Sources of Sovereignty: Roman *Imperium* and *Dominium* in Civilian Theories of Sovereignty

di *Daniel Lee*

When the French legist, Jean Bodin, formulated his classic definition of "sovereignty" in the *Six Livres de la République* (1576) as "the absolute and perpetual power of the state" [*la puissance absolue & perpetuelle d'une Republique*], he knew that he was stepping upon a linguistic *terra incognita*[1]. *Souveraineté* was a new term Bodin was consciously introducing into the lexicon of modern political and legal thought; it was a term which, as he asserted, "no jurist or political philosopher has defined"[2]. In Bodin's mind, the concept of sovereignty was intended to function as a generic concept, a linguistic placeholder, to signify the supreme power of any well-ordered state [*république*]. By any measure, it marked a watershed moment in the history of political and legal thought[3].

Yet, when one inspects the construction of Bodin's classic definition of sovereignty more closely, it is less clear what was especially original in Bodin's analysis. While the term, "sovereignty", did not indicate any obvious cognate in the classical literature, Bodin acknowledged that the content of the idea of "absolute and perpetual power" was already present in classical political thought. Indeed, he even suggested several equivalents in other languages – *akra exousia, kurion arche*, and *kurion politeuma* in Greek, *tomech shévet* in Hebrew, *segnioria* in Italian – to model the function of sovereignty in other linguistic contexts[4]. Even more striking were the Latin equivalents that he used to translate sovereignty – variously, *maiestas*, as well as *imperium* and *dominium* in his Latin translation of the text, *De Republica* (1586) and his earlier work, the *Methodus* (1566)[5]. But probably the most revealing aspect of Bodin's analysis was his careful choice of words deployed in his Latin rendering of his canonical definition: *MAIESTAS est summa in cives ac subditos legibusque soluta potestas*[6]. What is stunning in

D. Lee, University of Toronto: daniellee.lee@utoronto.ca

1. Jean Bodin, *Six Livres de la République*, Paris 1576, 125.

2. Jean Bodin, *On Sovereignty*, ed. Julian Franklin, Cambridge University Press, Cambridge 1992, 1.

3. Julian Franklin, *Jean Bodin and the Rise of Absolutist Theory*, Cambridge University Press, Cambridge 1973.

4. Bodin, *On Sovereignty*, 1.

5. Jean Bodin, *De Republica Libri VI* (originally published 1586); Jean Bodin, *Methodus ad Facilem Historiarum Cognitionem* (originally published 1566).

6. Bodin, *De Republica*, Frankfurt 1591, 123.

Bodin's Latin is the description of sovereignty as a "supreme power" [*summa potestas*] that is "loosened from the laws" [*legibus soluta*] and a "greater power to command" [*maius imperium*], a formulation which very clearly followed the juridical language of the *Digest* of classical Roman law in describing the supposedly extra-legal powers of a *princeps*[7].

Given how derivative his analysis was on classical legal thought, the supposed originality of Bodin's concept seems less impressive, as recent historians have suggested[8]. As David Johnston once put it, "The question arises how far in his own work Bodin did break free [from Roman law]. Not far, it seems"[9]. But, to be sure, it was not just Bodin who framed the concept of sovereignty in the juridical terms of Roman law. Like Bodin, the Dutch jurist, Hugo Grotius, similarly borrowed from classical law in his treatment of sovereignty, which he variously labeled *actus summae potestatis* and *summum imperium*[10]. Even Thomas Hobbes, who did not have any formal legal training in the civil law, drew upon the classical legal authorities in the analysis of sovereignty[11]. In *De Cive* (1642), Hobbes suggested no fewer than three Romanist candidates – *summa potestas, summum imperium,* and *dominium* – to express the idea of sovereignty as the supreme power of the state[12]. And, in chapter XXVI of *Leviathan* (1651), he directly quoted the famous Roman *lex regia* to suggest that the English sovereign, like a Roman *princeps*, can make legally valid proclamations and decrees because "the whole power of the people was in him" [*qui Summam habuere in Civitate Romana Potestatem*][13].

As one can observe, then, early modern political theorists such as Bodin, Grotius, and Hobbes did not hesitate to borrow juridical terms and doctrines freely from the Latin lexicon of the Roman law. Indeed, sovereignty could be translated through a diversity of terms, such as *imperium, dominium, maiestas, auctoritas, summa potestas*, as well as neologisms such as *supremitas*, such as in Alberico Gentili's *Regales Disputationes*[14].

But there remains, nevertheless, an important puzzle surrounding this thesis: Why were there so many different terms of classical Roman law used to translate what appeared to be a quite uniform and foundational concept of public law? As I

7. *Dig*. 1.31.1 (Ulpian): *Princeps legibus solutus est.*

8. Kenneth Pennington, *The Prince and the Law*, University of California Press, Berkeley 1993.

9. David Johnston, *The General Influence of Roman Institutions of State and Public Law*, in David Carey Miller, Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Qincentenary Essays*, Duncker & Humblot, Berlin 1997, 99.

10. Hugo Grotius, *Commentarius in Theses XI*, Thesis 4, in Peter Borschberg, *Hugo Grotius "Commentarius in Theses XI": An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, Peter Lang, New York 1994; Hugo Grotius, *De Jure Belli ac Pacis*, Paris 1625.

11. Daniel Lee, *Hobbes and the Civil Law*, in *Hobbes and the Law*, ed. David Dyzenhaus and Thomas Poole, Cambridge University Press, Cambridge (forthcoming).

12. Thomas Hobbes, *Elementa Philosophica de Cive*, Amsterdam 1647, 88 [V.11].

13. Thomas Hobbes, *Leviathan*, ed. Richard Tuck, Cambridge University Press, Cambridge 1996, 196; Thomas Hobbes, *Leviathan, sive de Materia, Forma, et Potestate Civitatis Ecclesiasticae et Civilis* [Latin *Leviathan*], Amsterdam 1670, 135. Cp. *De Cive* VII, 15: *Populus… potest ei summum imperium tradere*. Cp. *Dig*. 1.4.1 and *Inst*. 1.2.6.

14. Alberico Gentili, *Regales Disputationes Tres*, London 1605, 9-10.

suggest in this paper, this remarkable lack of linguistic consistency was no accident, but rather, highlights a broader problem in the legal historiography and construction of the concept of sovereignty in the later Middle Ages and the Renaissance, during the Reception – what Sir Paul Vinogradoff once called "the Second Life", of Roman Law[15]. Although the concept of legal sovereignty was crafted by jurists who studied and applied Roman law, the variety of arguments deployed in defense of sovereignty emerged from a turbulent history punctuated by deep interpretive disagreements concerning the validity and scope of Roman law in a post-Roman world. Such disagreements framed the strategic choices jurists made in applying and assimilating Roman law to their local conditions. While some jurists found it appropriate to ground their theories of public authority on the Roman notions of *imperium*, still others opted to craft theories from proprietary concepts of *dominium*[16]. In these and other ways, then, post-Classical lawyers treated the ancient *Corpus Iuris Civilis* as a kind of 'legal supermarket' of ideas, which opened multiple pathways for jurists to engineer modern notions of authority and statehood[17].

It is, thus, not quite correct to say that there was one uniform theory of sovereignty emerging from the Roman legal tradition[18]. Instead, the civilians generated a variety of theories, each drawing upon a different rubric or area of the *Corpus Iuris* to model the idea of sovereignty. To illustrate this diversity, I shall investigate two separate Romanist sources for the modern idea of sovereignty, *imperium* and *dominium*, and illustrate different historical pathways in the Middle Ages and the Renaissance by which Romanist ideas established the framework for modern political ideas. But we need to answer a more preliminary question first: Why did medieval and early modern theorists use Roman law at all?

Why Roman Law?

The fundamental problem to address first is why post-Classical theorists should have felt it necessary to make an appeal to the authority of Roman law for the purpose of constructing a theory of sovereignty. First of all, it is not at all clear that the Roman law had a distinctive notion of sovereignty that could serve as a practicable model for post-Classical students of Roman Antiquity. Indeed, according to the classical analyses of Polybius and Cicero, the Republican constitution was a blended or 'mixed' form that dispersed the exercise of power across the senior magistrates, senators, and the popular assemblies, an institutional arrangement hardly hospitable to the centralization of political power[19]. It is,

15. Sir Paul Vinogradoff, *Roman Law in Medieval Europe*, Clarendon Press, Oxford 1929.

16. Ben Holland, *Sovereignty as* Dominium*? Reconstructing the Constructivist Roman Law Thesis*, in "International Studies Quarterly", 54 (2010), 449-480.

17. Peter Stein, *Roman Law in European History*, Cambridge University Press, Cambridge 1999, 2.

18. It is a thesis which can be attributed to Gierke and Maitland.

19. Indeed, both Bodin and Hobbes strictly denied that the mixed constitution was a viable form of state. Rejecting the doctrine of the mixed constitution, early modern theorists of sovereignty instead classified Rome as a pure democracy, with the full rights of sovereignty in

of course, true that the Romans had a distinctive concept of *imperium* that was central to organizing functions and offices of government, especially in the high magistrates and pro-magistrates of the Roman Republic, the Consulship and the Praetorship[20]. But because these theories of *imperium* were too specific to the historical experience of Rome, it would be difficult – as Paul Koschaker once suggested – to universalize Roman constitutional theory so that it might function as a generic concept of sovereignty for all states[21].

Even if Rome *did* have a clear and systematic notion of sovereignty – as Mommsen once argued[22] – it would not, in any case, have been accessible through the extant Justinianic sources of Roman law. This was because the *Corpus Iuris Civilis* – the sixth-century codebooks of Roman law recovered and studied by medieval and Renaissance jurists – had very little to say about matters of public law. Indeed, the Roman law which shaped later jurisprudence was almost entirely a system of private law – or "civil law" [*ius civile*] – concerning such matters as property rights, commercial transactions, enforcement of contractual obligations, and civil procedure. As Reinhard Zimmermann rightly observes, "in spite of the fact that the distinction between *jus privatum* and *jus publicum* can already be found in Ulpian's *Institutions* [at *Inst*. 1.1.3; cp. *Dig*. 1.1.1.2], European legal science constituted itself first and foremost as a private law legal science"[23]. This was, in turn, because "Roman jurists were most uninterested in public law. [Consequently] no extended discussions survive of constitutional checks and balances or means for keeping a magistrate or other authority within the proper bounds of his jurisdiction"[24].

Given these limitations, why would jurists have turned to a system of private law for the task of developing a central concept of public law? In part, they did this out of practical necessity. Roman law was the only major legal source available to medieval technicians of legal science and government. Given its unrivaled technical superiority, the Justinianic *Corpus* functioned as the uniform starting point for the 'Romanizing' of medieval political and legal thought[25]. But, more importantly,

the popular assemblies. See also Richard Tuck, *Hobbes and Democracy*, in *Rethinking the Foundations of Modern Political Thought*, ed. Annabel Brett, James Tully, Holly Hamilton-Bleakley, Cambridge University Press, Cambridge 2006, who traces the source of this interpretation in Nicolas de Grouchy, *De Comitiis Romanorum*.

20. Theodor Mommsen, *Römisches Staatsrecht*, Hirzel, Leipzig 1887.

21. Paul Koschaker, *Europa und das Römische Recht*, Beck, München 1966, 270.

22. Andrew Lintott, *The Constitution of the Roman Republic*, Clarendon Press, Oxford 1999, 18, citing Theodor Mommsen, *Römisches Staatsrecht* , 3 vols., Leipzig 1887-88, I: 6ff.; I: 24ff. Johnston, *General Influence*, 92. Even for Mommsen, the *imperium* had to be reconstructed through historical sources.

23. Reinhard Zimmermann, *Foreword*, to Franz Wieacker, *History of Private Law in Europe with Particular Reference to Germany*, trans. Tony Weir, Oxford University Press, Oxford 1995, XII. See also Fritz Schulz, *History of Roman Legal Science*, Clarendon Press, Oxford 1946, 81, 138. Ulpian writes at *Dig*. 1.1.1.2, "Public law is that which respects the establishment of the Roman commonwealth [*ad statum rei Romanae*]… [and] covers religious affairs, the priesthood, and offices of state".

24. Johnston, *General Influence*, 87.

25. On the Reception of Roman law, see Stein, *Roman Law in European History*; Koschaker,

unlike their Roman predecessors, the post-Classical jurists were much more willing to apply expansive and looser interpretive principles to the Roman texts, so that the *jus civile* functioned as a rich fund of principles with potential application in both private and public contexts. Private law ideas could thus be refashioned to fit and model questions of public importance[26]. This was the great achievement and legacy of the later medieval civilians such as Bartolus of Sassoferrato and Baldus de Ubaldis, who made Roman law relevant in a post-Roman world.

Of course, this did not mean that the Roman codebooks had nothing at all to say about matters of public or constitutional law; it only means that they said very little about it. The few noteworthy texts which did treat topics of public law were indeed among the most famous and most closely studied passages in all of the *Corpus*[27]. Yet, while these texts certainly concerned issues of central importance for public law in the Roman Empire, they hardly amounted to anything like a system of public or constitutional law[28]. This was, in part, due to the *prima facie* internal contradictions found within the Roman texts themselves, such as the well-known ideological tension between the absolutist principle of *Princeps legibus solutus* and the constitutionalist principle of the *Digna vox*, or the ambiguity in the *lex regia* concerning the popular grant of power conferred upon the *princeps*[29].

Instead, such texts functioned more like raw data, fixed starting points, from which jurists had to "fill in the blanks" and construct a workable system. Indeed, "it was from these same texts, used selectively rather than systematically, that medieval and later jurists constructed their own arguments about sovereignty and power"[30]. Such arguments, as we will now see, were Romanist in appearance, but quite original and distinctively post-Romanist in substance.

Imperium

One of the rare occasions where the Roman jurisconsults commented upon public law in the *Digest* involved the *imperium merum et mixtum*, what the early seventeenth-century French jurist, Charles Loyseau, once regarded to be "the most

Europa und das Römische Recht; Roderick Stintzing, *Geschichte der Deutschen Rechtswissenschaft*, 3 vols., R. Oldenbourg, Leipzig 1884; Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, Vandenhoeck and Ruprecht, Göttingen 1967. More generally, Manlio Bellomo, *Common Legal Past of Europe*, trans. Lydia Cochrane, Catholic University Press, Washington 1989; Walter Ullmann, *Law and Politics in the Middle Ages*, Cornell University Press, Ithaca 1975.

26. One example is the maxim, *Quod omnes tangit*, originally in *Cod.* 5.59.5.2 concerning litigation under the law of guardianship. See Gaines Post, *A Romano-Canonical Maxim,* Quod Omnes Tangit*, in Bracton and in Early Parliaments*, in *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322*, Princeton University Press, Princeton 1964.

27. *Dig.* 1.3.31; *Dig.* 1.4.1; *Dig.* 2.1.3; *Inst.* 1.2.6; *Cod.* 1.14.4; *Cod.* 1.14.12.3-5; *Nov.* 105.2.4.

28. Martin Loughlin, *Foundations of Public Law*, Oxford University Press, Oxford 2010.

29. Brian Tierney, *The Prince is not Bound by the Laws: Accursius and the Origins of the Modern State*, in "Comparative Studies in Society and History", 5 (1963); P. A. Brunt, *Lex de Imperio Vespasiani*, in "Journal of Roman Studies", 67 (1977).

30. Johnston, *General Influence*, 92.

difficult point of all the Roman law without exception"[31]. Despite appearing only three times in the *Digest* [*Dig*. 1.18.5; *Dig*. 1.21.1.1; Dig. 2.1.3], the Roman concept of *merum imperium* "supplied the basic vocabulary of debate about sovereignty" and generated a long tradition among medieval and Renaissance students of Roman law who conducted the analysis of sovereignty under the rubric, *De iurisdictione*, in the *Digestum Vetus*[32].

Imperium was, in general, a term fraught with interpretive difficulties. Perhaps the greatest difficulty, however, involved determining who had the right to hold *imperium*. In the classical Roman context, this was relatively easy to answer. During the Republic, the *imperium* belonged to the senior magistrates. During the Principate, it belonged to the *princeps*, as Ulpian writes of the *lex regia* [*Dig*. 1.4.1]. But who, if anybody, could be a *princeps* with *imperium* in the post-Roman world of the Middle Ages and Renaissance?

For the 'Glossators' – i.e., the medieval civilians of the universities who read and 'glossed' Justinian's texts – the question was of supreme importance because the *princeps* of Roman law was legally entitled to the rights and prerogatives associated with *imperium*, such as the right to punish for *crimen laesae majestatis* [*Dig*. 48.4.3], the right of capital jurisdiction [*ius gladii*], the right to hold a public *fiscus* [*Dig*. 49.14.1 et seq.; *Cod*. 10.1], and the right to be *legibus solutus*[33]. The Glossators suggested two possible answers[34]. On one strict interpretation of the civil law, the *princeps* was understood to be a direct reference to the Germanic 'Holy Roman Emperors', as the medieval successors to the Roman *principes*. The significance of this interpretation was that it effectively excluded anybody else from claiming *imperium* for themselves. Since only the Roman *princeps* can rightfully hold *imperium*, all others must somehow be in a juridically inferior position. Even the most powerful kings and independent city-states must juridically be subject to Imperial rule [*subjecta imperatori*], as the Orleanist Pierre Belleperche would declare[35].

The problem with this view, however, was that it demanded recognition for the fictive *de jure* supremacy of the Emperor while denying the *de facto* power

31. Charles Loyseau, *Les Oeuvres de Maistre Charles Loyseau*, Lyon 1701 [*Cinq Livres du Droit du Offices* Book I, Ch. VI, § 28].

32. Johnston, *General Influence*, 95. John Robertson records fifty-three occurrences of *imperium* in the *Digest*. John Robertson, *The Meaning of Imperium in the Last Century BC and the First AD*, in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, ed. by Benedict Kingsbury and Benjamin Straumann,Oxford University Press, Oxford 2010, 29.

33. Ernst Kantorowicz, *King's Two Bodies*, Princeton University Press, Princeton 1957, Ch. 7, esp. 324-5. Pennington, *Prince and the Law*, 105-106. See also Francesco Calasso, *I Glossatori e la Teoria della Sovranitá: Studio di Diritto Commune Pubblico*, Guiffrè, Milan 1957 (3rd ed.).

34. Walter Ullmann, *The Development of the Medieval Idea of Sovereignty*, in "English Historical Review", 64 (1949), 1-33.

35. Ullmann describes this as the "minority opinion" in France in *Medieval Idea of Sovereignty*, 7. Cp. Albericus de Rosate, *Commentaria Super Digesto*, 2 vols., Venice 1585, Folio 31r [on *Dig*. 1.3.31], cited in Pennington, *Prince and the Law*, 95: *Omnes reges de jure sunt subditi imperio.*

and juridical independence of other temporal rulers, such as the King of France. Jurists thus offered an alternative, looser interpretation of the *imperium*, which held that any independent ruler who recognized no superior *in temporalibus* could be said to be like a *princeps* with his own *imperium*. On this reading of the law, a king or a high noble could stake a claim to the legal rights classically attached to the *princeps* of Roman law – as jurists proclaimed, *rex in regno suo imperator est*. Indeed, as Ken Pennington observes, this became the standard view: "By the end of the fourteenth century, no academic jurist denied that a king had the same authority as the Emperor"[36]. So flexible was the emerging legal understanding of *princeps*, that even an independent city, a *civitas*, such as Florence could enjoy the jural status of *princeps* and hold *imperium suum*, as in Bartolus' famous doctrine that "the city is an Emperor unto itself" [*civitas sibi princeps*][37].

Given this potentially loose application of *imperium*, Imperial jurists recognized at an early stage that they needed a more precise argument from Roman law to defend the exclusive supremacy of the medieval Emperor over all other temporal rulers and lords. They found this in the Roman law concept of *merum imperium*[38]. It was the Emperor Henry VI who, in search of legal grounds to legitimate his claim to such overlordship, asked the chief *doctores iuris* of his Imperial court, the Glossators Azo and Lothair, "To whom does *merum imperium* belong" [*Cui competit merum imperium*]? Lothair, seeking to curry favor, offered a doctrine favorable to the Emperor's interests. *Merum imperium* belonged solely to the Emperor, while all other inferior authorities held *mixtum imperium*.

Azo, by contrast, acknowledged that the Emperor had *merum imperium*, but also stressed that it was not exclusive to the Emperor. In his influential reply, recorded in his commentary on the rubric, *De iurisdictione omnium iudicum* [*Cod.* 3.13] in his influential *Summa Super Codicem*, Azo argued that *merum imperium* belonged not only to the Emperor, but to anybody with "the right of the sword" [*ius gladii*], the authority to inflict coercive punishment. Of course, the Emperor certainly had the *jus gladii* and, therefore, on this line of reasoning, also had *merum imperium*. But because there were numerous other officials besides the Emperor with such coercive punitive power, like provincial governors [*praeses*] and even city magistrates with limited jurisdiction inferior to the Emperor, Azo concluded that Lothair's answer could not possibly be correct[39]. "It must be lawful", Azo tells us, "for *merum imperium* to be wielded by other high powers" besides the Emperor[40].

36. Pennington, *Prince and the Law*, 105.

37. Bartolus on *Dig.* 1.1.9; *Dig.* 4.4.3; *Dig.* 43.6.2; *Dig.* 48.1.7; *Dig.* 50.9.4. Skinner, *Foundations*, 1, 11-12. This loose application of Roman law, moreover, was not restricted to the title of *princeps*. Jurists found all sorts of legal equivalents. For example, the Italian *podestá* was thought to approximate the Roman *praeses*, while a medieval town or city was represented by the Roman *municipium*.

38. M. P. Gilmore, *Argument from Roman Law in Political Thought*, Harvard University Press, Cambridge 1941, Ch. 1.

39. *Dig.* 1.18.6.8.

40. Azo, *Summa Azonis, Locuples Iuris Civilis Thesaurus*, Venice 1566, 179, col. 1 [Azo, *Summa* on *Cod.* 3.13, § 17].

According to tradition, the Emperor favored Lothair's reply and awarded him with a horse, giving rise to the complaint that the better jurist (Azo) inequitably lost a horse [*equum*], even though he defended equity [*aequum*]. But despite Lothair's victory in the Emperor's court, it was actually Azo's dicta on the question of *merum imperium* which became the preferred view for generations of medieval civilians and established the foundations for the juridical analysis of public authority. Indeed, Azo's dicta on Roman *imperium*, which was later to be enshrined in Accursius' *Glossa Ordinaria* to the *Digestum Vetus*, would reach every student of the civil law in European jurisdictions recognizing the *ius commune* up until, and even through, the Renaissance[41]. And it was through Azo and Accursius that civilians would absorb the theory that Roman *imperium* was not exclusive to the *princeps*, but also belonged to other authorities such as provincial governors [*presides provinciarum*], high magistrates [*magistratus*], and other judges [*alii judices*][42].

It was, however, Bartolus who was chiefly responsible for raising the Glossators' analysis of *imperium* to the level of a grand theory of public authority[43]. He was only able to do so by introducing a critical novelty in the analysis of *merum imperium* in his *Commentaria* on the *Digestum Vetus* marking a "deep conceptual break" from both classical Roman law and the Glossators[44]. On Bartolus' analysis, there was not one uniform concept of *merum imperium*, but instead, six degrees or "grades" [*sex gradus*] of *mera imperia*, all coexisting with each other within a single legal order[45]. For example, the highest degree of *merum imperium* was the *maximum merum imperium*, which included the sovereign right to summon a great assembly. But *merum imperium* also included the *minus merum imperium* which was defined as "limited coercive power" [*modica coercitio*] belonging to all magistrates [*quae competit omnibus magistratibus*], as well as the *minimum merum imperium* which was defined as the simple power to impose monetary fines [*mulcta pecuniaria imponitur*] for minor infractions[46].

These varieties of *mera imperia* in the Bartolist system were all understood to be 'public powers', designated exclusively for promoting *utilitas publica*[47]. Bartolus distinguished them from 'private powers' of civil jurisdiction concerning *utilitas privata*. In his analysis of this latter category of 'private powers', Bartolus stressed the critical point that, while such authority could be exercised *directly*

41. James Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, University of Chicago Press, Chicago 2008.

42. Odofredus, *Lectura Super Digesto Veteri* on *Dig.* 2.1.3.

43. C. N. S. Woolf, *Bartolus of Sassoferrato*, Cambridge University Press, Cambridge 1913; J. P. Canning, *Political Thought of Baldus de Ubaldis*, Cambridge University Press, Cambridge 1987; Maiolo, *Medieval Sovereignty.*

44. Constantin Fasolt, *Limits of History*, University of Chicago Press, Chicago 2004, 183.

45. Bartolus of Sassoferrato, *Omnia Quae Extant Opera*, vol. 1, *In Primam Digesti Veteris Partem*, Venice, 1590, 1: fol. 45, c – i [Bartolus on *Dig.* 2.1.1, *Divisiones et declarationes iurisdictionum*].

46. Bartolus, *Opera Omnia* 1: fol. 45, h – i [Bartolus on *Dig.* 2.1.1].

47. Bartolus, *Opera Omnia* 1: fol. 45, c [Bartolus on *Dig.* 2.1.1].

by holders of public power as part of their *imperium*, those very same powers could also be exercised *indirectly* by concessive delegation to other agents, what he called 'hired' or 'mercenary' officials, exercising powers held only *alieno beneficio*[48]. Because such private powers of civil jurisdiction were delegable in this way, Bartolus assigned two terms to specify whether such powers were exercised directly or indirectly. Such a power was to be called *mixtum imperium* if the jurisdiction was exercised directly by the 'noble' officer who held public powers by right. But if civil jurisdiction was exercised indirectly by delegation to a 'mercenary' officer, such a power was to be called *iurisdictio simplex*, a term which Bartolus had invented without any classical antecedent[49].

The result of Bartolus' analysis was one fully consistent with Azo's doctrine. Bartolus accepted that *merum imperium* was not the exclusive property of the supreme princely ruler. Rather, different degrees of *merum imperium* belonged to the corresponding degree of 'noble judge' who held his public power by right. The Bartolist vision was of a political and social world constituted by overlapping and intersecting layers of public authority and private rights.

But in the sixteenth century, the legal attitude had fundamentally changed to the point that jurists began to question the reasoning behind the medieval doctrine on *imperium*. This was due to the rise of legal humanism especially in the universities of France where humanists such as Andrea Alciato, Jacques Cujas, and Hugo Donellus sought to recover a 'pristine' text of the Roman law, purged of interpolations, glosses, and commentaries they regarded to be medieval barbarisms[50]. While the humanists were initially criticized or simply ignored as mere 'grammarians' applying philological techniques to the study of Justinianic sources, their scholarship had profound consequences for the development of sovereignty. This was because, by rejecting the teachings of Azo and Bartolus, the humanists effectively revived Lothair's dicta that *merum imperium* belonged exclusively to the *princeps*[51].

So remarkable was the humanist shift in legal opinion that Bodin, commenting upon the history of the debate between Azo and Lothair, observed in Book III of the *République* that, "many since have [adopted] the opinion of Lothair, so that the question remaineth yet undecided"[52]. But in Bodin's view, the civilians misunderstood the real issue at the heart of the debate. As he put it, "the doctors have confounded all together" these concepts[53]. For Bodin, *merum imperium* did not belong either to the prince or to the officer or anybody else – it belonged rather to the impersonal state. And because it was a distinct species of power, it

48. *Dig.* 2.1.5.

49. Bartolus, *Opera Omnia* 1: fol. 44, b [Bartolus on *Dig.* 2.1.1].

50. Donald Kelley, *Foundations of Modern Historical Scholarship*, Columbia University Press, New York 1970; Donald Kelley, *Civil Science in the Renaissance: Jurisprudence in the French Manner*, in "History of European Ideas", 2 (1981).

51. Gilmore, *Argument from Roman La*, Ch. 2.

52. Jean Bodin, *Six Bookes of a Commonweale*, trans. Richard Knolles, London, 1606, 327 [*République* 3.5].

53. Bodin, *Commonweale* 334 [3.5].

deserved to be called by a unique name that can only be attributed to the state. It was no longer to be called simply *imperium*, but rather 'sovereignty'.

Dominium

Conventional accounts of the Roman-law origins of sovereignty almost always seem to follow the narrative sketched above, by retracing the gradual reception of *imperium* by the Glossators and its application to the politics of medieval and Renaissance Europe[54]. It would, however, be a mistake to think that Roman *imperium* was the only civilian source used in crafting the modern idea of sovereignty. As we observed earlier, Roman law was almost entirely a system of private law, so jurists had to supplement theories of *imperium* with a vast array of private law concepts[55].

One such concept to be applied seamlessly to the analysis of public power was the concept of *dominium*. Originally in classical law, *dominium* indicated the full legal right of property ownership and implied an asymmetrical relationship of dependence and subjection[56]. *Dominium* was "man's total control over his physical world – his land, his slaves or his money"[57]. It was "the ultimate right, that which has no right behind it… a *signoria*"[58]. Perhaps the most distinctive feature of Roman *dominium* was its 'absolute' quality[59]. As Constantin Fasolt described, "*dominium* was like an atom of social and material relations. Either you had *dominium* over a thing or you did not. There was nothing in between. You could not share *dominium*… and you could not divide into different components to be parceled out among different individuals"[60].

Remarkably, despite its central importance for the *jus civile*, the *Corpus Iuris Civilis* did not contain any formal definition of *dominium*. As David Johnston points out, "the Romans did not trouble to do this"[61]. Although the principal titles on property in the Digest, especially the rubric, *De adquirendo rerum dominio* [*Dig.* 41.1], certainly discussed in detail the numerous modes of acquiring and transferring *dominium*, there was no self-standing definition and conceptual analysis of *dominium* itself. Even in the penultimate title of the Digest, *De verborum*

54. These include the accounts of Otto von Gierke, F. W. Maitland, W. Ullmann, C. H. McIlwain, J. W. Allen, and M. P. Gilmore, largely followed by Quentin Skinner in his *Foundations.*

55. In part, this was because the Glossators such as Guido of Suzzara did not allow the *imperium* to be attributed to anybody except the Roman Emperor. Guido of Suzzara on *Dig.* 1.3.31, cited in Pennington, *Prince and the Law*, 95.

56. *Dig.* 1.8; *Inst.* 2.1-2.2; *Gaius* 2.1-2.22, for classical divisions of *res*.

57. Richard Tuck, *Natural Rights Theories*, Cambridge University Press, Cambridge 1979, 10.

58. W. W. Buckland, *Textbook of Roman Law from Augustus to Justinian*, 3rd ed., rev. Peter Stein, Cambridge Cambridge University Press, Cambridge 1963, 188.

59. On the 'absolute' character of *dominium*, see Peter Birks, *The Roman Law Concept of* Dominium *and the Idea of Absolute Ownership*, in "Acta Juridica", 7 (1985).

60. Fasolt, *Limits of History*, 185.

61. David Johnston, *Roman Law in Context*, Cambridge University Press, Cambridge 1999, 53.

significatione, which was perhaps the closest approximation of a glossary to be found in the Roman codebooks, there were only but a few oblique references to the concept of *dominium*, but nothing in the way of a formal working definition[62]. Instead, the meaning of proprietary *dominium* was implied through an analysis of individuals without *dominium* such as a usufruct, possessor, or tutor who nevertheless had interests incident upon some object of property belonging to another [*ius in re aliena*].

For post-Classical practitioners of Roman law, however, legal definitions specifying meaning and scope of application were essential, especially for the most important terms such as *dominium*[63]. Because of this acknowledged need for definitions, *dominium* underwent a transformative semantic shift in the later Middle Ages resulting in an inflationary expansion of meaning. That shift produced a novel concept of *dominium* which indicated not merely private ownership, as in the legal semantics of classical law, but significantly, also public rulership [*jurisdictio* and *imperium*][64]. As Stephen Lahey put it, *dominium* became a 'portmanteau concept' in medieval legal and social thought, by blending together a private-law conception with a public-law one[65]. What emerged, therefore, in the reasoning of medieval civilians was a kind of legal eclecticism, in which jurists used private law concepts such as *dominium* to craft post-Classical public law doctrines of state and sovereignty.

One of the major consequences of this semantic shift in the meaning of *dominium* was its immediate application to the theory of princely rule, so that a *princeps* or *rex* was not merely a ruler over his realm, but also its owner [*dominus*][66]. One civilian source for this line of reasoning was the *lex Rhodia* in Book XIV of the *Digest*, which featured the dictum that the Roman Emperor was *dominus mundi*. According to the civilian tradition, the Emperor Frederick I (Barbarossa), upon encountering this *locus*, asked his Bolognese lawyers, Bulgarus and Martinus, "Am I lord of all the world?" Bulgarus, known as the 'golden mouth', acknowledged in his answer that the Emperor may be *dominus* of the world in a narrowly technical sense, but absolutely denied that his universal *dominium* also entailed a particular *dominium* over the private property held by his subjects[67]. Martinus, by contrast, ruled that universal *dominium* entailed particular *dominium* over all privately-held property as well [*dominus universalium, ita et sic particularium rerum*], thus providing a theory in which all lesser particular forms of *dominium* are 'nested'

62. Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution*, Cambridge University Press, Cambridge 2007.

63. Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law*, Cambridge University Press, New York 1992.

64. Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato*, Eburon, Delft 2007, 156.

65. Stephen Lahey, *Philosophy and Politics in the Thought of John Wyclif*, Cambridge University Press, Cambridge 2003, 24.

66. J. H. Burns, *Lordship, Kingship, and Empire: The Idea of Monarchy, 1400-1522*, Oxford University Press, Oxford 1992.

67. Stein, *Roman Law in European History*, 47.

within the universal *dominium* of the Emperor[68]. For Martinus, the Emperor was not only the ruler, but indeed, the owner of the whole world and everything in it. And for this obsequious reply, the Emperor awarded Martinus a horse, while Bulgarus received nothing, again prompting the quip, "I lost a horse [*equum*] because I upheld equity [*aequum*], which is not equitable [*non fuit aequum*]"[69].

But even though Martinus won the horse, it was the dissenting opinion of Bulgarus, cited approvingly by generations of later jurists, that prompted the Glossators to specify more precisely the special nature of princely *dominium* and enabled a more sensible reading of the *Corpus Iuris*[70]. For example, Accursius' Gloss on Book VII of the Code [*Cod*. 7.37.3, *omnia principis esse intelligantur*] narrowed the scope of princely *dominium*, by clarifying that *omnia* is not a reference to the whole world, but merely refers to the public fisc and the private patrimony of the princely ruler [*Dig.* 43.8.2.4, *Res enim fiscales quasi propriae et privatae principis sunt*].

Following Bulgarus and his defenders, Bartolus likewise argued that the Emperor could not possibly have *dominium* in his subjects' property [*pro opinione Bulgari quod Imperator non sit dominus particularium rerum*][71]. But the Bartolist dicta took a different turn. Since proprietary *dominium* was indivisible, it could not be shared by two *domini* simultaneously over the same *res* [*dominium insolidum penes duos esse non potest*], even *res publica*. While universal *dominium* could entitle the Emperor to the whole world [*mundus est universitas quaedam*], it could not entitle him also to *dominium particularium rerum* over the constitutive parts of the world which, for Bartolus, were categorically distinct. In short, the Emperor's *dominium* was "a right to the whole, but not the parts"[72]. This was because world itself was "not as a collection of particular things, but as a single whole", an indivisible unit, a *res* over which there could, in theory, be only one unique *dominus*[73].

Bartolus' solution thus allowed a peaceful coexistence between all sorts of *dominia*, allowing a legal pluralism of jurisdictional *dominia* at all levels. Thus, the *dominus mundi* was not alone in claiming jurisdictional rights of public *dominium*. Rather, the *dominus mundi* with universal jurisdiction over the 'whole world' could coexist alongside an inferior *dominus* such as a king or prince, as *dominus terrae*, with exclusive jurisdictional rights in his kingdom or principality[74]. So too could a king, enjoying what Glossators called *dominium directum* over a kingdom,

68. Bartolus on the Constitution *Omnem*, § 3 referencing *Dig*. 14.29 and *Cod*. 7.37.3.

69. Pennington, *Prince and the Law*, 16.

70. Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322*, Princeton University Press, Princeton 1964, 282.

71. Bartolus on the Constitution *Omnem*, § 3. Cf. *Dig*. 13.6.5.15 on *Insolidum*.

72. Fasolt, *Limits of History*, 193. Bartolus on *Dig*. 6.1.1, under *Per hanc autem actionem* §§ 1-2.

73. Fasolt, *Limits of History*, 191.

74. Wieacker, *History of Private Law in Europe*, 73. Bartolus refers to *rex vel dominus* interchangeably, as at Bartolus *Super Digesti Novi*, *Dig*. 49.2.1.

coexist alongside an inferior feudal *dominus* such as an enfeoffed noble vassal, enjoying what Glossators called *dominium utile,* a lesser species of *dominium* over a fief[75]. As Myron Piper Gilmore once observed, in the "careful attempt to explain fourteenth-century *dominium* in terms of the Roman law…Bartolus achieved a hierarchy of superiorities, wherein each superior had what might be called a property right in his power"[76].

In this way, then, the princely assertion of *dominium* over a realm [*jura in re publica*] was merely the juridical public-law equivalent of expressing *dominium* over one's private estate [*jura in re sua*], as an object of private property. The king as *dominus* was not merely the ruler, but in a crucially important legalistic sense, also the 'owner' of his realm, precisely because, as the civilians declared, *iurisdictio cohaeret territorio*[77]. Legal ownership over territory by legal right of *dominium* entailed exercise of civil jurisdiction and political authority.

It was this vision of political and legal order, framed in the juristic language of *dominium,* which enabled theoretical explorations of sovereignty in the twinned terms of 'ruling' as well as 'owning'. And it was in this way that jurists such as Bartolus set the framework in which a proprietary concept of sovereignty, as *dominium*, would begin to emerge in early modern thought, especially among the French humanist legists such as Alciato, Duarenus, and Dumoulin, who similarly viewed the *rex* or *princeps* as a kind of *dominus in rebus* – specifically, *dominus reipublicae* – exclusively entitled to protect regalian rights against the claims of his inferior vassals and lesser magistrates who, by virtue of lacking valid title to *dominium*, were regarded mere usufructs, possessors, or tenants on the crown demesne.

Of course, the major beneficiary of this background analysis of *dominium* was, again, Bodin whose constitutional ideas were informed by the humanist analysis[78]. Like his predecessors, Bodin found irresistable the Romanist concept of absolute *dominium* to model the nature of civil sovereignty and, in particular, to specify how sovereign right was distinct from the rights of inferiors, such as the feudal nobility and the lesser magistracy of a well-ordered state. Bodin delivered his theory by way of an investigation of the jural status of the offices or powers held by officers: "[It] is but a thing borrowed [*commodatum*]"[79].

Indeed, for Bodin, those who receive and exercise sovereign rights by delegation such as officers and magistrates are understood to be trustees, usufructs, keepers, placeholders, occupants, guardians – even 'borrowers' or 'precarious' tenants holding by mere 'sufferance' [*precarium*] – whose powers they "exercise, but by

75. On *dominium divisum*, see E. Meynial, *Notes sur la Formation de la Théorie du Domaine Divisé*, in *Mélanges Fitting*, vol. 2, Larose et Tenin 1908; Robert Feenstra, Dominium Utile Est Chimaera*: Nouvelles Réflexions sur Le Concept De Propriété dans le Droit Savant*, in "Legal History Review", 66 (1998).

76. Gilmore, *Argument from Roman Law*, 41-42.

77. Bartolus, *Opera Omnia* 1: fol. 46, § 15 on [Bartolus on *Dig.* 2.1.1].

78. Julian Franklin, *Jean Bodin and the Sixteenth Century Revolution in Law and History*, Columbia University Press, New York 1963.

79. Bodin, *Commonweale*, 281.

way of borrowing" or loan[80]. By contrast, the sovereign alone is described as the sole owner, or *dominus*, fully entitled to rights of ownership in sovereignty. Just as a *dominus* in civil law – who can "lend or pawn unto another man [his] goods" – is entitled to restitution or recovery by the assertion of a real action [*actio in rem*], so too is the sovereign entitled to recover or 'recall' those 'mortgaged' rights and powers [*depositum imperium reposcat… pignori*], over which he always "remains still the lord and owner [*domini ac possessores*] thereof"[81]. The right of sovereignty, on Bodin's analysis, then, is juridically indistinct from the right of *dominium* – both are manifested in the legal right of recovery, to assert a *vindicatio* over one's estate, and to dispossess others of their temporary holdings.

The inevitable consequence of this variety of legal doctrines and concepts in the analysis of sovereignty was that there could be no fully settled uniform view among the jurists on what should count as an orthodox legal theory of sovereignty. This is perhaps why theorists such as Bodin struggled to find the right words – whether *dominium* or *imperium* – to express what was such a politically explosive concept with no single classical ancestor. By abandoning the classical analysis and introducing the term, 'sovereignty', Bodin understood the novelty of his analysis. The English parliamentarian, Sir Thomas Wentworth, voiced in 1628 the common complaint of the Bodinian conception: "[We] are not acquainted with sovereign power. We desire no new thing"[82]. But despite the complaint, this has been legacy we have inherited, whereby the Roman analysis of power was supplanted by a general theory of public law and state that assigned central importance to sovereignty.

Assessing the Multiple Legacies of Roman Law

The goal of this article has been to recalibrate our understanding of the legacy of classical Roman law in later medieval and early modern political thought. In order to do this, I investigated two different pathways by which Romanist legal concepts

80. Bodin, *Commonweale*, 84 [1.8]; 333 [3.5].

81. Bodin, *De Republica* 123-124: *Non igitur summi principes dici possunt, sed potius summae potestatis ac imperii custodes tamdiu sunt, quoad summus princeps populusve depositum imperium reposcat, cuius ipsi sunt verissimi possessores ac domini, non aliter quam qui res suas commodata vel pignori dederunt; aut suam iurisdictionem imperiumve alteri fruendum, sive ad certum tempus, sive precario permisuerunt, suae potestatis iurisdictionisque arbitri ac possessores esse non definunt.* Notice the explicitly Civilian terminology in just this sentence alone: *Imperium* is described as subject to a contract *re*, such as *depositum* or *commodatum*. *Imperium* can be an object not only of 'bonitary ownership' [*possessio bonae fidei*] but also full *plenum dominium*. *Imperium* can be 'pledged' or 'mortgaged' as in a *pignus*. The holder of an outsourced *imperium* or *iurisdictio* can be thought of as holding it by a precarious tenure [*precarium*]. That Bodin had rules of civil law in mind is especially evident by the marginal note he supplies in the Latin *De Republica* which cites, *inter alia*, the rubrics of Book 41 in the *Digest* dealing especially with possession and usucaption.

82. Speech of Sir Thomas Wentworth in John Rushworth, *Historical Collections of Private Passages of State*, London 1659, 568-569.

framed the later development of the idea of sovereignty. One pathway focused on the reception and application of Roman *imperium*, while the other pathway traced the reception of Roman *dominium*. These different traditions of legal argument had a direct proximate influence on the most important theorist of modern sovereignty, Jean Bodin, who drew upon this legal eclecticism and pluralism of Roman legal thought to establish the foundations for modern political theory.

Having sketched out these diverse applications of Roman law, I need to conclude by tempering this sweeping analysis by underscoring the ideological ambiguity of the Romanist sources. Traditionally, scholars understood Roman law as a classical source to promote absolutist theories of princely rule, such as in the doctrine, *Princeps legibus solutus*. But closer inspection of the Roman sources suggest that such a clear interpretive position cannot be so easily generated from the *Corpus Iuris*. Take, for example, the *lex regia*. An absolutist reading would suggest that *imperium* belongs to the *princeps* because the *populus* unconditionally and irrevocably transferred [*transtulit*, *contulit*] its original supremacy. But the Glossators, beginning with Azo, challenged this view, suggesting instead that the conveyance of *imperium* should properly be understood, as it is suggested in the *Institutes*, as a mere conditional and revocable *concessio* of the people as *universitas*, a temporary delegation or grant of sovereignty, held by the *princeps*, as Accursius put it in the Gloss to the *Digestum Vetus*, as one holding authority *alieno beneficio*[83]. Both absolutist and populist interpretations of *imperium* as sovereignty were thoroughly argued and defended throughout the Middle Ages and the Renaissance.

The ideological ambiguity extended even to arguments drawn from Roman *dominium*. Just as civilians proclaimed the *principes* and *reges* can be thought of as *domini*, there were others who denied that princely rulers should be regarded as asserting rights of *dominium.* Perceiving the potential dangers of attributing *dominium* to princely rulers, jurists suggested instead that they should be understood in terms of other Romanist idioms, such as usufructs, guardianship, or agency, as persons who lacked not only *ius utendi re [publica] sua* but indeed also the *ius abutendi re [publica] sua*. On this view, championed later by Monarchomach jurists such as François Hotman and Philippe Du Plessis Mornay, the prince should properly be understood as the *tutor reipublicae*, with duties to care for the people of the *res publica*, just as a *tutor* in civil law has duties to care for the *res pupilli*.

Thus, even if Roman law provided the elementary building-blocks for crafting modern theories of sovereignty and rights in its conceptually rich language of *imperium*, *dominium*, and *iurisdictio*, no party or ideological school – whether absolutist, royalist, democratic, or liberal – can justly claim the Roman legal tradition to be exclusively their own.

83. *Glossa Ordinaria* on *Dig.* 2.1.5, on *alieno beneficio.*

Abstract

The article considers the question why there was no settled uniform Latin equivalent for the concept of sovereignty in early modern thought. Writers such as Bodin and Hobbes applied a variety of terms derived from Roman law to approximate sovereignty, but without any consistency. As I argue, this lack of linguistic consistency was no accident, but rather, highlights a broader problem in the legal historiography of sovereignty in the later Middle Ages and the Renaissance. Interpretive disagreements concerning scope and authority of Roman law in the post-Classical world forced jurists to make strategic choices in applying and assimilating Roman law to their local conditions. While some jurists found it appropriate to ground their theories of public authority on notions of *imperium*, others opted to craft theories from proprietary concepts of *dominium*. As a result, there was no single uniform theory of sovereignty emerging from the Roman legal tradition.