

Roman Law and Global Constitutionalism

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ABSTRACT

The parallel between contemporary issues and Roman history often fascinates and illuminates. In this Article, I argue how Roman law can serve today as an inspiration toward global constitutionalism given it was one of the several sources of inspiration for the American founders. Looking

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to Roman law helps reduce certain prejudices derived from the current privileging of the sovereign state and the positivist paradigm as the only genuine and possible models for international law. These prejudices constitute an actual hindrance to the right development of global constitutionalism. Global constitutionalism inherently moves beyond sovereignty, nationalism, and positivism. Roman law enables constitutionalists to eliminate from global constitutionalism any nonfoundational elements derived from a highly statist paradigm, mostly due to its precedence to the notions of sovereignty, nationalism, and positivism. Roman law also constitutes a good antidote to any kind of extreme global constitutionalism that seeks to extend the language and modes of national constitutionalism without sufficiently filtering and refining them.

I. INTRODUCTION

This article tries to contribute to the gripping academic debate on global constitutionalism¹ by drawing on ideas and arguments from Roman law. This approach entails neither nostalgia nor anachronism. Just as Roman constitutional principles and values illuminated the decision of the framers of the United States Constitution in 1787,² Roman constitutional history can also have a practical impact on the global constitutionalist experience.³ This can occur especially if we consider the word “constitution” (from Latin *constituere*: to set up, to establish) in the broader and traditional sense—i.e., linked to concepts of community, checks and balances, and participation—rather than in the narrow modern sense of the liberal, democratic, formal

1. Global constitutionalism is an umbrella expression used to capture the need for applied constitutional principles, values, standards, procedures, and mechanisms beyond the state. The term denotes a way of thinking about global governance that promotes a deeper understanding of the foundations of international law and the global legal order applying the language of constitutional law. In fact, international law is moving, at least in some areas, from a paradigm based on state sovereignty and consensualism to a new one based on progressive constitutionalization; see Anne Peters, *Global Constitutionalism*, in THE ENCYCLOPEDIA OF POLITICAL THOUGHT (2014), for a general overview of the current debate on global constitutionalism as well as for selected bibliography on this topic; see also generally JEFFREY L. DUNOFF & JOEL P. TRACHTMAN, RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (2009); JAN KLABBERS ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2010); SURENDRA BHANDARI, GLOBAL CONSTITUTIONALISM AND THE PATH OF INTERNATIONAL LAW (2016); ANTHONY F. LANG JR. & ANTJE WIENER, HANDBOOK ON GLOBAL CONSTITUTIONALISM (2017); TAKAO SUAMI ET AL.,

2. See DAVID J. BEDERMAN, THE CLASSICAL FOUNDATION OF THE AMERICAN CONSTITUTION 58–59 (2008).

3. See HAROLD JAMES, THE ROMAN PREDICAMENT: HOW THE RULES OF INTERNATIONAL ORDER CREATE THE POLITICS OF EMPIRE 141 (2006) (Adam Smith and Edward Gibbon also used the Roman example to illustrate the relations between Britain and its North American colonies).

constitutions associated with sovereign nations. While the Americans can rightly say, “We the People of the United States,” the Romans many centuries earlier were able to declare “We the People of Rome.” It seems that Roman public law can serve as a model for global constitutionalists interested in developing principles, rules, mechanisms, and standards to order the emerging global human community, as well as its correlative incipient legal order. A so-called global law.⁴

Because it predates the nation-state, Roman law constitutes a good antidote against any kind of extreme constitutionalism that would seek to extend unfiltered or unrefined language and modes of national constitutionalism. But Roman law also constitutes a good antidote against those who are skeptical about the viability of global constitutionalism. Looking to Roman law tempers the view that the current constitutional positivist sovereign state is the only genuine and possible paradigm. This prejudice, seems to constitute an actual hindrance to the right development of global constitutionalism, which is genetically postsovereigntist, postnationalist, and postpositivist. If global constitutionalism is *post* all of these things, Roman law was, so to speak, *pre* all of them: presovereigntist, prenatalist, and prepositivist. Global constitutionalism and Roman law are thus linked in being nonsovereigntist, nonnationalist, and nonpositivist. They represent the past and the future of the law, though not the present, which is mostly sovereigntist, nationalist, and positivist.

The Roman law paradigm does not constitute a perfect framework for global constitutionalism, since global constitutionalism cannot turn back the clock to become presovereigntist, prenatalist, and prepositivist, as Roman law was. Moreover, the Romans did not share certain fundamental values of global constitutionalism, such as the concept of radical human equality under law, principles of liberal democracy, the principle of nondiscrimination, or the moral duty to avoid war, among others.⁵ Nevertheless, some aspects of Roman law can provide inspiration to cosmopolitan constitutionalists. Put differently, what Roman law offers to global constitutionalism is not an imitable model but genius, vision, ideas, and stimulus.

4. See generally NEIL WALKER, *INTIMATIONS OF GLOBAL LAW* (2015); RAFAEL DOMINGO, *THE NEW GLOBAL LAW* (2010).

5. See generally *THE CAMBRIDGE COMPANION TO ROMAN LAW* (David Johnston ed., 2015) (providing a general overview of Roman law); PAUL DE PLESSIS ET AL., *THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY* (2010); RAFAEL DOMINGO, *ROMAN LAW: AN INTRODUCTION* (2018); see also FRANZ WIEACKER, *RÖMISCHE RECHTSGESCHICHTE: QUELLENKUNDE, RECHTSBILDUNG, JURISPRUDENZ AND RECHTSLITERATUR I* (1988).

I offer three caveats before developing my argument. First, my effort is not undermined by the fact that Roman law was instrumental in the maturation and progress of the classical doctrine of international law, which the new constitutionalism seeks to overcome. This historical tension is merely a consequence of the polyvalent capacity of Roman law to illuminate even opposite undertakings.⁶ On the other hand, classical international law was founded not only on the Roman idea of the law of nations (*ius gentium*);⁷ but also, and specifically, on the Roman law of contracts and property. The laws governing international treaties owe much to Roman law of contracts. The same can be said of the Roman law of property in relation to the doctrine of sovereign territory.⁸ Global constitutionalism, however, could benefit from other ideas and values of the constitution of the Roman Republic that are at the heart of Roman public law.

My second caveat is that, while Roman law supported an empire and therefore, an imperialist perspective, this fact does not reduce the potential advantages of Roman law's inspiration. On the contrary, the transition from the Roman Republic to the Roman Empire during the Principate (27 BCE to 284 CE), inaugurated by Emperor Augustus (63 BCE – 14 CE), implied a break with the Republican constitutional order and principles that support my argument. The Roman revolution initiated by Augustus⁹ revealed the false universalism of an empire, just as any constitutional attempt to transform the world into a global state will unveil the false universalism of a spurious global constitutionalism. Here, too, Roman history is a heuristic key to life.

My third caveat is simply a reminder that the global human community is universal because it includes humankind *as a totality* and *in its totality*. Thus, the global community merits a unique framework: a tailor-made model of law. Therefore, the language of Roman law, which governed a non-universal and instrumental political community, should be transposed very carefully

6. See generally Max Radin, *Fundamental Concepts of the Roman Law*, 12 CAL. L. REV. 393, 394 (1924) (contending that maxims of legal principles are contradictory and cannot be used to distinguish Roman law from Common law).

7. See Arthur Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678, 681–82 (1952).

8. See THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS: ALBERICO GENTILI AND THE JUSTICE OF EMPIRE 1 (Benedict Kingsbury & Benjamin Straumann eds., 2010) (explaining the relationship between Roman law and international law); BENJAMIN STRAUMANN, ROMAN LAW IN THE STATE OF NATURE: THE CLASSICAL FOUNDATIONS OF HUGO GROTIUS' NATURAL LAW (2015); see also Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EUR. J. INT'L L. 25, 25–28 (2005) (generally discussing the relationship between Roman law and international law).

9. See BENJAMIN STRAUMANN, CRISIS AND CONSTITUTIONALISM: ROMAN POLITICAL THOUGHT FROM THE FALL OF THE REPUBLIC TO THE AGE OF REVOLUTION (2016); see also RONALD SYME, THE ROMAN REVOLUTION 1 (2002).

and in a limited way to the contemporary global community. This is intrinsically universal and necessary.¹⁰

II. APPLYING SOME LESSONS FROM ROMAN LAW TO GLOBAL CONSTITUTIONALISM

In this section, I will describe ten good examples that Roman law provides to global constitutionalism. First, I will explain the relevant Roman principle, value, or social fact. Then, I will refer to its potential translation into the realm of global constitutionalism. I will accommodate my explanations of Roman law to the purpose of this article, which is especially addressed to constitutionalists.

A. A Cosmopolitan Spirit

Roman law offers global constitutionalism a good example of supporting cosmopolitanism as a political ideal and a noble human attitude.¹¹ The Stoic spirit, which animated almost all the Roman jurists and many of the Roman thinkers during both the republic and the empire (Cicero, Seneca, Marcus Aurelius), was cosmopolitan in character and constituted the main influence on Roman legal education.¹² Cicero applied Stoic ideas to international relations by making relevant statements on the duties of communities and peoples toward one another.¹³ Cicero then coined the expression *ius gentium* (law of nations) in the process.¹⁴ According to Cicero, the human race is naturally and harmonically united in a way similar to the way parts of the body relate to each other.¹⁵ This is why “nature does not allow us to increase our means, our resources, and our wealth by despoiling

10. See Rafael Domingo, *The New Global Human Community*, 12 CHI. J. INT'L L. 563, 563–87 (2012), for an explanation of the differences between a global human community as a totality and in its totality.

11. See Thomas L. Pangle, *Roman Cosmopolitanism: The Stoics and Cicero*, in COSMOPOLITANISM IN THE AGE OF GLOBALIZATION: CITIZENS WITHOUT STATES 40–69 (Lee Trepanier & Khalil M. Habib eds., 2011); see also Martha C. Nussbaum, *Kant and Stoic Cosmopolitanism*, 5 J. POL. PHIL. 1, 1–25 (1997).

12. See Anthony Padgen, *Stoicism, Cosmopolitanism, and the Legacy of European Imperialism*, 7 CONSTELLATIONS 1, 4–20 (2000).

13. Thomas L. Pangle, *Socratic Cosmopolitanism: Cicero's Critique and Transformation of the Stoic Ideal*, 31 CAN. J. OF POL. SCI. 235, 251–53 (1998).

14. See CICERO, CICERO: ON DUTIES xxvii–xxviii (M.T. Griffin & E.M. Atkins eds., 1991) (2013).

15. *Id.* at 108, ¶ 3.22.

others.”¹⁶ The same principle, according to Cicero, is established “not only in nature, that is in the law of nations, but also in the laws of individual peoples, through which the political community of individual cities is maintained: one is not allowed to harm another for the sake of one’s own advantage.”¹⁷

Among the late classical Roman jurists, Ulpian was the most cosmopolitan. His philosophical views, deeply influenced by Stoicism, were egalitarian, and they helped resolve the new legal challenges arising from the extension of citizenship to all free individuals of the empire by the Antonine constitution (212 CE).¹⁸ Ulpian tried to convert Roman law into a more cosmopolitan legal system suitable to the needs of a multicultural society based on the values of liberty, dignity, universality, and equality.¹⁹ As a result, scholars like Tony Honoré consider Ulpian a pioneer of the human rights movement.²⁰

Global constitutionalism is foundationally cosmopolitan.²¹ What in ancient Rome was an ideal and aspiration shared by philosophers and lawyers is today a verifiable reality: all human beings are in fact members of an emerging global human community in which they share needs, interests, and projects.²² Global constitutionalism claims that this universal community must also be ruled by law, and that each nation state should be cosmopolitan in spirit in the sense that it should preserve, assist, and sustain the global legal order.²³ Roman law offers strong arguments for the legitimation and justification of these two claims.²⁴ It also opens the door to the so-called postnationalist approach, which insists on reformulating the idea of the nation-state in the face of globalization and reterritorialization.²⁵

16. *Id.*

17. *Id.* at 108, ¶ 3.23.

18. TONY HONORÉ, *ULPIAN: PIONEER OF HUMAN RIGHTS* 76 (2d ed. 2002).

19. *Id.* at 95.

20. *Id.* at ix.

21. See Pauline Kleingeld & Eric Brown, *Cosmopolitanism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2014); see also Robert Post, *Introduction*, in *ANOTHER COSMOPOLITANISM 1* (Seyla Benhabib ed., 2006) (analyzing the relationship between the concepts of cosmopolitanism and global constitutionalism).

22. See Domingo, *The New Global Human Community*, *supra* note 10, at 567.

23. See generally Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 *IND. J. GLOBAL LEGAL STUD.* 605 (2013) (providing analysis on cosmopolitanism in the global legal system).

24. See Rafael Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, 22 *EUR. J. INT’L L.* 627, 630–31 (2011); see also Domingo, *The New Global Human Community*, *supra* note 10.

25. In recent decades, the breakup of the former Soviet Union and increased immigration, among other factors, has caused a rise in nationalism, while the idea of the nation-state continues to deteriorate; see, e.g., Robert Conquest et al., *Soviet Union*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/place/Soviet-Union> [<https://perma.cc/W6QV-8BEZ>] (last modified Dec. 20, 2018).

B. Unwritten Constitution

The language of constitutionalism in relation to the global community benefits from the Roman law experience, which established a model of community without a codified constitution.²⁶

Rome never had a written constitution.²⁷ Rather than a single document, Rome's constitution was a living and nimble set of legal and political norms.²⁸ It was a long, ongoing, and complex process of constituting the Republic by creating and developing institutions, political powers, principles and rules, practices and functions, as well as mutual institutional relations.²⁹ The Roman constitution was largely unwritten and evolving over time, and it was based on tradition but not on obsolete precedents.³⁰ The Roman constitution contained fundamental elements, such as the annual election of two consuls, the existence and functions of the Senate, and the gathering of different popular assemblies for different purposes.³¹ However, these elements were unregulated by written statutes.³² The Roman constitution accommodated changing circumstances with new ideas and arguments.³³ For this reason, the Roman constitution was inescapably controversial, intrinsically political, and always opens to testing in public debate.³⁴ Romans were proud of the superiority of their constitution because of its stability, balanced structure, clear assignment of functions, and solid discipline.³⁵ The great Greek historian Polybius (c 200–118 BCE) associated Roman military success with the perfection and greatness of Rome's constitution,³⁶ which enabled Rome to bring almost the whole of the Mediterranean world under its dominion within a mere fifty-three years.

26. KARL LOEWENSTEIN, *THE GOVERNANCE OF ROME 179–80*, 227 (1973).

27. Clinton Walker Keyes, *Original Elements in Cicero's Ideal Constitution*, 42 AM. J. OF PHILOLOGY 309 (1921).

28. See WOLFGANG KUNKEL, *AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY* (J. M. Kelly trans., 2d ed. 1973), for an overview of the Roman constitution; ANDREW LINTOTT, *THE CONSTITUTION OF THE ROMAN REPUBLIC* (1999); STRAUMANN, *CRISIS AND CONSTITUTIONALISM*, *supra* note 9.

29. DOMINGO, *ROMAN LAW: AN INTRODUCTION*, *supra* note 5, at 29.

30. Domingo, *Gaius, Vattel, and the New Global Paradigm*, *supra* note 24.

31. DOMINGO, *ROMAN LAW: AN INTRODUCTION*, *supra* note 5, at 29.

32. Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, *supra* note 24.

33. *Id.*

34. DOMINGO, *ROMAN LAW: AN INTRODUCTION*, *supra* note 5, at 29.

35. See CICERO, *ON THE COMMONWEALTH AND ON THE LAWS* 3 (James E. G. Zetzel ed., 1999).

36. 1 POLYBIUS, *THE HISTORIES* 9 (W. R. Paton trans., 1999).

Polybius and Cicero understood the Republican constitution as a mixed constitution.³⁷ This understanding arose from the combined elements of aristocracy (the Senate) with democracy (the people) and monarchy (the consuls).³⁸ According to Cicero, such a constitution has an extensive component of equality; it provides harmony and stability, and it prevents corruption.³⁹ Simple constitutions lead to corrupted versions of each kind of rule, producing a despot rather than a king, an oligarchy as opposed to an aristocracy, and a chaotic mob instead of a democracy.⁴⁰ In contrast, the Roman constitution provided a system of checks and balances based on a combination of powers and vetoes of magistrates, and political control of the magistrates by the Senate and the people.⁴¹ The greatness of the Roman constitution can be reflected in a short phrase: “the Senate and the People of Rome” (*Senatus Populusque Romanus*, abbreviated as SPQR).⁴² As Cicero explained through Cato the Elder, one of the reasons the Roman constitution was superior to others was that it was established not by the great ability of a single man but by the leadership of many, and not in the course of one life but over eras and generations.⁴³

The constitutional experience of Rome helps international constitutionalists replace the state paradigm by a global paradigm. The global community does not need a written, comprehensive, and totalizing constitution, as if it would be the supreme law of a world state. The global paradigm does not need to resemble the constitutional features of a nation-state. Any attempt to establish a comprehensive constitution will fail both at the national and the global level. Rather, the global community needs to be organized under a coherent global legal order that ensures global harmony, stability, and development and limits the use of power. Such a legal order demands, of course, some degree of constitutionalization, but not a comprehensive written constitution.

37. Compare 3 POLYBIUS, *THE HISTORIES* 11–18 (W. R. Paton trans., 2010) (explaining that Polybius does not use the expression “mixed constitution” as such), with CICERO, *supra* note 35, ¶ 1.69 (describing that for Cicero, the mixed constitution was primarily an instrument for restoring the lost constitutional balance, a last resort to save the republic, but his preferred constitutional order was not mixed); see also JED W. ATKINS, *ROMAN POLITICAL THOUGHT* 11–36 (2018); Mitja Sadek, *Cicero and the Mixed Constitution (res publica mixta)*, 11 *KERIA: STUDIA LATINA ET GRAECA* 29, 31 (2009).

38. Elizabeth Asmis, *A New Kind of Model: Cicero’s Roman Constitution in De Republica*, 126 *AM. J. OF PHILOLOGY* 377 (2005).

39. CICERO, *supra* note 35, ¶ 1.69.

40. NEAL WOOD, *CICERO’S SOCIAL AND POLITICAL THOUGHT* 144 (1988).

41. HANS JULIUS WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 27 (1951).

42. NEAL WOOD, *supra* note 40, at 125.

43. CICERO, *supra* note 35, ¶ 2.1.2.

C. Respect for Tradition

The Romans possessed a special veneration for tradition, precedent, and authority.⁴⁴ They esteemed ancestral customs (*mores maiorum*), the ways of their forebears, and their traditional ideas, particularly in the field of law.⁴⁵ The Romans preserved a notable spirit of traditionalism.⁴⁶ They were reluctant to abolish any valid law, because they considered their ancestors part of the Roman people.⁴⁷ Additionally, Romans had a deeply rooted distaste for unnecessary changes and greatly distrusted novelty.⁴⁸ They did not like quick innovations, hurried modifications, and revolutionary attitudes. They tried to build on what their ancestors had built, exquisitely respecting key legal decisions in the past. This conservative attitude explains the centuries-long preservation of the rigid and severe formalism that characterizes the primitive legal system.⁴⁹ At the heart of the Romans' conservatism and respect for tradition lays the idea that justice, as a constant, continual, and perpetual individual and collective will, required careful and gradual historical development.⁵⁰ The leader was the people as an eternal community, not this or that particular lawgiver.

The evolutionary nature of Roman law constitutes a good example for global constitutionalism because the integrative conceptual framework of global constitutionalism should be evolutionary, not revolutionary. Global constitutionalism should respect tradition. International law is mainly a European tradition.⁵¹ Constitutionalism is both a European and an American tradition. But the universality of global constitutionalism should by no means exclude respect for the particularity of tradition. As Martti Koskenniemi has pointed out, "if the universal has no representative of its own, then particularity itself is not scandal."⁵² The particularity transcends itself when it is accepted by others as universal. For my purposes, this means that global constitutionalism will be universalized when it is universally accepted as

44. DOMINGO, ROMAN LAW: AN INTRODUCTION, *supra* note 5, at 15.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 113–15 (2005).

52. *Id.* at 115.

an inherent element of the global human community and an adequate politics of global law.

D. Nonsovereign State Paradigm

Roman law can help global constitutionalism to transcend the sovereignty-based state paradigm. The sovereign nation-state is a modern abstraction quite contrary to the Roman spirit. Politically, the Roman people were invested not with sovereignty but with *maiestas* (majesty), one of the fundamental principles of the Roman Republic.⁵³ *Maiestas* was an original concept with no equivalent term in Greek.⁵⁴ *Maiestas* comes from *maior* (greater) and expresses the idea of the superiority and greatness of the Roman people.⁵⁵ In virtue of its superiority, Rome demanded respect and submission from other peoples, although this requirement did not imply a rejection of others' liberty.⁵⁶ Indeed, liberty of other people was considered a necessary condition of Roman *maiestas*.⁵⁷ The transference of majesty from the people to the emperor began with Augustus and ended by the beginning of the Dominate at the end of the third century.⁵⁸ As the emperor's majesty grew, the republican structure declined, but majesty remained the measure of authority.⁵⁹

The idea of sovereignty on the other hand, represents a French absolutist and exclusive adaptation of Roman majesty. Sovereignty appeared for the first time in Jean Bodin's *Les six livres de la République* (1576).⁶⁰ In *Les six livres de la République*, Bodin understood sovereignty as, "[the] absolute and perpetual vested in a commonwealth," or, in French, "la puissance absolue et perpetuelle d'une République."⁶¹ In the Latin version of Bodin's work,

53. See Bernard Kübler, *Maiestas*, in 14.1 PAULYS REALENCYCLOPÄDIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFT: LYSIMICHOS BIT MANTIKE 452–59 (Friederich Pauly ed., 1928); R. A. BAUMAN, THE CRIMEN MAIESTATIS IN THE ROMAN REPUBLIC AND AUGUSTAN PRINCIPATE 1–14 (1967); RAFAEL DOMINGO, TEORIA DE LA "AUCTORITAS" 23–23 (1987); ÁLVARO JACOBO PÉREZ, AUCTORITAS ET MAIESTAS. HISTORIA, PROGRAMA DINÁSTICO E ICONOGRAFÍA EN LA MONEDA DE VESPASIANO 55–57 (2003); Davide Salvo, *Maiestas*, in THE ENCYCLOPEDIA OF ANCIENT HISTORY 4236–38 (2013).

54. DOMINGO, ROMAN LAW: AN INTRODUCTION, *supra* note 5, at 30.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See FRANCESCO CALASSO, I GLOSSATORI E LA TEORIA DELLA SOVRANITÀ (Giuffrè, 3d ed. 1957), for the medieval antecedents, especially those beginning with the formula *rex superiorem non recognoscens in regno suo est imperator*.

61. See JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE 24 (M. J. Tooley trans., Basil Blackwell Oxford 1955) (1576). Discusses the attributes of sovereignty, *id.* at 41–43, and a numerical discussion of them as the first and second attributes of sovereignty, *id.* at 43–45;

the definition of *maiestas* appears as a synonym of “sovereignty,” loosely translated by Ulpian’s phrase, “the emperor is not bound by statutes,” or, in Latin, “*princeps legibus solutus*.”⁶² Sovereignty was thus an exclusive and excluding power in the hands of the prince, who could impose laws upon his subjects without their consent and without himself being bound by them.⁶³ Sovereignty so conceived implied an absolute indivisibility of power within a community and an absolute independence in international relations.⁶⁴ This concept of sovereignty—which again replaced the Roman concept of *maiestas*—definitively closed the doors to a harmoniously ordered international system.⁶⁵ And, instead, it artificially standardized a constellation of states, each with plenary powers in its respective territory enclosed by borders.

Of course, there is little left of this initial concept of princely sovereignty in current international law. But, the whole system of international law was, in a way, vitiated by this exclusionary territorial idea of sovereignty. Moreover, if the very category of international law seems to appear outdated in our globalized world, it is probably because of the restrictions imposed by the idea of sovereignty. Sovereignty was essential to the creation of an international law based on coexistence, but it is a real hindrance in developing an international law based on cooperation and solidarity. The idea of sovereignty must be revised for it to be compatible with the principles and values of global constitutionalism. The options appear to be adopting a pluralist sovereign approach or replacing the concept of sovereignty with a new political concept that captures the essence of the global community as different from the global state.⁶⁶ This does not mean that sovereignty has no role in the new global paradigm because sovereignty could remain as an instrumental and useful concept, but only after its reformulation.⁶⁷ It is the role of global constitutionalists to rid the idea of sovereignty of

see DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT 1-2 (2016), for discussion on the idea of sovereignty; see HOWELL A. LLOYD, JEAN BODIN ‘THIS PRE-EMINENT MAN OF FRANCE’ AN INTELLECTUAL BIOGRAPHY (2017), for an intellectual biography of Jean Bodin.

62. 1 THE DIGEST OF JUSTINIAN 13, ¶ 1.3.31 (Alan Watson trans., 1998).

63. See BODIN, *supra* note 61, at 20–22.

64. See Jens Bartelson, *On the Indivisibility of Sovereignty: Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts*, 2 LUND U. 85, 86 (2011).

65. DOMINGO, THE NEW GLOBAL LAW, *supra* note 4, at 65.

66. See JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM 53–56 (2012).

67. *Id.*

its dark side, which involves exclusions, boundaries, impunity, and lack of solidarity.⁶⁸ If Roman law is presovereigntist, global constitutionalism should be definitely postsovereigntist.

E. An Integrated Idea of Public Law

Ulpian roughly defined public law as the law that concerned the state of the Roman commonwealth (*quod ad statum rei Romanae spectat*).⁶⁹ By contrast, he defined private law as the law governing relations between private individuals (*ad singulorum utilitatem*).⁷⁰ In general, public law was established for the interest of the political community or the people.⁷¹ It covered everything not concerned with the private interest of individual citizens. Public law dealt with the constitution, administration, and functioning of the Roman political community. It integrated and combined religion and administration of the political community, and it was concerned with magistrates, priests, and sacred things. Public law basically emanated from popular assemblies and the Senate and later from the emperor as well.

While public law was a collective product of generations of senators and magistrates, private law was a manifestation of the free will of the individual.⁷² It was an expression of individual rights and freedoms, though it was not governed just by self-interest. Private law retained the idea of moral duty.⁷³ The most important practical difference between Roman public law and private law was that “public law cannot be changed by agreements concluded between private individuals.”⁷⁴ This unchangeable law is exactly what we would now call *ius cogens*.⁷⁵ However, at the heart of both public and private law lays the idea that public law could not eclipse or replace private law. In Roman law, public law was an expansion of private law, and not vice versa, because the individual (i.e., the citizen), not the political community, was the center of the Roman legal system. Public law proceeded from private law. This original model of the construction of the law, from the bottom up and not from the top down, ought to be transferred to all legal spheres, including global constitutionalism, traditionally established from the top down.

68. MARTTI KOSKENNIEMI & JAMES CRAWFORD, *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 58 (2012).

69. See *THE DIGEST OF JUSTINIAN*, *supra* note 62, at 1, ¶ 1.1.1.2.

70. *Id.*

71. *Id.*

72. DOMINGO, *ROMAN LAW: AN INTRODUCTION*, *supra* note 5, at 9.

73. *Id.*

74. *THE DIGEST OF JUSTINIAN*, *supra* note 62, at 71, ¶ 2.14.38.

75. See REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 33 (2d ed. 1994) (defining *ius cogens* under the literal meaning of “compelling law,” which is the technical term given to those norms of general international law that are hierarchically superior).

In Ciceronian thought, public interest (*utilitas rei publicae*) and stability (*salus*) were the twin aims of public law.⁷⁶ Public interest served as a principle for legitimating new statutes, a standard for legal interpretation, and a guide for jurisprudential activity.⁷⁷ Papinian mentioned public interest as the ultimate ground for the validity of praetorian law,⁷⁸ and Ulpian did not hesitate to put the idea of *utilitas* at the center of any legal change: “In determining [new rules], there ought to be some clear advantage [(*utilitas*)] in view, so as to justify departing from a rule of law which has seemed fair since time immemorial.”⁷⁹ Drawing upon Greek philosophy and the Ciceronian understanding of *utilitas*, classical jurists abundantly invoked the idea of *utilitas* (in the general sense of practicality, social interest, and sound policy) as a good reason to explain the acceptance of a concrete and pragmatic legal solution instead of another solution based on strict logical and dogmatic reasoning.⁸⁰

Modern public law is a result of necessary secularization, rationalization, and positivization.⁸¹ Still, the essential Roman concept of *utilitas* should continue to be vital. The theory of sovereignty held sway for centuries as the basis of public law, but it should be replaced by the ideas of public service,⁸² solidarity, and functionality. These should be at the heart of global constitutionalism as well.⁸³ An excessive entanglement of sovereignty and

76. MARCUS CICERO, ON INVENTION. THE BEST KIND OF ORATOR. TOPICS 111–13 (Taylor Anderson ed., H.M. Hubbell trans., 3d ed. 1949).

77. DOMINGO, ROMAN LAW; AN INTRODUCTION, *supra* note 5, at 19.

78. THE DIGEST OF JUSTINIAN, *supra* note 62, at 2, ¶ 1.1.7.1.

79. *Id.* at 15, ¶ 1.4.2.

80. DOMINGO, ROMAN LAW; AN INTRODUCTION, *supra* note 5, at 20.

81. See generally MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 153–63 (2003); MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 50–88 (2010) (discussing the modern understanding of public law).

82. See LÉON DUGUIT, LAW IN THE MODERN STATE 32 (Frida Laski & Harold Laski trans., 1919).

83. See Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 513–44 (2009), and Anne Peters, *Are We Moving Towards Constitutionalization of the World Community?*, in REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 118, 120–23 (Antonio Cassese ed., 2012), for a discussion of the paradigm shift from sovereignty to humanity and humanity as the foundational principle of public law, claiming humanity underlies the entire international system of the protection of human rights; see GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (Gareth Norbury trans., 2012), for a discussion of the societal constitutionalist approach; see also Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, *supra* note 23, at 605–28 (arguing that all legitimate nation-states must be

public law leads to a fragmentation of public law. By contrast, a more inclusive normative idea of public law connected with its purpose (or ultimate cause) constitutes a source of global integration.

F. Recovering the Idea of Necessity as a Source of Binding Law

For the Romans, necessity (*necessitas*) was a source of binding law.⁸⁴ *Necessitas* was the Roman goddess who personified the constraining force of destiny, the inevitable.⁸⁵ She was identified with the Greek goddess Ananke and was depicted as a powerful goddess who walked before Fortuna carrying brass nails and wedges to fix fast the decrees of Fate.⁸⁶ Opposed to free will, necessity is a force or influence that compels an unwilling person or a group of persons to act.⁸⁷

Necessity affects the law in two different ways. First, sometimes the plea of necessity should be taken into consideration to legally justify a departure from ordinary law. This is indeed the practice regarding the doctrine of necessity in international law, which is based on the rule that the law does not apply when necessity comes into play (*cessat lex ubi venit necessitas*).⁸⁸ Second, sometimes, however, necessity creates law by grounding legal obligations and duties. This circumstance is reflected in the well-known legal French aphorism: *nécessité oblige*.⁸⁹ Thus, necessity becomes an important source of law, that is to say, of binding legal obligation. I am using the concept of necessity in this latter way, although the two legal implications are interconnected. If necessity can lead to the

cosmopolitan states in the sense of incorporating and reflecting the global legitimacy conditions for claims to sovereignty in their own constitutions).

84. See Domingo, *The New Global Human Community*, *supra* note 10, at 575.

85. *Id.*

86. See Wagner, *Necessitas*, in *AUSFÜHRLICHES LEXIKON DER GRIECHISCHEN UND RÖMISCHEN MYTHOLOGIE* cols. 70–72 (Wilhelm Heinrich Roscher ed., 1897); HORACE, *ODES AND EPODES* 86–87 (Niall Rudd ed., trans., 2004) (“[T]e semper anteit seava Necessitas, clavos trabalis et cuneos manu gestans aena, nec severus uncus abest liquidumque plumbum.” [Ruthless Necessity always strides in front of you, carrying beam nails and wedges in her brazen hand, not forgetting the immovable clamp and lead for melting down.]).

87. See *Necessity*, BLACK’S LAW DICTIONARY (2d ed. 1910).

88. See Francesco Accursio, *Cessat lex ubi venit necessitas*, in *PRINCIPIOS DE DERECHO GLOBAL: 1,000 REGLAS Y AFORISMOS JURÍDICOS COMENTADOS* 76 (Thomson Reuters Aranzadi 2d ed., 2006), for a commentary on this rule and other similar rules.

89. *Nécessité oblige* means that when a need exists, a concomitant legal obligation arises; Tony Honoré, *Nécessité Oblige*, in *MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL* 129 (1987) (“[I]n the last resort necessity makes law: *nécessité oblige*.”); see generally H.L.A. HART, *THE CONCEPT OF LAW* 82–91 (3d ed. 2012) (explaining the difference between obligation and duty; obligation always requires a voluntary agreement and a duty does not because it derives from the law).

suspension of laws, it must also be able to suggest new laws. Otherwise, society would dissolve into chaos.

It is no mere coincidence that the wording of the most famous definition of obligation, from *Justinian's Institutes*,⁹⁰ includes the word “necessity.” In this context, necessity expresses the idea that the obligation created by a legal bond constrains the wishes of the party. This definition of obligation entered the Anglo-American common law tradition via the work of Henry de Bracton’s (c. 1210–68) *De legibus et consuetudinibus Angliae*.⁹¹

The Roman jurist, Modestinus, in his first book of legal rules, expressed what I am trying to explain here: “Thus, all law has been made either by consent, or established by necessity, or confirmed by custom.”⁹² Here, the term necessity has its ordinary, nontechnical meaning—an imperative need or desire, a pressure of circumstances, a physical or moral compulsion, which excuses someone from fulfilling an obligation or creates a new one.⁹³

In our day, a strong sense of contractualism has fueled disregard for the partition of sources of law into consent, custom, and necessity. Consent has become primary, while custom and necessity are relegated to irrelevance. Custom, however, has succeeded in maintaining its (admittedly secondary) status in the international realm thanks to the very nature of international law.⁹⁴ And in part, thanks to the defense of customary international law by some international scholars in recent years.⁹⁵ But global constitutionalism still needs to recover the concept of necessity to develop a correct approach to the law in this era of globalization. As Tony Honoré aptly puts it: “As

90. JUSTINIAN, JUSTINIAN’S INSTITUTES 104 (Peter Birks & Grant McLeod eds., 1987) (“obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura” [An obligation is a legal binding whereby we are bound by a necessity of performing some act according to the laws of our community]).

91. 2 HENRY DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE [ON THE LAW AND CUSTOMS OF ENGLAND] 283 (George E. Woodbine et al. eds., Samuel E. Thorne trans., 1968) (“An obligation is a legal bond whereby we are constrained, whether we wish to be or not, to give or do something.”).

92. THE DIGEST OF JUSTINIAN, *supra* note 62, at 14, ¶ 1.3.40.

93. See Theo Mayer-Maly, *Topik der Necessitas*, in ÉTUDES OFFERTES À JEAN MACQUERON 478–86 (1970).

94. Indeed, in cases in which it is difficult to achieve an agreement between states, custom could play an important role; see ANTONIO CASSESE, INTERNATIONAL LAW 166 (2d ed. 2005), for further discussion and other areas in which customary law is developed.

95. See BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 47 (2010); DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 135 (2010).

regards the world community necessity is the relevant ground.”⁹⁶ The reason for grounding the world community in necessity was explained already in the sixteenth century by Francisco de Vitoria using Aristotelian thought: necessary causes are final causes.⁹⁷ Indeed, human relationships in an era of globalization have made it necessary for humanity to manage its global needs well. Some of those needs derive directly from human dignity (e.g., eradicating poverty and combating international terrorism). Global constitutionalism provokes the pressing question of the legitimacy of global governance,⁹⁸ and the principle of necessity offers a good response.

The special norms of *ius cogens* and *erga omnes*, which have acquired more practical relevance today, constitute a powerful expression of the current recovery of the principle of necessity.⁹⁹ The peremptory character of the *ius cogens* and the existence of norms that all states can invoke in case of violation (*erga omnes*) may suggest the *necessity* of standards in order for the system of international law to survive. Indeed, the international legal order could not be a universal system if it were founded only on the principle of consent. If a particular political community did not consent to the universal system of rules, international law would cease to be universal. It is precisely the principle of necessity that makes international law universal (global law) by protecting some irrevocable moral values (*ius cogens*) and expanding their scope (*erga omnes norms*).

G. A Nonfoundational Approach to Constituent Power

Roman law helps clarify that what is foundational to global constitutionalism is the political community of free citizens,¹⁰⁰ rather than the constituent power or constitution as such.¹⁰¹ The Senate and the People of Rome (*Senatus*

96. Honoré, *supra* note 89, at 237.

97. See FRANCISCO DE VITORIA, POLITICAL WRITINGS 4–11 (Anthony Pagden & Jeremy Lawrance eds., 1991).

98. KLABBERS ET AL., *supra* note 1, at 351 (2009).

99. See MALCOLM N. SHAW, INTERNATIONAL LAW 88 (7th ed., 2014) (discussing *ius cogens* and *erga omnes* as concepts based upon an acceptance of fundamental and superior values within the system and in some respects akin to the notion of public order or public policy in domestic legal orders); see also ROBERT KOLB, THÉORIE DU IUS COGENS INTERNATIONAL: ESSAI DE RELECTURE DU CONCEPT 5, 23–27 (2003) (explaining the unitary concepts surrounding *ius cogens* and its role with necessity in the reorganization of international law for a greater focus on the common interests and public order).

100. See Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 INT’L J. CONST. L. 697, 709–10 (2016).

101. See generally LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 81, at 221–28; Martin Loughlin, *The Concept of Constituent Power*, 13 EUR. J. OF POL. THEORY 218, 218–37 (2014); ERNST-WOLFGANG BÖCKENFÖRDE ET. AL., CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 175–80 (Mirjam Künkler & Tine Stein eds., Thomas Dunlap trans., 2017).

Populusque Romanus), which embodied the political power of the Roman Republic, presupposed the very idea of people.¹⁰² It was the people (the citizens of the past and the present) that ultimately provided legitimacy to the Roman constitution, not the other way around.

The idea of constituent power, however, is modern at least in the form in which it emerged with the creation of the nation-state. Constituent power was associated with constitutionalism through the Calvinist interpretation of sovereign power and was transformed during the European Enlightenment as a result of secular rationalization.¹⁰³ The concept of constituent power presupposes not only the belief that political power vests ultimately in the people or political community but also the understanding that the political constitution derives its power and legitimacy from the people.¹⁰⁴ The political community thus becomes the ultimate source of the constituent power that legitimates the authority of constitutions.

However, at the global legal dimension, the concept of constituent power should be reformulated. Otherwise, the global community would be at risk of being transformed into a global state. This transformation into a global state would be, in the words of Hannah Arendt, “the end of all political life as we know it,”¹⁰⁵ the end of liberty itself. The global community is a community of many peoples and, as such, does not constitute a single people. A people is a plurality of persons recognized as a whole. The global community, however, does not comprise merely a plurality of the world’s population but is its totality. The idea of a people demands otherness—this people as over or against some other people. Because the global community is unique in its totality, it is incompatible with otherness. Thus, the global community does not require a constituent power in the modern sense of the expression “We the People of [some state or territory].” There is no “We the Humanity,” and thus there can be no written formal constitution either.

In his revised account of constituent power under the perspective of global constitutionalism, Mattias Kumm argues that constituent power is vested not only in “[w]e the People” but also in “the international community” as a requirement of a cosmopolitan and postpositivist conception of

102. 3 CORNELIUS CASTORIADIS, *POLITICAL AND SOCIAL WRITINGS* 246 (David Ames Curtis ed. & trans., 1993) (explaining that *Senatus Populusque Romanus* centers around the concept that sovereignty belongs to the people and that power emanates from the people).

103. Loughlin, *The Concept of Constituent Power*, *supra* note 101, at 219.

104. *Id.*

105. HANNAH ARENDT, *MEN IN DARK TIMES* 81 (1995).

constitutionalism.¹⁰⁶ The two components, “[w]e the People” and the “international community,” would be “co-constitutive” of both national constitutions and the international community.¹⁰⁷ This co-principle of constituent power assures the integration of national constitutions into the global order. Kumm thus challenges the positivistic approach that traditionally attributed to the constituent power a foundational role, and he defends instead a normatively constituted and circumscribed approach.¹⁰⁸

I basically agree with Kumm, but I differ in the formulation of the argument. In my opinion, because of globalization and the emergence (by necessity) of a global community, the constituent power of a political community is no longer vested in “We the People,” but in “We a people of the global community.” A people is no longer an independent political community but one interdependent with the rest of the world’s population. A political community is thus always an expression and a part of the global community. The global community does not require an autonomous global constituent power, because it is not a complete community.¹⁰⁹ Ultimately, the reason why both the political community and the global community are the constituent power of any particular community, while at the same time there is no global constituent power, is that the global community consists of an *incomplete* but necessary community. I call *complete* those communities that, informed by the principle of autonomy and self-government, endeavor to satisfy as many human needs as possible within their borders (work, health, education, security, and so on). By contrast, incomplete societies are those that strive to satisfy only certain specific human needs. Aristotle and Aquinas considered the *polis*¹¹⁰ or *civitas*¹¹¹ as the only complete and self-sufficient community. In our day, the nation-state is the paradigm of a complete community. In addition to being complete in this sense, the nation-state is also an instrumental society: it is not necessary inasmuch as its purpose is not natural and its

106. Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, *supra* note 100, at 698; *see also* Neil Walker, *The Return of Constituent Power: A Reply to Mattias Kumm*, 14 INT’L J. CONST. L. 906, 907 (2016); Mattias Kumm, *Constituent Power, Boundaries and Identity: On the Justificatory Depth of Constitutionalism - A Rejoinder to Neil Walker*, 14 INT’L J. CONST. L. 914, 916 (2016).

107. Kumm, *Constituent Power, Boundaries and Identity*, *supra* note 106, at 914.

108. *Id.* at 920–24.

109. See Domingo, *The New Global Human Community*, *supra* note 10, at 583, for a discussion of the global community as an incomplete community.

110. See ARISTOTLE, *POLITICS* bk. I, at 3–4 (H. Rackham trans., Harvard Univ. Press rev. ed. 1998) (1932).

111. Thomas Aquinas, *Summa Theologiae*, in *THE TREATISE ON LAW* 127–38, pt. I-II, Q. 90, Reply Obj. 3 (R. J. Henle, ed. & trans., 1993) (2012); *see also id.* at pt. II-II, Q. 65, art. 2, Reply Obj. 2; *see* JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 52, 114, 122, 219, 211 n.10, 226, 307 (1998), for additional discussion of “*communitas perfecta*” by Thomas Aquinas.

responsibilities can be carried out by other intermediate political and social groupings.¹¹² In the same manner that Belgium, Japan, or the United States began to exist in a concrete historical moment, they can also cease to exist.¹¹³ These communities are not an irreplaceable requisite for human existence.¹¹⁴ They are a cultural product of human experience and historical development.¹¹⁵ The rich variety of existing political communities is mutable, insofar as they are subject to political vicissitudes.¹¹⁶ In these political communities, the science of the possible reigns; that is, these entities do not have an intrinsic value so much as an instrumental one.¹¹⁷ They are not ends in themselves since they are instrumental and political by nature.

The global community now has become a necessary but not sufficient condition for any constituent power of any people who are a subset of humanity organized as a complete political community. In other words, the self-government of any political community or people must be viewed within the framework of global law to be globally legitimated. The practical consequence of this insight is that global law should not depend on the consent of the state, as it has happened with classical international law. Global law should have the same legitimacy in the global community that the national law has in the national community. In this sense, a postpositivist approach is required, since any political community influences the global community, and the global community influences the national community.¹¹⁸ From this perspective, no legal system in a globalized world would consist only of norms and regulations commanded by a single sovereign. If this is so, the idea of constituent power should be extended and not rigidly constrained to national power. However, this does not mean that a global constituent power should be recognized.

H. A Nonpositivist Approach to the Law

Roman law offers a prepositivist approach to the law and prevents global constitutionalism from taking an implicit or explicit positivist position. The term positive law (*ius positivum*) is not a Roman creation but a medieval

112. Rafael Domingo, *A New Global Law for a New Global Human Community*, FREE UNIVERSITY OF BRUSSELS 18 (2015).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *See infra* section II.H.

one.¹¹⁹ The distinction between positive law and natural law was first proposed by French scholars such as William of Conches, Hugh of Saint Victor, and Peter Abelard, as well as French canonists of the twelfth century.¹²⁰ This does not mean that Roman law does not consist of positive law: the Roman civil law, the praetorian law, and the Roman law of nations certainly can be categorized by the non-Roman term “positive law.” In the words of one of the great positivists, Hans Kelsen, “positivism confines itself to a theory of positive law and its interpretation.”¹²¹ Positivism thus stands completely outside Roman law, which offers instead an integrated framework to the different dimensions of the law: law of nations, fetial law, sacred law, praetorian law, and civil law, among others.

Global constitutionalism should recognize the relevance of positive law, but positive law must fulfill its function as part of a cosmopolitan and postpositivist framework.¹²² Global constitutionalism cannot be positivist, because it could not be firmly connected to the most relevant postulates of positivism. Unlike positivism, global constitutionalism demands that the sovereign lawmaking authority be subjected to legitimate limitation. Unlike positivism, global constitutionalism advocates for internal constraints of constituent powers that cannot be provided merely by appealing to the will of people, and it demands that global normative standards cannot be created out of nothing, based only on a sovereign act of popular will. Unlike positivism, global constitutionalism should not confuse global law and global legality, and it should not demand a basic norm as a reason for validity. Yet, some principles, values, institutions, and standards should be used as parameters to inspire the new global public law.

Global constitutionalism should transcend positivism rather than rejecting all positivist ideas and assumptions. As postpositivists accept that the theories, knowledge, and values of a researcher can influence what is observed,¹²³ so global constitutionalism states that any behavior of a political community affects the global community, and any behavior of the global community affects the particular community. The global community and the national

119. THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT 306–38 (J. H. Burns ed., 1988) (2010).

120. See STEN GAGNÉR, STUDIEN ZUR IDEENGESCHICHTE DER GESETZGEBUNG 210–40 (1960); THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT, *supra* note 119, at 336.

121. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 391 (Andres Wedberg trans., 1961) (2007).

122. See Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, *supra* note 100, at 698.

123. There is a connection between post-positivism and quantum physics. Quantum theory states that by the very act of watching, the observer affects the observed reality; see, e.g., KENNETH W. FORD, THE QUANTUM WORLD: QUANTUM PHYSICS FOR EVERYONE (2004) (providing an overview of quantum theory).

community are both observers and observed constitutional realities. Global constitutionalism allows us to see the state not only from within but also from outside. This explains why interdependence is at the heart of global constitutionalism.¹²⁴ The protection of human rights, for example, is critical in both international and national law. If human rights are not well protected in national courts, then international tribunals are available to review violations. But if international tribunals violate the international law of human rights, national courts need not abide by these international tribunal decisions. In these cases, as Geir Ulfstein has argued, the constitutional value of protecting human rights should prevail over the importance of respecting judicial decisions by international tribunals.¹²⁵

I. Centrality of Litigation and Plurality of Jurisdictions

The history of Roman legal procedures is hardly less than the history of the legal system itself. Legal remedies and litigation in general influenced the structure and evolution of Roman law insofar that substantive law can be understood only from this procedural perspective.¹²⁶ Roman jurists were more concerned about specific legal remedies than abstract rights.¹²⁷ For this reason, Roman law is by nature a law of actions. The link between the classical period and legal procedure is so strong that the classical period ended along with the fading of the so-called formulary procedure around 230 CE.¹²⁸

The praetor was the jurisdictional magistrate par excellence. The key to praetorian law lays in the fact that the praetor controlled remedies, and his primary legal function was to grant remedies in individual cases.¹²⁹ If both parties were Roman citizens, the magistrate with jurisdiction inside the limits of Rome was the urban praetor.¹³⁰ If one or both litigants were not

124. See Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579, 579–610 (2006), for a discussion of compensatory constitutionalism.

125. See KLABBERS ET AL., *supra* note 1, at 152; ANDREAS FØLLESDAL ET AL., *THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES* 1–3 (2014).

126. DOMINGO, *ROMAN LAW: AN INTRODUCTION*, *supra* note 5, at 111.

127. *Id.*

128. *Id.* at 5.

129. *Id.* at 51, 138.

130. *Id.* at 114.

Roman citizens, the jurisdictional magistrate was the *praetor peregrinus*.¹³¹ The growth of international trade led the Romans to recognize some institutions and transactions (e.g., contract of sales, service, and loans) that could be applied by Roman courts to relations between foreigners and between foreigners and citizens (*ius gentium*).¹³² The *aediles curules* had jurisdictional power over sales concluded in the market of Rome.¹³³ A special court had jurisdiction where some relevant inheritances were claimed or the validity of a will was challenged.¹³⁴ Some cases of greater public interest came under the jurisdiction of a court of several judges called *recuperatores*.¹³⁵ In the provinces, the governor had jurisdiction and played the role of the praetor.¹³⁶ Local magistrates were to display and administer justice according to the edict of the provincial governor.¹³⁷ In Italian *municipia*, local magistrates had a limited jurisdiction, and it was possible for parties to demand transfer of the procedure to Rome.¹³⁸ By voluntary and formal agreement (*compromissum*), Roman law also allowed parties to submit a dispute to arbitration.¹³⁹ The enforcement of the award came from the reciprocal stipulations given by the litigants and was strengthened by penalties as an additional part of the agreement.¹⁴⁰ The advantage of arbitration was that the arbitrator had more freedom to determine an award than did the judge of the formulary procedure, who was always bound by the praetor's instructions inserted in the formula.¹⁴¹ This basic outline of legal procedure shows the great flexibility of the Roman legal order due to the plurality of interrelated jurisdictions under the same legal system.

A relevant feature of current international law, and a clear expression of its constitutionalization, is the increased importance and establishment of international tribunals and the judicialization of dispute settlement.¹⁴² In the last decades, new courts and tribunals, such as the International Tribunal for the Law of the Sea, the World Trade Organization dispute-settlement body, and arbitration by the International Centre for Settlement of Investment Disputes (ICSID), among others, have been created. As a result, relevant areas of law, such as international trade law and the law of the sea, are

131. *Id.*

132. Gordon E. Sherman, *Jus Gentium and International Law*, 12 AM. J. OF INT'L L. 56, 59–60 (1918).

133. DOMINGO, ROMAN LAW: AN INTRODUCTION, *supra* note 5, at 114.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 124.

140. *Id.*

141. *Id.*

142. *See* KLABBERS ET AL., *supra* note 1 at 126–52.

brought under international judicial control. These tribunals mix in and interfere in national state actions while developing constitutional functions beyond the state. Global constitutionalism should continue expanding a system of jurisdictional pluralism that hinders, restrains, and prevents the excessive concentration of judicial authority, without being afraid of reasonable fragmentation. Roman law offers to global constitutionalism a good example of legal and jurisdictional pluralism. Territorial borders cannot solve all legal conflicts.

J. A Practical Law Connected With Reality

Roman jurists cultivated a sophisticated and practical legal science and produced a substantial literature in the field of law.¹⁴³ These included commentaries on civil law and on the praetorian edict, collections of legal opinions or legal distinctions, monographs on legal topics, and so on.¹⁴⁴ But unlike the Greeks, Roman jurists spent little time on philosophical abstractions.¹⁴⁵ They were primarily concerned with finding fair solutions in individual cases.¹⁴⁶ Their interest in philosophical issues was peripheral. They did not develop a general theory of justice, law, the state, or political administration. They simply accommodated Greek philosophy when necessary for their legal purposes. Roman jurists were concerned with the daily practice of law, probably because most of them were public men involved in politics and were interested in legal issues (without any remuneration) only as a part of their political careers. The development of legal science was a matter of disputation over interpretations of law, and legal science was very much linked with authentic legal conflicts.

Global constitutionalism is mainly defended and developed by scholars and, to some extent, by international courts, but not by national governments, treaty-makers, and powerful international actors.¹⁴⁷ Thus, constitutionalism runs the risk of isolating itself, creating its own unconnected discourse detached from legal reality, or as Anne Peters has pointed out, the risk of promoting a government of judges “in which judicial self-empowerment

143. DOMINGO, ROMAN LAW: AN INTRODUCTION, *supra* note 5, at 62.

144. *Id.*

145. *See, e.g.*, FRITZ SCHULTZ, HISTORY OF ROMAN LEGAL SCIENCE 60–64 (1946); *see also* DOMINGO, ROMAN LAW: AN INTRODUCTION, *supra* note 5, at 62.

146. DOMINGO, ROMAN LAW: AN INTRODUCTION, *supra* note 5, at 62.

147. *See* Peters, *Are We Moving Towards Constitutionalization of the World Community?*, *supra* note 83, at 118–28.

is achieved with the help of constitutional language.”¹⁴⁸ This peril is real. Roman law offers global constitutionalism a good example of developing a practical legal science elaborated from legal conflicts rather than from legal abstractions. Global constitutionalism should not be limited to an intellectual, infertile product. It should be, on the contrary, a way of thinking that illuminates the whole body of international law in the era of globalization.

III. CONCLUSION

Roman law offers good lessons in how legal systems, doctrines, and paradigms can be developed and modernized based on equitable ideas and principles. It is therefore a profitable source of inspiration for emerging global constitutionalism. The cosmopolitan spirit of Roman law, its unwritten constitution, its respect for tradition, and its legal pluralism are among the features of the Roman law system that can help to develop a coherent constitutionalization of international law. But the most important link between Roman law and global constitutionalism is that, while Roman law offered a prestatist, presovereignist, prenatalist, and prepositivist framework, global constitutionalism offers a postsovereignist, postnationalist, and postpositivist framework. Roman law constitutes an excellent antidote to the excess of statist, positivist, and sovereign elements in the elaboration and development of global constitutionalism.

148. *Id.* at 128.