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Legal thought and empires: analogies, principles, and authorities from the ancients to the moderns

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ABSTRACT

Empire reveals some of the reasons why the history of legal thought should not be prepared in precisely the same way as the history of political thought. This article, beginning in the Mediterranean before adopting a more transnational scope, identifies analogy, principle, and authority as some of the principal modes of legal reasoning, and then seeks to examine several instances of their application within different imperial and colonial contexts. The British Empire is the most obvious trajectory in what follows. Like many other modern empires, however, it is optimally approached in view of longer term institutional and intellectual developments in Europe. Substantively and procedurally, European law became elaborate over time as dominant communities expanded to interact with more fixed communities. The motivations of those lawyers who elaborated this body of law were various and must be comprehended. While imperialism spurred innovation and change in the kind of objectives that were tasked to legal thinkers, what remained essential to the realisation of those objectives was their ability to enjoy recourse to those very modes of reasoning (analogies, principles, and authorities) that had characterised the development of European legal thought for millennia.

KEYWORDS

Empire; colony; thought; analogy; principle; authority

Michael Nolan, an Irish scholarly lawyer who had been called to the English bar in 1790, rose to address the Court of King's Bench on Wednesday, 10 February 1810. He was eager to leave an impression on this case now at trial, which had already been thoroughly investigated, in both London and Port-of-Spain, in the years leading up to this date. Indeed, a plain verdict had already been returned upon Thomas Picton's guilt. To order the torture of a young girl, as Picton had in his capacity as colonial governor of the conquered colony of Trinidad, was unlawful. Such, at least, was the estimation of the jurors in 1806, before procedural technicalities and concerns about the jury, all sufficient to support a motion for a retrial, led to a modified verdict. Now at the outset of 1810, old arguments had to be rehearsed anew, leaving Nolan with the job of persuading the court to confirm Picton's guilt. Shuffling through a series of historical anecdotes about Ancient Rome and the medieval British Isles, he proceeded to recite a number of legal authorities from the continent, all buttressed by precedents of common law *dicta* and *ratio* familiar to his colleagues. This he did to explain the movement of law between 'inferior' and 'superior' jurisdictions,

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hopeful of impressing upon them 'that allegiance to the Crown extends beyond the mere limits of England, and that the privileges of the people of [Trinidad] were enjoyed beyond the capital of the empire in which the laws were enacted'. The method here was conventional, even if the ordering of the argument made Nolan 'anxious', as he confessed:

> to ground upon principle, and fortify by analogy, the proposition which I set out with attempting to establish, before [referring] to the cases which bear directly upon the point.[1]

Facing empire in the seat of metropole, Chief Justice Lord Ellenborough beheld Nolan performing rather ordinarily at this moment. For this is how arguments were won and lost at law, as they had been, indeed, for many centuries before this. We are able to appreciate as much once we elongate our visions to scan for patterns in the history of legal thought, which requires attending to more than just *les événements* of the past – as Fernand Braudel, better than anyone else in the Annales School, revealed by example in *La Méditerranée* (1949).[2]

The history of ideas was initially a field happy to entertain great periodisations whenever documentary evidence could be found to permit great generalisations (a correlation now recognised to be a downfall of that approach). In more recent decades, intellectual historians have shown a preference for the clear confines of context over the relative unboundedness of long-term trends. An exception is David Armitage. In 2012, he could be read urging scholars to begin effecting 'a greatly overdue rapprochement between intellectual history and the *longue durée*'.[3] But few have followed his lead in approaching the *longue durée* in pursuit of a 'history *in* ideas' – as Armitage did, exemplarily, by tracking the 'fundamentally *political* concept' of civil war from Ancient Rome to contemporary Syria.[4]

On specifically *legal* concepts across time and space, international lawyers have proven equally cautious not to stray far from modernity, if sometimes with good reason (even if this also explains, I think, why 'international' so often fails, in this field, to fulfil its lexical promise). On periodisation, Anne Orford has inspired plenty of rumination. Expressing rightful surprise at the persistence with which 'contextualist critics of international legal scholarship [have] dismissed any "wide-ranging" studies of the movement of meaning across centuries as at best "genealogy" and at worst "anachronism"', Orford identified a kind of paradox: that those very historians who were quickest to police the context of legal ideas also happened to be the unlikeliest to undertake studies that might show the movement of ideas across them. 'If we want to understand the work that a particular legal argument is doing', Orford stressed,

[1] *The King v Thomas Picton* [1804–1812] 30 ST 903.
[2] Compare books one and two with book three of Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (Sian Reynolds tr, Folio Society 2000), which is the best English edition.
[3] David Armitage, 'What's the Big Idea? Intellectual History and the Longue Durée' (2012) 38 History of European Ideas 497. For Armitage (499), the 'longue durée' involves canvassing 'a span of time extending over decades, if not centuries'. Compare, however, René Koekkoek and others, 'Visions of Dutch Empire: Towards a Long-Term Global Perspective' (2017) 132 Low Countries Historical Review 85: 'The chronological starting-point of an intellectual history of empire over the longue durée should be placed in the sixteenth-century, when ideas about Dutch imperial exceptionalism matured in the making of the Batavian myth'. These are many steps removed from the conceptualisation in Fernand Braudel, 'Histoire et Sciences sociales: La longue durée' (1958) 13 Annales 725.
[4] David Armitage, *Civil Wars: A History in Ideas* (Yale University Press 2017) 18.

> we have to grasp […] the way it relates to a particular, identifiable social context, and the way in which it gestures beyond that context to a conversation that may persist – sometimes in a neat linear progression, sometimes in wild leaps and bounds – across centuries.[5]

Orford was partially responding to critical 'contextualist historians' associated with the 'Cambridge School': a famously diffuse body of research into the history of political thought originally associated with the work of Quentin Skinner, J. G. A. Pocock, and others, more latterly extending to include many fields of enquiry with very little in common with each other beyond a declared commitment to the careful and detailed study of political ideas in their contexts.[6] Part of the problem with characterisations by legal scholars of 'Cambridge contextualism' is the slipperiness of 'Cambridge' in the expression and, as well, the unattributability of any sophisticated overarching method to it. The bigger problem, to my mind, is the reality that its practitioners remain above all committed to a history of *political* thought, not a history of *legal* thought. This has led many to *subsume law* all too readily *within politics* in view of the tussling of humanists and scholastics over state and society, nature and humanity, philosophy and history, and other idioms fleshed out over a long early modern period of European history (but germane particularly to the history of western Europe and Great Britain between 1400 and 1800).[7] Legal ideas – usually plucked from Roman law or English common law, though sometimes also from canon law – tend only to be worthy of serious consideration when they are to be discovered giving encouragement, within a certain context in the past, to imaginative appraisals of the sovereign's attributes and the imposition of constraints upon the sovereign and its delegates. Legalistically inspired political thinking of this kind is often (and not unproblematically) considered within the all-encompassing frame of 'constitutionalism'. It was conventional for Pocock, for example, to consider 'the language of the common law as a constituent of […] ancient constitutionalism' and a variant of 'political argument'; Skinner was able to write how the 'Roman law' became 'one of the major sources of modern constitutionalism' in the 'political thought' of the Counter Reformation.[8] As Skinner and Pocock each went on to produce thousands of

[5]Anne Orford, 'On International Legal Method' (2013) 1 London Review of International Law 174, 176. Here is not the place to correlate this particular observation (or any others made by Orford) with what has become a difficult debate to follow on the value of anachronism in international law, but the reader should at least be aware that such a debate exists.

[6]JGA Pocock, 'The History of Political Thought: A Methodological Enquiry' in Peter Laslett and WG Runciman (eds), *Philosophy, Politics and Society: Second Series* (Basil Blackwell 1962); Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 History and Theory 3.

[7]See especially Quentin Skinner, *The Foundations of Modern Political Thought* (2 vols, Cambridge University Press 1978), which should be read with Annabel Brett and others (eds), *Rethinking the Foundations of Modern Political Thought* (Cambridge University Press 2006), seeing especially the chapter by Harro Höpfl.

[8]JGA Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge University Press 1985) 2–3; Skinner, *The Foundations of Modern Political Thought* (n 7) 2: 124. Approaches to 'constitutionalism' within the history of political thought are various, including (but not limited to) focus upon conciliar theory, cultural diversity, social organisations and their interrelation, political proceduralism, the 'separation of powers', as well as 'checks and balances' on sovereign power. See JN Figgis, *Studies of Political Thought from Gerson to Grotius, 1414–1625* (Cambridge University Press 1907); Charles I McIlwain, *Constitutionalism, Ancient and Modern* (Cornell University Press 1947); CJ Nederman, 'Conciliarism and Constitutionalism: Jean Gerson and Medieval Political Thought' (1990) 12 History of European Ideas 189; CJ Nederman, 'Constitutionalism – Medieval and Modern: against Neo-Figgisite Orthodoxy' (1996) 17 History of Political Thought 179; Francis Oakley, '"Anxieties of Influence": Skinner, Figgis, Conciliarism and Early Modern Constitutionalism' (1996) 151 Past and Present 60; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1999); Francis Oakley, *The Conciliarist Tradition: Constitutionalism in the Catholic Church, 1300–1870* (Oxford University Press 2004); Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (Cambridge University Press 2006). See especially, and most recently, Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press 2016), especially the discussion at 15–20.

pages of scholarship in divergent directions, a number of other scholars working in political thought and intellectual history at Cambridge have engaged more directly with rights, sovereignty, and the state in the creation of international order at a time when, again, the broadness of the school under recent headmasters should be noted: Professor John Robertson, who led until recently, initially worked on eighteenth-century political economy before turning his attention to sociability, whereas the new chair, Professor Richard Bourke, initially worked on Edmund Burke and Ireland before turning his attention to democracy.[9] As key studies in particular by Richard Tuck and Annabel Brett have acquired influence over the least two decades, more and more attention has been paid to 'natural law' as a moral or political philosophy that sometimes carries the impression of being a coherent and functional source of law oppositional to established doctrines of scholarly law.[10]

This article proposes a different approach to similar concerns and makes the case for showing greater attention to what intellectual characteristics were shared by legal thinkers as a group – and not only when they are to be found saying something 'political' or 'constitutionalist'. Focusing not only upon the applications of certain legal ideas, but also upon the motivations of individuals who conceived or adapted those ideas, this article begins the task of examining certain patterns of legal argumentation across millennia, and in the process, discusses the practicality of distinguishing legal ideas from political ideas in history and historiography. Natural law, as one of a number of intellectual strategies, begins to look very different in such a frame.

An obvious pitfall to approaching legal ideas in isolation, of course, is that it can lead almost inevitably to overly exuberant attention upon the individuals who conceived those ideas. This was something Marc Bloch recognised in his *Apologie* (1949), who otherwise acknowledged that such an approach could still perform an important role within the human sciences. 'L'histoire du droit', he put it,

> pourrait bien n'avoir d'existence séparée que comme l'histoire des juristes: ce qui n'est pas, pour une branche d'une science des hommes, une si mauvaise façon d'exister. Entendue en ce sens, elle jette sur des phénomènes très divers, mais soumis à une action humaine commune, des lueurs, dans leur champ nécessairement limité, très révélatrices.[11]

It is difficult to think of a historian who saw all of this better than Frederic William Maitland, whose approach to the history of legal thought will be emulated as far as possible here. In Cambridge, long before a 'school' was coalescing around Skinner, Pocock, and their followers, Maitland had been sketching out his manifesto for 'the history of law [as] a history of ideas'. This was the 1890s. The history of law, as he saw it, must

[9]That neither of these necessarily brief biographies does justice to the fullness of breadth in the research interests of each scholar only furthers the case for rejecting easy generalisations about work undertaken in political thought and intellectual history at Cambridge in the twenty-first century.

[10]Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge University Press 1979); Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge University Press 1997); Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press 1999); Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton University Press 2011).

[11]Marc Bloch, *Apologie pour l'histoire ou Métier d'historien* (2nd edn, Librairie Armand Colin 1952) 86:

> The history of law has perhaps no separate existence from the history of the jurists; but this is not, for one branch of the sciences of man, a bad fashion of existence. Understood in this sense, [the history of law] allows us to understand sundry things about humanity in common, glimmers of insight which, however constrained, are still very revealing.

disavow 'many kinds of anachronism', and 'represent to us not merely what men have done and said, but what men have thought in byegone ages'. Depending on his audience, Maitland was playful with this line, which he used on multiple occasions, but *always* it brought him to remind his readers and listeners of the need, before even considering legal ideas, to 'recover' the habits and beliefs of those who used them. In essence, these are the *mentalités* of law, *avant la lettre*, which of course was Maitland's way.[12]

This article promotes an appreciation of legal thought not as something that should (or can) be seen as merely a strand of political thought, but as something that has evolved uniquely as a body of ideas owing to its adaptation by individuals whose work takes place within certain *procedural* and *jurisdictional* confines, and whose motivations are often attached to particular *interests*. This requires a robust definition of law in operation as something which is determined by ideas and institutions malleable enough to the extent of allowing the *good and fair* ('boni et aequi') to prevail against the *evil and unfair*, whenever their distinction becomes uncertain.[13] Recorded human history is replete with incidents of this uncertainty; it is therefore replete with instances of law. It is crucial that the encapsulation of individuals from diverse backgrounds within new jurisdictions has usually occurred in periods of political and economic disorder: sometimes resulting from the expansion or contraction of a particular polity, or otherwise resulting from technological developments in the fields of transport, military, or communication across geographies. Always, in these moments, legal ideas and institutions have become malleable in the hands of practitioners, scholars, administrators, and anybody else comporting to develop and extend arguments from *within* (or otherwise *in direct view* of) formal enquiries. This kind of thinking occurs so that a particular kind of activity may be rendered good and fair, or evil and unfair, depending on the outcome. Naturally, empires and colonies demanded plenty of this very discretion and flexibility. Empires and colonies needed law.

Legal historians and scholars of international law have laboured to see some of the procedural, political, cultural, or discursive aspects of this phenomenon. But their overwhelming preference for the period between 1450 and 1950 imbues much of this work with a teleology that still runs the same old line from 'black legend' to 'human rights'. Adherence to this kind of periodisation has discouraged attempts to identify some of the intellectual attributes that had been developing within legal thought to deal with foreign individuals and territories for over a millennium before the earliest colonial 'encounters' and 'cultures' described by Antony Anghie, Lauren Benton, and others writing from the late 1990s onwards.[14] Some interesting interpretative trends have come to animate this new scholarship. Now just about any European international jurist in this period can become the target of sustained critical readings designed above all to reveal the fraud or the folly of their failure to appreciate the colonial realities from which they were far removed. Now just about everywhere Europeans dashed out into the extra-European world and left a paper trail can become primed for selection as an exotic case study pickable to illustrate the playing out of this or that jurisdictional drama so long as it never fails to reveal the prejudices already embedded within the law. And now, in what is a burgeoning subsection

[12]FW Maitland, 'The Corporation Aggregate: The History of a Legal Idea', unpublished lecture (25 May 1893), comparing FW Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge University Press 1907) 356.
[13]This definition borrows from a formulation that comes via Justinian via Ulpian via Celsus. *D*[*igesta*] 1.1.1.
[14]Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005); Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press 2001).

of this historiography, the imbrication of law and empire is mostly ever to be seen manifest in localised and highly specific events taking place *in spite of* whatever thoughts had settled or were still settling in the minds of metropolitan élites, inked onto the page or not.[15] One thinks in this frame especially of Lauren Benton's *Law and Colonial Cultures* (2001) and Benton's *Search for Sovereignty* (2009). Both are comprised of a series of chapters that resist being tied together into any clean monographical argument, and that is partly because both examine isolated episodes, illustrated through conventional and unconventional primary and secondary sources, to reach conclusions not just about law and empire, but also about law in and of itself.

If some of these claims recall to mind the ideological manner in which anti-formalists engaged with formalists during the twentieth century, it provides a telling contrast with the concerns of legal realists (to explain how law works in action) that a celebrated portion of these case-study histories of imperial and colonial law, while richly textured in exposition, seem almost deliberately vague when it comes to explanation. These are studies conducive to *findings* of complexity, multiplicity, plurality, and other abstract nouns. Many are inclined to describe sovereignty, jurisdiction, and legal hierarchies over sea and land with obscuring adjectival metaphors; they are elaborate in argument about the extent to which such aspects of the law are layered, fluid, opaque, messy, hybrid, plural, labyrinthine, complex, myriad, decentred, and lumpy.[16]

Some of this work exhibits hostility to the traditional realm of ideas. For example, *Rage for Order* (2016), a recent book by Lauren Benton and Lisa Ford, privileges an examination of documentary evidence of the practical work by legal actors ('jurispractice') over the contemplative writings of jurists ('high theory'). This book advocates a selectivity with sources that gives more volume to the 'cacophony' of the peripheries than to the 'dry' monotony of the centre, the authors stress, because only the former had the potential for carrying 'new' and 'powerful' arguments about law, whereas the classics of 'jurisprudence' had little to add when it came to practice.[17] The message here is clear, even if the overtones of anti-intellectualism are a little unfortunate for implying that now so many legal and intellectual historians on the continent, having spent their careers translating, transcribing, and interpreting this jurisprudence before publishing their findings graciously *in English* (!), can so easily be dismissed in only a few breaths.

Serious critical reflections upon this kind of approach are now emerging. For example, Andrew Fitzmaurice, writing in the *Journal of the History of International Law*, expresses considered scepticism for any methodology appearing to privilege certain sources over others. As he puts it, historians should only really accept the need to 'distinguish

[15]Benton, *Law and Colonial Cultures* (n 14); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press 2009).

[16]Only the most recent example of this approach is an ambitious attempt to write a history of property and land tenure across 'empires' in North America: Allan Greer, *Property and Possession: Natives, Empires and Land in Early Modern North America* (Cambridge University Press 2018). The primary point of this breathtaking research is not to draw any broad comparative conclusions about *why* procedural and institutional variations developed from colony to colony, and far less is the book interested in exposing the logic or evidence of the legal thinkers who identified and advanced a particular aspect of property in land. Instead, the book succeeds in uncovering 'complexities' and 'multiplicities', 'occasional incoherence', and all manner of things 'fluid', 'dynamic', 'unfixed', and 'variegated', in the history of possession and dispossession. 'Legal pluralism', for obvious reasons, is another subject in legal history prone more than others to appraisal with the same kind of language. See especially the introduction to Lauren Benton and Richard Ross (eds), *Legal Pluralism and Empires, 1500–1850* (NYU Press 2013).

[17]Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press 2016) 21 and accompanying footnote at 211n61.

"metropolitan" statements of legal practice from law as it was experienced in empires and colonies *insofar as that distinction was meaningful to our historical subjects*' (my emphasis). He continues in this vein to make the case for breaking down all distinctions between 'theory' and 'practice', 'above' and 'below', 'metropolitan' and 'on the ground', and more of the same.[18] Benton has since responded with a steadfast claim that this is precisely what she has been doing all along, as she turns the table; her work, in fact, *does* attempt 'to uncover the interrelation of juridical thought to legal practice', and instead it is *Fitzmaurice* and others like him who work to 'perpetuate the artificial separation of intellectual history and the study of legal politics'. This allegation is tough to appraise absent any (possibly forthcoming) clarity as to what Benton takes to mean by 'legal politics'.[19]

Brought into stalemate, both agendas may be complementary to the one I wish to push here: that is, to call for more engagement, but with a greater sense of awareness over long periodisations, with law both on its own terms and also in relation to the evolution of empires and colonies. It is complementary because an experiment of this kind entails a reduction of regard for conventional blocs of history, and thereby some appreciation of the general modes of legal reasoning across epochs and peoples, for this leads to the discovery that precisely the same modes of legal reasoning are pertinent to 'jurispractice' in localised settings on the fringes of empire as they are to the scholarly literatures developed in the universities of Europe.

'Empire', as it appears in the previous few paragraphs, is used in the socio-political-territorial sense of the word with which students and scholars in the contemporary moment will be most familiar, but this is not an understanding of the word that ancient and medieval legal thinkers will recognise. The starting point of this article, then, will be to introduce *imperium* by setting out how it pertained to the concepts of office and delegation in Rome, as well as to the notion of a 'Roman Empire' reaching across lands and peoples. I then argue that the infusion of these particular meanings with a number of Christian ideals gave legal thought a fundamentally syncretic character from the early middle ages onwards. So often, to see through a window onto a thousand years of law and empire, it is first necessary to peel back the curtains of church and state. Doing so reveals repeated instances of the same kinds of reasoning, prominent among which were analogies, principles, and authorities. Of course, these modes of reasoning were not unique to legal thinkers, but the applications they were given within the sphere of law tended to particular outcomes that were often very different to those intended by political thinkers.

If we are to look for beginnings, as this article does, within a Mediterranean context, before eventually taking in more of the world around that sea, then the overwhelming legacy of the *ius civile* of the Romans is impossible to escape. What made this body of law so 'remarkable', in the words of Jill Harries, was 'its tenacity over a very long period': a period 'which saw the rise and partial fall of an Empire, the incorporation of numerous diverse legal systems and customs into the Roman order, and the replacement of a republic by a sole […] theocratic autocrat.'[20] Roman law was tenacious for a much

[18]Andrew Fitzmaurice, 'Context in the History of International Law' (2018) 20 Journal of the History of International Law 20.
[19]Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 Journal of the History of International Law 25.
[20]Jill Harries, 'Roman Law from City State to World Empire' in Jeroen Duindam and others (eds), *Law and Empire* (Brill 2013) 59.

longer period after this regime fell apart, too. Peter Stein told us it 'constituted a kind of legal supermarket, in which lawyers of different periods have found what they needed at the time'.[21] Johann Wolfgang von Goethe rather preferred to liken the endurance of Roman law to a 'diving duck that hides itself from time to time, always to come up alive again',[22] an image that recurs agreeably throughout Tamar Herzog's introductory account of 'the last two and a half millennia' of European law.[23] Roman law will therefore necessarily prove an important frame in what follows, but it will not be the only frame.

Applied legal thought requires analogies, principles, and authorities, where custom and observance fail. These are separate melodies, even if they work best in harmony. By no means are they are the only melodies. But the ease with which they will be identified and recognised by students and scholars working across either history or law encourage their isolation here. Over the course of this essay, I will reveal how these modes of European legal thought became established by the age of the great Roman emperors, before then they were used within medieval traditions of sacred and secular law, before finally defining our modern traditions of municipal and international law. If a focus of this broadness is able to reveal that imperialism, in one form or other across thousands of years, has often spurred innovation and change in the substance and procedure of law, then neither is it justifiable, any longer, to approach the early modern period in isolation from earlier periods, nor is it correct to treat the writings of legal thinkers between 500 and 1500 as evidence of the hidden genius of proto-political 'moderns' dabbling in 'constitutionalism'. Having made these arguments, this article concludes with an observation about how unerring today remains the commitment of legal thinkers to the use of analogies, principles, and authorities, despite innumerable substantive and procedural innovation, and wider economic and geopolitical transformations.

Empire

Imperium is a word from Ancient Rome, where it conveyed the ability to command. Implicit to it was the expectation that others will observe and obey. It invoked a diverse range of possible meanings in the Republic. It was often assigned a rhetorical or romantic function to laud the territorial boundaries of Rome (*imperium orbis terrarum*) or its people (*imperium populi Romani*). It was mobile, often appropriated by governors, magistrates, and others away from Rome, in control of soldiers at war and faced with all the attendant exceptions from ordinary law that their campaigning entailed (*imperium maius* in contrast with ordinary *imperium*; *imperium militiae* in contrast with *imperium domi*).[24] Within the context of the central administrative system, a legalistic meaning applied to *imperium* in regards to officeholding. In this specific register, *imperium* was

[21] Peter Stein, *Roman Law in European History* (Cambridge University Press 2004) 2.

[22] Johann Peter Edermann (ed), *Gespräche mit Goethe in den letzten Jahren seines Lebens: 1823–1832* (Brodhaus 1836) 12: 109: '[…] das römische Recht, als ein fortlebendes, das gleich einer untertauchenden Ente sich zwar von Zeit zu Zeit verbirgt, aber nie ganz verloren geht und immer einmal wieder lebendig hervortritt […]'.

[23] Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Harvard University Press 2017) 13, 216.

[24] The classic introduction in English remains Richard Koebner, *Empire* (Cambridge University Press 1961) 1–17. For a stronger sense of the semantic variation, see John Richardson, *The Language of Empire: Rome and the Idea of Empire from the Third Century BC to the Second Century AD* (Cambridge University Press 2008); Mario Pani, *Il costituzionalismo di Roma antica* (Laterza 2010); Fred K. Drogula, *Commanders and Command in the Roman Republic and Early Empire* (University of North Carolina Press 2015).

used to convey an assortment of public powers, of supreme command as well as jurisdiction, that came to be vested in the high offices of state. While much can be speculated about the terminology carried in the *lex de imperio* of Vespasian in 66, as well as the functionality of the instrument itself, what remains least easy to dispute is the direction of that grant, for it runs in one way unambiguously: the powers are bestowed upon the emperor by the senate and the people.[25] Glimmers of *delegation* and *office* are therefore both to be seen in the word *imperium* by the late Republic. As juristic authorities gained greater recognition among the political classes and were consulted more consistently by the rulers of Rome, so did the juridical understanding of *imperium* appear to become more sophisticated by measures.[26] Divestment from the senate played a role in this. Changes in the constitution during the Principate period intensified the need to define the collation of powers attributed to the very *highest* office of state (the *imperator* or emperor), and what followed from that, the need to determine the extent to which this kind of *imperium* could be delegated to magistrates. In this context, Ulpian (170–223) distinguished *imperium* into *merum* and *mixtum*: *merum* conveying a pure imperative to wield the 'power of the sword' for the preservation of peace, and *mixtum* the imperative to exercise jurisdiction over property and to establish lesser judicial offices for the upkeep of order.[27]

The rising importance of *imperator* during the Dominate period from late in the third century through to the deposition of the last western emperor in 476 provided for plenty of ongoing interest in the office within Roman constitutional thought. By the time of Justinian (527–65), Roman law recognised only one *imperator*, and that was the office he occupied. Deriving this *imperium* and *potestas* from the people, Justinian enjoyed a legislative and judicial power that was inferior to none.[28] This was *imperium* in the same sense of office as Ulpian and others before him had sought to define. Equally, however, the term could be used to convey in general the administrative machinery coalescing around the emperor. In other words, even if this represents a gross oversimplification, within Roman legal thought at the very moment it survived and began to outlast the empire of Rome itself, *imperium* conveyed both the highest office of government *and* the expectation that it entailed the delegation of essential public duties.

Organised religion added one final ambiguity to all this, and right at the very moment – it is no coincidence – that late antiquity prepares to give way to the early middle ages. After Theodosius orchestrated the abandonment of polytheism and made Christianity the state religion of the Roman Empire in 380, he and Ambrose, the bishop of Milan, endured an

[25]PA Brunt, 'Lex de Imperio Vespasiani' (1977) 67 Journal of Roman Studies 95; Michael Peachen, 'Exemplary Government in the Early Roman Empire' in Olivier Hekster and others (eds), *Crises and the Empire* (Brill 2007).

[26]For the argument that the office *a libellis*, later *magister libellorum*, provided the main momentum for this trend, see Tony Honoré, *Emperors and Lawyers* (Duckworth 1981).

[27]*D* 2.1.3: *Ulpianus libro secundo de officio questoris* (by the title alone we are instructed to recognise this to be a theory of office): 'Imperium aut merum aut mixtum est. Merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines, quod etiam potestas appellatur. Mixtum est imperium, cui etiam iurisdictio inest, quod in danda bonorum possessione consistit. Iurisdictio est etiam iudicis dandi licentia'.

[28]*I[nstitutes]* 1.2.6:

> Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit. quodcumque igitur imperator per epistulam constituit vel cognoscens decrevit vel edicto praecepit, legem esse constat: hae sunt quae constitutiones appellantur [… that which pleases the prince has the force of law, as per the law of kingship, […] the people having conceded to him all their imperium and power. Consequently whatever the emperor ordains in letters, judicial hearings, and edicts, is law […] called constitutions].

awkward co-existence, never quite getting to the bottom of disagreements over the separation of their spheres of authority, the ownership of churches, and the ferocity with which non-Christians should be persecuted.[29] For centuries to come, popes, bishops, and priests would begin to stake the claims of the institutional church to the essence of *imperium*, causing much resistance from emperor-kings, kings, and princes in turn – and all of this much earlier than the onset of an 'age of imperialism' in the early modern period whereupon most historical studies of international law take their starts. Indeed, the very means by which medieval legal claims were rehearsed and hashed out – through a series of widely recognised modes of reasoning – had already become deeply entrenched within Europe by this time. That we need to return to a period long before even the Principate to appreciate these modes of reasoning will now be shown. The most obvious and elaborate place to begin, for it opens the door to every other mode of legal reasoning, is with an apprehension of like for like.

Analogies

Historically, the expansion of particular regimes across geographies has demanded the acknowledgement and, wherever possible, the subordination of unfamiliar persons and things. In the process, jurisdictions have been made to envelop a series of strange relationships not just between persons *inter se* (pertaining, most obviously, to obligations), but also between persons and things (pertaining, sometimes indistinguishably, to things corporeal and tangible, and things incorporeal and immaterial). Novel situations like this have been encountered for millennia. By definition, they are troubling to comprehend because their particularities have never been comprehended before. Whenever a legal thinker, central or peripheral, has been confronted with new situations, he or she has generally been moved to consider next if *situations like them* have been comprehended before. So often it can be seen, in the history of legal thought, that what begins with a default natural response to unfamiliarity leads into reasoning by way of analogy.

'Analogy', wrote Henry Sumner Maine (1822–88) in *Ancient Law*, was 'the most valuable of instruments in the maturity of jurisprudence', but at the same time was 'the most dangerous of snares in its infancy'. For Maine, law is primitive when it is unwritten and disorganised, and when individuals, encumbered by their own illiteracy and superstition, are impaired in their abilities to distinguish between like-situations. To illustrate this, Maine presents 'a man menaced with the anger of the gods for doing one thing, [who] feels a natural terror in doing any other thing which is remotely like it'.[30] Individuals belonged to progressive society, by contrast, when political reformers moved to blend prevailing custom with borrowed principles of old and new law in the process of establishing codes. This coming-of-age narrative has western jurisprudence achieving puberty with the Twelve Tables in the fifth century BCE before advancing into adulthood during the prominence of the great jurists of the second and third centuries CE. It is at this point that legal thought became 'endowed with a nice perception of analogy', a capacity 'to

[29]See especially Michael Stuart Williams, *The Politics of Heresy in Ambrose of Milan: Community and Consensus in Late Antique Christianity* (Cambridge University Press 2017).

[30]Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (Frederick Pollock ed, 10th edn, John Murray 1916) 17.

adduce and consider an entire class of supposed questions', from 'a particular feature', somehow 'connected', according to Maine.[31]

From the Greek *ἀναλογία*, relating the mathematical proportions of *logoi* or reckonings, analogy had become one of the essential arts of persuasion by the age of the Republic. Latin grammarians seem to have come around to the device after Varro (116–27 BCE) made the claim in *De lingua Latina* for using *analogia*, tempered by *consuetudo*, to reach standards of derivational morphology.[32] Outside the doors of the academy, of course, good orators were busy dealing their analogies in groups. Cicero is famous for them. We find, for an example the importance of which will become more obvious later, in the third book of *De Officiis*, on the breaking of promises, the analogy of a man demanding his sword back in a fit of insanity: to restore it would be sinful, it is dutiful not to restore it ('reddere peccatum sit, officium non reddere').[33] Elsewhere, in *De Legibus* for example, analogies are used to situate the laws in relation to the people ('ut enim magistratibus leges, ita populo praesunt magistratus').[34] Analogies of a rhetorical kind like this were often fleeting, best deployed while manoeuvring through areas of law and custom that were disorderly. This is how fiction (*fictio*) first emerges in classical legal thought: procedurally, the invocation of falsehoods through analogy was performed in the interests of generating jurisdiction where none had been available before.[35]

Greater elaboration in the use of analogical reasoning within the sphere of legal thought occurred during the Principate period and after. For this, Peter Stein stresses the importance of Labeo of the Proculians, who brought a wider body of law to bear on cases of a private nature than his intellectual foes the Sabinians (who lionised *consuetudo*).[36] A century or so later, analogy was receiving official sanction with the *Edictum Perpetuum* of Salvius Julianus, which was prepared during the reign of Hadrian (117–138). Here, analogies are encouraged for disputes arising beyond the exact provisions of the laws – precisely the sentiment, indeed the very same wording, that would be mirrored four centuries later in the *Constitutio Tanta* (533) of Justinian promulgating the *Institutes*.[37] That Justinian liked analogy is clear in the preface to his edict of 541, in which the reform of the law is likened to the medication of the sick: an inspired principle of legislative constraint while plague ravished Constantinople.[38]

[31] ibid 42.

[32] Wolfram Ax, 'Pragmatic Arguments in Morphology: Varro's Defence of Analogy in Book 9 of his De Lingua Latina' in Pierre Swiggers and Alfons Wouters (eds), *Ancient Grammar: Content and Context* (Peeters 1996).

[33] Cicero, *De Officiis* (Walter Miller tr, Harvard University Press 1913) 372.

[34] ibid 460–61:

> For as the laws govern the magistrate, so the magistrate governs the people, and it can truly be said that the magistrate is a speaking law, and the law a silent magistrate. Nothing, moreover, is so completely in accordance with the principles of justice and the demands of Nature (and when I use these expressions, I wish it understood that I mean Law) as is government, without which existence is impossible for a household, a city, a nation, the human race, physical nature, and the universe itself. For the universe obeys God; seas and lands obey the universe, and human life is subject to the decrees of supreme Law.

[35] Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton University Press 1986); Maine, *Ancient Law* (n 30) 26–47.

[36] Peter Stein, 'The Relations between Grammar and Law in the Early Principate: The Beginnings of Analogy' (1971) 2 La Critica del Testo, Atti del II congresso internazionale della Societa italiana di storia del diritto 757; Peter Stein, 'The Two Schools of Jurists in the Early Roman Principate' (1972) 31 Cambridge Law Journal 8; Peter Stein, 'Interpretation and Legal Reasoning in Roman Law' (1995) 70 Chicago-Kent Law Review 1539.

[37] *Constitutio Tanta* (December 533), section 18, via *C[odex]* 1.17.2: 'ut si quid in edicto positum non invenitur, hoc ad eius regulas eiusque conjecturas et imitationes possit nova instruere auctoritas'.

[38] *N[ovellae]* 111: 'quod medicamenta morbis, hoc exhibent iura negotiis'.

If legislation promulgated for the regulation of offices and institutions was occasionally conveyed in language attached to descriptive, figurative, or cutesy analogies, the sphere of public and administrative law remained, on the whole, less receptive to substantive and detailed analogical *reasoning* than Roman private law. Republican constitutional thinking may have survived the Republic itself – not in the form of any codification, just in the memories and records of great orators – but its rudiments were soon incompatible with the politics of a new era in which the operation of law and government fell more so to bureaucrats and emperors than to advocates and jurisconsults.[39] What changed, at this moment, was the organisation and entrenchment of Christianity within Roman society. That made all the difference. Once the ideological rudiments of Christian thinking became comprehensible within society, teachers and preachers received temptation to move beyond the provision of moral principles and begin to use religious teaching to inform legal thought.

Although this trend really took off in the middle ages, it was already set in late antiquity. Some of the earliest cross-fertilisation occurred from the fourth century at least, as will be illustrated in a brief consideration of the life and times of Augustine of Hippo (354–430). In *De Civitate Dei contra Paganos*, Augustine presents Rome as a new Babylon, 'through whose agency it pleased God to conquer the whole world and impose peace over its whole length and breadth, uniting it in the single society of the Roman commonwealth and its laws'.[40] Like any other realm, Rome had to conform with 'iustitia'; a realm without justice, otherwise, is no better than an evil criminal gang, 'imperio principis regitur, pacto societatis astringitur, placiti lege praeda dividitur'.[41] Augustine's association here of empires generally with people beyond the law – *latrones* – reveals a sense of ambivalence that is detectable elsewhere in his writings about the accomplishments more specifically of a mostly Christian Roman Empire.[42]

Some wider intellectual context here will be revealing. Augustine had mastered the art of analogy in the early part of his career as a rhetorician, the profession which, long before his work on *The City of God*, had drawn him to the city of Milan. Here, at the hands of Ambrose, his solemn baptism took place. Bishop Ambrose, for his part, had studied similar topics in his own youth – rhetoric and law – before fastidiously obsessing with the Old Testament in his maturity. This was an intellectual combination which often led Ambrose to favour a more eye-watering kind of analogy. In a letter addressed to his sister in 384, in which an imagined or hypothetical interchange with an adversarial *imperator* is recounted, he argues for the superiority of *sacerdotem Ecclesiae* over *imperium* by drawing an analogy to sexual intercourse with an adulteress.[43]

[39] Jochen Bleicken, *Lex Publica: Gesetz und Recht in der Römischen Republik* (Walter de Gruyter 1975).

[40] Augustine, *City of God, Volume V: Books 16–18.35* (Eva M. Sanford and William M. Green tr, Harvard University Press 1965) XVII, 438–39: 'per quam Deo placuit orbem debellare terrarum et in unam societatem rei publicae legumque perductum longe lateque pacare'.

[41] Augustine, *City of God, Volume II: Books 4–7* (William M. Green tr, Harvard University Press 1963) IV, 16–17: 'For what are robber bands except little kingdoms […] governed by the orders of a leader, bound by a social compact, and its booty divided according to a law as agreed'.

[42] Gillian Clark, '*Imperium* and the City of God: Augustine on Church and Empire' (2018) 54 Studies in Church History 46–70. Original and influential in many respects, the *City of God* is not optimally read as an archetype of Roman *legal* thought, however, for Augustine's analogies to the kingdom of God in view of legal relationships in the Roman Empire were always crude in contour and not legalistic in any detail.

[43] Ambrose, *Epistola* 20: 19:

> Ad imperatorem palatia pertinent, ad sacerdotem Ecclesiae. Publicorum tibi moenium jus commissum est, non sacrorum. Iterum dicitur mandasse imperatorem: Debeo et ego unam basilicam habere. Respondi: Non tibi licet illam habere. Quid tibi cum adultera? Adultera est enim, quae non est legitimo Christi conjugio copulata.

This was the beginning of a protracted standoff between church and state.[44] Central to it was the language of law, of course, and the measurement of analogies by one against the other. Sacred power was to secular power what the sun was to the moon. Basilicas were to bishops what palaces were to emperors. The pallium was to archiepiscopacy what the crown was to kingship. Just about any institution of organised Christianity, in fact, came to find some analogue to a state institution.

The disintegration of Rome itself, which followed shortly after the beginning of this standoff – and certainly played a role in the fall – was an event which had different consequences for empire and legal thought depending on which part of the world one inhabited between 476 and 1204. Barely had the western portion caved in on itself than its laws were mined and redacted, giving legal analogy several new and transliteral applications. Not only were analogies to prove handy for the framers of basic codes like the *Lex Burgundionum*, the *Lex Visigothorum*, the *Lex Saxonum*, and the *Concilia aevi Merovingici*, but they were also necessary if these codes were to be received among peoples for whom both the *language* and the *political organisation* of Rome were alien models. 'Vulgarisation' has been a common way to regard this process of reception, although here it will be submitted that *analogisation* should be considered one of its necessary conditions. In this connection, it might also be seen how the word *imperium* was able to linger around for the Carolingians first, after 800, before the Ottonians, after 962, to adopt (or 'renovate') for the glorification of their own secular powers. The empire was dead, but long lived the emperors – even if the church was partly to blame for this confusion.[45] Beyond this orbit, a cohort of kings and lesser princes were soon to be heard making claims for themselves that, within their own realms, they too ruled *like* emperors. By contrast, in the Byzantine East, *βασιλεύς* (basileus) became the more appropriate term to convey the highest office of state, *imperator* being just one of the earliest of many hundreds of legal ideas of Roman conception that were made to undergo translation and paraphrasis (*παράφρασις*) from Latin into Greek. In Constantinople, this was an office whose holders were often fond of appropriating elements of priesthood. Some moved to dominate patriarchal elections and were unafraid of promulgating controversial new laws for the church and religious observance (activities which have inspired generations of historians to identify localised experiments with 'caesaropapism').[46] The importance of metaphors and analogies as heuristic devices for determining the best actions and obligations in movement between Latin Roman civil law and Greek Roman civil law is easily seen in the key legal of tracts of the period too, few more important than the *Synopsis Legem* of Psellos (1017–1078).[47]

[44]Brian Tierney, *The Crisis of Church and State 1050–1300* (Prentice Hall 1964), despite the title of which provides coverage from Ancient Rome, and covers many of the better-known controversies.

[45]Frankish self-belief in the ability to renovate the old Roman Empire was testified in the wording of seals stuck to their charters (*RENOVATIO ROMANI IMPERII*), a notion which was then to be echoed throughout time. For interpretations of Charlemagne's imperial power in the Middle Ages, see Anne A. Latowsky, *Emperor of the World: Charlemagne and the Construction of Imperial Authority, 800–1229* (Cornell University Press 2013).

[46]The expression was coined in Justus Henning Böhmer, *Ius ecclesiasticum protestantium: Usum hodiernum iuris canonici iuxta seriem Decretalium ostendens et ipsis rerumargumentis illustrans* (Impensis Orphanotrophei 1756) 1: 10–11. The best study remains Gilbert Dagron, *Empereur et Prêtre: Étudesur le "césaropapism" byzantine* (Éditions Gallimard 1996), recently translated into English as *Emperor and Priest: The Imperial Office in Byzantium* (Jean Birrell tr, Cambridge University Press 2003).

[47]Michaelis Pselli, *Synopsis Legum Versibus Iambis et Politicis* (Guilelmum Gotlobum Sommerum 1789). For context, see Zachary Chitwood, *Byzantine Legal Culture and the Roman Legal Tradition* (Cambridge University Press 2017) 150–83.

The Roman context, increasingly 'ancient', became generous once it was made to account for new relationships and personalities within an enlarging scope of 'law'. The rediscovery of Justinian added flesh to a frail skeleton of private law during the eleventh and twelfth centuries, prompting universities to accept that law was an academic discipline as well as a practical art. By careful steps in the thirteenth and fourteenth centuries, scholars began to experiment with taking private law ideas out of context to give them new and sometimes dangerous applications, even *political* applications, as Quentin Skinner points out in his *Foundations*. His prime example is the supplication of hypothetical arguments for violence against tyrannous kings and popes with passages from the *Digest* sanctioning individual self-defence (*vim vi repellere licit*).[48] Skinner sees this as an example of 'modern constitutionalism' within European political thought insofar (one has to infer) as it gestured to the imposition by subjects of constraints upon sovereigns. This observation appears to overlook the reality that analogies from the same source were often just as attractive to any absolutist augmenting his statecraft as they were to those making calls for his limitation.

Another matter cuts more directly to the principal message of this article. Confronted as we are by the consistency with which analogical reasoning was used among all the glossators, post-glossators, and their students – as they worked to fill voids in the Roman law and bring it up to date – it becomes unobvious why such a method should be considered either 'modern' *or* 'political'. Roland of Lucca, for an early and particularly interesting example, found recurrent need (as a good Tuscan) to refer to a number of Roman law statements about churches in order to elaborate his legal thinking about cities and public property throughout his *Summa Trium Librorum* (ca. 1195–1234), as Emanuele Conte has shown.[49] For another example from across the spectrum of legal learning at the time, consider the guile shown first by canonists, before the civilians, towards the *persona*. Whatever had been its character in Roman law as the locus of capabilities, *persona* came to be analogised by Innocent IV in contemplation of the *collegium* in the *Apparatus* (1254) with famous effect.[50] Soon it was accepted that a group could be presented as a 'traditional person', as Johannes Andraea (1270–1350) put it, 'who in an individual substance is a rational entity'. Entities of this kind went by many names (*universitas, communitas, collegium, corpus, societas*).[51] This invocation of falsehood through analogy, for the purpose of generating jurisdiction where none had been hitherto available, is actually exemplary of an *ancient* method of appealing to fiction in legal thought, even if the transformation in question – of ecclesiastical corporation into *persona ficta* – represented a style of contortionism that was characteristically *medieval* in performance (the

[48]Skinner, *The Foundations of Modern Political Thought* (n 7) 2: 123–34. See also Harro Höpfl, 'Scholasticism in Quentin Skinner's *Foundations*' in Brett and others, *Rethinking the Foundations of Modern Political Thought* (n 7) 125–26.

[49]Emanuele Conte, 'Roman Public Law in the Twelfth Century: Politics, Jurisprudence, and Reverence for Antiquity' (forthcoming, in the author's possession); Emanuele Conte and Sara Menzinger (eds), *La* Summa Trium Librorum *di Rolando da Lucca (1195–1234): Fisco, politica, scienta iuris* (Viella 2012).

[50]A college is in law but not reality one person, Innocent gave (c. 57 X 2.20), for which see JP Canning, 'The Corporation in the Political Thought of the Italian Jurists in the Thirteenth and Fourteenth Centuries' (1980) 1 History of Political Thought 17.

[51]Johannes Andraea, *Sextus* 5.11.5, 8–9, quoted in ibid 17. See also PW Duff, *Personality in Roman Private Law* (Cambridge University Press 1938) 148–49, 221–23; Walter Ullmann, 'The Delictal Responsibility of Medieval Corporations' (1948) 64 Law Quarterly Review 81; Otto von Gierke, *Political Theories of the Middle Age* (FW Maitland tr, Cambridge University Press 1900).

consequences of which modern empires would later have to grapple with).[52] While there is nothing all that surprising about this kind of method within the *legal* thought of the second half of the middle ages, it still true that their applications could have some political – and even interpolitical – effects. For example, as Ryan Greenwood has shown, the very first secular arguments of any sophistication in the *ius ad bellum* tradition derived from the recognition that, just as injured individuals had to secure redress for themselves in the exceptional absence of judicial authority (*copia superioris*), so could entire cities launch remedial wars against neighbouring cities, rustic lordships, or whatever other group had wronged them.[53] But not all analogies were so bellicose; many others were mundane. The point is that when lawyers felt there was a need for them, the *Corpus iuris civilis* often met that need. It is not for no reason that the conjunctions *tamquam*, *ut*, and *quasi* were so ubiquitous in neo-Latin law, as they would remain at the hands of canonists and civilians into the Renaissance and beyond.

It should not be surprising that Roman law, as a combination of principles and authorities that had been perfected by the sixth century to govern all relationships between individuals within the *civitas*, became the first point of reference for legal scholars laying the framework centuries later for relationships *inter civitates*. For this project to work required ostensibly comparable models of civic organisation and political language, if not of law itself. The rise and increasing sophistication of maritime trade and exploration helped in this respect. City-states dotted along the coastline of the Mediterranean, whose spokespeople had for millennia been measuring their differences against each other, gradually appeared to have a lot more in common than once thought. This is something which the development of *lex mercatoria* indicated long before gossip swirled of navigators confronted with contexts of exotic dissimilarity beyond Europe.[54] It was in this moment, amid the series of false starts that delayed the proper commencement of the 'age of discovery', that the task of transposing the ideas and institutions of the 'Old World' upon the 'New' got underway.[55] These were the fifteenth and the sixteenth centuries. In this period, dismal and recurrent were the failures of merchants (covetous of items to trade), settlers (desirous of land to occupy), and proselytes (despairing of some parity of divinity) to generate a common understanding of obligations necessary to commence interrelationships. What followed their failures, however, was crucial. In the cities, many disenchanted sponsors behind these ventures – syndicates, orders, patrons, courtiers, public authorities, and others – turned to lawyers.[56] Legal thought was tasked, in these circumstances, with rationalising foreign relationships so that modern empires (we might call this *imperialism*) could commence. Alone, it was unconvincing to insist

[52]Maine, *Ancient Law* (n 30) 26–47; Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton University Press 1986); Philip J Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India Oxford* (Oxford University Press 2011); Edward Cavanagh, 'Corporations and Business Associations from the Commercial Revolution to the Age of Discovery: Trade, Jurisdiction, and the State, 1200–1600' (2016) 14 History Compass 493.

[53]Ryan Greenwood, 'War and Sovereignty in Medieval Roman Law' (2014) 32 Law and History Review 31.

[54]Mary Elizabeth Basile and others (eds), *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and Its Afterlife* (Ames Foundation 1998); V Piergiovanni (ed), *From Lex Mercatoria to Commercial Law* (Duncker und Humblot 2005). For a similar emphasis upon the commonality of Mediterranean cities caused by the imposition of external conditions, see Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (n 2).

[55]JH Elliott, *The Old World and the New, 1492–1650* (Cambridge University Press 1992).

[56]For the associationism of late medieval commercial and spiritual life as a precondition for expansion into the New World, see Cavanagh, 'Corporations and Business Associations' (n 52).

upon the universality of human sociability (try as Francisco de Vitoria (1492–1546) and others did to promote the bilateral benefits of *ius communicandi* or *ius praedicandi*).[57] The elaboration, on just one side of the encounter, of a novel *ius* was never enough to dismantle the interface preventing interrelationships in the first place (unless, of course, that new *ius* was flanked by force, which became controversial after Christian moralists began to question the justness of aggressive violence abroad).[58] Non-Europeans for their part often perceived few benefits from engaging with the western legal tradition, so refrained, at first anyway, from acknowledging it, waiting in turn for the right moment to speak their own rights talk.[59]

Analogy was about to prove vital. To the spout of this well, jurists in Spain and Italy had been taking their buckets often enough between the fourteenth and sixteenth centuries (among them, those charged with elaborating the claim of some or other prince or lord to some or other territory or waterway), though it is Hugo Grotius (1583–1645) who has since become, in the appraisal of international lawyers anyway, the most famous exponent of the method. Early in the seventeenth century, Grotius saw in the imposition and recognition of conditions of transfer from one individual to another transactions analogous within the murky public law of the sea. '[T]o territory and the law of peoples can be applied the same reasoning' as could be found in authoritative Roman treatments 'of private estates and of private law', Grotius admitted, 'since peoples in their relation to the whole of humanity occupy the position of private individuals'.[60] Once Grotius had witnessed the age of discovery give way to the age of imperialism, generations of Europeans after him continued to persevere with the task of drawing analogies from Roman private law in the process of creating public international law, all the while concealing their disregard for the imbalance of relations between certain nations and communities.

Consider now prescription. In Rome, the generation of ownership through continuous possession was called *usucapio*, which provided relief to a possessor against an owner who was not considered to be taking the appropriate steps to secure his ownership of property. For land ownership to divert to the possessor, the act of possession had to be performed in good faith, and it typically required a just cause (pertaining, perhaps, to an awry sale), over and above the passage of time (typically, ten or twenty years).[61] By the sixth century, the principles and procedures of *usucapio* were simplified, and the term was replaced by

[57]Francesco de Vitoria, *On the American Indians*, in Anthony Pagden and Jeremy Lawrance (eds), *Francisco de Vitoria: Political Writings* (Cambridge University Press 1991) 278–86 (q. 3, a. 1). For justifications of preaching the gospel, see Daniel S Allemann, 'Empire and the Rights to Preach the Gospel in the School of Salamanca, 1535–1560' (2018) 62 Historical Journal 35.

[58]Anthony Pagden, 'Conquest and the Just War: The "School of Salamanca" and the "Affair of the Indies"' in Sanhar Muthu (ed), *Empire and Modern Political Thought* (Cambridge University Press 2002).

[59]Only gradually did native claims, as a collection of analogies expressed through 'rights talk', come to be turned upon intruders with mixed successes. See, for example, Saliha Belmessous (ed), *Native Claims: Indigenous Law against Empire, 1500–1920* (Oxford University Press 2012).

[60]Hugo Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to take part in the East Indian Trade* (Ralph van Deman Magoffin tr, James Brown Scott ed, Oxford University Press 1916) 36: 'Verum est loqui iurisconsultum [i.e., Ulpian] de praediis privatis, et lege privata, sed in territorio et lege populorum eadem hic est ratio, quia populi respectu totius generis humani privatorum locum obtinent'. Later in his career, he would extrapolate a public law of war and peace from private law correlates, as Alberico Gentili (1552–1608) had already attempted with some success in his own work. See Benedict Kingsbury and Benjamin Straumann (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press 2010).

[61]Alan Watson, *The Law of Property in the Later Roman Republic* (Clarendon Press 1968) 31–32, 48–61; HF Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman law* (3rd edn, Cambridge University Press 1972) 151–55, 506.

praescriptio longi temporis, which now referred to the acquisition of land ownership after a slightly longer period of possession.[62] Prescription of time, as a means of both generation and extinction, was vulgarised, feudalised, and given applications in local settings for the allocation of status, title, and personal jurisdiction, after imperial disintegration in the West. Then the idea diverged in two different ways. Canonists used prescription to settle positions of authority and access to rights of tithe and the like, whereas civilians used prescription as it had been used in Roman law, but they also used prescription, along with an amplification of Roman customs (*consuetudines*) to measure the legitimacy of new kingdoms and city-states against the *Imperium Romanorum*. This kind of prescriptive reasoning found a strong place in both the *ius commune* and the English common law by the time Fernando Vázquez de Menchaca (1512–69) emerged to present his highly elaborated and nuanced account of prescription in his *Controversies* (1564), an authority which Grotius cited as the 'pride of Spain'.[63] Prescription, having been one of the most important analogical tools used to fortify the territorial sovereignties of autonomous European polities, then became a key component in the ideologies of European imperialism, as it was used to contemplate territorial and maritime claims abroad. After prescriptive reasoning opened the seas to all who sailed them, it then extinguished (though never endorsed) aboriginal title, and finally settled boundaries between states powerful enough to contest them (most exemplarily in the arbitration between British Guiana and Venezuela in the 1890s).[64]

Quite how international law managed to triumph within European thought essentially as a mode of legal thinking through analogy should not, therefore, surprise us. 'International law is but private law writ large', as T. E. Holland (1835–1926) lectured at Oxford in May 1878, which he rushed into French for the European audience of the *Revue de droit international et de législation comparée*. 'C'est l'extension aux communautés politiques des idées légales qui sont appliquées originairement aux relations des individus. Ses distinctions principales sont donc naturellement les mêmes que celles avec lesquelles nous a familiarisés depuis longtemps le droit privé'.[65] Jurists confident enough in their own positivism may have tried their best to repress this interpretative habit, but public international law as a scholarly and systematic endeavour, as it developed between 1869 and 1914, could not help but look altogether like an extrapolation of Roman civil law to geopolitics. The only standout anomaly was the almost arbitrary enjoyment by some polities of full personality akin to individuals as *civilised* leaving others lagging behind them, embodying only partial personality, and condemned therefore to relegation at the margins of international law as 'quasi-sovereign', or worse still *semi-civilised* or *uncivilised*.[66] If these principally non-European communities were analogy's losers, its cosmopolitan victors remained utilitarian in offsetting its deficiencies with its merits. Hersch

[62] *C*, 7.31, 7.33–5.

[63] D Fernandi Vasqvii Menchacensis, *Controversiarvm illvstrivm* (Venice 1564), bk II; Hugo Grotius, *Commentary on the Law of Prize and Booty* (Martine Julia van Ittersum ed, Liberty Fund 2006) 343–46.

[64] Edward Cavanagh, 'Prescription and Empire from Justinian to Grotius' (2017) 60 Historical Journal 273; Boundary Arbitration Treaty between Great Britain and Venezuela (2 February 1897) 184 *C[onsolidated] T[reaty] S[eries]* 188; Award regarding the Boundary between the Colony of British Guiana and the United States of Venezeula (3 October 1899) 28 *Reports of International Arbitral Awards* 331.

[65] TE Holland, 'Les Débats Diplomatiques Récents' 10 Revue de droit international et de législation comparée (1878) 168, comparing his own translation in TE Holland, *Studies in International Law* (Clarendon Press 1898) 152.

[66] This is rightly interesting to intellectual historians of international law. See Natasha Wheatley, 'Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State' (2017) 35 Law and History Review 753; Andrew

Lauterpacht, looking back at this period, may have harboured some despair at the shortcomings of the European legal imagination in his taxonomical *Private Law Sources and Analogies of International Law* (1927). But still the last words of that book, like its overall tenor if we are to be honest readers, amounted to a celebration of Grotius's identification of individuals *respectu totius generis humani*: here was 'an ideal', Lauterpacht confessed, that remained 'worthy of pursuance' between the wars.[67]

Not all ideas in law were analogistic in precisely the same way as those to be found in private law, however. Far more awkwardly refitted to meet the demands of early modern imperialism were those ideas underpinning the laws of public administration in ancient empires, which had never been all that elaborate outside of matters touching church and office. Here is another of those contexts which have led some scholars to struggle to keep up any strict distinction between *the legal* and *the political* and to slide into appraisals of *the constitutional*. Whatever one may think of this compromise, there are a number of ways to imagine a different narrative framework by showing a greater appreciation of what legal thinkers were doing *with the law itself*. While the Renaissance had seen a resurgence of highly selective interest with the Republican constitutional tradition, this was only done in view of European political circumstances, not of the colonies dreamed possible beyond Europe. Any sage worth his salt during the sixteenth and seventeenth centuries knew to seize upon the political ideals of Rome, in particular those of the Republic, mostly channelling Cicero on virtue, glory, and war (and regardless, really, of the message).[68] But to the extent that somehow Roman ideals provided a benchmark in considerations of early modern expansion, it was usually to contemplate diplomatic and political matters of state, or otherwise the commercial and economic concerns of the metropole.[69] No analogies of any detail were drawn to old Rome when it came to the *legal* aspects of colonial administration. Ethical and practical concerns, expressed by legal thinkers in London or Paris, say, about the governance of a number of dependencies far away from those cities, were hashed out in a standalone register – and how Rome figured within it is a question. The image of a central Roman *imperator* encircled by administrative and judicial machinery may have enlivened the analogical imagination of Europeans writing about empire in the age of discovery, but he was not so central to their musings as he could have been; more important, it seems, the image of the lonely provincial praetor, fumbling principles for enforcement of contracts, and that of the roaming commissioner, foisting foreign codes upon fresh subordinates along the frontier in wait for further instructions, were thoroughly kept out of mind and off the page.

This is not to say that analogy had no part to play in the imagination of empire in England or France, but rather to say that Rome was not always the main analogue for

Fitzmaurice, 'The Expansion of International Franchise in the Late Nineteenth Century' (2017) 28 Duke Journal of International and Comparative Law 449.

[67]Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (Longmans, Green, and Co 1927) 306.

[68]Martin van Geldern and Quentin Skinner (eds), *Republicanism: A Shared European Heritage* (two vols, Cambridge University Press 2002); Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (Oxford University Press 2016) 241–341. See, however, Clifford Ando, *Law, Language, and Empire in the Roman Tradition* (University of Pennsylvania Press 2011) 81–114.

[69]The best comparative study remains Anthony Pagden, *Lords of All The World: Ideologies of Empire in Britain, France, and Spain, 1400–1800* (Yale University Press 1995).

lawyers – even if it could be invoked at key moments. The ideological tradition of the 'British Empire' after the American crisis, and then Indian scandals, was enlivened by many analogies to Rome when it came to thinking through constitutional peculiarities, it is true.[70] Likewise in France around a similar time, it was the Revolution and, after that, the rise of Napoleon Bonaparte to Emperor, that inspired the same harkening to antiquity.[71] Still it remains a question as to how far ancient public law analogies, for all their deployment in awfully juristic contexts, were conceived with rhetorical rather than adjudicative ends in mind. It is hard not to adorn, in marble, Ciceronian Burke in the Warren Hastings impeachment, or Justinianic Napoleon and his legislations of general effect.[72] And yet, in the English tradition, either side of Burke, it made more sense to invoke the Norman yoke than the Roman one, and to speak of an 'ancient constitution' that was really a *medieval* one.[73] By contrast, when French legal thinkers, who had for centuries repressed their historic Gallicism, finally embraced *romanticism*, this was a wondrous misnomer for a continental movement that had nothing to do with the exactitude of Rome and everything to do with the sublimity of its aftermath. Frustrated though this movement was by the strictures of the Code Napoléon, French legal thought was not to be shaken from the important medieval inflection it acquired, in this period, to go with its positivism.[74]

Maybe it remains to ask *why* administrative legal thought between 1500 and 1800 – which includes the writings and opinions of advisors and judicial officeholders who shaped the commissions, charters, and strategies of kings, councils, and designated trading bodies – tended not to dwell for long upon comparisons drawn to the constitutional processes by which new settlements and conquests were bound and unbound to ancient empires. Simplest it could be answered that early modern imperialism – the designs of multiple competing monarchs, sometimes with the endorsement of a centralised pope, and carried out by corporate and proprietary proxies – looked structurally very different to Roman or Greek imperialism in any of their expansionist phases. If we follow Moses Finley, this dissimilarity is so profound that it mitigates even against the use of the same terminology of imperialism (and, if we struggle to see any parallels between offices of imperator in the sixth, the eleventh, and the sixteenth centuries, then we probably should still follow Finley).[75] One's feeling about this dilemma may depend on one's habituated loyalties towards politics, history, and literature, for each of these genres is suited to its own methods of interrogating the relationship between ancient and modern empires. For *historians of legal thought*, however, a few questions emerge about context and motivations. Should it appear remarkable that republican political

[70]David Armitage, *The Ideological Origins of the British Empire* (Cambridge University Press 2000).
[71]Claude Mossé, *L'Antiquité dans la Révolution française* (Albin Michel 1989); Harold Talbot Parker, *The Cult of Antiquity and the French Revolutionaries: A Study in the Development of the Revolutionary Spirit* (Chicago University Press 1937).
[72]Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Princeton University Press 2017), esp. 820–50; Donald R Kelley, 'What Pleases the Prince: Justinian, Napoleon and the Lawyers' (2002) 23(2) History of Political Thought 288–302. See generally Koebner (n 24), *Empire*, 105–297.
[73]JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 1987); RJ Smith, *The Gothic Bequest: Medieval Institutions in British Thought, 1688–1863* (Cambridge University Press 1987); James Muldoon, *John Adams and the Constitutional History of the Medieval British Empire* (Palgrave Macmillan 2017).
[74]Donald E Kelley, *Historians and the Law in Postrevolutionary France* (Princeton University Press 1984); Kathleen Davis, 'Sovereign Subjects, Feudal Law, and the Writing of History' (2006) 36 *Journal of Medieval and Early Modern Studies* 223.
[75]Moses I Finley, 'Colonies: An Attempt at a Typology' (1976) 26 Transactions of the Royal Historical Society 167.

traditions of the Renaissance and the Reformation, which derived so much of their inspiration and legitimacy from Cicero and what were perceived to have been the pressing political concerns of his time, flourished quite apart from the sketchy and often crudely feudalistic legalism that was made to affix European metropoles to their extra-European offshoots?[76] Or, in view of the systematic need to grant concessions of privileges to individuals and groups, or the desire of élites to transplant entire personal estates abroad, should it appear surprising that hard and loose analogies were drawn from conventions of feudal and manorial law? Forward a century or so, on the same theme, is it remarkable, for all the Roman anecdotes and analogies of Emer de Vattel (1714–67), that their applicability to 'the law of nations' is circumscribed within a European sphere of public law in which arbitration is to be avoided wherever possible? By extension, keeping in view Vattel's purpose, his audience, and also the authorities with whom he conversed, should it be surprising that his observations about the establishment and administration of colonial governments and their relationships to metropolitan governments are cursory given his interest in legal principles relevant to the latter and not the former?[77] To find the answers to these questions, historians must first attempt to channel the motivations of certain thinkers before coming to the substantive and procedural claims they made about law and empire in the early modern period.

When the intellectual climate changed between 1770 and 1830, an age of revolutions imposed irreversible restraints upon absolutist monarchies and delegated lordly jurisdictions, while seeing some fusion of popular sovereignty with participatory democracy. Once these conditions began to burden the minds of legal thinkers in Europe (along with legal thinkers in America who inherited what was essentially an Anglo-European intellectual enterprise) with a compulsion to justify and fortify the public legal principles underpinning their national administrative systems, it became possible for experiments with more systematic ordering of imperial administrative systems.[78] All of this was certainly called for. Empires were never so global in reach as they were at the turn of the eighteenth century into the nineteenth; subject populations never appeared so different from one another and, as well, from Europeans. If administrative uniformity became the goal in theory for those, toiling away at their desks in metropolitan cities, salaried by the state to find some way to transform distant hubs of empire into the bureaucratic appendages of European governments, then what was learned in practice, during this meridian

[76]See, most recently, Wyger Velema and Arthur Weststeijn (eds), *Ancient Models in the Early Republican Imagination* (Brill 2017).

[77]Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. Béla Kapossy and Richard Whitmore (Liberty Fund 2008); Amanda Perreau-Saussine, 'Lauterpacht and Vattel on the Sources of International Law: The Place of Private Law Analogies and General Principles' in Vincent Chetail and Peter Haggenmacher (eds), *Vattel's International Law from a XXIst Century Perspective/Le Droit International de Vattel vu du XXIe Siècle* (Brill 2011); Ian Hunter, 'Vattel's Law of Nations: Diplomatic Casuistry for the Protestant Nations' (2010) 31 Grotiana 108.

[78]See generally Martin Loughlin, *The Foundations of Public Law* (Oxford University Press 2010), which is strongest on historical ideas of state and constitution in the eighteenth and nineteenth centuries. For an unembellished but still valuable reference book on the evolution of the English administrative system, see Norman Chester, *The English Administrative System, 1780–1870* (Clarendon Press 1981). For attendant ideology, see Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press 2015). By contrast, for an overview of the reworking of administrative principles in the early-nineteenth-century France, see Igor Moullier, 'Une Révolution de l'AdminsitrationLa Naissance de la Science Administrative Impériale (1800–1815)' (2017) 3 Annales Historiques de la Revolution Française (2017) 139. The French interpretative tradition matured in the nineteenth century to become suspicious of analogy and courteous towards real interests. For this, see François Gény, *Méthode d'interprétation et sources en droit privé positif* (2 vols, Librairie Générale de Droit & de Jurisprudence 1919).

moment, was the uneasiness with which colonial governments are ever to fit through cookie cutters.[79]

This was particularly the case in Great Britain, whose 'empire swirled with legal analogies: convicts to slaves, property in land to property in slaves, the despotism of masters to the tyranny of governors', as Benton and Ford point out in *Rage for Order* – a finding that supports my exposition here, even if it is reached by maintaining a resolute focus upon only those challenges confronted by 'middling officials' and dispatched commissioners toiling 'on the ground'.[80] For Benton and Ford, legal thought is only to be seen whenever *ad hoc* pragmatism received gentle encouragement by a government department of mostly meek Oxbridge graduates: only *this* was law, for the authors, and it was 'everywhere', albeit with some qualification:

> Law was everywhere. It was the medium of multiple, parallel projects of imperial change, and it provided the text and subtext of numerous colonial controversies, including debates about colonial legislative powers and crown prerogative. But it was not gathered up in the tomes of jurists or even Privy Council cases, the usual fixtures of constitutional law.[81]

A justification for excluding certain types of documentary evidence and placing them onto a maligned list of sources unworthy of treatment (to which one would certainly need to add the Court of King's Bench, which is unquestionably the more important venue for cases touching the imperial constitution between 1770 and 1820) is elusive throughout *Rage for Order*. Readers tempted to track down opinions expressed in reports of the law officers of the crown, arguments heard at all stages in cases making their way into the King's Bench, and published works of legal scholarship churning out of presses in Clarendon and Cambridge over the same period cannot fail to ignore similar bursts of analogising by legal thinkers to attain precisely the same end: imperial order.

Undoubtedly, in the nineteenth century, a new verve for political and administrative reform within imperial states, coupled with an understanding of the globalisation in reach of the polities now attached to them, planted the seeds of legal positivism in the minds of many legal thinkers, who – allowing these seeds to germinate a little while – grasped for analogies whenever they needed to find them. Perhaps the most noteworthy aspect of this trend was the diminishing hesitance of learned legal thinkers to reach back into antiquity for their analogies. Here is precisely the kind of discovery that will be better appreciated by scholars prepared to follow intellectual trends across centuries rather than decades. Sir George Cornewall Lewis's *Essay on the Government of Dependencies* (1841), a detailed and eclectic guidebook of examples from classical empires, has to be cited as a key contribution to a tradition that is more latterly attributed to Maine and his moment.[82] Whoever are to be seen as its earliest proponents – following Duncan Bell, we might look instead to John Stuart Mill – this was a tradition reaching vertiginous peaks by the end of the century: a time when contradictory positions and fast-handedness with classical anecdotes make it easier to grow

[79]CA Bayly, *Imperial Meridian: The British Empire and the World, 1780–1830* (Longman 1989); David Todd, 'A French Imperial Meridian, 1814–1870' (2011) 210 Past & Present 155.
[80]Benton and Ford, *Rage for Order* (n 17) 52, comparing Benton, *Law and Colonial Cultures* (n 14) 260–61.
[81]Benton and Ford, *Rage for Order* (n 17) 3.
[82]George Cornewall Lewis, *An Essay on the Government of Dependencies* (John Murray 1841).

dizzier still.[83] For Albert Venn Dicey (1835–1922) it was no paradox to scorn legal antiquarianism for its misdirection of English public legal thought at this moment, while admiring the Ancient Greek model of isopolitan citizenship for its application to an imaginary federation of English-speaking peoples.[84] Alike was James Bryce (1838–1922). Consumed with the similarities and differences between the diffusion of laws in Roman and British empires, Bryce dismissed England's medieval constitution as an 'immature feudality' with only 'a Continental tinge' left by the Normans worth noticing: and this was precisely the kind of thinking that made him more readable in Adelaide than it did in Alençon.[85]

This was indeed an eccentric period of academic legal and historical thought, and its distinct contribution to the jurisprudence of high imperialism, and public law generally, has yet to be held. Feeding into these intellectual energies was a charge supplied by the rigorous revival of enquiry into Greek and Roman texts in the second half of the nineteenth century. That this was a movement pioneered by antiquarians and classicists first of all in German universities, in direct view of which, but not always in agreement, the 'historical school' of jurisprudence took its shape, delivers another reminder of the interdisciplinary factors that contribute to the propensities of legal thinkers towards historical analogies.[86] At Oxford, it should only be added, Dicey and Bryce like many of their generation were fed on diets rich in the classics and deficient in the Year Books; and among those of their students were many sitting entry exams for the civil service in their second or third years at university, those who later went on to accept work in government departments like the colonial office in their twenties and thirties, and those who were commissioned to a colony in their thirties and forties.

One final observation about analogy has to be made before entering into a consideration of its counterparts. Historians should be uneasy to acknowledge, though they must, that the wisdom of analogy in legal thought does not necessarily appear diminished in relation to the period of time that elapses between its application to a present situation and the past situation from which the analogy derives. Analogy is not used to illustrate historical truth, but to make sense of ambiguity within an applied context. For intellectual historians of law and empire it seems to follow that the *motivations* of legal thinkers making recourse to historical analogies as well as the *outcomes* they are hopeful of

[83]Duncan Bell, 'From Ancient to Modern in Victorian Imperial Thought' (2006) 49 Historical Journal 735; Eugenio Biagini, 'Liberalism and Direct Democracy: John Stuart Mill and the Model of Ancient Athens' in Eugenio Biagini (ed), *Citizenship and Community* (Cambridge University Press 1996).

[84]AV Dicey, *Lectures Introductory to the Study of the Constitution* (Macmillan and Co 1885) 14; AV Dicey, 'A Common Citizenship for the English Race' (1897) 71 Contemporary Review 457. See also Duncan Bell, 'Beyond the Sovereign State: Isopolitan Citizenship, Race and Anglo-American Union' (2014) 62 Political Studies 418. Greece had been inspiring analogies for safest deployment in contemplation of local rather than colonial democratic achievements before this. See Kyriacos Demetriou, 'In Defence of the British Constitution: Theoretical Implications of the Debate over Athenian Democracy in Britain, 1770–1850' (1996) 17 History of Political Thought 280.

[85]James Bryce, *Studies in History and Jurisprudence* (Clarendon Press 1901) 1: 72–123, 2: 746. Throughout the 1890s, the leading Australian federalist Alfred Deakin instructed friends and foes alike to read the work of James Bryce, in particular, the *American Commonwealth* (1888), and at the constitutional convention of 1897 in South Australia was to be heard lauding 'the Hon. Mr Bryce' as '[a]n authority, to whom we have often referred since 1890, an authority to whom our indebtedness is almost incalculable'. Australasian Federation Conference Debates (30 March 1897) 288.

[86]The circumstances will soon be appropriate for intellectual historians to suspend their enquiries into the mid-twentieth-century moment and go back a little further to focus upon the originating influences of intellectuals like Georg Heinrich Pertz (1795–1876), Georg Waitz (1813–1886), Theodor Mommsen (1817–1903), Otto von Gierke (1841–1921), and others in relation to the development of constitutional thought in America, England, and continental Europe.

achieving in relation to jurisprudence (much less historiography) are considerable. This is not a call to turn a blind eye to false analogy. For it is surely just as 'urgent' now, as it was when the historian and imperial thinker J. R. Seeley (1834–95) first argued as much, that 'politicians' (and he might also have said 'lawyers') 'should study history [so] that they may guard themselves against the false historical analogies which continually mislead those who do not study history'.[87] But there is more to fuss over than truth or falsity. What falls to a *historian of legal thought* is the task of focusing more upon the intellectual causes and effects of analogies than upon the verisimilitude of those analogies. This involves making an appraisal of *how* as well as *why* analogies come to be accepted or rejected as *law*. It is of more than passing interest, then, that we encounter Seeley's observations about historical analogy in a passage from *The Expansion of England* (1883), wherein he hopes for renewed innovation in regard to imperial federation across land and sea, decrying the elusiveness of meaningful historical models to that end, which survives in exact contradistinction, we might note, to Dicey's isopolitanism. Empire is revealed here at the making as well as the unmaking of analogies (right or wrong).

Principles

Across epochs and peoples, legal thinkers have not always made recourse solely to analogy at the earliest apprehension of a novel situation, for they have just as easily made recourse to *principle*. In legal thought, principles will be observed to carry out a very different function to analogies, for they lend themselves to general rather than specific application. The worship of *Mɜᶜt* ('right conduct') in Old Kingdom Egypt and the adulation of Δίκη ('dikē') in Ancient Athens may have performed similar functions insofar as each were associated with the acceptance by groups of empirical assessments of right and wrong, free and unfree, and so on.[88] A feature of Roman legal thought from the third century BCE onwards is the increasing propensity of praetors and jurisconsults to query and dispense principles presuming either the instinctive moral consensus of an audience or otherwise the possibility that moral consensus might be reached through persuasion.[89] Expressions of principle proliferated from this time, surviving as maxims, precepts, *regula* and *definitio*, akin in purpose and performance to more recent declarations of 'truths held to be self-evident', 'principes simples et incontestables', equally prone to cliché as they are to codification. Informing procedural and substantive law, principles are observed according to variable levels of strictness as *rules*, whenever they are given some positive charge by a court or a legislature. Their mobility and their *subvertibility* are not their weaknesses, but rather what make them important within legal thought, as Javolenus recognised around the turn of the first century into the second: 'Every *definitio* in civil law is dangerous: rare it is for one to avoid subversion'.[90] Ronald Dworkin had something

[87] JR Seeley, *The Expansion of England* (Cambridge University Press 2010) 297.

[88] Alexandre Loktionov, 'Evolutions in Ancient Egyptian Justice' (forthcoming, in the author's possession); Stephen Todd and Paul Millett, 'Law, Society and Athens' in Paul Cartledge and others (eds), *Nomos: Essays in Athenian Law, Politics, and Society* (Cambridge University Press 1990).

[89] Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh University Press 1966); Bruce W Frier, *The Rise of the Roman Jurists: Studies in Cicero's* Pro Caecina (Princeton University Press 1985); Jill Harries, *Cicero and the Jurists: From Citizens' Law to the Lawful State* (Duckworth 2006).

[90] *D* 50.17.202 [via *Iavolenus Libro 11 Epistularum*]: 'Omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset'.

like this in mind when he wrote, in 1967, of the 'weight' of principles, a dimension, unshared by positive rules, which is to be noticed encouraging measurements and comparisons.[91]

For legal thinkers, including lawyers who dabble in history, it has long been acceptable, when the novel basis of an argument is needed, to deal principles in unusual configurations. For political thinkers, and more especially those who study the history of political thought, to enjoy the same intellectual freedom, under the imprimatur of universality, is to expose the head as well as the footing of their ideas to ridiculing accusations of flippancy at best and anachronism at worst. The recent fallout between intellectual historians and international lawyers over modern empires and their legacies is one of the best and most recent examples of this methodological difference between, on the one hand, casting backwards in time with contemporary principles and, on the other, adjusting our contemporary vision to account for historic principles.[92] This debate, like so many 'wars' of history where colonised voices are concerned, may never be waged entirely without emotion, but it is possible to present new perspectives by appreciating trends of the same kind across a longer period of history. Doing so requires acceptance of a necessary conclusion that, whether principles are true or false, anachronistic or contextual, complicated or unsophisticated, they have often proven helpful to legal thinkers in the process of reaching a particular outcome. Principles are the perfect vehicles, in other words, for discretion and flexibility. It is not scandalous that they have been *allowed* a degree of anachronism if they have also been seen to reach good ends.

Placing to one side the substantive *authenticity* as well as the legal, political, and economic *effects* of flexible principles – recognising that these are what divide historians of international law into those who celebrate its humanity and those who decry its inhumanity – certain patterns are easily detectable in the intellectual circumstances of principle usage. For example, whenever access to legal principles could not be sustainable through use of legal fictions, principling has tended to recur spontaneously in contemplations of the voids in written or doctrinal law. Of this there is an early glimpse in the Aristotelian conception of *epieikeia* (ἐπιείκεια). Commonly rendered as *aequitas* and from thence into *equity*, this ideal of fairness began as a corrective to strict law. *Epieikeia*, as presented in the *Nicomachean Ethics* and *Rhetoric*, to convey the broadest principles of justice, was accessible by consulting the lawgiver instead of the laws. For modern readers, the strength of Aristotle's esteem for the ethics of the public office of appellate judge might be the most arresting part of this appraisal. Less objectionable is the space

[91] Ronald M. Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14.

[92] Anghie, *Imperialism, Sovereignty, and the Making of International Law* (n 14); Orford, 'On International Legal Method' (n 5) 166, 170–77; Georg Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 10 Journal of the History of International Law 181; Ian Hunter, 'Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations' in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan 2010); Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentricity' (2011) 19 Rechtsgeschichte 152; Martti Koskenniemi, 'A History of International Law Histories' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012); Ian Hunter, 'The Figure of Man and the Territorialisation of Justice in "Enlightenment" Natural Law: Pufendorf and Vattel' (2012) 1 Intellectual History Review 289; Andrew Fitzmaurice, 'Sovereign Trusteeship and Empire' (2015) 16 Theoretical Inquiries in Law 447; Anne Orford, 'International Law and the Limits of History' in Wouter Werner and others (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017).

this opens, within legal thought, for the principles of fairness to inform good judgement and to address defects, because this space is still needed today.[93]

Certainly, this space was needed in Ancient Rome, and whenever it was closed up, pressures were placed on the legal system and the spirit of reform took hold. When Cicero and his contemporaries turned to magistrates and senators, in response they often received justice tarnished by inconsistency, self-interest, or exceptionalism in the interests of war. Many a speech was delivered to check miniature despotisms in the Republic at this time to forge new principles of office, order, and hierarchy. This was the work of Roman elites. And while they were often eloquent in their gestures towards the interests of the people (*plebs*) and the commonwealth (*res publica*), they did not falter in their promotion of wealth, glory, and domination. These characteristics made the genre memorable for later readers. Interpreted a certain way, orations from this time appear replete with constitutional principles, for the measurement of different kinds of lawgiving instruments and institutions, and for the evaluation of the circumstances best befitting their applications.[94] Practising lawyers in the succeeding age of the Principate came to show greater appreciation for logical arguments and a corresponding distrust for the unquestioning application of broad principles, particularly as conflicts of law emerged as a result of jurisdictional expansion. For all that, principles, depending on the pressures of the situation, were merely used to offset principles in moments of uncertainty: fictitious and substitutive ones were just moved into the place of old ones, then buttressed by analogies, as Clifford Ando shows in his scholarship.[95] Variation between magistrates again characterised the age of autocratic empire under the Dominate, until finally the methodical reorganisation of the entire Roman law was orchestrated by the central imperial government just as it was beginning to lose all of its remaining legitimacy.

This was the *Corpus iuris civilis* of Justinian's reign, a compendium of no greater importance has ever been compiled in human history. Perfect for empires later to beckon, civil law, as embodied in this written form, appears as a succession of principles, some of them 'rules' of mixed persuasiveness, in comprehensive lists, which are classifiable loosely into categories of persons, things, and actions. Of all the items making up the Justinianic bequest, the *Institutes*, a textbook with the force of law, is only the most ornate in this respect: principles, followed often by subordinate abstractions of principle, are illustrated sometimes through hypothesis, or analogy, or even more principles. The passage on feral beasts (at 1.12) would have been a terrifically inconspicuous example of this kind of layering up of principles had it not carried with it the following highly qualified remark: 'quod enim ante nullius est id naturali ratione occupanti conceditur'.[96] Witness natural reason here called into the service of a principle that is merited in no other application but for

[93] *Nicomachean Ethics*, 1137a31–1138a4; *Rhetoric*, 1374a26–1374b23. However we think about the separate evolutions of equity through canon law, civil law, and common law, during the late Middle ages, the idea that often attaches to it – that voids may be plugged up with principles – remains compelling.

[94] Straumann, *Crisis and Constitutionalism* (n 68) 27–145.

[95] Ando, *Law, Language, and Empire* (n 68) esp. 19–36.

[96] *I*[*nstitutiones*] 1.12:

> Ferae igitur bestiae et volucres et pisces, id est omnia animalia quae in terra mari caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est id naturali ratione occupanti conceditur. nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno: plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi, ne ingrediatur. quidquid autem eorum ceperis, eo usque tuum esse intellegitur, donec tua custodia coercetur: cum vero evaserit custodiam tuam et in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit.

its allowance of hunters to claim wild animals in order to eat them. Removed from this primal context, however, it became attractive to jurists reflecting a millennium later upon imperial projects. It is therefore conspicuous. As Andrew Fitzmaurice reveals in *Sovereignty, Property and Empire* (2014), public international lawyers confounded to justify the appropriation of 'unpeopled' territories were happier to avoid the analogy between birds and soil by resorting instead to the identification of *res nullius* as a principle, and from here it could be sucked deep into a vacuum of property, given suspension in a state of nature, and finally made retrofittable to occupied territories. *Terra nullius* may be bad law, but it is not surprising law, when we reflect upon the education, the motivations, and the institutional environments of those who later announced it to be a 'doctrine'.[97]

The *Corpus iuris civilis* was transmitted, magnified, and copied throughout Europe during the middle ages.[98] It was 'excellent', according to Maine, because of its 'wealth in principles', providing the 'débris' for those on the continent to 'buil[d] into their walls', he continued, while the common lawyers of England endured poverty in wait for the development of their own idiosyncratic jurisprudence of equity.[99] Maine might be challenged on several fronts here. Perhaps he made too much of the ambiguity of determinations in the English law reports; perhaps he did not make enough of the unique interpretative charge that fell to subsequent generations of serjeants and judges reading them. Perhaps he understated the *broadening* of principles that had taken place at the hands of continental civil lawyers, confronted, in the fourteenth and fifteenth centuries, with urban and maritime economies of new complexity; perhaps he overstated the isolation of classically unquestioning jurists from those who called, in the sixteenth century, for the abandonment of foreign debris, and for its replacement with locally sourced materials, suitable for the terrain. The larger point Maine is trying to make is valid, however, forgiving again his characteristic unsubtlety: contrasting Roman law and English equity, to the extent of revealing the similar task each could be given in their provisions of guiding principles within legal systems, is an extremely sensible exercise, whatever the substantive absurdity of that contrast.

Putting aside this juxtaposition, which has its problems, it is more illustrative to consider a source of moral principles common to continentals and Britons alike. For as long as Greek philosophy went unappreciated for much of the common era – as the major works of Plato and Aristotle were until the Renaissance – European legal thinkers in the Middle ages turned, of course, to the church. Granted a virtual monopoly over the written word in many parts of Europe at the onset of the Middle ages, men of religion researched the scriptures and extracted Christian ethics from them, which they then taught to laypersons through easily communicable parables. Oral traditions of customary law were inevitably infused with biblical ideas at this time, as the church occupied a number of the vacuums left by the collapse of the Roman administrative system in the west, and borrowed, where it needed, from Roman models. The development of doctrinal law followed as a consequence of this closed-loop culture of research combined with the

naturalem autem libertatem recipere intellegitur, cum vel oculos tuos effugerit vel ita sit in conspectu tuo, ut difficilis sit eius persecutio.

[97]Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge University Press 2014).

[98]Charles M. Radding and Antonio Ciaralli, *Corpus Iurus Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Brill 2007).

[99]Maine, *Ancient Law* (n 30) 41–43.

growth of legislation enacted for the entirety of Christendom. Thus, the church became 'fortement juridicisée', in Michel Villey's words, and took to expressing its laws through papal decrees and conciliar canons.[100] Not only were these laws observed by church office-holders and, after the twelfth century, semi-autonomous mendicant orders, but they also came to define the civil life of laypersons in deeply significant matters of life, death, and matrimony. While true that the consolidation and reassertion of secular power served to place important checks upon the expansion of the papal power, *canon law* from this time (a 'concordia discordantium canonum', as it was studiously compiled by Gratian in the mid-twelfth century) assumed a key place in European legal thought. It had developed, in the enthusiastic appraisal of Harold Berman, 'into a coherent, integrated intellectual system, with a complex structure of principles, including principles for regulating the application of principles to specific kinds of cases'.[101]

For all that Berman would disagree in his writings with Maitland, the latter was surely right to suggest that the combination of pontifical decrees and local bespoke canons (by officeholders sometimes themselves called 'canons') required plenty of compromise when it came to the reception of church laws from jurisdiction to jurisdiction; or, as he put it, a sense of 'give and take without any sacrifice of first principles'. More from Maitland:

> The rulers of the church […] had to tolerate much that they could not approve, or at any rate much that they could not approve in the name of the church. […] No doubt there were principles for which they would have professed a willingness to die after the fashion of St. Thomas; but they were not called upon to shed their blood for every jot and tittle of a complex and insatiable jurisprudence. Popes, and popes who were no weaklings, had taught them by precept and example that when we are dealing with temporal power we may temporise.[102]

Through a process of compromise and accommodation to which Maitland was energetically alive, a number of divine and human ideas became infused into principles of lasting importance in consequence of the coexistence of secular and sacred bodies of thought. This infusion Ernst Kantorowicz later had in mind when he sketched out the 'medieval political theology' of *The King's Two Bodies* (1957), although his concerns were with aspects of kingship and office where links of this kind are most obvious.[103] Considering instead some of the private relationships that developed among people and between people and things, a more nuanced picture emerges from the comparison of notes by canonists, civilians, theologians, and politicians. The resultant output was often heavy on principle and attractive, for that reason, to borrowers from outside. Contracts and obligations are especially rich in evidence of hybridisation, to the extent that just about any pithy Latinate principle still in use across Europe today has the fingerprints of late medieval churchmen on it and is often only tenuously ancient.[104] Recall from earlier the

[100]Michel Villey, *La Formation de la Pensée Juridique Moderne* (2nd edn, Quadrige Manuels 2017) 285.
[101]Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) 224. The book contains lots of 'firsts', and some unusual characterisations of secular law, but its treatment of canon law in relation to the institutional development of the church, which takes up the first half of the book, remains terrific.
[102]FW Maitland, *Roman Canon Law in the Church of England: Six Essays* (Methuen and Co 1898) 57.
[103]Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press 1957).
[104]Reinhard Zimmermann, *The Law of Obligations* (Oxford University Press 1996); Wim Dekok, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Brill 2013); James Gordley, *The Philosophical Origins of the Modern Contract Doctrine* (Clarendon Press 1991).

Ciceronian example of the sword: this was borrowed by Augustine of Hippo in his treatment of contractual relationships in the holy scriptures, from where it made its way to Gratian and his canon law followers before its repackaging into the *clausula rebus sic stantibus* principle for private contracts by the sixteenth century (extending, by analogy, to public treaties by the nineteenth century).[105]

Principles of nature were even more manipulative. Finally we come up against that most unshakable intellectual habit across many subjects of philosophical enquiry over the two thousand years or so that elapse between the *Laws* of Plato and the enlightenment *philosophes*: that is, the justification of particularly inventive interpretations of something or other by making conjectures about *the condition of nature and human instinct within it*. More important is it, within the scope of this article, that Gaius, Ulpian, Justinian, and Gratian all let 'nature' be a factor in law, so other legal thinkers inevitably followed. Benjamin Straumann has revealed the indebtedness of Hugo Grotius to a broad conceptualisation of *natural law* as the vehicle for statements of universal principle not just about persons, things, and obligations, but also war and peace, and a recent posthumous work by Merio Scattola has gone further to clarify the relationship between natural law and principles in Grotius and his contemporaries.[106] Looking away from Grotius can be difficult for historians of international law, but it is necessary in order to notice the diversity – and, by implication, the opportunism – of every appraisal of natural law offered by the early modern eminents.[107] 'A law of nature, *lex naturalis*, is a precept, or general rule, found out by reason', declared Thomas Hobbes, 'by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved'.[108] For Montesquieu, by contrast, natural law conveyed the instinctive perception of justice, *knowing* the law rather than having *knowledge* of law ('la faculté de connoitre qu'il n'auroit des connoissances').[109]

Early modern thinkers were never in agreement about what the 'law' element in this construction should be taken to mean, let alone how and why one should revere 'nature' in connection to law. Despite all this uncertainty, 'natural law' remains a pillar in recent scholarship in the history of *political* thought (especially but not exclusively those associated with the so-called 'Cambridge School') for reasons that require reflection. There is perhaps no better example than this of a subject that must be seen within the history of legal thought in terms of the motivations of those who sought to give the concept some juristic applications. Natural law is no mystery: it produces no law in and of itself, but provides instead for the use of a certain kind of principles to reach particular outcomes at law.

Nature, throughout so much recorded history, has never been more or less than a concept used to set out principles of an *ad hoc* kind when placed into the service of *boni et aequi*. It was attractive to medieval and early modern legal thinkers for allowing more and more length to be leveraged onto the leashes that still bound them to ancients,

[105]Zimmerman, *The Law of Obligations* (n 104) 579–82.

[106]Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law* (Cambridge University Press 2015); Merio Scattola, *Prinzip und Prinzipienfrage in der Entwicklung des modernen Naturrechts* (Frommann-Holzboog 2017).

[107]TJ Hochstrasser and Peter Schröder (eds), *Early Modern Natural Law Theories: Contexts and Strategies in the Early Enlightenment* (Kluwer 2003).

[108]Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of A Commonwealth Ecclesiasticall and Civil* (Andrew Crooke 1651), ch. 14.

[109][Charles de Secondat baron de Montesquieu,] *De l'Esprit des Loix* (Barillot et Fils 1748) 1: 6.

apostles, and anybody else. For that reason, invocations of nature have been multiple and often strange. The temptation must therefore be avoided to regard 'natural law' as a coherent body and source of law in the same way that the terms 'civil law' and 'canon law' are regarded. Civilians, who all referred back to Justinian, worked within a distinct legal tradition meticulously elaborated in the works of commentators, glossators, and others after them. Canonists, who all referred back to Gratian and whatever popes and councils they admired, worked within a distinct legal tradition meticulously elaborated in the works of decretists, decretalists, and others after them. There could never be any 'naturalists' in the same sense, for as long as natural law remained a device much cherished by humanists and scholastics as well as civilians and canonists (and much loathed, instinctively, by positivists) for its unsystematic flexibility. Precisely the same observation can be made about the *ius gentium*, one of the reasons for whose call into being was the need for universality and exceptions on the provincial fringes of Rome and beyond them. For a long time, this was an idea functionally if not semantically interchangeable with *ius naturale*.[110] Only much later, between the sixteenth and eighteenth centuries, did *ius gentium* develop a distinct connotation with the natural principles of law both *within* nations and *between* nations – flexible guidelines which were especially timely, of course, for guiding the colonising powers of Europe through the modern age of global expansion.

In this period and for a good deal afterwards, the kind of access enjoyed by certain groups of people to the principles of law depended on a number of institutional and linguistic factors. Of course, it helped to be found among the colonisers instead of the colonised. As the underappreciated Paul Vinogradoff set out in his *Outlines of Historical Jurisprudence* (1920):

> It is not without importance for the development of legal principles whether the atmosphere surrounding them is that of a pastoral, an agricultural, or an industrial community; it is certainly of importance for public and private law whether a nation is living an independent life or has to submit to conquest.

The principles of modern legal thought, at least as they were comprehended within cosmopolitan Europe by Vinogradoff's time, had been actively shaped by the victors and only passively shaped, if at all, by the vanquished.[111] That is not to say that colonised indigenous communities were inherently bereft of legal principles, which is far from the truth, but rather to say that Europeans were insufficiently motivated to recognise, and then to act upon, such principles. They preferred to reach for analogies and to modify their own principles, wheresoever, that is, they were first unable to seek guidance from a recognisably distinguished legal scholar on a topic before them.

Authorities

The last discernible characteristic of certain ways of legal thinking I wish to highlight in this article is a reverence for authorities. By authority, I take to mean any revered source in the professional study of laws, distinct from (if still slightly related to) the

[110] *I*, 1.1–2.

[111] Paul Vinogradoff, *Outlines of a Historical Jurisprudence: Volume I, Introduction – Tribal Law* (Oxford University Press 1920) 159.

sense of state power required to buttress the practical application of laws. By authority, in other words, we see the pen in front of the sword. We see reports, transcripts, and treatises. We see posterity.

In the Roman legal tradition, a culture of citation had become conventional by the time of Papinian, Paulus, and Ulpian, and indeed partially explains their eminence as great jurists. It is probably true that, after them, the bureaucratisation of imperial government, combined with the emergence of autocratic and militaristic emperors, coincided with a slight decline in the importance shown to jurisprudential sophistry. Even if many jurists found themselves relegated to the margins of administrative life by the fifth century, they were still regularly consulted in that period.[112] The great codifications of Theodosius II and Justinian would not have been so rich in principle, and so compelling as definitive guides, without their references to known authorities. Without these references, any hope for continuity was imperilled. Further still it may be generalised that the legitimacy of all attempts to reform and reorganise Roman law was determined to a large degree by the inclusion of acknowledgements of distinguished juristic authorities in the process. This is what gave the *Digest* its timelessness, and this is why Justinian's attempts to prevent commentaries upon it are so unbelievable.[113] If we accept that the emperor intended an outright and perpetual ban on commentaries and reinterpretations, then we must also accept that he knowingly mitigated against his own posterity, and we must also accept that he charged his successors, reigning over a fragmenting empire with circumscribed authority, the unmanageable task of restraining the habitual inclination of legal thinkers to model themselves upon authorities.[114]

This inclination shifted towards the east, where *scholastikoi* were just as revered as *antecessores*. As Zachary Chitwood tells us, the Macedonian period of Basil I and Leo VI (867–912), which saw a great 'cleansing of the ancient laws', was 'both a mimetic and creative act'.[115] In this moment, the Roman laws of Justinian's reign were redacted in Hellenised form and promulgated as the *Basilika*, a code of principles which quickly assumed authoritative status in the Byzantine empire. Quite often, the *Digest* and the *Basilika* were shown to be at odds with each other, which was an unsurprising consequence of linguistic change and the challenges of translation this posed. Crucially, in the measuring up of old authorities, new authority could emerge. Perhaps the best-known example of this syncretism is the anonymous *Meditatio De Nudis Pactis* (*Μελέτη περὶ ψιλῶν συμφώνων*), prepared sometime in the mid-eleventh century, which sounds out a real or fictitious lawsuit between a monastery and a protospatharios over the binding nature of their agreement. Like all good precedents of case law, this record

[112]Honoré, *Emperors and Lawyers* (n 26).
[113]Constitutio Deo Auctore de Conceptione Digestorum (530) 12.
[114]Adolf Berger, 'The Emperor Justinian's Ban upon Commentaries to the Digest' 55–56 (1948, supplementum post bellum) Bullettino dell' Istituto di Diritto Romano 124–69; Fritz Pringsheim, 'Justinian's Prohibition of Commentaries to the Digests' (1950) 5 Revue International des Droits de l'Antiquité 383; Herman Jan Scheltema, 'Das Kommentarverbot Justinians' (1977) 45 Tijdschrift voor Rechtsgeschiedenis 307. For the interpretative and methodological evolution of medieval commentators conscious of this measure, see Willem J. Zwalve, 'The Legal Middle Ages and the Roman Law Tradition: Justinian's *Const. Omnem* and its Medieval Commentators' in Karl Enenkel and Henk Nellen (eds), *Neo-Latin Commentaries and the Management of Knowledge in the Late Middle ages and the Early Modern Period (1400–1700)* (Leuven University Press 2013).
[115]Chitwood, *Byzantine Legal Culture and the Roman Legal Tradition* (n 47) 41.

was observed for both sides of the argument it carried, acquiring thereby an authoritative status of its own.[116]

Somewhat later in the west, the rediscovery of Justinian did not so much reawaken as it did intensify the desire of legal thinkers to achieve continuity through acknowledging authorities. This 'world of commentary' which came into existence was united through its sense of humbleness towards authorities.[117] Glossators and commentators became fussy in their acknowledgements of long-dead legal thinkers, generally either to affirm old principles, or otherwise, following Bartolus and Baldus, to modify them slightly either to account for a 'secondary' group of subordinate principles (as can be seen in the separation of *ius gentium* into primary and secondary tiers),[118] or to extrapolate multiple new categories from singular concepts (as can be seen in the disaggregation of *imperium* into new scales and formulations).[119] At work, decretists and decretalists were little different in their approach to authoritative statements of principle, and in this respect, their adoption of the Greek word *kanōn* (κᾰνών), which conveyed both *rule* and *authority*, much befitted their project. Legal scholars of all hues then began to read each other, and cite each other, while continuing to cite authoritative texts now seen to belong to very different eras to their own. Inevitably, less discrimination was made between sacred and secular texts (a division that was less obvious in this era than most others anyway).

Sceptics emerged in France, Germany, and elsewhere, during the sixteenth century, not to antagonise legal authorities *tout court*, but instead to chivvy for the reduction in authority of Roman and canon sources and their spokespeople.[120] Entertainingly representative of this movement was François Hotman's *Antitribonian* (1567). Hotman disputed 'l'autorité de Iustinian' (and his old commissioner Tribonian). He refuted the 'semblance' of the Roman Republic and the Kingdom of France. He criticised the prominence of 'Canonistes' and 'Docteurs' when it came not only to law itself, but also to the institutional environment which gave it meaning.[121] Claims like this usually went hand-in-glove with demands for the magnification in authority of customary sources (which had the regrettable effect of adding even more to the unwanted synonymy, developing since Bartolus, of 'custom' and 'prescription' in legal thought).[122]

Establishment legal thinkers had discovered, by the Renaissance, that they could get away with saying just about whatever they wished to say – moving whatever principles they wanted into whichever categories they desired to move them – so long as they complied with the convention of citing authorities, living and dead. Grotius himself,

[116]Chitwood, *Byzantine Legal Culture and the Roman Legal Tradition* (n 47) 150–83; W. Wolska-Conus, *L'école de droit et l'enseignement du droit à Byzance au XIe siècle* (E. de Boccard 1979).

[117]David Kästle-Lamparter, *Welt der Kommentare: Struktur, Funktion und Stellenwert juristischer Kommentare in Geschichte und Gegenwart* (Mohr Siebeck 2016).

[118]See Dante Fedele, 'Ius Gentium: Metamorphosis of a Legal Concept' (forthcoming, in the author's possession).

[119]Bartolus, for example, processed six gradations of *merum imperium*: *maximum*, *maius*, *magnum*, *parvum*, *minus*, *minimum*. See Myron Piper Gilmore, *Argument from Roman Law in Political Thought, 1200–1600* (Russell & Russell 1941) 15–44. See also Joseph Canning, 'Ideas of Empire and the Late Medieval Roman Law Jurists' (forthcoming, in the author's possession).

[120]Martine Grinberg, 'La rédaction des coutumes et les droits seigneuriaux: Nommer, classer, exclure' (1997) 52 Annales: Histoire, Sciences Sociales 1017; William Farr Church, *Constitutional Thought In Sixteenth-Century France: A Study In The Evolution Of Ideas* (Harvard University Press 1941); Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton University Press 1986); Pocock, *The Ancient Constitution and the Feudal Law* (n 73) 1–29.

[121][François Hotman,] *Antitribonian ou Discours d'un Grand et Renomme Iurisconsulte de nostre temps* (Jeremie Perier 1603), esp. 12–32, 118–30.

[122]Cavanagh, 'Prescription and Empire from Justinian to Grotius' (n 64) 282–84.

recognising that 'many' legal thinkers had already dealt with the same subjects he was attempting to master, confessed to a German confidant that his way of throwing 'new light' on the matter was entirely alchemic: 'with a fixed order of teaching, the right proportion of divine and human law mixed together with the dictates of philosophy'.[123] Throwing in a few analogies and abstractions of principle along the way, and many old matters, all of a sudden, received brilliant illumination. Even Grotius's analogy, considered earlier in this article, between the law of servitudes and the law of the sea to suggest that nations were little different to private persons, was clear in its deference to Ulpian. The rest of his margins are thick with references to biblical, theological, and classical authors, besides those to the civilian authorities whose ideas he wished to borrow, expand, or modify. Self-consciously assimilating with established authorities, Grotius's career as a legal thinker was made (and this is quite irrelevant to the *post hoc* perceptions of enlightenment and continental philosophers in the history of political thought).[124] Later still, what Lauterpacht saw as the 'Grotian tradition in international law' was flourishing: a system of arbitration between nations, where principles and analogies were interpreted and evaluated first in relation to the authorities, then applied in relation to the circumstances of the case, and finally emerging as non-binding norms to guide future conduct.[125]

It is not a fluke that so many codifications promulgated in Europe during the long nineteenth century were invariably repackaged to be consumed in the long twentieth century as authoritative commentaries upon the originals. Today, competing editions still seek to attain definitive status for their treatment of codified laws, and these are consumed primarily by practising lawyers and judges, precisely those readers who are often too easily capable of deriding any search for the root of these principles as irrelevant antiquarianism. Anne Orford scorned the 'contextualist historians' for turning away from this kind of understanding, but of course they are little better or worse than hurried lawyers-in-practice, dogmatic anti-formalists, and others of a modern kind. Maitland detected a similar if more pronounced trend in England, which he illustrated by way of distinguishing between historians and lawyers, but the same observation might just as firmly hold for any German lawyers who have found themselves forced to thumb through some recent edition of commentaries on the *Bürgerliches Gesetzbuch* (for example) to get to the real *law* of the matter before them:

> A lawyer finds on his table a case about rights of common which sends him to the Statute of Merton. But is it really the law of 1236 he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the decision the more valuable for his purpose. That process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost

[123]Hugo Grotius to G. M. Lingelsheim (23 November 1606), in Grotius, *Commentary on the Law of Prize and Booty* (n 63) 553. Thus he enabled himself simultaneously to hold that it was right for corporations and individuals to wage private war in the absence of judicial recourse on the seas, apparently without contradiction of his defence and expansion of the concept of public authority and sovereignty.

[124]Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Presses Universitaires de France 1983). Compare Tuck, *Rights of War and Peace*. See also the review of the former by the latter in *Grotiana* 7 (1986) 87–92, where the contrasting approaches to Grotius from scholars of political thought and scholars of legal thought ironically prompts a pupil of the Cambridge School to demand anachronism from a scholar tracing the trajectory of the just war theory from the late middle ages into the early modern period.

[125]Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) *British Yearbook of International Law* 1–53.

> of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority, and the logic of evidence. What the lawyer wants is *authority* and the newer the better; what the historian wants is evidence and the older the better.[126]

Part of the reason why Maitland thought this distinction most pronounced in England was the development of an unshakable obsession in that country, by his time, with precedents, a subject best considered now, with the European background in mind, in the frame of authoritative law.

To a far greater extent than the Roman jurists who prized the legacy of *antecessores*, the common lawyers of late medieval and early modern England derived their authorities from reports of their own law. It is to the reign of the Plantagenet Edwards that the most significant institutional change must be attributed. The jurisdiction of the king's courts expanded, within which the presiding judges, faced with a steadying stream of enquiries, grew more confident in their abilities to adjudicate laws 'common' to the realm. In these courts, written proofs came to be treated with intensifying deference, while precedent and protocol came to be held with a reverent if restrained dogmatism.[127] The vocabulary of Roman law was sometimes retained but used only as a lubricant to counteract some of the friction involved in the expansion and standardisation of jurisdiction throughout the fourteenth century. As David J. Seipp shows, common lawyers displayed fondness for Latin within their systems of oral pleading, but 'sought only style and a bit of enhanced legitimacy', while refraining on the whole from using 'substantive Roman law principles'.[128] If sometimes they spoke in brocards, always they thought like Englishmen. Maintaining this commitment to insularity, their common law developed an extent of dependency upon its own sources of law, which made it look different to continental systems at the start of the early modern period. Appearances are not everything, however. No real divergence took place in the modes of legal thought, even if they came to be configured a little differently. Precedents were only ever used to infer principles from analogous cases recognised as authorities within the institutional framework of the common law. In a nation of record-keepers, the common law was simply becoming its own authority.

Reporting changed with the system. Once a single report achieved authoritative status, it was never so important for its verdict as it was its associated reasoning (*ratio decidendi*) and discussion (*obiter dictum*) upon the case, as well as the recorded arguments of counsel informing them, which could be moved around and reworked by subsequent readers. Reports came to be produced in larger quantities and consumed by students, eradicated in the process of variations in language, style, and substance (which all coincided, for better or for worse, with the rising importance of judicial determinations as well as argument in precedents), during the eighteenth and nineteenth centuries. When finally, in the 1870s, the judicature was tidied up and many procedural aspects of bringing actions to

[126]FW Maitland, *Why the History of English Law is Not Written: An Inaugural Lecture* (CJ Clay & Sons 1888) 13–14 (my emphasis).

[127]FW Maitland, *The Constitutional History of England* (Cambridge University Press 1968) 1–164; Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn, Liberty Fund 2010) 6–34, 83–156; MT Clanchy, *From Memory to Written Record: England, 1066–1307* (2nd edn, Blackwell Publishers 1993).

[128]David J. Seipp, 'Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law' (1989) 7 Law and History Review 175.

court were simplified, the modernisation of the common law was as complete as it would ever be. It had become its own authority.

That the father of the modern common law, Edward Coke (1552–1634), has maintained his claims to paternity before all of these changes hints again at some of the institutional and intellectual continuities that pervaded legal thinking in his own time as well as the period around the corner. To illustrate this, consider the blending of analogy, principle, and authority in the common law by Coke's time, which was only just beginning to recognise that many realms were affixed in some way or other to England. On this topic, Coke's report of *Calvin's Case* (1608) was innovatively declaratory and overly descriptive. *Calvin's Case* concerned the privileges accorded to a subject of the Scottish crown born after the union of the two realms in 1603, and its reporting provides a fine example of English legal thought at work. In a stunning piece of *obiter dictum*, Coke uses the platform to flesh out the 'diversity between a conquest of a kingdom of a Christian king, and the conquest of a kingdom of an infidel':

> All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace; for as the Apostle saith, 2 Cor. 15. *Quae autem conventio Christi ad Belial, aut quae pars fideli cum infideli,* and the Law saith, *Judaeo Christianum nullum serviat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere.* Register 282. *Infideles sunt Christi et Christianorum inimici*. And herewith agreeth the book in 12 H. 8 fol. 4. where it is holden that a Pagan cannot have or maintain any action at all. […]
>
> [I]f a king come to a Christian kingdom by conquest, seeing that he hath *vitae et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom, but until he doth make an alteration of those laws, the ancient laws of that kingdom remain. But if a Christian king should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated; for that they be not only against Christianity, but against the law of God and of nature, contained in the Decalogue: and in that case, until certain laws be established amongst them, the king by himself, and such judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said.[129]

Some of these principles derive from nature and others from Christianity, only some of which have an obvious scriptural lineage to the Old Testament. Others are of more obscure authority, the only other obvious reference being to a precedent from the Year Books. The 'power of life and death' is a trope of Roman political commentary upon the *paterfamilias* and *patria potestas*, whereas 'perpetui inimici' comes from the *Discorsi* of Machiavelli (concealing a secret analogy to the Equians and Volscians as enemies of the Romans), but this is little more than the rhetoric and posturing of dicta. The other analogy to 'kings in ancient time' may appear obscure, but the wider report, thick with antiquarian details of ancient and medieval conquests, offers some contextual, if not always factual, relief. And here again is another aspect of legal thought that sets it apart

[129] 7 Co[ke] Rep[orts] 17b. For this passage in relation to the place of infidels in the history of English legal thought, see Edward Cavanagh, 'Infidels in English Legal Thought: Conquest, Commerce, and Slavery from Coke to Mansfield, 1603–1793' (2019) 16 Modern Intellectual History 375.

from political thought, for Coke continues to be revered as the father of the common law *despite* the liberties he was known to take with case details in his own reports!

Coke did not invent the means of legal argument which, by his own mastery of them, he propagated (and much to the notice of the American common lawyers taking his method in their strides).[130] What I have tried to show here is the undiminishing appeal of these modes of argument within wider European legal thought, which would remain mostly unchanged as it diffused beyond Europe to be practised by settlers and administrators abroad, just as it remained practised within England in 1810. There is no distinguishing Coke's method from the one adopted by Michael Nolan, who sought 'to ground upon principle, and fortify by analogy', a certain 'proposition', which he did by referring only to 'those cases which bear directly upon the point', as we saw at the outset of this article. Reading the whole report of the trial in the Court of King's Bench, it emerges that the most prominent precedent used as an authority in his argument was indeed Coke's report of *Calvin's Case* (1608). A Mr Dallas is encountered in proceedings, who appears as counsel for Picton to use precisely the same case law and scholarship used by Nolan but for *precisely the opposite ends*. 'For the purpose of my argument', he put it to Ellenborough, 'I am content to have recourse to no other authorities than what have been introduced by my learned friend, Mr. Nolan'.[131]

In truth, Dallas was nowhere as nimble with authorities as Nolan, the Irishman desperate to sink his teeth into a chewy piece of constitutional law in the best central court to do so. With great artistry, Nolan wove through the relevant Spanish sources to scrutinise the lawfulness of inflicting torture upon a young and free girl. Reiterating that such an order was unlawful according both to 'the law of Spain' and 'the existing law of the island of Trinidad, at the time of conquest', Nolan stayed with that distinction in order to consider the effects of the regime change. 'Your lordships will recollect that this is the case of a conquest', which made 'the law of Spain […] inapplicable to the subjects of his majesty there' – if not automatically, he alleged, then by the principles of English law, for 'if in a country conquered by us, there exist any law that is *malum in se*, that law instantly ceases by the conquest, as being contrary to the fundamental principles of our constitution'.[132] This was familiar language buttressed by familiar common law authorities, but not before Nolan performed a brief nose-dive into an unusual rabbit hole of Roman law: citing a passage of Bynkershoek on the Rhodian laws, in which Bynkershoek cites a passage of Gothofredus, in which Gothofredus comments on the *Corpus iuris civilis*.[133] This clearly stumped the bench, even prompting one judge to concede his unfamiliarity with the authority. If Nolan wanted to sustain this call to antiquity, he was on much surer ground citing Cicero's argument against the praetor, Gaius Verres, for inflicting torture upon a citizen of Rome in Sicily. While true that the legal circumstances of that case were not quite apposite, Nolan gave himself another and better opportunity to rehearse his Latin before the judges, rightly emphasising the showpiece of that oration: Cicero's portrayal of the victim, suffering violent blows, declaring his affinity to the laws of his metropole

[130]Daniel J. Hulsebosch, 'The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence' (2003) 21 Law and History Review 439.
[131]*The King v Thomas Picton* (n 1) 768.
[132]ibid 741.
[133]See Cornelis van Bynkershoek, *De lege Rhodia de jactu liber singularis et de dominio maris* (Joannem Verbessel 1703) 84–85.

– *Civis Romanus sum* ('I am a Roman citizen'). In this magic passage, Cicero adopts the voice of the *praetor*'s victim, Publius Gavius, in order to give heightened theatre to what follows in his oration: namely, a powerfully moralistic admonition of any attempt to detract from the righteousness of Roman laws in any of its peripheries.[134] Here, in other words, was a spectacular array of analogies, principles, and authorities, all of them pooled together *not* to establish that Roman examples should (or *could*!) somehow now be followed in England, but instead to win a legal argument through bedazzlement. It was a performance of alchemy to attain authoritativeness. It is a kind of argumentation we are better suited to appreciate disencumbered of the constraints of periodisation.

Conclusion

Whether our concern is with interchanges in court such as this, or law 'on the ground' talked about by 'men on the spot', or in the intricacies of scholarly 'doctrine' and 'high theory', legal thought, as a coherent body of ideas, demands renewed reflection by intellectual historians as something that amounts to more than merely a feeder into political thought. The reward for scholars prepared to develop greater appreciation of certain modes of legal reasoning across empires and colonies is not necessarily the discovery that the substantive content of legal thinking was similar from colony to colony. The reward is rather the discovery that the same tools were available to all legal thinkers making certain claims to other legal thinkers whom they had every expectation would recognise their claims and respond to them. This point holds regardless of whether we are speaking about claims heard within a given colony or abroad of it, and regardless of whether these claims were made by elites or non-elites. There seems to be nothing inherently wrong with the approach of those who seek to make distinctions between different legal thinkers like this. But it does appear to follow that if, historically, it can be shown that legal actors 'on the ground' and 'in the peripheries' reached for analogies, principles, and authorities in *precisely the same way* as desk-bound judges and jurists reached for them at the centre, then it falls to those who uphold such distinctions in the history of legal thought to justify it with solid conclusions in plain English.

If we are to prepare the history of legal thought in a complementary but different manner to the way in which leading practitioners of the 'Cambridge School' have prepared the history of political thought – and that is the central proposition of this article – then the first step in distinguishing such an approach may be to appreciate (if not, to undertake research into) the expansion of communities, and individual interests, across a longer

[134] *The King v Thomas Picton* (n 1) 743, which has the Latin (from the fifth part of the second oration, on punishments) as follows:

> Caedebatur virgis in medio foro Messanae civis Romanus, judices; cum interea nullus gemitus, nulla vox alia istius miseri, inter dolorem crepitumque plagarum audiebatur, nisi hac, Civis Romanus sum. […] Huccine tandem omnia reciderunt, ut civis Romanus in provincia populi Romani, in oppido foederatorum, ab eo, qui beneficio populi Rom. fasces et secures haberet, deligatus in foro virgis caederetur?

and for which the following translation suffices:

> Struck with rods in the middle of the forum of Messana a Roman citizen, O judges; while in the meantime no groan, no other expression of that miserable man, amid all his pain of enduring blows was heard, except this: 'I am a citizen of Rome'. […] Have all our rights been rescinded so much, that a Roman citizen in a province of the Roman people, in a town of our confederate allies, a beneficiary of the people of Rome, face blows in a forum with rods?

frame of time than is conventional, as Anne Orford said as early as 2003, as David Armitage implied in 2012, and as I have shown here with reference to Ancient Rome and medieval Europe. This is not the only frame imaginable. Continuities pointing towards the modern structures of international law may well be detected with reference to other constellations. But I believe they are unlikely to do so as seamlessly.

The next step is to work within a *longue durée* to examine what intellectual characteristics are peculiar to legal thinkers. Fairly easily we appreciate that legal thinkers were much less obvious in their idealisation of civic conduct and princely *virtu*, and that legal thinkers were probably possessed of a greater propensity than political thinkers to lie about things, to change their minds about things, and to base a number of extraordinary assertions on fictions. And these characterisations continue to hold. While *politics*, at least as it continues to be studied in post-enlightenment democracies, continues ably to pass as a science that tends to the optimisation of governments and the encouragement of civic participation within them, *law*, and especially law based upon precedent, continues to be revered as a series of outcomes which, having been reached by logic, can be pieced together to form a coherent if acceptably imperfect whole.

Less superficial differences appear when we consider the institutional rituals of law within the unyielding confines of jurisdiction. We know that legal thinkers *as well as* political thinkers throughout human history have both shown much keenness to the forms of organisation that encase individuals, families, and groups. We know that both have persistently sought to understand society in terms of the optimal configuration of these forms. Yet legal thinkers have always had to be more conscious of the limitations imposed upon the institutions offering determination for those forms, and in communicating their opinions have always had to fuss over the extent to which the technicality of their propositions makes them cognisable to others. For these essentially *procedural* reasons, legal thought has a proneness to appear more chaotic, with sources strewn all over the place, and more specific and antiquarian, dedicated to singular vindication through some time-honoured action or plea, than political thought, which has a proneness to appear more orderly, more ambitious, and at times necessarily more utopian, in comparison. Empire bore upon of the proceduralism of law *as well as* the idealism of politics, of course, but it *bore upon each of them in different ways*.

Legal thinkers have also been far more often called into service to support an interest connected in some way to a sponsor, superior, claimant, or defendant. This has an immense bearing on the kind of things that are argued or illustrated in the first place. Because of this, it is not uncommon within legal thought to discover priority for the persuasiveness and accomplishment of an argument over its consistency and altruism. This realisation is unavoidable to anyone who compares the different arguments rehearsed by the same serjeants in the fifteenth-century English common law or, easier still, anyone who compares Coke on Elizabeth's prerogative with Coke on James's prerogative.[135] So too is this realisation unavoidable to anyone who follows Grotius after his prison break in the United Provinces, through Antwerp, and into Paris where his bidding was that of the French king who offered him asylum and paid his

[135]David J. Seipp, 'Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law from Antiquity to Modern Times* (Cambridge University Press 2012); David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578–1616* (Cambridge University Press 2014).

pension.[136] Of course, Grotius was more than just a hired pen. But he was also that – and many others were too. Historians should recognise that this changing of tack, almost willy-nilly, is precisely the kind of thing that legal thinkers have always done to win arguments at law. Anyone but a hagiographer who considers, in its entirety, the *oeuvre* of some important modern jurist should find the same traces of this variability. It is inconsequential whether or not Michael Nolan believed in the guilt of Thomas Picton; what matters are his exertions to prove it. It is this aspect of legal thought more so than any other that brings into mind the observation of Montesquieu about the place of law within society, that '[i]n a free nation, it is very often indifferent whether individuals reason well or badly; it suffices that they reason: from that comes liberty, which is a guarantee against the effects of these same reasonings'.[137]

By the time Montesquieu released *The Spirit of the Laws* onto the world in the mid-eighteenth century, analogies, principles, and authorities provided some of the best ways to reason within European legal thought, as revolutionaries began to poise themselves around the next corner after him. But like so many others who, at various stages throughout human history, flaunted the promise of offering new principles and analogies, throwing away the old authorities, and reverting back to, much less creating a kind of custom, the disruption of revolution was only ever a means to an end. Of course, how we assess that end, and this is the point of any history of legal thought in the *longue durée*, depends upon the perspective of time. Replacing one kind of absolutism with another, written constitutions put together for the United States of America and the Republic of France were hailed by contemporaries for being progressive. It may be unwise to continue for very long with the same celebrations without saving some regard for the safety and conservativeness of the institutions and ideas that fed into them, however. In this we see a recurring dialectic, even if the responsibility for it falls at the feet of politicians as much as lawyers: as when the severest proponents of legal positivism came up against the staidest students of the historical school of jurisprudence, the codifications and statutes receiving the breath of life in these decades were safe and often modest little creatures. Looking further ahead, as when decolonisation and democratisation triggered sweeping political overhauls across the rest of the world, constitution framers are to be seen going about their work by comparing notes, compromising for different interests, and producing functionally very similar documents to the extent that each shared an imperviousness to amendment by design. Sometimes they worked, but sometimes they did not.

The delivery of wholly new constitutions in modern times has almost invariably entailed the encapsulation of individuals from diverse backgrounds in the process. Political and economic disorder has sometimes been followed with some accession to *constitutionalism*, which might now be defined here in a modern (if cynical) way as the placement of internal political impediments in the way of attempts to amend, reform, or alter enactments of authoritative principle. Political and economic disorder has at other times been followed by calls to fill up the voids of law and order with morsels of moral principles of an

[136]Erik Thomson, 'France's Grotian Moment? Hugo Grotius and Cardinal Richelieu's Commercial Statecraft' (2007) 21 French History 377. See also, generally, Étienne Thuau, *Raison d'État et Pensée Politique à l'Époque de Richelieu* (Armand Colin 1966).

[137]Montesquieu, *De l'Esprit des Loix* (n 109) 1: 520: 'Dans une Nation libre il est très souvent indifferent que les particuliers raisonnent bien ou mal; il susit qu'ils raisonnent: de-là fort la liberté qui garantit des effets de ces mêmes raisonnemens'.

external kind such as *human rights*. If, how, and when a coincidence of resource shortage and climate emergency has the effect of encouraging certain state actors to impose pressure upon other state actors, and if, how, and when this catastrophe is to be followed by demographic upheavals, mass migrations, and the dismantlement of whole economies, it is certain that professional legal thinkers will once again find themselves commissioned with the job of mounting a case for one side or another. Analogy, principle, and authority will then have another imperial context yet.

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