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True Lies: Canossa as Myth

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"Myth redeems history."

— Northrop Frye (1981)**

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I. ROMANCE

The story of Canossa—or, at least, *one* story of Canossa—is well-known. Professor Horwitz succinctly relates that in 1076 Pope Gregory VII sought to revoke the traditional royal prerogative of "lay investiture," whereby candidates for high priestly office were installed by the feudal ruler of the jurisdiction rather than the Pope. When Henry IV of Saxony angrily rejected this effort in a dispute over the next Bishop of Milan, Gregory promptly excommunicated him, dissolving the oaths of fealty

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** NORTHROP FRYE, THE GREAT CODE: THE BIBLE AS LITERATURE 72 (2007) (1981).

owed Henry by his vassals and effectively dethroning him as feudal overlord. Henry then took a long and dangerous journey in the dead of winter to Canossa, a village in what is now Italian Emilia-Romagna, where he knelt barefoot in the snow outside Gregory's castle, humbly begging absolution, which Gregory granted on the third day.[1]

I will call this the "authorized version" of what has come to be known as, simply, "Canossa." It was a Middle-Age feudal dust-up seemingly indistinguishable from hundreds of others, save for the unforgettable image of the future Holy Roman Emperor kneeling barefoot in the snow. The incident, however, has been showcased as a crucial moment in Western history, perhaps most effectively by the estimable Professor Berman in his path-breaking *Law and Revolution* (1983).[2] Berman argued that Canossa entrenched in the Western church/state tradition the powerful idea that the Church governs a realm separate from and beyond the reach of the State.[3] Contemporary scholars routinely cite "Canossa" as the first and decisive blow for limited government against totalitarian rule, in the form of *libertas ecclesiae*, or "freedom of the Church."[4]

Is this story "true"? Professor Horwitz suggests that it is not untrue, though it leaves a lot out.[5] To his credit as an institutionalist,[6] Horwitz finds the literal history of Canossa more complex and contradictory than the authorized version suggests, perhaps too complicated and remote from even the U.S. founding to justify the "romantic" use to which Berman and others have put it.[7] At best, he suggests, Canossa must be

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1. Paul Horwitz, *Freedom of the Church Without Romance*, 50 J. CONTEMP. LEGAL ISSUES 59, 62, 70–77 (2013); *see also* Thomas Oestereich, "Pope St. Gregory VII," *in* 6 THE CATHOLIC ENCYCLOPEDIA (1909), http://www.newadevent.org/cathen/06791c.htm.

2. HAROLD BERMAN: LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

3. BERMAN, *supra* note 2, at 2, 269.

4. *See, e.g.*, GEORGE WEIGEL, THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD 101 (2005) ("Thanks to . . . the resolution of the investiture controversy in favor of the Church, the state . . . would not occupy every inch of social space. [] The Western ideal—a limited state in a free society—was made possible in no small part by the investiture crisis."); Richard Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THGT. 1, 2 (2007) ("What was at stake at Canossa . . . was the 'principle that royal jurisdiction was not unlimited . . . and that it was not for the secular authority alone to decide where its boundaries should be fixed'") (quoting BERMAN, *supra* note 2, at 269).

5. *See* Horwitz, *supra* note 1, at 62.

6. *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2012); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009).

7. Horwitz, *supra* note 1, at 62, 64, 87–89.

translated and adapted to a much-chastened and devolved understanding of the freedom of the Church.[8]

I agree, and would go further. As a matter of literal history, it is simply not accurate to portray Canossa as Gregory's heroic effort to rescue the Church's spiritual independence from the totalitarian clutches of secular rulers. Horowitz himself convincingly portrays Henry and Gregory as only two players in a raging 11th-century conflict among power-hungry feudal overlords, all of whom legitimately wielded spiritual and political power under the laws and customs of their time.[9] A clear-eyed realist picture of the investiture controversy could depict, on the one hand, a collection of unstable premodern proto-states constituted by complex oaths of personal loyalty to an feudal overlord who claimed sovereignty over spiritual as well as temporal matters in his realm, and was perpetually at war within and without with anyone—including the Church—who might challenge that sovereignty.[10] And the same picture would show, on the other hand, the leader of this very Church as the absolute monarch of central Italy, freely exercising temporal as well as spiritual power in the Papal States and beyond, interceding directly in the governing of other feudal kingdoms—even claiming the power to remove kings and emperors—and enforcing these intercessions with excommunication and violent force (whenever it could retain mercenaries or obtain allies).[11]

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8. Horwitz, *supra* note 1, at 127–28.

9. Horwitz, *supra* note 1, Part I-B. No meaningful distinction between "religious" and "secular" existed during the Middle Ages and the medieval and early modern periods; typically, the Church and the State each exercised power in both realms. *See, e.g.*, RÉMY BRAGUE, THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA 136 (G. Cochran trans. 2007); Richard Schragger & Micah Schwartzmann, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 928 (2013). Moreover, as Horwitz makes clear, Gregory did not want to free himself of Henry so much as he wanted to take his place. Horwitz, *supra* note 1, at 73 ("Only the most vague or delicate description could ignore the fact that the Gregorian reform and the Investiture Controversy were not about 'two swords' wielded by two distinct powers, each with distinct jurisdictions, but about two swords ultimately wielded by *one* man.").

10. *See generally* COLUMBIA HISTORY OF THE WORLD 370–80 (John A. Garraty & Peter Gay eds., 1972).

11. *See generally* BERMAN, *supra* note 2, at 87, 94–98; BRAGUE, *supra* note 9, at 136; HARRY HEARDER, ITALY: A SHORT HISTORY 43–59 (Jonanthan Morris rev. & updated ed. 2001); Schragger & Schwartzman, *supra* note 9, at 935.

Though formally absolute, the temporal power of the Papacy over the States was often compromised by that of the Holy Roman Emperor and other feudal rulers who periodically invaded or occupied parts of Italy, as well as the local nobility and a generally endemic corruption. *See* LUIGI BARZINI, THE ITALIANS 162, 302–05 (1977);

II. HISTORY

It is not obvious, shall we say, why the politically alien and historically remote events at Canossa should mark the birth of the "freedom of the Church" or tell us anything else about the proper relation of church and state in the United States. Why retreat nearly a thousand years to place the freedom of the Church in a feudal event that predated the modern state, capitalism, liberal democracy, the separation of church and state, freedom of worship, religious pluralism, and so much else that characterizes contemporary Western society? If we're looking for the idea of religious sovereignty suggested by "freedom of the Church," we have plenty of constitutional history closer to home: powerful conceptions of state sovereignty at the founding, dual sovereignty during the 19th and early 20th centuries, state "dignity" in the contemporary era, and the status of Native American tribes as "domestic dependent nations." I group these below into "strong-sovereign" and "weak-sovereign" analogies to freedom of the Church.

A. Strong-Sovereign Analogies

In the wake of the Constitution's ratification, at least some prominent Americans understood the states to be truly sovereign—that is, to have held an internal governing power strong enough to defeat claims of even the new federal government. "[T]he several states composing the United States of America, are not united on the principle of unlimited submission to their general government," declared Thomas Jefferson in 1798 Kentucky Resolutions, meaning that "whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force."[12] Jefferson concluded that, as in any bilateral relation of equals, each of the federal government and the states had "the right to judge for itself" not just "infractions," but even "the mode of redress."[13] James Madison agreed, and seemed to go further in the parallel Virginia Resolutions:

> [T]he powers of the Federal Government as resulting from the compact [are] no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of

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BERMAN, *supra* note 2, at 90–91. Papal power was real enough, however, to impose the Inquisition in the Papal States and much of the rest of Italy, even if its Italian version was somewhat less brutal than Spain's. *See* BARZINI, *supra*, at 314.

12. Thomas Jefferson, Resolutions Adopted by the Kentucky General Assembly, Res. I (Nov. 10, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON: 1 JANUARY TO 31 JANUARY 1799, at 550 (2003).

13. *Id.*

> the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.[14]

Similarly, one interpretation of John Calhoun's nullification theory—which maintained the power of individual states to refuse to enforce laws which they believed were unconstitutional—argues that he was merely invoking a version of the customary Anglo-American "right of resistance" against tyrannical government, by which the colonists had justified the Revolution and which Jefferson and Madison invoked in the Virginia and Kentucky Resolutions.[15]

One might conceptualize the "freedom of the Church," then, as the power of an independent sovereign, like the Vatican today.[16]

A comparably powerful conception of sovereignty was at work in so-called "dual sovereignty," a 19th-century attempt to regularize federal-state relations by characterizing an activity as "naturally" or "inherently" within the jurisdiction of the federal government or of the states, but never both.[17] Its most important assumption was the exclusivity of the separate areas of federal and state power—that is, "if a power is committed to one sovereign, it cannot be exercised by the other sovereign."[18] This

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14. James Madison, Resolutions Passed by the Virginia General Assembly, Res. III (1798), *in* IV WRITINGS OF JAMES MADISON 326 (Gaillard Hunt ed., 1906). *See generally* U.S. Declaration of Independence (July 4, 1776).

15. *See, e.g.*, Gaillard Hunt, *South Carolina During the Nullification Struggle*, 6 AM. POL. SCI. Q. 232 (1891); Pauline Maier, *The Road Not Taken: Nullification, John C. Calhoun, and the Revolutionary Tradition in South Carolina*, 82 S. CAR. HIST. MAG. 1 (1981).

16. A crucial part of the Lateran Pacts of 1929, which closed the rift with the Church that had dogged the newly unified Kingdom of Italy since its annexation of the Papal States and Rome in the mid-19th century, was Italy's recognition of the Church as a true sovereign state, thereby preserving its temporal power (even if geographically restricted to the tiny enclave of Vatican City). *See* R.J.B. BOSWORTH, MUSSOLINI 236–39 (2002); HEARDER, *supra* note 11, at 230.

17. *See, e.g.*, Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 4 DUKE L.J. 569, 584 (1987) ("In the 'dual federalism' model of American constitutional government, the state and federal governments each exercise their own exclusive area of jurisdiction."); Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, NOMOS LIV, at 2 (2012), *available at* http://ssrn.com/abstract=2156351 ("Dual federalism" was the "attempt to define separate and exclusive spheres for national and state action.").

18. Redish & Nugent, *supra* note 15, at 584.

was the reigning theory—or, at least, the reigning aspiration—of federalism from the early 19th century until the New Deal.[19]

A dual-sovereignty conception of the freedom of the Church, then, would imagine the State and the Church to exercise sovereign power in mutually exclusive spheres, though these would be defined by the Supreme Court and thus lack the strong independent-nation overtones of the sovereign-state model implicit in nullification and the Virginia and Kentucky Resolutions.

Strong-sovereign analogies in American constitutional history are close to what advocates of freedom of the Church seem to want. Professor Horwitz, for example, has elsewhere written, "The state can no more intervene in the sovereign affairs of the church than it can in the sovereign affairs of Mexico or Canada."[20] State sovereignty and dual sovereignty, however, may not be well-suited to guide a contemporary conception of freedom of the Church. The idea that the states possessed sovereign power that was functionally independent of and co-equal to the federal government was decisively crippled by the Civil War, and dual sovereignty collapsed under the combined weight of its dubious metaphysical assumptions and the national economic emergency of the Great Depression.[21]

B. Weak-Sovereign Analogies

One could instead look to contemporary federalism doctrines as inspiration for freedom of the Church. For all its pro-state rhetoric, however, there's not much there to inspire. Contemporary federalism treats state sovereignty as a vestigial remnant of more powerful days gone by, like the United Kingdom treats the Queen. States are entitled to a certain courtesy and respect for their formal status as sovereigns. So, the thinking goes, it is undignified to require an unconsenting state to answer a suit for damages even in its own courts, let alone those of

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19. *See* Young, *supra* note 17, at 10; *e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat) 316, 423 (1824):

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

Id.

20. Paul Horwitz, *Act III of the Ministerial Exemption*, 106 NW. U.L. REV. 973, 980 (2012).

21. Young, *supra* note 17, at 26–27.

another sovereign like the federal government—as if, like the Queen, the state were properly exempt from that sort of vulgar embarrassment.[22] Likewise, the so-called "anti-commandeering" cases save the states from the indignity of looking like federal errand boys (or girls), holding that the federal government simply lacks the power to order states to exercise their sovereign legislative and executive powers in support of federal interests.[23]

But for all that, a state can still be put under a federal-court injunction to stop violating the Constitution even if it can't be sued for damages, under the transparent fiction that state officials who commit unconstitutional acts in the name of the state are not state agents.[24] And the anti-commandeering cases find it perfectly acceptable for the federal government to "bribe" the states to do its bidding with federal funds or, indeed, to shoulder the states aside entirely and impress its federal will directly.[25]

What these decisions suggest is that state sovereignty is largely a matter of etiquette. Etiquette requires certain forms, including at times a willful ignorance of what everyone already knows is really happening in a particular situation, to preserve the dignity of all concerned. One must treat the states with a certain politeness, like one treats the Queen, never saying aloud what everyone knows: The "sovereignty" that states possess is these days a mere remnant of what they wielded at the founding or even in the early 20th century, that the states ceased to be genuine "co-equals" with the federal government long ago.

Under this conceptualization, the freedom of the Church is more apparent than real, a courtesy that the State extends to the Church. The Church may develop its own theology and pick its own leaders, but the State retains the power to intervene in church matters on the basis of

22. Federal Maritime Comm'n v. South Carolina St. Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."). This "state-dignity" rational was disavowed by *Seminole Tribe v. Florida*, 517 U.S. 44, 96–97 (1996), but promptly resurfaced in *Alden v. Maine*, 527 U.S. 706, 748–49 (1999).

23. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

24. Ex parte Young, 209 U.S. 123 (1908). Justice Harlan dissented precisely because the majority's holding affronted state dignity. *Id.* at 204 (Harlan, J., dissenting).

25. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

"neutral principles of secular law,"[26] and church autonomy remains (literally) an "exception" rather than a rule.[27] In reality, the Church does not even enjoy significant autonomy, let alone sovereignty.

Finally, the freedom of the Church might be analogized to the sovereignty of Native American tribes. In the United States, Indian tribes are "domestic dependent nations," a phrase coined by Chief Justice Marshall to describe the status of those subject to the jurisdiction and control of the United States, but excluded from "We, the People."[28] Tribes wield only such sovereignty as is permitted them by the United States under its right of conquest. Thus, "American case law has limited tribal governmental authority to domestic and internal matters"[29]—much as it has church autonomy. Religious organizations are not in the "state of pupilage" to the State or the relation of "ward to his guardian" that Chief Justice Marshall described as the relation of Indian tribes to the federal government,[30] but in meaningful respects they do "look to our government for protection; rely upon its kindness and its power," and "appeal to it for relief to their wants."[31]

The freedom of the Church, then, might be like the limited sovereignty of Indian tribes, allowing churches a measure of "internal" or "domestic" independence, subject at all times to the plenary and superior supervision of the United States.[32]

* * *

All of these analogies are imprecise, over- and understating differences from and similarities to the freedom of the Church. All of them fall short, perhaps well short, of capturing the contemporary relationship of

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26. Jones v. Wolf, 443 U.S. 595 (1979); *cf.* Employment Div. v. Smith (1990) (believers are not entitled to exemption from religiously neutral laws of general applicability).

27. Hosanna-Tabor Church & School v. EEOC, 130 S. Ct. (2012) (upholding the "ministerial exception" to employment anti-discrimination laws). I have argued elsewhere that *Hosanna-Tabor* overreached in a way that is likely to end in its narrow construction and application. *See* Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405, 421–33 (2013).

28. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (plurality opinion).

29. Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 ORE. L. REV. 1109, 1110 (2004).

30. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

31. *Id.*

32. *Cf.* U.S. CONST. art. I, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made in pursuance thereof; shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding.").

Church and State, descriptively or normatively. But whatever their problems, they are each more historically salient to that relationship than the particulars of a conflict fought to a draw nearly a thousand years ago between two feudal rulers with mutual absolutist intentions.

III. MYTH

So, is Canossa "not true"? As one symposium participant indignantly protested, "But Canossa really happened!" Well, *something* happened at Conossa, but, as Professor Horwitz demonstrates, it seems not to have been the birth of a freedom of the Church from State control. The authorized version is a myth.

Like the protesting symposium participant, freedom-of-the-Church advocates may resist the suggestion that the authorized version is mythical rather than historical. After all, standard definitions of "myth" include a "widespread but erroneous story or belief," a "misconception," and (worst of all) "a misrepresentation of the truth."[33] Contemporary thinking understands the mythical as the opposite of the "real"—opposed to history, reason, and science.[34] Calling the authorized version a "myth" seems the same as saying that it never even happened.[35]

The error in this thinking is its assumption that the authorized version cannot function as the foundation for freedom of the Church unless it "really happened" in some literal-historical sense. This reflects the way in which modern consciousness has replaced myth with history: For the ancients, myth provided social meaning, whereas today that function is served by history.[36] But the literal-historical truth of myth is beside the point; as Professor Cover brilliantly demonstrated, the myths, stories, and narratives that a society tells about itself constitute their "normative

33. *See myth,* OED ONLINE (2d ed. 1989; vis. May 22, 2013).

34. *See* JUNG ON MYTHOLOGY 90–91 (Robert A. Segal ed., Princeton 1998) ("If you are honest, you will doubt the truth of the myth because our present-day consciousness has no means of understanding it. History and scientific criteria do not lend themselves to a recognition of mythological truth."); CLAUDE LÈVI-STRAUSS, MYTH AND MEANING 40 (Schoken, 1979) (noting "the simple opposition between mythology and history which we are accustomed to make").

35. NORTHROP FRYE, THE GREAT CODE: THE BIBLE AS LITERATURE 53 (Penguin 2007) (1981) ("In our culture [there is] a difference between the words 'history' and 'story.' The word 'myth' . . . has tended to become attached only to the latter, and hence to mean, 'not really true.'").

36. LÈVI-STRAUSS, *supra* note 34, at 38–43.

universe," their moral order.[37] These remind a society of what it holds dear, the moral commitments upon which it is built—a function that does not depend on the literal-historical truth of the stories it tells.[38] The account of an event, in other words, can capture or signify or personify truth without being literally true.

Stories in the Hebrew Bible, for example, work better as myths than as history. As Professor Frye observed, "the Bible will only confuse and exasperate a historian who tries to treat it as a history."[39] Who wants to believe in a God who tested a father's faith by commanding him to slit his son's throat and stand by while the life ran out of him?[40] (And who wants to honor the father prepared to do it?[41]) Who wants to believe in a God who delivers a man into the hands of evil, killing his entire family and leaving him destitute,[42] on a bet?[43] But there is a truth embedded in

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37. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); *accord* FRYE, *supra* note 35, at 5 ("Biblical imagery and narrative . . . set up an imaginative framework—a mythological universe . . . within which Western literature operated down to the 18th century.").

38. *See* TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 104 (Minnesota, 1983) (Myths "are devices to think with, ways of classifying and organizing reality, and this, rather than the recounting of any particular tale, is their point."); FRYE, *supra* note 35, at 54.

> Certain stories seem to have a peculiar significance: they are the stories that tell a society what is important for it to know, whether about its gods, its history, its laws, or its class structures. These stories may be called myths in a secondary sense, a sense that distinguishes them from folktales. [] In Western Europe, the Bible stories had a central mythological significance of this kind until at least the 18th century. Mythical, in this secondary sense, therefore, means the opposite of "not really true.": it means being charged with a specific seriousness and importance. Sacred stories illustrate a specific social concern.

Id.

39. FRYE, *supra* note 35, at 64.

40. *Genesis* 22: 1-2, 9 (New Revised Standard).

> After these things God tested Abraham. [] He said, "Take your son, your only son Isaac, whom you love, and go to the land of Moriah, and offer him there as a burnt offering on one of the mountains that I shall show you.
>
> . . .
>
> When they came to the place that God had shown him, Abraham built an altar there and laid the wood in order. He bound his son Isaac, and laid him on the altar, on top of the wood. Then Abraham reached out his hand and took the knife to kill his son.

Id.

41. *See* Søren Kierkegaard, *Fear and Trembling* (1843), *in* FEAR AND TREMBLING; REPETITION 1 (Howard V. Hong & Edna H. Hong eds. & trans., Princeton 1983).

42. *Job* 1:8–12 (New Revised Standard).

> The Lord said to Satan, "have you considered my servant Job? There is no one like him on the earth, a blameless and upright man who fears God and turns away from evil." Then Satan answered the Lord, "Does Job fear God for nothing? Have you not put a fence around him and his house and all that he

these narratives for the believer willing to read them mythically rather than literally: God loves and blesses those who obey and follow him, even (or especially) in the face of unspeakable hardship and pain.[44]

A more prosaic example is Magna Carta, long revered in the Anglo-American legal tradition as the font of foundational principles like the "due process of law" and the "rule of law." As literal history, it's hard to see what Magna Carta has to do with any contemporary Western legal principle; like Canossa, it's just another feudal dust-up. A bunch of Norman nobles threatened to depose King John unless he honored his feudal obligations. In the face of the barons' superior armies assembled at Runnymede, John bowed to reality and signed an oath to do so—which he promptly repudiated.[45]

Nevertheless, within two centuries Magna Carta came to be viewed as the remnant of an imagined "ancient Saxon constitution" ruptured by the Norman invasion.[46] Edward Coke appropriated and reimagined Magna Carta as a common-law restraint on the excesses of the Stuart kings.[47] The American colonists, in their turn, appropriated and reimagined Coke's version as a "constitutional" restraint on the British Parliament.[48] By the time it entered the U.S. Constitution as a guarantee against government deprivation of "life, liberty, or property without due process of law,"[49] the "myth of Magna Carta" as common-law guardian of personal liberty and rule of law bore little resemblance to its literal-historical origins at Runnymede—yet, who can deny its continuing and powerful hold on Anglo-American legal culture?

> has, on every side? You have blessed the work of his hands, and his possessions have increased in the land. But starch out your hand now, and touch all that he has, and he will curse you to your face." The Lord said to Satan, "Very well, all that he has is in your power . . . .

Id.

43. Professor Frye suggested that the story of Job is "a kind of wager" between God and the devil which renders the "happy ending" ethically problematic. FRYE, *supra* note 35, at 235, 238.

44. *See Genesis* 22:15–18; *Job* 5 (New Revised Standard).

45. *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596–97 (2009).

46. *Id.* at 598.

47. *Id.* at 598–608.

48. *Id.* at 614–22.

49. *See* U.S. CONST., Amend. V.

Canossa might function in the same way. The authorized version is a dubious historical retelling of how Gregory wrested the Papacy's rightful control of the Church from a usurping Henry, thus drawing a limit on State power and setting up the Church as guardian of personal liberty against totalitarian State excess. Though threats to personal liberty from freedom of the Church are well recognized, so are the threats that would materialize without the Church's freedom. The myth of Canossa, though literally false, may yet be true.