

INTRODUCTION

SOVEREIGNTY, TERRITORIALITY AND UNIVERSALISM IN THE AFTERMATH OF CARACALLA

Clifford Ando

In 212 C. E., by virtue of an edict now known as the Antonine Constitution, the emperor Caracalla extended citizenship to nearly all free-born residents of the Roman empire.¹ In so doing, he transformed not only his own but the ideal of empire and, indeed, of statehood in Europe ever after. And yet, despite what might seem the self-evident importance of his action, much about it remains obscure, not least its date, its motivation, and its effects in legal and social relations. Nor has the fact that this first universalization of citizenship occurred in the context of empire received sustained interrogation. This volume inquires into the contexts in which Caracalla's universalization of citizenship was first produced and later cited, and its effects on evolving conceptions of personhood, citizenship and subjectivity in empire and nation.

The form of influence exercised by the Antonine Constitution was shaped in absolutely essential ways by the fashion in which it was known. Until the first decade of the twentieth century, the actual wording of the Constitution was unknown, as was the justification offered by Caracalla for his extraordinary action. Instead, the Constitution was known and discussed in light of a number of references to it in legal, historical and later homiletic literatures.² This Introduction therefore falls into three parts. The first surveys the range of legal and ideological contexts in which the Constitution was cited between the sixteenth and eighteenth centuries, from the dawn of Europe's extra-European imperial ambitions to the writing of the Code Napoléon. The second turns to the subsequent phase in the history of the Constitution, to wit, that which unfolded after the discovery of an ancient copy of the text itself. The final offers one vision of the landscape of legal theory to which the Antonine Constitution, its history and the project here published pertain.

- 1 Perhaps the best, one-volume introduction to the context in which Caracalla acted and the immediate evidence for its effects is Buraselis 2007. For a more general survey see Ando 2012: 52–57, 76–99, 123–128.
- 2 An observation made in astute terms already by Fustel de Coulanges 1980 [1864], 379: “What is remarkable here is, that no one can tell the date of this decree or the name of the Prince who issued it. The honor is given, with some probability of truth, to Caracalla, – that is to say, to a prince who never had every elevated views; and this is attributed to him as simply a fiscal measure. ... Still the historians of that time took no note of it, and all we know of it we glean from two vague passages of the juriconsults and a short notice in Dion Cassius.”

RUMOR AND REALITY IN THE HISTORY OF CITIZENSHIP

In the absence of the text and actual words of the Constitution itself, preeminent among the references by which it was known was what had been a mere aside by the jurist and imperial official Ulpian, a contemporary of Caracalla, contained in a jurisprudential commentary that he composed on the edict of the Roman praetor. In short, the praetor's edict was a catalog of actions allowed at civil law; Ulpian appears to have mentioned the Constitution by way of observing that many more persons were now eligible to be sureties:

[Ulpianus] libro vicensimo secundo ad edictum. In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt.

Ulpian, On the Edict, book 22. Everyone in the Roman world has been made a Roman citizen as a consequence of the enactment of the Emperor Antoninus.³

As it happens, Caracalla's edict did not apply to all persons; inter alia, slaves were excluded. By contrast, the specification *in orbe Romano*, "in the Roman world," had important consequences. It was not a technical term in classical Roman law, concerning jurisdiction or anything else – this is its only appearance in the *Digest*. Rather, it appears to have been crafted so as to embrace lands under Roman control that were not strictly classified as Roman or Italian at law. In so writing, Ulpian may have been responding to Caracalla's own diction, and I will consider this problem later. In the event, it was by the first words of Ulpian's reference that the law was known and cited in the post-classical world.

By Ulpian's day, the categories of "Roman" and "Italian" soil had come to map one another, but these remained legally distinct from lands and soil that were remembered as once subject to conquest and so classified as "provincial." The history of these categories could be reconstructed from ancient sources and was understood with some accuracy by the medieval and early modern legal tradition. The term *orbis*, "world," and in particular the phrases *orbis Romanus* ("Roman world") and *orbis terrarum* (literally, "the circle of the lands," or "the entire world"), become common in claims about the scope of imperial legislation only in the fourth century CE. The distinction between Italian and provincial lands was largely erased by the emperor Justinian, at least as a formal matter, and to a point medieval and later readers of the *Corpus Iuris Civilis* (n. b., itself a name invented in the late medieval period) tended to read Ulpian's language in light of the unity that the empire became. To do so, however, often required uncomfortable confrontation with the discontinuous conjunctures of territoriality and citizenship, on the one hand, and territoriality and sovereignty, on the other. In short, post 212 and for at least three hundred years thereafter, notionally all persons *in orbe Romano* were Roman, while some lands within that space remained alien in respect of Rome and significant categories of goods and action in Roman civil law were unavailable on them. To confront this fact was to recognize that the first polity in European history in which all free per-

3 Ulpian, *Ad Edictum* book 22 fr. 657 Lenel = *Dig.* 1.5.17, translation by D. N. MacCormick. For the context within Ulpian's commentary see Lenel 1927, 214–215.

sons had been citizens had originated in empire; and likewise to comprehend a polity in which the materiality of political belonging and the territoriality of sovereignty were profoundly disjoined. This is a problem to which we will return.

The other significant reference to Caracalla's act in literature contemporaneous with the Constitution itself – significant not least because it was regularly cited in medieval and early modern Europe – is contained in the *History* of Cassius Dio, a senator of the highest importance in the age of Caracalla. Dio, too, writes that Caracalla made “everyone in his empire Roman,” with the additional observation that he did so in order to render all persons subject to taxes from which the former aliens had theretofore been exempt.⁴ Apart, once again, from the misleading reference to “everyone” – the parties who were not included rated so little in the thought of Ulpian and Dio as to not merit explicit exclusion from the ranks of “all persons” – Dio's explanation for Caracalla's action neither is cogent in itself nor does it reflect the justification now known to have been offered by Caracalla (Ando 2012, 59–60).

A minor but not insignificant error in the tradition mistakes the emperor who promulgated the edict. Those in error most commonly assign the act to Hadrian (reigned 117–138) instead of Caracalla. The first attestation of this error occurs in a homily of John Chrysostom, bishop of Constantinople 397–403/4 (on which see the chapter of Hervé Inglebert, p. 106), and it is repeated as late as the Lord Chancellor Francis Bacon's speech in Calvin's Case, concerning the so-called post-nati of Scotland.⁵ There Bacon rightly insists that in the Roman case, “naturalization did never follow by conquest,” meaning, it did not ever follow as a matter of course;

but was ever conferred by charters or donations, sometimes to cities and towns, sometimes to particular persons, and sometimes to nations, until the time of Adrian the emperor, and the law “In orbe Romano.”

There are several ways one might explain the error in any given case, but it bears mention that Bacon, at least, cites Ulpian (and not Chrysostom), and his error might therefore have been autonomously made. (The strong likelihood, however, is that Bacon acquired both his learning and his error at second hand.) What is more, the name employed by Ulpian to identify the author of the Constitution, “Antoninus,” was a family name associated with emperors over many years, albeit only commencing with Antoninus Pius, successor to Hadrian – its attachment to what became a curious dynastic construct cannot, therefore, readily explain Chrysostom or Bacon's error. That said, Hadrian was otherwise closely associated with a series of legal reforms and integrative policies, while Caracalla was a notorious despot, fratricide, and butcher of his own people.⁶

4 Dio-Excerpta Valesiana 78[77].9.5.

5 John Chrysostom, *Homil. in Acta Apostolorum* 48.1 (*Patrologia Graeca* 60.333); Francis Bacon, “Case of the post-nati of Scotland,” in Montago 1842: 175.

6 On Chrysostom's error see Hervé Inglebert's essay in this volume; on Hadrian see Ando 2000: 277–335, 410–411. It is in fact startling to see the extent of later confusion about the particular “Antoninus” who issued to the Constitution. Aurelius Victor, a Roman senator and historian of the mid-fourth century, attributes it to Marcus Aurelius, it being in keeping, in his view, with that emperor's greatness of spirit (*De Caesaribus* 16.12). The emperor Justinian, by contrast, assigned it to the original Antoninus, to wit, Antoninus Pius (*Novellae* 78.5).

The case of the postnati, and by implication the antenati, concerned the status in English law of subjects of King James VI of Scotland, those born before and those born after the union of the crowns of Scotland and England in 1603. To describe the question at issue in Calvin's Case in language apposite to the longer history of (imperial) citizenship under consideration here, Scotland and England had been separate polities before 1603, and within the ideology of common law it was an open question whether common law rights, privileges and actions were open to subjects of James, either those born before the union of the crowns or those born after, and on what grounds that grant would be conceded or withheld. To summarize the ultimate decision in the briefest possible terms, the case was concluded in favor of a territorial conception of political identity and a national conception of jurisdiction: persons born in Scotland after James acceded to the throne of England owed allegiance to him as King of England (even as they also did on grounds of his also holding the Scottish throne), and in more general terms, anyone born in territory over which the King exercised dominion owed allegiance to him in consequence of that fact. However, while as subjects of the king they enjoyed access to English common law courts, they could use those courts only for issues over which those courts had jurisdiction, mostly particularly and immediately, property rights in England.⁷

One should also be clear that what was at issue in Calvin's Case is a distinctly imperial form of citizenship: regardless of which decision rule the Court adopted, namely, whether they sided with territoriality or birth as determinative, the consequences for the born-before and born-after alike concerned allegiance as a political matter and rights at private law as a legal one. What was lost to view to those debating Calvin's Case, and certainly to Bacon, was Rome's past as an imperial republic, in which naturalization would have granted important political rights in the metropole. That past had an important legacy that remained potent, however obscure its origins: the division of empire into jurisdictions, and the sorting of its people by their discrepant citizenships, had worked to cleave the empire into constituent polities using the same legal framework that had been understood to regulate, and operate between, the independent polities of some earlier, non-imperial world. We have seen one consequence of this already: that following the universalization of citizenship, some Romans lived within the empire but on foreign soil. We shall examine several others in the pages to come.

Edward Coke presided over Calvin's Case as Chief Justice of the Court of Common Pleas, and, like Bacon in his speech, Coke's Report on Calvin's Case considers the issues it raised in light of reflections on Roman law, not least the Roman citizenship of Paul of Tarsus. Coke's understanding of the history of Roman law in the matter is defective – his remarks elsewhere on Roman jurisdiction are often grossly erroneous⁸ – but he has one proper intuition, to wit, that the nature of

7 On Calvin's Case in general see Price 1997; on the character of Coke's jurisprudence as regards the imperial status of English law see Hulsebosch 2003.

8 In the preface to Part Six of the *Reports*, when Coke defends the antiquity of the "the Common Laws of England," he avows that "the self same Customs" governed it from its habitation by "the Britans" to his own day. He goes to say that if they had not been "right good," some one

the emperor's jurisdiction, and of a subject's identity and allegiance, were to a point dependent on one's legal place of origin.⁹ This was consequent upon the empire's status as an empire – in the lifetime of Paul, the metropole and the provinces were powerfully discrepant at law – and resulted likewise from the historical imbrication of political and legal acts over the centuries in which the empire had come to be.

Coke's use of Roman history provokes reflection on another issue of salience to the importance of place of Roman history and law in political and legal argument. Roman history was long, and little about it beyond mere expansion exhibits any comforting continuities. This is profoundly true of Roman practice as regards citizenship.¹⁰ Early in its history, Rome imposed citizenship on conquered populations even as it seized territory, on the grounds, it would seem, that to be governed, a population and territory had to be legally Roman. Long after this practice had ceased, the language and symbolism of the forcible imposition of citizenship remained available, even into the late Republic, when the Romans described the concession of citizenship to their former allies in the aftermath of a brutal war as a grant to those who had surrendered.¹¹ The concept of the "province," a unit of foreign soil containing foreign polities over which one rules and to which one sends magistrates, was only invented in the aftermath of the First Punic War (264–241 BCE) for the administration of Sicily, after Rome had been engaged in a project of imperial expansion for several centuries. Likewise, there were periods when Rome tended to found colonies composed of Roman citizens; as a matter of public law, these remained substituent parts of the Roman state. This was certainly the pattern of the earliest ones. Later, Rome tended to found so-called Latin colonies: colonists in such communities were not Roman citizens but possessed a sort-of privileged alien status named "Latin." In consequence, although Roman citizens had to give up their Roman citizenship to join these ventures, they appear to have retained the right (under circumstances we do not know) to reclaim citizen status and return to Rome.¹² Finally, as regards both ad hoc grants of citizenship as well as institutional mechanisms for making systematic ones, ideology and practice fluctuated over

of the foreign powers that ruled England would have imposed its laws, "especially the Romans, who did judge all the rest of the World by their own Laws" (Sheppard 2003: 150). This is (all) nonsense.

9 Sheppard 2003: 221–224.

10 For reflections on discontinuous nature of the history of Roman citizenship see Ando forthcoming. A general bibliography is provided in Ando 2009 and would certainly include Sherwin-White 1973, Humbert 1993, and Thomas 1996.

11 Granius Licinianus 35.27–34 Criniti: having surrendered, the Samnites said that they would enter into peace only on the condition that citizenship be given to them and all who had fled, and their property restored. Later, *dediticiis omnibus civitas data est*, "citizenship was granted to all those who formally surrendered."

12 I here follow a fine recent suggestion by Saskia Roselaar, who has been undertaking a broad reconsideration of Roman colonization in the middle Republic (Roselaar 2013). Roselaar believes that various rights that the later traditions associates with all "Latins" were probably in origin special privileges granted to specific communities, and there is ample reason to believe the so-called *ius migrationis*, the right of moving to Rome and (re)claiming citizenship, was particularly attached to Latin colonies.

time. Where the evidence is sufficiently robust, it suggests dynamic debate within the Roman population around these issues at any given moment, whatever the trend obtaining in practice. The emperor Augustus, for example, is famously said posthumously to have urged the Romans not to free too many slaves, lest they fill the city with an indiscriminate mob, or enroll too many to citizenship, in order that there be a substantial distinction between themselves and their subjects.¹³ The emperor Claudius, by contrast, construed the greatness of the Roman state to rest in very large measure on the openness not simply of its citizen body but its office-holding class, as well. The historian Tacitus paraphrases a speech by Claudius to this effect before the Roman Senate in his narrative of 48 CE, and a spectacular and nearly intact inscribed copy of Claudius' actual speech was discovered at Lyon in 1528.¹⁴

The abundance and disharmony of the evidence for practice in the spread of citizenship and expansion of the state notwithstanding, three historical phenomena overdetermined the range of interpretations it was possible to impose on the history of Roman citizenship already in the high empire and late antiquity. The most important was of course the promulgation of the Antonine Constitution, and in particular the fact that it appears to have been experienced primarily in legal relations and rapidly came to be known through its citation by legal sources and ultimately nearly from Ulpian alone. That is to say, as it seems by the sixth century CE, largely because of Ulpian, the Antonine Constitution was known as an edict *about* the universalization of citizenship, rather than one in which a universal grant of citizenship is described as merely the most appropriate expression of a sentiment that moderns might understand as distinct from the politics of empire. By that time at the latest, the Antonine Constitution had made it impossible to understand the long history of Roman citizenship in anything other than teleological terms: periods of even profound stinginess were treated as aberrations from a long trajectory that was always already going to end in world rule, the universalization of citizenship, and the erasure of distinction between conqueror and conquered.

The second phenomenon shaping interpretive claims about the history of Roman citizenship is a long thread of comparisons between Greek and Roman practice, of which the first extant evidence is a letter from King Philip V of Macedon to the city of Larisa in Thrace, preserved on stone and first published in 1882. In his letter, Philip urges the city not to follow the Greeks, who are chary with citizenship, but rather to emulate the Romans, who give citizenship even to their manumitted slaves "and in that way have sent colonies to over seventy places." Although in the text of Tacitus the emperor Claudius cites arguments from this tradition (whence they are cited by Machiavelli and others), the comparison as such is a special preoc-

13 Cassius Dio 56.3.1–6. Suetonius does not mention this topic in his remarks on the documents Augustus deposited with the Vestal Virgins along with his will but does remark on Augustus' practice as regards citizenship in language very consonant with that of Dio (Suetonius, *Augustus* 40.3–4; 101). On these passages see Ando 2000, 149–150.

14 On Claudius' arguments see Sherwin-White 1973, 237–250; on the relationship between the texts of Claudius and Tacitus, with many sensible observations about the historical arguments presented in both, see Malloch 2013, 338–380. Claudius' speech likewise figures in the Afterword of Anthony Pagden, p. 245.

cupation of Roman-era Greeks, among whom it takes two forms: laments in the conquest period (roughly the last two centuries BCE), to the effect that if only the Greeks had acted otherwise, they might have staved off conquest by Rome, giving way to speeches of triumph and thanksgiving, on the grounds that Rome invited the Greeks, too, among all best peoples, to join their polity and its governing classes.¹⁵

The third determinant of the reception of Roman citizenship in historical memory lies in the specific political and legal inflection it is given in the major sources, which derive nearly wholly from the period of republican empire and not the democratic republic.¹⁶ This has two components of relevance here. On the one hand, historically decisive statements of the concerns of the Roman citizen *qua* citizen were provided in this period nearly wholly by legal sources, which in the Roman tradition are perforce very largely sources concerned with private law. In the astute reading of J. G. A. Pocock, in the legal sources of the high empire, an individual became a citizen

through the possession of things and the practice of jurisprudence. His actions were in the first instance directed at things and at other persons through the medium of things; in the second instance, they were actions he took, or others took in respect of him, at law – acts of authorization, appropriation, conveyance, acts of litigation, prosecution, justification. His relation to things was regulated by law, and his actions were performed in respect either of things or of the law regulating actions.¹⁷

And on the other hand, Roman narrative and legal sources overwhelmingly put forward a view of citizenship *qua* Romanness, and Romanness *qua* citizenship, based on consent. There is an emphatically contractarian view of political belonging. As regards political ideology, one need only cite the myth of Romulus, in which radically atomized individuals, arriving as exiles and therefore non-citizens of any state, come together to found the city. In the Roman tradition, even the household postdates the political: the myth of the rape of the Sabine women, for example, affirms the foundation of the Roman family as having occurred after the foundation of the polity and exclusively through exogamy.¹⁸ In broader terms, the importance of contractualism to Roman metaphors for the social, and to Roman social theory more generally, could scarcely be overemphasized. It finds expression not least in the seeming underinterrogation given to the unity and homogeneity of the imperial elite and the belated rise of a discourse on Romanness itself. In high imperial writings on the culture and cohesion of the imperial elite, citizenship is what all Romans shared, and the term and concept appear to have captured all that they shared.¹⁹

These considerations shape the particular cast to citations of Roman practice in political and legal argument throughout the early modern and modern periods, even when the arguments in question diverged in their aims. For example, in the *Discorsi*, Machiavelli construes Roman policy on citizenship as unitary across the en-

15 For a summary of this material see Ando forthcoming; for more wide-ranging treatments see Sherwin-White 1973, 397–444, and Ando 2000, 49–70. Machiavelli: *Discorsi* 2.3, 2.4.1.

16 On the importance of this distinction see Ando 2011, 81–114.

17 Pocock 1992, 40.

18 Ando 2015a, 1–2.

19 Ando 2015b; see also Ando forthcoming.

tirety of its long history: it kept “the ways open and secure for foreigners who plan[ned] to come to inhabit it, so that everyone [might] inhabit it willingly.” It was on the basis of this manpower that Rome became the greatest, indeed, an inimitable imperial republic:

[The mode of expanding] which the Romans took is known therefore to be the true mode, which is so much more wonderful inasmuch as before Rome there is no example of it, and after Rome there was no one who imitated it.²⁰

The French jurist Jean Bacquet, born in 1620, a decade before Jean Bodin, whose thought on citizenship is the subject of Dan Lee’s chapter in this volume, understood the long history of Roman practice in exactly the same way, but followed the emperor Augustus, as described by Suetonius, in holding suspect the integrity and purity of the community created through the endless naturalization of foreigners.²¹ For Bacquet, the wars fought in the fourth century by Roman emperors against their own barbarian recruits were the best evidence that Rome had ultimately fallen in consequence of a misconceived generosity.

That said, for all his attachment to racialist definitions of Frenchness, Bacquet does entertain the legal questions, why letters of naturalization were called by that name, and what were their effects. To the first question, he responded by describing them as effecting a legal fiction: through such letters, persons who in natural law were *peregrini*, foreigners, were treated *perinde ... ac si*, exactly as if they had been born *in regno Gallia*, in France.²² Bacquet clearly wrestles with an anxiety about materiality, about attachment to soil as determinative of both one’s political affections and socialization to law, analogous to that operative in Calvin’s Case, and the legal fiction is an attempt to respect but also surmount it.²³

As for the effects of letters of naturalization, Bacquet considers the question in light of an array of classical sources, reaching back to the second book of Cicero’s *On the Laws*. There Cicero had considered the relationship between one’s membership in a local polity, a polity of one’s origin (*origo*), which one had by birth, and the polity of one’s citizenship. Though Cicero urged that one had to surrender preeminent affection to the *patria*, the fatherland, in which one held citizenship, the passage instantiated the difficulty obtaining within classical Latin vocabulary for distinguishing empire (or nation) of citizenship (*civitas*) and local political community (also perforce denominated *civitas*). So, Bacquet resolved (following Baldu), that having obtained a letter “de Civilité” (“concerning citizenship”), one be-

20 Machiavelli, *Discorsi* 2.4.2, translated by Mansfield and Tarcov.

21 Bacquet, *Traité du droit d’Aubeine*, Part 1, chapter 3, § 5–6 = Bacquet 1744, 6. On Bacquet see Wells 1995, 58–93, where the analysis seems reliable enough though the citations are often erroneous.

22 Bacquet, *Traité du droit d’Aubeine*, Part 3, chapter 24, § 1 = Bacquet 1744, 71. In the French summary: “Et par le moyen des Lettres de Naturalité les Estrangers sont mis au rang de ceux quis sont naiz en France: partant elles sont appellées Lettres de Naturalité.”

23 Although many well-known and complicated historical contingencies distinguished the contexts of France and Spain, Spanish lawyers and authorities wrestled with many of the same questions concerning naturalization and the presence of legal aliens within the lands of the crown. On this history see the now classic work of Tamar Herzog 2003.

comes a citizen of a city in France as if one had been born in France, because the kingdom of France is nothing other than “a great City, after the example of the Roman empire, following the law *in orbe Romano*” – meaning, of course, the Antonine Constitution, according to the name medieval lawyers derived from the text of Ulpian.²⁴

The same tendency is ascribed to Roman policy on citizenship as a whole, which is also assigned a unity and consistency it did not possess, in the *De iure belli ac pacis* (“On the Law of War and Peace”) of Hugo Grotius, the first edition of which was published in 1625. Grotius turned to Roman policy on citizenship in book 3, chapter 15, when he took up the subject of “Moderation in Obtaining Empire” (*Temperamentum circa acquisitionem imperii*).²⁵ Grotius, of course, was interested to assert ethical and legal constraints upon the exercise of sovereign power over peoples, even when that power was acquired through victory in just war. (It is a notable feature of the argument at this juncture that Grotius argues by analogy from ethical relations among private persons to warfare and post-war relations between sovereign states.²⁶) Grotius first asserts a homology between an ethical good of non-expansion; an original human practice, in which war was undertaken only in pursuit of peace (or as Sallust puts it, “to remove the power to hurt”); and a Christian position, which glories in the flourishing of one’s own people and disdains conquest.²⁷ He then asserts that the “prudent moderation of the ancient Romans comes very near to this standard of ancient innocence.” Of course, Grotius knew the Romans had in fact engaged in expansion nearly continuously from the foundation of Rome to the end of the Republic; implicitly, at least, he thus endorses here the Roman claim that their wars had been just, a topic he explores at length elsewhere. His concern at this juncture is different. Pursuing the argument of 3.15.1, Grotius explores not moderation in the acquisition of empire as such, but the ways in which Rome exercised her power after conquest.²⁸ And here, his focus is entirely on the extension of citizenship, and his argument is wholly within the framework we have sketched. Grotius quotes the speech placed in the mouth of Claudius by Tacitus, to the effect that the Roman habit of extending the franchise to conquered peoples

24 Bacquet, *Traité du droit d’Aubeine*, Part 3, chapter 24, § 2 = Bacquet 1744, 71: “Ou bien telles Lettres peuvent estre appellées, selon Balde, *in consil.* 123. Lettres de Civilité: *quia per huiusmodi rescriptum à Principe impetratum, extranei jus alicujus civitatis Gallia sive Parisiensis, sive Lugdunensis, sivi Rothomagensis assequi possunt.* Et peuvent estre faits Bourgeois de telle ville de France que bon leur semble, tout ainsi que ceux qui sont naiz en France, *vel si ita dicere liceat, post huiusmodi rescriptum à Rege concessum, peregrini fiunt cives regi Galliae*, comme tout le Royaume de France n’estant qu’une grande Cité, à l’exemple de l’Empire Romain, suivant la Loy *in orbe Romano*...”

25 I cite the Latin text of *De iure belli ac pacis* from Grotius 1646 and adopt the English translation from Grotius 2003.

26 Grotius, *De iure belli ac pacis* 3.15.1 opens (1646, 551; English translation, 2003, 1498): *Quae in singulos aut exigitur aequitas, aut laudatur humanitas, tanto magis in populos aut in populorum partes, quanto in multos insignior est & injuria & beneficentia.*

27 Grotius, *De iure belli ac pacis* 3.15.2 (1646, 551–552; English translation, 2003, 1499–1500).

28 This is of course itself a hallowed topic in historical and political literatures reaching back to Polybius and taken up by the Romans themselves at great length.

commenced with Romulus and progressed continually thereafter; he likewise quotes the claim that Roman practice differed from that of Athens and Sparta, which explains the discrepant fate of their imperial ambitions. And lastly, he cites the Antonine Constitution, “which is especially to be admired,” “by which all those in the Roman world were made citizens,” explicitly employing the very words of Ulpian.²⁹

William Blackstone wrote his *Commentaries on the Laws of England* (1765–1769) in a very different context, and does not directly cite the Antonine Constitution, though his text was read by those who did. But it is worth lingering over his reflections on the unification not of the Roman empire as a whole but merely Roman Italy. The fourth part of the Introduction to the *Commentaries* seeks to explain the history of sovereignty, legislative authority and jurisdiction in the “Countries” that were, by his day, “subject to the laws of [the kingdom] of England.”³⁰ The aspect of the situation demanding explanation was how and why “the civil laws and local customs of this territory,” to wit, “the kingdom of England,” obtained in Wales, Scotland, Ireland, and “many other adjacent countries” that were not “by the common law” included in the kingdom – though they were, Blackstone allows, “part of the king’s dominions.”

Blackstone commences with Wales, whose history he tells from the presumptive “primitive pastoral state” ascribed to it by Caesar and Tacitus. Blackstone’s narrative is deeply at odds with itself. On the one hand, Blackstone recognizes that Wales became “part of the king’s dominions” through centuries of bloody warfare: it was invaded by the Saxons; the population was “driven from one fastness to another, and by repeated losses abridged of their wild independence.” In consequence of his success in “abolish[ing]” “the line of their ancient princes,” Edward the First “may justly be stiled the conqueror of Wales.” But on the other, neither the ideology of Union would permit the styling of the Kingdom as an empire, nor would that of the common law permit its description as artificial and imposed. Thus, Blackstone presents a series of historical justifications by which conquest could be understood as the recreation of some earlier state, though the justifications are not presented as cumulative. Blackstone figures the separate items of the series rather as alternatives, some of which might obtain simultaneously with others: the creation of the son of Edward as prince of Wales was in fact an act of “re-annex[ation] (by a kind of feudal resumption)”; according to the statute of Rhudhlan, Wales had once been subject to the law of the king – Blackstone repeats a claim that “their princes” had once done homage to the king of England – and thus the present subjection of Wales to the crown of England was really (Blackstone avers) an act of unification, “as if it

29 Grotius, *De iure belli ac pacis* 3.15.3 (1646, 552). I have not followed the diction in the translation edited by Richard Tuck, but it is certainly fine (2003, 1500–1501).

30 The title of the fourth section of the Introduction is, “Of the Countries subject to the Laws of England.” The first sentence of the section commences: “The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king’s dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries” (Blackstone 1803, 93).

were part of a body” being restored to wholeness. As with Bacquet, the competing claims of history and ideology can only truly be reconciled by fiction.

Where law was concerned, Blackstone allows that the statute of Rhudhlan made “very material alterations in divers parts of their laws,” but also insists that they retained “very much of their original polity.” “The finishing stroke to their independency” came by statute only in the reign of Henry VIII, “which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication with the laws of England.”

One might have thought a process by which one’s private law relations and the sovereignty of one’s people were fundamentally reconfigured as the result of centuries of warfare and legislation imposed by foreign power, would be episodic, violent, halting, and fitful. Not so:

Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practised with great success, till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.³¹

Even apart from demands of an emergent political ideology of union, we witness here the working out of at least two further ideological commitments: one is simply a matter of long-standing legal theory, according to which true freedom lies in subjection to law, and therefore, better laws result in a truer freedom. The other is particular to the common law, which being immanent in the lives of the people, cannot be imposed: whatever the history of warfare and metropolitan legislation that Blackstone had just provided, he could not allow that “the common laws of England” existed anywhere as other than custom. The ontology of law inherent to the ideology of common law would not permit this.³²

Blackstone’s term “insensibly” is then taken up as a term of art in Gibbon’s *History of the Decline and Fall of the Roman Empire*, both in direct echo of Blackstone, applied precisely to the process discussed by Blackstone, to wit, the unification of Italy; and then analogically, to explain processes of acculturation and social change in the empire more generally.

Till the privileges of Romans had been progressively extended to all the inhabitants of the empire, an important distinction was preserved between Italy and the provinces. The former was esteemed the centre of public unity, and the firm basis of the constitution. Italy claimed the birth, or at least the residence, of the emperors and the senate. The estates of the Italians were exempt from taxes, their persons from the arbitrary jurisdiction of governors. Their municipal corporations, formed after the perfect model of the capital, were intrusted, under the immediate eye of the supreme power, with the execution of the laws. From the foot of the Alps to the extremity of Calabria, all the natives of Italy were born citizens of Rome. Their partial distinctions were obliterated, and they insensibly coalesced into one great nation, united by language, manners, and civil institutions, and equal to the weight of a powerful empire. The republic gloried in her generous policy, and was frequently rewarded by the merit and services of her adopted sons.³³

31 Blackstone 1803, 94.

32 Pocock 1957.

33 Gibbon, *History*, volume 1 (1776), Chapter 2 (1994, 62).

Similar processes were then described as operative in social and political change in the empire at large: “it was by such institutions [of law, language, education and entertainments] that the nations of the empire insensibly melted away into the Roman name and people.”³⁴ It perhaps merits reflection how different are the ontologies ascribed to the units of analysis in the two metaphors employed by Blackstone, to wit, that of distinct lines of descent merged by the legal fiction of adoption, on the one hand, and the production of an alloy through “melting,” which cannot henceforth be separated, on the other.

In the legal tradition canvassed thus far, the Antonine Constitution figures as an historical example and potent precedent at the intersection of the law of persons, state sovereignty, and empire. Ancient and premodern empires were understood by their rulers as pluralist, and as a formal matter, forms of difference were categorized and even encouraged along many axes, not least law.³⁵ Often, as in the Roman case and, after its own fashion, the English, new political forms emerged from empires that had understood themselves, in formal terms, at least, as comprised of separate polities. But as citizenship was extended, the theory of territoriality that obtained in the application of the law of persons came into conflict with the doctrine(s) of territoriality that subtended other systems of law, whether rules of jurisdiction or the reach of administrative law or doctrines of state power. What did it mean to create Romans on land that was not Roman? Or fashion persons as participants in the common law of the English people who did not and would not ever dwell in England? And what sort of polity developed from such impositions or universalizations of citizenship, in consequence of which persons and polities internal to the aggregate ceased any longer to be foreign in relation to each other?

These issues were all at play once again in France between the Revolution and the production of the Code Napoléon.³⁶ The problems of consent and territoriality arose vividly in connection with the annexation of Belgium and were resolved (as it were) by the law of 23 February 1797, by which all inhabitants of Belgium were made French. The issue was revisited in the famous case of Terence MacMahon, an Irishman who married a Frenchwoman, Caroline Latour, in 1789. An itinerant soldier who served under more than one flag, his wife sought to divorce him following an absence “of five years without news.” In some of the deliberations, his legal status was at issue: had naturalization made him French? Had he consented? Was he an active citizen? What did it mean, that he had sworn “le serment civique,” the citizen’s oath, “to be faithful to the nation” (“Je promets, sur mon honneur, d’être fidèle à la nation”)? And what distinction was there, if any, between those “declared natural French persons” (“déclarés naturels Français”) and those whom the law orders to be “known as French (“réputés Français”)? The Latour-MacMahon case reach the Cour de Cassation in 1806, when the great jurist Philippe-Antoine Merlin

34 Gibbon, *History*, volume 1 (1776), Chapter 2 (1994), 67. “Insensibly” is used some 53 times in volume 1 alone (of the initial six-volume edition).

35 For some recent case studies see Benton and Ross 2013.

36 On Merlin’s report regarding the MacMahon case in the context of the history of citizenship, see the brief but helpful remarks of Weil 2008, 17, and the chapter by Luigi Lacchè in this volume. For a more expansive reading see Heuer 2007.

was solicitor general. Merlin wrote an exceedingly detailed report of the case, in first person, for his *Répertoire universel et raisonné de jurisprudence in matière civile*.³⁷ The report is an historical delight, but the issues of relevance in this context arise late in the text. Was MacMahon a citizen? Merlin analyzed the problem thus:

Naturalization, is it not a contract between the government that adopts a foreigner and the foreigner himself? And this contract, is it not like all others, dependent on an agreement of the wills of the parties between whom the contract is made? Two responses.

First. Naturalization can without doubt be founded upon a contract that results from the request of the foreigner for this benefit, and from the concession that is made to him by the sovereign. But it can also be founded upon the power of the law alone, and without the assent of the foreigner. The sovereign, by the fact alone that it is sovereign, can say: "I want all those who inhabit my lands to be citizens," and once he says this, no one has the right to respond to him, "I do not want to be a citizen, even though I inhabit your lands." It is thus that Antoninus, by a decree recorded in the law 17 of the Digest, [the chapter] *de statu hominum*, declared Roman citizens all the inhabitants of his vast empire, a status theretofore reserved for inhabitants of Italy... It is thus that the law of 5. ventôse an. 5 [23 February 1797] declared French citizens without distinction, and regardless whether they asked, without seeking their acceptance, all the inhabitants of the communities of Belgium over which sovereignty devolved to France solely by right of conquest.³⁸

The MacMahon case unfolded in the shadow of the production of the Code Napoléon, which featured a momentous contest between the jurist and Romanist François Tronchet and Napoleon himself over the basis of citizenship: Did control over membership lie in the power of the state over the persons dwelling within its domain, or in descent and (more particularly) inheritance? Or, to use the modern language that masquerades as ancient, should political belonging be governed by *ius soli* or *ius sanguinis*? The quarrel between Tronchet and Bonaparte and the Code Napoléon are treated by Luigi Lacchè's contribution to this volume and naturally figure in many distinguished histories.³⁹

With the production of the Code Napoléon, we enter a new phase in the history of the law of citizenship and in particular of the influence of Roman law on it. In Europe, at least, it was henceforth through the Napoleonic Code that the Antonine Constitution and its legacies were reinscribed and redebated in national citizenship laws, even as Calvin's Case or, more narrowly, Coke's Report, often served to define the horizons of argument in the Anglo-American tradition.⁴⁰ The Napoleonic era may also serve to mark a transitional moment in European ideologies and practice of empire, from an earlier, Roman phase, in which metropolitan states imagined the telos of their practice in the unification of empire and universalization of metropolitan norms; to a more Greek one, in which colonies possess real political and economic autonomy, their affective dependence bringing profit to the metropole

37 Merlin, *Répertoire* s. v. Divorce, Section IV, § 10 (1812, 762–804).

38 Merlin, *Répertoire* s. v. Divorce, Section IV, § 10 (1812, 789–790). The second argument turns on the question of how acceptance is made: did it have to be made expressly and formally, or could one accept tacitly, by deeds indicating one's will?

39 See Sahlins 2004, 267–327, and Weil 2008, 11–83.

40 The magnificent work of Pietro Costa, 1999–2001, volumes 2–3, provide the most comprehensive single study of citizenship law in Europe in the nineteenth century.

