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FINDING THE CONSTITUTIONAL PAST

IN

FRANCE, ARAGON, AND ENGLAND

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From the fertile imagination of the late Erwin Panofsky came once a bit of mental imagery which captures the essence of the Renaissance as well as anything I know. In order to distinguish the two medieval "renascences" (the Carolingian and 12-century ones) from the Renaissance that begin in Italy in the fourteenth century, he pictured their respective feelings towards classical antiquity in this way: "The pre-Gothic Middle Ages had left antiquity unburied, and alternately galvanized and exercised its body. The Renaissance stood weeping at its grave and tried to resurrect its soul."¹

This metaphor meant for art history is as felicitous for historiography. The medieval chronicler regarded his own times as a direct continuation of classical history, and not different from it in kind; the ubiquitous myth of the Trojan origins of European nations and the up-dated version of the old "Four Monarchies" scheme are proof². To the Renaissance humanist, however, classical history was the story of a bygone age, whose values (which had expired centuries before) were different from and superior to contemporary ones. The difference the humanist felt to exist between ancient and contemporary culture sharpened his sensitivity to anachronism, which must be the primary instinct of the historian. Thus the Renaissance marks a new departure for historiography.

The effort to recover pure knowledge of classical history spread throughout Europe, but the Italians who began it must always have had special feelings about Roman history being also Italy's "great past". Italian humanists going back through the cultural wilderness of the Middle

¹ "Renaissance and Renascences", *Kenyon Review*, VI (1944), 228.

²On the Trojan myth, see Jacques Barzun, *The French Race* (New York, 1932), 42-58, and George Gordon, "The Trojans in Britain", in *The Discipline of Letters* (Oxford, 1946), 35-58; on the four monarchies myth in medieval and renaissance thought, Theodor E. Mommsen, "Petrarch's Conception of 'The Dark Ages'," *Speculum*, XVII (1942), 238ff.

Ages finally came upon the resplendent age of their nation's greatest achievement. Humanists of other nations following backwards their national history found themselves finally at a point where their forebears, true barbarians, disappeared into the dark forests of central and eastern Europe. In Italy, therefore, national history stood in relationship to classical history in terms of *renovation*, elsewhere in terms at best of *imitatio*.³

Everyone recognizes that ancient historical works provided a model for historians of Renaissance times in matters such as rhetorical expression and scholarly techniques,⁴ but in the present essay I choose to look at how modern national historiography differed from its classical counterpart. Three differences (thinking always of national histories outside of Italy) constitute in a fashion the premises of my argument. The first is that primitive histories of European nations concerned not a civilization that had expired (as had the Roman) but one that was alive and flourishing almost as never before. The second is that the values of the pristine civilization were considered to be the true national values, that they could not have expired else the nation would have failed (although they may be momentarily depressed). The third—the consequence of the first two—is that whenever national historical investigation touched the question of the original constitution of the nation, the issue was not merely academic but necessarily forensic. In other words: the historian of antiquity stressed discontinuity, difference, and irrelevancy except by individual rejuvenation through the study of humane letters; the national historian stressed continuity from the early middle ages onwards, similarity of institutions, and direct relevance of the past to present in political and social matters; if the same person pursued both classical and national studies, he had to apply different criteria.⁵

These generalizations might prove useful in all fields of Renaissance historiography, but they have come to my mind when thinking about just one of them, which I think it is apt to call

³Budé, echoing Pico, said moderns were not imitators but emulators (cf. Donald Kelley, "Legal Humanism and the Sense of History", *Studies in the Renaissance* XIII [1966], 192); this reveals sensitivity to the classical-national issue I am speaking about. Perhaps revival-survival would be better than *renovatio-imitatio*: classical antiquarians revived what they chose to love, national historians faced the survival of living political institutions.

⁴Kelley's keen article on legal humanism (previous note) shows how this worked out in France. See also Domenico Maffei, *Gli inizi dell'Umanismo giuridico* (Milan, 1956).

⁵Some French humanist scholars tried to show that their nation's institutions derived from eponymic Roman ones, but better scholars--classical and national--rejected the idea: Cujas's "Quid hoc ad edictum praetoris?" and Hotman's *Anti-tribonian* are philosophically compatible for all the political contrariety of their authors.

"constitutional antiquarianism"⁶. I say "constitutional" because I focus upon legal-political matters to the exclusion of other fields such as national or religious historiography (without, however, wishing to derogate from their importance)⁷. I say antiquarianism in order to differentiate the *érudit* from the *historien* (the convenient modern French distinction), that is, the new kind of scholar of the Renaissance who dealt in analytical terms with discrete problems as contrasted with the traditional narrator of events of a given period of time⁸. Furthermore, I shall be concerned chiefly with the single problem of national origins, although I do not think that constitutional antiquarians necessarily treated this differently than they did other problems. Lastly, I shall deal with just three countries, two (France and Aragon) which I know somewhat by virtue of my own researches, and the third (England) which is readily knowable because of the riches of learned literature about Tudor-Stuart historiography in recent years.⁹

⁶Pocock, *Ancient Constitution* (below, n. 9), 18, clearly wanted to use this term as the keynote to his book, but shied away because it "would perhaps do less than justice to the quality of the historical thought which its practitioners sometimes displayed." But antiquarianism was then a noble, and not a "mere", endeavor; it was, indeed, the best part of historical scholarship in those times. Pocock actually rejected the term because (I think) it was clumsy and heavy-footed; I agree.

⁷See Kelley, "Fides Historiae: Charles Dumoulin and the Gallican View of History", *Traditio*, XXII (1966), who shows that the Gallican differentiation of French religious history from Rome's equals the Lutheran and Anglican emancipation of theirs from its.

⁸As does everyone else, I bow to the brilliant demonstration by Arnaldo Momigliano ("Ancient History and the Antiquarian", *Journal of the Warburg and Courtauld Institute*, XIII [1950], 285-315, reprinted in his *Contributo alla storia degli studi classici* [Rome, 1955]) of the dichotomy between the philological/narrative and the antiquarian approaches to classical studies from the beginning of the Renaissance through the 17th century. I believe that this conception can be made to fit national historiography in the same period, and it underlies the entire argument of the present paper.

⁹In what follows, most of the remarks about France (and François Hotman) derive from "When and Why Hotman Wrote the *Francogallia*", *Bibliothèque d'Humanisme et Renaissance*, XXIX (1967), 581-611, or simply grow out of my edition of the *Francogallia* which will soon be published, along with a new translation of the work by J. H. M. Salmon, by the Cambridge University Press; about Aragon (and Gerónimo Blancas) from *If Not, Not The Oath of the Aragonese and the Legendary Laws of Sobrarbe* (Princeton, 1968); about England (and Sir Edward Coke) from J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, 1957) to which I am much indebted. I have looked into the works Pocock cites (p.16f) as examples of "constitutional antiquarianism" in other countries—Sweden, Sicily, and the Netherlands—and concur that they fit the scheme.

1.

I have chosen one scholar each from France, Aragon, and England to exemplify the *obiter dicta* which I will offer about constitutional antiquarianism: François Hotman (1524-1590), Gerónimo Blancas (ob. 1591) and Sir Edward Coke (1552-1634)¹⁰. Of the three, only Blancas was a professional historian. In 1581 he succeeded the famous annalist, Zurita, in the office of royal historiographer of Philip II (as king of Aragon), after having had a thorough humanist education and pursued the profession of notary. François Hotman's livelihood came chiefly as a professor of law, though he acted as a diplomat for Huguenot leaders at various times and acquired his greatest fame from polemical writings in the Huguenot cause. Coke, of course, held many high offices: attorney-general under Elizabeth, then Chief Justice of the Common Pleas and of the King's Bench under James I, besides being a member of parliament both early and late in his life; but still he is best remembered for his dauntless character shown by derring-do in relations with James I.

The work of Blancas is more markedly antiquarian than that of either Hotman or Coke. He wrote several small treatises on institutions (e.g., on the Cortes and royal coronations) and his greatest work, *Commentaries on Aragonese History* (1588) sounds like an antiquarian's album. The dominant concern of that book, however, was the history of the person entitled "Justice of Aragon", a famous ephor-like official who had the power to intervene on behalf of an individual subject who was being pursued or prosecuted by the royal government, and to take him into his own jurisdiction and jail (both called *manifestación*). There was ample proof of the Justice's power in the later middle ages, but his origin was obscure and his authority by the time Blancas wrote apparently quite feeble. When treating the origin of the Justice, Blancas became enmeshed in two separate legends. One of them, going back more than a century, held that Aragon had grown out of a primitive kingdom of Sobrarbe (a place-name in Aragon), a Christian community that had survived the Muslim conquest and promulgated a new code of laws, called the *Fueros de Sobrarbe*. The other legend held that these proto-Aragonese people had accepted their kings only conditionally by chanting an oath when he acceded: "We who are as good as you, and can do as much as you, elect you as king on such and such conditions, that between you and us there

¹⁰It is some measure of how radically views about historiography have changed to note that the last generation's standard text on that subject by J. W. Thompson, *History of Historical Writing* [New York, 1942], 2 vols.), says nothing at all, or makes only slighting remarks, about Hotman, Blancas, and Coke as historians.

is one who commands more than you."¹¹ By assuming that this person "between you and us" must refer to the Justice, and by deceiving himself that the Justice was actually named in the founding fathers' laws of Sobrarbe, Blancas instilled a powerful notion of resistance right into the original Aragonese constitution.

François Hotman's most remembered work, *Francogallia* (1573), has traditionally been treated as a "monarchomach" tract written in revenge for the St. Bartholomew's Day Massacre, but there is evidence that it was written before that event took place, and certainly its arguments should be linked to Hotman's earlier writings on Roman and feudal law¹². The original version of the *Francogallia* is truly an antiquarian album, with brief essays on early French land, customs, and institutions. The overall thesis runs like this: the Gauls and the Franks were both Germanic tribes and each in its way limited the power of its kings; the Gauls, after being conquered by the Romans and suppressed for several centuries, were liberated by the Franks and joined with them to form the nation which should be called *Francogallia*. Hotman deprecates Roman influences on all scores. The early Francogallian monarchy was outright elective, he claimed, and throughout the centuries the kings had always sought the advice and consent of a national assembly of nobles; but this had ended during the reign of the tyrant Louis XI, just a century ago. By implication, the French monarchs since then had ruled in violation of the ancient constitution.

Hotman's and Blancas's most famous works thus eulogized national institutions which limited the power of the monarch. Sir Edward Coke's life and deeds, as well as his writings (all technical legal treatises), plead the same case. Coke's basic formula was an old one: *rex sub lege*, although he meant it not in medieval terms of divine or natural law but rather of the English common law which he believed had existed immemorially. His heaping up of precedents extracted from the year books (or from supposed collections of pre-Norman laws) can be looked upon as legal antiquarianism of the highest or of the lowest order, depending upon whether one considers its quantity or quality. Coke had a strong intellect but an even stronger will, so that he was inclined to a lack of scrupulosity. Still, no one did more to create the illusion that England had somehow always possessed substantively the same law, lawyers, and courts which were the heart of its constitution.

¹¹One "primary" version of the oath ends with the words "and if not, not", whence the title of my book (above, n. 9), *q. v.*, p. 247, for the four known versions of the oath.

¹²This is the argument of "When and Why", (above, n. 9), although the public reception of the book in its time has endowed it permanently with a Monarchomach label. For a new view of the *Francogallia's* political theory, see Julian H. Franklin's forthcoming *Constitutionalism and Resistance in the Sixteenth Century* (which I would like to thank him for having let me read.)

2.

So inevitable seems to have been the involvement of our constitutional antiquarians in political affairs that we might be justified in referring to "antiquarian activists".

Sir Edward Coke's life is a testimonial to political activism: he spoke directly to kings and others, assuming the pose of an oracular antiquarian expositing the ancient mysteries of the law, and it is hard to determine whether his political actions or his writings had the greater effect upon the course of English history.

How François Hotman blended politics and antiquarianism can be illustrated easily by noting the fate of the *Francogallia*. The first edition was universally regarded as an attack upon the current French monarchy, and the book was widely condemned and even burned in Savoy. This naturally increased its popularity, and it was soon pirated and translated into French. Hotman himself put out a second edition in 1576, and a third in 1586, the last one with the special purpose of promoting Henry of Navarre's claim to the throne. In earlier editions Hotman had denounced the Salic Law as a principle of royal succession, so that he (unlike his co-religionists) could not now embrace it. Instead, he contrived a defense of Henry's right to the throne using principles derived from Roman law. Ironically, therefore, the final redaction of the *Francogallia* imparted to French public law the very kind of flavor of Romanism which the book was originally designed to expugn.¹³

Gerónimo Blancas was disposed to remain an ivory-tower humanist scholar, but the nature of his work inevitably dragged him into the political arena. That he censored his *Commentaries* before publishing them in 1588 (eliminating the suppositious "Oath" and also the text of the legally proscribed Privileges of Union of 1287) was doubtless necessary in order to receive the royal license to publish. But that did not blight much the work's encomium of the Justice of Aragon, and we must believe that the book helped embolden the incumbent Justice in 1590 to reassert his ancient power. Philip II's officers were about to seize the traitor Antonio Pérez, who had fled jail in Madrid and crossed into Aragon, when the Justice took him into custody and gave him protective confinement in the jail of the *manifestación*. After one failure to have Pérez removed by force, Philip II got Blancas' expert advice concerning a loophole in the Justice's

¹³On the Salic law vs. Romanism in various editions of the *Francogallia*, see my *The Juristic Basis of Dynastic Right to the French Throne* (=Transactions of the American Philosophical Society, LI:5; Philadelphia, 1961), 17ff, 30ff.

authority: the Inquisition. So, armed with new charges of heresy against Pérez, the royal officers tried again to take possession of him. The abortive revolt of Aragon of 1591-1592 followed, and one result was the stripping of the Justice of Aragon's power forever. Blancas did not live to see this, but it is nonetheless grimly true that his herculean efforts to immortalize the Justice in history were paid for by one rash bit of political advising.

These examples of political activity by antiquarians by no means prove a necessary relationship between politics and historiography in this age, but the fact that kings and ministers were so often sensitive to antiquarian writings' opinions illustrate engrossment of this age in questions of the constitutional past.

3.

Considerable attention has been given to the proclivity of Renaissance historiography to glorify Germanic origins of modern nations—what is called generically "Gothicism"¹⁴. Constitutional antiquarians contributed more than their share to this, since they stressed limitation on royal power and the Goths were universally regarded as famous for that very thing. Hotman, by claiming Germanic origin for both Gauls and Franks, "made himself," in Maitland's words, "in some sort the ancestor of the Germanists."¹⁵ Blancas, like so many Spanish historians throughout the ages until recent times, assumed that preservation of Hispanic racial purity in the face of Muslim occupation and Jewish habitation was a central issue in medieval Spain. This meant necessarily that all the petty Christian kingdoms that arose after the Muslim invasion—of which Aragon was one—must have been related to the last kings of Visigothic Spain. The Spanish are the Gothicists par excellence.

Lord Coke did not avowedly support the Anglo-Saxon (i.e., English "Gothic") origin of his fatherland, but his defense of immemorial custom was a boon to the Gothicist cause. He formally endorsed the centuries-old myth of the Trojan origins of England (a theory actually dying out in his time), presumably because his excessive devotion to the principle of immemorialness inclined him to accept whatever theory extended the origins back the farthest. But the legal records which he loved to cite went back no further than Anglo-Saxon times, so that his precedent-hunting

¹⁴Samuel Klinger, *The Goths in England* (Cambridge, Mass., 1952); Jacques Barzun, *The French Race* (New York, 1932).

¹⁵*English Law and the Renaissance* (Cambridge, 1901), 58.

worked chiefly to glorify Anglo-Saxon precedent as against Norman ones. So, he served well the Gothicist cause that arose in his lifetime and pervaded 17th-century English historiography.¹⁶

4.

The fact of Gothic origins did not act as a bond among the nations that claimed it in the 16th and 17th centuries. It seems to have served different purposes in different places: anti-Roman, anti-Muslim, anti-Norman—i.e., essentially xenophobic in contrast to the self-glorifying role it played in 19th century romanticism. The sense of national individuality was, however, served in other ways by constitutional antiquarianism. Metaphorically speaking, it provided the adolescent nation states with distinctive political personalities.

The idea of the state is not new in this time: I believe with Gaines Post that the medieval legists had defined the juridical characteristics of the state by 1300. Withal, 1500 is also a crucial date for the rise of the state (as Friedrich Meinecke has shown) provided one thinks in terms of the psychology of rulership¹⁷. But medieval legists stated principles applicable to *every* state, and Machiavelli's rules fit *every* ruler, whereas the constitutional antiquarians revealed the peculiar traits of one state, from which arise *special* imperatives for its ruler. From all this would come not so much *raison d'état* as (for example) *raison de France*.

In the complicated process of national individuation which extends from the 12th to the 19th centuries, some phases were developed by the time of the Renaissance (language and customs, for example) while others (precise territorial definition, mass participation) were hardly begun. Constitutional antiquarianism is a step in the democratization of the idea of who actually "owned" the nation. Medieval myths had centered around the royal office or the royal family. Early modern times certainly did not lack for this, as dynastic principles reached their wildest extension. But at the same time the constitutional antiquarians, by establishing the antiquity of laws and magistracies and councils, created the basis for the better people in the nation to share in

¹⁶See esp. Pocock, *Ancient Constitution*, 56f.

¹⁷My opinion of the merits of Post's and Meinecke's positions on this matter has been set forth in a review of Post's *Studies in Medieval Legal Thought*, in *Yale Law Journal*, LXXV (1966), 1072-1075.

the national heritage¹⁸. The titled nobility, of course, but even more the nobility of the robe that had become the life blood of the royal government, were provided with a conception of the national past where they held center stage. There was, to be sure, a countervailing antiquarianism on the royalist side which developed secular claims for the royal hegemony which abetted the medieval theological apparatus such as curing the king's evil, Maundy Thursday rites, and the like. Royalists were in competition with the constitutional antiquarians, but the important fact is that both were trying to restate the national myth in the vogueish terms of historical precedent.

5.

The constitutional antiquarians' quest for distinctive national character complements the classical historians' sensitivity to anachronism. Both are ways of sensing dissimilarity: the national antiquarians by finding synchronous differences between closely related nations; the classical historians, diachronous ones between almost unrelated civilizations. Appreciation of national distinctiveness presumes at least a silent comparison with other countries in order to be able to declare what is unique. Still, I do not believe that constitutional antiquarians were particularly sympathetic with the comparative method. Instead they favored an antitypical mode, which might be called the "disparative" method, that of isolating differences. The comparative method was born in this very period, if we follow along with those who make Jean Bodin the patron saint of comparative studies¹⁹, but I believe this is the *métier* of the philosophical historian and not the antiquarian.

6.

Having viewed sympathetically the aims of the constitutional antiquarians, and even credited them with contributing to intellectual history in ways of which they never dreamed of, we should balance the accounts by reckoning their failings.²⁰

¹⁸This would complement the principle of nationality in Gallican church terms which we find in Dumoulin's work; see Kelley, "*Fides Historiae*", 392, 395.

¹⁹Evidenced by the name of the Franco-Belgian organization: Société Jean Bodin pour l'Histoire Comparative des Institutions.

²⁰At least minor mention should be made of the reliance of our constitutional antiquarians upon false documents: Hotman on Hunnibaldus and Philip IV's denunciation of Boniface VIII; Blancas and Hotman on the "oath of the Aragonese" and Blancas alone on the false *Fueros de*

Relating contemporary affairs to pristine institutions inevitably involves gross expressions of the substantialist fallacy, that is, in the cases at hand, imputing to the beginning of the nation's history all the important features of the contemporary state.²¹ Nothing really new, therefore, appeared to have happened in the course of the nation's history. A crucial example for our case studies is medieval resistance to royal authority. Instances which we would regard as likely as not to have arisen spontaneously were read by Renaissance constitutional historians as consciously renewed expressions of an original *Widerstandsrecht*. So, Hotman took the power of deposing the king in primitive Gallic and Frankish tribes to be the same as that of deposing Merovingian kings, of terminating the Carolingian line in the 9th century, and of restraining Louis XI by the League of the Common Good in the 15th. Blancas viewed the Justice of Aragon's power embodied in *fuero* number five of the 9th-century *Fueros de Sobrarbe* as being the same as the power vouchsafed by the Privilege of Union in 1287 and residing in the *manifestación* in the 16th century. Coke regarded the power of common law, the courts, and even parliament as having had the same viability in Anglo-Saxon, Norman, and Stuart times. What is blighted, in all cases, is the sense of change and development in history, or, to compare them unfavorably with classical historians, of a good sense of anachronism.

The substantialist fallacy is also ultimately the reason for what I regard as the main flaw in the constitutional antiquarians' view of history: their failure to understand the role of feudalism. Not that they were ignorant of feudal law: Hotman was one of the early serious historical scholars of it; Blancas dealt with it constantly when treating baronial relations with the king; and Coke knew its operation in early English history even if he failed to see its relationship with continental feudal law. In all cases the error lies in assuming that feudalism was the deliberate creation of powerful monarchs in the early middle ages, rather than being (as we see it today) a makeshift way to exercise public authority on a decentralized basis when those early medieval monarchies became enfeebled during the 9th to 11th centuries. Our constitutional antiquarians saw no hiatus in their nations' histories from the early middle ages to their own day, while today we would date the rise of European nations only from the feudal age.²²

Sobrarbe; Coke on the *Mirror of Justices* and the *Modus Tenendi Parliamentum* (see Philip Styles, "Politics and Historical Research in the Early Seventeenth Century", in *English Historical Scholarship in the Sixteenth and Seventeenth Centuries*, ed. Levi Fox [Oxford, 1956], 62-3), as well as apocryphal Anglo-Saxon *leges* (cf. Pocock, *Ancient Constitution*, 43).

²¹I take the concept of the substantialist fallacy from R. G. Collingwood, *The Idea of History* (Oxford, 1946), 42-45.

²²That is, if one accepts (as do I) the periodization called for by Dietrich Gerhard, "Periodization in European History", *American Historical Review*, LXI (1956), 900-913.

In an odd way, our constitutional antiquarians, by binding their age so firmly to the early medieval barbarian kingdoms, committed the same kind of self-deception, mentioned at the outset, the medieval historian indulged in when he linked *his* age to antiquity. Wherefore, naturally, we might restate Panofsky's dictum: "The Renaissance left the early middle age unburied, and alternatively galvanized and exorcised its body. The modern age stands at the grave [I'll not say weeping] and tries to resurrect its soul."

Perhaps there is a dialectic in historiography whereby every nation or civilization—if it is advancing—must reorder its historical past so as to express a changed conviction about its character and purpose. If so, then our antiquarian scholars' search for a constitutional past may be viewed as an attempt to combat the medieval (but far from dead) doctrine of the king's divine vicarship²³. Except for England, however, it was to remain for centuries a losing cause.

²³Were this argument to be extended, it would reveal my enthusiasm for the thesis of W. H. Greenleaf, *Order, Empericism and Politics* (Oxford, 1964), as a way to polarize royalist and constitutionalist antiquarianism.