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What Roman Antiquity Had to Offer

A Scientific Method and a Vast Inventory of Property Concepts

The Legend of Roman Absolute Dominium

Roman property is enveloped in a mist of mythology. In his 1885 lectures at the University of Rome, Professor Vittorio Scialoja (1856–1933), one of the most prominent Italian Roman law scholars of the time, introduced the topic by warning students that "the Roman theory of property has inspired the strangest legends not only among the populace but also, sometimes, among the educated."[57] Scialoja was onto something. Roman property has long struck the imagination not only of lawyers but also of historians, economists, and philosophers because of its supposedly "absolute," "individualistic," "unitary," "extremely concentrated" nature. A quick glance at modern Roman law textbooks reveals the ubiquitous presence of the idea that Roman property is absolute. "The Roman law of classical times" – a leading textbook reads – "is dominated by what is commonly called the absolute conception of ownership," which is defined as "the unrestricted right of control over a physical thing."[58] This unrestricted right of control includes the right to use (*ius utendi*), the right to draw fruit (*ius fruendi*), and the right to abuse (*ius abutendi*).[59] The owner, we also learn, has very limited ability to parcel out to other individuals these three entitlements, in the way, in the Anglo-American common law, an owner can, for example, divide up ownership of land between a tenant for life and a reversioner. This

[57] Vittorio Scialoja, *Teoria della proprietà nel diritto romano*, vol. 1 (Rome: Sampaolesi, 1928), 242.

[58] H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 2008 [1972]), 140.

[59] Barry Nicholas, *An Introduction to Roman Law* (Oxford: Oxford University Press, 1995 [1962]), 154.

limited ability in Roman law makes property a "unitary" or "concentrated" right.[60]

Such assertions of absoluteness and individualism come with either scathing criticism or impassioned praise. Critics denounce the ruthless individualism of Roman property as both dangerous and lacking realism. For example, Otto von Gierke (1841–1921), who opposed the idea of a "Romanist" private law for Germany, championing instead an indigenous German private law, was blunt in his criticism of Roman property. The Roman concept of absolute property, which had been adopted in the first draft of the German Civil Code, was a fantasy, and a dangerous one, because it encouraged the assumption that property rights are unrestricted and it ignored the limits required by ethics and public law.[61] Another critic, Sir Frederick Pollock (1845–1937), could not resist teasing his fellow jurists for embracing a Romanist concept of absolute property that "has no being for English lawyers except when they are trying to pose as economists."[62] As to how Roman property came to be so strongly individualistic, a bewildered Pollock noted that "we are not aware of any answer to this, or even of any clue. Roman law makes its first historical appearance with its leading ideas already full blown."[63] Others, however, acclaimed Roman absolute property as a sound model that we should strive to revive. In his book *In Defense of Property*, Gottfried Dietze

[60] See also W. W. Buckland and Arnold D. McNair, *Roman Law and Common Law: A Comparison in Outline* (Cambridge: Cambridge University Press, 1965 [1936]), 81–82, for this direct comparison with the common law:

> The classical [Roman] jurists had an extremely concentrated notion of ownership, that is to say, although they recognised that various people could own the same thing in common at the same time, they did not attempt any division of ownership as such. This excluded for instance anything in the nature of feudal tenure, under which the ownership of land could be split up between landlord and tenant: even in respect of leases, the landlord was full owner, and the tenant had only the benefit of an obligation. Similarly it excluded anything in the nature of a doctrine of estates, whereby the ownership of land could be divided in respect of time .... Finally there could be no distinction between the legal and equitable estate. In other words, one could not dissociate the owner's powers of management from his rights of enjoyment, and vest the former in a trustee, and the latter in a beneficiary.

[61] Otto von Gierke, *Die soziale Aufgabe des Privatrechts* (Berlin: Springer, 1889), 17–20.

[62] Frederick Pollock, "Review of *Property, Its Duties and Rights Historically, Philosophically and Religiously Regarded: Essays by Various Writers, with an Introduction by the Bishop of Oxford*" (1914) 117 *The Law Quarterly Review* 111–112.

[63] Id., 111.

(1922–2006), a German-born American political theorist of anarcho-conservatist leaning, lauded Roman law for being "the most individualistic and property-conscious of all legal systems."[64] Writing at a time when America was suffering the consequences of a "growing disregard for property," Dietze praised the Roman jurists for realizing that "the liberal principle demanded that ownership should be as unrestricted as possible and that the greatest possible latitude should be given to individual action and initiative."[65]

Despite its pervasiveness, the idea that, in Roman law, property was an absolute right is, as Scialoja put it, a legend, concocted by Roman law and property law scholars in the nineteenth century. The actual Roman law of property was complex, diverse, and transformed significantly over time, spanning as it did a period of a thousand years, from the Twelve Tables (451–450 BC), an early statute that restated the rules of traditional customary law, to the *Corpus Iuris Civilis*, the wholesale compilation of Roman law carried out by the Emperor Justinian primarily in the second quarter of the sixth century AD.[66] These thousand years saw the succession of radically different constitutional regimes: from the early Republic, where power was shared between a handful of magistrates, the senate, and the citizens' assemblies; to the Principate, in which powers were concentrated in the hands of the Emperor, who shared legislative authority with the senate; to the Dominate, where the *Princeps* became a sort of Hellenistic monarch, first in Rome and then in Constantinople.[67] These thousand years also saw drastic changes in Rome's economic structure and class relations.[68] From a small city-state based on agriculture and a

[64] Gottfried Diezte, *In Defense of Property* (Baltimore: The Johns Hopkins Press, 1963), 13.
[65] Id., 14.
[66] For an overview of the sources of Roman law from the Twelve Tables to Justinian's compilation, see Hans Julius Wolff, *Roman Law: An Historical Introduction* (Norman: University of Oklahoma Press, 1951), 27–84; Nicholas, *An Introduction to Roman Law*, 14–17 and 38–42; Paul Du Plessis, *Borkowski's Textbook on Roman Law*, 4th ed. (Oxford: Oxford University Press, 2010), 27–62.
[67] For an overview of the constitutional background of Rome, see Nicholas, *An Introduction to Roman Law*, 3–12; Du Plessis, *Borkowski's Textbook on Roman Law*, 1–23; Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History*, 2nd ed. (J. M. Kelly, trans.) (Oxford: Oxford University Press, 1973). For analyses of aspects of Roman law before 451 BC, see the contributions to Sinclair W. Bell and Paul Du Plessis (eds.), *Roman Law before the Twelve Tables: An Interdisciplinary Approach* (Edinburgh: Edinburgh University Press, 2020).
[68] For an overview of the social and economic conditions at various points in Rome's history, see T. J. Cornell, *The Beginnings of Rome* (London: Routledge, 1995); Luigi Capogrossi Colognesi, *Law and Power in the Making of the Roman Commonwealth*

relatively strong free peasantry; to the progressive concentration of land in aristocratic hands; to the huge territorial expansion of the later Republican era and the beginning of the Empire, with the concomitant accumulation of vast private fortunes by means of exploitation, corruption, and plunder; to the economic integration and growth of the early Empire; to the eventual solidification of social and economic identities starting in the third century AD; and to the economic turbulence and social fragmentation attending the fall of the Western Empire. Finally, these thousand years witnessed a rich and changing cultural landscape: from the appropriation and modification, to the point of originality, of Greek philosophy and political theory; to the "invention" of law as a specific form of social regulation; to the birth of Roman Christianity and the development of a systematic Christian theology.[69] These political, economic, and cultural/ideological transformations were inevitably reflected in the intellectual development of property law; through their logical and systematic methodology, the Roman jurists developed a rich conceptual vocabulary of property, that is, a set of concepts, organizational schemes, and doctrines to describe and solve the constantly changing legal questions posed by property.

When they set out to develop modern property, the nineteenth-century jurists approached the juristic texts of Roman antiquity with a combination of sincere scholarly devotion and instrumental spirit. They regarded the writings of the Roman jurists as highly authoritative and deserving of rigorous historical and philological study. Yet they approached these writings with their own practical questions, ideological views, methodological queries, and professional ambitions. Hence, they

(Laura Copp, trans.) (Cambridge: Cambridge University Press, 2014); Harriet I. Flower, *Roman Republics* (Princeton, NJ: Princeton University Press, 2010); Peter Garnsey and Richard Saller, *The Roman Empire: Economy, Society and Culture*, 2nd ed. (Oakland: University of California Press, 2015); Peter Sarris, "The Eastern Empire from Constantine to Heraclius (306–641)," in Cyril Mango (ed.), *The Oxford History of Byzantium* (Oxford: Oxford University Press, 2002), 19–70; Andrea Giardina, "The Transition to Late Antiquity," in Walter Scheidel, Ian Morris, and Richard P. Saller (eds.), *The Cambridge Economic History of the Greco-Roman World* (Cambridge: Cambridge University Press, 2007), 743–768.

[69] See Aldo Schiavone, *The Invention of Law in the West* (Jeremy Carden and Antony Shugaar, transs.) (Cambridge, MA: Harvard University Press, 2012); Claudia Moatti, *The Birth of Critical Thinking in Republican Rome* (Janet Lloyd, trans.) (Cambridge: Cambridge University Press, 2015); Duncan MacRae, *Legible Religion: Books, Gods, and Rituals in Roman Culture* (Cambridge, MA: Harvard University Press, 2016); Jed W. Atkins, *Roman Political Thought* (Cambridge: Cambridge University Press, 2018).

selectively borrowed from the vast and diverse conceptual vocabulary of property developed over the centuries by the Roman jurists only the ideas and doctrines that spoke to the absolute character of property rights, overlooking all else. Readers accustomed to the legend of absolute *dominium* that pervades the nonspecialist literature on Roman property will be surprised at how much richer and more varied the Roman conceptual vocabulary of property actually was. Lost in the legend of absolute *dominium* is all that was pluralistic, amenable to being disaggregated, relative, and limited in Roman property law.

The literature that explores the complexity of Roman property law is wide and ambitious, and scholars have offered remarkably different narratives of Roman property's development.[70] The objective of this chapter is not to provide an exhaustive and detailed account of Roman property law but rather to offer an inevitably simplified overview of Roman property that will serve as a preamble to the story of the invention of Romanist-bourgeois property. In the pages that follow, we will look into the features of Roman law that attracted the nineteenth-century property modernizers: a scientific method and an inventory of concepts and doctrines that could easily be repurposed.

A Powerful Professional Role Model: The Roman Jurists and the Promise of an Impartial Legal Science

Who were the Roman jurists who captivated the imagination of their nineteenth-century heirs and shaped their professional ambitions? And what were the reasons for, and the scope of, their promise of a neutral

[70] Of the vast literature, see (in English): Herbert Hausmaninger and Richard Gamauf (eds.), *A Casebook on Roman Property Law* (George A. Sheets, trans.) (Oxford: Oxford University Press, 2012); Peter Birks (ed.), *New Perspectives in the Roman Law of Property. Essays for Barry Nicholas* (Oxford: Oxford University Press, 1989); M. I. Finley (ed.), *Studies in Roman Property by the Cambridge University Seminar in Ancient History* (Cambridge: Cambridge University Press, 1976); De Plessis, *Borkowski's Textbook on Roman* Law, 151–204; Alan Rodger, *Owners and Neighbours in Roman Law* (Oxford: Clarendon Press, 1972); Fritz Schulz, *Classical Roman Law* (Oxford: Clarendon Press, 1951); Alan Watson, *The Law of Property in the Later Roman Republic* (Oxford: Clarendon Press, 1968). See also Ennio Cortese (ed.), *La proprietà e le proprietà: Pontignano, 30 settembre–3 ottobre 1985* (Milan: Giuffrè, 1988); Luigi Capogrossi Colognesi, s.v. Proprietà (dir. rom.), in *Enciclopedia del diritto* (Milan: Giuffrè, 1988), 37; Max Kaser, *Das römische Privatrecht* (Munich: C. H. Beck, 1955); Otto Karlowa, *Römische Rechtsgeschichte*, 2 (Leipzig: Metzger and Wittig, 1901); Scialoja, *Teoria della proprietà nel diritto romano*.

property science? To fully understand what exactly the Roman jurists had to offer their nineteenth-century successors, we have to look back to the early days of Rome.

The jurists' demand for recognition as a distinct professional class grew out of the fascinating development of the nature of their work, from religious rituality to scientific reason.[71] In early Rome, law was the domain of a specific priestly circle, the *pontifices*, who were the guardians of the *mos maiorum*, the religious and social custom of the ancestors. The *pontifices* were not priests in the sense of spiritual figures. Rather, they were men of patrician social standing who, because of their economic privilege, could undertake public duties without pecuniary remuneration. Their prescriptive pronouncements took the form of "responses" (*responsa*) to questions of the *patres* (the living male patriarchs of the community), who wanted to know what ritual should be used when performing specific operations of daily life, such as claiming power over a thing, conveying property, or entering into marriage.[72] The *pontifices*' responses combined formalism and practical rationality, prescribing times, words, gestures, and the use of ritual objects, such as the wand, the piece of bronze, and the scales, to address practical questions of everyday life. As Aldo Schiavone has noted, the combination of formalistic ritualism and practical reason that we find in this early priestly jurisprudence would, in time, develop into a critical feature of legal science, both Roman and modern.[73] This ability for both abstraction and case-based practical knowledge would be the basis of the jurists' assertion of expertise and their claim to power.

Between the end of the fourth and the beginning of the third century BC, the locus of power shifted from religion toward politics and giving *responsa* became an aristocratic prerogative, rather than a priestly one.[74] *Responsa* were now produced by experts drawn from the new "aristocracy of government," which included not only the patrician elite but also the most important plebeian families.[75] These aristocratic legal experts were not yet "jurists" in the modern understanding of the term, and their work was not yet "science" in the sense of constructing abstract concepts;

[71] Schiavone, *The Invention of Law in the West*, 70–79 and 201.
[72] Id., 76–80; Fritz Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), 6–20.
[73] Schiavone, *The Invention of Law in the West*, 79.
[74] Capogrossi Colognesi, *Law and Power in the Making of the Roman Commonwealth*, 108.
[75] Id., 63–67. It is no coincidence that Tiberius Coruncanius, the first person to give *responsa* in public, was also the first plebeian *pontifex maximus*.

rather, they engaged in practical legal analysis with the aim of solving individual cases.[76] The "revolution" that transformed legal knowledge into a science and the jurists into a highly influential professional class of their own happened around the middle of the second century BC. The only surviving narrative account of the rise of Roman legal science is a short passage from the *Enchiridion*, a treatise written around AD 130–140 by the jurist Sextus Pomponius. Pomponius believes that three men, M. Manilius, M. Junus Brutus, and P. Mucius Scaevola, "established the civil law" and that "Quintus Mucius, son of Publius and *pontifex maximus*, was the first to set the civil law in order by arranging it *generatim* [by genera] into eighteen books."[77]

Pomponius' account is laconic and sheds no light on the reasons that led to the "establishment" of a science of law nor on the specific contributions of this new science. In his book *The Rise of the Roman Jurists*, Bruce Frier identifies the origins of Roman legal science in the "tacit bargain" between the newly emergent socioeconomic elite of the Late Republic, who, at a time of political instability and social ferment, demanded greater security of property and contract rules, and the jurists, eager to be recognized as a powerful professional class. The new elite included the established "equestrian" class of well-off citizens – who owned less property than did members of the senatorial class, often derived their income from their estates and from trade, and in many cases performed roles that were crucial to the functioning of the state – as well as a heterogeneous group of upwardly mobile municipal notables, shippers, and merchants. Largely comprising self-made men, this group had individualistic social values and was more rule-oriented in its understanding of private law than were the old citizens who had greater familiarity with Roman private law;[78] consistent with this interest in private law as it developed from the middle of the second century BC is the fact that the equestrian class would produce some of the most influential of the Roman jurists. The rules of property and contract appeared to this new elite increasingly more unstable for a variety of reasons. Among these reasons were the significant increase in the number of disputes following the expansion of Roman citizenship after

[76] Bruce W. Frier, *The Rise of the Roman Jurists: Studies in Cicero's* Pro Caecina (Princeton, NJ: Princeton University Press, 1985), 140.

[77] Id., 156; Schiavone, *The Invention of Law in the West*, 156–158. For the two quoted passages, see Digest 1.2.2.39 and 1.2.2.41.

[78] Frier, *The Rise of the Roman Jurists*, 256–259.

the Social War of 91–88 BC and the earlier introduction of a new procedural system, the formulary procedure, which gave the *praetor*, the magistrate who controlled the granting of remedies, more discretion to fashion legal actions and, hence, to shape new law. The jurists' response to the new elite's demand for greater stability in private law was to turn law into a written science with its own concepts and modes of reasoning, seemingly insulated from transient political changes.[79]

What was the essence of this new science? All Pomponius tells us is that Quintus Mucius Scaevola (140–82 BC) was the first to organize the civil law *generatim*, that is, by *genera*, or "categories." Generations of historians from the nineteenth century to the present have identified the systematic organization of legal concepts as the unique contribution of this new science and hailed Quintus Mucius, and his colleague Servius Sulpicius Rufus (ca. 105–43 BC), as close contenders for the role of the father of Roman, and modern, legal science.[80] Whether the Roman jurists themselves understood systematic legal analysis to be the essence of the science of Quintus Mucius and Servius is unclear, but certainly this seems to be the view of Cicero. Cicero, who, as a former student of Quintus Mucius and a friend of Servius, was close to both men, praised Quintus Mucius as the exemplary Roman hero and credited him with making good practical use of the law while also lauding Servius for transforming law into an *ars* of *iuris scientia*.

> Scaevola was the most eloquent of those learned in the law .... But perhaps [Servius] preferred that which he achieved, to be the foremost expert, not only among men of his own time, but even relative to those who came before him, in knowledge of the civil law .... Scaevola and others had great practical command of the civil law, but only Servius made it an art. He could never have done this by knowledge of the law alone, not without first acquiring *that* art which instructs one to divide the whole into its constituent parts, to uncover the latent elements by defining them, to explain the obscure through interpreting; to see first the ambiguities and then to distinguish; and finally to keep a method by which are judged truths and falsehoods, and what conclusions follow from what premises and what do not ... the greatest of all arts ... dialectic.[81]

The supposedly systematic approach of Quintus Mucius and Servius was part of a larger intellectual movement to improve the organization of

[79] Schiavone, *The Invention of Law in the West*, 162.
[80] Id., 318; Schulz, *History of Roman Legal Science*, 68–69.
[81] Cicero, *Brutus*, 39.145–42.153.

knowledge in different domains, from law to grammar, to eloquence, to architecture.[82] As Cicero described it in his *De Oratore*:

> All the things that are now included in the arts, were once scattered and disordered; as in music, meter, tones and measure; in geometry, lines, forms, spaces and magnitudes; in astronomy, the revolution of the sky, the rising, setting, and movement of the stars; in philology, the study of the poets, the learning of histories, the interpretation of words, the sound in delivery; and finally in this very system of speaking, to devise, to embellish, to arrange, to memorize, to deliver, once seemed unknown and quite separate to everyone. A certain extrinsic art was therefore applied from another particular sphere, which philosophers claim entirely for themselves, so that it might bind together things that had been disconnected and divided and hold them together in some system. Let this therefore be the purpose of the civil law: the preservation of justice, stemming from law and custom, in the matters and concerns of citizens.[83]

That the Roman jurists' "scientific revolution" consisted of binding together into a system legal concepts that had been loose and divided, as Cicero nicely captured it, was also the understanding of one of the most prominent Romanists of nineteenth-century Germany, Georg Puchta (1798–1846). Puchta played a critical role in popularizing the legend of Quintus Mucius as a virtuous statesman and the father of the systematic approach to legal analysis. To be sure, Puchta may well have been anachronistically attributing to Quintus Mucius his own methodological creed, which focused on the task of system-building.

The truth is that while the legend of Quintus Mucius continues to thrive, we know very little about the actual nature of his work. None of his writings have survived intact, and we are left with sparse traces of his thought in later works, almost always in the form of quotations by later jurists.[84] These later quotes can only give us a superficial sense of what Quintus Mucius' systematic classifications may have looked like. For example, Gaius recounts that Quintus Mucius identified five types of tutorship:

[82] Moatti, *The Birth of Critical Thinking in Republican Rome*.

[83] Cicero, *De Oratore*, 1.187–188.

[84] The three passages in the Digest attributed to Quintus Mucius – 41.1.64; 50.16.241; and 50.17.73 – do not allow us much understanding of his contribution. Quotations of Quintus Mucius by later jurists are found throughout the Digest; for a list of these quotations, see Kaius Tuori, "The Myth of Quintus Mucius Scaevola: Founding Father of Legal Science?" (2004) 72 *Tijdschrift voor Rechtsgeschiedenis* 243–262, at 251. Quintus Mucius was also quoted by writers who were not jurists.

> It suffices to remind that some, such as Quintus Mucius, have said that there are five *genera*, others, such as Servius Sulpicius, three, others, such as Labeo, two, while others still have maintained that there are as many *genera* as there are *species*.[85]

Similarly, we learn from the jurist Paulus, active during the reign of the Emperors Septimius Severus and Caracalla, that Quintus Mucius' classified possession into distinct types, or *genera possessionis*, although Paulus was not persuaded by this schema:

> Quintus Mucius was quite wrong to include among the *genera* of possession those cases in which we possess a thing by order of a magistrate so as to preserve that thing: for the magistrate who renders a creditor in possession so as to preserve the thing, either because a remedy has not been provided due to threatened damage or in the name of an unborn child, does not grant possession but custody and control of the property.[86]

The method of classifying larger concepts into kinds that we see applied in these brief surviving quotes was not Quintus Mucius' own invention; he borrowed it from Greek philosophy. *Diairesis* was a method of reaching a definition through the logical division of kinds (*genera* and *species*). This classification into kinds would then lead to the discovery of the principles governing the kinds and explaining individual cases. The diairetic method was first developed in Plato's dialogues and later became a method for classification used in the Aristotelian and Stoic schools.[87] Quintus Mucius was familiar with *diairesis* because it was a part of the intellectual culture of the Roman aristocracy.[88] Quintus Mucius' appropriation of *diairesis* for the purpose of legal analysis was the fundamental move that transformed law into a "science," in the sense in which the term is used by Plato and Aristotle, and introduced Roman jurisprudence into the circle of the Hellenistic professional sciences.[89] Through the diairetic method, law achieved what was required from a science: the logical classification of elements, their systematic integration, and the definition of their governing principles.

The methodology supposedly developed by Quintus Mucius would influence the nineteenth-century craftsmen of Romanist-bourgeois property

[85] Gaius, *Institutes*, 1.188.
[86] Digest 41.2.3.23.
[87] Donald R. Kelly, "Gaius Noster: Substructures of Western Social Thought" (1979) 84(3) *American Historical Review* 619–648.
[88] Schiavone, *The Invention of Law in the West*, 185.
[89] Id., 184–186; Schulz, *Roman Legal Science*, 62–65.

in two critical ways. To begin with, the diairetic method combined two intellectual processes – formalistic abstraction and practical case-oriented analysis – which the modern jurists would continue to see as the essence of legal science and of their unique expertise.[90] To analyze the facts of social life, such as belongings, exchanges, and obligations, into *genera* and *species*, the Roman jurists needed both a good grasp of the living reality they were studying as well as the ability to organize this living material in abstract concepts. In property, this meant organizing the myriad different types of "things" (*res*) that can be the object of ownership according both to their physical characteristics and to the interests and values they implicate; it also meant classifying the many possible ways in which something "belongs" to someone within the abstract concepts of *dominium*, bonitary ownership, possession, and a number of lesser real rights. This ability for abstraction and practical reasoning was sharpened by the use of *diairesis* but, as we have seen, it was already present in the early days of the priestly jurists who prescribed formal rituals for everyday legal acts.

Another aspect of Roman legal science would influence the creators of modern Romanist-bourgeois property. From Quintus Mucius onward, the Roman jurists saw their abstract concepts not merely as useful categories of thought but as real entities, as objective things that legal science would study and analyze but that had a life of their own, separate from, and preexistent to, the intellectual activity of the jurists.[91] As Aldo Schiavone notes, it is difficult to determine whether Platonic or Aristotelian ideas directly influenced the jurists' belief in the objective existence of legal concepts, but certainly this epistemic commitment to the objectivity of legal concepts owes a lot to Greek philosophy and would feature prominently in nineteenth-century property science.[92]

Historians like Franz Wieacker have doubted that either Quintus Mucius or Servius could have developed anything like a systematic organization of the law since both were still inevitably hamstrung by the jumbled and casuistic framework of the Twelve Tables, the earliest

[90] Schiavone, *The Invention of Law in the West*, 199; Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 119–127.

[91] Friedrich Karl von Saigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr und Zimmer, 1814), ch. 1, sec. 4, n. 17. As Schiavone indicates (*The Invention of Law in the West*, 202), the implications of the insight of this passage were not immediately realized.

[92] Schiavone, *The Invention of Law in the West*, 202.

and most influential compilation of Roman laws.[93] The story of Quintus Mucius and Servius may well be yet another modern legend concocted by nineteenth-century Roman law scholars eager to bolster their own professional power.[94] Yet its influence is still with us today. Just as the legend of absolute *dominium* lent prodigious power to the modern robustly individualistic idea of property, so too the legend of Quintus Mucius' systematic science conferred tremendous strength on the abstract formalistic approach that enabled the fiction of absolute property.

The Elements of the Roman Conceptual Vocabulary of Property

To be sure, *dominium ex iure Quiritium*, that is, the right that gave Roman citizens exclusive and ample legal power over the things that, under the law, could be privately owned, was an important concept of Roman property law. However, the Roman conceptual vocabulary of property comprised a variety of doctrines and concepts that made property plural, flexible, and limited. These elements of pluralism and variability include: (1) a classification of the different things (*res*) that could be the object of property rights and the correspondent variety of *res*-specific property regimes; (2) a wide menu of lesser forms of "ownership," conflated under the label of "*possession*," that existed alongside full *dominium*; (3) a menu of lesser property rights over things owned by another (*iura in re aliena*) that allowed owners to parcel out entitlements and achieve a variety of social and economic goals; (4) a complex

[93] Franz Wieacker, "Über das Verhältnis der römishen Fachjurisprudenz zur griechisch-hellenistischen Theorie" (1969) 20 *Iura* 448–477; Id., "Cicero und die Fachjurisprudenz seiner Zeit" (1978) 3 *Ciceroniana* 69–77; Antonio Carcaterra, *Le definizioni dei giuristi romani: metodo, mezzi e fini* (Naples: Jovene, 1966); Bruno Schmidlin, *Die römischen Rechtsregeln* (Cologne: Böhlau, 1970); Id., "Horoi, pithana und regulae – Zum Einkluß der Rhetorik und Dialektik auf die juristische Regelbildung," in Hildegard Temporini (ed.), *Aufstieg und Niedergang der römischen Welt 2.15: Recht (Methoden, Schulen, Einzelne Juristen)* (Berlin; New York: de Gruyter, 1976), 101–130. Remo Martini, *Le definizioni dei giuristi romani* (Milan: Giuffrè, 1966).

[94] See Tuori, "The Myth of Quintus Mucius Scaevola," as well as Alan Watson, "The Birth of the Legal Profession" (1987) 85 *Michigan Law Review* 1071. The interest, on the part of scholars of Roman law, in how Roman jurists worked within and advanced their profession extends to the schools to which Roman jurists of the early Empire belonged. Much ink has been spilt over the supposed differences – methodological, doctrinal, and political – between the two schools, called the Proculians and the Sabinians, but this discussion too often reflects contemporary academic and political debates, rather than ancient realities. On this topic, see Charles Bartlett and Anna di Robilant, "Labeo Noster: The Proculians and the Sabinians in legal and political history" (forthcoming).

regulatory regime that limited owners' entitlements and the broad catch-all concept of "abuse of rights"; and (5) the notion of *lex agraria*, a blueprint for a comprehensive plan to correct patterns of inequitable access to fundamental resources. In the pages that follow, we will focus on these five features of Roman property both because they present a stark contrast with the legend that Roman property was absolute and unitary, and because these five features would have pride of place in the making and remaking of modern property. Each of these features would be retrieved by subsequent generations of modern jurists who would draw inspiration from them while fiercely disagreeing over their meaning and applicability.

The Roman Law of Things: The Classification of the Various Types of "*Res*"

A reader searching for *the* definition of property in the Roman sources would be disappointed. After all we have said about the legends surrounding Roman "absolute" *dominium*, the absence of *the* definition, or of any definition, comes as a surprise. But offering one, univocal definition of property, good for all purposes, is not how Romans thought about property or law more generally.[95] As noted by Pietro Bonfante (1864–1932), one of the most eminent Italian Romanists, "the attempt to define property is typical of modern jurisprudence. In the Roman sources, there is no trace of a definition. There are, indeed, many definitions that pass as textual and Roman, or at least as inspired by Roman texts. But this is an illusion of the exegetic fetishism of modern times."[96]

Roman law textbooks, from Gaius' *Institutes* to modern textbooks, begin their exposition of the law of property not with a definition of the concept of property but with a classification of the various types of *res*. For our purposes, we will translate *res* as "thing," although the Roman meaning of *res* is broader and is the object of significant controversy

[95] The famous definition of law as "the art of the good and the equitable" (Digest 1.1.1.pr.) by the jurist Celsus is unusual and hardly overly-specific.

[96] Pietro Bonfante, *Corso di diritto romano: Vol. II, La Proprietà* (Milan: Giuffrè, 1966 [1926]), part 1, 233. See also K. Kagan, "Res corporalis and res incorporalis – A Comparison of Roman and English Law of Interests of Life" (1945–1946) 20 *Tulane Law Review* 98.

among Roman law scholars.[97] The idea that property is a "law of things" is a popular one today, nicely captured in the title of a highly-cited recent article by US property scholar Henry Smith.[98] Roman property law was, quintessentially, a "law of things." Before delving into a more detailed exploration of how the Roman jurists classified things, we need to pause and consider the fundamental relevance of "the law of things." While obscured in the modern legend of Roman absolute *dominium*, this pragmatic focus on things is the single most important legacy of Roman property. The Roman classification of things is interesting intrinsically, as a mode of legal analysis, as well as for the influence it had on modern jurists.

As a mode of legal reasoning, the Roman "law of things" is a good example of the Roman jurists' talent for combining practical reasoning and formal categorization. The Roman jurists did not base their classification of things on some abstract and intuitive understanding of the different types of things. Rather, they brought into play specific frames of positive or normative analysis, external to law and drawn, to a considerable extent, from religion and philosophy. This pragmatic, positive, and extralegal cognizance of things was then organized into formal, legal categories. The significance of the Roman "law of things" for modern property thinking is momentous albeit largely overlooked. Contrary to the legend of a monolithic and absolute *dominium*, the Roman classification of things speaks to the pluralism of property values and the consequent variability of property entitlements. As Pietro Bonfante noted, the Romans had the intuition that "property is not, and cannot be, a uniform, monolithic block; property is subject to varying limits and regulations, so that it assumed radically different configurations depending on the object that is owned."[99] In the hands of modern jurists,

[97] Bernhard Windscheid, a leading figure of the German nineteenth-century Pandectist School of legal thought, which sought to "actualize" Roman law, argues that the term *res* denotes any material thing or right or obligation that is part of one's patrimony. See Bernardo Windscheid, *Diritto delle Pandette: con note e riferimenti al diritto civile italiano*, vol. I (Carlo Fadda and Paolo Emilio Bensa, transs.) (Turin: UTET, 1930 [1902]), 478, n. 3. By contrast, Vittorio Scialoja suggested that *res* has an even broader meaning, independent from the concept of patrimony. Scialoja's argument rests on a passage from Ulpian that calls *res* (*incorporales*) legal relations, which in Roman law were not part of the patrimony in the way that was the inheritance (which became part of one's patrimony only after it was acquired), or the tutelage that a former patron had over a freed female slave (*liberta*); see Scialoja, *Teoria della proprietà nel diritto romano*.

[98] Henry E. Smith, "Property as the Law of Things" (2012) 125 *Harvard Law Review* 1691.

[99] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 1, 211.

this intuition about the pluralism and variability of property would be a fertile source of theoretical and practical innovation.

Let's now take a look at some of the specific ways in which the Roman jurists classified things, which is maddeningly complicated to our modern eyes. In modern property law, the most familiar and fundamental distinctions are that between movables and immovables, or real property and personal property, and between private property and public property. While some of the Roman distinctions mirror modern ones, much of the Roman world is opaque to us and we must guard against anachronism in our effort to understand its legal system. To understand the Roman classification of things we have to shed these familiar distinctions and look at Roman law and Roman society with fresh eyes.

The first and fundamental distinction between the various *res*, fundamental because it marks the very boundaries of the realm of property, is that between "corporeal things" (*res corporales*) and "incorporeal things" (*res incorporales*). This origin of this distinction is philosophical.[100] The Roman jurists borrowed it from Roman philosophers who, in turn, got it from Aristotle. We can find a neat example of this slippage from the language of philosophy to that of law in Cicero's *Topica*. Cicero starts by providing a philosophical definition of corporeal and incorporeal things but then draws his examples from law.

> I say things "exist" when they are able to be seen and touched, as for example a farm, a house, a wall, rain water, a slave, cattle, furniture, food, and so on; certain things of this class you must define at times. On the other hand, I say things "do not exist" that are not able to be touched or indicated, but still can be discerned by the mind and understood, for example if you were to explain *usucapio*, guardianship, the familial clan, or agnatic relation, none of which has an underlying physical substance, there is nevertheless a certain form distinguished and impressed on the intellect, which I call a "notion." Often in argumentation, this notion must be explicated by definition.[101]

The transition from philosophical debates to legal textbooks seems to be complete by the time of Gaius, the jurist of the second century AD, who, in his *Institutes*, discusses the distinction between corporeal and incorporeal things in a manner that closely tracks Cicero's and that would be

[100] See Raymond Monier, "La date d'apparition du 'dominium' et de la distinction juridique des 'res' en 'corporales' et 'incorporales,'" in *Studi in onore di Siro Solozzi* (Naples: Jovene, 1948), 357–374, at 360.

[101] Cicero, *Topica*, 5.27.

literally reproduced in Justinian's *Institutes*.[102] For Gaius, corporeal things are the material, tangible things that are the object of property, while the term "incorporeal things" has the broader sense of "legal relations." In other words, the distinction between corporeal and incorporeal things seems to have the same meaning of another distinction that is recurrent in the sources, that between *corpora* and *iura*, that is, material, tangible things and rights. Both ways of distinguishing demarcate property as the realm of tangible things.

Another distinction that was central to the Roman social and legal imagination is that between *res in commercio* and *res extra commercium*. The former were things that could be privately owned and freely exchanged in the market; the latter were exempt from private property and market transactions because of either their religious significance (*res divini iuris*) or their public import (*res humani iuris*). Among the things that involved religious interests were the objects and buildings used to honor the gods (*res sacrae*), to remember the dead – such as graves and burying sites –(*res religiosae*), and the walls that encircled the city of Rome and its gates (*res sanctae*). Two aspects of this classification are fascinating for the modern reader. First, this distinction does not map neatly onto our familiar modern distinction between private property and public property. As Yan Thomas has suggested, by classifying things into *res in commercio* and *res extra commercium*, the Romans marked off a separate realm – the sacred – from that of the public, while using terms that indicated their contiguity and close relation.[103] This fuzziness of the line that separates the sacred and the public is for us largely unfathomable, as it confounds our ideas about the separation between human and divine, state and church, law and religion.

A second aspect of this distinction that deserves mention is its constitutive role. By ascribing things to different classes, Roman law did not

[102] "Moreover, some things are corporeal, others incorporeal. Corporeal things are those that can be touched, such as a farm, a slave, clothing, gold, silver, and in fact innumerable other things. Those things that cannot be touched are incorporeal, and they are such that they exist only in law, for example inheritance, usufruct, and obligations contracted by whatever means. And it does not matter that things included in an inheritance are corporeal, or that fruits, which are obtained from a farm (subject to a usufruct), are corporeal, and that what we owe under an obligation is usually corporeal, such as a farm, a slave, or money; for the right of succession, in itself, and the right of usufruct, in itself, and the right of an obligation, in itself, are all incorporeal" (Gaius, *Institutes*, 2.12–14).

[103] Yan Thomas, "Le valeur des choses: Le droit romain hors la religion" (2002) 57(6) *Annales: Histoire, Sciences Sociales* 1431–1462.

simply recognize and ratify the existing, shared, and plain cultural, social, or economic value of a thing. It also constituted new things, giving them new status, meaning and value.[104] Take the case of "sacred things" (*res sacrae*), that is, the things used to honor the gods. A building or an object would become "sacred," and hence exempt from private ownership and market transactions, through a procedure. *Res sacrae* were consecrated to the gods in a solemn ceremony. After previous authorization of the Roman people (through a *lex*, a *plebiscitum*, or later a *senatusconsultum*), a magistrate representing the Roman people transferred ownership of the *res sacra* to the gods, represented by the *pontifex*.[105] Occasionally, the consecration of property to the gods could become a highly controversial affair involving fierce political rivalries and acts of retaliation, as happened in a case involving Cicero. During Cicero's exile, his enemy P. Clodius Pulcher, consecrated Cicero's house on the Palatine Hill to the goddess *Libertas*. Clodius' consecration was clearly an act of political aggression against a rival. In a highly emotional speech entitled *De Domo Sua*, Cicero fiercely disputed the validity of the consecration and, ultimately, prevailed. Cicero's speech deserves attention not only because it gives us a sense of the procedural requirements of the ritual of consecration, but also because it illuminates the constitutive role of the Roman classification of things. Through the legal and religious ritual of consecration, Cicero's house, privately owned, was constituted into something different, a *res sacra*, thereby changing its status and value. A distressed and mystified Cicero decries the cruel and vengeful use of the legal category of *res sacra*:

> What? In a dedication do we not ask who dedicates, and what he dedicates, and in what way? Or do you so confound and disturb these principles that it is possible for whoever wishes to do so to dedicate whatever he wants and however he likes? Who were you, the dedicator? By what right? What law? What precedent? What authority? When did the Roman people entrust this to you? For I see that there is an old tribunician law which prohibits a building, land, or an altar being consecrated without the order of the people; and at that time Quintus Papirius, who proposed this law, did not think, nor did he suspect, that there would be any danger that the homes or possessions of citizens, who had not been condemned, would be consecrated . . .. If you interpret the terms of the legislation to pertain to our houses and lands, I do not contest it; but I ask

[104] Giorgio Agamben, "Introduction," in Michele Spano (ed.), *Yan Thomas: Il valore delle cose* (Macerata: Quodlibet, 2015).

[105] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 1, 20–21.

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> what law was passed that you should consecrate my house, from where this authority was given to you, by what right you acted. And here I am not discussing religion but in fact the property of us all, not pontifical rights, but public rights. The Lex Papiria prohibits a building being consecrated without the order of the people. Let it be understood clearly that this refers to our buildings and not to public temples. Show me even a single word having to do with consecration in your law, if it actually is a law at all, and not the expression of your evil and cruel nature.[106]

Moving to distinctions that are more familiar to the modern reader, Roman law's treatment of the distinction between private and public property deserves close attention. Things that were exempt from private property and market transactions because of the public interest were subdivided into "common things" (*res communes*), "public things" (*res publicae*), and "things belonging to the municipality" (*res universitatis*). The concept of "common things" has inspired the moral and legal imagination of generations of modern jurists in Europe and beyond, who have framed legal claims about access to natural resources, water, or artistic and historic treasures in the language of "common things." Despite its modern appeal, the notion of *res communes* is controversial among Romanists because, while it appears in Justinian's *Institutes*, it is absent from Gaius, whose *Institutes* inspired Justinian's, and from virtually every other classical source. The only exception is Marcianus, a jurist of the time of the Severi, who wrote that:

> Indeed by natural law these things are common for everyone: air, flowing water, and the sea, and through this the shores of the sea.[107]

Roman law scholars, from Mommsen to Bonfante, have dismissed the significance of this passage. For some, Marcianus was sloppy in his use of language, and by *res communes* he really meant *res publicae*.[108] Others assert that Marcianus was simply translating in legalese what was, in fact, a philosophical concept.[109] Once again, as in the case of corporeal and incorporeal things, the legal category of "common things" seems to be directly informed by philosophical ideas. In a passage of his moral treatise *De Beneficiis*, Seneca explains the philosophical concept of

[106] Cicero, *De Domo Sua*, 49.127–50.128.
[107] Digest 1.8.2.1.
[108] Theodor Mommsen, "I. Sopra una iscrizione scoperta in Frisia, II. Nuovo esemplare dell'editto 'de accusationibus' di Costantino" (1889) 2(3–5) *Bullettino dell'Istituto di Diritto Romano* 129–135, at 131.
[109] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 1, 55.

"common things" as the gifts that the gods have bestowed on all humans, regardless of merit, such as the sun, the alternation of seasons, natural fonts, and regularly blowing winds.[110] Over time, "common things" became a legal concept that applies to the air, the flowing water, the sea and the sea shores, as well rivers and river banks. In Justinian's *Institutes*, the idea of an essential, innate gift from which no one can be excluded is no less vivid than in Seneca but is associated with a specific legal regime, the core element of which is that the public has the temporary and shared right to access and use common things.[111]

[110] "The gods too," he said, "bestow much upon the ungrateful. But they had prepared those things for the good; still, the bad also partake of them, because they cannot be separated from the good. It is better then, to aid also the bad for the sake of the good, than to neglect the good for the sake of the bad. So those things you note – the day, the sun, the sequence of winter and summer and the moderate seasons of spring and autumn between them, rains and fonts for drinking, the fixed blowings of the winds – the gods invented for all; they could not except individuals. A king gives honors to the worthy, but largess to the unworthy as well. The thief, the perjurer, and the adulterer all receive public grain, as does everyone, who has been registered, without distinction of *mores*; whatever else he is, a man receives public grain, not because he is good, but because he is a citizen, and the good and the bad obtain the same. God has also given certain gifts to the entire human race, from which no one is shut out. For, while it was a common good that the commerce of the sea lie open and the domain of mankind expand, it was impossible for the same wind to favorable to good men and contrary to bad; and law was not able to govern the falling rains, so that they would not fall upon the fields of the bad and the wicked. Certain things are placed in common. Cities are founded for the good and no less for the bad; publication broadcasts works of genius even if they will pass to the unworthy; medicine shows its power even to criminals; no one has suppressed the compounding of salutary remedies, so that the unworthy will not be healed." Seneca, *De Beneficiis*, 4.28.1–4.

[111] "By natural law certain things are common to all .... And indeed the things that by natural law are common to all are these: the air, and flowing water, and the sea, and through this the shores of the sea. Therefore no one is to be prohibited from going to the shore of the sea, but nevertheless he should keep away from houses, monuments, and buildings, because these things are not subject to the law of all peoples (*ius gentium*), as is the sea. Rivers are common property and ports are state property: the right to fish in ports and rivers is common to all. The shore of the sea exists as far as the highest winter tide runs. Use of the banks is public and subject to the law of all peoples (*ius gentium*), just as is use of the river itself: everyone is free to moor their boats on them, to fasten ropes from the trees growing there, to unload some cargo on them, just as to navigate the river. But ownership of the banks belongs to those who own the adjacent fields; for this reason, the trees growing on the banks are also their property. Similarly, use of the sea-shores is public and subject to the law of all peoples (*ius gentium*), just as is use of the sea itself. And so anyone is free to erect a shack there, in which he can take shelter, just as he can dry his nets and pull his boat ashore. Ownership of these shores belongs to no one, but they are subject to the same law that also governs the sea and the land or sand that lies under the sea." Justinian, *Institutes*, 2.1; 2.1.1–2.1.5.

Turning to things that belonged to the realm of private property and market transactions, the fundamental modern distinction between real property and personal property exists in the Roman sources, but its actual relevance is unclear, at least in the classical period. For one thing, this distinction seems to be absent in the terminology of the classical jurists, who, instead of "real property," used more specific expressions such as *fundus* (parcel of land), *praedium* (farm), or *fundus et aedes* (land and buildings). For another, the supposed differences in the way classical Roman law treated real property and personal property (employing different terms for *usucapio*/prescription, recognizing different remedies to protect possession, and indicating differences in the modalities for conveyance by *traditio*) are less meaningful than they appear.[112]

Regardless of the merit of these arguments, Roman law scholars seem to agree that, in the classical period, the distinction between real property and personal property is obscured by another, more fundamental, distinction: that between *res mancipi* and *res nec mancipi*.[113] This latter way of classifying things is foreign to the modern way of thinking. It is rooted in the peculiar ritualistic formalism that characterized early Roman legal thought and it refers to the different modes of conveyance required for these two classes of things. *Res mancipi* could only be conveyed by *mancipatio* or *in iure cessio*. A simple delivery would not suffice. *Mancipatio* was a ritual ceremony involving a fictitious sale, described in detail by Gaius:

> Now *mancipatio*, as we have said already, is a sort of fictitious sale; it too is a legal institution unique to Roman citizens. This is how it is performed: in the presence of no less than five witnesses who are Roman citizens of full age, and also of another with the same status who holds a bronze scale, and is therefore called the *libripens* (scale-holder), the party who is accepting by *mancipatio*, while holding a piece of bronze, says the following: "I declare that this man is mine by quiritary right, and let him be purchased by me with this bronze and bronze scale." Then he strikes the scale with the piece of bronze, and he gives the piece of bronze

[112] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 1, 217–218.

[113] Bonfante, "Forme primitive ed evoluzione della proprietà romana (*Res mancipi* e *res nec mancipi*)," in *Scritti giuridici varii: Vol. II, Proprietà e servitù* (Turin: UTET, 1918), 1–326. See also Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 1, 170 ff.; Id., *Istituzioni di diritto romano* (Turin: G. Giappichelli, 1946), 246 f.; Fernand de Visscher, *Mancipium et res mancipi* (Rome: Apollinaris, 1936), 263 ff.; Id., *Nouvelles études de droit romain: public et privé* (Milan: Giuffrè, 1949), 193 ff.; Max Kaser, *Das römische Privatrecht*, vol. I (Munich: Beck, 1955), 44 f.; Id., *Eigentum und Besitz im älteren römischen Recht*, vol. II (Cologne: Böhlau, 1956), 388.

> to the party from whom he accepts by *mancipatio* symbolically instead of paying a price.[114]

As Gaius' passage suggests, *mancipatio* as a mode of conveyance was not available to just anyone. The limited availability of *mancipatio* reflected the inequities of the Roman law of persons. *Mancipatio* was initially limited to Roman citizens and only subsequently extended to Latins, both *coloniarii* (inhabitants of the colonies) and *Iuniani* (informally manumitted slaves). And women could perform *mancipatio* only with the authorization of their guardian. The other way for transferring ownership of *res mancipi*, *in iure cessio*, was no less formal or cumbersome. It simulated the action asserting ownership (*vindicatio*) and it required appearing before the *praetor*.

Ceremonies aside, what types of things were *res mancipi*, and how is this distinction related to that between movables and immovables? Pseudo-Ulpian informs us that:

> All things are either *res mancipi* or *res nec mancipi*. *Res mancipi* include estates on Italian soil, whether rural, such as a farm, or urban, such as a house; also rights attached to rural estates, such as driving paths, walking paths, herding paths, or the right to draw water; also slaves, and quadrupeds that are broken by the saddle or the yoke, for example cattle, mules, horses, and donkeys. Other things are *res nec mancipi*. Elephants and camels, although they may be broken by the yoke or the saddle, are *res nec mancipi*, because they are among the number of wild animals.[115]

The nature of the things on Pseudo-Ulpian's list suggests that *res mancipi* were the resources that had significant value in the early Roman agricultural economy. In other words, the distinction between *res mancipi* and *res nec mancipi* was based on their socioeconomic significance.[116] The distinction partially overlaps with that between real property and personal property because most items on Ulpian's list happen to be land or rights related to land. And the rationale of the two distinctions seems to be similar: certainty and publicity. Because of their socioeconomic significance, the transfer of ownership of *res mancipi* required specific, highly ritualized modalities capable of ensuring certainty in economic transactions. By the time of Diocletian (AD 284–305), the distinction

[114] Gaius, *Institutes*, 1.119.
[115] Pseudo-Ulpian, *Liber singularis regularum*, 19.1.
[116] Filippo Gallo, *Studi sulla distinzione fra* "res mancipi" *e* "res nec mancipi" (Turin: G. Giappichelli, 1958), 13. Similarly, Bonfante, "Forme primitive ed evoluzione della proprietà romana," 217.

between *res mancipi* and *res nec mancipi* had lost relevance and it was eventually abolished by Justinian. As the distinction between *res mancipi* and *res nec mancipi* declined in importance, that between movables and immovables gained more relevance.

Real property was the object of further classifications that reflected either the economic use of the resource or its location. Immovables were divided into *rustici* and *urbani*. The former were land and buildings used for agricultural purposes, the latter for residential purposes. The economic use, not the location, was the basis for the distinction, so that there was rustic real property in the city and urban real property outside the city. The location of the land was, at least initially, the basis for another distinction, that between Italic land, located in Italy, and provincial land. The distinction was a critical one: Italian land could be owned in *dominium*, that is, the full ownership reserved to Roman citizens. By contrast, as Gaius explains:

> In the provinces it is generally accepted that land cannot become *religiosum*, because *dominium* in these areas is held either by the Roman people or by Caesar, and we individuals seem to have only possession or usufruct. But still, although it is not *religiosum*, it is treated as such. Similarly, something in the provinces that is consecrated not under the authority of the Roman People is not strictly *sacrum*, but it is treated as such.[117]

Because it belonged to the Roman people, provincial land could not be the object of *dominium*. It was owned by the Roman state and granted to private individuals who had entitlements similar to those of an owner but who were subject to an annual tax. These provincial landholders were not formally owners and were designated with formulas such as *habere possidere* or *frui licere*. However, as time passed, the distinction lost its initial connection with the location of the land and came to be based merely on the legal regime the land was subject to. Italic land came to designate any land subject to the *ius Italicum*, even if actually located outside of Italy. Hence, the *ius Italicum* is yet another example of how the Roman classification of things actually created or constituted new "things" with new value and legal meaning. The *ius Italicum* was a legal fiction, a privilege granted to certain communities in the Roman provinces whose land was treated as if it were in Italy. Lands that had the privilege of the *ius Italicum* were governed by Roman private law and

[117] Gaius, *Institutes*, 2.7–7a.

could be the object of *dominium*.[118] The legal fiction of the *ius Italicum* may have been an important tool to negotiate the political complexities of Roman imperial expansion. This new, imperially minded use of the *ius Italicum* was formulated in the first years of Vespasian's Principate, when Vespasian, pressed by the urgent need for new revenue, reorganized imperial finances, significantly raising taxes. The grant of the *ius Italicum* was a way to exempt from the highly unpopular tax reforms colonies established by Italians, who were overwhelmingly legionary veterans.[119] The distinction between Italic land and provincial land lost relevance with time and was eventually abolished by Justinian.

Finally, another set of classifications hinged on the physical nature of the thing itself. Roman law distinguished between fungible and non-fungible things. The former (*res quae in genere suo functionem recipiunt*) are things whose individual units are capable of mutual substitution, such as wine, olive oil, or grain of the same quality. Non-fungible things are unique in their individuality. A bemused Bonfante illustrates this distinction between fungible and non-fungible things with an anecdote. Today, Bonfante notes, we think of works of art as non-fungible. This was not the case for the Romans. Apparently, at the time of the conquest and sack of Corinth (146 BC), which entailed one of the largest hauls of artistic treasures in Rome's history, the general Lucius Mummius had the shippers who brought back the bronzes to Rome promise that, if the bronzes were lost in transit, they would replace them with new ones.[120] Probably, Bonfante took too seriously a joke about Mummius' lack of sophistication that was popular among Mummius' rivals.

[118] On the *ius Italicum* see: Jochen Bleicken, "'In provinciali solo dominium populi Romani est vel Caesaris.' Zur Kolonisationspolitik der ausgehenden Republik und frühen Kaiserzeit" (1974) 4 *Chiron* 4 359–414; Thomas H. Watkins, "Vespasian and the Italic Right" (1988) 84(2) *The Classical Journal* 117–136. Valeriu Şotropa, *Le droit romain en Dacie* (Amsterdam: J. C. Gieben, 1990); Giuseppe Luzzatto, *Sul regime del suolo nelle province romane: spunti critici e problematica*. Excerpted from *Atti del Convegno Internationale sul tema: "I diritti locali nelle province romane con particolare riguardo alle condizioni giuridiche del suolo" (Roma, 26–28 ottobre 1971)* (Rome: Accademia Nazionale dei Lincei, 1974), 2; Mario Talamanca, "Gli ordinamenti provinciali nella prospettiva dei giuristi tardoclassici," in G .G. Archi (ed.) *Istituzioni giuridiche e realtà politiche nel tardo impero (III–V sec. d.C.)* (Milan: Giuffrè, 1976), 95–246, at n. 322 (217–219) and n. 379 240–241).

[119] Watkins, "Vespasian and the Italic Right," 120–125.

[120] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 1, 107–108. For the ancient assertion of Mummius's lack of sophistication, see Velleius Paterculus, *Compendium of Roman History*, 1.13.3–4.

Roman jurists also distinguished between things that can be consumed and things that cannot. The distinction was legally relevant mainly because the former could not be the object of a usufruct, that is, the right to use another's property and to take its fruits, without impairing its substance. Another distinction, one that is partially opaque to us because rooted in Stoic physics, is that between "single things" (*res unitae)*, "composite things" (*res compositae*), and "totalities of things" (*universitates rerum*). Let us hear Pomponius' explanation:

> There are three types of things: the first, that which is comprised of one spirit, called in Greek "unitary," as for example a slave, a piece of timber, a rock, and similar things; another, that which arises out of things connected to each other, that is from multiple things joined together among themselves, which [in Greek] is called "constructed," such as a building, a ship, or a cabinet; the third, that which consists of discrete entities, not as many bodies separated, but placed under one name, such as the people, a legion, a flock.[121]

Pomponius describes "unitary" as characterized by the fact that they contain one single spirit. His explanation is informed by the Stoic understanding of nature. For the Stoics, material things of the world hold together because of an internal flow of either one *pneuma* or numerous *pneumata*, the breath(es) of life, that produces cohesion, called *hexis*, in the matter.[122] Hence, a log or a seashell is held together by the "dynamic process" of *hexis*, which, in the case of a unitary thing, consists in one *pneuma*, translated by Pomponius as "spirit."[123] In property law, whether a thing is single or composite or a *universitas rerum* mattered mostly for the purpose of acquisition by *usucapio* (adverse possession). Does the adverse possessor of a composite thing acquire the whole, or are the distinct things that become part of composite thing acquired separately? Pomponius explains that:

> There is no question that the first kind [single things] should be subject to *usucapio*, but it is less clear with the other two [composite things and totalities of things]. Labeo, in his books of epistles, says that if someone, who needs ten days to finish *usucapio* of roof tiles or columns, installs them in a building, he will complete *usucapio* just the same, provided that

[121] Digest 41.3.30.pr.

[122] On Stoic physics see Samuel Sambursky, *Physics of the Stoics* (Princeton, NJ: Princeton University Press, 2014 [1959]) pp. 21–48; Bernard Besnier, "La conception stoïcienne de la matière" (2003) 37(1) *Revue de métaphysique et de morale* 51–64.

[123] Sambursky, *Physics of the Stoics*, 21–22.

> he possesses the building. So what about things that do not become fixed in the earth, but continue to be removable, such as a gemstone in a ring? In this case it is true that both the gold and the gemstone may be possessed and usucapted, as long as each one remains intact.[124]

While intricate and, at times, opaque, the significance of the Roman classification of the various kinds of *res* cannot be overstated because it impacts the very conceptual structure of property. Where the modern reader, familiar with the legend of Roman unitary and absolute *dominium*, expects to find a general, all-encompassing definition of property, we find instead a pluralistic structure, consisting of many *res*-specific property regimes.

A Critical Conceptual Pair: Absolute *Dominium* and Possession

The pluralism of the Roman classification of things did not guide the creative activities of nineteenth-century jurists, who, instead, embarked on the quest for *the* definition of property. They projected their own agendas and concerns on the few, short ancient passages that could suggest a definition of property, at times going so far as to drastically change or even invert what they found in the works of their Roman predecessors.

As it happens, the Roman jurists themselves had little to say about the concept of property. To begin with, the terminology varies and one would be tempted to conclude that, in the early and classical period, the Romans did not even have a term that unequivocally meant "property." In fact, the words used for property seem to have had broader meanings. *Mancipium*, which seems to be the earliest term for property, also designated the authority of the king, of a magistrate, or of the *pater familias* over the members of his family. *Dominium* was often used in the wider sense of a "subjective right," and *dominus* had the broader meaning of "right-holder," not only the holder of property rights (*dominus proprietatis*) but also the holder of a usufruct (*dominus usufructus*) or the heir (*domimus hereditatis*).[125] Only the word *proprietas*, which became

[124] Digest 41.3.30.pr.–1.

[125] Monier, "La date d'apparition du 'dominium,'" 358, who notes that the early references to *dominium* (for example, in the *De Re Rustica* of Varro [116–27 BC]), which some Roman law scholars have interpreted as referring to the abstract idea of property, in fact were more specific.

more widely used in the later imperial era, seems univocally to have meant "property."[126]

No less puzzling is the fact that, while Romanists have identified in the sources several "definitions" of property, all of which emphasize the broad scope of the owner's powers, at closer inspection, none of these supposed definitions is really about property. Rather, these definitions are extrapolated from texts that discuss specific legal questions that bear only a loose relation to property. A first definition takes the form of a maxim inferred from a rescript of the Emperor Constantine.[127] It reads "every man is the ruler and arbiter of his own property according to the *ius civile*." The precise Latin wording of this definition is not found in any ancient text but is rather a product of later juristic reformulation.[128] Neither this definition nor the rescript, however, includes the word *dominus*. Further, in order to construe the meaning of "one in complete control of his property," the maxim had to take the opposite of the meaning of the relevant sentence of the rescript, which says explicitly that the "ruler and arbiter" cannot do as he pleases with regard to his property in all instances. So this first definition can be ruled out.

Another supposed definition that made an impression on the nineteenth-century jurists for its absolutist tone is that property is "the right to use and abuse one's thing (*ius utendi et abutendi re sua*)." It is drawn from a passage of Ulpian on the claim for inheritance:

> The senate has been mindful of the interests of good faith possessors, so that they are not brought into complete ruin, but may be held liable only to the extent to which they were enriched. Therefore whatever outlay from an inheritance they make, if they cause something to deteriorate or to be lost, although they think that they were consuming their own property, they will not be responsible for it. If they have made a gift, they will not be considered to have been enriched, even though they have of course obligated someone to return the favor by giving them a gift. Clearly, if they received return-gifts, it must be said that they were

[126] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 2, 229–233; Scialoja, *Teoria della proprietà nel diritto romano*, 255.

[127] The rescript in question is: "In a case of mandate, there is a risk not only in terms of money, which is certainly the object of the action of mandate, but also to reputation. For whoever is the ruler and arbiter of his own property does not conduct all his dealings, but rather most of them, according to his own design. But the affairs of others must be managed with exacting care, and nothing in their administration that is neglected or done unsuitably is free from blame." Code 4.35.21.

[128] See Konrad Summenhart, *De contractibus* (Hagenaw: Heinrich Gran and Johannes Rynman, 1500), *quaestio* 57 for one instance of this maxim.

> made richer to the extent of what they received: because this would be a kind of bartering.[129]

The reader will wonder what this passage has to do with property. The text addresses the problem related to a possessor in good faith of an inheritance, only indirectly casting some light on the question of the powers of an owner. Because the good faith possessors of the inheritance here believed that they were owners and hence were entitled to "abuse" their property, they should not be held liable for the acts listed, including "squandering" and "causing waste." Nineteenth-century property writers would tirelessly play up these words as suggesting that Ulpian conceived of property as the absolute right to use and abuse one's thing. However, the matter is more complicated since, as the translation suggests, the word *abuti* is closer in meaning to "consuming" than to "abusing."[130] In other words, the *ius utendi* and *abutendi re sua* suggests that the owner has the right to use the thing and to fully consume it to the point of exhausting it, rather than the right to abuse, waste, or capriciously destroy the thing.

A third famous "absolutist" definition *of dominium* says that "it is the right of complete disposal over a corporeal thing, as long as it is not prohibited by law."[131] But this definition is not Roman. Its author is the medieval jurist Bartolus de Saxoferrato (1313–1357), who coined it in his comment on a passage of Ulpian that explains the difference between ownership and possession but says nothing about an owner's absolute right over a thing.[132] Yet another supposed definition of property, one that would serve as a template for many of the modern civil codes, is taken from Florentinus, a jurist of the second century. Florentinus tells us that:

> Liberty is the natural capability of a person to do what he likes, except for what is prohibited either by force or by law.[133]

[129] Digest 5.3.25.11.

[130] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 2, 233.

[131] Bartolus ad Digest 41.2.17.1. See Bartolus de Saxoferrato, *In Primam Digesti Novi Partem* (Venice: Giunti, 1585), 84v.

[132] The passage of Ulpian on which Bartolus comments is: "The difference between *dominium* and *possessio* is this, that *dominium* remains even when the owner does not wish to be such, but *possessio* lapses when the possessor decides he does not wish to possess. Therefore, if someone has transferred *possessio* with a mind that it would be returned to him later, he ceases to possess" (Digest 41.2.17.1).

[133] Digest 1.5.4.pr.

This sentiment, here concisely and powerfully expressed, would be critical to modern political and legal theory, that is, in the idea of negative freedom and its limits, but, once again, it is not about property.

The terminological and definitional vagueness that surrounds Roman property leaves us wondering whether the Roman jurists actually intended to be "absolute" and "unitary," as the nineteenth-century architects of Roman-bourgeois property wanted us to believe. The answer is far from straightforward. Undoubtedly *dominium ex iure Quiritium* had unique features. It was the broadest form of ownership, reserved to the *Quirites*, the ancient Roman citizens, intrinsically connected to the (Roman) land and therefore charged with high political and symbolic meaning. As Pietro Bonfante argued, *dominium* was a right akin to territorial sovereignty and it belonged to its owner, the quiritary citizen and *pater familias*, "not only for the economic purpose of utilization, but also for the political purpose of preservation and defense."[134]

Because of its social and political relevance, *dominium* was highly symbolic and its unique features were staged through elaborate rituals. Its intrinsic connection with sovereignty over land was performed through the ritual of *limitatio*. In this solemn ceremony, the boundaries of land owned by a Roman citizen were marked with *termini*, that is, posts of wood or stone. A free space, five-feet wide, was left to separate neighboring parcels. This free space, called the *limes*, was devoted to public use, ingress and egress, and ploughing. The *limitatio* could be of one of two types: *centuriatio*, which divided the land in square or rectangular parcels forming a regular grid, and *scamnatio*, which divided the land in rectangular plots irregularly arranged. A fascinating example of legal geography, the *limitatio* shaped the appearance of the physical landscape and determined the legal and social relations of its inhabitants.[135] It marked, physically and symbolically, an enclosed space within which the sovereignty of the owner extended above and below the surface, was purportedly immune from the interference of neighbors and of the state, and was perpetual.[136] In other words, the function of

[134] Bonfante, "Forme primitive ed evoluzione della proprietà romana," 19.

[135] On "legal geography," see Jane Holden and Carolyn Harrison (eds.), *Law and Geography* (Oxford: Oxford University Press, 2003). On the physical landscape of Roman property, see Éva Jakab, "Property Rights in Ancient Rome," in Paul Erdkamp, Koenraad Verboven, and Arjan Zuiderhoek (eds.), *Ownership and Exploitation of Land and Natural Resources in the Roman World* (Oxford: Oxford University Press, 2015), 107–131.

[136] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 2, 243 and 327.

the *limitatio* was to eliminate, symbolically, from the property the reality of the inevitable conflicts and interrelations between neighbors by relegating these conflicts into a dedicated public buffer zone. The nineteenth-century architects of Roman-bourgeois property would successfully popularize it, making it a central image of the modern liberal legal and political imaginary. But the real authors of the image of property as separate spheres of absolute sovereignty are the Roman *pontifices* and jurists, who, through their ritualism, inscribed it, however unrealistically, onto the landscape of property.

Rituals aside, in what way was the *dominus*' sphere of "sovereignty" truly absolute? The *dominus*' partial immunity from state power was achieved by exempting the *dominus* from real estate taxes. The *dominus* paid taxes, of course, but personal taxes, not property taxes. *Dominium* was absolute also in another way: it was protected through a special action, the *rei vindicatio*. The *rei vindicatio* was an assertion of absolute title. It was the only action of this type. The dispossessed *dominus* sued the possessor of the thing for its recovery, asserting "*ex iure Quiritium meum esse aio*" (I claim this under quiritary law).[137] The ability to make this assertion of title in a *rei vindicatio* was the essential feature of *dominium*. It was so essential that the jurist Celsus, not without some circularity, tells us that:

> What is mine is whatever remains of my property over which I have the right of vindication.[138]

But, practically, the *rei vindicatio* was hardly a convenient remedy. If the defendant denied the plaintiff's ownership, the plaintiff had to prove that he had acquired *dominium* over the thing from its previous *dominus*, who in turn had acquired it from the *dominus* before him. Proving the entire chain of title back until the first owner's original acquisition must have been, in many cases, almost impossible. The possessory interdicts available for the protection of possession were a much more efficient option. Ritualism suggesting full sovereignty over a thing also characterized the transfer of *dominium*. For *dominium* to be successfully transferred, the parties had to use one of two specific forms, *mancipatio* or *in iure cessio*. *Mancipatio*, we have already learned, consisted in the

[137] Pietro Bonfante, *Corso di diritto romano: Vol. II, La Proprietà* (Milan: Giuffrè, 1968 [1926]), 395–418. Because the titles of the volumes in Bonfante's *Corso* are similar, this part will be denoted as "*Corso di diritto romano: Vol. II, La Proprietà* (1968)."

[138] Digest 6.1.49.1.

transferee's declaration that "this is mine" accompanied by a ritual with bronze and scales in the presence of five Roman citizens as witnesses. *In iure cessio*, as we have seen, also involved a resolute claim of ownership in the context of a fictitious dispute in which the transferee acted as a dispossessed owner.[139]

Despite these many rituals and formalities asserting the "absolute" character of *dominium*, *dominium* was, obviously, not absolute. It was certainly not absolute in the sense that the *dominus* had full enjoyment of the thing, free of any restrictions. Obviously, equal, unrestricted enjoyment for all owners is hardly conceivable. For an owner to have unfettered entitlements against all persons with respect to a thing would mean that others have no legitimate interests, meriting legal protection, in their things or in their person that may conflict with the owner's exercise of his rights. Even the crudest legal system restricts the owner's enjoyment to allow the similar enjoyment of other owners and to protect, even if minimally, the public interest. As we will see shortly, Roman law imposed a set of limits on owners that look very much like those of a modern legal system. The transformation from a small agrarian economy to an imperial market economy, the empire's growing demand for revenue, and the increasing pressure for redistributive policies left their mark on the law of property. By Justinian's time, the public policy limitations on property did not differ too much from the modern regime of limited property entitlements we are familiar with. *Dominium* could also have been absolute in the sense that the *dominus* was immune from losing ownership without his consent. But this was not the case in Roman law, which knew various forms of prescription (*usucapio*, *longi temporis praescriptio*, *praescriptio quadriginta annorum*), by which an owner could lose title to a possessor in good faith by the simple lapse of time.[140]

Finally, as Barry Nicholas suggests, *dominium* may have been absolute in the sense that it was the best, ultimate right and the only of its kind because there was no other formal *right* to "own" a thing. In other words, one was either a *dominus* or a mere de facto possessor. However, *dominium* was not the only right of its kind. There were two modes of owning that were, in substance, equivalent to *dominium*. The first was the case of the "bonitary owner," the transferee who had received a *res mancipi* by mere conveyance (*traditio*) rather than through the prescribed forms. The second was the person whose title was defective

[139] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà* (1968), 181–198.
[140] Nicholas, *An Introduction to Roman Law*, 156.

because he or she had received the thing, in good faith, from someone who was not the owner. Technically, both the "bonitary owner" and the *good faith* possessor had no better title than a mere possessor, entitled to the limited remedy of the interdicts. However, in the late Republic, the *praetor* granted both protection equivalent to that of an owner (*dominus*), de facto creating two other forms of ownership that came to be known as "praetorian ownership" and differed from *dominium* only in name.[141] After a certain *praetor*, called Publicius, made available to the "bonitary owner" the *Actio Publiciana*, which was essentially a *vindicatio* in which the necessary lapse of time for *usucapio* was fictitiously presumed, the "bonitary owner" was protected against everyone, including the owner *ex iure Quiritium*, and hence was, for nearly all practical purposes, in the position of an owner. But the Romans, Nicholas notes, could not bring themselves to call the "bonitary owner" *dominus* and opted for the convoluted formula "*in bonis esse*," which means "to have something in one's estate."[142] The modern jurist can only be baffled. Someone who is not an owner merely because he failed to perform an old cumbersome ritual is put in the same exact position of an owner, through a legal fiction, and yet denied the name "owner" and designated instead with a clumsy circumlocution. Preserving the symbolic and conceptual uniqueness of *dominium* required as much.

To conclude, the answer to the question of whether *dominium* was *truly* absolute is both no and yes. *Dominium* was not absolute in its actual daily operation. It was not the ultimate and unique right, as the owner was not entitled to unfettered enjoyment and was not wholly immune from loss. But *dominium* was absolute in the formalities and rituals it involved. The most important moments in the life of *dominium* – from the tracing of the physical boundaries of the parcel, to the transfer of ownership, to its protection – were marked by resolute assertions of absolute ownership. The echoes of such assertions would resonate in the overblown rhetoric of the treatises and monographs of the nineteenth-century architects of Roman-bourgeois property.

Dominium also had a twin concept, possession (*possessio*). Today, possession has largely slipped out of legal scholars' sight, and it is often dismissed by Anglo-American jurists as "the vaguest of all vague terms."[143] Yet, possession was a critical concept in Roman law and, in

[141] Id., 155–156.
[142] Id., 128, 157.
[143] Reg. v Smith 1855 6 Co C C 554, 556; see also Burke Shartel, "Meanings of Possession" (1931) 16 *Minnesota Law Review* 611.

turn, in Romanist-bourgeois property law. *Dominium* and possession were twins because, in very simplified terms, *dominium* was a *right* while possession was a *fact*. In other words, the *dominus* was *entitled* to have a thing while the possessor *actually had* a thing, meaning that the possessor exercised actual physical control over a thing and intended to exercise such control, albeit without having a formal legal entitlement.[144]

However, the notion that, in Roman law, possession is merely a fact and not a right is misleading and needs clarification. There were two situations in which the fact of possession did have legal consequences, regardless of formal title. The first was *usucapio*, that is, the acquisition of *dominium* by continuous possession. Present certain requirements, the person who possessed a thing for a protracted period of time became its owner. In other words, *usucapio* operated similarly to a familiar institution of Anglo-American property law that puzzles every first-year law student, that is, adverse possession. The second case in which possession had legal consequences is less familiar but truly fascinating. While the possessor had no formal entitlement over the thing, she or he still received some degree of protection from the law through remedies known as "possessory interdicts." Interdicts were orders issued by the *praetor* at the request of the claimant and aimed at quickly solving the controversy. Through these interdicts, the possessor could restrain others from interfering with his possession and recover possession from anyone who had dispossessed him. Different types of interdicts applied to specific types of property and circumstances. The *interdictum utrubi* applied to movables while the *interdictum uti possidetis* was available for immovables; the *interdictum de vi* covered cases of dispossession through physical force and the *interdictum de vi armata* cases of dispossession with the assistance of armed persons.[145] To enjoy the protection of the interdicts, the possessor had to hold the thing in the manner of an owner, that is, to have both sufficient physical control of the thing, either directly or through another person, and the intention to possess like an owner.[146]

[144] Nicholas, *An Introduction to Roman Law*, 107.

[145] Watson, *The Law of Property in the Later Roman Republic*, 86–89.

[146] This meant that someone who held the thing in pursuance of a contract with the owner, for example, a lessee, was not considered a possessor protected by the interdicts. A lessee could, of course, proceed *in personam* against the lessor but could not avail himself of the interdicts. For the same reason, the interdicts were unavailable to anyone who held the thing in the exercise of one of the more limited real rights; see Nicholas, *An Introduction to Roman Law*, 107–108.

Why the law would protect a possessor who is acting with no right was a question that fascinated the nineteenth-century architects of modern Romanist property law. In 1803, the German jurist Friedrich Karl von Savigny published a treatise *On Possession* that proved immensely influential and sparked a vivacious, and at times violently polemical, debate among jurists throughout Europe.[147] For Savigny, Roman possession was a matter of protecting the peace and order of society against force and lawlessness; for others, possession was about protecting the will of the possessor, actualized in the exercise of control over a thing; still others stressed that safeguarding possession was an indirect and imperfect means of affording effective and temporary protection without the need to prove chain of title.

The Limits of Roman Property

The nineteenth-century proponents of modern, Romanist *dominium* were eager to emphasize that the very idea of limits was foreign to the way the Romans thought about property. As Bonfante put it:

> From what we said about the origins and the concept of Roman property, it appears that limits were not an original characteristic of property: the primigenial structure of *dominium ex iure Quiritium* does not allow for real limits, or at least limits are few and dissimulated.[148]

Yet, there are good reasons to question Bonfante's statement. Limits to property entitlements may have been "few and dissimulated" in the early days of Rome but, as Roman society developed and the Roman economy grew, the number, if not the nature, of the regulatory limits to private property came to resemble modern property law. For religious as well as public health reasons, owners were prohibited from burying the dead on their land within the city walls. In case of land located outside the city, when a holder of the *ius sepulchri* was not also owner of the land, the latter had a duty to grant the former access to the land for the purposes of mourning and honoring the deceased. If flooding prevented the use of a public road, neighboring owners had a duty to grant a temporary public right of passage over their land. By late imperial times, limitations were imposed on owners' rights over the subsurface of their land.[149]

[147] Friedrich Carl von Savigny, *Das Recht des Besitzes. Eine civilistische Abhandlung* (Baden-Baden: Nomos Verlagsgesellschaft, 2011 [Giessen: Heyer, 1803]).

[148] Bonfante, *Corso di diritto romano: Vol. II, La Proprietà*, part 2, 277.

[149] The maxim *cuius est solum, eius est usque ad coelum et ad inferos* is at times thought to apply to conditions during the classical period of Roman law, but here again we have a medieval maxim posing as an ancient rule. See p. 278.

A constitution of the Emperors Gratian, Valentinian, and Theodosius on quarries prescribed the division of the materials excavated between the owner, the person who excavates and the state:

> If any persons with laborious digging follow a vein of stone through lands belonging to private individuals, they are to pay a tenth to the fiscus and a tenth to the owner of the land, and what remains they may vindicate according to their wishes.[150]

Detailed regulations also limited the ability of owners to develop and build on their land, whether urban or rural. Conservation regulations, aimed at securing the stability and the aesthetic value of buildings in the city, prohibited owners from separating valuable materials, for example, marbles, from buildings for the purpose of selling them. And a senatorial decree during the reign of the Emperor Claudius prohibited altogether the sale of buildings when the object of the transaction was not the building itself but rather its materials. Further, legislation in the imperial period began to prescribe the minimum distance between buildings and to regulate the height of buildings and the width of party walls, reflecting a concern present in modern legal systems as well. Also, under the Emperors Leo and Zeno the regulation of relations among neighbors made a qualitative and quantitative leap, becoming a comprehensive, detailed body of rules. A constitution issued by Zeno for the city of Constantinople gives us a good sense of what the new regulatory regime looked like. In addition to the new limits as to height and distance, Zeno introduced easements (δουλεία, in the Greek text of the constitution) for light and air and for the view of the sea. Another important limitation, this one originating in the Twelve Tables, was the *actio aquae pluviae arcendae*, an action given against the owner of neighboring land for having constructed improvements that changed the natural flow of rainwater such that it damaged the plaintiff's property. By Justinian's time, juristic debate over the *actio aquae pluviae arcendae* had expanded to cover interferences that resulted in a diminution of the natural flow of a source of water.

It was a common contention among the nineteenth-century proponents of modern *dominium* not only that limits to property entitlements were "few and dissimulated" but also that the Roman state had no eminent domain power to take private property for public use. Proponents of this view pointed to the absence of any legislative or

[150] Theodosian Code 10.19.10.

juristic text expressly recognizing the principle and to a variety of texts from which it can, supposedly, be inferred that no such principle existed. For example, in his speech *De Lege Agraria*, Cicero, criticizing the demagogic and unrealistic nature of proposal of the tribune P. Servius Tullius that the state buy privately owned parcels of land and redistribute them to the landless, notes:

> Now observe the unbounded and unacceptable license of all the provisions. Money has been collected to buy lands; further, they will not be bought from those who are unwilling to sell. If the owners agree not to sell, what will happen?[151]

What Cicero is describing is the classic holdout problem, traditionally offered as a justification for eminent domain: when private owners refuse to sell their land, which the government needs for a public purpose, the government takes it by eminent domain and pays just compensation. Cicero's ironic interrogation – "what will happen if owners refuse to sell?" – is taken to suggest that the Roman state had no power to take property in the case of holdouts. Further evidence of the absence of eminent domain in Rome was found in an anecdote recounted by the historian Livy (64 or 59 BC–AD 12 or 17). During their term of office (179–174 BC), the censors M. Aemilius Lepidus and M. Fulvius Nobilior, Livy tells us, had planned to build an aqueduct, but the realization of the project was frustrated by the opposition of one single owner, M. Licinius Crassus, who refused to sell his land.[152] However, this story does not prove much; it may speak more to the power of one man than to the question of eminent domain. Crassus was a member of one of the prominent families in Rome, the *gens Licinia*, and it is possible that he would have succeeded in his opposition even if eminent domain existed.

Were the Roman law scholars who, in the nineteenth and twentieth centuries, argued for the existence of eminent domain in Roman law all socialistic ideologues anxious to redeem Roman property from the accusation of being excessively individualistic and anti-social, as Bonfante seemed to believe? Certainly not. While the absence of explicit statements and discussion of eminent domain is surprising, there is an abundance of texts from which such a general principle can be inferred. The Romans may not have felt the need to articulate such a general principle, or to develop a full-fledge theory of takings, but they were

[151] Cicero, *De Lege Agraria*, 1.5.15.
[152] Livy, *Ab Urbe Condita*, 40.51.7.

certainly familiar with the state taking property for public purposes. To begin with, citizens' property could be taken for religious reasons if it interfered with the Roman people's relation with the supernatural. We have seen how entangled the public and the sacred were, and indeed Roman property can hardly be understood if one forgets their interrelation. Cicero tells a story that gives a sense of how religion could justify a loss of property:

> For example, when the augurs were preparing to make observations from the citadel and they ordered Tiberius Claudius Centumalus, who owned a house on the Caelian Hill, to demolish the parts of the structure that blocked the taking of the auspices because of their height. Claudius advertised the block for sale, and Publius Calpurnius Lanarius bought it. The augurs ordered him to do the very same thing.[153]

The *augures* were a college of high priests whose distinct prerogative was to ritualistically interpret the auspices, which meant observing certain natural phenomena to determine whether or not the gods approved of an important public action about to be launched. What is not clear from this passage is whether the mandate to destroy Claudius' house gave rise to any claim for compensation.

But the most significant traces of eminent domain in the Roman law of property can be found in the literature on aqueducts. Our informant is Frontinus, not a jurist but a high-ranking public official who was appointed water commissioner for the city of Rome in AD 97. In his *De Aquis Urbis Romae*, a treatise about the administration of the Roman aqueducts, Frontinus explained the process of planning and building an aqueduct. In the section devoted to the tracing of the aqueduct's path, Frontinus cited a decree of the senate imposing a variety of limits on private owners whose land was located on the aqueduct's route. Further, Frontinus described, as an example of admirable balancing of private and public interests, what to our modern eyes seems a typical case of taking with payment of just compensation:

> The consuls Quintus Aelius Tubero and Paulus Fabius Maximus made a report that the courses the aqueducts, which come into the city, are encumbered with monuments and buildings and planted with trees, and upon putting the matter to the senate for decision, it has been resolved: because, in order to repair channels and conduits (the blockages and encumbrances must be cleared) by which public infrastructure is

[153] Cicero, *De Officiis*, 3.16.66.

> damaged, it is decreed that around the fountains, arches, and walls a space of fifteen feet is to be left clear on each side; and that around the channels that are underground and the conduits both within the city and within buildings adjacent to the city, a space of five feet is to remain clear on each side, and it is not permitted to build a monument or a building, nor to plant trees, in these places after this time; if there are now trees within this space, they will be extirpated unless they are connected to a house or enclosed in buildings . . .. This resolution of the senate would seem quite just, even if these areas were claimed only for the sake of public utility. But our ancestors, with much more admirable justice, did not take from private citizens even those areas that were integral to the public project, but, when they were building aqueducts, if a proprietor made a fuss about selling a part, they bought the whole field, and, after the necessary expanse was determined, they sold the field again, so that, within their own boundaries, the state and private citizens should have their own right.[154]

This brief glance at Roman property's limits leaves us with a puzzle: if the regulations limiting owners' entitlements were vast and detailed, and the texts alluding to the state's power of eminent domain are numerous, what justifies the idea that Roman property suffered no limit? Roman law scholars who are proponents of this idea have one last arrow in their quiver: the absence of a general principle prohibiting *aemulatio* or "abuse of rights," that is, the owner's abusive exercise of her rights. The principle was included in several of the nineteenth- and twentieth-century civil codes and was the object of enthusiastic endorsements and heated polemics in the debates between the proponents of modern absolute *dominium* and their social critics. The former sought to show that a general principle of "abuse of rights" was nowhere to be found in the Roman sources, while the latter were eager to affirm the Roman character of the doctrine of "abuse of rights." As with eminent domain, the proponents of "abuse of rights" could not point to a text explicitly articulating a general principle but found numerous sparse allusions to the doctrine. Most of these were allusions to a prohibition of a spiteful, malicious, or purposeless exercise of one's right in connection to a specific resource, namely water. For example, a passage from Ulpian seems to suggest a consensus among jurists that acts done with the intent to harm, *animus nocendi*, and not for useful purposes, are not within the scope of the owner's right:

[154] Frontinus, *De Aquis Urbis Romae*, 2.127–128.

> The same authorities (Sabinus and Cassius) say that everyone can retain rainwater on his own property or can lead surface rainwater from his neighbor's property onto his own property, as long as work is not done on another's property, and that no one is to be held liable for this, because no person is prohibited from enriching himself as long as he does not harm anyone while he does it. Next, Marcellus writes that against someone who, while digging on his own property, diverts a water source of his neighbor, no action can be brought, not even the action for fraud. And certainly the neighbor should not have an action, if that someone did this not with a mind to harm his neighbor, but to make his land better.[155]

Another allusion to malice, considered important by Roman law scholars because it does not concern waters but rather seems a more general statement of a principle is contained in a passage from Celsus, a jurist of the classical era. Celsus, while discussing the rights of the good faith possessor who makes improvements on the owner's land, states:

> There must be no allowance for malice. If, for instance, you want to scrape away plaster, which you have applied, and destroy pictures, you will accomplish nothing but to be obnoxious.[156]

Bonfante may have been right that the Roman jurists aptly disguised the limits to property. They made it easy for their modern counterparts to downplay the relevance of these limits and to focus instead on the absence of general principles regarding eminent domain or the prohibition of abuse of rights. Yet, these limits were neither few nor insignificant.

Public Land and Provincial Land: The Lesser Forms of Resource-Specific "Ownership"

Dominium was the supreme property form but, alongside *dominium* and the two equivalent forms of "praetorian ownership," there were other forms of "ownership." These other forms were not called "property" but were rather designated with formulas such as *possidere*, *uti*, *frui*, or *habere possidere frui*, all of which evoke the idea of a full enjoyment of the thing. And, in fact, the scope of the owner's entitlements was so broad as to make these forms hardly distinguishable from "property" as we think of it today. The existence of these lesser "properties" is one of the most important features of Roman property that the nineteenth-century

[155] Digest 39.3.1.11–12.
[156] Digest 6.1.38.

legend of *dominium* has virtually erased. One aspect of these lesser forms of "ownership" is worth noting. These "properties" were, to a large extent, resource-specific. They were tailored to the specific interests and needs implicated by different types of land that were key to the Roman economy or to Roman geo-political designs, such as public land and provincial land. By variously tweaking the entitlements comprised in these lesser forms of ownership, the Roman state was able to effectively pursue a variety of political and economic goals with regards to public and provincial lands.

Not all land in Italy was held as private property by *domini*. Large swathes of land were public land, known as the *ager publicus populi Romani*.[157] Public land, which the Roman state acquired by confiscation from defeated enemies, was owned by the state but was made available to private citizens through a variety of forms that closely resembled ownership. Initially, not all private citizens had access to public land. The sources for the early Republic suggest that plebeians, the lower class, were originally excluded from public land.[158] The tenure regime for public land was, initially, very informal. Public land, to the extent it was not used by the state, could be freely "occupied" (*ager occupatorius*) by users who wished to work it. A passage by Appian of Alexandria, a Roman historian of Greek origin who wrote in the second century AD, gives us a good sense of the informality characterizing this early "ownership" regime for public land:

> As the Romans subdued Italy piece by piece in war, they would take a part of land and make new cities there, or they would enlist colonists of their own to settle in cities that already existed. They intended to use these cities in place of garrisons, and whenever they took land in war, what was being cultivated they would immediately distribute, sell, or lease to the colonists. But as they did not have the time to divide the land that was

[157] On Roman public lands, see Alberto Burdese, *Studi sull'ager publicus* (Turin: G. Giappichelli, 1952); Luigi Capogrossi Colognesi, "Alcuni problemi di storia romana arcaica: 'ager publicus', 'gentes' e clienti (1980) 83 *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"* 29–65; Saskia Roselaar, *Public Land in the Roman Republic: A Social and Economic History of Ager Publicus in Italy, 396–89 BC* (Oxford: Oxford University Press, 2010); Dominic W. Rathbone, "The Control and Exploitation of *ager publicus* in Italy under the Roman Republic," in Jean-Jacques Aubert (ed.), *Tâches publiques en enterprise privée dans le monde romain* (Neuchâtel: University of Neuchâtel, 2003), 135–178.

[158] Luigi Capogrossi Colognesi, "Ager publicus e ager privatus dall'età arcaica al compromesso patrizio-plebeo," in Jaime Roset (ed.), *Estudios en homenaje al Profesor Juan Iglesias* (Madrid: Universidad Complutense de Madrid, 1988), Vol. II, 639–650.

> then lying fallow because of the war, which was the majority usually, they would auction it in the interim to anyone who wanted to work it for a tax on the annual harvest, a tenth of what was sown, and a fifth of what was planted. A tax was imposed also on those keeping livestock, whether larger or smaller animals.[159]

In this early stage, occupiers' use rights were highly unsecure. Users held the land without a legal title and the state could take away the land from the occupier whenever it was needed, without any duty to pay compensation. How much public land users could occupy and who was allowed to occupy are highly contentious questions. From the *agrimensores*, the professional surveyors who codified the Roman land system, we gather that, at an earlier time, "each man did not occupy as much land as he could then cultivate, but he sought to gain as much as he had the hope of cultivating."[160] It also appears that in 367 BC, the *Lex Licinia de modo agrorum* capped the amount of land that could be occupied by one individual to 500 *iugera*. This limit, however, seems to have remained dead letter.

From the third century BC on, these informal use rights evolved into more stable and secure forms of "ownership" in response to larger structural changes in the Roman economy as well as in the Roman class structure. Over the course of the third century, what some historians have called a Roman market economy started taking shape.[161] As Rome

[159] Appian, *Bellum Civile*, 1.7.26–27.

[160] *Commentum*, 50.28–30.

[161] Scholars passionately disagree on whether Rome had a market economy, that is, an economy where many resources are allocated by prices that are free to move in response to changes in underlying conditions. Ancient historian Moses Finley maintained that Rome's economy was qualitatively different from a modern market economy and argued that, in the Roman "ancient economy," an ideology of agricultural self-sufficiency as well as status considerations acted as brakes on the development of factor markets, technology, trade, and profit maximization. See M. I. Finley, *The Ancient Economy* (Foreword by Ian Morris) (Berkeley: University of California Press, 1999). However, in recent decades, a variety of new methodological approaches to the Roman economy have cast light on the relevance, the size, and the actual operation of the Roman, and larger Mediterranean, market. Peter Temin has devoted a great deal of effort to showing that the economy of the early Roman Empire was primarily a market economy. Building on abundant evidence and extensive earlier studies of the wheat market and prices, Temin makes two claims: that many individual actions and interactions in the Roman world are best seen as market transactions and that there were enough market transactions to constitute a market economy. Further, Temin suggests that, while local markets were not tied together as tightly as they are today, they were still interconnected and functioned as part of a comprehensive Mediterranean market. This Mediterranean market promoted regional specialization and exploited the comparative advantage of different parts of the

rapidly grew into a Mediterranean empire, the acquisition of new territory and the influx of money and slaves made larger commercial agricultural production possible. Commercial agriculture required a significant investment in the forms of equipment, slaves, wages for free laborers, livestock, seeds or plants and transportation, but insecurity of tenure under this informal form of occupation made commercial farmers reluctant to invest. Under the pressure of this expanding economy, the inflexibility of a property system that offered either absolute *dominium* or informal, unsecure use rights became apparent, and new types of "ownership" were developed whereby land remained the property of the state but users were granted an official title, broad entitlements, and security of tenure.

The earliest of these new "ownerships" concerned public lands known as *ager quaestorius*.[162] This form of tenure derived its name from the fact that it was "sold" in fifty-*iugera* blocks at an auction, presumably at market rates, by the *quaestores*, elected officials who supervised the treasury and the finances of the state. The sources use the word *vendere*, which means to sell, but what was "sold" was, technically, use rights, not the land itself, which remained the property of the state. However, the "owners" had broad entitlements that made their position similar to ownership. Use rights over the parcels gave the "owner" full control over the use and management of the land, were freely transferable, and could

Mediterranean. See Peter Temin, *The Roman Market Economy* (Princeton, NJ: Princeton University Press, 2013). See also Philip Kay, *Rome's Economic Revolution* (Oxford: Oxford University Press, 2014); Alan Bowman and Andrew Wilson (eds.), *Quantifying the Roman Economy* (Oxford: Oxford University Press, 2009); Walter Scheidel (ed.), *The Cambridge Companion to the Roman Economy* (Cambridge: Cambridge University Press, 2012); André Tchernia, *The Romans and Trade* (Oxford: Oxford University Press, 2016); Cameron Hawkins, *Roman Artisans and the Urban Economy* (Cambridge: Cambridge University Press, 2016). Scholars adhering to the "New Institutional Economics" approach have also focused on the existence and operation of markets in the Roman world. The picture these scholars present is a more complicated one. The Roman economy was a mixed system, whereby a price-setting market coexisted with public supply channels and the government was heavily involved in some areas of resource exploitation, such as mining. The market and public supply supported each other in various ways and promoted efficient outcomes, either outcomes that were efficient economically or in other social respects, especially in regard to religion or politics. See Arjan Zuiderhoek, "Introduction: Land and Natural Resources in the Roman World in Historiographical and Theoretical Perspective," in Paul Erdkamp, Koenraad Verboven, and Arjan Zuiderhoek (eds.), *Ownership and Exploitation of Land and Natural Resources in the Roman World* (Oxford: Oxford University Press, 2015) 1–18, at 11–16.

[162] Roselaar, *Public Land in the Roman Republic*, 121–127.

be bequeathed to heirs. In the "law in the books," "owners" had a duty to pay rent, but there is reason to doubt that, in practice, collection actually happened. As to security of tenure, it appears from the sources that the protection of "owners" against dispossession by third parties was gradually reinforced by making available the possessory interdicts. What is not clear is whether the state could take back the land. Some scholars have argued that the parcels could be bought back by the state only at the initiative of the "owner." In any event, regardless of what the status of the "owner" vis-à-vis the state was formally, it seems that, in practice, tenure was made relatively secure by the fact that supervising, administering, and, possibly, taking back public lands was costly and complicated for the state.[163]

Another form of "ownership" for public lands, called *ager in trientalibus*, was developed as a way to finance the Second Punic War.[164] Private citizens gave their gold, silver, and jewelry to the treasury for the purpose of financing the war effort, with the agreement that they would be paid back in three money installments. However, in 200, when the time came for the second payment and no money was available, the senate decided to repay citizens by granting use of parcels of the *ager publicus*. As Livy recounts,

> As the private citizens made a fair request, and nevertheless the republic could not repay the loan, the senate decreed something that was mid-way between fair and pragmatic, namely that, because a large part of these citizens said that lands were generally for sale and that they needed to buy some, the public land that was within fifty miles should be available to them: the consuls were to appraise the land and impose a tax of an *as* per *iugerum* for the sake of maintaining that the land was public, so that if anyone, when the state was solvent, wanted to have money instead of land, he could restore the land to the people. Happily the private citizens accepted this proposition; this land was called "*trientabulum*," because it had been given to satisfy one third of the debt.[165]

Rich farmers interested in commercial agriculture found this compromise very attractive. The fact that the land was situated within a fifty-mile radius from Rome meant that it was in high demand among those wishing to produce for the market in the city. As in the case of the *ager quaestorius*, "owners" of the *ager in trientalibus* had the entitlements of

[163] Id., 123–124.
[164] Id., 127–128.
[165] Livy, *Ab Urbe Condita*, 31.13.5–9.

an owner and virtually complete security of tenure. Land could only be taken back by the state at the initiative of the "owner" who preferred cash, and there is no evidence that anyone exchanged land for money. The *ager in trientalibus* was mentioned as a category of land in the *lex agraria* of 111 BC and, by this time, its "owners" had held their parcels undisturbed for almost ninety years.[166]

Yet another special "ownership" form was developed for public lands known as *ager censorius* because these were leased out by the *censor*, a high Roman magistrate, with an arrangement that resembled a long lease rather than ownership.[167] However, in the sources, the recipients of such lands were at times called *redemptores* (buyers), which suggests that, in practice, their entitlements were not too different from those of an owner.[168] Although the prevailing opinion was that recipients of *ager censorius* were lessees rather than owners, the potential perpetuity of the lease and the ability to transfer the land to one's heirs made them de facto owners.

Public lands were a critical resource in the economic, social, and political life of the Roman Republic, and the Roman state made available these lesser forms of "ownership" for a number of reasons. Chief among these was the policy of supporting the material prosperity and, in turn, the demographic growth of Roman farmers as well as of Latin and Italian farmers, who were not Roman citizens but who provided manpower critical to Rome's wars of expansion. These various forms of private "ownership" of public lands also made it possible for the state to finance its war efforts and to promote economic initiatives, such as the development of commercial farming.

Public land was not the only type of land for which the Roman state made available a smaller, customized form of "ownership." Provincial land (*solum provinciale*) was exempt from Roman property rules and from *dominium*. However, because the majority of the inhabitants of the empire lived in the provinces, a type of "provincial ownership" had to be developed. As with the various "ownership" forms available for public lands, provincial ownership was not technically ownershi, but rather was described, in the classical sources, as *possessio* or *usufructus*. Roman jurists always treated provincial ownership as an exception. They emphasized the rules and doctrines that did not apply to it: ownership of

[166] Roselaar, *Public Land in the Roman Republic*, 128.
[167] Id., 128–133.
[168] Id., 129.

provincial land could not be transferred through *mancipatio* or *in iure cessio* and it was exempted from acquisition by *usucapio*.[169] As a result, we know very little about the positive regime of provincial ownership, beyond the fact that it was subject to a yearly tax and that it was protected through a *vindicatio*, not a *rei vindicatio*, which was reserved to *dominium*, but a *vindicatio* based on *aequitas*, that is, on considerations of equity. In recent years, historians of Rome have started exploring in greater depth provincial ownership but, because of the scant evidence, have found it difficult to develop a detailed schema of provincial landownership that is consistent across provinces. The picture these scholars trace is one of significant legal pluralism. As a general principle, Rome respected the local legal systems in the provinces and only intervened to clarify or supplement local property regimes.[170] However, on the ground, a spectrum of different ownership bundles developed out of the interaction of the competing claims of different actors: local elites, local peasants, Romans in the provinces, and Rome's political elite.[171]

Egypt is the one province for which we have good evidence based on a rich stream of source material and hence has been the focus of this recent scholarship.[172] In Egypt, a variety of land regimes coexisted. To begin with, a special form of ownership was made available for provincial state land. In Egypt, Rome inherited a long tradition of state ownership of land and, under Roman rule, all land for which taxes had previously been paid directly to the Ptolemaic monarchs continued to be treated as public land. This was the case for formerly royal land and portions of the lands formerly belonging to temples. This public land was assigned to state farmers whose entitlements comprised use rights, a positive duty to cultivate the land, a duty to pay a yearly tax, the right to transfer or "sublet" their cultivation rights, and the right to pass their rights and duties to their successors.[173] Other land was treated as "private," including land already recognized as private under the Ptolemies, but also some

[169] Lisa Pilar Eberle, "Law, Empire, and the Making of Roman Estates in the Provinces during the Late Republic" (2016) 3(1) *Critical Analysis of Law* 50–69.

[170] Andrea Jördens, Julian Wagstaff, and Dennis P. Kehoe, "Possession and Provincial Practice," in Paul J. du Plessis, Clifford Ando, and Kaius Touri (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford: Oxford University Press, 2016), 553–568.

[171] Eberle, "Law, Empire, and the Making of Roman Estates in the Provinces during the Late Republic," 67; Andrew Monson, Communal Agriculture in the Ptolemaic and Roman Fayyum, Princeton/Stanford Working Papers in Classics Paper No. 100703 (2007).

[172] Jördens, Wagstaff, and Kehoe, "Possession and Provincial Practice," 554.

[173] Id., 558.

temple land, the land of the Ptolemaic military settlers, and former state lands that had been privately cultivated for generations. "Owners" of this private land had a different set of ownership entitlements and duties. They had a duty to pay a tax, called the *artabeia*, which was, on average, only a third of the rate of the tax applied to public land. Also, because this land was originally public, transfer of this land could not take the form of a true sale but rather required special modalities. Yet another type of "ownership" characterized temple estates, where priesthoods administered the many economic functions – including farming, manufacturing, and grain distribution – that had made each estate "a system unto itself" since pharaonic times.[174] These holdings could be inherited by successors, leased and pledged as security.

By recognizing these types of "ownership" with different scope and shape, the Roman state sought to achieve both economic and fiscal goals with regard to the province of Egypt.[175] The Roman government promoted the free alienability of privately owned land and protected security of tenure in order to unleash private investment in large productive estates. With sufficient financial outlay, highly remunerative, but capital-intensive, forms of agriculture, such as viticulture, could be further developed. In fact, there is much evidence that, during the course of Roman rule, Egypt saw the creation of large commercial estates that had not existed before.[176] Another reason for the state to retain direct control of land in Egypt was the desire to manage the productive targets for the province's economy, deciding what crops would be planted and, for example, subsidizing the production of wheat by leasing wheat land on favorable terms.[177] From a fiscal perspective, through these forms of private tenure, the Roman state could do much to ensure that revenues, which largely depended on the rents extracted from the production of small farmers on state lands, were stable over the long term. This stability

[174] J. G. Manning, *The Last Pharaohs: Egypt under the Ptolemies, 305–30 BC* (Princeton, NJ: Princeton University Press, 2009), 83.

[175] Dennis P. Kehoe, "Property Rights over Land and Economic Growth in the Roman Empire," in Paul Erdkamp, Koenraad Verboven, and Arjan Zuiderhoek (eds.), *Ownership and Exploitation of Land and Natural Resources in the Roman World* (Oxford: Oxford University Press, 2015), 88–106, at 90–91; Id., *Law and Rural Economy in the Roman Empire* (Ann Arbor: The University of Michigan Press, 2007).

[176] Dominic Rathbone, *Economic Rationalism and Rural Society in Third-Century A.D. Egypt: The Heroninos Archive and the Appianus Estate* (Cambridge: Cambridge University Press, 1991).

[177] Kehoe, "Property Rights over Land and Economic Growth in the Roman Empire," 101.

was crucial not only to the governance of Egypt but to the administration of the entire empire.

The *Iura in Re Aliena* and the Disaggregation of Property Entitlements

The supposed "indivisibility" of Roman property is a recurrent theme in Roman law and comparative law scholarship. As we have seen, the classical jurists, we are told, "had an extremely concentrated notion of ownership"[178] and were generally uncomfortable with the idea that the entitlements comprised in the owner's "absolute sovereignty" could be split up between different subjects. Hence, Roman law knew no doctrine of estates, whereby ownership of land could be divided in time between a present owner and a future owner to whom the property would, at some point, "revert."[179] This unitary character of Roman property also precluded anything in the nature of a trust, whereby property interests could be split between a trustee, who would have the power to manage the property, and a beneficiary, who would have the right to enjoy the profits.[180]

This supposed indivisibility is hard to fathom for contemporary property lawyers. Our property culture is permeated by the idea that property is a legal device to create, capture, and retain certain kinds of economic value, of utility. Divisibility, that is, the ability to split up ownership entitlements, is critical to creating and capturing economic value. In modern property systems, owners have the ability to create and maximize property value by disaggregating property entitlements.[181] How could it have been that Roman property law, which was the central institution through which the Roman elite extracted value, did not permit divisibility?

Indivisibility may well be yet another aspect of the "legend" of Roman property law. In reality, Roman law offered owners a number of ways to parcel out single entitlements through a sizable menu of "rights over a thing owned by another" (*iura in re aliena*). It is worth taking a closer look at the list of available rights not only to get a sense of the type of

[178] Buckland and McNair, *Roman Law and Common Law*, 81.
[179] Id., 81–82.
[180] Id., 82.
[181] Abraham Bell and Gideon Parchomovsky, "Reconfiguring Property in Three Dimensions" (2008) 75 *University of Chicago Law Review* 1015.

social and economic goals owners were able to achieve by creating and parceling out these lesser real rights but also to gain insight into the conceptual dilemmas that these rights posed to the jurists. Servitudes were the oldest of the *iura in re aliena*, and the only ones that can safely be said to exist already in classical law. A servitude is the right of a person other than the owner to make a certain use of that owner's land, for example by using a road for ingress and egress or drawing water for irrigation purposes; such a person was usually the owner of a neighboring piece of land. Max Kaser argued that servitudes were sharply distinguished from ownership and classified as "rights in a thing owned by another" only at a later time and were initially conceived as functionally divided ownership. The person entitled to the servitude was considered as the owner of that part of the land over which the road or the watercourse passed. But this ownership was confined to the function or purpose of the servitude, and the owner of the servient estate was owner for all other intents and purposes.[182]

As compared with contemporary servitudes, the Roman law of servitudes limited what the parties could achieve in two important ways. First, in classical Roman law, the concept of servitudes likely included only servitudes that benefited land and not servitudes that benefited a person. Personal servitudes were a later development that stirred up the passions of nineteenth-century Romanists. With his usual sharpness, Pietro Bonfante noted that so called personal servitudes have little in common with "praedial" servitudes and that the assimilation of the two categories was a product of the conceptual confusion and ignorance of the "Byzantine" jurists.[183] A second significant limitation came from the rule that a servitude could not impose on the owner of the servient estate an affirmative duty to do something, with the sole exception of support rights, that is, the right to have one's structure or building supported by the neighbor's land. As this passage from book 17 of Ulpian's *Libri ad Edictum* shows, even this narrow exception stirred disagreement among Roman jurists:

[182] Max Kaser, *Das römische Privatrecht* (Munich: C. H. Beck, 1959) 2.178–180. On the *iura in re aliena* and their role in the emergence of *dominium*, see Charles Bartlett, "The Development of *dominium*: Ownership Rights and the Creation of an Institution," in Charles Bartlett and Michael Leese (eds.), *Law, Institutions, and Economic Performance in Classical Antiquity* (Ann Arbor: University of Michigan Press)

[183] Pietro Bonfante, *Corso di diritto romano: Vol. III, Diritti Reali* (Milan: Giuffrè, 1972 [1933]), 19, 23–24.

> So concerning a servitude, which has been imposed for the purpose of providing support, we have a right of action to ensure that the servient owner both provide the support and repair his structures in the way that was envisioned when the servitude was created. Gallus thinks a servitude cannot be imposed in such a way, with the result that someone is forced to do something, but rather only so that he cannot prohibit me from doing something: for in all servitudes repair is the duty of he who benefits from the servitude, not of he whose property is servient. But the view of Servius has won, so that in this specific case, someone can defend his claim that he is able to force his opponent to repair a wall so that it can bear the load. Labeo, however, writes that this servitude does not oblige the person, but rather the property, and so the owner is able to abandon the property.[184]

Servitudes were subdivided by Roman jurists into two subcategories: rustic and urban. Because the former were critical to the Roman agrarian economy, they were treated as *res mancipi*, created through the ritual of *mancipatio* to ensure certainty and publicity about their existence and scope. The rustic servitudes included three types of right of way: *iter* (passage foot or horse), *actus* (passage of herds and agricultural equipment), and *via* (the use of a traced path with the predetermined width of eight feet in straight sections and sixteen feet at turns). Other rustic servitudes included a variety of *iura aquarium* – rights to draw water for irrigation or drinking, or rights to expel run-off surface waters – the right to dig sand, to take clay, to burn lime, to graze cattle and to gather acorns. Urban servitudes included three big clusters of rights, namely rights to expel rainwater and sewage, rights relating to the construction and support of buildings and rights to view, light, and air.

This quick glance at the list of servitudes raises the question of whether the list was a closed one. In other words, could the parties create their own custom-made servitudes, or were they limited to the standard servitudes we have just examined? This question is an important one. A system with a closed menu of forms guarantees predictability and low information costs. Individuals who wish to acquire property entitlements know what options are available and what they can expect.[185] By contrast, free customization resonates with liberal values and promotes individuals' ability of self-authorship by allowing them to freely acquire and exchange resources and entitlements and to enlist one another in the

[184] Digest 8.5.6.2.

[185] Thomas W. Merrill, Henry E. Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 *Yale Law Journal* 1.

pursuit of private goals and purposes.[186] As we will see over the course of our journey through modern property, from the nineteenth century to the present, property lawyers on both sides of this debate have drawn arguments from Roman law, emphasizing either the supposed "closure" or the alleged flexibility of its property system.[187] However, once again, the truth is that we know very little about the possibility to customize servitudes in Roman law. The classical sources are silent on this point, but sparse references to the parties' ability to create new servitudes appear in Justinian's legislation.[188] Further, some Romanists suggest that even in classical times, the parties had the ability to modify and reshape by agreement the servitudes recognized by the law.[189]

Another way of dividing up property entitlements was for the owner to grant an usufruct, which the Roman jurist Paulus defined as "the right to use and enjoy the fruits of another's property without impairing the substance of the thing."[190] How to properly conceptualize the usufruct was a question that generations of nineteenth-century Roman law scholars debated with passion. Once the post-classical jurists, in all likelihood, invented the concept of personal servitudes, usufruct seemed to fit easily into the new category. However, Bonfante, who, as we have seen, had doubts about the very category of personal servitudes and explained its creation as stemming from the lack of a solid conceptual grasp on the part of the Byzantine jurists, was not convinced. The classical jurists, with their conceptual acumen, Bonfante argued, had understood that servitude and usufruct are radically different concepts. A servitude is a mere limitation on the *dominium* of the servient owner, who has to tolerate the dominant owner's exercise of a narrow entitlement, say passage by foot or horse, but is not deprived of the enjoyment of the land. By contrast, the effect of the usufruct is to transfer to the holder of the usufruct a portion of the owner's *dominium*, specifically, the right to use the land and to appropriate its revenue, for a period of time that cannot exceed the latter's life. In other words, the usufruct does not merely limit *dominium* but actually carves out a portion of *dominium*.[191]

[186] Hanoch Dagan, "Markets for Self-Authorship" (2018) 27 *Cornell Journal of Law and Public Policy* 577.
[187] Silvio Perozzi, *Sulla struttura tipica delle servitù prediali in diritto romano* (Rome: Forzani, 1888).
[188] Bonfante, *Corso di diritto romano: Vol. III, Diritti Reali*, 40.
[189] Id., 41.
[190] Digest 7.1.1.
[191] Bonfante, *Corso di diritto romano: Vol. III, Diritti Reali*, 23, 65–73.

And yet even defining the usufruct as a portion of *dominium* seemed hardly satisfactory, because the transferred portion came with one important limitation: the holder of the usufruct could not allow the thing to deteriorate or diminish or change its current productive use. Ulpian provides us with a wealth of examples:

> A usufructuary cannot make the condition of the property worse, but he can make it better. If the usufruct of an estate is left by a legacy, then the usufructuary cannot cut down fruit trees or bring down farm structures or do anything to the detriment of the property. And if by chance the estate is for pleasure, having verdant gardens or drives or walking paths shaded pleasantly with trees that do not bear fruit, the usufructuary cannot cut them down, so that he may plant vegetable beds or something similar, with an eye to profit.[192]

In other words, Bonfante explained, the holder of the usufruct had a right over the thing in its current form or quality (*species rei*), not a right over the "substance of the thing" (*substantia rei*), which remained with the owner. As the non-agricultural sectors of the Roman economy expanded and the state became more involved in the extraction of raw materials and minerals, the limits on the ability of the usufructuary to change the use of the land were further relaxed. By Justinian's time, the prerogatives of the usufructuary were broadened, allowing for change in the use of the land. The subsequent passage in the Digest from Ulpian was likely interpolated to provide an explicit rule for mining.[193] The rule omitted any reference to the substance of the property and instead allowed the usufructuary to engage in the most productive use of the land:

> The question is whether the usufructuary himself can open stone quarries or chalk pits or sand pits? I think he is indeed able to open them, as long as he does not occupy a part of the land necessary for something else while doing this. And so, he can indeed search for veins of stones and of metals so obtained: therefore, he is able either to work the mines of gold, silver, sulfur, copper, iron or other minerals that were opened by the *pater familias*, or to open such mines himself, as long as this does not bring any harm to the cultivation of the land. And if by chance more profit should be returned from a mine that he opened than from the vineyards, or the plantations, or olive groves which were there beforehand, perhaps he will be able to cut these down, since he is able to improve the property.[194]

[192] Digest 7.1.13.4.
[193] For a discussion of the likelihood of interpoliation, see Bonfante, *Corso di diritto romano: Vol. III, Diritti Reali*, 78–79.
[194] Digest 7.1.13.5.

This expansion of the entitlements of the holder of the usufruct made the usufruct look even more like *dominium* and less like a personal servitude. Throughout the nineteenth century, scholars of Roman law and private law continued to question the fuzzy line between *dominium* and usufruct and to see usufruct as a lesser form of "ownership" that existed uneasily alongside *dominium*.

Similar to the usufruct but more limited in scope was the right of *usus*, which entitled its holder to use another's property but not to appropriate the revenue or fruits of the thing. If no use of the thing was possible other than taking the fruits, for example, in the case of an orchard, the right holder could use the fruits for himself but not sell them. A particular variant of the right of *usus* was the right of *habitatio*, that is, the right to use another's house for dwelling. Two other "rights over a thing owned by another" that were fully developed only at a later time were the right of *superficies* and the right of *emphyteusis*. The former was developed in the context of increasing urban intensification and land oligopoly in the city of Rome, as land came to be owned by a relatively small number of corporations and private owners. The right of *superficies* was a way of slicing the land. It made it possible for the developer who built on land owned by another to acquire a perpetual and hereditary right to use the surface of the land by paying an annual "rent" called *solarium*.[195]

Emphyteusis was yet another hybrid form that presented classificatory problems similar to the ones posed by the right of usufruct. Land was transferred to an emphyteutical possessor over very long periods of time, or even in perpetuity, in exchange for payment of an annual rent.[196] *Emphyteusis* shared characteristics with both a contract of lease, which transferred possession for a term, and a sale, which transferred full ownership. A constitution of the Emperor Zeno clarified that emphyteusis could not be assimilated to either a sale or a lease but rather was a distinct form giving rise to a set of entitlements that was unique in kind:

> The right of *emphyteusis* should not be related to those of lease or alienation, but it has been determined that this right is of a third type, separate from both of those contracts mentioned, and without connection or likeness to them; that it has its own composition and definition; and that it is a just and valid contract, by which all things, which were agreed upon by both contracting parties, ought, in all cases, even those that happen by chance, if put in writing, to be kept as firm and unalterable

[195] Bonfante, *Corso di diritto romano: Vol. III, Diritti Reali*, 165–166.
[196] Id., 161 and 165.

> through a perpetual stability in all ways: so that, if those things that occur by accident were not figured as part of the pact when the agreement was made, and if indeed some calamity comes to pass, which brings to utter ruin the very property which was subject to the *emphyteusis*, this loss will not redound to the e*mphyteucarius*, who was left with nothing, but to the *dominus* of the property, who, because it resulted from fate, must be held responsible, as there was nothing about the other party's liability in the contract. But if some specific or otherwise light damage occurs, by which the substance of the property was not deeply harmed, the *emphyteucarius* should not hesitate to assume this as his charge.[197]

Zeno's constitution settled the matter only temporarily, and the question of the real nature and appropriate classification of *emphyteusis* would periodically resurface. While the duty to pay rent put the *emphytecarius* in the position of a lessee, the *emphytecarius* had full and secure use entitlements analogous to those of an owner and could sell, bequeath, or otherwise alienate his or her rights to others. *The emphytecarius* could only lose his or her rights for non-payment of the rent for three consecutive years.

To conclude, while these lesser real rights, or "rights over a thing owned by another," differed in shape and scope, each speaks to the pluralism and variability of Roman property. By appropriately combining these smaller rights, owners were able to achieve a wide range of social and economic outcomes. They could multiply the number of subjects who benefited from the resource, design with relative precision the scope of each user's entitlements, disaggregate control and management of the resource at any particular time, and slice up the resource into different assets. Further, over time, as the rules regulating these lesser rights were relaxed, owners acquired greater ability to customize forms and outcomes. Finally, the broadest of these rights, usufruct and emphyteusis, granted the right-holder entitlements comparable to those of an owner. They were, effectively, more limited forms of "ownership" that added to the already striking variety of modes of owning that we have explored in the previous sections.

Property Law and Redistribution: The *Lex Agraria*

The *Lex Sempronia agraria* was a law proposed by the tribune Tiberius Gracchus in 133 BC, and re-proposed by his brother Gaius Gracchus in

[197] Code 4.66.1.

123, that sought to limit the maximum amount of public land individuals could possess and to redistribute the land possessed in excess of this limit to the indigent.[198] Although hastily dismissed by the proponents of modern *dominium* as a radical and arbitrary political act, a redistributive *lex agraria*, as shown by the recurring fascination and legislative energy it has engendered, is nevertheless a critical element of the conceptual vocabulary of Roman property, one that figured prominently in the discourse of eighteenth-century revolutionaries and of the nineteenth-century social reformers. In fact, among the Roman property concepts, the *lex agraria* may be second only to *dominium* in the lasting and vivid impression it has made on generations of historians, politicians, and activists. The *lex agraria* has provided modern reformers with a vocabulary to discuss questions of land redistribution, a blueprint for reform, and a set of powerful rhetorical arguments about the relationship between property, equality, and freedom.

While the *lex agraria* became a centerpiece of modern reformers' discourse about distributive justice, the social and economic situation that led to its proposal, the aims of the Gracchi, and the actual content of the law remain the object of controversy among historians of Rome. Throughout the eighteenth and nineteenth centuries, there was sustained debate as to whether the *lex agraria* applied to private as well as to public land, but scholars now agree that it only concerned the *ager publicus*. In the conventional narrative, told by Appian and Plutarch and by generations of modern historians, the *lex agraria* was proposed to address the accumulation of public land by the wealthy and the consequent proletarianization of the free Roman citizen.[199] Plutarch describes this process of proletarianization and its consequences with great clarity:

> Of the territory of their neighbors that the Romans won in war, some they sold and some they made common, and gave it to the poor and needy of the citizens to possess, once they paid a small tax to the public treasury. And when the rich began to offer higher taxes and expelled the poor, a law was passed that no one person could hold more than five hundred *iugera*

[198] For admirably clear discussions of the various *leges agrariae* in Roman history, see Roselaar, *Public Land in the Roman Republic*.

[199] Gianfranco Tibiletti, "Il possesso dell'*ager publicus* e le norme *de modo agrorum* sino ai Gracchi" (1948) 26 *Athenaeum* 173–236; and (1949) 27 *Athenaeum* 3–41; Arnold Toynbee, *Hannibal's Legacy: The Hannibalic War's Effects on Roman Life* (Oxford: Oxford University Press, 1965); Keith Hopkins, *Conquerors and Slaves* (Cambridge: Cambridge University Press, 1978); David Stockton, *The Gracchi* (Oxford: Oxford University Press, 1979).

> of land. For a short time, this legislation checked the greediness of the rich, and it aided the poor in remaining on the land according to how it had been rented and in maintaining the allotments which each had held from the outset. But later, the rich neighbors, by means of false identities, transferred these leases to themselves, and finally possessed most of the land blatantly in their own names. The poor, who had been forced off, did not appear eager any longer for military campaigns, and had no care for the rearing of children, with the result that soon all Italy perceived the shortage of freemen, and was full of fettered gangs of foreign slaves, through whom the rich, as they had expelled the citizens, cultivated their estates.[200]

The story Plutarch tells is one of greedy accumulation of land by the rich and related proletarianization of the small farmer. More recently, historians have revised elements of this narrative, contesting the idea of a demographic decline and downplaying the causal relevance of the accumulation of public lands in the hands of the elite.[201] In this revised account, the Gracchian *lex agraria* was passed to tamp down the growing demand for the limited stock of land caused by technological and economic developments in central Italy.

Paradoxically, for a law that has fueled so much political controversy over the centuries, what we know about the actual content of the *Lex Sempronia agraria* is largely speculative and is in fact inferred from a subsequent agrarian law, passed in 111 BC. One thing about the law seems clear: the *Lex Sempronia agraria* marked a fundamental turning point. Limits on the amount of public land individuals could occupy (passed through *leges de modo agrorum*) were not new, but violators had seldom been fined and their excess possessions were left undisturbed. The *Lex Sempronia agraria*, for the first time, took back the land owned in excess of the limit. During the second century BC, "owners" of the *ager publicus* had treated their land as private property, even though they had no formal guarantees of secure tenure: they had sold it, mortgaged it and bequeathed it. Naturally, dispossession caused great mayhem. Appian tells us that:

> Standing together, they complained each in turn and put forward to the poor that their farms and plantations and buildings were ancient. Some asked if they would lose the money paid to their neighbors along with the land, some said that their ancestral tombs were on the land and that they

[200] Plutarch, *Vitae Parallelae: Tiberius Gracchus*, 8.1–3.
[201] Roselaar, *Public Land in the Roman Republic*, 150–219, 290, 297.

> had made divisions into inheritances as if it were hereditary, others stated that their wives' dowries had been invested in these lands or that the land had been given as a dowry to their daughters, and moneylenders could show debts contracted on this security. In short, there was disorderly lamentation and vexation.[202]

Whether dispossessed "owners" received compensation is unclear. It seems that, initially, Tiberius Gracchus intended to buy back the excess land from the owners but that the final version of the bill did not provide for any compensation. Tiberius apparently argued that, for the rich, acquiring secure tenure over their remaining, legitimate holdings of public land was itself just compensation for the loss of the excess land.

The actual limit set by the *Lex Sempronia agraria* is a debated issue. From Appian, we learn that the limit was 500 *iugera* plus an additional amount for the main occupant's children;[203] from Livy, we hear that the limit was 1,000 *iugera*.[204] Most Roman law scholars side with Appian, reasoning that, in order to make its passage more likely, Tiberius would have wanted to present his law as a mere repetition of earlier laws – as reinforcing the *mos maiorum* – rather than as a radical innovation, and that he would hardly have been able to do so if the limit proposed had been twice that of the earlier legislation. It is also unclear how much of the excess land repossessed by the state each of the indigent beneficiaries received. Based on a passage from the *lex agraria* of 111, it is often suggested that the lots amounted to thirty *iugera*.[205] However, some scholars cast doubt on this figure, noting that the amount seems large compared to the amount granted to colonists in earlier colonization programs.[206] Also, if each beneficiary were assigned thirty *iugera*, only a relatively small number of people would have benefited from the *Lex Sempronia agraria*.[207] Another aspect of the *Lex Sempronia agraria* that has not been fully elucidated is the nature and scope of the beneficiaries' entitlements. Historians agree that the recipients of the land had a duty to pay a rent (*vectigal*) and no right to sell the land. These two basic facts

[202] Appian, *Bellum Civile*, 1.10.39.
[203] Appian, *Bellum Civile*, 1.9.37.
[204] Livy, *Periochae*, 58.1.
[205] Jérôme Carcopino, *Autour des Gracques: etudes critiques* (Paris: Les Belles Lettres, 1967); Ernst Badian, "Tiberius Gracchus and the Beginning of the Roman Revolution" (1972) 1 *Aufstieg und Niedergang des römischen Welt* 668–731.
[206] Roselaar, *Public Land in the Roman Republic*, 231.
[207] Id., 231.

raise the question of whether the land became the private property of the beneficiaries or remained in the public domain.

An alternative possibility is that the land given to beneficiaries by the *Lex Sempronia agraria* was in fact private property but of a more limited nature. This may be yet further evidence of the fact that, in Roman property law, alongside full *dominium*, there was a variety of lesser forms of ownership. In a somewhat anachronistic fashion, one could say that Tiberius appears to have shaped the entitlements of this limited form of private ownership to maximize the likelihood that the law would achieve the goal of improving the economic condition of the recipients in the long term. Owners' inability to sell was designed to prevent them from transferring their smaller holdings to large landowners who would have been eager to purchase them; such sales had played a central role in swelling the landless urban population, which the *lex Sempronia agraria* was meant to aid by returning such citizens to the land. The possible solution that Tiberius had crafted with this limited ownership form designed to protect the long-term security of the beneficiaries, if this was what he devised, was not to last, as the *lex agraria* of 111 made the land distributed under the *Lex Sempronia agraria* fully private.[208]

The Gracchan reform program involved more than the distribution of public lands. One of the reasons that the Gracchi have been hailed as visionaries by modern progressive reformers is that the *lex agraria* and the related measures could be seen, with contemporary eyes, as establishing a comprehensive set of welfare entitlements. The limited private property entitlements over the parcels of land were complemented by other entitlements. We know from Plutarch that Tiberius intended to grant the new owners a sum of money to stock their small farms. Further, when Caius Gracchus re-proposed the *lex agraria* ten years after the death of his brother, he also advocated that the government supply grain at half the market price to indigent Roman citizens who applied. This marked a radical departure in policy.[209] The Roman government had previously resorted to similar measures in years of crop failure and famine, but the grain law was the first permanent relief measure. The elites saw the passage of the law as a populist measure, an attempt to win the support of the proletariat. But they still took advantage of it. Cicero tells the story of Lucius Calpurnius Piso Frugi, a wealthy consul who

[208] Id., 236.

[209] Edwin W. Bowen, "The Relief Problem of Ancient Rome" *The Classical Journal* 37, 1942, 407–420, 414–416.

opposed the grain law but was then found in line to get his share of grain.[210] The story has also been taken to suggest that the law as actually enacted did not include a need-test for beneficiaries. Practically, the grain law failed: it was financially unsustainable and it defeated the very purposes of the agrarian law, namely benefiting small farmers in Italy, by putting enslaved labor in the grain-rich provinces in competition with the free laborers of Italy.

The *lex agraria* acquired a legendary status among modern reformers and revolutionaries and was hailed as the first comprehensive social reform designed to endow citizens with a minimum of fundamental material resources. If we pierce the veil of legend that envelopes the Gracchan reforms, the *lex agraria* appears as a much more complex effort to strengthen the Roman Republic – socially, politically, and economically – by expanding democratic participation, managing social tensions, and promoting a sense of belonging, and bolstering military power.

Conclusion

As this brief excursion through the intricacies of Roman property law suggests, Roman property was not "absolute." *Dominium* was robust and its claim to be the supreme form of ownership was staged daily through elaborate rituals. But alongside *dominium*, Roman property law offered a rich set of forms and doctrines that made it pluralistic and variable. The unique feature of Roman property – and its enduring legacy to modern property – is not its alleged absolute character but its "law of things," its focus on resources. Rather than offering abstract definitions of *dominium*, the Roman jurists pragmatically looked at the special characteristics of different resources and relied on external frameworks, drawn from philosophy or religion, to examine the distinct values and interests different resources implicated. The result was a plurality of variable and limited resource-specific property forms that facilitated and balanced different, and often conflicting, normative considerations.

Further, despite the Roman jurists' promise of an autonomous property science, Roman property law was actually at the center of a complex governance project. The conceptual vocabulary of property developed by the jurists was key to sustaining a highly unequal class structure, in which

[210] Cicero, *Tusculanae Disputationes*, 3.20.48.

a small social and economic elite derived its wealth and power from the exploitation of a widening social base of Roman, Italian, and provincial small landholders, urban poor, and slaves.[211] As the various iterations of the *lex agraria* show, when the social tensions generated by this highly unequal class structure threatened to destroy Rome's political institutions, adjustments in the legal regime of property mitigated class conflict by achieving some realignment of Rome's political structure with its social base.

In addition to supporting an unequal class structure, Roman property law also supported the needs of a complex Mediterranean economy. Property forms and doctrines buttressed the economic policies of the Roman state. As we have seen, by making available several forms of private "ownership" for public land, the government promoted the expansion of large-scale, capital-intensive commercial agriculture on estates that produced for the Mediterranean market. While important for a full understanding of Roman property, this renewed focus on the operation of market forces and on trade in the Roman world should not obfuscate the fundamental differences between the Roman economy and the capitalist mode of production that the nineteenth-century jurists were seeking to support through Romanist-bourgeois property law. The Roman conceptual vocabulary of property supported an economic order of owners of land and slaves and of merchants, not of producers. Rome knew commerce and markets but not capitalism. The Roman economy was an overwhelmingly slave-based economy in which private property seldom met free, wage labor. As Aldo Schiavone puts it, this contact between property and wage labor is the authentic crucible of modernity, one that never materialized in Rome.[212]

Finally, the Roman conceptual vocabulary of property needs to be understood against the background of the Roman project of imperial expansion. Rome's control of territory was only partly due to its military

[211] Capogrossi Colognesi, *Law and Power in the Making of the Roman Commonwealth*, 54–63, 108–120.

[212] Aldo Schiavone, *The End of the Past: Ancient Rome and the Modern West* (Margery J. Schneider, trans.) (Cambridge, MA: Harvard University Press, 2000), 165–174. In contrast to this view, Peter Temin has argued that "free hired labor was widespread and that ancient slavery was part of a unified labor force in the early Roman empire." See Peter Temin, "The Labor Market of the Early Roman Empire" (Spring 2004) 24(4) *Journal of Interdisciplinary History* 513–538, at 515. Temin sees substantially more contact between free and slave labor than did, e.g., Finley, who characterized free hired labor as "casual and seasonal." See Finley, *The Ancient Economy*, 185–186.

might. It owed as much to a complex set of policies, including a land policy, to govern the territories over which it had extended its hegemony.[213] Imperial stability, Clifford Ando has shown, required consensus regarding Rome's right to govern and to establish a normative political culture. Land policy and property law were part of the official discourse of Rome's imperial government, a discourse that turned on Rome's ability to elicit its subjects' obedience and their self-justifications for participating in their own subjugation.[214] Rome's pluralistic system of provincial property allowed the Roman state to balance two conflicting goals: building consensus among its provincial subjects by leaving largely intact preexisting local property systems, while also facilitating the plainly imperialistic exploitation of the provinces. War and territorial expansion had become Rome's largest form of investment, generating colossal economic returns for the Roman governing class.

[213] Capogrossi Colognesi, *Law and Power in the Making of the Roman* Commonwealth, 98.
[214] Clifford Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley: University California Press, 2000). Id., *Law, Language and Empire in the Roman Tradition* (Philadelphia: University of Pennsylvania Press, 2011).