

Empire the Modern Way



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The purpose of this paper is to examine an assumption that underlies much modern scholarship on empire, namely, that empire rests on force.^❶ My thesis is that this is too limited a point of view. Empire need not rest on force, at least not exclusively, and especially not if it aspires to universality. Indeed, to the extent that universal empire is conceivable at all, it must rely on something else. I would therefore like to draw a distinction between two different types of empire: empire that rests on force and empire that rests on something else, as yet to be defined. I shall call the former empire the modern way and the latter empire the ancient way. That is of course too simple. But it will help to lift the fog. Once we can see more clearly, it will be possible to complicate the picture without distorting it again. Let me just add one caution: empire the ancient way is not to be confused with empire the ancient Roman way.

Let me explain how I arrived at these reflections. I started with an observation. The observation was that contemporary scholarship seems strangely unable to come to proper terms with universal empire. It was as though the scholarship could take no look at universal empire at all without assuming that it rested on false ideas and illegitimate foundations. I was not particularly disconcerted by the dismissal of universal empire by those who disapprove of it as illegitimate outright. That universal empire conflicts with modern principles of sovereignty and liberty is a familiar position. That historians living in the modern world should therefore commonly disparage or neglect universal empire is not particularly difficult to understand.

The treatment universal empire received from its friends was intellectually more intriguing. I thought that their insistence on the significance of empire for understanding medieval and early modern politics was on the mark. Yet they did not seem able to escape from the hegemony of their opponents. What was the reason? Was it a kind of narrow-minded pigheadedness preventing modern historians from appreciating the attractions of universal empire? I doubted that. Pigheadedness is scarcely so unevenly distributed. Was it a

^❶ The literature is vast. For an authoritative study see Richard Koebner, *Empire* (Cambridge: Cambridge University Press, 1961). For a selection of more recent views see David Armitage, ed., *Theories of Empire, 1450-1800* (Aldershot: Ashgate, 1998). Especially pertinent in the present context is James Muldoon, *Empire and Order: The Concept of Empire, 800-1800* (New York: St. Martin's Press, 1999).

certain romantic quality in arguments that seemed to deny the very reality of universal empire they were supposed to demonstrate? I noted that universal empire was described as a phantom and a mystical idea.^② I found a brilliant insight articulated with ironic clarity in the *Persian Letters* of Montesquieu. Rica, writing home to Persia about what he calls the Germanic Empire, points out that “it is only a shadow of the first Empire, but I believe it is the only power ever on earth not to be weakened by divisions; the only one, I further believe, strengthened in proportion as it loses land, and which, slow though it is to profit by success, becomes invincible in defeat.”^③ Clearly the view of empire as a phantom was something more than a misleading characterization of its political reality. Clearly it carried deep historical conviction, imbued with real historical significance. Yet just as clearly it seemed incapable of putting the political reality of universal empire into convincing language.

This was a puzzle that I wanted to solve. I will not claim that I have solved it. But I have an idea for a solution that I would like to share with you. I found the key in a famous passage in the writings of Bartolus of Sassoferrato (1313/14-1357), the well-known late medieval commentator on Roman law.^④ Bartolus maintained that even those Italian city states who were not obliged to obey the emperor because of certain privileges they had received from him did nonetheless belong to the Roman people and had to acknowledge the emperor’s right to rule the world. He went on to maintain that “the same is true of those other kings and princes who deny that they are subject to the king of the Romans, like the king of France, the king of England, and others like them. For so long as they admit that he

② For an influential formulation see Frances Amelia Yates, *Astraea: The Imperial Theme in the Sixteenth Century* (London, Boston: Routledge & K. Paul, 1975), 1, 2: “The transitory and unreal character of the empire of Charles V is the aspect of it usually stressed by modern historians. Whilst not denying its unreality in the political sense, it is the purpose of the present essay to suggest that it is precisely as a phantom that Charles’s empire was of importance, because it raised again the imperial idea and spread it through Europe in the symbolism of its propaganda, and that at a time when the more advanced political thinking was discrediting it. ... These revivals, not excluding that of Charlemagne, were never politically real nor politically lasting; it was their phantoms which endured and exercised an almost undying influence.” Concerning the empire of Constantine the Great, Yates maintains that “it would seem that what is developing here is a species of secular mysticism, or mystical secularism, with the Emperor as a kind of temporal Christ, redeeming man back to the Earthly Paradise with his justice, bringing in a full golden age with his imperial order.” *Ibid.* 8.

③ Charles de Secondat Montesquieu, *The Persian Letters*, trans. George Robert Healy (Indianapolis: Bobbs-Merrill, 1964), 231, letter nr. 136.

④ See Julius Kirshner, “Bartolo da Sassoferrato,” in *Dictionary of the Middle Ages*, ed. Joseph R. Strayer (New York: Charles Scribner’s Sons, 1982-1989), 2:114-116.

is universal lord (*dominus universalis*), they do not cease to be Roman citizens, for the reasons given above, even though they may remove themselves from his universal lordship (*dominium universale*) by virtue of privileges, prescription, or other such reasons.”⁵

This passage raises a not inconsiderable difficulty. What on earth can Bartolus have had in mind when he maintained that the king of France was fully entitled to remove himself from obedience to the emperor’s universal lordship just so long as he acknowledged that the emperor was universal lord? There seems to be a flat-out contradiction here. Either the emperor really is ruler of the world. Then the king of France needs to obey him. Or the king of France does not need to obey him. But then the emperor is obviously not ruler of the world. Yet this is not how Bartolus appears to view the matter. He insists that the king of France does not need to obey the emperor and yet insists as well that the emperor is truly lord of the world. Indeed, he claims that rulers who deny the emperor’s right to rule the world fall into heresy even if they need not obey the emperor anyway.⁶ How can this be?

The answer to this question came in two separate installments. First came the recognition that for Bartolus the right to rule the world did not entail the right to rule any particular part of the world. Bartolus uses a shepherd and his flock as an analogy. The

⁵ “Et idem dico de istis alijs Regibus et principibus qui negant se esse subditos Regi Romanorum, ut Rex Franciae, Angliae, et similes. Si enim fatentur ipsum esse dominum universalem, licet ab illo universali dominio se subtrahant ex privilegio, vel ex praescriptione, vel consimili, non desinunt esse cives Romani, propter ea quae dicta sunt. Et secundum hoc quasi omnes gentes, quae obediunt Sanctae matri Ecclesiae sunt de populo Romano.” Bartolus on *Digest* 49.15.24, s.v. *hostes*, *Opera* (Venice: Apud Iuntas, 1570-71), 6:228r col. a, no. 6. [I maintain that the same is true of those other kings and princes who deny that they are subject to the king of the Romans {i.e., the emperor}, like the king of France, the king of England, and others like them. For so long as they admit that he is universal lord, they do not cease to be Roman citizens, for the reasons given above, even though they may remove themselves from his universal lordship by virtue of privileges, prescription, or other such reasons. By the same logic virtually all people who obey Sacred Mother Church belong to the Roman people.] These words are taken from Bartolus’s commentary on the word *hostes* (“enemies”) in a passage of the *Digest* (the largest and most important of the four volumes constituting the body of Roman Law issued by Emperor Justinian in the sixth century A.D.) that deals with a distinction between enemies of the state and mere robbers or criminals. The standard edition of the *Digest* is *Digesta*, ed. Theodor Mommsen, *Corpus Iuris Civilis*, 1 (Berlin: Weidmann, 1872, frequently reprinted). There is an English translation by Alan Watson and others, *The Digest of Justinian*, 4 vols. (Philadelphia: University of Pennsylvania Press, 1985).

⁶ “Et forte si quis diceret dominum Imperatorem non esse dominum, et monarcham totius orbis, esset haereticus: quia diceret contra determinationem ecclesiae, contra textum Sancti Evangelij, dum dicit, Exivit edictum a Caesare Augusto ut describeretur universus orbis, ut habes Luc. ij. c. Ita etiam recognovit Christus Imperatorem, ut dominum.” Bartolus on *Digest* 49.15.24, s.v. *hostes*, *Opera*, 6:228r col. a, no. 7. [And if someone were to say that the lord emperor is not lord and monarch over the entire world, he would be a heretic, for he speaks against the determination of the church and the text of the Holy Gospel, where it says that “there went out a decree from Caesar Augustus that all the world should be surveyed,” as you can read in Luke, chapter two. Christ himself thus recognized the emperor as lord.]

shepherd has a right to dispose over the flock, but not over the sheep. The flock belongs to the shepherd. The sheep, however, belong to those who hired the shepherd to tend the flock. In just that way, Bartolus thought the world, like a flock of sheep, belongs to the emperor, but the parts of the world do not.⁷ The king of France was therefore free to rule France as he pleased, but only France, and only so long as he acknowledged that the emperor had the right to rule the universal flock. The emperor, meanwhile, had the right to rule the world, but only the world, and not France. His lordship was *truly* universal, but *only* universal. In that way the apparent contradiction could be resolved.

Yet this was obviously only half an answer. It left me in the dark about the difference between ruling the whole and ruling the parts, and it raised troubling questions about shepherds ruling flocks in which there are no sheep. I owe the other half to the work of my good friend and colleague Tamar Herzog. Prof. Herzog has recently published a book on citizenship in early modern Spain and Latin America.⁸ A central thesis of her book is that citizenship (*vecindad*) in early modern Spain rested on grounds entirely separate from obedience to the king. Citizenship was the right of those who belonged to a community (*vecinos*) to be acknowledged as members of that community. A good analogy for citizenship defined that way is membership in a linguistic or cultural community. Speakers of English, for example, may be considered citizens of English, as it were, not because they obey any particular ruler, state, or institution, but because they obey the rules of the language. Those rules are basic and powerful, as anyone who breaks them will soon enough find out. They guarantee the possibility of communication and constitute the ground on which the members of the community can meet. And yet they do not compel any one to say

⁷ “Ex hoc nota modum pronunciandi et exequendi, quando petitur universitas rerum, quod licet iudex pronunciet gregem esse meum, tamen restitutio fiet mihi detractis capitibus alienis. Pro hoc ego sum consuetus dicere in prima constitutione huius libri, ut cum Imperator sit dominus totius mundi. Et glossae dicunt eum dominum quo ad protectionem: quia cum alij sint domini singulariter, plures non poterunt esse domini in solidum. Ego quod Imperator est dominus totius mundi vere.” Bartolus on *Digest* 6.1.1, s.v. *per hanc autem actionem*, *Opera*, 1:172r col. b, nos. 1-2. [Now consider the method of pronouncing and executing judgment in a case involving {the vindication of a legal claim to} a certain whole {as for example a flock of sheep}. In a case like that the judge may pronounce that the flock belongs to me, but the flock will nevertheless only be returned to me after any individual heads belonging to someone else have been taken away. This is the reason why I am accustomed to say in my commentary on the constitution *Omnem* {i.e., the first imperial constitution in the *Digest*} that the emperor is truly lord of the whole world, even though the glosses say that he is lord only insofar as he protects everything, since different people cannot have complete control over the same thing.]

⁸ Tamar Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America* (New Haven: Yale University Press, 2003).

any particular thing; much less are they enforced by any central agency. So long as people speak the language, they will be recognized as citizens of English, no matter what they say or whom they disobey.

On this analogy empire the ancient way embodied the conviction that all human beings are members of one cultural community, never mind their many different ways of life, and never mind the many other groups—such as cities, nations, states, and families—with which they may identify. The unity of this community does not consist of what its members say or do, but of the language and the culture that they share. Perhaps that *is* a mystical idea. But no more so than the idea of any linguistic or cultural community.

Two factors thus go into making empire the ancient way. One is the point that Bartolus makes explicit: empire is universal, but only universal, and not to be confused with control over any particular part of the world. The other is a point that Bartolus takes for granted: empire is what we would call a culture, a civilization, perhaps even a church, but definitely not a state.

It seems to me that this analysis accomplishes three purposes. First, it removes empire the ancient way from the realm of mystical ideas. Second, it helps to understand why empire the ancient way declined and fell in late medieval and early modern times. And third, it leads to a better grasp of empire the modern way than we have had so far. Let me take up each point in turn.

First, we can now assign a reasonable meaning to the emperor's alleged right to rule the world. Acknowledging that right was meant to signify membership in a community, namely, the Roman people. Of course that community was not so much defined by language as by law. But neither law nor language depended for their success upon subjection to the force of a central authority. In this community law and language were transparent in a way such that no force was needed to procure obedience. Obedience rather followed from understanding—by no means a far-fetched possibility if one remembers that, etymologically speaking, obedience means first of all lending one's ear, and only secondarily doing what one has been told to do. Universal empire rested on the conviction that culture and politics were seamlessly joined together by understanding.

The function of the emperor was therefore neither to enforce obedience nor to command any particular kind of action, and his empire did not consist of armies or his ability to make his will obeyed. The emperor's function rather was to guarantee the unity of

language and law—of culture and politics—and his empire consisted of jurisdiction, what Bartolus called the power of law (*potestas iuris*), and especially the power of legislation, which he defined as the summit of jurisdiction. Of course laws can be broken and may have to be enforced. Of course the emperor might be called upon to put the law into execution. But since disputes are logically inconceivable outside some common linguistic ground, that was a different and entirely subordinate kind of responsibility.⁹ First and foremost the emperor was judge and legislator, not executioner. His rule assured that meaning could be transmitted without loss of understanding and that political obedience and disobedience were equally founded on the truth. Disobedience was no more incompatible with imperial rule than saying “no” is incompatible with speaking English.

Second, this helps us understand why empire the ancient way declined and fell. The reason is that language is never entirely transparent and politics never completely fused with culture. This is of course one of the central tenets of Christianity. Christ is the word. Christ is the truth. Indeed, Christ is the truth made flesh and promises a kingdom in which only the truth will rule. But Christ’s kingdom is not of this world, and communion is not communication. In this world, to quote St. Paul, the truth is not communicated “face to face,” but only “through a glass, darkly.”¹⁰ The point of the famous line to “render unto Caesar the things which are Caesar’s” is not that Caesar has a right to tax.¹¹ It is that Caesar has no right over the word. Christianity stresses that politics and culture are heterogeneous. It does so in the doctrine of the Trinity itself. The Father and the Son are equally divine, but separate persons. Thus Caesar has no right to rule the true community because no such community exists on earth.

⁹ Bartolus defined legislation as the first, and the right of the sword (*ius gladii*) as the second, in a total of six degrees of “pure empire” (*imperium merum*); Bartolus on *Digest 2, Opera*, 1:45 verso col. a. He also explicitly rejected the identification of “pure empire” with the ability to inflict punishment on the grounds that “pure empire” included the power to make laws: “Iac. de Are. fuit ille qui primo incepit ponere diffinitionem, et dicebat sic. Merum imperium est iurisdictione severioris ultionis inferendae, publicam utilitatem respiciens. Haec diffinitio non placet. Nam constat quod condere legem est meri imperij.” Bartolus on *Digest 2.1.3, s.v. imperium, Opera*, 1:48r col. b, no. 6. [Iacobus de Arena was the first to assert that “pure empire” consists of jurisdiction over matters of capital punishment, where public utility is at issue. That definition is not acceptable, because it is certain that “pure empire” includes legislation.]

¹⁰ “For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.” 1 Corinthians 13:12, King James Version.

¹¹ “And he saith unto them, Whose is this image and superscription? They say unto him, Caesar’s. Then saith he unto them, Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.” Matthew 22:20-21, KJV.

This is precisely what Bartolus denied. For Bartolus the world did constitute a true community, embracing earth and heaven. That is why he defined the right to rule the world as property and went so far as to suggest that an emperor from whom the right to rule the world was taken away would be entitled to sue for its return under the Roman legal action of *vindicatio rei*.¹² His point was obviously not that there exists a court in which the emperor could sue. His point was that the right to rule the world is not political but cultural in nature. Thus Caesar is a rather different kind of ruler from the universal emperor whom Bartolus had in mind, and rather more like the emperor with which I started, the kind whose rule relies on force.

It is of course debatable how central the heterogeneity of politics and culture is to Christianity. There have been forms of Christianity in which it does not seem to matter much, and there may be religions other than Christianity in which it matters more. But there can be no doubt about one thing: the heterogeneity of politics and culture is like a genie that no emperor can put back in the bottle once it has managed to get out. An emperor whose right to rule the world has been defied by the assertion that culture transcends his grasp is caught in a dilemma. If he gives in, his enemies can take his empire away. And if he fights, he merely proves that his authority rests, not on the truth, but on the force of arms. His choice is between hiding inside Kyffhäuser—the legendary mountain where the true emperor is said to bide his time and whence he will eventually return in order to restore the empire—or turning himself into the ruler of a state. If the true emperor goes into hiding, his empire falls to his enemies; if he becomes the ruler of a state, it falls to himself. In either case the heterogeneity of politics and culture is confirmed. Empire the ancient way thus suffers from a congenital deficiency. Precisely because it claims universality, it is incapable of self-defense. Once the taboo on its authority is broken, empire the ancient way can only shrink.

¹² “Nec obstat, quod alij sunt domini particulariter, quia mundus est universitas quaedam: unde potest quis habere dictam universitatem, licet singulae res non sint suae. Unde si alius teneret mundum, ipse Imperator posset vindicare.” Bartolus on *Digest* 6.1.1, s.v. *per hanc autem actionem*, *Opera*, 1:172r col. b, no. 2. [It is no valid counter argument that other people are lords over individual things, because the world is a kind of whole. Hence someone can be said to have this whole {like a lord}, even though the individual things do not belong to him. If someone else were to hold the world, the emperor could therefore vindicate his claim {in a court of law}.]

Third, I think this leads to a better grasp of empire the modern way. So far I have defined empire the modern way as founded on domination by some central authority, and I have drawn a sharp distinction between that kind of domination and universal empire. I did so for the sake of clarity. But leaving it at that would be a real mistake. There are good reasons for making that mistake. They arise from the circumstances under which early modern states established their right to sovereign independence from imperial control. For sovereignty originated in opposition to universal empire. It was defined as the exclusive, undivided, and territorially limited power of a sovereign ruler to impose his will and to demand unconditional obedience. This view was justified by drawing on ancient Roman views about *imperium* that were notoriously difficult to reconcile with jurisdiction and seemed to prove that Bartolus was fundamentally mistaken when he defined empire as a kind of jurisdiction.¹³ Rhetorically speaking, that was a masterstroke. But we need not believe the counterfeit history of ancient origins designed by early modern humanists to liberate early modern rulers from universal empire and endow them with territorial sovereignty. In historical reality, sovereignty is not derived from ancient Rome at all. It is a direct descendant of universal empire. Its essence consists of the same legislative power that Bartolus ascribed to the emperor. That power is quite different from Roman *imperium*. It is a legal power, as opposed to a military one; it governs all subjects equally; and it does not apply itself directly to particulars but rather carefully distinguishes between laws (matters of legislation) and privileges or decrees (matters of execution). On these points there is agreement among theorists of sovereignty as different from each other as Jean Bodin, Thomas Hobbes, and Jean-Jacques Rousseau. Bartolus had it exactly right: a sovereign ruler is emperor in his kingdom. But modern theorists of politics cannot afford to say so because, if they did, they would lay bare the dirty secret of modern sovereign states: that they aspire to the same coincidence of culture with politics and aim at the same kind of universality as empire the ancient way.

¹³ Early modern humanist historians of law never tired of pointing out that the medieval etymology of *iurisdictio* was wrong; see Gothofredus's standard gloss on the title of *Digest 2, De Jurisdictione*, in *Corpus iuris civilis in quatuor partes distinctum* (Frankfurt: Wust, 1688), 35 n. a: "Fallitur Accursius hoc titulo dum notat a ditione Iurisdictionem esse, cum sit a jure dicundo." [Accursius's gloss on this title is wrong to note that *iurisdictio* {jurisdiction} is derived from *ditio* {dominion}, for in fact it is derived from *ius dicere* {to declare what is right}.] It followed that empire (*imperium*) could not be construed as a species of jurisdiction (*iurisdictio*).

Thus empire the ancient and empire the modern way are complementary forms of one and the same political reality. Both seek to reconcile culture with politics, force with reason. They merely start from opposite directions. Empire the ancient way consists of a cultural community in search of political unity. The more the emperor insists on force in order to procure obedience, the more his power shrinks until he is compelled to choose between retreating into the legendary mountain or turning himself into a territorial ruler. Empire the modern way consists of a territorial ruler in search of cultural significance. The more he reaches for cultural significance, the more he is compelled to choose between self-annihilation and conquering the world. Empire the ancient way lasts only as long as it can shrink; empire the modern way lasts as long as it can grow.

Modern historians should therefore not be criticized for whatever romantic longing their writings may display, nor should they necessarily be blamed for their satirical dismissal of empire the ancient way. The longing and the dismissal reflect the same historical reality. Dante and Bartolus themselves were full of romantic longing for an empire that was shrinking fast. And what was the papacy's unwavering support for territorial rulers if not the most effective satire to which empire has ever been exposed? Empire the ancient way has always been something of an illusion, and empire the modern way is at the very least as old as the request to give to Caesar what is Caesar's. States claiming universality are bound to be defeated. But that defeat does nothing more effectively than to establish the liberty of culture from political control. That, I believe, is at the heart of Montesquieu's ironic observation that the Germanic Empire "is the only power ever on earth not to be weakened by divisions; the only one, I further believe, strengthened in proportion as it loses land, and which, slow though it is to profit by success, becomes invincible in defeat."¹⁴

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¹⁴ Charles de Secondat Montesquieu, *The Persian Letters*, trans. George Robert Healy, 231, letter nr. 136.