

The Hermeneutics of Sovereignty: The Written Word, State Sovereignty, and Freedom of Religion in the Late Antiquity Roman Empire

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Words are important.¹ We order our lives around words. States and international bodies, themselves, are set forth as being based on what amount to collections of words in constitutions, charters, and codes. But these written legal instruments all refer to more basic philosophical principles and notions of justice, and those are the basis and justification for the laws themselves. But that they are written is important, and it gives us a starting point for trying to determine just what those principles are on which our society is based. We can also look back at the laws of earlier times to see just what principles guided their justifications, and very likely see reflections of our own choices on principles in theirs. The various states of the world constitute themselves based on documents which refer to these principles, as noted. What makes them a state, and one that can be thought of and recognized as a state vis-à-vis other states, is based on another principle laden idea, that of state sovereignty. But state sovereignty is not a thing, it does not really have an existence, instead it describes things, groups of people who order their lives around words. State sovereignty, in a real sense, is just words: what is far more important is what it signifies, and that is fairness and functional order in a defined societal unit.

Related to this, I have noted elsewhere the fact that since at least the time of the Greeks, sovereignty has always been defined, in theory, as an attribute of a state when, and only

¹ I first heard this turn of phrase ‘Words are important’ from Professor Eugene Petersen in a lecture he gave at Regent College, and even though he would not claim it as his own, I have found it applicable on a number of occasions and wanted to credit him as being the first person from whom I heard the phrase.

when, that state acts in the best interests of its citizens, ergo, the community at large.² I have also suggested: “unless theoretical sovereignty can be meaningfully connected to its epistemological roots, wherein the citizen’s protection and benefit is the body around which all other incidental considerations orbit, ...our investigations into its true nature are near meaningless gestures reflecting, rather, what given interests think it ought to be.”³ Certainly, what a sovereign state has come to be understood as now is basically a list of bare physical attributes: population, territory, recognized government, etc.; but there are significant efforts, such as the Responsibility to Protect initiative, to attach a moral imperative to the benefits of its use, i.e., continuing to be a recognized member state of the United Nations.⁴ Yet, even these noble efforts are going to need to be put in to written legal form before any group of nations could expect to hold a single nation accountable for a breach of any such law. One can see how constructions of words are powerful and necessary for the creation of constitutions which set out the parameters of obligation on the state, which will protect the needs of citizens; it is also clear that in some cases new words must be added to make those laws more just, as with the above example.

Sovereignty is a concept absolutely at one with the aforementioned human fascination and dependence on words, and our legislatures, coming from the Latin word *legere*, meaning read,⁵ appeal to their use of words to define their own sovereign status. This use of words to establish a sense of sovereignty has a long pedigree. As legal historian Sir Henry Maine wrote so notably over a century ago, “[t]he most celebrated system of

² Craig Garfield Bateman, 2009. “Nicaea and Sovereignty: Constantine’s Council of Nicaea as an Important Crossroad in the Development of European State Sovereignty,” Electronic Theses and Dissertations (ETDs) 2008+. T, University of British Columbia, 54. doi:<http://dx.doi.org/10.14288/1.0070866>.

³ C.G. Bateman, “Sovereignty’s Missing Moral Imperative,” *International Zeitschrift* 8.2 (May 2012): 30-41.

⁴ United Nations 2005 World Summit Outcome, September 15, 2005, U.N. Doc. A/60/L.1, available at [http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005\(1\).pdf](http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf).

⁵ Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. eds. Stephen A. Barney et al. (Cambridge: Cambridge University Press, 2006), V.iii.2-4, 117.

jurisprudence known to the world begins, as it ends, with a Code.”⁶ A code is a written instrument of words. The written word was venerated by the Romans: beginning with the *Twelve Tables* (the earliest public Roman code of law) in 450 B.C.E, and later in the Principate (27-284 C.E.) and Dominate (284-476 C.E.) eras, the emperor’s laws, the *constitutiones principis* in various forms: *edicta*, *decreta*, *rescripta* and *mandata*.⁷ These latter had an existence and authority all their own, and were equivalent in status to previous legislation out of the Roman Senate. George Mousourakis notes: “The direct law-making power of the princeps-emperor was justified on the ground that the law that conferred imperium on the emperor (*lex de imperio*) transferred to him the authority to legislate in the name of the Roman people.”⁸ Yet, “...the true foundation of the emperor’s legislative authority is not discovered in legal rationales but in political reality: the emperor’s socio-political power evolved so that his assumption of a direct legislative role could not be challenged.”⁹ John Firth, in his classic study on Constantine (272-337 C.E.), aptly notes: “The Emperor, in brief, was absolute monarch, autocrat of the entire Roman world, and his will and nod were law.”¹⁰ As powerful as they were, these individual emperors were, like all people, a product of their environment, and that religion was seen as directly connected to the fortunes of all people and nations was an idea which was imbued in, and given form in, their legislation. The emperors as lawmakers engaged in the interweaving of religion and law on behalf of the state’s sovereign organizing matrix. Emperors in late antiquity legislated on religion because they believed that the prosperity of the Roman state depended on the approval of the deity. In their specific late antiquity context, they could hardly have done otherwise.

⁶ Sir Henry Maine, *Ancient Law, Everyman’s Library*, vol. 734, ed. Ernest Rhys (New York: E.P. Dutton, 1931; 1861) 1.

⁷ See generally, George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (New York: Springer, 2015), see discussion at 65-66 on the laws of emperors.

⁸ *Ibid.*, 65.

⁹ *Ibid.*

¹⁰ John Firth, *Constantine the Great: The Reorganization of the Empire and Triumph of the Church* (New York: Palatine Press, 1905; 2015), chp. 16.

Roman Emperors Galerius and Constantine on State Order

This idea is at least connected to our own day, because major constitutions in the Western experience today still either refer to the fact, or imply it, that the deity is the guarantor or the basis on which rights can be grounded.¹¹ So, let us return to Maine's Late Antiquity Rome and look for an example of where this practice of referring to the deity can be seen in full bloom. Take, for instance, these excerpts from the *Edict of Toleration* (311) from the Roman Emperor Galerius (r. 305-311 C.E.), the erstwhile persecutor of Christianity. Keep in mind Galerius had initiated one of the worst periods of persecution against Christians in Rome's history, from 303-311. Ultimately, and suffering from a terminal illness, he conceded this had been a mistake.

¹¹ Several nations' Constitutions make use of the *invocatio dei* (call on God), usually located in the preamble of such documents. For instance, in Canada, in the recent *Charter of Rights and Freedoms* (1982), the preamble reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." The United States Declaration of Independence reads, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Many states' constitutions employ the invocation, but many more do not. Besides their position as Defender of the Faith, British monarchs, since William and Mary in the seventeenth century, are required to maintain the laws of God, the true profession of the gospel, and the Protestant Reformed faith established by law. Add also their role as head of the Church of England. This relates specifically to the *Coronation Oath Act*, 1688. The Magna Carta is set forth as being related to God in the following important ways: One, again, in the preamble, "JOHN, by the grace of God King of England"; second, "KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom," [notice here the connection between God and state order that could be inferred.]; third, "FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.; lastly, SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security. Australia's Constitution of 1900 reads: "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established..." The number of world nations that still employ an *invocatio dei* is somewhere north of thirty.

Among all the other arrangements which we are always making for the advantage and benefit of the state, we had earlier sought to set everything right in accordance with the ancient laws and public discipline of the Romans and to ensure that the Christians too, who had abandoned the way of life of the ancestors, should return to a sound frame of mind;¹²

Here is the *sin qua non* of the imperial will, according to Galerius: the stability of the state; and how did he intend to bring this about, by encouraging a religion to return to its roots and practice their faith in accordance with ancient principles which even the Romans would appreciate.

When finally our order was published that they should betake themselves to the practices of the ancients, many were subjected to danger, many too were struck down. Very many, however, persisted in their determination and we saw that these same people were neither offering worship and due religious observance to the gods nor practicing the worship of the god of the Christians.¹³

The instability of the state, according to Galerius, was being caused by improper religious worship.

...we have taken the view that in the case of these people too we should extend our speediest indulgence, so that once more they be Christians and put together their meeting-places, provided they do nothing to disturb good order. We are moreover about to indicate in another letter to governors what conditions they ought to observe.¹⁴

“Good order,” this was the heart of the *Edict of Toleration*. Further, this law was going to get further enforcing mechanisms in direct missives to the governors, which were orders directing the hand of the governments of the provinces which Diocletian had set in order. Constantine’s subsequent legislative activity, through this lens of his rival,

¹² Lactantius, *De Mortibus Persecutorum*, ed. and trans. J.L. Creed (Oxford: Clarendon Press, 1984) 34.1-5, 53.

¹³ Ibid.

¹⁴ Ibid., 34.1-5, 53.

Galerius, are far more understandable and make him far less unique as an emperor convinced of the importance of religion, Christian or not. Galerius goes on:

Consequently, in accordance with this indulgence of ours, it will be their duty to pray to their god for our safety and for that of the state and themselves, so that from every side the state may be kept unfarmed and they may be able to live free of care in their own homes.¹⁵

Following Galerius' Edict in 311, came the *Edict of Milan* in 313, penned by co-emperors Licinius (r. 308-324) and Constantine. It comes as no surprise that in such a context Constantine, who is most notable as the emperor who adopted the Christian religion into the state's organizing matrix, would be just as assiduous in ensuring the Christians and other religious adherents got down to proper worship.¹⁶ That it reaffirms and expands on the Toleration edict is clear, and its opening shows that the connection between state order and good religious practice was paramount in the minds of its authors, just as it was for Galerius.

When we, Constantine and Licinius, emperors, had an interview at Milan, and conferred together with respect to the good and security of the commonweal, it seemed to us that, amongst those things that are profitable to mankind in general, the reverence paid to the Divinity merited our first and chief attention, and that it was proper that the Christians and all others should have liberty to follow that mode of religion which to each of them appeared best; so that God, who is seated in heaven, might be benign and propitious to us, and to every one under our government.¹⁷

These emperors were concerned about ensuring that "reverence paid to the Divinity" was carried out properly, so that God would prosper their state and empire, and it is

¹⁵ Ibid.

¹⁶ MacMullen, *Constantine*, 64. He writes: "The advantage and profit of the state, stressed at the outset [of Edict] as the reason for any kind of legislation.... Prayer is patriotism, the gods directly save or destroy."

¹⁷ Lactantius, *Of the Manner in Which the Persecutors Died*, trans. Rev. William Fletcher, *Ante-Nicene Fathers: The Writings of the Fathers Down to A.D. 325*, vol. 7, eds. Alexander Roberts and James Donaldson, rev. & arr. A. Cleveland Coxe (Peabody: Hendrickson Publishers, 1886; 2004) XLVIII, 320.

interesting that they believed the security of the state, a serious issue given the violent incursions of barbarians, was at issue. Like Galerius, state order was something they were aiming at with this law. They go on: “For it befits the well-ordered state and the tranquility of the times that each individual be allowed, according to his own choice, to worship the Divinity; and we mean not to derogate aught from the honour due to any religion or its votaries.”¹⁸ This highlights the fact that this Edict was not merely about encouraging the practice of Christianity, although that was surely a key tenet, but about encouraging the free practice of all religions who worshipped the Divinity. Here was a sea change going on in imperial state governance and order: no longer would the persecution of religious adherents be carried out, at least in theory, something the imperial state had engaged in since the times of the Julio-Claudian dynasty in the first century. Further, religions were now to be encouraged, because the rulers saw a direct connection between the success of their rule and freedom of the people to worship the Divinity in the way they saw fit.

The Edict of Toleration (311) and its companion,¹⁹ *The Edict of Milan* (313), were the Roman state’s adoption papers, if you will, pursuant to the Christian religion. In those two edicts we find the basis for all other legislation relating to the vaulted place of Christian Bishops in the Roman legal and societal constitutional framework of the fourth century and beyond. One scholar refers to the Milan Edict as a “turning point in world history.”²⁰ All one has to do is consider medieval history in Europe at any point along a 1200 year timeline, 4th – 16th centuries, to realize how the ubiquitous presence of Christianity, in society, law and politics, most notably, began in earnest as Constantine extended his favour to this religion; and importantly, it is with the *Edict of Milan* in 313 that we see the beginning of this relationship set out in clear terms by a legal instrument,

¹⁸ Ibid.

¹⁹ Philip Hughes saw the *Edict of Milan* as a supplement to the *Edict of Toleration*. Hughes, *History of the Church*, (London: Sheed & Ward, 1947), 176.

²⁰ Herbert H. Gowen, *A History of Religion* (Milwaukee: The Morehouse Publishing Co., 1934), 489.

a law. The two edicts not only made the practice of Christianity legal, but encouraged its practice. In both edicts, the stability of the state was the aim, and the practice of the Christian religion, along with the other religions, if carried out in an orderly way would apparently encourage such an aim. But the Milan Edict was also about emphasizing anyone's right to worship in the way they saw fit. In a later rescript of Constantine and Licinius, quoted by Eusebius of Caesarea, we read the words of the Emperors themselves on this matter:

When [we] had come under happy auspices to Milan, and discussed all matters that concerned the public advantage and good... we resolved to make such decrees as should secure respect and reverence for the Deity; ... [that besides the Christians] authority has been given to others also, who wish to follow their own observance and form of worship – a thing clearly suited to the peacefulness of our times – so that each one may have authority to choose and observe whatever form he pleases. This has been done by us, to the intent that we should not seem to have detracted in any way from any rite or form of worship.²¹

...

In all these things thou shouldest use all the diligence in thy power for the above-mentioned corporation of the Christians, that this our command may be fulfilled with all speed, so that in this also, through our kindness, thought may be taken for the common and public peace.²²

While it is true the Milan edict was undoing the damage done to the Christian religion during a long period of persecution at the hands of the state, it was also levelling the playing field for every religion, and it gives one the impression that the emperors were giving the first voice to, as H.A. Drake pointed out, the idea of freedom of religion.²³ These two laws, focused as they were on both the right practice of religion (*Toleration*) and the freedom to choose religion (*Milan*), are paramount to understanding what

²¹ Eusebius, *HE*, X.v.6-9, 449.

²² *Ibid.*, X.v.9-13, 451.

²³ H.A. Drake, *Constantine and the Bishops* (Baltimore: The Johns Hopkins University Press, 2000), 194; See also, John Firth, *Constantine the Great: The Reorganization of the Empire and Triumph of the Church* (New York: Palatine Press, 1905; 2015), chp. 6.

Constantine's actions concerning the Church were founded on, and they seem to point to an attitude of forbearance in religious matters, as Ramsay MacMullen noted was true of this emperor in his religious policy;²⁴ and as for the impetus behind such an attitude, the desire for a secure and prosperous dominion under his rule plainly suggests itself in the "public peace" Constantine wrote of. But the notion of freedom of religion came to be mangled almost immediately after the Milan law. As John Firth notes on Constantine's reaction to the Donatist crisis, "[s]o little observant was he of his own edict of toleration that he was prepared to use force to secure uniformity within the Church!"²⁵ Of course, such an observation can be applied to some of Constantine's actions to do with the Church in the later Arian crisis as well, where he openly exiled various persons and outlawed their writings based on their theological views. The Church and state in Western Europe during the early Medieval period would completely ignore the Milan Edict's institution of freedom of religion, and this attitude was only to be shook off with the early Modern Period's cultural, scientific, and religious revolutions and wars, most pointedly the 'Thirty Years' War, which gave rise to the sovereign and independent state system.

In these two edicts, "the state" is clearly the entity around which all other considerations orbit. 'Benefit of the state,' 'safety of the state,' 'state kept unharmed,' and how were Galerius, Constantine, and Licinius and their legal advisors hoping to achieve this? According to these legal pronouncements, it was proper religious observance by the Christian population of the Empire, a segment of Roman society which was growing beyond the control, in both numbers and devotion, of any emperor, Galerius or Constantine. Religious affiliations in the fourth century were at the heart of Roman culture, and they remained that way in Western Europe until, perhaps, the enlightenment. In order to appreciate Constantine's actions, legal or otherwise, one must

²⁴ Ramsay MacMullen, *Constantine* (New York: Dial Press, 1969), 165.

²⁵ Firth, *Constantine the Great*, chp. 9.

keep this essential element of context at the forefront of their minds to better understand why he likely made those decisions which, in hindsight, have shaped an enormous part of our culture to the present day. Like Galerius, Constantine's words would be imbued with a sense of duty towards proper religious observance, and his goal in crafting laws this way, as with the peaceful facilitation of the complex relationships within society is the main goal of a sovereign state today,²⁶ was to bring stability to the state.

History, Nomos, and Order

Beyond the legal instruments of emperors, there are the societal raconteurs, historians, who with words kept track of events as they understood them. Written words from the hands of historians like Herodotus, Suetonius, Josephus, and Eusebius of Caesarea, taking directly from Berger's and Luckmann's suggestions on the importance of symbolic activity, of which religion is an obvious example, created in their writings part of the matrix of cohesive words which gave their societies a sense of meaning and legitimacy. Berger and Luckmann wrote: "The symbolic universe ...orders history. It locates all collective events in a cohesive unity that includes past, present, and future."²⁷ Religion does exactly that: it tells us where we came from, God, where we are, under God, and where we are going, to be with God. We are hemmed in like chicks in a nest of symbolic interpretations about reality, and there is the rub. People like to be in the safety of these constructions.

In Peter L. Berger's earlier work, he defined this construction as '*nomos*.' Berger writes: "It may now be understandable if the proposition is made that the socially constructed

²⁶ F.H. Hinsley, *Sovereignty* (New York: Basic Books, 1966), 233-234.

²⁷ Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y. : Doubleday, 1966), 95.

world is, above all, an ordering of experience. A meaningful order, or *nomos*, is imposed upon the discrete experiences and meanings of individuals. [*] To say that society is a world-building enterprise is to say that it is ordering, or *nomizing*, activity.”²⁸ If we then take this idea and apply it to our subject matter, we can see that the Roman state and leadership apparatus, by employing the state sponsored practice of religion focused on a pantheon of gods based on earlier Greek practice, had furnished their citizens with a past, present, and future which had continuity and seemingly bred stability. So we observe that it was the laws, the religion, the histories, and traditions which gave the Greek and Roman societies their stabilizing matrix, and ones that were built on and ensconced within the written word.²⁹ In Rome’s history, the written words of a king, the Senate, the consuls, and emperors became a sacred part of daily life for those living within Roman environs, and each of the aforementioned were as involved in religion as they were in matters of state. We see this writ large in the later designation expropriated by Emperor’s beginning with Augustus, *Pontifex Maximus*. This title comes from the leader of the College of Pontiffs who were the keepers of the law in Rome’s early monarchy and in to the Republican period: the archaic era from the eighth to third centuries B.C.E.³⁰ That law was first in the possession and under the influence of religious functionaries in early Roman society is interesting when we think how Roman law was much later, in a variety of ways, carried into the Middle Ages via the Roman Catholic Church.

²⁸ Peter Berger, *The Sacred Canopy*, 19. * Berger notes: “[t]he term “*nomos*” is indirectly derived from Durkheim by, as it were, turning around his concept of *anomie*. The latter was first developed in his *Suicide* (Glencoe, Ill.: Free Press, 1951), 192.”

²⁹ The subject of why the old pantheons were ultimately discarded for a new belief system focused on a single God relates to a number of factors: the influence on the Tetrarchic, and following, Empire of, then, Asiatic/oriental religions more focused on single deities, the fact that a lone Emperor inheres to the belief and allegiance to a single God, and the most compelling factor being that bringing all peoples under a single God under the authority of the Empire tends to more order and stability, hallmarks for what would become state sovereignty.

³⁰ George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition*, 2.

After the Western Empire had fallen to the so-called “barbarian” tribal peoples of Europe in the fifth century, in the seventh century, Isidore of Seville (c. 560-636 C.E.) wrote his renowned *Etymologiae*, a compendium of general classical knowledge, and left it unfinished at his death in the 1st half of the seventh century. Isidore’s work, *inter alia*, encompasses a brief overview of the evolution of legal systems throughout history as Isidore understood it, and it is perhaps no surprise that as a Bishop of the Christian Church he began his cursory survey with Moses as the first law-giver.³¹ An interesting observation to be made about the Bishop of Seville’s survey on laws is that having begun with the Israelite prophet’s delivery of law, he then goes directly to the ancient roots of law for the Greeks, Egyptians, Athenians, Spartans, and then brings us to King Numa Pompilius (753-673 B.C.E.), Romulus’s successor, who gave the earliest Romans a set of laws. Then, importantly, came the *Decemvirs*, the “ten men,” a democratically appointed group whose incarnation only lasted three years, from 451-449 B.C.E., who may have taken their lead from the Greek laws of Solon to create Rome’s famous *Twelve Tables*. We learn from Isidore that long after this, the consul, Pompey (106-48 B.C.E.), sought to gather all the laws into writing, but feared retribution for doing so and demurred. Then, Julius Caesar (100-44 B.C.E.) embarked on the same project but was killed before he could accomplish this. The ancient laws apparently grew obsolete in neglect over a period of three hundred years. Then, we are told, it is when we get to the age of the Emperor Constantine and his legal innovations that we begin to see written laws in the Roman world once again. This is, of course, not correct, laws had been issued by emperors all through the principate and dominate periods, but Isidore points to Constantine as the reviver of written Roman law because, most likely, he was the first Christian emperor, and certainly he wrote a great deal of them, somewhere north of three hundred. These laws were indeed written in Constantine’s time, but were not, then, collected in any ordered fashion. It was Theodosius Augustus the younger (401-450

³¹ Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. Stephen A. Barney, W.J. Lewis, J.A. Beach, and Oliver Berghof, collab. Muriel Hall (Cambridge: Cambridge University Press, 2006), V.i.1-7, 117.

C.E.) who later collected the laws from Constantine's time until his own to create his *Theodosian Code* (created between 429-438). Why is this important to mention? It is important because Isidore comes from just the other side of two-hundred years from the life of Constantine and we can see exactly how influential Constantine's reign had been for the revival of law making. The Catholic Church now carried with it the Roman Law, and in a real sense gave it to the nations of Europe with the re-introduction of the Code of Justinian (*Corpus Juris Civilis*) by the Church into their own legal framework in the eleventh century, and this inspired the reception and concomitant influence of this same legal document by the "secular" governments, monarchies, over many centuries — the most famous example being the creation of the Napoleonic Code.

In his *Etymologiae*, Isidore lays out some basic assumptions of the time on the nature of law, and they are worth mentioning: "A law is a written statute. A custom is a usage tested by age, or unwritten law, for law (*lex, gen, legis*) is named from reading (*legere*), because it is written."³² He does go on to say, however, that 'customary law' can be taken as law when an actual law is lacking because, and even though it does not exist in writing, it can be validated by reasoning, hence reason.³³ Consistent with the suggestion that sovereignty resides in that body which provides a stabilizing matrix in society, he goes on to write, *inter alia*, that "...if law is based on reason, then law will be everything that is consistent with reason — provided that it agrees with religion, accords with orderly conduct, and is conducive to well-being."³⁴ The latter two requirements are in accord with the idea of a stabilizing matrix (order, well-being), and Isidore was a Bishop of the Roman Christian Church of whom I suggest had more influence on the stability of the European peoples after the Western fall of Rome than any King or Emperor. Since Isidore's work is admitted to be a portrayal of all the learning gained by the Roman

³² Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. eds. Stephen A. Barney et al. (Cambridge: Cambridge University Press, 2006), V.iii.2-4, 117.

³³ *Ibid.*

³⁴ *Ibid.*

world up to his own seventh century provenance, we can observe that, at least in the Roman experience of his times, law simpliciter was predicated on the fact that it must be in the form of writing. The Romans were not the first society to recognize the value of written laws, but theirs is the society upon which Europe's was based, and thus for the study of our laws and their concomitant justifications, we can learn much from the source. Isidore went on further to define law.

X. What a law is (*Quid sit lex*) A law is a rule for a people – through it those who are nobler by birth, along with the common people, have ordained something.

...

XX. Why a law is enacted (*quare facta est lex*) Laws are enacted in order to control human audacity though the fear they arouse, and so that innocent people may be safe in the midst of reprobates, and so that even among the impious the power of doing harm may be restrained by a dreaded punishment.

XXI. What sort of law should be made (*qualis debet fieri lex*) A law should be honorable, just, feasible, in agreement with nature, in agreement with the custom of the country, appropriate to the place and time, necessary, useful, and also clear, lest in its obscurity it contain something deceitful and it should be written not for private convenience, but for the common benefit of the citizens.³⁵

Isidore insists that law is enacted so that innocents may be kept safe — a key element of the moral imperative for a sovereign power — and this definition is one that assumes order will be the outcome. Finally, notwithstanding the various requirements which make up his conclusion on what sort of law ought to be made, he writes that it should be for the common benefit of the people who make up the society. Each of these aspects speak to the insistence on a stable and ordered society which were originally made the highest priority by Constantine. We have to remember this. Why? Because Isidore was a Roman Christian Bishop and all of Europe at that time, the way we think of Europe, was quickly becoming entirely Christian, even if in name only. I suggest that the fact Isidore gave primacy of place to Constantine as being the first Roman Emperor to begin issuing

³⁵ Ibid., V.x, 118; V.xx, 119; V.xxi, 119.

a series of written laws³⁶ merely points to the significance of Constantine's legislating activity as he attempted to use the instrumentality of law to stabilize the Roman state. His prolific legislative efforts were, importantly, collated into a Code for use, along with other subsequent Emperor's laws, by Theodosius the Younger – the *Theodosian Code*.³⁷

Isidore is a paradigmatic example of a mind moulded under the Roman-Christian model, a direct result of Constantine's adoption of the religion of Christianity. Isidore uses phrases like "divine laws" and "Sacred Scriptures," the same words once used by the famous Christian philosopher and theologian, Origen of Alexandria (185-254 C.E.), one hundred years before Constantine. If we remember that Origen's most famous supporter was the Church historian Eusebius of Caesarea (260-340 C.E.), the confidant and friend of Constantine and the one to whom the construction of a Roman-Christian worldview can be somewhat credited, we see a lineage of burgeoning culture and set of ideals running from Origen to Isidore, beginning in Greek Christianity and ending in Constantine's Roman Christianity. In Constantine's reign we find a Roman Empire in the nascent stages of being Christianized and an international Christian religion in the process of being Romanized. Concomitant with this are the two interweaving historical realities that Rome was changing from supporting a plurality of Gods to supporting one God, and that the Church was being transformed from being the keepers of only God's

³⁶ Of course, as noted above, Isidore is a Christian Bishop and author and the fact that he incorrectly ascribes Constantine as being the first to promulgate written laws, because edicts and law had been fulsome previously in the Republic and Empire, means perhaps two not so surprising things. First, Constantine was the first Christian emperor, and thus Isidore regards him as the keystone of laws emanating from a Christian regime, thus the first "legitimate" set of written laws; second, Constantine was very concerned about drawing all legal decisions towards his authority and purview (John Noël Dillon, *The Justice of Constantine: Law, Communication, and Control* (Ann Arbor: University of Michigan Press, 2012) and as such likely did promulgate more written edicts and rescripts to the provinces than any emperor before him. He had every wish to stop the provincial governors and civil servants from taking bribes and being inconsistent in their judgments, and give the empire's subjects, to the best of his ability, a legal system that was more equal in application and which endeared citizens to his unifying and fair rule. He was ruthless, but he was not ignorant of the importance of both ethics and optics. The former could be said to be a Christian and Stoic sentiment while the latter was strictly political and expedient.

³⁷ *Ibid.*, V.i.7, 117.

law, to being the keepers of Roman law as well. The praetor would become a priest, and the priest, a praetor.³⁸

Judaism, Christianity, and the Written Word

For another group of people in Late Antiquity Roman society, the written word was also sacred, and had actually become considered thus many centuries earlier. I refer to the Jewish nation and peoples. Their written word served to preserve their ways, laws, and traditions, and it came to be treated by all Jews as the very words of God. This allowed King Josiah (641-609 B.C.E.), the king historians believe most likely to have put together the first part of the Jewish Scriptures as we know them, to draw all authority under one God.³⁹ The words of the Torah provided a stabilizing matrix for all peoples within the separate Kingdoms of Israel and Judah to belong to, and thus a unifying and centralizing of power and authority: a sovereignty. It has been noted: “Josiah is the only king who made a covenant on the basis of “the book of the Torah”; in so doing he gave this book the force of a state law. ...it was given constitutional force by Josiah.”⁴⁰ Further, as we see in the much later mission of Judas of Galilee, which predates Christ’s revolutionary activities by only twenty years, the sovereignty we are talking about belonged to Yahweh. Judas’ movement was based on the principle of “the absolute sovereignty of Yahweh,

³⁸ Augustine would be a Bishop who was also a judge; Gregory the Great was a praetor/judge who was pressed ganged into the seat of Roman Bishop, and raised a standing army for the city of Rome and established a taxation system for the Western Church. Thus, within two hundred years of Constantine’s death, his adoption of the Christian Church into the state was getting traction and this is shown by the careers of the two most influential Western characters of the early Middle Ages, Augustine and Gregory.

³⁹ Israel Finkelstein and Neil Asher Silberman, *The Bible unearthed: archaeology’s new vision of ancient Israel and the origin of its sacred texts* (New York: Free Press, 2001); See also Joseph Campbell’s observation, reasonable as well, that it was the sixth century BCE exile of the Israelites in Babylon which occasioned this transformation of focus from one God of many, to a single God: Joseph Campbell, *The Power of Myth*, ed. Betty S. Flowers (New York: Doubleday, 1988), 21.

⁴⁰ Yehezkel Kaufmann, *The Biblical Age: The Age of Classical Prophecy*, in *Great Ages and Ideas of the Jewish People*, Salo W. Baron, et al., ed. Leo W. Schwarz (New York: The Modern Library, 1956), 71-72.

the God of Israel.”⁴¹ G.F. Brandon notes, ‘...Judas obviously conceived of Israel as a theocracy, and he was prepared to face the practical consequences of that conception, namely, to refuse to recognize and support the alien power that had possessed itself of Judaea, the holy land of Yahweh.’⁴² The aforementioned principle of the sovereignty of Yahweh, enshrined in the Jewish Scriptures, was also at the heart of Jesus’ version of Judaism, and such an ideal was transferred to the religion that sprung from his teaching, Christianity.⁴³ This new religion, like its Jewish predecessor, treasured the written word as well, and took much of Jewish literature into their new religious matrix; and just as with the Jews, these writings, these words, served as a sovereign stabilizing matrix for the new religious community to grow around. Some letters of the first Christian Apostles, followed by the oral traditions of Jesus, were copied and written down, and a select collection⁴⁴ of these came to be thought of as sacred documents, inspired by God himself. The point here is that the written word was deeply important to all three cultures: Roman, Jewish, and Christian. This written word had the power to punish an offender; it also had the power to exonerate an offender. It had the power to set geographical boundaries and mark certain places as being of special significance or belonging to a certain people, and these written words also instructed the people on how to live their daily lives. These were powerful words. Our modern societies are based on the same kinds of words, found in our legal systems.

In fact, scholar Joseph Campbell noted that because modern society has jettisoned most of its mythological connections due to a pluralistic reality, “[l]awyers and law are what [now] hold us together. There is no ethos.”⁴⁵ What Campbell is conveying is that with no

⁴¹ G.F. Brandon, *Jesus and the Zealots: A Study of the Political Factor in Primitive Christianity* (Manchester: Manchester University Press, 1967), 32.

⁴² Ibid.

⁴³ R. M. Grant, *Augustus to Constantine*, 42.

⁴⁴ C.G. Bateman, *Origen's role in the formation of the New Testament Canon*, Thesis (M.C.S.) Regent College, Vancouver, B.C., 2008. Theological Research Exchange Network (Series), #048-0352. Pages 105-112.

⁴⁵ Joseph Campbell, *The Power of Myth*, ed, Betty S. Flowers (New York: Doubleday, 1988), 9.

sacred myths by which a society, such as the Israelites under Josiah, can orient their lives and goals, a pluralistic society needs another manifestation of words by which to order the multivariate rites and traditions attempting to co-exist in one state: the law. When examining the context of the late antiquity Roman Empire, we see words in the form of scriptures guiding groups within society, but we also see how law from Diocletian, Galerius, and Constantine attempted to bring sovereign order to the diverse commitments at play in the world of religions. Law, for perhaps the first time, was being used to challenge the authority of scripture and become kind of a “scripture” of the state.

Both the Late Antiquity Jewish and Christian communities had sacred collections of words around which their religions’ revolved: Israel’s sacred collection, in various writings, beginning around the seventh century B.C.E., and then with the Christian’s relying on Israel’s sacred scriptures initially, ultimately adding their own writings which were recognized tentatively by the Church in the late fourth century.⁴⁶ Today, we have sacred documents as well, our constitutions. If you doubt the sanctity of the Constitution of the United States, try and get your hands on an original copy. True, it is not kept in a Temple, but in the National Archives in Washington, D.C., a building very similar in structure to an ancient temple, and the document is kept behind bullet proof glass. Canada’s constitution was kept in the Tower of London until 1982 when it was repatriated under the leadership of Prime Minister Pierre Trudeau (1919-2000). These constitutions are the legitimizing and legitimate words which give rise to sovereign nations, and along with these come the several Codes and Acts around which we have agreed to order our lives. If a citizen of B.C., Canada, breaches a part of the, let us say, *Criminal Code*, the police then, under another set of authorizing words, the *Police Act of*

⁴⁶ In a festal letter of 367 written at Easter, then Pope, Athanasius specified the only accepted writings of the Catholic Christian Church: see specifically, Athanasius, Letter XXXIX (For 367.) in Philip Schaff and Henry Wace, Editors, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, vol. 4, (Grand Rapids: Eerdmans, 1975), 551 – 552.

British Columbia, may detain or arrest a person on the authority of these words. The same was true of the Ancient state of Israel. Based on the sacred words of the Torah, people could be detained and brought before priests to be judged, not by the priest's inclinations, but by the words of God written in their 'Constitution'. The emphasis on a supernatural guarantor as the author of these texts has not survived into modern day Western legal systems, but it should be pointed out, as noted above,⁴⁷ that God is referred to in the original constitutional documents of the United Kingdom, the United States, and Canada, just to name a few; and the collections of words pertaining to the two latter states were solemnized only a couple hundred years from our own time. Henry Maine noted how just such legislation has a long and identifiable pedigree in the environs of the late Roman Empire, exactly where we find Constantine.

The true period of Roman Statute Law does not begin till the establishment of the empire. The enactments of the emperors, clothed at first in the pretence of popular sanction, but afterwards emanating undisguisedly from the imperial prerogative, extend in increasing massiveness from the consolidation of Augustus's power to the publication of the Code of Justinian. It will be seen that even in the reign of the second emperor a considerable approximation is made to that condition of the law and that mode of administering it with which we are all familiar. A statute law and a limited board of expositors have risen into being; a permanent court of appeal and a collection of approved commentaries will very shortly be added; and thus we are brought close on the ideas of our own day.⁴⁸

In other words, not much has changed. While much has, no doubt, changed, the fact that Constantine's historical context puts him at the beginning of the constitutional era which we are still a part of is important: some ideas become foundational for future formulations, as Drake points out on the principle of Freedom of Religion spelled out clearly by Constantine and Licinius in the *Edict of Milan*.⁴⁹

⁴⁷ See footnote 11.

⁴⁸ Sir Henry Maine, *Ancient Law*, 25; see also in the same work, 40.

⁴⁹ Vide infra.

Words are important. Words are the basis upon which states are sovereignly organized through collections of words, constitutions, that constitute authority over a specific territory, a specific population, and such populations must be so ordered and consistent in their governance as to be recognized as a legitimate state by the international community of states.

Yet words are not universally thought of as being capable of conveying meaning in all circumstances. In fact, the words of the Jewish Law and Christian scriptures are examples of metaphors for what, by their own admission, are beyond total human comprehension and actually belong to their God instead. Heinrich Zimmer suggested, “[t]he best things can’t be told because they transcend thought. The second best are misunderstood, because those are the thoughts that are supposed to refer to that which can’t be thought about. The third best are what we talk about.”⁵⁰ Based on the foregoing discussion, what nations “talk about” is reflected in their laws that quite literally, and stated outright in the various scriptures and constitutions, are claimed to be in reference to a being that transcends our mortal sojourn. Laws are not posited on the wisdom of people, they claim to be referring to a higher order or norm that, while not marked out in the temporal world, is yet accessible to people through principles or self-evident truths, the latter of which is the outcome of the former.

Conclusion

Words have been essential to the creation of sovereign states since at least, referring to the history of the Western world, the seventh century B.C.E; and for most of the intervening twenty-seven centuries, the belief in a single deity has set the parameters for what the Constitutions of the various Western states in our common history were based

⁵⁰ Zimmer, Heinrich, as in Joseph Campbell, *The Power of Myth*, ed. Betty S. Flowers (New York: Doubleday, 1988), 49.

on. It is only in the last five centuries, perhaps, that Religion began to lose its *sin qua non* status in the organization and delivery of social services and justice in the Western experience. If historical context means *everything*, then historical context *is* everything when it comes to interpreting historical events. Like historian John Lukacs noted: "...the history of everything amounts to the thing itself."⁵¹ Constantine and other emperors of Rome made laws they believed would encourage the stabilizing of their societies; we make laws for the same reason. We use the same means, legislation, but we justify it not on the pleasure of the gods, but on principles we believe in just as strongly. But these principles are in flux, and just as religion was jettisoned as a justification, so some of our ideas about justice have had to change.

Words are arranged to reflect ideas, and as noted above, these ideas can alter the course of history, and we do well to note that our recent *Western* history has shown how monstrously such arrangements of words into ideas have been employed in society and yet bereft of any moral imperative. Howard Zinn wrote:

The idea, which entered Western consciousness several centuries ago, that black people are less than human, made possible the Atlantic slave trade, during which perhaps 40 million people died. Beliefs about racial inferiority, whether applied to blacks or Jews or Arabs or Orientals, have led to mass murder.

The idea, presented by political leaders and accepted by the American public in 1964, that communism in Vietnam was a threat to our "national security" led to policies that cost a million lives, including those of 55,000 young Americans.

The belief, fostered in the Soviet Union, that "socialism" required a ruthless policy of farm collectivization, as well as the control of dissent, brought about the deaths of countless peasants and large numbers of political prisoners.

Other ideas – leave the poor on their own ("laissez-faire") and help the rich ("economic growth") – have led the U.S. government for most of its history to

⁵¹ John Lukacs, *Historical Consciousness: The Remembered Past* (New Brunswick (U.S.A.): Transaction Publishers, 1968; 1985;1994; 2003), ix.

subsidize corporations while neglecting the poor, thus permitting terrible living and working conditions and incalculable suffering and death. In the years of the Reagan presidency, “laissez-faire” meant budget cutting for family care, which led to high rates of infant mortality in city ghettos.

We can reasonably conclude that how we *think* is not just mildly interesting, not just a subject for intellectual debate, but a matter of life and death.⁵²

For Constantine, the thwarting of sectarian groups of Christians such as the Donatists was an example of how a mere idea about a religion, about which no one had any evidence other than the fact that the belief was widespread and adopted by the state, resulted in people being killed. Today, one might argue, we are aghast at these past ideas and their horrific outcomes, and yet we still live in a world where mere words, whether religious or political in nature, lead to tragic events. We as human beings have not outgrown our addiction to flawed ideas and beliefs, but the hope is that the continuing outgrowth of ideas that began with the enlightenment will continue to transform the written legal instruments we have created with the aim of protecting human rights and promoting peace. It is acknowledged that it is with no small difficulty that societies who promote the latter are forced to deal with societies who cling to the former.

⁵² Howard Zinn, *Declarations of Independence: Cross Examining American Ideology* (New York: Harper Collins, 1990), 1-2.