech to Eichmann as "*Führerworte haben Gesetzkraft,*" "the Führer's words have the force of law." Edward Peters has recently suggested that for Glanvill, law is the product of "the idealized king and the magnates acting in council, promulgating laws with the king's approval, a view also found in other contemporary or near-contemporary English and other texts."[20] Current medieval and early modern legal history is investigating this question of

[15] See the essay by Lee Manion in this volume.

[16] Maiolo, *Medieval Sovereignty*, 285.

[17] ". . . the authority of the empire does not derive from the authority of the supreme Pontiff": Dante, *Monarchia*, ed. and trans. Prue Shaw (Cambridge: Cambridge University Press, 1995), 3.1.1 (99).

[18] Takashi Shogimen, *Ockham and Political Discourse in the Late Middle Ages* (Cambridge: Cambridge University Press, 2007), 232–62. See also *Political Thought in Early Fourteenth-Century England*, ed. and trans. C.J. Nederman, MRTS 250 (Tempe: ACMRS, 2002), 141–97.

[19] Cited in Edward Peters, "Introduction: The Reordering of Law and the Illicit in Eleventh- and Twelfth- Century Europe," in *Law and the Illicit in Medieval Europe*, ed. Ruth Mazo Karras, Joel Kaye, and E. Ann Matter (Philadelphia: University of Pennsylvania Press, 2008), 1–14, at 2.

[20] Peters, "Introduction," 3.

the connection of law to sovereignty, in such areas as the laws of treason and the legal status of the colonized.[21] More generally, however, the later Middle Ages also saw cogent critiques of absolute power residing in a single individual, whether pope, king, or emperor, and even an emergent theoretical "parallel with republicanism."[22] For Marsilius of Padua, citing Aristotle, "the human authority to make laws belongs only to the whole body of the citizens or to the weightier part thereof"; thus, the ruler's excesses "must be corrected according to the law."[23]

The early modern period witnessed further developments in this redefinition of the relationship between sovereignty and law. For one example, George Buchanan, another "quasi-republican" thinker, asserted as part of his polemical project against Mary, Queen of Scots, that "the ruler, far from being above the law by royal prerogative, was subject to it at all times: to flout the law was not merely to oppose the will or welfare of the people, but to declare oneself a tyrant. . . ."[24] Negotiations between law and sovereignty will be a theme running throughout the present volume's essays, which attest to the rich variety of results these negotiations produced throughout the medieval and early modern periods.

These essays collectively conduct such an investigation: in each section of this collection, similar concerns with questions of sovereign power in relation to law may be observed crossing the lines of periodization. They also, collectively, cross cultural and disciplinary boundaries; thus the various essays range from the Anglo-Saxon period to the seventeenth century, move across England, Germany, France, Italy, and Spain, and offer observations drawn from the histories of literature, art, and religion as well as those of law and politics. I have arranged the essays in four loose thematic groupings; within each group, the essays are arranged in rough chronological order according to their subject matters. Some essays focus on law, others on sovereignty, and many on the relationship between the two.

Part I, "Theories," offers theoretical perspectives on the relationship between law and sovereignty drawn from thirteenth-century literature, sixteenth-century politics, and seventeenth-century theology. Albrecht Classen, in "Unjust Rulers and Conflicts with Law and Sovereignty: The Case of Gottfried von Strassburg's *Tristan*," offers a reading of Gottfried's courtly romance as a theoretical critique of the unjust sovereign, one who betrays the body politic to his own individual ends. Harald Braun's essay on "Lawless Sovereignty in Sixteenth-Century Spain" finds similar concerns in very different cultural circumstances, addressing the manner in

[21] On treason, see Stephen D. White, "The Ambiguity of Treason in Anglo-Norman-French Law, c. 1150-c. 1250," in *Law and the Illicit*, 89–102; James Muldoon, "The Ties that Bind: Legal Status and Imperial Power," in *Law and the Illicit*, 57–68.

[22] Shogimen, *Ockham*, 259.

[23] Marsilius of Padua, *Defensor pacis*, trans. Alan Gewirth (1956; repr. Cambridge, MA: Medieval Academy of America, 1980), 46; 88.

[24] John Guy, *Queen of Scots: The True Life of Mary Stuart* (New York: Houghton Mifflin, 2004), 375.

which early modern theories of sovereignty themselves evade a strict adherence to legal concepts. Torrance Kirby's "'Godes Lieutenantes': The Augustinian Coherence of Richard Hooker's Political Theology" moves the discussion of law and sovereignty to seventeenth-century England and the realm of theology, inquiring how they may be coherently related in Hooker's political speculations, and suggesting that an answer may be found by looking across the historical divide to the sources of Hooker's thought in St. Augustine, who, by way of Marsilius of Padua, provides a framework for Hooker's more widely recognized Thomistic sources.

Part II, "Fictions," brings together essays both literary and historical on the use of fictions—whether dramatic, narrative, poetic, or diplomatic—in critiquing or interrogating specific instances of real-world English and French politics. In "Sovereign Recognition: Contesting Political Claims in the Alliterative *Morte Arthure* and *The Awntyrs off Arthur*," Lee Manion discusses the concept of sovereign recognition as it appears in two fourteenth-century Arthurian romances, and also crosses historical boundaries to find "the origins of modern notions of sovereignty . . . in an amalgam of politics, historical precedent, and fiction"; in doing so, he addresses the very negotiations over sovereignty mentioned above, as well as its comparative fluidity. Sharon King's introduction to her translation of the anonymous fifteenth-century French farce *The Fart* suggests that the play may have relevance to a contemporary territorial dispute between two sovereigns, while the play itself offers its own comical perspective on law and jurisdiction. Retha Warnicke, in her essay "Diplomatic Rumor-Mongering: An Analysis of Mendoza's Report on Elizabeth I's Audience with Scottish Ambassadors in 1583," outlines the connection between sovereignty and diplomacy, and considers the fictional aspects of diplomatic reports, especially concerning the representation of female sovereignty in the person of Elizabeth I. Catherine Loomis moves the discussion forward historically in "'Withered Plants do bud and blossome yeelds': Naturalizing James I's Succession," which traces the fictional and poetic legitimation of the transfer of sovereign power from Elizabeth to James, both in the fictionalized accounts of Elizabeth's deathbed and in the poetic naturalization of James's succession.

Part III, "Contestations," looks at several instances of competition or negotiation over sovereign power, variously defined. Andrew Rabin, in "Testimony and Authority in Old English Law: Writing the Subject in the 'Fonthill Letter'," challenges the prevalent notion of the passive subject in Anglo-Saxon England, suggesting, through a discussion of the ways in which royal power and legal identity could be defined, debated, and negotiated, that "if, in royal legislation, we witness the king writing the subject, in surviving charters and case records, we witness the subject writing back." Martina Saltamacchia's essay, "The Prince and the Prostitute: Competing Sovereignties in Fourteenth-Century Milan," takes an art-historical approach to investigate the competing claims to one of the forms of medieval micro-sovereignty mentioned above, in this case the one between the Duke and the Milanese people in the construction of Milan's cathedral. Aurelio Espinosa argues, in "Sovereignty of the People: Discourses of Popular Sovereignty

in Renaissance Spain," that sovereignty might be shared between the monarch and other "actors"—the Cortes, the *comuneros*, the church—specifically with regard to Charles I and to Spain's development into a nation-state.

Finally, Part IV, "Applications," examines the particular spaces occupied by women with regard to law and power—further examples of "micro-sovereignty"—from three different points of view, all concerned with the practical applications of law. Erika Hess takes a literary-historical approach in "Inheritance Law and Gender Identity in the *Roman de Silence*," investigating both the practicalities of medieval inheritance law and its application in the thirteenth-century romance, as well as its implications for the representation of royal sovereignty, suggesting that *Silence* pits royal authority against natural moral law. Adrienne Williams Boyarin approaches women's legal authority from the perspective of religious history in "Inscribed Bodies: Feminine Legal Authority and the Medieval Reception of Holy Women," suggesting that "the female body itself held a powerful intellectual element that might breathe both legal and textual authority into the medieval experience of women, and perhaps into medieval women's experience," applying Jewish women's documented legal authority to representations of the Virgin and other holy women. Richard Firth Green's essay "Cecily Champain vs. Geoffrey Chaucer: A New Look at an Old Case" reopens the famous accusation of *raptus* and in so doing illuminates not only this individual case, but an underexplored aspect of medieval English law and its specific application, including the significance of the Champain/Chaucer quitclaims having been enrolled in the royal records.

All thirteen contributions were originally presented at the 2008 Arizona Center for Medieval and Renaissance Studies conference on "Law and Sovereignty in the Middle Ages and the Renaissance," Richard Firth Green's as a plenary address, *The Fart* as a performance with introduction, and the others as presentations in individual sessions. Together they provide a variety of perspectives on law, sovereignty, and their relationship, and suggest that the problems posed by these concepts were being addressed in the Middle Ages and Renaissance in ways that are at least as sophisticated as our current debates on the same topics—and far more so than the modern simplifications parodied in Littell's novel.

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