The period from the late thirteenth century to the mid-fifteenth occupies a particularly important position in the history of the juristic contribution to political thought, because in it there emerged the school of the Commentators, which was the culmination of medieval civilian jurisprudence, and as such was to exert a profound influence on early modern political thought. These years also produced major canonists building on the achievements of the thirteenth century. Juristic theory deeply influenced political ideas in three areas in particular. First, jurists developed further the theme of the relationship between positive law and the overall normative structure within which they considered human law and government operated: that is to say, the relationship between the will of the law-makers (whether emperor, pope, king, signore, or people) and the limitations posed by fundamental laws. The other two aspects relate to the jurists’ response to the contemporary political phenomenon of the emerging territorial state. They consolidated theories of territorial sovereignty, in the case of kingdoms developing further theories which had originated towards the end of the twelfth century, and in that of city-republics producing innovations in juristic terms. Furthermore they made crucial advances in corporation theory producing thereby a specifically juristic contribution to the emergence of the idea of the state.

The normative context of human law and government

The role of fundamental norms

That these jurists should have accepted such a normative structure was only to be expected: it was, after all, a basic presupposition of the juristic tradition and of medieval thought about law and society with, as we shall see, the possible and notorious exception of the views of Marsilius of Padua. Thus in all juristic works divine law, natural law, and the ius gentium

1. The most extensive modern treatment is Cortese 1962-4.
provided necessary criteria according to which human positive law could be judged. These fundamental laws simply could not be abolished by human enactments: indeed, human laws which opposed them simply were not valid. These higher norms were considered binding ultimately because God was seen as the creator of the natural world and of man. Although the civilians sometimes retained Ulpian’s distinction between the natural law and the ius gentium, they normally followed Gaius in considering the ius gentium as a form of natural law in the sense of being specific applications of it derived through the operation of natural reason. Indeed all jurists laid great stress on the role of reason both in the composition of law itself and in the function of the law-maker. As Baldus said, the exercise of supreme power should itself be subject to reason: ‘The princeps is a rational creature possessing supreme power, but insofar as he is rational he should obey reason.’ In making reason the link between man, natural law, and the eternal law of God, Baldus was clearly revealing the Thomist influence which was extremely strong amongst fourteenth-century jurists.

Manifestly, given these limitations, no ruler could be considered truly absolute. Thus the concept of princeps legibus solutus retained its established meaning of freedom from human positive law alone. It was solely within this sphere that a form of limited absolutism was possible. In conformity with l. Digna vox (C.1.14.4) the submission of the princeps to human laws remained purely voluntary, a well-worn theme to which Baldus made a refreshing clear contribution: ‘The supreme and absolute power of the princeps is not under the law, and therefore this law [i.e. l. Digna vox] applies to his ordinary power not his absolute power.’ The distinction between potestas absoluta and potestas ordinaria or ordinata had been used by Hostiensis in relation to papal plenitude of power and was also well-established in

2. Ius naturale could also be considered as that governing the primeval state of nature preceding the era of the ius gentium: ‘Iure naturali primaevi non statuitur sed per instinium naturalem iure introductum gentes bene aliquid instituuerunt quod ius gentium appellatur’, Jacobus de Ravannis ad Inst., 1.2, n. 1: 1577.

3. ‘Princeps est creatura rationabilis habens potestatem supremam, sed inquantum est rationabilis debet obediere rationi’, Cons. iii.277: 1491, fol. 84r (= Cons. 1.327, n. 2: 1575, fol. 101r). But Baldus also adheres to the commonplace that to obey reason is no infringement of liberty: ‘Nam non minus est liber quia obediat rationi. . . Immo summa libertas est rationi servire’, Consilium on the Great Schism (ad C.6.3.4). For Baldus’ political thought in general see Canning 1987.

4. Out of a host of examples, see Cynus ad C.1.14.4, n. 2–3: 1578, folb. 25v–26r, ‘Dico ergo quod imperator est solutus legibus de necessitate; tamen de honestate ipse vult ligari legibus, quia honor reputatur vinculum sacri iuris et utilitas ipsius’; and Bartolus, ibid., n. 1: 1577, fol. 27v, ‘Fatcor quod ipse [i.e. princeps] est solutus legibus, tamen aequum et dignum est quod legibus vivat, ita loquitur hic, unde ipse submittit se legibus de voluntate, non de necessitate.’

5. ‘Suprema et absoluta potestas principis non est sub lege, unde lex ista habet respectum ad potestatem ordinariam non ad potestatem absolutam’, ad C.1.14.4: 1498a, fol. 50r–v.
In adopting this distinction Baldus sought to differentiate that aspect of the power of the princeps which appeared in the ordinary day-to-day exercise of his jurisdiction from the aspect of ultimate and absolute sovereignty which provided the fundamental and underlying guarantee of the structure of positive law.

Yet the ruler’s freedom of action was not restricted to the area of positive law. The jurists did not take an unsophisticated view of the relationship between the law-maker’s will and higher norms. Thus the ruler could derogate from higher norms ex causa, that is, when applying these norms in practice to particular cases, he could interpret them extremely freely and in such a way that he might appear to have denied their specific effects without being understood to have thereby abolished their general principles, a process analogous to casuistry in theological terms. A classic juristic distinction was made between the Mosaic law’s prohibition of killing and the validity of judicial execution. This capacity for derogation was accorded to monarchs and sovereign peoples (by those jurists, like Bartolus, Baldus, and Paulus de Castro, who accepted this latter concept). There were limits, however, to this process: as Cynus de Pistoia, for instance, said, some parts of the ius divinum, such as the prohibition of the marriage between a man and his mother simply could not be the subject of derogation.

It was, however, possible to accept that such derogation did not infringe the integrity of higher norms by seeing the causa involved in it as the practical application of reason. Yet the initiative clearly lay with the ruler, and to modern eyes this use of causa could be seen as undermining the normative structure, because who but the ruler, monarch, or sovereign people was to determine the validity of the causa? Amongst late medieval jurists, however, normative limitations were taken very seriously, as was the ruler’s voluntary submission to the positive law.

The role of will

It was, however, the counterpoint and tension between this normative structure and the voluntarist aspect of positive law existing within it that proved to be a fundamental theme in fourteenth- and fifteenth-century jurisprudence. What was particularly notable about juristic thought was the attention given to the role of will in the creation of law — either in the form of the ruler’s voluntas or the people’s consent. This is already clear from the

7. C.1.19.7 provided a major locus for juristic discussion of this process. See Cortese 1962, vol. 1, p. 111, for Azo’s contribution on this point.
question of derogation; and most importantly, as we shall see, will emerged as the generator of territorial sovereignty. Highly important implications resulted from the jurists’ concentration on will as the constitutive element in positive law.

If the princeps, the model for the secular ruler, is considered, there is a formidable mass of evidence suggesting a conception of a truly sovereign will. The implications of the attribution of plenitudo potestatis to the princeps and other monarchs were further explored; but most notable was the elaboration of the well-established formula, ‘in principe pro ratione voluntas’, which was universally known and underlay a major statement in the gloss of Accursius.9 The two main aspects of law as the product of will and of reason were thus combined, but in such a way as to recognise the superiority of the ruler’s will, which became its own justification. This trend culminated in Baldus’ definition, ‘Plenitude of power is, however, a plenitude of will subject to no necessity and limited by no rules of public law’:10 as a definition of sovereign will this on the face of it left nothing to be desired.

Furthermore Jacobus Butrigarius (a teacher of Bartolus) and Baldus moved considerably nearer a less limited absolutism by seriously undermining the strength of the ius gentium in the crucial area of subjects’ property rights. It was the jurists’ communis opinio that such rights (harking back to the twelfth-century dispute between Bulgarus and Martinus) were not derived from the princeps but were the product of ius gentium (or natural law understood in the sense of ius gentium), and that the princeps could, therefore, only remove or transfer private property cum causa. Petrus de Bellapertica and Cynus had accepted that, whereas the princeps had no right in law to remove his subjects’ property sine causa, there was in practice no way of preventing him: he could do this de facto, but, as Cynus said, he sinned in so doing.11 Jacobus Butrigarius went far further by maintaining that the princeps through the exercise of his imperial will alone could remove his

10. ‘Est autem plenitudo potestatis arbitrii plenitudo nulli necessitati subjecta nullisque iuris publici regulis limitata’, ad C.3.34.2: 1498, fol. 190v; cf. idem ad X.1.2.1, n. 30: 1551, fol. 12r, ‘Plenitudini potestatis nihil resistit, nam omne legem positivam superat, et sufficit in principe pro ratione voluntas.’
11. See Petrus de Bellapertica ad Inst. 1.2, n. 67: 1586, p. 108, ‘Et ideo dico princeps de iure (non dico de potestate sua cum sit legibus solutus, ut [D.1.3.31]) non potest mihi auferre sine causa’; Cynus ad C.1.19.7, n. 12: 1578, fol. 36v, ‘Aut imperator vult mihi auferre rem meam cum causa rationabilis, aut sine causa. . . Secundo casu, scilicet, quando vult mihi tollere dominium rei meae sine aliqua causa de mundo, si quaeratur utrum possit de facto, non est dubium. Sed utrum possit de iure, et de potestate sibi per iura concessa, in veritate non potest. . . negari tamen non potest quod si mihi rem meam auferat sine causa quod ipsa peccat.’
subjects' property *sine causa*.\(^\text{12}\) Bartolus, however, expressly rejected this view on the grounds that, whereas Jacobus was treating imperial power and the laws guaranteeing property rights as being on the same level, the emperor's jurisdiction in this question as in others was hedged about by the requirements of justice, to achieve which God had instituted the imperial authority: a classic statement of the location of the emperor's power within the structure of higher norms.\(^\text{13}\) Baldus nevertheless chose to follow Jacobus: in depriving subjects of their property 'any reason which so moves the emperor is cause enough'\(^\text{14}\) — that is to say, he interpreted the requirement of a cause not according to objective standards of right but according to the subjective will of the *princeps*, a crystal-clear definition of unrestricted absolute power in this respect. The cause had in short been subsumed in the will. But, it should be noted, Baldus applied this freedom of will only to the emperor: in the immediate continuation of his commentary on this passage (C.1.19.7) he expressly excluded *populi* from the exercise of such unrestricted power.\(^\text{15}\)

A balanced view is, however, especially necessary in interpreting the role of will. The jurists indeed admitted a large area of legal activity within which they considered a presumption of the good faith of the *princeps* could

\(^{12}\) 'Item opponitur quod imperator non possit quem privare de dominio rei suae, ut [C.1.19.2]. Sol. potest ex causa, ut hic favore publicae utilitatis, sine causa non potest, ut ibi. Immo puto quod ubique princeps non errat in facto et refert ibi contra ius aliquid, quod valeat rescriptum, nam quod ipse non possit aliquem privare re sua non est ex defectu potestatis suae, sed ideo quia dixit se nonolle hoc facere. Vicunque ergo ipse vult, dummodo non sit error in facto, tenet rescriptum, et videtur tollere legem derogatoriam, quae contra hoc est, cum scire omne praesumat', ad D.1.14.3, n. 12: 1606, p. 37.

\(^{13}\) 'Dominus Iacobus Butrigarius dicebat simpliciter quod princeps potest auferre mihi dominium rei meae sine aliqua causa. Nam eius potestas et potestas istarum legum quae hoc prohibit procedunt a pari potentia; ergo sicut potest istas leges tollere, ergo eodem modo possit dare alteri dominium rei meae sine causa. Quod puto non esse verum, nam princeps non possit facere unam legem quae contineret unum in honorem vel in ius: Nam est contra substantiam legis: nam lex est sanctio sancta iubens honesta et prohibens contraria, ut [D.1.3.2]. Eodem modo si vellet auferre mihi dominium rei meae inustae non possit, quia princeps habet jurisdictionem a deo, ut in auth. "Quomodo oporteat episcopos" [Nov., 6] in prin. Sed deus non dedit ei jurisdictionem pecundis, nec auferendi alienium indebito, ergo etc.', ad C.1.22.6, n. 2: 1577, fol. 35v.

\(^{14}\) 'Quaerunt doctores nunquid imperator potest rescribere contra ius gentium. Glossa videtur dicere quod non; unde per rescriptum principis non potest alciui sine causa auferri dominium, sed cum aliqui bene potest [D.40.11.3; D.21.2.11; D.31.1.78, 1; D.6.1.15]; et habetur pro causa quaelibet ratio motiva ipsius principis', ad C.1.19.7: 1498a, fol. 63r. This view of Baldus became well-known: see Philippus Decius' prominent inclusion of it in his discussion of his whole question (ad X.1.2.7, n. 98-9: 1575, fol. 269). Cf. Baldus ad C.7.37.3: 1498a, fol. 201v: 'Bona verum singularium personarum non sunt principis . . . de his tamen imperator disponere potest ex potestate absoluta ut de propriis . . . et *maxime* causa subsistente' — a just cause is desirable but not essential.

\(^{15}\) 'Secus est in statuto populi, quia non debet inesse causa motiva, sed debet inesse causa probabilis et condigna, alias non valet.'
be made. Yet, in making the presumption of a just cause on the part of the *princeps* where one was not specified, in for instance the case of an imperial rescript infringing the general provisions of higher norms, they by no means absolved him from the requirement to have in fact a just cause. The *princeps* in such cases was presumed to be willing what was objectively just; it was not considered that whatever he willed was *ipso facto* just simply because he willed it. Thus when Cynus maintained that imperial rescripts contrary to the mutable part of the *ius divinum*, the natural law, and the *ius gentium* made without specified just cause were valid 'quoad observantiam', he did not mean that such rescripts necessarily constituted valid derogations from such higher norms, but only that his subjects must presume that their superior was acting with just cause, and obey. Cynus made it clear that this only applied when there could be a just cause: an obviously unjust rescript would be a different matter. 16 Although there was thus a strong presumption in favour of the *princeps*, which meant that his freedom of action and will was thereby considerably enhanced, the jurists maintained as their general position that the *princeps* through his will alone and without just cause could not derogate from higher norms. It was only positive law that he could change without needing any cause or reason save his own will. Only in that sphere could he act in an untrammeled manner and sweep away existing laws by measures issued 'non obstante lege'. The views of Jacobus Butrigarius and Baldus on property rights remained exceptions. 17

Nevertheless the extent to which civilians accorded considerable freedom of action to the will of the *princeps* did not go uncriticised in canonist circles. Panormitanus, for instance, rejected the argument that a just cause could be presumed in rescripts *contra ius divinum* or *contra ius*

16. ‘Vltimo ut sciatur quando rescriptum principis tenet et quando non, ita distinguatis . . . Aut directo est contra ius, et tunc aut contra ius divinum aut contra ius gentium vel naturale . . . Si est contra ius divinum referit, aut ius divinum est perpetuum, infallibile, id est, quod habet perpetuum causam prohibitionis, verbi gratia, ut filius contrahat matrimonium cum mater vel sorore . . . et hoc casu non valet . . . Aut est tale ius divinum quod ex causa potest immutari, tunc referit, aut scribit cum iusta causa aut sine causa. Si quidem scribit cum iusta causa, ut quia vere homicidam mandat occidi, tunc tollit omnino ius divinum; si autem scribat sine causa, tunc aut quaevis utrum valeat quantum ad tollendum ius divinum, et non valet, aut quaevis utrum valeat quantum ad observantiam, dico quod sic, quia praesumere debemus de causa, ex quo causa subsistente fieri potest. Secundo casu quando rescribit contra ius gentium vel naturale, tunc referit, aut facit ex causa rationabili, et tunc tollit . . . aut facit sine causa, tunc non valet quantum ad hoc, ut tollat ius naturale vel gentium, sed valet quantum ad observantiam’, ad C.1.22.6, n. 7: 1578, fol. 4or.

17. Cortese (1964, vol. 11, pp. 226–7) considers that Raphael Fulgosius made the most extreme juristic statement, holding the *princeps* to be freed from the natural law and the *ius gentium* (Cons. 143, n. 3: 1577, fol. 202v). A close reading, however, reveals that Fulgosius did not take this view in this *consilium*.
He also even went so far as to say, ‘Where there is no legitimate cause for contravening the positive law, the princeps sins in violating it’, a view which directly contradicted the civilian conception of the nature of the absolute power of the princeps. The point, however, remains that, whatever divergences and nuances of opinion existed in juristic treatments of the relationship of positive law to higher norms, throughout the vast bulk of jurisprudential writings the argument was always carried on within a context which assumed an overall structure of higher norms: there could for these jurists be no truly positivist theory of law.

Marsilius of Padua, the one fourteenth-century writer who produced a theory of law which can appear positivist, had no influence on juristic conceptions of law. There has in any case been a serious difference of opinion amongst modern scholars as to whether Marsilius was indeed a thorough-going positivist. Marsilius did not reject the existence of a normative structure as such. He made, however, a very clear distinction between the status of human law and that of higher norms. In considering human law as existing within a strictly this-worldly political perspective, he concentrated on human will and the attribute of coerciveness as the constitutive elements of such law. Indeed, it was only human law understood in these terms that Marsilius was willing to consider as being, properly speaking, law at all: other norms might share the name of law but in the context of this world were not in content truly law. This applied in particular to divine law which he accepted as valid but only possessed of effect in the world to come. Natural law he left to one side, rejecting the medieval tradition of considering it as a form of higher norm, and treated it instead as a kind of positive law (the general principles deducible from the laws of men). It is misleading, however, to conclude that Marsilius adopted a purely positivist approach to human law. His view was that the human legislator would in the vast majority of cases enact laws suitable to

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18. 'Non praesumatur causa inquantum vult [princeps sacialis] statuere contra ius divinum, quia non debet inferior violare statutum superioris sine causa aperta', ad X.1.2.7, n. 10: 1605, fol. 221v; 'Quando dubitatatur an subsit causa auferendi quae mihi competunt de iure naturali, et tunc Cynus et communiter legistae tenent quod praesumitur pro princepe quod iusta causa fuit motus . . . Hoc dictum videtur satis durum, et nullo iure aperte probatur . . . tamen in practica servaretur. Limitarem tamen istud dictum multipliciter. Primo ut non procedat, cum ipse princeps sit obligatus in his quae sunt de iure naturali puta ex suo contractu, alias de facili possit evacuare omnem contractum cum eo firmatum', ibid., n. 14, fol. 221v.

19. 'Vbi non subest legitima causa veniendi contra ius positivum, princeps peccat illud violando', ibid., n. 17, fol. 221v.

20. For the argument that Marsilius was a positivist see, for instance, Gewirth 1951, vol. 1, pp. 134–6. For criticism of Gewirth's interpretation see Quillet 1970a, pp. 135 and 139.

21. Defensor pacis, 1.10.4. 22. Ibid., 1.10.3. 23. Ibid., 2.12.7.
the nature of the people and attuned to the realisation of the ends of the natural state, itself the product of natural reason: that is to say, peace and the good life.  

24 He was, however, willing if necessary to accept the validity of objectively unjust laws.  

25 Thus for Marsilius the essence of human law is positivist, the product of coercive command, but its content usually either has a moral quality or is morally indifferent. His overriding aim was to produce for human law an economical definition which would leave the determination of secular law in lay hands alone: through ignoring natural law in the traditional sense, locating the effects of divine law in the next world, and denying the validity of ecclesiastical jurisdiction itself, he felt he had removed the grounds upon which the clergy could claim to interfere in secular law and government. His attitude placed Marsilius apart from other late medieval writers including his fellow refugee at Lewis IV’s court, William of Ockham, who, although he too sought to desacralise secular authority and law and to stress the spiritual aspects of ecclesiastical authority, nevertheless accepted in a traditional sense the structure of divine law, natural law, and reason as standards by which to assess positive law and government.  

The role of feudal custom

The normative limitations on the exercise of government and jurisdiction were not exhausted by the categories already discussed: late medieval jurists also treated feudal custom as existing on what was tantamount to the same fundamental normative level. It came to be accepted that feudal relationships, unknown of course in the Corpus Iuris Civilis, were the product of nature as the force for change in human life. Baldus in what came to be accepted as a truly influential commentary on the Libri feudorum considered that feudal custom amounted to nothing less than a day-to-day revelation of the natural law,  

27 an aspect of the long-established juristic theme that custom was second nature (a derivation ultimately from Aristotle and Cicero).  

28 This reveals how deeply ingrained feudal conceptions had become. The civilian, Guido de Suzaria (d. c. 1290), in a famous quaestio, now lost but also reported by Cynus, had established what became the communis opinio of the

24. Ibid., 1.13.2.  
25. Ibid., 1.10.5.  
27. ‘Nam princeps est subjectus consuetudinibus feudorum tanquam sit ius naturale istius posterioris inventionis, quia ius naturale quotidie nascitur’, ad Feud., 2.7: 1495b, fol. 36r.  
Commentators, namely that the princeps was bound by his contracts and privileges which were guaranteed by the natural law and the ius gentium.29 Amongst the Commentators the prime form that such contracts and privileges took was feudal: as Baldus said of the emperor in this connection, ‘God subjected the laws to him, but he did not subject contracts to him.’30 Furthermore the princeps was bound by his predecessors’ feudal contracts and privileges, because these were not purely personal but made by virtue of the imperial office.31 Feudal custom thus performed its function of protecting the rights of the subject against the ruler’s whim: Baldus most notably accorded to the subjects’ feudal rights a protection which he denied to their other property rights. Feudal custom therefore appeared as a fundamental ethical norm, and one which severely limited the sovereignty of the princeps.

The rights of the community

The remaining form of limitation on the exercise of the ruler’s will was not on the same fundamental level as those already discussed, but was treated by fourteenth- and fifteenth-century jurists as having the status of a universally valid norm: the rights of the community, the iura imperii or iura regni. These jurists elaborated the established view of the role of the emperor or king as being an office or dignity with a specific function: the preservation or well-being of the empire or kingdom. This view recognised, therefore, the inalienability of the basic rights of the community which the ruler governed.32 Canonist opinions were particularly important in the development of the idea of the ruler as procurator whose duty was not to damage the interests of the community in his care.33 The ruler’s duty of protection was institutionalised in the coronation oath, for the discussion of which Honorius III’s decreet, Intellecto (X.2.24.33), remained the locus classicus.34

29. Cynus ad C.1.14.4, n. 7: 1578, fol. 26r. But see Cortese 1962, vol. 1, pp. 155–9, for the argument that the text of the quaestio can be reconstructed. For a trenchant later expression of the communis opinio see Paulus de Castro, Cons. 1.318, n. 5: 1582, fol. 168r, ‘Communiter doctores tradunt quod ibi etiam princeps contractum initium cum subdito tenetur servare et non potest venire contra de iure, etiam ex suprema potestate, quia faceret contra ius naturale primaevum, seu legem naturae . . . tale ius gentium seu naturale princeps ex suprema etiam potestate non potest tollere.’
30. ‘Deus subiecit ei leges, sed non subiecit ei contractus’, ad Feud., 1.7: 1495b, fol. 17v.
31. ‘Lictor princeps non ligetur lege legis, ligatur lege conventionis [C.1.14.4] per Cynum et [D.2.1.14]; ipse dico non successor, quia contractus principis non transit in successorem, quia successor non habet ab eo causam . . . quia ius non transit ad successorem, sed de novo creatur per electionem [X.3.5.25]. Et hoc verum nisi faciat ea quae sunt de natura vel consuetudine sui officii, sicut est infiendare’, Baldus ad D.1.4.1, n. 2–3: 1616, fol. 26v.
32. Civilian discussions of the Donation of Constantine treat at great length the problem of the alienation of imperial rights involved in it.
34. See pp. 438–9 above.
Particular stress was given to the king’s tutorial role, which neatly expressed his duty to conserve the kingdom’s inalienable rights. Amongst the fourteenth-century civilians there can be no doubt that Baldus’ treatment of kingship and its duties was the most profound and influential: for him the fundamental reason justifying the *iura regni* was that the kingdom was an immortal entity composed of free men possessing the capacity derived from the *ius gentium* to elect their ruler.\(^{35}\) The individual and mortal king held his kingdom in trust for future generations.

**The enforceability of the normative structure**

The jurists, therefore, made a commitment to rulership as moral in execution and to the state as a body of right. Tyranny whether by the monarch or the people was universally condemned as infringing the *utilitas publica* which government was considered to have been instituted to achieve. Bartolus’ exhaustive tract, *De tyranno*, was the major juristic contribution to this subject and ranks as one of the main treatments of the medieval period. But could the normative structure be enforced, or was it just a theoretical construction? Were the normative limitations merely pious hopes, or did the jurists consider that rulers could actually be controlled? There is evidence in their writings both for the sanctioning of resistance to the tyrant on the grounds that his rule is invalid and for pragmatic acceptance of a tyrannical regime for the fear of the possible disturbances involved in trying to remove him. No legal problem was seen in the removal of a tyrannical *signore* by his oppressed subjects. In the case of a king, however, greater circumspection appears: Baldus, for instance, accepted that a people could expel its king for tyranny, but that he still retained his royal dignity, that is his office.\(^{36}\) Resistance against the emperor on the grounds of his tyrannical behaviour could be justified on rational

\(^{35}\) ‘Rex non potest alienare populum suum nec dare ei alium regem, quia populus est liber, licet sit sub rege’, ad D.V., Proem ad v. ‘Quoniam’: 1498b, fol. 1v; ‘Quaeritur an hodie provincia possit sibi eligere regem? Et videtur quod non, nam provinciae sunt sub naturali dominio imperatoris, ergo non possunt conferre aliqui merum imperium, in auth. “De defensoribus civitatum” § “interim” [Nov., 15, 1]. Sed tu dic, quod sic, si est talis provincia quae non subit imperatori, ut Hispania. Nam si dominus Castellae deficeret in totum regnicolae possent sibi eligere regem de iure gentium, ut hic. Nunnquid ergo iurisdictiones fuerunt introductae de iure gentium? Dic quod sic, quia rex significat se habere iurisdictionem; cum ergo de iure gentium fuerint reges, ergo et iurisdictiones’, ad D.1.1.5: 1498b, fol. 7r. For the kingdom as an immortal entity see Cons. 1.359: 1490 (= Cons. iii.159: 1575), discussed below p. 475.

\(^{36}\) ‘Quaeritur an regem propter inustitias suas intollerabiles et facientem tyrannica subditi possint expellere? Et videtur quod sic . . . cum malus rex tyrannus sit . . . Contrarium est verum, quia subditii non possunt derogare iur’ superioris; unde licet de facto expellant, tamen superior non amittit dignitatem suam’, ad D.1.1.5: 1498b, fol. 7r.
Development: c. 1150–c. 1450

grounds. Baldus also accepted that the emperor could justifiably take up armed resistance against the pope if the latter broke the bond of feudal faith existing between them. Those jurists who accepted the claim of the pope to ultimate superiority over the emperor supported the papal power to depose him for just cause. Although the emperor’s role in suppressing tyranny remained basic amongst the civilians, those Commentators who accepted the sovereignty of some Italian cities did not put forward any practical means of controlling such cities’ infringements of the normative structure: the emperor would be unable to curb them since, as these jurists considered, such cities had obtained their sovereignty precisely because of imperial absence and impotence. Amongst canonists and some but by no means all civilians, a form of universal power of judgement was reserved to the pope *ratione peccati*; but for these civilians any such papal intervention in secular matters outside the lands of the church would be rare indeed and the product of an extreme crisis. Clearly juristic thought could only offer a limited enforceability for higher norms; but the jurists nevertheless considered such norms to have real value even if in practice they were usually unenforceable – a view far removed from any positivist theory rejecting the existence of norms which cannot be enforced.

The juristic theory of territorial sovereignty

Kings

Jurists first developed a theory of territorial sovereignty to accommodate emerging territorial monarchies. Indeed, late thirteenth- and fourteenth-century jurists were in this respect elaborating a theme which had been established from the end of the twelfth century and developed throughout the thirteenth by canonists and civilians in terms of the well-established conceptions of the sovereign king who does not recognise a superior in temporal matters, and who within his kingdom is the emperor of his kingdom.

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37. ‘Notandum est ergo quod originalis intentio creationis imperii fuit bonum et utilitas rei publicae non privatae, puta Caroli imperatoris. Ergo si imperator in respublicas saeviret, excutere ab eo iugum tantae servitutis non esset contrarium rationi naturali’, Baldus, Cons. III.283: 1491, fol. 88r (= Cons. 1.333: 1575).

38. ‘Et est alia ratio quia ecclesia debet vasallo vicem, et de suo imperio non potest eum [imperatorem] laedere. Immo papa se facit alienum a potestate si talem iustitiam non reddit imperatori qui iuravit fidelitatem . . . Et imperator potest se defendere cum exercitu suo’, De pace Constantie, ad v. ‘In nomine Christi membrum’: 1495a, fol. 94v.

39. Cynus' reservations on this point were well-known: ‘Ecclesia sibi usurpavit ratione peccati totam jurisdictionem’, ad Auth., ‘Clericus’ (ad C. i.3,33), n. 1–2: 1578, fol. 18v.

40. These two conceptions were in origin distinct although they were soon very often combined: see Ullmann 1979a, p. 188 n. 48; also pp. 432–3 above.
To consider first the civilians in our period, there existed concerning the status of kings two traditions which were differentiated by their attitude towards the emperor. The first denied the universal sovereignty of the emperor, and through treating independent monarchies as being essentially on a par with the territorially restricted empire advocated thereby a plurality of territorially sovereign powers. The major expression of this view was to be found in the works of Neapolitan jurists, notably Marinus da Caramanico (d. 1288) and Andreas de Isernia (d. 1316). Oldradus da Ponte, who taught law at Padua, also maintained this thesis in his famous *Consilium*, 69, in which he justified King Robert of Naples’ rejection of imperial overlordship. The kings of Sicily claimed in any case that their kingdom was outside the empire on the grounds that it was a papal fief, and had been won back from Islam by conquest. These jurists did not however consider that the kings’ status as papal vassals resulted in any real infringement of royal sovereignty within the kingdom itself, but rather, with the Sicilian monarchy primarily in mind, produced a theory of territorial sovereignty which to a considerable extent possessed a wide application suitable for justifying the independence of kings in general. The fundamental and universal norm of the *ius gentium* was used to justify the sovereignty of kings within their kingdoms. Thus Marinus envisaged for the world a political history in which ‘long before the empire and the Roman race from of old, that is from the *ius gentium* which emerged with the human race itself, kingdoms were recognised and founded’.  

Indeed, he considered that the Romans had no universal right to empire because they had established their dominion through force of arms, so that the empire was essentially a merely *de facto* power: hence, with the contemporary shrinking of the empire’s geographical extent, kingdoms were regaining their original rights under the *ius gentium*. Oldradus denied that the Roman emperor was *de iure* lord of the world on the grounds that the Roman people, lacking themselves any just title to dominion over other nations, could not through the *lex regia* legally transfer any such authority to the emperor. Indeed, he considered that the *ius gentium*, being a form of natural law, gave kings a juster title than that of emperors who derived

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42. Ibid., pp. 196–7.

43. ‘Videndum est ergo qualiter [imperator] acquisivit dominium. Et ipse allegat quod habet causam a populo qui ei concessit, et in eum transitut omnem imperii potestatem . . . Respondentur sic quod populus non potuit plus iurus conferre in eum quam habuit . . . sed populus non habuit de iure dominium super alias nationes, ergo nec ipse’, Cons. 69, n. 7: 1550, fol. 24v.
Development: c. 1150–c. 1450

 theirs only from Roman civil law. Marinus was willing to attribute to the king of Sicily within his kingdom all the legal rights and powers which the princeps possessed under Roman law, but he did this not on the basis of any pretensions by the emperor, but insofar as it had been accepted by the custom of the Sicilian people and given effect by the will of the Sicilian monarchy which expressly appropriated elements from Roman law in the Liber constitutionum. The pro-Neapolitan ius gentium argument was clearly a contribution to the theme of the rex qui superiorem non recognoscit. For jurists who accepted that in some sense the emperor possessed universal jurisdiction the other current formula for royal sovereignty, rex in regno suo est imperator regni sui, essentially envisaged that the king enjoyed within his kingdom the powers which the emperor possessed within the empire as a whole—that is to say, it involved the notion of a still widespread rather than restricted empire. Since the pro-Neapolitan argument denied such an interpretation of the Roman empire, these jurists cannot strictly speaking be seen as contributing to that interpretation of the formula: for them the world was composed of a plurality of kingdoms with the empire being but one territorial body amongst several. Thus Andreas de Isernia did indeed attribute to a king in his kingdom the same power as the emperor possessed in the empire; but he meant by this that a kingdom and the empire were in essence the same kind of territorial body, and that the world had therefore returned to its pristine condition before the conquests of Rome:

With cause another king will be able to do in his kingdom what the emperor can in the land of the empire, which is small these days. In Italy he possesses only Lombardy, and not all of that, and part of Tuscany; the rest belongs to the church of Rome, like the kingdom of Sicily also. The first lords were kings as Sallust says... The provinces therefore (which have a king) have returned to the pristine form of having kings, which is easily done. Free kings have as much in their kingdoms as the emperor in the empire.

The other tradition among the civilians presented a complete contrast: it was that of the mainstream French and Italian Commentators. They

44. 'De iure naturali primaevó, nec sunt regna nec imperium... De iure gentium quod etiam naturale vocatur... de iure isto per occupationem distincta sunt dominia, et regna condita [D.1.1.5]. Et sic cum de iure isto sint reges, et imperatores solum fuerunt de iure civili, quia per populum romanum, ut infra patebit reges iustior titulum habent, cum a iure quodammodo naturali (quod divina providentia constitutum est) semper firmum atque immutabile perseverat', ibid., n. 5, fol. 24r.


46. 'Cum causa rex alius poterit in regno suo quod imperator potest in terra imperii, quae hodie modica est. In Italia non habet nisi Lombardiam, et illam non totam, et partem Tusciam; et alia sunt ecclesiae Romanae, sicut et regnum Siciliae. Primi domini fuerunt reges, ut dicit Sallustius... Reddita ergo sunt provinciae (quae regem habent) formae pristinae habendi reges, quod de facili fit [D.2.14.27]. Liberi reges tantum habent in regnis suis quantum imperator in imperio', ad Feud., 2.56, n. 2: 1579, fol. 286r.
Law, sovereignty and corporation theory, 1300–1450

retained the conviction that the emperor as dominus mundi possessed a de iure universal sovereignty. It was thus very difficult for them to accommodate the existence of territorially sovereign kings. The view of these jurists should therefore be seen as being distinct from that of the thirteenth- and early fourteenth-century publicists who, denying imperial sovereignty over France, had elaborated a theory of the de iure sovereignty of the French king in particular.

The early Commentators did not develop a theory of the sovereignty of kings, because they considered them to have, in comparison with the emperor, a merely de facto power. Sovereignty remained an essentially de iure authority. The only possible exceptions are Johannes de Blanosco and Guilelmus de Cuneo: it can be argued (but not conclusively) that they accorded to the king of France at any rate a de iure independence from the emperor.47 The major jurists, however, of the School of Orleans, Jacobus de Ravannis and Petrus de Bellapertica, were only willing to attribute a de facto independence to the king of France. As Jacobus de Ravannis memorably said, ‘Some say that France is exempted from the empire. This is impossible de iure. You have it in C.1.27.2, 2 that France is subject to the empire . . . If the king of France does not recognise this I do not care.’48 Similarly, Cynus de Pistoia, who played a key role in familiarising Italian universities with the jurisprudence of the School of Orleans, followed Petrus de Bellapertica in allowing only a de facto independence to those who did not recognise the emperor’s authority and thus showed themselves unworthy of his laws: the emperor would not demean himself by trying to impose his rule on such people, and thereby making his laws a laughing-stock.49

With Bartolus and Baldus, however, a great change of view emerged. It was fundamental to the structure of Bartolus’ political thought that, while

47. See Meijers 1956–73, vol. iii, pp. 192–3, and especially Guilelmus de Cuneo ad D.1.11.1, fol. 11v (Bodleian MS, Can. Misc. 472), ‘Dico quod omnes tribuni erant sub rege Romano sicut omnes reges sunt hodie sub imperatore excepto rege Franciae qui non habit superiorem.’

48. ‘Quidam dicunt quod Francia exempta est ab imperio; hoc est impossible de iure. Et quod Francia sit subdita imperio habes . . . [C.1.27.2, 2]. Si hoc non recognoscit rex Franciae, de hoc non curio’, ad D.V., Proem, fol. 2r, MS Leiden, d’Ablaing 2 (as quoted in Meijers 1956–73, vol. iii, p. 192). C.1.27.2, 2 provides the locus classicus for the argument that the French and Spanish kings are subject to the emperor.

49. This was their understanding of the first words of l. Cunctos populos (C.1.1.1) – ‘Cunctos populos, quos clementiae nostrae regit imperium’ (Codex, ed. Venice, 1498, fol. 3r) – which invited the application of the de iure–de facto distinction to the relationship between the emperor and lesser rulers. Was ‘quos’ to be taken declarative thus signifying that all peoples were under the emperor’s rule, or was it to be understood restrictive indicating that only his subjects were? Petrus (n. 3: 1571, p. 8) and Cynus (n. 3: 1578, fol. 1v) thus maintained that, whereas the emperor was de iure lord of the world, he had intended ‘quos’ to be taken in a restrictive de facto sense.
the emperor retained a genuine de iure sovereignty within the terrae imperii, other powers which in practice did not recognise a superior could obtain true sovereignty on a purely de facto basis. Bartolus in short recognised the facts of political life: such de facto authority was no longer mere power without legitimacy. Bartolus, as we shall see, developed this view with Italian city-republics primarily in mind. Despite his major discussion of certain aspects of monarchy in his tract, De regimine civitatis, he gave relatively little attention to kingship in the rest of his works. In consequence it was left to Baldus to apply to kings the Bartolist justification of de facto sovereignty. Baldus recognised that through custom, the prime expression of political reality, some kings were not subject to the emperor: thus he maintained that, whereas there still remained a de iure universal empire, it was in fact no longer whole because there were gaps in the spread of the emperor's jurisdiction where the sovereignty of territorial monarchies was operative. There was in short a hierarchy of sovereignty, a seeming paradox which accurately reflected fourteenth-century conditions as viewed from Italy: north of the papal patrimony the emperor was accepted as an ultimate legitimising authority by bodies which were in practical terms sovereign. The purest expression of Baldus' de facto argument was his acceptance that in the fourteenth century free peoples could on the basis of the ius gentium still elect their monarchs. This is not to deny that both Bartolus and Baldus also accepted the theocratic aspect of kingship; but it was their recognition of the fact of sovereign monarchies that was crucial.

In terms of canon law our period saw a major development as regards the theme of territorial sovereignty. Clement V's bull, Pastoralis cura (Clem., 2.11.2), which was issued in 1313, supported Robert of Naples' claims to independence against the imperial pretensions of Henry VII. Oldradus, who was acting as a legal advisor at the curia at Avignon, was highly influential in the drafting of this bull. In Pastoralis cura Clement

50. 'Respondeo omnes sunt subjicii [imperatori] de iure, et merito; sed non omnes sunt subjicii de consuetudine; et peccant sicut Francigenae et multi alii reges... et licet regnum Francorum non sit de Romano imperio, tamen non sequitur, ergo imperium non est universale, nam aliud est dicere universale, aliud integrum’, ad Feud., 2.53: 1495b, fol. 74r.

51. 'Omnis rex aut immediate a deo eligitur aut ab electoribus inspiciente deo... Et ex hoc noto quod regimen quod est per electionem est magis divinum quam illud quod est per successionem... Et ideo electio principis qui est rex universalis est per electionem praetorium et principum; non autem vadit per successionem... “Hoc” enim “imperium deus de caelo constituit...” Reges vero particulares sunt magis ex constitutione hominum, ut [D.1.1.3], Bartolus, De regimine civitatis (ed. Quaglioni 1983, p. 160). See also Baldus ad X.1.29.38, n. 5: 1551, fol. 14r, 'Vbi tamen est rex ibi puto prius regem aedendum, cum in regno suo in temporalibus sit vicarius dei' (this passage concerns appeals from secular to ecclesiastical jurisdiction).

52. His Cons. 43 which considered general principles relative to Robert's case was requested by cardinals and is considered to have formed part of the basis for Pastoralis cura: Will 1917, pp. 20–51. Oldradus here concentrated on the position of the king who was 'non subditus imperatori'.
considered the kingdom of Sicily to lie outside the territory of the Roman empire, and thus held that Robert was free from imperial sovereignty insofar as he was king of Sicily. Thus the empire was treated as a geographically restricted territory: the emperor himself possessed a territorially limited sovereignty. Admittedly Clement stressed the king of Sicily’s subjection to the Roman church: this can therefore be seen as an aspect of the theme of the hierarchy of sovereignty. What however was crucial was that the king, being considered to be free from any subordination to the emperor, had no secular superior. *Pastoralis cura* constituted the clear (one might say the official) abandonment of the high medieval papal conception of the universality of the Roman empire. The origins of the papal willingness to accept a territorially limited Roman empire can be traced back to *Per venerabilem* (X.4.17.13) in the light of which such a view could be seen as an implied corollary of recognising the fact of the French king’s sovereignty in secular matters; *Pastoralis cura* however drew the full implications of this view of the empire and expressed it in a permanent form. Nevertheless the period between Innocent III and Clement V did not see a uniform canonist rejection of the universal sovereignty of the emperor. In the mid-thirteenth century, for instance, whereas Innocent IV maintained that the king of France was *de iure* independent of the emperor, Bernard of Parma held that the king was only *de facto*. Similarly, Boniface VIII in the midst of his dispute with Philip IV in turning to the emperor-elect, Albrecht I, had expressed opinions favouring the universality of the empire.

**Cities**

A juristic theory of the sovereignty of city-republics was relatively late in emerging. It was the achievement of Bartolus to produce it, and his thesis, together with Baldus’ creative treatment of this theme, constituted a major contribution to late medieval theories of popular sovereignty.

In treating Italian cities the Glossators had not developed a theory of the


54. 'Vnde haec nota et dicta sunt quod vicarius Ihesu Christi et successor Petri potestatem imperii a Graccis transtulit in Germanos, ut ipsi Germani, id est septem principes quattuor laici et tres clerici, possint eligere regem Romanorum, qui est promovendus in imperatorem et monarcham omnium regum et principum terrae omnem. Nec insurgat hic superbia Gallica, quae dicit quod non recognoscit superiorem. Mentiuntur quia de iure sunt et esse debent sub rege Romano et imperatore . . . Ist enim rex [Romanus] praeceilens super omnes reges et nullus est ab eo exemptus', *MGH*, *Leges iv, Const. iv, 1*, pp. 139–40.
sovereignty of independent city-republics: for them sovereignty remained with the cities' superior, the emperor. That some Italian cities did not recognise a superior had, however, been admitted by some Commentators before Bartolus: by Jacobus de Ravannis and Oldradus. Furthermore, as we have seen, Petrus de Bellapertica and Cynus had referred generally but without approbation to populi who did not recognise the emperor's sovereignty. The canonist tradition, however, although it accorded considerable effectiveness to the law-making of cities, had not produced a theory of the sovereignty of cities to match its theory of the sovereignty of kings. The furthest that a canonist had been prepared to go is illustrated by Hostiensis who simply accepted, but certainly did not justify, Lombard cities' non-recognition of the emperor.

It was Bartolus' achievement to take the leap to justifying the sovereignty of independent city-republics. He was able to do this because he fully appreciated the effectiveness of popular consent. He accepted that the will of the people could be a complete alternative to that of a superior. Developing the work of earlier Commentators Bartolus drew the full conclusions from the identification of consent as the constitutive element of both the people's customs and its statutes. His argument began from customary law. Custom, he held, being the expression of popular consent did not require a superior's authorisation. Since, however, custom as the product of the people's tacit consent, and statute as the product of its express consent, were of equal force (peris potentiae), the people's statutes also did not in consequence require the authorisation of a superior. The exercise of consent in law-making led therefore to this measure of autonomy. Bartolus then took, however, the further crucial step of considering that the exercise of the people's consent could lead to the non-recognition of a superior, a fundamental sign of sovereignty. He considered that the civitas quae superiorem non recognoscit would be in the position of a free people, a populus liber. Bartolus then took the step for which he is most famous: he attributed

55. Jacobus de Ravannis ad C. 7.33.12: 1519, fol. 344v, 'Hodie, vacante imperio, civitates regunt se ipsas; et una civitas regit se ipsam nec habet superiorem'; and Oldradus, Cons. 69, n. 6: 1550, fol. 23v, 'Sed si ius cuiuslibet civitatis consideremus, de illo non est dubium, quia multae civitates et reges fecerunt leges et constitutiones quod non subissent imperatori.'

56. 'Vnde et haec iura collegiorum, sive corporum, vigent in civitatibus potissime Lombardiae, quae et si dominum habeant, ipsum tamen non, ut expedire reipublicae, recognoscunt, sicut nec rex Franciae', ad X.1.31.3: 1512, fol. 147r.

57. 'Quando populus habet omnem jurisdictionem potest facere statutum non expectata superioris auctoritate ... Et quod isto casu non expectetur superioris auctoritas patet exemplo consuetudinis, quae inducitur ex tacito consenso populi et aequiparatur statuto in quo constat quod non requiritur superioris auctoritas', ad D.1.1.9, n. 4: 1577, fol. 9v; and 'Tacitus et expressus consensus aequiparantis et sunt paris potentiae', ad D.1.3.32, n. 4: 1577, fol. 17r.
to the independent city-populus within its territory the jurisdictional powers which the emperor possessed within the empire as a whole — it was a civitas sibi princeps.58 Within Roman law terms this was the clearest way of showing the sovereignty of such cities, and was clearly an adaptation of the formula, rex in regno suo est imperator regni sui. Bartolus’ concept was by no means an obvious one, because the city was a corporate entity whereas the transposition between king and emperor was straightforward since sovereignty in both cases inhered in the person of the ruler.

Bartolus’ whole argument from consent was a prime example of his acceptance of the full legitimacy of de facto jurisdiction. His theory of the sovereignty of independent cities should, however, be seen in the context of that overall view which he shared with Baldus: the hierarchy of sovereignty. Cities indeed possessed a genuine sovereignty within their territories, but it was not the highest form, which in the terrae imperii was in secular matters possessed ultimately by the emperor, and in the terrae ecclesiae was in both secular and spiritual matters enjoyed by the pope (a view clearly accommodating the contention of Pastoralis cura that imperial jurisdiction in Italy was territorially confined). Furthermore according to Bartolus there existed side by side with cities’ de facto sovereignty, gained through the exercise of consent, the parallel valid structure of de jure jurisdictional rights derived from imperial or papal concession. Bartolus, accepting the realities of Italian political conditions, considered the emperor to be a distant and ultimate legitimising authority; towards the end of Bartolus’ life, however, imperial power became to some extent real in Italy during the visit of Charles IV in 1355. In the same period some attempt was made to reestablish papal power in the patrimony from 1353 onwards under Cardinal Albornoz. In the end, as is shown in his commentary on Henry VII’s constitution, Ad reprimendum, which he produced after Charles IV’s visit, Bartolus came to adopt a pro-papal and hierocratic interpretation of the relationship between papal and imperial authority, one by-product of which view was that he considered that the pope had an advantage in that he could cite in the terrae imperii whereas the emperor could not in the terrae ecclesiae.59

Baldus’ theory of the sovereignty of independent cities can only be appreciated when seen in relationship to Bartolus’. Baldus certainly adopted

58. See, for instance, Bartolus ad D.4.4.3. n. 1: 1577, fol. 133r. ‘Per statuta civitatum non possit concedi minoribus administratio bonorum suorum, quia hoc princeps reservavit sibi . . . Civitates tamen quae principem non recognoscunt in dominum et sic earum populus liber est . . . possent hoc forte statuere, quia ipsamet civitas sibi princeps est.’ For similar passages from Bartolus see Woolf 1913, pp. 155–8. 59. Ad v. ‘Per edictum’: 1497, fol. 5r.
Bartolus’ argument from consent, but appears to have had an even clearer understanding of the role of the people’s will in the non-recognition of a superior: he saw that logically sovereignty in the Italian context could only derive from a de facto exercise of will rejecting the superior, and could not be derived from de iure concession by the superior. Bartolus in comparison seems to have been a little less rigorous on this question, because on a couple of occasions he referred to cities’ non-recognition of a superior ‘de iure vel de facto’. In another respect, however, Baldus appears more circumspect than Bartolus, in that he did not baldly describe the sovereign city as sibi princeps but as being in the emperor’s place (vice principis). After all, Bartolus’ formula was strictly speaking elliptical because the people was not actually the princeps. Baldus did not mean that such cities were imperial vicars, but that in the de facto gaps in imperial jurisdiction such cities replaced the princeps as the bearers of sovereignty. If, however, the emperor were to be physically present in the city’s territory, the gap would be closed up, and then, according to Baldus, the emperor’s authorisation of city-statutes would be required: in this sense the emperor remained the ultimate sovereign. But in normal circumstances this argument was irrelevant, because for Baldus the sovereignty of cities was the practical result of the emperor’s political weakness and prolonged absence from Italy.

Where, however, Baldus clearly went beyond Bartolus’ approach was in...
exploring more profoundly the source of human political association and government. Although Baldus was not the first jurist to have adopted the term, 'political man',  

64 he does appear to have been the first to use the concept of an avowedly natural and this-worldly political dimension for man’s activities: a view for which he was of course indebted ultimately to Aristotle.  

65 This provided a philosophical context particularly suited to the de facto argument, which essentially accepted the political facts of man's life in this world. According to Baldus natural reason in the form of its product, the ius gentium, not only brought city-populi into existence, but endowed them with autonomous powers of self-government without the need for the authorisation of a superior: the foundation upon which the argument for their sovereignty could be built.  

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**Corporation theory and the territorial state**

Fourteenth-century jurists, however, went beyond theories of territorial sovereignty: through their application of corporation theory to independent cities and kingdoms they made major and quite distinctive contributions to the development of the concept of the territorial state itself. Corporation theory permitted them to define more closely the nature of these territorial entities and to explore their structure of government. The main contribution was made by Commentators who produced a complex conception of the city or kingdom seen as a corporation: it was at one and the same time a body composed of a plurality of human beings and an abstract unitary entity perceptible only by the intellect.  

67 This was a clear

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64. Amongst the early Commentators there developed a tradition of using the term, 'homo politicus', to indicate the subject-matter of jurisprudence: this appeared in the strikingly similar passages in the following jurists' commentaries on the Proem to the Digestum vetus — Guilelmus de Cuneo (Bodleian MS, Can. Misc. 472, fol. 1v – considerable variations are to be found in the text edited in Brandi 1892, p. 111), Cynus (Rome MS Urb. Lat. 172, fol. 8r, and Berlin MS Savigny 22, fol. 11v), and Alberticus de Rosciate (n. 12: 1585, fol. 2v).


66. 'Nota ergo quod populi possunt sibi facere statuta . . . Modo restat videre quod non quia populi sunt de iure gentium ergo regimen populi est de iure gentium, ut supra [D. 1.1.5]. Sed regimen non potest esse sine legis et statutis. Ergo eo ipso quod populus habet esse habet per consequens regimen in suo esse, sicut omne animal regitur a suo spiritu proprio et anima', ad D.1.1.9: 1498b, fol. 9r.

67. For full details see Canning 1980a, pp. 12–14.
advance on the thought of the Glossators who had almost universally identified the corporation with its members, as, for instance, Accursius’ famous formulation reveals: ‘the corporation is nothing other than the men who are there’. The Commentators, however, saw these human components not as mere isolated individuals (singuli), but as corporate men (that is, men seen specifically as united in a corporate whole): a view anticipated to some extent by Johannes Bassianus and Azo. The source for the idea of the corporation as an abstract entity can be found in the works of the Decretalists, certainly from Innocent IV onwards. Commentators who identified the territorially sovereign city or kingdom as an abstract entity distinct from its members or government were, in taking this view, making a crucial contribution to the development of what is generally understood to be a hallmark of the early modern concept of the state. Baldus, for instance, commenting on Accursius’ definition of the corporation neatly showed how the two aspects of the city–populus as a corporation combined: it was a collection of men into a unitary entity understandable only by the intellect, a definition embracing both the abstraction and the men who formed the material basis for this abstraction. The city–populus as a corporation acted through the medium of its physical members. Furthermore the city or kingdom viewed as a corporation was held to be immortal and in this way quite distinct from its human components.

By the constructive use of legal fiction these territorial states, conceived as abstract corporational entities, were understood to be endowed with legal personality: that is to say, these states as legal persons had legal existence and capacity distinct from those of their members. The Commentators thus developed Innocent IV’s formulation that the corporation was a persona ficta. Thirteenth-century jurists had invented the use of the term, persona, to denote a legal person: persona in that sense cannot be found in the Corpus Iuris Civilis, although Augustinian theological usage anticipated it somewhat in the identification of Christ as the persona ecclesiae.
Bartolus gave the clearest treatment of the structure of government of the city-republics conceived as corporations: the general assembly of the people was understood to elect a council which acted as the governing body of the city, and in turn elected the city’s officers.\(^73\) Thus in his memorable phrase, ‘The council represents the mind of the people.’\(^74\) For both Bartolus and Baldus the abstract city-
\textit{populus} was deemed to consent and act through the instrumentality of its mortal members organised in a structure of councils and representative elected officials.\(^75\) It was Baldus who produced the strikingly effective treatment of the government of sovereign kingdoms as corporations. For him the \textit{regnum} could be identified with its members (‘the nations and peoples of the kingdom themselves collectively are the kingdom’),\(^76\) but it also, in the form of the \textit{universitas} or \textit{respublica regni}, possessed an abstract and perpetual aspect, which was distinct from them. This immortal corporation of the kingdom established an abstract and thus also undying royal office or \textit{dignitas} which was operated by each individual as ruler in succession. This was a classic formulation of the theory of ‘the king’s two bodies’: Baldus thus considered that the king housed two completely different kinds of person – his human mortal person and an abstract legal person (his \textit{dignitas}). As Baldus said, ‘The person of the king is the organ and instrument of that intellectual and public person; and that intellectual and public person is that which is the principal source of action.’\(^77\) The king was therefore given the role of acting on behalf of the legal persons, the royal office and ultimately the kingdom itself.

Clearly in considering the territorial state as a corporation Commentators were making a specifically juristic contribution to political thought. Bartolus considered that civilians and philosophers had radically different approaches to the nature of groups, and that the legal fiction of the corporation had a specific and purely juristic function.\(^78\) Bartolus was surely right in his judgement. The dissemination of Aristotelian ideas of the

\(^73\) The best modern discussion is Ullmann 1962, pp. 716–23.
\(^74\) ‘Consilium representat mentem populi’, ad D.1.3.32, n. 10: 1577, fol. 17v.
\(^75\) See Canning 1980a, pp. 27–31.
\(^76\) ‘Ipsae gentes regni et ipsi populi collective regnum sunt’, Cons. 1.359: 1490, fol. 109v (= Cons. iii.159: 1575).
\(^77\) ‘Persona regis est organum et instrumentum illius personae intellectualis et publicae; et illa persona intellectualis et publica est illa quae principaliter fundat actus’, ibid. This consilium provides all these details concerning the corporational theory of the kingdom and kingship. But see also Cons. 1.417: 1490, fol. 129r (= Cons. iii.217, 1575); and Cons. 1.322: 1490, fol. 98r (= Cons. iii.121, 1575); and his commentaries ad C.6.51.1.6 (1498c, fol. 152v), C.7.55.1 and C.7.61.3 (fol. 252v).
\(^78\) ‘An universitas sit alius quam homines universitas? Quidam dicunt quod non, ut no. [D.3.4.7, 1], et [D.47.22.1] in fine, et hoc tenent omnes philosophi et canonicæ, qui tenent, quod totum non differt realiter a suis partibus. Veritas est, quod si quidem loquamur realiter vere et proprie, ipsi dicunt verum. Nam nil alius est universitas scholarum quam scholarum; sed secundum fictionem...
state had tended to result in an identification of the state with its members. Aquinas, for instance, had adopted this view: thus when he said, ‘In civil matters all those who belong to one community are considered as if one body, and the whole community as if one man’, 79 he did not mean to establish the community as an entity distinct from its members. It has, however, been argued that Marsilius considered the universitas civium to be a corporate entity distinct from individual citizens, but that he derived this view directly from juristic sources. 80 Ockham, in contrast, expressly rejected the jurists’ persona ficta concept, because for him any group was identified with the human beings who composed it. 81

The application of corporational concepts thus completed juristic theories of the territorial state in our period. Clearly considerable differences of juristic approach existed reflecting the variety of fourteenth- and fifteenth-century political conditions. For the reasons indicated these jurists can validly be considered to have enunciated theories of territorially sovereign states, although it should also be clear that in the strictest terms the sovereignty of such states was limited, not only because of the overall normative structure, but also because of the independence of ecclesiastical jurisdiction and the privileges of the clergy which all jurists in this period to a greater or lesser degree accepted, a vast subject outside the scope of this study.

79. 'In civilibus qui sunt unius communitatis reputantur quasi unum corpus, et tota communitas quasi unus homo', Summa theologiae, 1a 2ae, 81, 1.
80. See Wilks 1972a, especially pp. 254–6. For a rejection of this argument see Walther 1976, p. 162 n. 179.
81. See Tractatus contra Benedictum, c.8: 1956, p. 189.