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Title:

FROM EMPIRE TO STATE JURISDICTION: RECLAIMING BARTOLUS' JURISTIC CONTRIBUTION

Abstract:

This article corrects a widespread misreading of Bartolus' contribution to framing the notion of territorial jurisdiction. Bartolus is often said to have vindicated the independence of Italian city-states (vis-à-vis the Holy Roman Emperor) in terms of a de facto argument. In truth, as this article shows, Bartolus' argument is focally de iure. His key contribution lies in defending the independence of city-states by appeal to Roman law, where the latter is understood as a standing set of rules decoupled from the Roman Emperor as human sovereign. Decoupling Roman *law* from the Roman *Emperor* paves the way for the 'Reception' of Roman law and embodies a sound understanding of law-making as rule-governed.

Article text:

Introduction

The conceptual transition from empire to state jurisdiction is a fascinating juncture in the history of Western political thought. It is widely recognised that the Italian jurist Bartolus of Sassoferrato (1313–1357) makes a key contribution to that transition, but the nature of his contribution is poorly

understood. The purpose of this article is to spell out the full import of Bartolus' breakthrough.

The article starts by introducing Bartolus' well-known maxim '*civitas sibi princeps'*: the city is its own emperor. The maxim captures Bartolus' defence of the independent legislative power of Italian city-states vis-à-vis the fading claims to world rulership of the Holy Roman Emperor. As section I explains, the maxim contains a methodological puzzle. According to Roman law sources, the Emperor is world ruler, but, Bartolus stresses, city-states do in practice not recognize a political superior. Bartolus' immediate argument in support of the maxim suggests that he is trying to counter what holds as a matter of law by pointing to what holds as a matter of fact – that, in other words, he is challenging a de iure proposition by means of a de facto claim. Modern political theorists attribute to Bartolus just this kind of methodological move. Their interpretations, which jointly make up what I call the received reading of Bartolus, are discussed in section II. The position attributed to Bartolus echoes Austin's distorted conception of law-making in terms of the sheer will of a commander. It entails that the law-maker is not himself subject to law.

The remainder of the article makes a case against the received reading. Section III shows that it sits uneasily within the broader structure and format of Bartolus' juristic works, the very works from which the relatively scant evidence for the received reading is drawn. Then, by following through internal references within those works, section IV reveals that the theses under discussion are part of a wider juristic exercise wherein Bartolus carefully analyses the legal status of city legislation. Bartolus' important work on the

jurisdiction of city statutes and conflicts between them has been unduly neglected by recent political theorists. A close reading, in section V, of some key passages within that body of work yields the missing pieces required to solve the methodological puzzle raised at the start.

In light of these findings, the concluding section VI revisits '*civitas sibi princeps*'. It puts forward a reading of the maxim and of Bartolus' argument that is both historically and juristically more plausible than the received reading. On the proposed reading, '*civitas sibi princeps*' embodies a de iure argument, an argument advanced not in defiance of Roman law but under its auspices. What is crucial to grasping Bartolus' contribution is that he incipiently treats Roman law as a standing set of legal rules decoupled from the Emperor as human sovereign. In so arguing, Bartolus builds on and takes forward contemporary juristic commentary on point. He also reflects a sound understanding of sovereign legislating as necessarily rule-governed and liable, for that reason, to be legally limited. Bartolus' position, right at the origins of the modern state, is a powerful reminder that state sovereignty, then and now, is compatible with legal limits on law-making power.

I. '*Civitas sibi princeps*'

'The city is its own emperor'. This proposition of Bartolus has been hailed as 'a piece of brilliance',[1] indeed as 'his juristic masterstroke'[2] and the 'crowning

[1] M. Ryan, 'Bartolus of Sassoferrato and Free Cities', *Transactions of the Royal Historical Society*, 10 (2000), p. 66.

[2] J. Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge, 1987), pp. 96-7.

… step' in his 'political theories'.[3] Bartolus is not just any medieval jurist. He is the man about whom late medieval and early modern lawyers will repeat '*nemo iurista nisi bartolista'*: no one can be a jurist unless he is a follower of Bartolus.[4] He is a practising lawyer and teacher of law, who writes on a wide range of legal topics. He addresses problems that occupy lawyers in the communities he lives in. And he lives in Italian city-states. These are communities that have begun to self-organize as political units independent of larger feudal, ecclesiastic and imperial structures, not least by developing their own governmental institutions and legislating by and for themselves.[5]

The 'city' in Bartolus' maxim is the city-state. His claim that the city 'is its own emperor' involves a challenge to the Holy Roman Emperor's claim to rule over all Christian kingdoms in the known world, and hence over Italian polities. Although the Emperor's actual sphere of political influence is chiefly

[3] C.N.S. Woolf, *Bartolus of Sassoferrato: His Position of Medieval Political Thought* (Cambridge, 1913), p. 160.

[4] On Bartolus' influence, see generally J.N. Figgis, 'Bartolus and the Development of European Political Ideas', *Transactions of the Royal Historical Society*, 19 (1905), pp. 147-68. In recent writings, Bartolus is hailed as being 'the greatest medieval jurist' (A. Black, *Political Thought in Europe: 1250-1450* (Cambridge, 1992), p. 10), 'perhaps the most original jurist of the Middle Ages' (Q. Skinner, *The Foundations of Modern Political Thought*, Vol. I: The Renaissance (Cambridge, 1997), p. 9), and 'among the greatest jurists of all times' (G. Fassò, *Storia della filosofia del diritto*, Vol. I: Antichità e Medioevo (Bologna, 1966), p. 281).

[5] For an overview of the historical development touched on in this paragraph and the next, see Skinner, *Foundations of Modern Political Thought*, Vol. I, pp. 3-6; M. Bellomo, *The Common Legal Past of Europe: 1000-1800*, trans. L.G. Cochrane, Studies in Medieval and Early Modern Canon Law, Vol. 4 (Washington DC, 1995), pp. 40–60, including pp. 55-6 on the complex relation between the emerging culture and feudalism.

confined to German lands, he has not altogether given up on the effort to make good on the Empire's historical claims over Italy. Since the twelfth century, the Empire has been making periodic attempts to subdue the flourishing urban communities that have ceased to regard themselves as the Emperor's vassals. So far, these communities have resisted the imperial onslaughts. This is the scenario in which Bartolus puts forward his maxim.

In what respects is the city its own emperor, according to Bartolus? The maxim's intended scope is broad. Although Bartolus' discussion is scattered, on the whole he attributes to city institutions what we would consider to be core powers of a state. Bartolus invokes the maxim '*civitas sibi princeps'* in arguing that city officials can exercise powers hitherto regarded either as being exclusive to the Emperor or imperial officials, or as requiring imperial authorisation for their exercise. Sometimes Bartolus considers particular powers in isolation. He says, for example, (i) that a city's highest tribunal can act as a last instance court rather than being liable to have its decisions reviewed by an imperial tribunal,[6] (ii) that the city can restore persons to full civic status,[7] or (iii) that the city, being its own treasury (*fisc*), can levy taxes and acquire property that lacks a legal owner (otherwise

[6] Bartolus, *Commentary on Digest, 49, 1, 1*, s. 10 (for discussion, see Woolf, *Bartolus of Sassoferrato*, p. 157; D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford, 2016), p. 73).

[7] Bartolus, *Commentary on Digest, 48, 1, 7*, ss. 13-4 (for discussion, see Woolf, *Bartolus of Sassoferrato*, pp. 156-7; W. Ullmann, 'De Bartoli sententia: Concilium repraesentat mentem populi' in *Bartolo da Sassoferrato: Studi e documenti per il VI centenario*, Vol. II (Milano, 1962), p. 715).

assigned to the imperial *fisc*).[8] Bartolus generalizes these and similar claims when he writes that cities have *merum imperium*, the highest degree of jurisdictional authority.[9] Crucially, this includes the capacity to enact legislation without a superior's consent.

Bartolus' immediate argument in support of these propositions has a similar structure in each case. The *fact* that cities do recognise no superior – that they act as independent political entities – figures centrally as a premise towards the relevant conclusion. Bartolus reasons that, because cities recognize no superior, city institutions can occupy a place that otherwise only imperial institutions could occupy. The significance, to his argument, of the fact of non-recognition is particularly salient when he attributes to cities

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[8] Bartolus, *Commentary on Digest, 5, 3, 20*, s. 2 (for discussion, see Woolf, *Bartolus of Sassoferrato*, p. 121; D. Lee, *Popular Sovereignty*, p. 73; H.-W. Lee, *Political Representation in the Later Middle Ages: Marsilius in Context* (New York, 2008), n. 29 at p. 182); also Bartolus, *Commentary on Digest, 49, 14, 2*, s. 2 (for discussion, see O. Gierke, *Das deutsche Genossenschaftsrecht,* Vol. III: Die Staats- und Korporationslehre des Alterthums und des Mittelalters und ihre Aufnahme in Deutschland (Berlin, 1881), n. 116 at p. 381). For further powers attributed to cities, see *ibid*., pp. 381-2; Woolf, *Bartolus of Sassoferrato*, pp. 154-8; Ullmann, 'De Bartoli sententia', p. 715.

[9] Bartolus, *Commentary on Code, 2, 3, 28,* s. 5 (for discussion, see Woolf, *Bartolus of Sassoferrato*, pp. 135-6; Ryan, 'Bartolus of Sassoferrato and Free Cities', pp. 76-7); also Bartolus, *Commentary on Digest, 48, 1, 7,* s. 14 (for discussion, see Gierke, *Genossenschaftsrecht,* Vol. III, pp. 381-2; A. Black, 'Communal Democracy and its History', *Political Studies*, 45 (1997), p. 12; Woolf, *Bartolus of Sassoferrato*, pp. 156-7). On the idea of *merum imperium*, see Woolf, *Bartolus of Sassoferrato*, p. 405 in light of pp. 127 ff.; also F. Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Delft, 2007), p. 153.

merum imperium.[10] He begins by acknowledging that *merum imperium* would have to be awarded to cities by express concession from the Emperor. However, Bartolus continues, in the absence of imperial concession cities can demonstrate that they have acquired *merum imperium* by prescription (through the passing of time), or else just in virtue of the fact that they have exercised it. This last possibility, as Bartolus himself suggests, amounts to an acquisition of *merum imperium* through bare usurpation.[11]

There is something unsettling about the structure of argument I have just canvassed.[12] In each case, Bartolus appears to treat the fact that cities do not recognize a superior as sufficient warrant to affirm, in his own voice, that the cities do indeed have no superior. But this affirmation is meant as a challenge to a *legal* claim. In other words: the claim that city jurisdiction is subject to imperial authority—which is the claim that '*civitas sibi princeps'* stands up *against*—is not merely a claim raised by a crumbling imperial

[10] The following argumentative move is canvassed in detail in Woolf, *Bartolus of Sassoferrato*, pp. 122-44.

[11] Bartolus, *Commentary on Code, 2, 3, 28*, s. 5: ('*Scitis quod civitates communiter italie non habent merum imperium, sed usurpaverunt. Dico tamen si civitas vellet se defendere et merum imperium exercere quod habet necesse allegare concessionem principis. Item longissimum tempus quo dicta civitas merum imperium exercuit, isto casu posito quod non probaretur de concessione principis, tamen si probaret se exercuisse merum imperium, valet* …').

[12] A similar structure of argument accompanied the idea, developed in canon and secular writings, that a king who does not recognize a superior is emperor in his kingdom (*rex in regno suo est imperator regni sui*): see e.g. Woolf, *Bartolus of Sassoferrato*, pp. 369 ff.; J. Canning, 'Introduction: politics, institutions and ideas', in *The Cambridge History of Medieval Political Thought: c. 350-c.1450*, ed. J.H. Burns (Cambridge, 1988), p. 363.

administration and probed in the battlefield. It is a claim that can be traced back to the sources of Roman law, the very law that has formed the backbone of legal education since the eleventh century. Bartolus is a legal scholar, and legal scholarship takes as its central source text Justinian's sixth century compilation of Roman law. Justinian's compilation envisages an imperial political structure, and medieval lawyers, Bartolus included, regard the present Emperor as successor of Justinian.

It therefore seems as though Bartolus is countering a de iure proposition by means of a de facto claim. But is this a warranted move? And does Bartolus really make this move? Is the masterstroke at the foundations of our tradition *juristic* – if it is a masterstroke at all?[13]

II. The Received Reading: De Facto Rather Than De Iure

Bartolus' argumentative method raises an intriguing puzzle, which has attracted considerable attention on the part of historians of political thought. We are told that Bartolus introduced a 'methodological shift in juristic enquiry',[14] and that his methodology is his 'primary contribution'.[15] Unfortunately, this body of literature does not characterize Bartolus' methodology in a precise or stable way. Skinner, for instance, attributes to

[13] Perhaps reflecting such doubts, in his lightly revised version (J. Canning, *A History of Medieval Political Thought: 300-1450* (London, 1996), p. 169) of the text wherein he originally attributes to Bartolus a 'juristic masterstroke' (Canning, *Baldus de Ubaldis*, p. 96), Canning no longer calls the masterstroke 'juristic'.

[14] M. Loughlin, *Foundations of Public Law* (Oxford, 2010), pp. 50 ff., also p. 37.

[15] Skinner, *Foundations of Modern Political Thought*, Vol. I, p. 7.

Bartolus the 'basic precept' that 'where the law and the facts collide, it is the law which must be brought into conformity with the facts'.[16] Skinner speaks synonymously of Bartolus' 'basic axiom that the law must yield to the facts'.[17] Woolf, on whom Skinner relies, writes at the beginning of his treatise on Bartolus that the 'distinction between right and fact … is at the basis of all the political theories of Bartolus'.[18] The treatise concludes that 'his object … [is] to evolve from his texts a law rather practically acceptable than scientifically correct'.[19] Drawing on both Woolf and Skinner, Canning describes Bartolus' position on city independence as *both* a 'classic de facto theory'[20] *and* the first 'juristic justification for the legal sovereignty' of city-states.[21] Building on all the foregoing, Waldron argues that '[t]he key to Bartolus' contribution … lay in his recognition that when legal doctrine appears to contradict stable and well-established facts, it is sometimes the legal doctrine not the facts that ought to be modified'.[22] And according to Ryan, who appeals to Canning and

[16] *Ibid*., p. 7; quoting Skinner, D. Lee (*Popular Sovereignty*, pp. 72-3) deems this 'a fundamental norm of legal interpretation' established by Bartolus.

[17] Skinner, *Foundations of Modern Political Thought*, Vol. I, p. 10.

[18] Woolf, *Bartolus of Sassoferrato*, p. 22.

[19] Woolf, *Bartolus of Sassoferrato*, p. 387; also p. 5.

[20] Canning, *Baldus de Ubaldis*, p. 97 (original italics of 'de facto' removed).

[21] *Ibid*., 97.

[22] J. Waldron, *Law and Disagreement* (Oxford, 1999), p. 63.

Woolf, 'what has most endeared [Bartolus] to modern commentators' is 'his willingness to argue de facto instead of formally or de iure'.[23]

Although these statements purport to build on one another, they do not all express the same idea, and many of them are ambiguous in themselves. The primary ambiguity running through these statements concerns the basic criteria of success of Bartolus' enterprise. To borrow Woolf's words, it is one thing to seek to arrive at conclusions that are practically acceptable *rather than* scientifically correct, and another thing to strive for conclusions that are scientifically correct *precisely in being* practically acceptable. The first kind of argument is de facto *instead of* de iure; the second kind of argument is de iure, *and to that end* de facto.[24]

[23] Ryan, 'Bartolus of Sassoferrato and Free Cities', p. 88 (original italics of 'de facto' and 'de iure' removed). In this spirit, A. Black, *Political Thought in Europe*, p. 115 ('a basis was sought in … simple "fact" as opposed to law'); Figgis, 'Bartolus and the Development of European Political Ideas', pp. 157, 159 ('law is one thing and fact is another', 'Imperial laws do not abrogate [city] statutes, because [city statutes] are merely facts').

[24] Are these two alternatives exhaustive? No plausible third alternative is suggested in the literature. F.J. Cesar ('Popular Autonomy and Imperial Power in Bartolus of Saxoferrato: An Intrinsic Connection', *Journal of the History of Ideas*, 65 (2004), pp. 376-7) writes of a 'jurisdiction *de facto*' that is 'in a certain sense *de iure*', but does not explain that sense, or point to explanations or sources thereof. Maiolo (*Medieval Sovereignty*, p. 239 with n. 36) vaguely attributes to Bartolus an 'eclectic' approach that is 'juristic' *but not* 'legal' or 'established by law'. Canning (*Baldus de Ubaldis*, pp. 66-8; 'Law, sovereignty and corporation theory, 1300-1450', in *The Cambridge History of Medieval Political Thought: c. 350-c.1450*, ed. J.H. Burns (Cambridge, 1988), pp. 468 ff.; *A History of Medieval Political Thought*, p. 169) says that, for Bartolus, 'de iure sovereignty' and 'de facto sovereignty' 'exis[t] in parallel', the latter being distinguished from 'de facto power' in that Bartolus accords it 'legitimacy' – whether justifiably so, and on what basis, is left as open as the

Take the latter reading first. On this reading, which I shall call the de iure reading, Bartolus appreciates that propositions of legal science must be 'modified' or 'brought into conformity' with facts, in the name and for the sake of legal science. Although both Skinner's and Waldron's formulations are compatible with this reading, their accounts are radically incomplete to vindicate it. For, as we will see in the next section, these authors try but fail to identify a *legal* argument that supports Bartolus' central claims. At any rate, the proposition that 'where the law and the facts collide, it is the law which must be brought into conformity with the facts', taken literally, flies in the face of the most elementary legal logic. The possibility that law 'contradicts' or 'collides with' facts, that human conduct does not conform to the legal standard, is at the heart of the reason to have law in the first place. For something to be plausibly regarded as an obligation or demand, it must be logically possible to fail to conform to it. And, on any plausible view, law imposes obligations or demands on our behaviour, whatever else it does. So the unqualified injunction to bring law 'into conformity with the facts' is barely intelligible, let alone a 'basic precept' deserving a place in the history of ideas. Although Waldron more carefully notes that legal doctrine must 'sometimes' track facts, he does not explain *when* it must do so and why, or show that Bartolus' doctrine does so at the appropriate juncture.

By contrast, the former reading of Bartolus' methodology is not similarly dependent on further juristic argument. Perhaps this has contributed

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meaning of 'legitimacy' itself, a term that (as far as I can see) Bartolus does not use. M. Wilks' (*The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge, 1964), pp. 433-51) effort to map the de iure-de facto distinction onto some juristic contrasts is likewise unsatisfactory.

to its popularity. On this reading, which I shall call the de facto reading, Bartolus does not seek to counter a legal argument by opposing to it another legal argument, that is, by beating legal reasoning in its own field. He is deflecting a legal argument by relativising the significance of legal argument altogether, that is, by appealing to standards other than those of juristic science. He is arguing de facto *rather than* de iure. This reading draws apparent support from Bartolus' claim that, while the Emperor de iure rules over the whole world, de facto he only rules over the peoples who recognize his lordship.[25] Ryan describes this reading clearly: on this reading, Bartolus' argument 'suspend[s] the operation of Roman law'[26] and involves 'justifying government once the legal, formal source of jurisdiction has been by-passed'.[27] Ryan helpfully adds that 'this by-passing operation requires a suspension of critical faculties in order to work';[28] the resulting moves, he notes, 'smack[] … of convenience rather than rigour'.[29] In this same spirit, Woolf repeatedly treats weaknesses in Bartolus' legal reasoning as prime illustrations of his method. Thus Bartolus' claim that *merum imperium* can be acquired by actual exercise rather than by formal concession is deemed by Woolf *both* 'a rather lame conclusion' *and* 'a fine example of Bartolus' aim

[25] Bartolus, *Commentary on Code, 1, 1, 1,* before s. 1 (for discussion, see Woolf, *Bartolus of Sassoferrato*, pp. 21-2; Canning, *Baldus de Ubaldis*, p. 64).

[26] Ryan, 'Bartolus of Sassoferrato and Free Cities', p. 77.

[27] *Ibid*., p. 89.

[28] *Ibid*., 89; the author calls this '[t]he greatest and entirely unacknowledged weakness of Bartolus' justification of independent cities' (pp. 87-8).

[29] *Ibid*., p. 88.

and method, of his absolute adherence to fact'.[30] Going back to Skinner's words, on this reading 'law must yield to the facts' in a particularly strong sense of 'yield': the standards of juristic reasoning may have to be altogether by-passed, even perverted.

Two extended manifestations of the de facto reading are especially significant. The first manifestation is the claim that '*civitas sibi princeps*' embodies no less than a theory of sovereignty. Although 'sovereignty' is a term not yet in use, and which Bartolus does not use, Canning,[31] Woolf,[32] Skinner,[33] Waldron,[34] Ullmann,[35] and Black,[36] among others, tell us that it is sovereignty that Bartolus' account is about. Indeed Black speaks of 'a thoroughgoing and consistent theory of state sovereignty';[37] Ullmann refers to 'a fully-fledged theory of legislative popular sovereignty';[38] and, for Canning, it is an 'articulated civilian theory of the sovereignty of independent city-

[30] Woolf, *Bartolus of Sassoferrato*, p. 136.

[31] Canning, *Baldus de Ubaldis*, pp. 66 ff., 93 ff.

[32] Woolf, *Bartolus of Sassoferrato*, p. 160.

[33] Skinner, *Foundations of Modern Political Thought*, Vol. I, pp. 9, 11.

[34] Waldron, *Law and Disagreement*, pp. 60 ff.

[35] W. Ullmann, *Principles of Government and Politics in the Middle Ages* (New York, 2010), pp. 195 ff. ('legislative sovereignty'); Ullmann, 'De Bartoli sententia', p. 714.

[36] A. Black, *Political Thought in Europe*, pp. 115-6; A. Black, 'The Juristic Origins of Social Contract Theory', *History of Political Thought*, 14 (1993), p. 63.

[37] A. Black, *Political Thought in Europe*, p. 115. For H.-Y. Lee (*Political Representation*, p. 74), 'Bartolus was the first jurist to present a thoroughgoing and consistent idea of the sovereignty of the city-states'.

populi'.[39] This is the context of Canning's claim, quoted above, that Bartolus' is a 'classic de facto theory'.[40] According to this theory, as presented by Canning, 'the law-making activities of the people, whatever the de iure claims of the [E]mperor, break through to sovereignty.'[41] Or, as Ullmann puts it: 'the popular will [is] the reason for the validity of the law',[42] indeed 'it is the will of the people which imparts binding, enforceable character to a rule of action'.[43]

Note that such de facto theory of sovereignty is essentially equivalent to that advanced by Austin in the nineteenth century.[44] A community's sovereign, for Austin, is a commander who is habitually obeyed and is not in

[38] Ullmann, 'De Bartoli sententia', p. 714.

[39] Canning, *Baldus de Ubaldis*, p. 94.

[40] Canning, *Baldus de Ubaldis*, p. 97 (original emphasis of 'de facto' removed). Canning speaks alternatively of a 'de facto theory of sovereignty' and of 'de facto sovereignty' (*ibid*., pp. 67-8; 'Law, sovereignty and corporation theory, 1300-1450', p. 471); the latter expression is also used in e.g. H.-Y. Lee, *Political Representation*, p. 75; A. Black, *Political Thought in Europe*, p. 116.

[41] Canning, *Baldus de Ubaldis*, p. 97 (original emphasis of 'de iure' removed); Canning ('Introduction', p. 351) even notes that *legally* speaking cities are subordinate to the Emperor. In this spirit, Fassò (*Storia della filosofia del diritto*, Vol. I, p. 282) argues that, for Bartolus, the cities' effective sovereignty implies their legal sovereignty, so that Bartolus does not seek to provide any further foundation for the latter.

[42] Ullmann, *Principles*, p. 200.

[43] *Ibid*. And further: 'the consent of the people … automatically transforms a mere action into an enforceable rule'; 'it is the people alone … who confer legal and obligatory character upon these factually observed customs' (Ullmann, 'De Bartoli sententia', pp. 711-2).

the habit of obeying anyone else.[45] Like city-state legislative assemblies, Austin's sovereign recognizes no superior and its claims to sovereignty are generally heeded. These are facts – but Austin takes these facts to be a sufficient explanation of how the sovereign's say-so can have binding, normative force. On Austin's picture, the commander's say-so is the origin of all law, rather than law bestowing on the commander's say-so its legal character. The same is true on Bartolus' picture, as presented by Canning, Ullmann and others. This fits in well with the view that Bartolus 'suspend[s] the operation of Roman law'.[46]

This position entails that the city's law-maker is not itself regulated by law, and a fortiori is not limited by law. Austin famously writes that 'sovereign power is incapable of legal limitation'.[47] That the sovereign is not limited by law means that the law places no constraints on the content of what the sovereign may validly provide. It is therefore not surprising that this first manifestation of the de facto reading is often accompanied by a second one. Those who attribute to Bartolus a theory of sovereignty along Austinian lines typically gloss over or suggest a negative answer to the question whether *Roman law limits* what city assemblies can validly decide. Thus Ullmann takes it to follow from '*civitas sibi princeps*' that 'the people's will [can] regulate all

[44] J. Austin, *The Province of Jurisprudence Determined*, ed. W.E. Rumble, Cambridge Texts in the History of Political Thought (Cambridge, 1995), especially Lecture VI.

[45] *Ibid*., pp. 21 ff., 166, *et passim*.

[46] Ryan, 'Bartolus of Sassoferrato and Free Cities', p. 77.

[47] Austin, *Province of Jurisprudence*, pp. 212 ff.

matters pertaining to the citizenhood,'[48] that it can make law 'on any matter affecting the public weal'.[49] As Black more explicitly puts it, 'cities may make their own laws, even ones contrary to Roman law'.[50] And here as well, Bartolus himself appears to suggest as much. For he says that a city that recognizes no superior is a free people (*populus liber*) that can make law as it pleases (*prout sibi placet*).[51] This echoes the provision in the Roman sources that whatever pleases the Emperor is law.[52]

So once again Bartolus puts forward claims that are consistent with the de facto reading. Disturbingly for this reading, however, he steadily does so *by appeal to the language and sources of Roman law*.

III. Sources of Doubt

If the received reading is right, Bartolus repudiates de iure argument *in his lawyerly writing*. He makes his case for by-passing legal argument through the use of legal concepts and categories – including, as we have seen, legal doctrines of imperial concession, prescription, and of the Emperor's legal attributes (e.g. *merum imperium*). If the received reading is right, Bartolus

[48] Ullmann, *Principles*, p. 197.

[49] *Ibid*., p. 198; also Ullmann, 'De Bartoli sententia', p. 715.

[50] A. Black, *Political Thought in Europe*, p. 115.

[51] Bartolus, *Commentary on Code, 10, 63, 5* (for discussion, see Woolf, *Bartolus of Sassoferrato*, p. 151).

[52] Justinian, *Institutes*, 1, 2, 6 ('… *quod principi placuit legis habet vigorem'*); also Justinian, *Digest*, 1, 4, 1.

focally invokes the language of legal science *unscientifically*, perhaps to bestow a halo of juristic credibility upon conclusions that he knows, and at more candid junctures concedes, to be no true contenders in the de iure league. Supporters of this reading may of course insist that therein lies his merit. They may urge us to praise his courage for standing up against legal dogma, at a politically sensitive moment, and at the cost of juristic inaccuracy. And such kind of action may indeed be worthy of our praise. But it is unclear why our praise should be owed on *juristic* grounds. It is unclear why we should regard as a 'methodological shift in juristic enquiry' a move that shifts the enquiry to the point that it ceases to be juristic. And it is baffling that all this should count as the feat of a man whom later generations will champion as a prodigy of legal science.

There is a more poignant source of doubt about the received reading. The reading entails that Bartolus advocates the suspension of *Roman law* in the process of annotating *Roman legal sources*. For that is the material format of the writing he is undertaking. As a medieval lawyer, Bartolus writes comments *on* the texts of Justinian. The previous generations of scholars, known as glossators, had developed their scholarship in the form of marginalia (glosses) to the Roman texts. They had regarded their remit as discerning Roman legal rules through a reconstruction of the texts by way of dissolving apparent contradictions and consolidating gaps. Bartolus is a *post*-glossator. He drafts self-standing bodies of work (commentaries) as opposed to marginalia. Jurists in his age are less deferential to the literal tenor of the source texts; their tasks, nevertheless, retain the nature of an elaboration *of* a Justinian passage. It is in commentaries on the Justinian Digest and the

Justinian Code that we find the passages that yield the basis for the received reading of Bartolus, canvassed in the previous section.

And it is not as though, in Bartolus' time, the study of Roman law is becoming an outdated endeavor that one may appropriately honour in form while subverting in substance. Roman law and the derived canon law remain central to the curriculum of European law schools all the way to the eighteenth century. It is Roman law, not the cities' statutory law, that aspiring lawyers and practitioners absorb at universities in the course of a costly legal education, which in turn spurs a vast industry for the reproduction and the dissemination of Justinian's texts.[53] It is hard to imagine that professionals thus trained would consistently look up to someone whose contribution lay in obliterating the core grammar of their study.

But none of this is decisive to evaluating the received reading of Bartolus' work. Only Bartolus' work is. We should therefore now turn to the one other juncture of Bartolus' work that advocates of the de facto reading recurrently invoke, and which I had been reserving for discussion. That is Bartolus' analogy between customary and statutory law: what Canning calls Bartolus' 'well-known argument' from custom and consent.[54] The argument is as follows.

In at least two significant passages, Bartolus says that cities can enact statutory law without authorisation of a superior because statutory law is

[53] On the place of Roman law texts and education in medieval and early modern Europe, see Bellomo, *The Common Legal Past of Europe,* pp. 63 ff., 123 ff.

[54] Canning, *Baldus de Ubaldis*, p. 96; for articulations of the argument, see *ibid*., pp. 96-7; Ullmann, *Principles*, pp. 197-200; Ullmann, 'De Bartoli sententia', pp. 711-5.

relevantly similar to customary law – and customary law is created without authorisation of a superior. As Bartolus puts it in the first passage:

> When a people has full jurisdiction it can make statutes without needing the authorisation of a superior [references omitted]. And that in such a case the authorisation of a superior is not needed appears from the example of custom, which is introduced by the tacit consent of the people and is treated as equivalent to statute, from which it is obvious that authorisation by a superior should not be required.[55]

This linguistically unhappy passage already hints at what the relevant similarity is, for Bartolus, between custom and statute. Drawing on earlier doctrines, Bartolus considers that both custom and statute are made by the people's consent. Custom is made by the people's tacit consent, and statute is made by their express consent. The difference, as provided in the Digest, lies only in the way in which the people 'declares its will' (*voluntatem suam declaret*).[56] Therefore, what is true of custom – that it can be made without a superior's consent – is true of legislation as well. As the second passage heralds: 'tacit and express consent are equivalent and of equal force'.[57] Thus runs Bartolus' argument.

[55] Bartolus, *Commentary on Digest, 1, 1, 9*, s. 4 ('… *quando populus habet omnem iurisdictionem potest facere statutum, non expectata superioris auctoritate* [references omitted]. *Et quod isto casu non expectetur superioris auctoritas, patet exemplo consuetudinis, quae inducitur ex tacito consensu populi, et aequiparatur statuto, in qua constat quod non requiratur superioris auctoritas'*).

[56] Justinian, *Digest*, 1, 3, 32, 1.

[57] Bartolus, *Commentary on Digest, 1, 3, 32*, s. 4 *('tacitus et expressus consensus aequiparantur et sunt paris potentiae').*

But this argument does not support the de facto reading. Bartolus' analogy, if it is a valid one (as we need not query here), only warrants drawing an inference from custom to statute. It warrants saying about statutory law what is being said about customary law. And what is being said about customary law goes nowhere near a suggestion that communities can make customary law as they please, *even if contrary to Roman law*. Bartolus only claims that customs can be made without a superior's authorisation. This proposition must be understood in the context of the debate among commentators on whether a people can make customs *at all* or instead should be understood to have transferred to the Emperor the power to make customs.[58] Commentators treat this question as separate from, and prior to, the question of what customs can validly be *about*. The latter question is the object of intricate exchanges, particularly concerning whether, and if so under what special conditions, local customs can override Roman rules.[59] Bartolus here is speaking to the former question only. His view is that the people have retained the power to make their own customs. Customary law-making is available to the people, as opposed to not being available. Bartolus' point only

[58] On this debate, S. Brie, *Die Lehre vom Gewohnheitsrecht: Eine historisch-dogmatische Untersuchung*, Vol. I: Geschichtliche Grundlegung (Breslau, 1899), pp. 151 ff.

[59] For a careful overview of these arguments, see *ibid*., pp. 157-9; on Bartolus' restrictive view of the jurisdiction of customary law, see Woolf, *Bartolus of Sassoferrato*, pp. 151-2; and, especially, Ullmann's early essay 'Bartolus on customary law', (reprinted) in W Ullmann, *Jurisprudence in the Middle Ages* (London, 1980), pp. 280-1. In this essay, Ullmann explicitly distinguishes this question from the 'highly controversial' question of the cities' legislative capacity (*ibid*., n. 3 at p. 271).

concerns *who* can make customs, not whether the customs are subject to *legal limits*.

Hence Bartolus' argument from custom and consent cannot be deemed the central 'clue' yielding a 'doctrine of the people's legislative sovereignty' according to which 'the popular will [is] the reason for the validity of the law'.[60] From Bartolus' argument that the people have the same law-creating ability in the shape of statutory law as in the shape of custom, it does not follow, as Ullmann says it does, that 'the people's will [can] regulate all matters pertaining to the citizenhood'.[61] It is ironic, in any case, that writers like Ullmann or Canning should appeal to this argument from custom as a basis for the de facto reading, seeing as the argument itself is openly *legal*. And indeed, if we follow through the references of that argument and situate it within the broader reasoning context in which it occurs, we will not only confirm that the argument from custom does not ground the de facto reading. We will also hit upon a compelling array of materials that positively establish that the reading is wrong.

[60] Ullmann, *Principles*, pp. 197, 200; also Ullmann, 'De Bartoli sententia', pp. 711, 714; in this spirit, Canning, *History of Medieval Political Thought*, p. 169 ('His whole argument from consent justified the full legitimacy of de facto jurisdiction').

[61] Ullmann, *Principles*, p. 197; in Ullmann, 'De Bartoli sententia', p. 714, the point is made that 'from the strictly legal point of view, at no time any objection could be raised' to 'popular consent'.

IV. Statutes and Roman Law

The two above-mentioned passages, in which Bartolus draws the analogy between statute and custom, appear at strategic points of Bartolus' juristic work. The first passage belongs to Bartolus' extensive commentary[62] on the famous Digest passage that reproduces the opening words of Gaius' Institutes: 'The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind'.[63] Bartolus' commentary on that passage focuses on a people's (a city-state's) capacity to make laws 'peculiar to itself', both statutes and customs. About such city law-making, the commentary asks, in this order: (i) who can make law,[64] (ii) in what form,[65] (iii) on what matters,[66] (iv) to whom it applies,[67] (v) when it takes effect,[68] and (vi) how it must be interpreted.[69] The argument from custom appears under heading (i). This is consistent with and confirms our earlier construction: the

[62] Bartolus, *Commentary on Digest, 1, 1, 9*, ss. 1-69.

[63] Justinian, *Digest*, 1, 1, 9 ('*Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur'*) (my translation relies on E.A. Whittuck, *Gai Institutiones or Institutes of Roman Law by Gaius*, trans. E. Poste (Oxford, 1904)).

[64] Bartolus, *Commentary on Digest, 1, 1, 9*, ss. 1-14.

[65] *Ibid*., ss. 15-20.

[66] *Ibid*., ss. 21-35.

[67] *Ibid*., s. 36 (here Bartolus just points to his conflict of laws discussion, on which see note 78 below).

[68] *Ibid*., ss. 37-53z.

[69] *Ibid*., ss. 53a-69.

argument from custom is not meant to settle the questions addressed under the further headings, amongst them, crucially, the question (iii) *on what matters* statutes and customs can validly be made. But there is more. Under this third heading, Bartolus tells us that local laws are not valid – *non valent* – if they ordain what Roman law prohibits.[70]

Now it is true that the invocation by Bartolus of the language of 'legal validity', in and of itself, is not sufficient evidence that it is strictly *legal* limits he has in mind when saying that city statutes are invalid if contrary to Roman law. In that passage Bartolus does not elaborate on possible judicial or procedural implications of that invalidity. He does not specify, for example, whether the statute's invalidity renders judges and other officials legally bound to disregard it in adjudicating legal claims. And just before saying that city statutes are invalid if contrary to Roman law, he has said, using similar language, that they are invalid if they conflict with divine law,[71] or with natural law and the law of peoples.[72] Bartolus is writing at a time when the modern idea of legal validity has not yet robustly taken shape in Western legal culture, especially not the idea of the legal validity of legislative enactments

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[70] *Ibid*., ss. 26-7 (they are also invalid if they are dishonest or outside the people's jurisdiction); for discussion, see Woolf, *Bartolus of Sassoferrato*, pp. 150-1. Bartolus speaks of '*ius commune'*, not 'Roman law', but the former can for our purposes be regarded as equivalent to, or as including, the latter; on the complex notion of *ius commune*, see N. Jansen, '*Ius commune* (Gemeines Recht)' in *Handwörterbuch des Europäischen Privatrechts*, ed. J. Basedow, K.J. Hopt and R. Zimmermann (Tübingen, 2009).

[71] Bartolus, *Commentary on Digest, 1, 1, 9*, ss. 22-5.

[72] *Ibid*., s. 21.

(as opposed to private transactions).[73] Even medieval canon lawyers, whose elaborations of legal validity are pioneering in the West, discuss the status of unjust legal provisions (provisions that violate natural law) in ways that do not stably differentiate between the *moral* question of whether such provisions are binding in conscience and the *legal* question of whether they fall to be disregarded as legally void.[74] Nor is this latter question a focal concern of philosophical theologians such as Aquinas,[75] whose influential work Bartolus is familiar with.[76] Based on this commentary alone, therefore, we cannot

[73] See generally M Köpcke, *A Short History of Legal Validity and Invalidity: Foundations of Private and Public Law* (Cambridge, 2019).

[74] See *ibid*., pp. 62-4 (on the equivocation in Gratian's *Decretum*) and chapter 6 (on the more technical use of the vocabulary and grammar of validity in Pope Gregory IX's *Decretals*). On medieval lawyers' incipient distinction between the moral and the legal question, see e.g. K. Pennington, 'Law, legislative authority and theories of government, 1150-1300', in *The Cambridge History of Medieval Political Thought: c. 350-c.1450*, ed. J.H. Burns (Cambridge, 1988), pp. 427 ff. The distinction broadly matches Canning's contrast between 'limited' and 'controlled' rulership (Canning, *Baldus de Ubaldis*, p. 92; Canning, 'Law, sovereignty and corporation theory', pp. 463-4). Concerning the independence of the moral from the legal question, K. Pennington (*The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley, 1993), p. 120) writes that 'only an extraordinarily doughty lawyer would have pointed out to his prince that his laws were invalid because they were bereft of cause and reason'.

[75] For a discussion of the relevant statements of Aquinas (mostly drawn from *Summa Theologiae*, part I-II, questions 92, 95-6) and earlier writers in the tradition of natural law theorising, J. Finnis, *Natural Law and Natural Rights*, 2nd edn. (Oxford, 2011), pp. 360-1, 363-8.

[76] Woolf, *Bartolus of Sassoferrato*, p. 17; Figgis, 'Bartolus and the Development of European Political Ideas', p. 153.

establish for certain whether Bartolus deems Roman rules to circumscribe the jurisdiction of city statutes *as a matter of positive law*.[77]

But the question of the legal validity of city statutes is openly addressed towards the end of the commentary from which the second above-mentioned passage stems.[78] And that commentary, too, is important. For the relevant parts of it deal with the topic of conflict of laws or private international law. This is the topic with which many modern lawyers, unlike political theorists, primarily associate Bartolus, who is said to have inaugurated the discipline.[79] Today, rules on conflict of laws determine which bodies of regulation govern scenarios wherein parties and/or subject-matters bear links to different countries. Bartolus develops what will become the fundamental principles of the doctrine of conflict of laws in the course of pondering when the laws of different city-states apply to a given case. He considers questions such as, for example, whether a will made by a Florentine in Venice is subject to the Venetian or the Florentine statute on wills.

[77] There is a similar inconclusiveness in Accursius' discussion of natural law's limitation of legislative power, when taken in isolation from the rest of his work: B. Tierney, '"The Prince is Not Bound by the Laws." Accursius and the Origins of the Modern State', *Comparative Studies in Society and History*, 5 (1963), p. 388.

[78] Bartolus, *Commentary on Digest, 1, 3, 32*, ss. 25-31. A later and more extensive version of this conflict of laws treatise is in Bartolus, *Commentary on Code, 1, 1, 1*, ss. 13-51. Both versions (starting with the earlier one) are translated into English in J.A.C. Smith, 'Bartolo on the Conflict of Laws', *American Journal of Legal History*, 14 (1970), pp. 157-275. My own translations from these works of Bartolus are based on Smith's.

[79] '[P]robably on no topic has Bartolus received so much praise from modern authorities as for his systematic treatment of the "collisio statutorum"' (Woolf, *Bartolus of Sassoferrato*, p. 148).

Why is there a discussion of the validity of statutes in a commentary on conflict of laws? The central question of conflict of laws, the question of which law applies to a given case, is not a question about the legal validity of the relevant laws. It is a question about the scope of application of laws presupposed to be valid. If Florence and Venice did not each have a valid statute on wills, the question of which statute is applicable to a will made in Venice by a Florentine could not meaningfully arise. But it is precisely because questions of conflict of laws presuppose questions of validity that Bartolus broaches the latter kinds of question in his conflict of laws work. And that work, like the majority of his writings, is unequivocally addressed at the judge and legal practitioner – an audience interested not in fine philosophical elaborations but in answers to questions of positive law. Bartolus' discussion here is bound to be more revealing of his stance on city law-making than anything he can be found to say at more abstracting moments of discourse. To this discussion of validity I now turn.

V. A Juristic Discussion of Statutory Validity

A central problem that Bartolus tackles in his conflict of laws discussion is whether city statutes apply to outsiders.[80] The answer depends, he says, on the subject-matter of the statutes: whether they regulate offences, contracts, wills, or other issues. His discussion of statutes on wills contains the most

[80] This problem takes about one half of the discussion (Bartolus, *Commentary on Code, 1, 1, 1*, ss. 13–31; Bartolus, *Commentary on Digest, 1, 3, 32*, ss. 25–30); the other half is taken up by the problem of whether local laws have effects, or govern acts performed, in foreign *territory*.

illuminating passages for our purposes. Bartolus frames the query in these terms:

> Suppose there is a local statute or custom at Venice that a will is valid [*valeat*] if executed before [only] two or three witnesses: if some visitor has executed his will there, is it valid [*an valeat*]? On this question we must first consider whether the statute or custom is itself valid [*valeat*], and secondly whether, if valid [*valeat*], it applies to an outsider.[81]

The very setup of the problem provides valuable information. For one thing, it illustrates a point that Bartolus has clarified from the start of his conflict of laws commentary: 'whatever I may say about a custom is to be taken also as of local legislation and vice versa'.[82] So, buttressing yet again our earlier construction, the analogy between statute and custom does not by itself, in Bartolus' eyes, settle questions about the legal validity of either kind of law. The analogy is only the background against which the argument in this passage is embarked on. And it is significant, for another thing, that that argument explicitly treats questions of validity as distinct from, and directly relevant to, questions of scope of application. There can be no doubt now that Bartolus has a *legal* assessment of validity in mind. He enquires about the validity of laws in the very same terms (*an ... valeat*?) in which in the

[81] Bartolus, *Commentary on Code, 1, 1, 1*, s. 21 ('*Pone quòd statutum, vel consuetudo est Venetijs, quòd testamentum valeat coram duobus vel tribus testibus, quidam advena fecit ibi testamentum, an valeat? Ex hoc themate, primò est videndum, an consuetudo vel statutum valeat: secundò si valeat, an locum habeat in forensi'*); Bartolus, *Commentary on Digest, 1, 3, 32*, s. 28.

[82] Bartolus, *Commentary on Digest, 1, 3, 32*, s. 25.

preceding sentence he has enquired about the validity of wills, which for medieval lawyers is a routine juristic concern.[83]

Our interest lies in Bartolus' reasoning about the validity of the Venetian statute.[84] The matter requires reasoning because the statute's validity is open to question. And it is open to question because, as the ensuing discussion immediately discloses, the statute on its face contradicts Roman law. Roman law requires seven witnesses for a will.[85] In providing that two or three witnesses are enough, the Venetian statute departs from the Roman standard. In scholastic sequence, Bartolus begins by setting out arguments that others have put forward (or that might be put forward) for both denying and affirming the statute's validity, and then turns to explaining his own view.

The main argument Bartolus considers for *denying* that the Venetian statute on wills is valid is that it lacks the Emperor's consent – worse still, the Emperor explicitly disapproves of its terms. A passage in Justinian's Code

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[83] By contrast, he consistently probes the scope of application of laws by asking whether they apply, extend or stretch to a given kind of case, never by asking whether they are valid (*valeant*) for that case. The expressions he uses include '*porrigant effectum suum extra territorium'* (Bartolus, *Commentary on Code, 1, 1, 1*, s. 32, also s. 13), '*an locum habeat in forensic'* (s. 21), and '*trahatur ad forensem'* (s. 24). He also recurrently (e.g. ss. 13, 18, 19) asks which law is to be looked to (*inspicit*, *spectari*).

[84] The reasoning is at Bartolus, *Commentary on Code, 1, 1, 1*, ss. 22-3; Bartolus, *Commentary on Digest, 1, 3, 32,* 28. To the question of conflict of laws Bartolus eventually gives a qualified affirmative answer (the statute extends to an outsider, unless in its terms it is restricted to citizens: Bartolus, *Commentary on Code, 1, 1, 1*, s. 24; Bartolus, *Commentary on Digest, 1, 3, 32*, s. 29).

[85] E.g. Justinian, *Code*, 6, 23, 21 and 31.

provides that where seven witnesses cannot be found, notably in rural areas, no less than five witnesses shall be involved.[86] The Venetian law, in other words, contradicts an express injunction from the Roman Emperor.

Correspondingly, the three arguments Bartolus considers for *affirming* the statute's validity are all to the effect that the statute *does* have the Emperor's consent after all. The first argument is that, if the Emperor 'suffers' this law, he may be said to have established it: this consideration gains support from several passages in the Justinian Digest in which someone is deemed to have consented by acquiescence. A second possible argument, Bartolus notes, is that the Emperor could have expressly granted this privilege to a particular city: the Justinian Code provides as much in relation to testamentary regulations. And a third argument is that such privilege may also accrue through a deep-seated custom: this is in line with dicta in canon law according to which ancient customs can become law.

Thereupon Bartolus announces his own stance, in no uncertain terms: 'As I see it myself, the [law is] valid even if the Emperor knows nothing of [it].'[87] Let us stop for a moment to consider the boldness of this turn of argument. The arguments he had considered so far tracked the considerations that his predecessors would focus on. Their concern was with the presence or absence of the Emperor's consent. In order to vindicate the validity of city statutes, they would conjure up more or less elaborate fictions of the Emperor's approval. Sometimes they would do so on rather thin juristic

[86] Justinian, *Code*, 6, 23, 31, 3.

[87] Bartolus, *Commentary on Code, 1, 1, 1*, s. 23 ('*Ego credo quod statutum … valeat, etiam principe ignorante'*); Bartolus, *Commentary on Digest, 1, 3, 32*, s. 28.

footing. After all, the argument that the Emperor is 'suffering' a law against which Justinian issued a *hitherto unrepealed* injunction is weak, not least since Justinian's exemption – allowing five rather than seven witnesses – had been granted for the sake of rural and illiterate areas, hardly the profile of urban Venice.[88] And the fact that the Emperor could have expressly granted this privilege to Venice, *but has not*, surely counts against rather than in favour of the statute's validity.

Needless to say, Bartolus' predecessors were aware that the requirement of imperial consent was in practice no longer stably respected. We know that city statutes would often be heeded quite independently of their 'confirmation' by a political superior, to the point that a backlog of legislation awaiting 'confirmation' might eventually accrue.[89] But Bartolus' predecessors saw no other way to *legally* vindicate the validity of such local statutes than by appeal to conjectures of imperial consent.

Bartolus cuts through this conundrum. To him, the statute is valid, consent or not – indeed awareness or not. The tone of this move resembles some of his statements considered above. Like those statements, the present move could be read as a shift from de iure to de facto argument. Bartolus might seem to be taking a step further than his predecessors towards deference to fact. They sought to stretch the legal requirement of consent to make room

[88] Justinian, *Code*, 6, 23, 31, 2.

[89] See e.g. an interesting study of the region of Florence, covering a slightly later period: J. Black, 'Constitutional ambitions, legal realities and the Florentine state' in *Florentine Tuscany: Structures and Practices of Power*, ed. W.J. Connell and A. Zorzi (Cambridge, 2000), pp. 57-8.

for an improbable acquiescence. Bartolus might seem to be by-passing Roman law altogether, precisely in by-passing the requirement of consent. He might seem to be vindicating the validity of the Venetian statute on the basis of the sheer fact of its promulgation, stripped off any considerations flowing from Roman law. That being so, of course, his framing of the problem in terms of the *legal validity* of the Venetian statute would be little more than rhetorical window-dressing. And his careful isolation of the question of validity from the question of scope would be an empty, redundant argumentative step. If there is no possibility that the promulgated statute can be *in*valid, there is no reason for its validity either. Validity is intrasystemic: it is relative to some framework or order.[90] The very talk of validity is misplaced if Bartolus has really switched into de facto argument.

But this is not what he has done. Upon stating his view, Bartolus goes on to offer *legal* arguments in its support. First, he draws a comparison between testamentary formalities and the rules on probate, another area of testamentary law. Probate is likewise essential to the validity of a will, he reasons, but here formalities may be reduced by local legislation compatibly with Roman law, as both the Digest and the Code provide. Secondly, he notes that a father may dispose as between his children in front of just two witnesses compatibly with Roman law, and points out that, in a number of ways, Roman law provides that the fatherland's powers to dispose in respect of its subjects are on the same footing as a father's powers to dispose in respect of his children. Finally, Bartolus appeals to Roman law's explicit authorisation of the

[90] See Köpcke, *A Short History*, pp. 18-9.

passing of local legislation, in the passage (quoted above) on law 'peculiar to' a people.[91]

Those legal arguments are sound. They show scholarly insight and rigour. They reflect a lawyer's zeal to keep faith with the governing legal regime, the same regime that is profusely invoked throughout the discussion as support for each main proposition advanced – as my summaries of his arguments have indicated. It is also the regime in light of which Bartolus will go on to propose principles of conflict of laws, thereby articulating a *legal* answer to the question of the scope of application of city statutes. Bartolus has not for a moment abandoned juristic reasoning. He has restored sound juristic reasoning, the kind of reasoning that his predecessors were on the verge of losing their grip on.

Here is why. The key to Bartolus' move is that he assesses the statute's validity not in virtue of the Emperor's consent *but in virtue of its consistency with other rules of Roman law*. His focus is on the content of the two-witness rule, not on the say-so that gave rise to that rule, never mind on the Emperor's confirming say-so. The latter is of little interest to Bartolus. He argues that it can be dispensed with. But in so arguing he is not dispensing with legal argument himself. He is making a *legal* claim that the *legal* requirement of imperial consent can be dispensed with.

This is an application of a standard reasoning technique in Roman legal scholarship. The nature of the technique is closely tied to the very nature

[91] Bartolus, *Commentary on Code, 1, 1, 1*, s. 23. Bartolus provides two further, weaker, arguments, which are plainly residual not least in that they do not draw on further references to primary legal sources (for an overview, Köpcke, *A Short History*, pp. 86-7).

of what we call 'Roman law'. To the medieval scholar, Roman law, or more generally the *ius commune*,[92] is an unfolding body of amalgamated provisions. Justinian's compilation itself is a collation of snippets of juristic writings from different ages, and medieval legal science develops in the thrall of a collective effort to reconstruct the insights buried therein. In the course of that effort, scholars elaborate novel arguments, consciously or not. And in turn these scholarly arguments, these glosses and commentaries, themselves add up to a complex body of knowledge that straddles the divide between positive law and legal doctrine, between legal rules and legal science.[93] The resulting medieval Roman law inherently speaks to itself. It inherently arbitrates its own application, and hence its own validity. It provides when its own provisions may be validly overridden, and when not.[94] It is therefore natural for medieval

[92] On the idea of '*ius commune'*, see note 70 above.

[93] See e.g. Woolf, *Bartolus of Sassoferrato*, pp. 13-4. On the development of the relationship between law and legal science from medieval to modern times, see N. Jansen, *Rechtswissenschaft und Rechtssystem: Sieben Thesen nur Positivierung des Rechts und zur Differenzierung von Recht und Rechtswissenschaft*, Würzburger Vorträge zur Rechtsphilosophie, Rechtstheorie und Rechtssoziologie, Vol. 56 (Baden-Baden, 2018), especially thesis 3 (pp. 21-32).

[94] Bartolus sometimes makes it sound as though local laws can only appropriately *specify* particulars left open in the Roman corpus, rather than make provisions incompatible with the tenor of the Roman rules and in this sense *override* them. In his *Commentary on Digest, 1, 1, 9*, ss. 21-35, for example, he says that local laws are valid provided that (inter alia) they do not ordain what Roman law expressly forbids – having just said, in a similar vein, that human laws in general can amplify but not override divine law (*ius civile potest distingere, non tollere ius divinum*: s. 22). This echoes the idea of '*determinationes'* put forward by Aquinas (*Summa Theologiae*, part I-II, question 95, article 2 (answer)). But in truth many of Bartolus'

lawyers to argue for a departure from particular Roman sources by reference to Roman law – to other Roman sources. This is what Bartolus is doing here. His dictum that 'the [law is] valid even if the Emperor knows nothing of [it]' is advanced under the auspices of Roman law. It is itself a legal proposition.

VI. '*Civitas sibi princeps*' Revisited

And so is *'civitas sibi princeps'*. The maxim generalizes the logic which is at work, at the micro level, in the argument about the Venetian statute on wills. '*Civitas sibi princeps'* speaks not to the validity of one particular city statute but to the general ability of city-states to validly make law. It speaks not to a narrow problem of testamentary law but to a conundrum of fundamental constitutional reach. It provides that cities can legislate even without the Emperor's consent – compatibly with Roman law. At Bartolus' hands, the Emperor's consent has shifted from being the force that generates all law, to becoming *one* validating device, among others, within the governing Roman law framework. Herein lies the core of his breakthrough: *Bartolus incipiently treats Roman law as a self-standing body of principles and doctrines, decoupled from the Roman Emperor as human sovereign*.[95]

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examples involve a greater form of override than these formulations suggest: e.g. the Venetian two-witness rule in respect of the Roman seven-witness rule, or the latter in respect of the rule of divine law that 'in the mouth of two or three witnesses every word shall stand' (*in ore duorum vel trium stat omne verbum*: Corinthians I, 14:29; Corinthians II, 13:1; Matthew 18:16; Deutoronomy 19:15; discussed in Bartolus, *Commentary on Digest, 1, 1, 9*, s. 22).

[95] On this decoupling by Bartolus, see also Woolf, *Bartolus of Sassoferrato*, pp. 43-4, pp. 197-8.

Decoupling Roman *law* from the Roman *Emperor* is a momentous move from a historical point of view. It paves the way for Roman law's eventual 'Reception' into the legal orders of nascent sovereign states, who will see no inconsistency in adopting this body of rules while challenging the vestiges of the imperial apparatus.[96] But such decoupling is also critical from the viewpoint of legal and political science. For it redresses the fatal jurisprudential mistake that afflicted the reasoning of earlier scholars.

The mistake lay in conceiving of a law-maker who is not himself governed by law. For reasons Hart elaborated in his seminal critique of Austin, a mere human command, an expression of will, cannot craft law out of whole cloth.[97] It can only craft law if it occurs within the framework of a *rule* which itself is not, ultimately, the product of a one-off expression of will. It is such a framework rule or set of rules that bestows on the command its binding force in the first place. At the very least, the framework rule must determine the form and procedure of a valid enactment, thus making it possible to tell when the commander's expressions of will *make law* as opposed to voicing wishes

[96] The point is made e.g. in Woolf, *Bartolus of Sassoferrato*, pp. 44, 197. Figgis ('Bartolus and the Development of European Political Ideas', p. 160) writes that Bartolus 'prepared the way for the civil law to become the received jurisprudence of most countries by showing it to be *de facto* independent of the Emperor'; it is unclear, however, what is meant by civil *law* being '*de facto* independent' of anything. On the manifold kinds of 'Reception' process of Roman law, see e.g. T. Duve, 'Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive', *Rechtsgeschichte*, 20 (2012), especially pp. 31 ff.; M.T. Fögen and G. Teubner, 'Rechtstransfer', *Rechtsgeschichte*, 7 (2005), pp. 38-45.

[97] HLA Hart, *The Concept of Law*, 2nd edn. (Oxford, 1994), chapter 4.

devoid of legal import. Bartolus does not spell out these philosophical insights; he is a jurist, not a political philosopher.[98] But he soundly assigns to Roman law the role of framework regime, the regime in light of which it falls to assess the need for, and limits of, imperial authorisation.[99] On this conception, Roman law is not the product of imperial command. In an important sense, imperial command is the product of Roman law.

This shift in the jurisprudential conception of a legal order has paramount implications for grappling with the constitutional problem posed by city government. Once it is appreciated that imperial command is (because it cannot but be) subject to law, there is little legal difficulty in holding that law can be enacted other than through imperial command – in virtue of powers conferred by the very regime that controls imperial commanding. Viewed in this way, the recognition of the city as independent law-maker is not altogether different from a recognition of succession in office. The incumbent changes but the nature of the office holds stable. That is the focal meaning of '*civitas sibi princeps'*. It is a claim about the *office* of *princeps*, not about the

[98] In this spirit, Ullmann, 'De Bartoli sententia', p. 716; J. Coleman, 'Medieval Political Theory c. 1000–1500', in *The Oxford Handbook of the History of Political Philosophy*, ed. G. Klosko (Oxford, 2011), pp. 183-4.

[99] This may be the reason why, as Canning ('Introduction', p. 365) notes, Bartolus does not specifically rely on the *lex regia* for this purpose. The *lex regia* is a law referred to in the Roman sources as having once effected an express (one-off) concession of legislative power from the people to the *princeps* (Justinian, *Institutes*, 1, 2, 6: '*Sed et quod principi placuit legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit'*).

person(s) occupying it.[100] It would be flatly self-contradictory to say that the city, considered as a group of Italian persons, is the Emperor, considered as a German individual. As modern commentators implicitly recognise, the term '*princeps'* in the maxim designates a generic status, liable to be held by different individuals or groups. Hence the city (itself an abstract corporation in Bartolus' thought)[101] is *its own* emperor, *an* emperor onto itself. The claim is only meaningful as a juristic proposition, the proposition that cities hold legal powers hitherto exclusively incumbent on the Emperor's person. Of course the proposition is politically daring. It challenges a widely held understanding of the locus of political power. But the proposition is daring, and the stroke is masterful, precisely because it is *juristic*: controlled and governed by law.

So we should reject the de facto reading of Bartolus' stance on city powers. The de iure reading here proposed is juristically sounder,[102] but not only that. It also makes better sense of Bartolus' argument in its own terms, as

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[100] On the medieval development of the notion of 'office', see e.g. Loughlin, *Foundations of Public Law*, pp. 25 ff.

[101] Bartolus conceives of a corporation as a juristic fiction: Gierke, *Genossenschaftsrecht,* Vol. III, pp. 366 ff.; Canning, 'Law, sovereignty and corporation theory', pp. 473-6; A. Black, 'The individual and society', in *The Cambridge History of Medieval Political Thought: c. 350-c.1450*, ed. J.H. Burns (Cambridge, 1988), pp. 602-3; see further Ryan, 'Bartolus of Sassoferrato and Free Cities', p. 79, on '*civitas sibi princeps'* as involving a 'double abstraction' (of both '*civitas'* and '*princeps'*).

[102] The reading makes sense, too, of Bartolus' critique of tyrannical government (in Bartolus, *Tractatus de Tyrannia*) on strictly on *legal* grounds (Woolf, *Bartolus of Sassoferrato*, p. 169), a critique that Ryan ('Bartolus of Sassoferrato and Free Cities', p. 89) wrongly deems to be inconsistent with Bartolus' 'de facto' methodology.

well as in light of contemporary developments of juristic thought. We can appreciate this, by way of conclusion, in going through each of the remaining passages flagged up earlier in this paper as apparently buttressing the de facto construction.

Take, firstly, the *merum imperium* argument.[103] Failing imperial concession, says Bartolus, *merum imperium* can be acquired through prescription or through the mere fact of its exercise. That *merum imperium* can be *exclusively* acquired through concession is a legal proposition Bartolus is willing to challenge.[104] The proposition is reminiscent of the belief that an override of *any* Roman rule must be authorised by the Emperor, the rule's author. But contemporary writers reject that belief routinely and implicitly, in *reasoning* their way towards juristic conclusions of all sorts, and thus in treating Roman rules as *legally defeasible*, without expecting or requesting imperial authorisation at each argumentative step. The view that imperial authorisation is needed where Roman rules are set aside *by local statute*, but not when they are set aside in (other) juristic argument, is an extraneous element in the overall scheme of thought of fourteenth century legal scholarship.

Secondly, there is Bartolus' claim that a free people (*populus liber*) can make law as it pleases (*prout sibi placet*), just like the Roman sources say the

[103] Notes 10 and 11 above and accompanying text.

[104] His move here is similar to his argument that a corporation can be established not only in virtue of a superior's concession but also under a general rule of law; as Gierke (*Genossenschaftsrecht,* Vol. III, pp. 368 ff.) notes, Bartolus turns the latter option, previously regarded as exception, into the default avenue.

Emperor can.[105] But these Roman sources themselves are notoriously inconclusive on whether the Emperor is subject to law.[106] What is more, even at the height of Roman imperial rule, Roman legal thought evinces elements of legal control, if not limit, of imperial command.[107] And medieval secular law, in contrast to canon law, evolves largely independently of fresh legislative choices by the successive incumbents in the chief ruler's office, thereby buttressing legal culture's perception that legal reason is not at the mercy of a princely *Machtwort*.[108] Hence we should not be surprised to find that careful

[105] Notes 51 and 52 above and accompanying text.

[106] The most relevant passages are, in addition to both Justinian, *Institutes*, 1, 2, 6, and Justinian, *Digest*, 1, 4, 1 ('… *quod principi placuit legis habet vigorem'*): Justinian, *Digest*, 1, 3, 31 ('*Princeps legibus solutus est'*) and Justinian, *Code*, 1, 14, 4 ('*Digna vox maiestate regnantis legibus alligatum se principem profiteri: adeo de auctoritate iuris nostra pendet auctoritas …*'; also Justinian, *Code*, 6, 23, 3); for argument on point, see Pennington, 'Law, legislative authority and theories of government', p. 426; Tierney, 'The Prince is Not Bound by the Laws', pp. 386 ff.

[107] For example, imperial legislation under Constantine (and later) provides that imperial rescripts '*non valeant*' if '*contra ius*' (Köpcke, *A Short History*, p. 49), where '*ius'* (or '*ius vetus'*) refers to the body of classical juristic literature, itself a record of rules largely evolved as a customary framework within which the provisions of successive ruling institutions acquired their juristic significance (see generally *ibid*., chapter 4).

[108] For a similar point, see Pennington, *The Prince and the Law*, p. 87. Canon law is officially codified for the first time in 1234 (Pope Gregory IX's *Decretals*), a century before Bartolus: on this development, see A. Keogh, 'The Codification of Canon Law', *Journal of Comparative Legislation and International Law*, 3rd Series, 10 (1928), pp. 14-5; Köpcke, *A Short History*, chapter 6; K. Pennington, 'Decretal Collections 1190–1234', in *The History of Medieval Canon Law in the Classical Period, 1140–1234: From Gratian to the Decretals of Pope Gregory IX*, ed. W. Hartmann and K. Pennington (Washington, 2008), pp. 293-317.

general overviews of medieval legal thought discern an overall 'constitutionalist', indeed 'contractualist', conception of imperial power.[109] We should be even less surprised to find that Bartolus' above claim is immediately followed by a reference to Bartolus' own commentary on the people's ability to make law 'peculiar to itself', which commentary lists various kinds of *limits* on city law-making.[110] As section IV explained, such limits include

[109] A 'constitutionalist' conception of princely power has been traced from early glossators (Pennington, *The Prince and the Law*, pp. 79 ff.) all the way to Accursius (Tierney, 'The Prince is Not Bound by the Laws', pp. 378-400), and recently discerned in Bodin (D. Lee, 'Unmaking Law. Jean Bodin on Law, Equity and Legal Change', *History of Political Thought*, 39 (2010), pp. 269-96). It might be worth flagging up the inaccuracy of the term 'constitutionalism' (and its contrast to 'absolutism') to designate not a particular kind of political regime but a correct understanding of the nature of a legal system, which nature is constant as between different political forms (even Austin's account is meant to be true of democracies: Austin, *Province of Jurisprudence*, pp. 183 ff., especially p. 186). For the claim that a 'contractualist' conception of princely power runs through medieval political thought, see A. Black, 'Juristic Origins', pp. 57-76; on this conception, pacts are binding, even on the prince, because they occur within a framework of 'higher laws' (notably the law of nations) which are themselves not the product of a one-off legislative act. Although Black (*ibid*., p. 61) attributes this stance to Bartolus, and even notes that limits of this kind do not necessarily weaken a ruler's position (*ibid*., p. 63), he fails to appreciate that in Bartolus positive law, too, has the role of ('contractualist') framework regime. In a similar spirit, Canning ('Law, sovereignty and corporation theory', pp. 454-61) describes the 'normative context' of 'higher norms' assumed to exist by commentators, Bartolus included, but insists that 'positive law' itself is not part of such limiting context; this may be because Canning associates a 'positivist theory of law' to a narrowly Austinian picture. Gierke (*Genossenschaftsrecht,* Vol. III, pp. 381-2), on this part, explains how at the hands of Bartolus and others, 'the concept of corporation grew into the concept of state'.

[110] Bartolus, *Commentary on Digest, 1, 1, 9*, ss. 21-7.

those posed by Roman law, divine law, natural law, and the law of peoples. For Bartolus, those limits are incumbent on the Emperor as well.[111] His, too, is a legally framed jurisdiction.

Why, then, does Bartolus speak, as in the third kind of passage to be revisited, of what holds de iure *in contrast to* what holds de facto? He does so, for instance, when he says that de iure de Emperor rules the whole world but de facto he only rules the peoples who recognise his lordship.[112] He does so, too, when he says that de iure all peoples are under the Empire but de facto only some are.[113] Those propositions, however, are contextually detached from the legal arguments surveyed in this paper. And that is for a reason. Those propositions are narrowly concerned with the relationship between city and Empire considered as political bodies, *not* with the legal regime governing either. They concern the relationship of city-Emperor, not the relationship of city-law. Pennington rightly suggests that the relationship between political bodies, a theme that fascinates modern historians, is 'only one dimension of the [medieval] jurists' concerns', and not a pivotal one at that.[114] This is consistent with the fact that some of Bartolus' further uses of the de iure-de

[111] Woolf, *Bartolus of Sassoferrato*, pp. 45 ff.

[112] Bartolus, *Commentary on Code, 1, 1, 1*, before s. 1 (note 25 above and accompanying text).

[113] Bartolus, *Commentary on Digest, 36, 1, 26*; Bartolus adds the qualification that Church territories are not de iure under the Empire (for discussion, see Woolf, *Bartolus of Sassoferrato*, pp. 122-3; H.-Y. Lee, *Political Representation*, p. 75).

[114] Pennington, *The Prince and the Law*, p. 101.

facto distinction show indifference towards that distinction.[115] Free peoples, he says, recognise no superior 'either de iure or de facto' (*de iure vel de facto*).[116] It is not even clear that the terms are mutually exclusive to his mind. The Emperor ruling the world de iure *but not de facto* is compatible with cities ruling themselves *both* de facto *and* de iure.[117] Plainly, for him 'de iure' and 'de facto' are not terms of art, never mind labels for exhaustive argumentative methodologies.

To assign Bartolus' words their proper import we need to appreciate their scholarly pedigree.[118] The de iure-de facto distinction originates in juristic commentary on an intriguing phrase in a 1202 papal decretal: '… since the [French] king himself does not recognise a superior in temporal matters'.[119]

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[115] Gierke, *Genossenschaftsrecht,* Vol. III, p. 381 with n. 114.

[116] Bartolus, *Commentary on Code 10, 10, 1*, s. 7; Bartolus, *Commentary on Digest, 5, 3, 20, 7*, s. 2 (for discussion, see Gierke, *Genossenschaftsrecht,* Vol. III, p. 381; Canning, 'Law, sovereignty and corporation theory', p. 472 with n. 61; A. Black, *Political Thought in Europe*, p. 116).

[117] Woolf (*Bartolus of Sassoferrato*, n. 3 at pp. 122-3) conjectures that, in referring to cities who de iure do not recognise a superior, Bartolus might have in mind cities freed by formal concession rather than actual exercise of their powers; but we have seen that both these avenues are legally warranted for Bartolus.

[118] On which see especially W. Ullmann, 'The Development of the Medieval Idea of Sovereignty', *The English Historical Review*, 64 (1949), pp. 1-33; and further B. Tierney, 'Some Recent Works on the Political Theories of the Medieval Canonists', *Traditio*, 10 (1954), pp. 612-9.

[119] Pope Innocent III's decretal '*Per Venerabilem'*, integrated in Pope Gregory IX's *Decretals*, 4, 17, 13 ('… *quum rex ipse [Francorum] superiorem in temporalibus minime*

In making sense of this intriguing claim, an early glossator draws a contrast between the king's de facto non-recognition of a superior and his de iure subjection to imperial rule.[120] Bartolus' immediate predecessors carry over this unelaborated contrast;[121] not so, by the way, the copious political literature that flourishes in the same span of time, or the writings of popes and kings.[122] Bartolus loosely echoes his predecessors' jargon, just as he echoes other older claims that play no role in the juristic moves about city independence.[123] He 'adhere[s] to traditional doctrines of the *ius commune* that he [can]not ignore',[124] but that he cannot soundly build on either. The de facto reading, therefore, can hardly be traced back to the tenor of Bartolus' words. It has been credibly surmised that it was Bartolus' disciple Baldus who encouraged

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recognoscat'; my translation relies on Canning, 'Introduction', p. 363).

[120] Ullmann, 'The Development of the Medieval Idea of Sovereignty', pp. 4-5; the glossator is Bernardus.

[121] *Ibid*., pp. 5, 7-8; Canning, 'Law, sovereignty and corporation theory', p. 467; Bartolus' immediate predecessors include the French Petrus de Bellapertica, Guilelmus de Cuneo and Jacobus de Ravannis, and the Italian Cynus de Pistoia.

[122] This literature is predominantly of French and Neapolitan origin (Ullmann, 'The Development of the Medieval Idea of Sovereignty', pp. 1-33). For the most part, writers only *affirm* that the king is also de iure independent of imperial rule; only sometimes they seek to defend this claim, albeit with shaky juristic arguments.

[123] For Bartolus, the de iure universal lordship of the Emperor is not a 'workable constitutional reality' (Ullmann, 'De Bartoli sententia', p. 727; also Pennington, *The Prince and the Law*, pp. 183, 197).

[124] Pennington, *The Prince and the Law*, p. 197.

the de facto reading of the work of his master,[125] thereby leading modern scholars to glimpse in a casual turn of phrase a methodological cue it was never meant to carry.

Ironically, there *is* a robust de facto dimension to Bartolus' juristic methodology. Sound juristic thought is closely attentive to facts. Not to any and all facts, but chiefly to facts about the (self-)understandings, attitudes and dispositions of the relevant community, the community whose legal system it is. Hart explained in his critique of Austin that there is a practice of concordant recognition at the foundations of any legal order.[126] In steadily treating the *fact* that cities recognise no superior as a premise towards his juristic claims, Bartolus' argument is consistent with proper standards of legal science and, in the same breadth, with the understandings prevailing among legal practitioners in his time. It is a time in which the primary source of fresh production of law is legislation by city assemblies, but it is a time, too, in which such laws are invariably construed through the use of Roman principles, doctrines and conceptual maps.[127] The grammar of Roman law, taught at

[125] For an argument, Maiolo, *Medieval Sovereignty*, pp. 235 ff. (Maiolo rightly problematizes the de facto reading but proposes a confusing alternative reading based on religiously grounded 'normative concerns' with the good life); on Baldus' own methodology, see Canning, *Baldus de Ubaldis*, especially pp. 100 ff.

[126] Hart, *The Concept of Law*, especially chapter 6; for a legal system to exist, says Hart, such 'rule of recognition' must be 'accepted' by the legal profession 'as common public standar[d] of official behaviour' (*ibid*., p. 116); on Hart's related notion of the 'internal point of view' as the proper vantage point of legal science, *ibid*., pp. 56 ff., 88 ff.

[127] On this role of Roman law, see Bellomo, *The Common Legal Past of Europe*, pp. 152 ff.; Padoa-Schioppa, *A History of Law in Europe*, pp. 203-7; on how Roman law influences e.g.

universities, is to medieval practitioners the kind of framework regime that Bartolus portrays it as being. His argument is scientifically correct, precisely in being practically acceptable. It relies on facts, when and because they are relevant to law. It is de iure, and to that end de facto.

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Bartolus' categorisation of local laws, see Köpcke, *A Short History*, pp. 80-1.