Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice

LAUREN BENTON AND BENJAMIN STRAUMANN

What role did the Roman legal concept of *res nullius* (things without owners), or the related concept of *terra nullius* (land without owners), play in the context of early modern European expansion? Scholars have provided widely different answers to this question. Some historians have argued that European claims based on *terra nullius* became a routine part of early modern interimperial politics, particularly as a response by the English and French crowns to expansive Iberian claims supported by papal donations. Others have countered that allusions to *terra nullius* marked a temporary phase of imperial discourse and that claimants relied more often on other rationales for empire, rarely mentioning *res nullius* or *terra nullius* and often explicitly recognizing the ownership rights, and even the sovereignty, of local polities and indigenous peoples.

In sorting out these arguments and counterarguments about *res nullius* and *terra nullius*, we find that scholars on both sides of the debate have relied on relatively unexamined assertions about the Roman legal concepts and the way they were being used in and outside early modern Europe. A common error is to conflate the idea that Europeans were deeply influenced by Roman law with the assumption that they were very familiar with Roman law concepts. Scholars' assessments of *terra nullius* tend also to collapse multifaceted arguments and actions taking place at many levels of imperial activity, assuming, for example, the existence of direct and clear connections between the writings of jurists and

Lauren Benton is Professor of History and Affiliate Professor of Law at New York University <lauren.benton@nyu.edu> and Benjamin Straumann is Alberico Gentili Fellow at New York University School of Law <benjamin.straumann@nyu.edu>. For helpful comments on earlier drafts, the authors would like to thank Jane Burbank, Paul Corcoran, Andrew Fitzmaurice, Daniel Hulsebosch, William Nelson, four anonymous reviewers for this journal, and the participants in the Legal History Colloquium at the NYU School of Law.

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scholars in Europe and the actions or pronouncements of imperial agents in empire. Most scholars have further failed to distinguish between pronouncements for different audiences. Writers engaged in intraimperial debates about the moral and legal legitimacy of colonial rule often referred more explicitly to the Roman doctrine of *res nullius*. Imperial agents attempting to support claims against other European powers tended in contrast to invoke *res nullius* indirectly, if at all, in presenting evidence for occupation, usually preferring rather unsystematic discussions of proofs of possession instead. These various arguments had consistent bases in Roman law and, in practice, formed part of a single repertoire from which imperial legal actors could draw strategically depending on local conditions, indigenous people's actions, and the state of interimperial rivalries.

Distinguishing among different arenas for discourse about *res nullius* in empire and correcting confusions about its Roman law origins will allow us to reconcile many of the seemingly opposing arguments and move towards a balanced and more nuanced interpretation of the doctrine's role in empire. Building this alternative approach to understanding *res nullius*, *terra nullius*, and empire requires two exercises. The first involves a reconsideration of these concepts in Roman law and a discussion of the sources on which Europeans were drawing as they constructed rationales for, and criticism of, empire. This analysis depends upon a consideration of what constituted international law at the time, what its formal sources were, and what texts were regarded as its repositories. The exercise will show that early modern scholars and writers often referred to *res nullius* in ways that, far from supporting imperial claims, bolstered sophisticated criticism of empire. The second task is to reassess the ways in which imperial claims were put forward and defended, with particular emphasis on the direct or indirect referencing of Roman law by nonscholars actively involved in imperial ventures.

Contrary to the views of some historians, our analysis will show that *res nullius* was a concept with a firm foundation in Roman legal sources, but *terra nullius* was merely derived from the Roman concept of *res nullius* by analogy. It turns out also to be somewhat misleading to describe either concept as constituting a "doctrine of a legal vacuum" or to conflate either term with rationales for imperial claims based on *vacuum domicilium* (vacancy).[1]

1. On *terra nullius* as a "doctrine of a legal vacuum," see Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America," *Despotic Dominion: Property Rights in British Settler Societies*, ed. in J. McLaren, A. R. Buck and N. E. Wright (Vancouver: University of British Columbia Press, 2005), 51. David Armitage discusses *vacuum domicilium* and *terra nullius* in tandem in his *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), 97. For a discussion of the obscure origins of the "seductive" term *vacuum domicilium*, sometimes as synonymous with *terra nullius*, see Paul Corcoran, "John Locke on the Possession of Land: Native Title vs. the 'Principle' of *vacuum domicilium*," Proceedings, Australasian Political Studies Association Annual Conference

All these concepts were nested within a larger context of private Roman law ideas about natural acquisition of private property by *occupatio*. Not surprisingly, in criticizing or defending imperial claims, Europeans often drew on Roman law without invoking these terms, using other words to allude to ideas similar but not identical to Roman law concepts. Without even addressing the complex question of whether and when writings on *res nullius* were available to Europeans engaging in debates about empire or developing imperial claims, we can surmise that they interpreted Roman legal ideas differently, and at times understood them imperfectly.

In addition to interpreting Roman law freely, Europeans were invoking elements of it in the context of ongoing debates about law in empire and, as a result, they used the ideas to different effect. The writings of Francisco de Vitoria, Domingo de Soto, Alberico Gentili, and Hugo Grotius provide good illustrations of the ways *res nullius* was used in intra- and interimperial debates about European expansion. Some of these writers' use of *res nullius* was sophisticated and technically accurate, betraying an intimate knowledge of the Roman sources. Such arguments often had more of a vertical, or intraimperial, audience and were more often than not critical of empire.

The European discourse on possession and occupation developed both in metropolitan centers and in empire. Our analysis of symbolic acts and statements about possession in the early modern Atlantic world will show that imperial agents engaged in and encouraged an inclusive, not to say scattershot, approach to legal rationales. They favored inclusion of both direct and indirect referencing of Roman legal language, in part precisely because they wanted their actions and words to be understood by European rivals. Even as they jockeyed for position and patronage within empires, they formulated arguments to present and defend sovereigns' claims before an interimperial, or horizontal, audience. Their main objective was to show *better* title to territories vis-à-vis competing empires rather than to defend claims to absolute title or moral legitimacy, and this interest led them to favor multiple, often vague allusions to *possession* over allusions to occupation and *res nullius*, a distinction that will become clearer once the Roman legal background is analyzed. If imperial agents referenced the doctrine of *res nullius* at all, they did so in rather unsophisticated ways, usually in very nontechnical language, and often in combination with other legal arguments.

Combining the analysis of the Roman law and its interpretation in early modern Europe with an understanding of the various audiences and agents involved and the broad-based nature of claims making allows us to move beyond the flawed alternatives of either viewing *res nullius* as a guiding

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(Melbourne: Monash University, 24–26 September 2007), http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/index.php#political_theory.

"doctrine of conquest" or concluding from its nonsystematic application that ideas about *res nullius* were ignored in the process of early modern empire building. The uneven and sometimes oblique references to *res nullius* in the context of European expansion in turn illuminate the place of Roman law in the construction of ideas about a legal order outside and between established polities and about imperial sovereignty in this period. The Roman law of the *Corpus iuris* and especially the *Digest* increasingly assumed the place of a source of norms between the emerging imperial polities, gradually superseding other sources, such as papal grants or certain customs. At the same time, Roman legal doctrines comprised a repertoire rather than a blueprint for designing imperial claims. Early modern writers were innovative in expanding the range and application of Roman sources to assess the legal and moral basis for European expansion, but they continued elements of a tradition developed by late medieval glossators in their focus on reinterpreting definitions of property in Roman private law.[2] The approach left open the possibility of incomplete, or even indefensible, claims to sovereignty or ownership in empire, with the concept of *res nullius* being used to undermine European claims to sovereignty in the newly discovered territories, or to attack rival empires' trade monopolies by questioning their exclusive right to control vast parts of the ocean. This *theoretical* discussion raging in universities and treatises and conducted often at a high level of abstraction was different from, but formed the background to, the attempts of imperial *agents* to support claims to broad and often ill-defined territories by citing settlements and markers as signs of possession and occupation—with "possession" and "occupation" understood less as technical Roman legal terms than as vague claims to legitimacy.

Our aim in this article is not to provide a comprehensive treatment of the sundry uses to which the concept of *res nullius* was put in the context of early modern European expansion. Rather, we seek to put forward a view that makes room for a reconciliation of some of the seemingly contradictory interpretations found in the research literature and to outline a more flexible framework for understanding the many arenas in which Roman law was invoked, and for multiple purposes. We find that while the concept of *res nullius* was indeed well known and used by early modern scholars and writers—and not only by nineteenth-century international lawyers—it was put to very different uses than those usually imagined. We also show that although imperial agents

2. For the doctrine of things common to all, see Richard Perruso, "The Development of the Doctrine of *Res Communes* in Medieval and Early Modern Europe," *Tijdschrift voor Rechtsgeschiedenis* 70 (2002): 69–94. Perruso emphasizes the weight of classical, especially Stoic, philosophy for the development of ideas of *res communes* in the sixteenth and seventeenth centuries.

busy with warding off other empires' and autochthonous claims did not use Roman legal concepts in any technical way, their claims of possession still betray a fleeting acquaintance with ideas loosely connected with Roman law. Our approach leaves open the possibility of early modern treatise literature using *res nullius* in the ways conventionally imagined, or of imperial agents acting on detailed knowledge of technical Roman legal concepts. But our assertion is that Europeans mainly invoked *res nullius* explicitly within critiques of the legal basis of empire and implicitly and unsystematically—alongside claims to possession—within a broad set of symbolic actions and statements designed to establish superior claims over imperial territories.

This article proceeds in four parts. First we try to give an assessment of the existing research literature. Part II discusses the Roman background of *res nullius*, and Parts III and IV will deal with the role of *res nullius* in early modern political and legal thought and in a sampling of symbolic acts connected with early modern imperial practice, respectively. A final section reflects upon the lessons of our analysis for an understanding of the influence of Roman law in early modern imperial practice and theory.

I. Two Views of *Terra Nullius*

Some historians write that the English embraced *res nullius* as a main rhetorical weapon against the Spaniards as if describing widely accepted historical fact. J. H. Elliott, for example, states that the English both employed *res nullius* to combat Spanish claims and relied on it as "the principal justification for seizing land from the Indians."[3] He notes that under the principle of *res nullius*, those who first discovered lands became their owners.[4] Linking invocations of *res nullius* to English perceptions of Indian land use, Elliott suggests that the concept was employed more readily in places in the New World that were only "thinly populated."[5]

For all these statements, Elliott relies on a single source: Anthony Pagden's *Lords of All the World*.[6] Given Elliott's and others' reliance on this text, it is perhaps useful to survey Pagden's arguments and the support he provides for them.[7] Pagden's broadest statement of the importance of *res*

3. J. H. Elliott, *Empires of the Atlantic World. Britain and Spain in America, 1492–1830* (New Haven, Conn.: Yale University Press, 2006), 12.

4. Ibid., 30.

5. Ibid., 32.

6. Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France, c.1500–c.1800* (New Haven, Conn.: Yale University Press, 1995). More specifically, Elliot cites two pages (and sometimes one page) from Pagden's book: 76–77.

7. We will discuss Pagden's somewhat different analysis of *res nullius* in another of his works below.

nullius in European colonizing runs as follows: "[T]he British, and to a somewhat lesser degree the French, were driven to legitimize their settlements in terms of one or another variant on the Roman law argument known as *res nullius*. This maintained that all 'empty things,' which included unoccupied lands, remained the common property of all mankind until they were put to some, generally agricultural, use. The first person to use the land in this way became its owner."[8] As Pagden's phrase "one or another variant on . . . *res nullius*" indicates, he presents the concept as an umbrella term encompassing a range of rationales for, and actions intended to secure, imperial claims. This approach allows Pagden to treat claims based on discovery, improvement ("agricultural" use), and settlement of "unoccupied lands" as parts of a single legal doctrine. It also permits Pagden to draw a line connecting European statements about claims based on *res nullius* from Thomas More to Locke to Vattel and, finally, to defenders of the British settlement of Australia.

While Elliott and others have followed Pagden in using the term *res nullius* to refer to a bundle of strategies for marking and defending claims, other scholars have also emphasized the continuities in European, and especially English, thinking about rights to "vacant" land over centuries of colonial expansion and rule. Like Pagden, for example, David Armitage draws connections across the centuries: "From the 1620s to the 1680s in Britain, and then in North America, Australia and Africa well into the nineteenth century, the argument from vacancy (*vacuum domicilium*) or absence of ownership (*terra nullius*) became a standard foundation for English and, later, British dispossession of indigenous peoples."[9] Here *res nullius* becomes *terra nullius*, a term that came into use in international law circles in the late nineteenth century. Debates have arisen among historians about whether the term should be used to characterize rationales for late eighteenth-century and early nineteenth-century imperial expansion when the term itself was rarely—if ever—cited before the late nineteenth century.[10] More important is to observe that Armitage's approach

8. Pagden, *Lords of All the World*, 76.

9. Armitage, *The Ideological Origins of the British Empire*, 97. For a critique of elevating *vacuum domicilium* to a position of prominence in early English discourse, see Corcoran, "John Locke on the Possession of Land." It is worth pointing out that Armitage characterizes *terra nullius* as "a standard foundation" rather than "the standard foundation" of English dispossession of indigenous peoples, an important difference that, if emphasized, brings the claim more closely into line with our approach and with that of Pagden's later works discussed below.

10. This debate has been most pointed among Australian historians. Curiously, a reexamination of Roman legal ideas and their early modern applications has been mostly marginalized from this debate. For example, Michael Connor accuses some Australian historians of elevating *terra nullius* to the position of a central doctrine in the conquest of Australia and the dispossession of Aborigines when there is no record of imperial agents using the term

effectively merges Pagden's views with the arguments of Tuck, whose influential account of the history of European thought on international order traces a neat parallel between two developments: (i) the elaboration of the natural law theory (running from More to Gentili to Grotius), including the view "that uncultivated land was unoccupied and might simply be appropriated," and (ii) the statements by colonists and colonial investors in Virginia and Massachusetts about their rights to "unpeopled" lands.[11]

These expansive characterizations of *res nullius* as a central principle of English (and French) colonizing have recently come under attack. Surveying early English and French claims making in North America, for example, Slattery states categorically that territories in the New World "were not *terra nullius*" and "could be acquired only by methods applicable to occupied territories."[12] For Slattery, the main evidence against the influence of ideas about *res nullius* consists in explicit claims by French and English officials that conquest or cession, rather than occupation or settlement, provided the foundation for their acquisition of new lands. Stuart Banner, although acknowledging that some colonists advocated seizures of land in North America on the assumption that it was "vacant," also asserts that "by the middle of the eighteenth century, imperial policy in North America had turned away from *terra nullius*."[13] Banner finds the key to overturning the assumption that Europeans relied on *terra nullius* in the series of acts and statements by Europeans indicating their recognition of Indian property rights, not

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until after it surfaced in late nineteenth-century international law cases. But he repeats the error in defining *terra nullius* as "land without sovereignty" rather than "land without owners." The former definition emerged in a late nineteenth-century international law and lightly distorts the view that would have been available, by analogy, to earlier imperial agents in Australia and that might easily have informed their strategies, in the same way that Europeans in early modern empire employed Roman legal rationales while also citing them unsystematically. Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Paddington, N.S.W.: Macleay, 2005).

11. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 123–25.

12. Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America," in *Despotic Dominion: Property Rights in British Settler Societies*, ed. John McLaren, A. R. Buck, and Nancy E. Wright (Vancouver: University of British Columbia Press, 2005), 72. Slattery's is an unfortunate choice of words, as occupation is precisely the method of choice when it comes to acquisition of *res* or *terra nullius*.

13. Stuart Banner, "Why Terra Nullius? Anthropology and Property Law in Early Australia," *Law and History Review* 23 (1) (2005): 95. See also Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass.: Harvard University Press, 2005).

realizing that *res* or *terra nullius* could be and were indeed used precisely in order to recognize Indian property rights—as should become clear in the next section. In contrast to Tuck's account of a tightly parallel development of views by European scholars and colonial agents, Banner perceives a sharp difference between theory and practice—some Europeans continued to cast around for justifications for colonial settlement well after settlers themselves had affirmed the purchase of land from Indians as the central mode for legitimately acquiring territory. Locke's writing, for example, was "an exercise in high theory" that both contradicted other views and had scant influence on land policy conducted by settlers who would have "known [that] Locke was wrong."[14]

Before turning to the question of why research in similar sources has produced such different conclusions, we should note that these opposing approaches represent only two variants in a wider set of arguments about the legal rationales for Atlantic empire. In this broader historiography, other questions about European legal approaches to empire are at stake. One issue that overlaps with the *res nullius* and *terra nullius* debate involves the degree to which Europeans were relying on distinct municipal legal traditions or were drawing on shared Roman legal sources. The most extreme example of the first view is perhaps the work of Patricia Seed, who has argued that the various nations involved in Atlantic colonizing employed strikingly different symbolic rituals of possession that were in many cases opaque to outsiders. Seed represents the English common law (mixed with some biblical sources) as the main foundation for English associations of ownership through improvement.[15] Against this view, Ken MacMillan has argued that Roman legal sources were closely followed in English discourse about discovery, occupation, and possession in the New World. Although MacMillan's approach marks the legal framework for competing claims as transnational, given its origins in a history of Roman law as European *ius commune*, it also situates the problem of imperial acquisition in the context of what Slattery has referred to as "a form of European regional law."[16] This perspective recognizes that distinctions between the law of nations and shared understandings of law across

14. Banner, *How the Indians Lost Their Land*, 47–48.

15. Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (Cambridge: Cambridge University Press, 1995); Patricia Seed, *American Pentimento: The Invention of Indians and the Pursuit of Riches* (Minneapolis: University of Minnesota Press, 2001).

16. Ken MacMillan, *Sovereignty and Possession in the English World: The Legal Foundations of Empire*, 1576–1640 (Cambridge: Cambridge University Press, 2006); Slattery, "Paper Empires," 52.

similarly structured legal orders were blurred in the sixteenth and seventeenth centuries.[17] The task of defining the relation of *res nullius* to acts of possession and occupation connects directly to the question of which legal framework—municipal law, emerging international law, or some blending of the two—defined discourse about colonial settlement and imperial claims.

It is worth noting, too, that alternative interpretations of the importance of *res nullius* in these processes play out in somewhat different forms in the historiography on earlier and later periods. We can point to an emerging consensus, for example, about the legal implications of papal bulls supporting Iberian expansion and, specifically, the Treaty of Tordesillas. Rather than awarding the Portuguese and Spanish crowns title (or sovereignty) to hemispheres divided by a north-south line in the Atlantic, the Treaty of Tordesillas marked off spheres of influence. That is, further acts were required for Spain and Portugal to establish dominion over particular territories within the spheres, even while each power was in theory protected from incursions by other Christian forces.[18] Further, the pope's jurisdiction over extra-European ventures was recognized as both limited in practice and expansive in certain circumstances—authority over spiritual matters could extend to other practices, even involving nonbelievers, that contravened divine law.[19] Recognizing these constraints on Iberian claims based on papal donations is consistent with the view that both the Portuguese and Spanish crowns tried for extended periods and at particular conjunctures to establish an interpretation of these grants as awarding title. It is only against the backdrop of this position that English and French references to rights based in discovery and occupation can be seen as historically novel. More broadly, the turn to Roman law sources formed part of a challenge to papal authority within international law and at the same time of a move towards a new doctrine of sources of legal obligation

17. On the idea of a global legal regime in the early modern period, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (New York: Cambridge University Press, 2002).

18. As Slattery states, "the papal grants took effect only when the grantee assumed 'actual and real possession'" ("Paper Empires," 55). In not granting sovereignty, the papal donations did not construe extra-European lands as unoccupied or unclaimed. Instead, the grants effectively conferred the right to possess newly discovered territories and/or acquire them by conquest (through the subjugation of non-Christians who by implication held sovereignty at the time of discovery) or cession. See Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Oxford University Press, 1996), 44–45.

19. James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250–1550* (Philadelphia: University of Pennsylvania Press, 1979); see also Benton, *Law and Colonial Cultures*, ch. 2.

between polities, a doctrine that accorded special weight to Roman legal materials.[20]

For nineteenth-century empire, some historians point to the importance of *terra nullius* but disagree on the details of how and when it was invoked as a legal doctrine, but others argue that it is significant that explicit references to *terra nullius* are in fact absent from the historical record of debates about colonial sovereignty. Suggesting, for example, that by the middle of the nineteenth century British observers and Australian courts had embraced *terra nullius* as a rationale for settlement in Australia without compensation to Aborigines, John Gascoigne asserts that this position was "part of the mental furniture of the founders," while Kercher places its emergence at the end of a period of legal confusion about Aborigines' legal status.[21] Connor has found no explicit references to *terra nullius* in the late eighteenth and nineteenth centuries in Australia.[22] Andrew Fitzmaurice points to the constructed and indirect application of *terra nullius* as evidence that the principle had never been well established as a part of imperial discourse—and he denies that there ever was anything resembling a doctrine of *res nullius* in Roman law.[23] Stuart Banner emphasizes the diversity of ways in which *terra nullius* fit within land acquisition schemes across the Anglo-American Pacific: Australia opted for "terra nullius by design," California "ended up as terra nullius" after treaty ratifications failed, and British Columbia "switched to terra nullius" after a period of land purchases.[24]

20. See for this change in the doctrine of sources of law, B. Straumann, "'Ancient Caesarian Lawyers' in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius' *De iure praedae*," *Political Theory* 34 (3) (2006): 330, 332.

21. John Gascoigne, *The Enlightenment and the Origins of European Australia* (Cambridge: Cambridge University Press, 2002), 8; Bruce Kercher, "Native Title in the Shadows: The Origins of the Myth of Terra Nullius in Early New South Wales Courts," in *Colonialism and the Modern World: Selected Studies*, Gregory Blue, Martin P. Bunton, and Ralph C. Crozier (Armonk, N.Y.: M. E. Sharpe, 2002), 100–119.

22. Connor (*Invention of Terra Nullius*) goes on to accuse other historians of political motives in adopting uncritically the assumption that *terra nullius* had featured prominently in nineteenth-century debates and to criticize jurists for suggesting that the term had historical relevance in the decision in *Mabo v. The State of Queensland* (1992) establishing native title. For a comment on his position, see note 10 above. Our hope is that Connor and his critics might gain something from our analysis of *res nullius* in early modern discourse and colonial practice.

23. Andrew Fitzmaurice, "A Genealogy of *Terra Nullius*," *Australian Historical Studies* 129 (2007): passim, 6. For an extension of his arguments, see Andrew Fitzmaurice, "Moral Uncertainty in the Dispossession of Native Americans," in *The Atlantic World and Virginia, 1550–1624*, ed. P. C. Mancall (Chapel Hill: University of North Carolina Press, 2007), 383–409, where an excellent account of the Salamancan School's stance on empire is given.

24. Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge, Mass.: Harvard University Press, 2007), 3.

The diversity of interpretations and the language they employ suggest that the term *terra nullius* may be standing in for not a single doctrine but a legal orientation and a diverse set of practices. Curiously, after asserting so strongly just one side of the debate, it is Pagden who renders the connections between seemingly opposed assessments of the influence of *res nullius* most clearly. The careful qualifications appear in an essay on the "struggle for legitimacy," in which Pagden notes that "the *res nullius* argument . . . could only be made effective if it required some claim to prior discovery, since discovery constituted the necessary first step towards effective occupation."[25] Pagden also acknowledges that the intent to demonstrate "effective occupation" motivated attention to agricultural improvement: "only the continuing fact" of settlement could ultimately confer European dominium. Prescription, in other words, added a further layer of legitimacy to claims. Such statements take Pagden rather far from his initial emphasis on *res nullius* and natural rights. Sovereignty depended upon occupation, which in turn was preceded by discovery and also required prescription; these arguments rested upon "legal, not natural rights." Pagden concludes that *res nullius* and prescription "were part of the same essentially existential juridical argument."[26] Slattery, having argued forcefully against the importance of *res nullius*, at times does not seem far from this perspective. He emphasizes French and English instructions to acquire territory in the New World by conquest or cession, yet the language he reports commands not just conquest but also occupation. The Marquis de la Roche, for example, traveled to North America in 1577 with instructions "to raid, seize, besiege and make his own each and all of these lands that he will be able to make himself master

25. Pagden, "The Struggle for Legitimacy and the Image of Empire in the Atlantic, to c. 1700," in *The Origins of Empire*, ed. Nicholas Canny (Oxford: Oxford University Press, 1998), 34–54; it is unclear, however, why discovery would constitute a necessary condition for occupation—obviously one can occupy something without having discovered it first.

26. Ibid., 50. Pagden continues this approach in a still more recent article ("Law, Colonization, Legitimation, and the European Background," in *The Cambridge History of Law in America, Vol. I, Early America (1580–1815)*, ed. Michael Grossberg and Christopher Tomlins [Cambridge: Cambridge University Press, 2008], 1–31). But here Pagden again emphasizes the term *terra nullius* as a key part of the wider discourse, while also stating that the term itself was not used until the nineteenth century. The distinction between his presentation in this article and our understanding of the influence of Roman legal ideas about *res nullius* is subtle but, we think, important. Pagden writes that in Roman law "any territory that had not been formally enclosed in some manner and could not be defended, or had once been occupied, but was now abandoned, was held to be vacant" (200). We emphasize that such an explicit definition was present mainly within critiques of empire, but its implicit form emerged only indirectly in imperial practice, and in somewhat muddled form, through a congeries of strategies for asserting and defending claims.

of, provided that they do not belong to our friends, allies and confederates of the Crown." Though this language betrays a concern with conquest, Slattery must also report that the commission directed La Roche to establish effective occupation: "to have fortresses built, constructed, erected, fortified and strengthened . . . in order to retain, preserve, occupy, hold and possess them under our protection, and to enjoy and use them."[27] Despite his claims to the contrary, Slattery shows that references to conquest and occupation formed part—to use Pagden's phrase—of a single "juridical argument."

We are now in sight of the solution to the problem of seemingly stark differences in interpretation of the role of *res nullius* in imperial discourse. The solution has several parts. One requires us to clarify the relation between *res nullius* in Roman law and other modes for acquiring property. Doing so allows us to weigh the degree to which it is accurate to fold legal arguments about occupation, discovery, possession, and prescription into a category defined as the application of a doctrine of *res nullius*. Following Roman sources, the reverse seems more logical, that is, *res nullius* is a term used to describe things that can be owned through a mode of acquisition, occupation, that sits within a larger set of modes of acquisition. A clearer understanding of Roman legal principles must be supplemented with consideration of their elaboration in sources that would have been available to sixteenth- and seventeenth-century commentators and early colonial actors.[28] Finally, it is important to recognize that the coexistence of seemingly different rationales for colonial acquisitions was no accident. Authors and speakers often understood the arguments to fit together under the law, or they considered the presentation of multiple arguments itself as a viable and important legal strategy.

II. Roman Law and the Doctrine of *Res Nullius*

The Roman empire owed its existence mainly to conquest. This fact rendered the question of the legitimacy of the empire dependent upon the

27. Slattery, "Paper Empires," 61.

28. We will not here engage in a discussion of the thorny question of the respective weight of the *Corpus iuris*, the *Glossa ordinaria*, and the later interpretations of the commentators. When we speak of the influence of Roman law, we do not wish to deny the importance of the glossators and the commentators. For the purposes of this article and the level of generality at which it operates, however, nothing seems to hinge on a more fine-grained rendering of what Roman law meant to our writers and imperial agents. On the influence of the Roman law on the natural law ideas of the glossators, see Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Munich: Max Hueber, 1967).

legitimacy of the conquests leading up to Roman rule. The legitimacy and authority of direct Roman rule in the provinces of the empire hinged on a doctrine concerned with the legitimate waging of war, the doctrine of the just war (*bellum iustum*). However, war was not the only way acknowledged by the Romans leading to legal authority and rights over territory, people, or things, nor was the doctrine of just war the only important Roman legacy to early modern authors concerned with empire. Cicero, in his influential work on practical ethics and political thought, *On Duties* (*De officiis*), discussed both public and private rights over territory and things and explained the emergence of such rights—arising out of some sort of a natural condition—thus: "Nothing is private by nature, but rather by long occupation [*occupatio*] (as when men moved into some empty lands in the past), or by victory (when they acquired it in war), or by law [*lex*], by settlement, by agreement, or by lot [*sors*]. The result is that the land of Arpinum is said to belong to the Arpinates, and that of Tusculum to the Tusculani. The distribution of private possessions [*possessiones*] is of a similar kind."[29] Although *On Duties* is a philosophical rather than a legal work, Cicero's terminology shows that he was developing his ethical ideas in close analogy with private Roman law when talking about the ways in which rights, both public and private, over territory and things first emerged. It is certainly noteworthy that Cicero's explanation encompasses both sovereign legal authority and private property, thereby foreshadowing and effectively anticipating the analogy between domestic private law and public international law with which the early modern writers on the law of nations are so often credited. Cicero's list of ways of acquisition of public rights seems fairly exhaustive.[30] Of the various methods by which the rights in question could be acquired, three are potentially relevant for what we would nowadays consider international or external sovereignty, namely, occupation (*occupatio*), victory in war, and, possibly, acquisition of territory through interstate agreement (*pactio*). Only acquisition of empty lands by occupation is original, *ab initio*, without any conveyance, be it voluntary or not (such as in the case of victory in war).

29. Cic. *de off.* 1, 21: *Sunt autem privata nulla natura, sed aut vetere occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello potiti sunt, aut lege, pactione, condicione, sorte; ex quo fit, ut ager Arpinas Arpinatium dicatur, Tusculanus Tusculanorum; similisque est privatarum possessionum discriptio*. The translations are taken from Cicero, *On Duties*, ed. M. T. Griffin and E. M. Atkins (Cambridge: Cambridge University Press, 1991) and have on occasion been modified.

30. See A. R. Dyck, *A Commentary on Cicero, De Officiis* (Ann Arbor: University of Michigan Press, 1996), 110.

Cicero's choice of the term "occupation" warrants the conclusion that he is thinking here of something analogous to the private Roman law doctrine of the acquisition of unowned things (*res nullius*). However, the fact that he is using the term *occupatio* in conjunction with the qualifying adjective "long" (*vetus occupatio*) makes it probable that he is also drawing an analogy to a different private Roman law doctrine, namely, acquisition of ownership by possessing the thing for a certain period (*usucapio*). In what follows, we will try and give a brief survey over both doctrines. Note that we will focus not on the law of Cicero's time, but on Roman law as it appears in Gaius and especially in Justinian's *Digest*, since it is in this latter shape that the early modern authors knew it.[31] A further principle from Roman law, closely related to the doctrine of *res nullius* but distinct, deserves mentioning here because it was to have an impact on the way early modern writers on the law of nations formulated their arguments: the principle of *thesauri inventio*, under which a treasure with no traceable owner goes to the finder. We shall discuss it in conjunction with *res nullius*.

Res nullius are things belonging to no one. In the Roman sources they are discussed in the context of modes of acquisition of ownership (*dominium*). Things that belong to no one are susceptible to being acquired by taking (*occupatio*), a mode of acquisition understood by the Roman jurists to be natural, based on natural reason and the *ius gentium*, and therefore open to Roman citizens and noncitizens (*peregrini*) alike—an aspect that is obviously of no small importance when it comes to the early modern use of this doctrine. Here is Gaius on the acquisition of ownership of unowned things:

> Of some things we acquire ownership [*dominium*] under the law of nations [*ius gentium*] which is observed, by natural reason, among all men generally, of others under the civil law [*ius civile*] which is peculiar to our city. And since the law of nations is older, being the product of human nature itself, it is necessary to treat of it first. So all animals taken on land, sea, or in the air, that is, wild beasts, birds, and fish, become the property of those who take them. . . . What presently belongs to no one [*quod nullius est*] becomes by natural reason the property of the first taker [*occupans*]. So far as wild animals and birds are concerned, it matters not whether they be taken on one's own or on someone else's land. . . . Any of these things which we take, however, are regarded as ours for so long as they are governed by our control [*custodia*]. But when they escape from our custody and return

31. For the property law of the late republican period, see A. Watson, *The Law of Property in the Later Roman Republic* (Oxford: Clarendon, 1968), 71 and passim.

> to their natural state of freedom, they cease to be ours and are again open to the first taker.[32]

Unowned things can thus be acquired by anybody, Roman citizen or not, under the law of nations (*ius gentium*) by taking them (i.e., by *occupatio*). The effective seizure of an unowned thing was sufficient for establishing ownership, *occupatio* being an instant conveyer of ownership; however, with loss of actual control, ownership would be lost too, so that ownership (*dominium*) was limited by factual possession (*possessio*). It does not seem as if Gaius had meant to establish a *numerus clausus* of unowned things here with his list of "wild beasts, birds, and fish," but had offered merely a few examples. However, it is important to note that title to certain classes of things could not be gained by *occupatio*. Things that were open to everyone (*res communes*), for example, such as the high seas or air, could not be acquired by capture. Such things were not susceptible to being in anybody's private property, nor could they possibly become public property (*res publica*), a rule that was to become very important for the early modern writers on the law of nations in their quarrels over the freedom of the seas. For our purposes a further class of things not susceptible to acquisition by *occupatio* should be mentioned: land. Provincial land could not be acquired by capture because it was in the property of the Roman state, while Italic land belonged, to the degree that it was not also in the public domain, to the category of *res mancipi*, things that could only be acquired according to rules of the civil law (*ius civile*) and not under the *ius gentium* (with *occupatio* being, as discussed, an institution of the latter). It must be kept in mind, however, that these rules related to the acquisition of land went through a considerable process of change and that what the early modern writers on the law of nations were drawing upon was often Justinian's postclassical Roman law, which had given up the strict distinction between *res mancipi* and other things and which accordingly made it seem possible to apply *occupatio* to land.[33]

Another category of things that could be acquired by simple seizure (*occupatio*) and was similar to the category of unowned things was that of *res derelictae*, that is, intentionally abandoned property, which was held—by the more influential strand of Roman legal thought at least—to be unowned (*res nullius*) from the time of abandonment. It seems that there was a requirement in place that the occupier actually

32. Gai. *Dig*. 41, 1, 1–3: the translation is taken from A. Watson, ed., *The Digest of Justinian*, 2 vols. (Philadelphia: University of Pennsylvania Press, 1985).

33. See Max Kaser, *Römisches Privatrecht*, 16th ed. (Munich: Beck, 1992), 122.

know that the thing had been intentionally abandoned by its previous owner.[34]

An interesting principle that was influential in early modern legal writing on the law of nations is acquisition of ownership of treasure by the finder of the treasure (*thesauri inventio*), a treasure being something valuable without a traceable owner. Like *occupatio*, *thesauri inventio* is a mode of acquisition said to be based on natural equity (*naturalis aequitas*)[35] and not on the civil law. Yet, it rested on Emperor Hadrian's legislation,[36] and it might very well be that *occupatio* was held by the Roman jurists to be the legal basis of this mode of acquisition, too, as it is not simply the first person to see the treasure to become the owner, but the first person effectively to control the treasure.[37] Still, discovery seems to be important in the Roman sources and adds a key element not contained in the rules underlying the doctrine of *res nullius*, one that was to be of great significance for early modern lawyers writing in the age of discoveries.

In case a thing did have an owner, there was still a way in Roman law of acquiring ownership over it other than from the existing owner, namely, *usucapio*, the acquisition of ownership (*dominium*) by possession (*possessio*) for a certain time.[38] Importantly, this mode of acquisition, going back to the Twelve Tables,[39] is part of the civil law (*ius civile*) and hence not thought of as a "natural" way of acquiring a thing (unlike acquisition by *occupatio*). For the same reason, *usucapio* was at least originally not open to noncitizens and was restricted to things that could be owned under the rules of the *ius civile*, such as land in Italy. There are two main requirements for this mode of acquisition of ownership. First, there must have been uninterrupted possession of the thing in question, two years for land and one year for movables. Possession in Roman law was distinct from ownership in that it was based on fact rather than on entitlement[40]—a "person who had a thing and intended to possess it was its possessor."[41] The second requirement for *usucapio* is that the possession must have started in good faith and with a good cause; so somebody acquiring real estate in good faith from a person other than the owner of the thing

34. See *Dig*. 41, 7, 2pr. See also W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 2nd ed. (Cambridge: Cambridge University Press, 1932), 206.

35. *Inst*. 2, 1, 39.

36. Ibid.

37. See Buckland, *Text-Book*, 219.

38. For *usucapio*, see *Dig*. 41, 3, 1.

39. See Cic. *top*. 4, 23.

40. David Johnston, *Roman Law in Context* (Cambridge: Cambridge University Press, 1999), 56.

41. Ibid.

under a contract of sale could become the owner by *usucapio* by possessing it without interruption for two years, except if the real estate had been previously stolen, in which case *usucapio* would not work. It is plausible that *usucapio*, not being part of the *ius gentium*, seemed less attractive a doctrine to the early modern writers on the law of nations. However, the concept of possession (*possessio*), understood as based on fact rather than legal entitlement, proved to be quite important for the practice of imperial agents, as we shall see in section four below. Possession, albeit originally a concept of the civil, not the natural, law, was very practical in that it could be established and protected much more easily than title to property; absent the use of force or stealth or a permission given to somebody else, the actual possessor of a thing was given possession of the thing by the praetor. This meant that the possessor did not have to prove title, which was absolute, in order to keep possession—he merely had to show that his claim to the thing in question was *better* than his contestant's claim, that is, that he had not gained possession by force or stealth from the other litigant and that he had not given permission to the other litigant. This made possession attractive to early modern empires in their dealings and arguments vis-à-vis competing empires; rather than having to establish title tout court, they simply could aim to show that they had a better claim than the competing power in question, without having to pay attention to the legitimacy of title and how the thing in question had been acquired.

We can take away several points from this summary to inform an understanding of early modern Europeans' uses of Roman law in asserting claims to imperial territories. The first is that Roman law regarding the acquisition of unowned things consisted at least since Justinian of a complex blending of several legal doctrines. Although these doctrines seemed to lend themselves to being used with regard to the public or private acquisition of territory, the application of *occupatio* to land and, more importantly, to the public acquisition of territory required the use of analogy, given the narrow range of things that could at least originally be acquired under the *ius gentium* and given the private law nature of the doctrine of *res nullius*. As we have seen above, Cicero had already drawn such an analogy in his work on ethics and political theory, *On Duties*. This point is important because it underscores that when Europeans in the sixteenth and seventeenth centuries drew on Roman law, they did not have the option of simply seeking to apply a unified doctrine to new conditions. A related point is that although classical Roman law clearly distinguished between *dominium* and *imperium*—the latter being legitimately wielded by Rome's magistrates and extended through (just) wars—analogies drawn from the realm of private law were applied to public sovereignty already in contemporary Roman political theory. No matter how clearly Roman

jurists distinguished between private and public law principles, some concepts and principles were bound to be applied across categories—occupation is a key example. Later European writers were thus not simply misinterpreting Roman sources when they represented signs of occupation in empire as symbols of sovereignty and as markers of private or corporate claims or jurisdictions. Finally, Roman law underwent change. The post-classical Justinian sources that would have been most readily available to early modern Europeans had introduced certain changes and simplifications, in particular conflating categories of things that could be owned. This was important because by shifting the emphasis from distinctions between kinds of property it created a more general category of modes of acquisition that might be applied in combination. *Res nullius* had firm foundations in Roman law, to be sure. But applying this concept to imperial territories and determining a recipe of actions to establish legal acquisition remained entirely open-ended problems of law.

III. *Res Nullius* in Early Modern Legal and Political Thought

We can now turn to the ways the early modern writers on the law of nations drew on the concept of *res nullius*, and to what uses the concept was put. We will highlight especially the following important aspects, which have been touched upon infrequently in the recent research literature: (i) the use of *res nullius* to support, or *deny*, claims of private property; (ii) the application of *res nullius* to issues of public rule or sovereignty, but (iii) in order to show the *insufficiency* of European claims to sovereignty in the newly discovered territories;[42] and, finally, (iv) the concept's application to the *high seas*, as opposed to land. First, though, we will need to discuss briefly the remarkable development that brought about a necessary condition for the use of the concept of *res nullius* in the first place, namely, the *revolution in the doctrine of sources of law* that accompanied the emergence of polities seemingly outside of the universal papal power's reach. Until at least the late sixteenth or even the early seventeenth century, the application of *res nullius*, a concept of the body of private Roman law contained mainly in Justinian's *Digest*, to matters beyond private legal disputes and beyond papal and imperial claims of sovereignty was by no means self-evident. Theology in general and canon law in particular were assumed to provide the bases for a translocal legal order. As late as 1613, the Scottish jurist William Welwod could attack Grotius's use of

42. For a similar argument, see Fitzmaurice, "Genealogy of *Terra Nullius*," 6–9; Fitzmaurice, "Moral Uncertainty in the Dispossession of Native Americans."

Roman law in the latter's *Mare Liberum* (1609) as outside the domestic realm of private law and exhort jurists to pay heed to a "simple and orderly reciting of the words of the Holy Spirit" instead.[43]

Title to both territories and the high seas was bestowed in the middle of the fifteenth century by papal bulls, and then increasingly by bilateral treaties between Spain and Portugal. The 1455 papal edict *Romanus Pontifex*, for example, bestowed title of possession over lands and the ocean.[44] In contrast to those older papal edicts, however, neither the edict *Inter Caetera* (1493) nor the Treaty of Tordesillas (1494) explicitly mentioned any *specific* kind of legal authority, such as possession, over territories or the ocean anymore. Rather, *Inter Caetera* stated a general prohibition on sailing without the king's permission to any of the overseas territories bestowed to the Spanish crown, and the Tordesillas treaty permitted Spanish ships to sail through the Portuguese zone, yet established restrictions on their course. In the Treaty of Saragossa (1529), Spain and Portugal established exclusive zones of navigation and trade in the East.[45] All three instruments thus stated the Spanish and Portuguese claims to some sort of exclusive authority over spheres of influence and the high seas but without giving the claims any legal specification, be it jurisdiction, property, or possession.[46] To be sure, the reciprocal claims became obsolete with the unification of Spain and Portugal in 1580, but the monopoly on access to and trade with the Spanish and Portuguese spheres of colonial influence, based on papal donation, discovery, and possession, remained in place and was reflected in custom. While the legal power of the papal bulls was contested from an early stage, both the bulls themselves and the empires favored by these papal bestowals asserted their binding character.[47]

43. The comment was made in 1613. See Straumann, "'Ancient Caesarian Lawyers,'" 329.

44. The bull *Romanus Pontifex* can be found in Frances G. Davenport, ed., *European Treaties bearing on the History of the United States and its Dependencies*, 4 vols. (Washington, D.C.: Carnegie Institution of Washington, 1917), 1:20–26. The original text in Latin is in the same volume, at pages 13–20. See also Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte*, 2nd ed. (Baden-Baden: Nomos, 1988), 301n1.

45. For the treaty of Saragossa, see Gundolf Fahl, *Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493–1649. Eine rechtsgeschichtliche Untersuchung* (Cologne: Heymann, 1969), 26–33.

46. Grewe, *Epochen*, 301: "Der ausschliessliche Herrschaftsanspruch der iberischen Nationen über die Weltmeere kam demnach in beiden Dokumenten unmissverständlich zum Ausdruck, wenngleich man davon absah, ihn juristisch zu qualifizieren." For the edict and the treaty, see Davenport, *European Treaties*, 1:72.

47. Most modern scholars agree that these papal bestowals did not have the power to create binding norms of international law. The bulls, however, succeeded in giving the supported claims more weight, which was important, for example, with regard to treaty negotiations. See Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die*

This was the traditional doctrine of sources that had underpinned the Iberian imperial claims and became the target of some of the most influential writers on the law of nations in the sixteenth and seventeenth centuries. Especially custom and the papal bulls were attacked from the 1530s onwards, by both some Spanish scholastics and Northern European protestant scholars, in favor of an alternative doctrine of sources relying increasingly on *Roman* legal sources. This was an original means of confronting the Iberian legal claims at their roots by way of establishing a fresh doctrine of sources of law. The new doctrine formally declared "nature" the source of the law governing the contested high seas and the newly discovered territories, while substantively it gave legal weight to certain rules and principles contained in Gaius's *Institutes* and Justinian's *Digest*.

Res nullius was one of those principles. Let us now turn to the ways the early modern writers on the law of nations drew on the concept, beginning with the application of *res nullius* to support or deny claims of private property or other claims short of sovereignty, in order to look then at some applications of *res nullius* to sovereignty claims. Using the concept to support or deny private property claims was important in the context of imperial expansion in two ways. First, the question arose whether all things in the new world had, upon the arrival of the Europeans, the status of *res nullius*, or whether the indigenous population in the newly discovered territories had any private property claims in the things in those territories—the implication of course being that if there were any such claims, then the objects covered by those claims could not qualify as *res nullius*. Second, in the event that some of the New World things did have rightful owners, what about things that were not part of anybody's property? Could at least those things be claimed as *res nullius*, or were there sovereign rights of indigenous polities standing in the way of such claims? The second question required that one find out whether the indigenous people had anything in the way of sovereign polities, and, if so, whether their sovereignty could bar the application of *res nullius*.

Vitoria in his *Relectio de Indis* (1539) had famously posed the question whether these "barbarians, before the arrival of the Spaniards, had true dominion, public and private."[48] With regard to both private and public

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Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart (Stuttgart: Steiner, 1984), 46–54; the book by Fisch is an invaluable resource. Fahl, *Grundsatz*, 129, concludes that the papal bulls were less important as the formal legal foundation of the Iberian claims than commonly assumed, yet he acknowledges that they were instrumental as a source of legal arguments.

48. Vitoria, "On the American Indians," in *Political Writings*, ed. with trans. by Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 239f., q. 1, art. 1.

ownership (or sovereignty), Vitoria dismisses several arguments that would establish that the Indians had not qualified for having private or public ownership rights. The argument from natural slavery receives especially short shrift: Vitoria interprets Aristotle interestingly as using the term "slave" merely in a metaphorical way, and not in order to refer to slavery in any technical legal sense. Entirely in accordance with Roman law, Vitoria states that "no man can belong by nature" to the "civil and legal condition" of slavery.[49] Dismissing five other arguments that would deny the Indians any private or public property rights, Vitoria arrives at the conclusion that even if one were to grant that "these barbarians are as foolish and slow-witted as people say they are, it is still wrong to use this as grounds" to deny them ownership rights. The Indians did therefore according to Vitoria possess "true dominion, both in public and private affairs" before the arrival of the Spaniards.[50]

Vitoria goes on to dismiss quickly the Spanish title to the new territories by right of discovery (*iure inventionis*), arguing explicitly from *res nullius*: "The law of nations . . . expressly states that goods which belong to no owner pass to the occupier. Since the goods in question here had an owner, they do not fall under this title. Therefore, . . . this title . . . provides no support for possession of these lands, any more than it would if they had discovered us."[51] Vitoria thus did not acknowledge title by discovery, accepting instead the principle of *res nullius*, which of course did not lend a scrap of support to the Spanish claim to title, given the Indians' possession of "true dominion, both in private and public affairs" previously established. Here we have an early modern example of the application of the private law concepts of *res nullius* and *occupatio* to the acquisition of public ownership or sovereignty by way of analogy.[52]

What about the things that were no one's property when the Spaniards arrived? Could such things be claimed as *res nullius*? And if so, under what authority? This is a question Vitoria treats under the rubric of the "first just title by which the barbarians of the New World passed under the rule of the Spaniards," namely, the title of "natural partnership and communication,"[53] whereby he puts forward the proposition that in case the Indians were already sharing certain things with strangers, it would be unlawful for them to prohibit the Spaniards from sharing and enjoying

49. Ibid., 251, q. 1, concl.

50. Ibid.

51. Ibid., 264f., q. 2, art. 3. See the excellent comments by Fisch, *Europäische Expansion*, 214.

52. Vitoria's argument clearly applies to both sovereignty ("public ownership") and private ownership; *pace* Fitzmaurice, "Genealogy of *Terra Nullius*," 12.

53. Ibid., 278ff., q. 3, art. 1.

them. Vitoria illustrates his proposition with the following example: "If travelers are allowed to dig for gold in common land or in rivers or to fish for pearls in the sea or in rivers, the barbarians may not prohibit the Spaniards from doing so."[54] This right of the Spaniards, however, goes only as far as other strangers are allowed to participate in the riches of the Indians, too; here Vitoria seems to allow for certain sovereign rights of the indigenous people's polity, as long as these rights are not exerted in a discriminatory way. This is not altogether clear, however, since Vitoria infers his proposition explicitly from his earlier propositions, which prohibit the indigenous people from interfering with the Spanish rights to trade and travel freely, without any qualifications—such a prohibition, Vitoria holds, would run counter to the law of nations (*ius gentium*), period. At the same time, Vitoria also establishes the unlawfulness of the indigenous polity prohibiting the Spaniards from sharing common things independently by reference to the *ius gentium* principle of *res nullius*, and in this case sovereign indigenous interference with the Spaniards' right seems to be excluded: "[I]n the law of nations [*ius gentium*], a thing which does not belong to anyone [*res nullius*] becomes the property of the first taker, according to the law *Ferae bestiae* (*Institutes* 2, 1, 12); therefore, if gold in the ground or pearls in the sea or anything else in the rivers has not been appropriated, they will belong by the law of nations to the first taker, just like the little fishes of the sea."[55] This principle Vitoria takes to be derived from natural law, making it sufficient to be binding. Even if it were not part of natural law, it would still be binding, however, since even in cases where the *ius gentium* as contained in the *Institutes* and the *Digest* is not derived from natural law, "the consent of the greater part of the world is enough to make it binding," according to Vitoria, "even if a minority disagree."[56]

Vitoria, then, holds that the principle of *res nullius* is binding for Spaniards and Indians alike, and that it cannot be interfered with by any

54. Ibid., 280.

55. Ibid. Cf. *Inst*. 2, 1, 12: *Ferae igitur bestiae et volucres et pisces, id est omnia animalia, quae in terra mari caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur*. "Wild beasts, birds, fish, that is, all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner." Translated by Thomas Collett Sandars, *The Institutes of Justinian*, with intr., trans., and notes (London, 1922; repr. Westport, Conn., 1970), 95. Pagden and Lawrance mistakenly hold that the relevance of that passage from the *Institutes* with respect to *dominium rerum* is denied by Vitoria in *De Indis*, q. 2, art. 3; but there, Vitoria aims quite clearly not primarily at *dominium rerum*, but at sovereignty.

56. Ibid., 281.

sovereign Indian rights (nor by any other sovereign power, for that matter). Three facets of this argument are worth keeping in mind here. Note that Vitoria is using private Roman law as a legal source for the dealings of Spaniards in the Indies, labeling it "law of nations," a label of course derived from Roman law as well. Second, this move allows him to limit any sovereign encroachment on rights of private property derived from *res nullius*. Third, Vitoria acknowledges sovereign rights on the Indians' part. These rights deserve some discussion, since they barred the Spaniards from treating sovereignty over the indigenous people as some sort of unowned thing that could potentially be claimed and exerted.

The application of the private law concept of *res nullius* to the public realm by way of analogy was something that Vitoria's understudied pupil and fellow Dominican Domingo de Soto had already done in his early *Relectio de Dominio*, delivered in the spring of 1535 when Soto was professor of theology at Salamanca.[57] After drawing a distinction between *dominium* in the sense of public rule on the one hand (*dominium iurisdictionis*) and in the sense of private property on the other (*dominium rerum*), Soto went on to ask "by what right do we retain the overseas empire that has just been discovered?" His answer: "I actually do not know. [*Re vera ego nescio*.]"[58] There was in particular one potential title to empire whose legitimacy Soto discussed and that owed its soundness to both factual and normative claims about the ancient Roman empire—the title of the Roman emperor to world dominion. This point became important for the Spanish Habsburgs after Charles I received the imperial crown in 1519 and thus became Holy Roman Emperor Charles V. Charles V's title to the newly discovered territories by virtue of being lord of the world (*dominus mundi*) rested on an interpretation of the status of the ancient Roman emperor and on a theory about how that status came to be transferred validly to the Spanish king. Soto, unlike other participants in the controversy of the Indies such as Vitoria, doubted the legitimacy

57. For Domingo de Soto's life and works, see Juan Belda Plans, *La Escuela de Salamanca* (Madrid, 2000), 399–500. For the text of the *Relectio*, see the first edition by J. Brufau Prats, with an introduction and Spanish translation; Domingo de Soto, *Relección* "*De Dominio*," edited by Jaime Brufau Prats (Granada: Universidad de Granada, 1964). For Soto's role in the Spanish controversy of the Indies, and for an excellent account of the reliance of that controversy on classical models, see David Lupher, *Romans in a New World: Classical Models in Sixteenth-Century Spanish America* (Ann Arbor: University of Michigan Press, 2003), 43–102; our English translations are taken from Lupher, *Romans in a New World*, 61.

58. Soto, *Relección* "*De Dominio*," 162: *Quo ergo iure retinemus Imperium quod modo reperitur ultramarinum? Re vera ego nescio*.

of the latter transfer of the imperial title,[59] but most of the debate over the validity of Charles's claim to the Americas centered on whether the ancient Roman emperor had been, *de iure* or *de facto*, lord of the world, a claim discussed on the basis of a passage from the *Digest* in which the Roman emperor Antoninus Pius declared: "I am master of the world [*egô men tou kosmou kurios*]."[60] Soto did not doubt the universal aspirations implicit in this phrase, nor that the Romans had indeed subjected most of the world known to them. His argument was rather that as a matter of historical fact, the "Romans never had the empire of the *whole* world, for it has never been recorded that Romans came to the antipodes or to these lands that have just been discovered. Therefore, the Romans could not hand over the sovereignty [*imperium*] over these nations to anyone, because they did not have it, any more than the French can create a king of Spain."[61] This argument of Soto's proved influential in the further history of the debate over the Indies. The civil lawyer Vázquez de Menchaca, for example, was to cite this argument of Soto's in his *Controversiae Illustres* (1564),[62] and Vitoria, while not discussing in detail the passage from the *Digest*, denied that the Holy Roman emperor had dominium over the entire world and hence did not accept title to the Spanish overseas empire by virtue of the Holy Roman emperor's alleged status.

Interestingly, Soto used the private Roman law argument from *res nullius* to counter the public Roman law argument based on the *Digest*

59. Soto in fact found Julius Caesar to have usurped his *imperium* unlawfully; see Soto, *Relección* "*De Dominio*," 150: *dato quod romani ius haberent supra aliquas nationes, tamen Iulius Caesar, ut in ipsius Commentariis compertum est, tyrannice et per discordiam civilem obtinuit Imperium*. For the medieval theory of *translatio imperii*, see Werner Goez, *Translatio imperii: ein Beitrag zur Geschichte des Geschichtsdenkens und der politischen Theorien im Mittelalter und in der Neuzeit* (Tübingen: Mohr, 1958).

60. *Dig*. 14, 2, 9; in Mommsen's translation: *Ego orbis terrarum dominus sum*. See Soto, *Relección* "*De Dominio*," 154. For the use of this passage (*lex Rhodia*) in medieval legal writings, see W. Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas* (Ithaca, N.Y.: Cornell University Press, 1975), 57f.

61. Soto, *Relección* "*De Dominio*," 152: *Nam romani non potuerunt dare Imperatori nisi quod habebant; sed romani numquam habuerunt Imperium totius orbis, numquam enim memoriae traditum est pervenisse romanos ad antipodas vel ad has terras quae modo inveniuntur; ergo, non potuerunt romani tradere Imperium harum nationum alicui, quia non habebant illud, non magis quam galli possunt facere regem Hispaniae*.

62. *Nam ut Sotus ubi supra recte ait, non eis concessit imperium universi orbis, sed tantum partis eius*. We have used the following edition, which is transcribed from the 1564 *editio princeps*: F. Vázquez de Menchaca, *Controversiarum illustrium aliarumque usu frequentium libri tres*, ed. F. Rodriguez Alcalde, vol. 2 (Valladolid, 1931), c. 20, 31. See also c. 20, 37 For an excellent discussion of Vázquez de Menchaca's political thought and its relation to the School of Salamanca, see Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 165–204.

passage made by the advocates of the imperial claim to world dominion. By invoking the maxim from the *Digest* that "no one can transfer greater rights to someone else than he has himself"[63] as the basic rule of the argument, Soto undermined the claim made by emperor Antoninus Pius in the *Digest* passage mentioned. The analogy between Spain and the "lands that have just been discovered" makes it obvious that Soto conceives of the Americas as anything but *res nullius*. He uses the concept in determining whether sovereignty (*dominium iurisdictionis*) over the Americas could have validly been acquired by the ancient Romans in the first place in order to be transferred to the Spanish emperor, accepting the conditions laid out by the *Digest* for the lawful *ab initio* acquisition of ownership (*dominium*) over an unowned thing, *res nullius*. Soto here clearly relies on *occupatio*,[64] namely, as we have seen the acquisition of an unowned thing according to the *ius gentium*, where the thing, after having been seized, must also constantly be held in order to be owned—ownership of such *res nullius* was thus limited by control (*custodia*), a condition the Romans as a matter of historical fact could simply not meet with regard to the overseas "lands that have just been discovered."

Alberico Gentili (1552–1608), an Italian Protestant in exile in England and a consummate Roman law scholar in the Bartolist tradition, discussing title to territory through occupation and discovery followed essentially Vitoria's argument concerning the Spanish claim to title by virtue of the right of discovery. Gentili, as Vitoria before him, accepted occupation of *res nullius* as legitimate but did not think that the territory claimed by the Spanish had in fact been *res nullius*. He shrewdly reproaches the Spanish with confounding discovery and *res nullius*: "And they [the Spanish] regarded it as beyond dispute that it was lawful to occupy [*occupare*] those lands which were not previously known to us; just as if to be known to none of us were the same thing as to be owned by no one [*in nullius*]."[65] As for Vitoria, *res nullius* for Gentili was a concept apt to undermine the Spanish claim to title of the new territories—mere discovery of territories did not bestow title, and the territories the Spanish occupied had not in fact been *nullius*, hence the occupation was not lawful.

It seems, then, that it was not until the second half of the eighteenth century that writers on the law of nations developed a theory of occupation and

63. Ulp. *Dig*. 50, 17, 54: *nemo plus iuris ad alium transferre potest quam ipse habet*.

64. For this mode of acquisition of ownership *iure gentium*, see above, and *Inst*. 2, 1, 12ff.; *Dig*. 41, 1, 3–6.

65. Gentili, *De iure belli libri tres* 1. 19, 144; the following edition has been used: Alberico Gentili, *De iure belli libri tres*, The Classics of International Law 16, 2 vols. (Oxford: Clarendon, 1933). We slightly modified the translation by John C. Rolfe contained in the second volume.

res nullius more amenable to the needs of expanding empires. The Swiss writer Emer de Vattel (1714–1767) in his *Le droit des gens* (1758) was instrumental in crafting a doctrine that differentiated between effective occupation on the one hand and indigenous nomads' claims on the other, pushing territories inhabited by "roaming" peoples rather than farming settlers into the realm of *res nullius*.[66] The early modern writers before Vattel who were drawing on *res nullius* and applying the concept to land were using the idea mainly to ends critical of empire.[67]

Having considered the application of *res nullius* to claims of private property and the concept's use to show the insufficiency of European claims to sovereignty in the newly discovered territories, we now finally turn to the concept's application to the high seas, as opposed to land, a use which perhaps proved to be its most widely influential. The distinction between land and sea was a fundamental principle of Roman property law, with the sea being qualified as belonging naturally, that is, according to natural law, in common to all men.[68] An upshot of this was that the municipal law of Rome (*ius civile*) provided for legal remedies against violations of this natural law principle.[69] This was to prove important for Grotius, who, defending the United Provinces' right of navigation to the East Indies against the monopolist claims of the Portuguese, tried to prove in his *Mare Liberum* (1609) that "neither the Indian Ocean nor the right of navigation thereon belongs to the Portuguese by title of

66. Vattel, *Le droit des gens*, 1, 18, 208. Emer de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, ed. Albert de Lapradelle, 3 vols. (Washington, D.C.: Carnegie Institution of Washington, 1916). Cf. Fisch, *Europäische Expansion*, 275ff; Tuck, *The Rights of War and Peace*, 191ff. It is worth mentioning that with regard to the earlier Spanish expansion, Vattel's arguments were equally critical of empire, since the autochthonous civilizations of Middle and South America were believed to have lived up to Vattel's civilizational standards.

67. With the exception of John Locke, and the possible exception of Richard Zouche, although both Locke and Zouche seem to think in terms of private law occupation, not occupation with effects on sovereignty; see Fisch, *Europäische Expansion*, 248. Our view runs counter to that of scholars such as Antony Anghie and Robert Williams and is more closely aligned with Andrew Fitzmaurice's position. See A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 13–31; R. Williams, *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990), 105ff.; Fitzmaurice, "Moral Uncertainty in the Dispossession of Native Americans," 386f.

68. See *Inst*. 2, 1, 1; *Dig*. 1, 8, 2, for the qualification of the sea as *res communis*. Cf. Perruso, "The Development," who suggests plausibly that the early modern natural lawyers depended for this idea not solely on the *Digest* but also and more importantly on philosophical works by Cicero and Seneca.

69. See Ulp. *Dig*. 47, 10, 13, 7, granting an action for insult (*actio iniuriarum*) for being prohibited from fishing in the sea.

occupation."[70] The Portuguese position was said to rely on the idea that the high seas were *res nullius*, susceptible to being occupied by the first taker. Yet Grotius was intent on showing that the body of law that had given rise to the very concept of *res nullius*, the Roman law contained in the *Institutes* and the *Digest*, did not support the characterization of the high seas as *res nullius*. Grotius argued in accordance with the Roman jurists that quite to the contrary, the high seas were not unowned, but common to all (*res communis*), and as such not open to occupation by anyone.

Grotius makes it clear that the sea is different from land. Land, although originally a *res communis* as well, can be occupied and acquired under the law of nature.[71] The sea, by contrast, can never be made the private property of anybody, "for nature does not merely permit, but rather commands, that the sea shall be held in common."[72] Grotius seems to take this to be a consequence both of the empirical fact that the sea cannot be occupied, and the normative second reason that nature seems, according to Grotius, to have made the sea vast and unsusceptible to occupation *in order* for it to be held in common. Grotius thus would not allow exclusive property rights under natural law even if the sea *could* be occupied. Such an occupation would not, as in the case of *res nullius*, create ownership, but merely the "semblance of ownership" produced by unjust confiscation

70. Hugo Grotius, *Mare liberum, The freedom of the seas, or, The right which belongs to the Dutch to take part in the East indian trade*, trans. with a revision of the Latin text of 1633 by Ralph van Deman Magoffin, ed. with an introductory note by J. B. Scott (New York, 1916), 22 (henceforth *ML*): *Mare ad Indos aut ius eo navigandi non esse proprium Lusitanorum titulo occupationis*.

71. See Grotius's description of the rightful original occupation of the empty area Holland—a *res nullius*—by the Batavi in his historical work *De antiquitate reipublicae Batavicae*, 2, 1: *eaque loca, ut Tacitus narrat, cultoribus vacua occupantibus cessisse, aequissima naturae lege, qua rerum sine domino iacentium domini fiunt qui primi eas possident*. ("[A]nd that this area was empty [as Tacitus records] when they took possession of it to use it as farmland, on the basis of this very just law of nature, which says that those who first take possession of unoccupied territory become its lords.") Hugo Grotius, *The Antiquity of the Batavian Republic*, ed. and trans. J. Waszink (Assen: Van Gorcum, 2000), 56f.

72. Grotius, *De Iure Praedae* 12, fol. 103 (=*ML* 5, 30): *Mare igitur proprium omnino alicuius fieri non potest, quia natura commune hoc esse non permittit, sed iubet*. The following facsimile edition of *De Iure Praedae Commentarius* (hereafter cited as *IPC*) has been used: Hugo Grotius, *De Iure Praedae Commentarius. A Collotype Reproduction of the Original Manuscript of 1604 in the Handwriting of Grotius belonging to the State University of Leyden*, The Classics of International Law 22, vol. 2 (Oxford: Clarendon, 1950). For the English translation we used the following recent edition (which reproduces the translation prepared by Gwladys L. Williams in 1950 for the Classics of International Law series): *Commentary on the Law of Prize and Booty*, ed. and with an introduction by Martine Julia van Ittersum (Indianapolis, Ind.: Liberty Fund, 2006).

(*iniusta detentio*).[73] The Portuguese, however, could in Grotius's view not even claim unjust confiscation of the high seas leading to the East Indies, since Portuguese ships were not able to hold the seas and effectively control them.

Grotius explains the distinction between land and sea in terms of a theory of the state of nature,[74] with the high seas having remained in the original natural state. He developed this idea of the sea as an enduring state of nature out of Roman law and Ciceronian political theory. Along with other goods such as air, the sea belongs to the class of things common to all. These goods, Grotius writes, "proceeded originally from nature and have not yet been placed under the ownership of anyone (as [the Roman jurist] Neratius points out); and in the second place, it is evident (as Cicero observes) that nature produced them for our common use."[75] Not only has the sea not yet been placed under the ownership of anyone and therefore remained in "that primeval state in which all things had been held in common,"[76] it is also not susceptible to be made subject to ownership, for two reasons to be found in Roman property law. First, it is empirically impossible to be occupied, and second, as a matter of natural law, it must be used in common by all men.[77] With this framework in place, it remained for Grotius to justify his choice of private Roman legal rules to govern relations between both private subjects and public entities in the state of nature, that is, on the high seas. Grotius, well aware of the momentous importance of this move, explicitly addressed the extension of private Roman law to the relations between polities and, after applying a discussion of servitudes (*servitus*, i.e., rights in the property of another) by the Roman jurist Ulpian to the high seas, justified it thus: "It is true that Ulpian was referring . . . to private law; but the same principle is equally applicable to the present discussion concerning the territories and laws of peoples, since peoples in relation to the whole of mankind occupy the

73. *IPC* 12, fol. 106 (=*ML* 5, 39): *Quia enim prima, ut diximus, occupatio res proprias fecit, idcirco imaginem quandam dominii praefert quamvis iniusta detentio*.

74. For Grotius as an early exponent of a theory of a natural state, see Benjamin Straumann, *Hugo Grotius und die Antike. Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht* (Baden-Baden: Nomos, 2007), 32–58; Straumann, "'Ancient Caesarian Lawyers,'" 337ff.

75. *IPC* 12, fol. 102' (=*ML* 5, 28).

76. *IPC* 12, fol. 104 (=*ML* 5, 34).

77. *IPC* 12, fol. 102' (=*ML* 5, 29): *Haec igitur sunt illa quae Romani vocant communia omnium iure naturali*. Three passages adduced from the *Digest* stem from the discussion in book 41 of the acquisition of ownership: *Dig*. 41, 1, 14; 41, 1, 50; 41, 3, 45. One is taken from book 43, dealing with interdicts preventing anything from being done in public places (*Dig*. 43, 8, 3f.), and one from book 47 which deals with obligations arising from delicts (*Dig*. 47, 10, 13, 7). The rest are from *Dig*. 1, 8, 10; 8, 4, 13.

position of private individuals."[78] It is this analogy between the domestic and international realms that establishes the validity of Roman legal principles for private subjects and sovereign polities alike and that furthermore justifies the application of the *res nullius* doctrine to territories and waters beyond the reach of Roman civil law as conventionally conceived. The possible application of *res nullius* to territories, as opposed to the high seas, however, was only a secondary aspect for Grotius, who was primarily arguing against the application of *res nullius* to the sea and exclusive rights of navigation and did not make a positive claim to justify the imperial takeover of land.

To conclude: The doctrine of *res nullius*, far from serving simply as an imperialist argument for the acquisition of sovereign rights overseas, was used in many more ways in the normative discussions surrounding European colonial expansion in the sixteenth and seventeenth centuries. First, *res nullius* served in its original purpose to govern acquisition of private ownership, with Vitoria insisting on its validity universally and even against sovereign claims to the contrary. Second, *res nullius* was put forward, most succinctly by Domingo de Soto, in order to *undermine* Spanish claims to sovereignty in the New World. Third, *res nullius* was used by Grotius on behalf of the nascent United Provinces and its trading companies to counter monopolist Iberian claims to rights of navigation on the high seas and to defend the doctrine of the free sea. All three applications involved, in different ways, the purposeful confusion of private and public law. They responded, too, to concrete problems posed by European imperial encounters, including relations with indigenous polities and shifting conditions of interimperial competition.

IV. Imperial Claims

Our account of European writers' and scholars' views on *res nullius* must be separated analytically from an understanding of references to *res nullius* by imperial agents, many operating far from Europe and with partial or indirectly acquired understandings of Roman law. It seems clear that European strategies did not follow a clear script about the actions required to establish sovereignty. Asserting and defending claims instead involved a scattershot legal approach, with multiple, overlapping, and even conflicting arguments being addressed to various, sometimes imagined, audiences.

78. *IPC* 12, fol. 105 (=*ML* 5, p. 36): *Verum est loqui Iurisconsultum [Ulpianum] de . . . lege privata, sed in territorio et lege populorum eadem hic est ratio, quia populi respectu totius generis humani privatorum locum obtinent*.

While the record affirms the influence of Roman law, including some traces of *res nullius*, in some claims of acquisition, it also reflects the uneven dissemination and reception of Roman legal ideas in the cultures of early modern Europe and its outposts and colonies. To the extent that voyage chronicles reveal the influence of the ideas of European jurists about the application of Roman law to imperial rule, they mainly stand as testimony to the imaginative and analogy-driven approach favored by early scholars of international law. If there was a single identifiable Roman legal idea that was more prominent in empire than any other, it would seem to have been possession, rather than *res nullius*. In Roman law, possession, based on brute fact rather than entitlement, could potentially lead to ownership by way of *usucapio*. But more importantly, possession constituted a claim to a thing that could easily be evaluated, much more easily than the claim to actual title, since it was only ever put forward against a specific contender—and then the question concerned who of the two contenders had the *better* claim, rather than who had absolute title. Inquiring about possession did not involve inquiring about the rightfulness of acquisition. How the contested thing in question had been acquired only played a role when the specific contender could claim that it had been obtained *from him* by force or stealth—initial acquisition by conquest from a third party, say from autochthonous peoples, would simply have no role in the context of competing claims between empires. Obviously this made claims of possession very attractive to imperial agents on the ground, who were mostly concerned with warding off claims of competing empires, not with justifying an absolute claim to dominion against everybody, including those who might have even better rights (such as indigenous peoples).

Claims about possession were combined creatively with reports about acts or rituals confirming the subordination of local inhabitants. Such reports were meant to show that a transfer of sovereignty had already taken place, making the argument from possession of a secondary character. In other words, European interpretations of local conditions mattered: In case the sovereignty of local Indian leaders was acknowledged, sovereignty was understood to have been acquired derivatively; in case their sovereignty was not acknowledged, an original, nonderivative claim had to be established by way of modes of acquisition that could secure *res nullius*, though possession would have been sufficient in the context of arguments vis-à-vis a competing empire. There is little evidence that those advancing such arguments paused to consider the apparent contradiction between a claim based on *derivative* acquisition, with the Indians being the original claimants, and a claim based on *ab initio* acquisition, with the thing having been in nobody's possession. Indeed, in many

cases the same act was supposed to serve in support of both arguments. Actions showing authority over indigenous inhabitants or their incorporation into colonial political communities as subjects could be interpreted as showing that a transfer of sovereignty had taken place, with implied consent, even if no formal ceremony had occurred.

We cannot offer an exhaustive treatment of these aspects of European claims making but will instead highlight examples that illustrate three points: (i) the creative combination of legal arguments by imperial agents drawing, often indirectly and in imprecise ways, on Roman law; (ii) the importance of possession over title as the basis for asserting claims superior to those of other powers; and (iii) the continued efforts to provide ample rather than specific support for claims, in part by emphasizing the foundation of political communities as an act that could stand as evidence for either possession or the peaceful acquisition of sovereignty. Illustrating these points does not depend upon showing that agents in empire were especially familiar with Roman law. If anything, an imprecise understanding of modes of acquisition and their legal relation was probably key to the combination of symbols and arguments in support of claims.

It would be helpful first to dispose of the notion that Europeans employed different sets of rituals of acquisition, even on the local level in the periphery of empire. Patricia Seed's argument that Europeans adopted different "national" approaches to "ceremonies of possession"—with, for example, the English favoring a "turf and twig" ceremony in which a piece of the land was the central prop, the Spaniards enacting rituals to claim suzerainty over people, and the Portuguese preferring stone markers coordinated with astronomical projections—does not hold up.[79] In addition to observing, as Ken MacMillan shows for the English, that Europeans relied heavily on widely circulating notions about the acquisition of territory as proscribed in Roman private law, particularly as expressed in Justinian's *Corpus iuris*, we find a common repertoire of ceremonies of acquisition and possession across European empires. The explicit purpose of the acts was to mark and communicate claims to other Europeans. Spaniards engaged in early reconnaissance and in New World conquest enacted a varied array of ceremonies, sometimes in combination or quick succession. They even used chunks of earth at times in

79. There is more—the French supposedly enacted possession by observing their acceptance by inhabitants and the Dutch through mapping. Patricia Seed, *Ceremonies of Possession*. For an older treatment of acts of possession that shows the variety and flexibility of ceremonies and their shared symbols, see Arther Keller, Oliver Lissitzyn, and Frederick Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400–1800* (New York: Columbia University Press, 1938). Also compare MacMillan, *Sovereignty and Possession in the English World*.

ways that resembled the "turf and twig" ceremonies said to be the exclusive preserve of the English in empire.[80] For their part, English settlers often followed what seemed to be—absent Catholic rituals—a script very similar to that of the Iberians. It made no sense, after all, for the English to draw narrowly on insular customary practices or to rely solely or even principally on common law traditions, when the shared references to civil law procedures for making ownership claims were widely available and far more useful in communicating claims across empires.

The stock-in-trade for early voyages of the English, French, Portuguese, Spaniards, and Dutch was to place markers—stone columns, wooden pillars, and, especially, crosses—at strategic spots, such as on islands in estuaries or at the joining of two rivers, where they might be both visible to other European travelers. Such markers undoubtedly signified inchoate claims to areas of undetermined dimensions. Their location near the mouths of rivers indicated an intention to travel and settle riverine regions and even vast watershed areas. This strategy cut across empires. The Portuguese captain Diogo Cão erected a *padrão*, or stone column, at the mouth of the Congo River on his first voyage in 1483; when he returned three years later and traveled to the fall line, his men made carvings in the cliff face to mark their progress. Cartier set up a thirty-foot-high cross in Gaspé Harbour in the Gulf of St. Lawrence in 1534, and Ribault erected a column in Florida "in a high place of the entrie of a great river."[81] On the first expedition to Jamestown, Newport erected a cross at Cape Henry near the entrance to the Chesapeake Bay, and another upriver at the falls that bore the inscription "Jacobus Rex. 1607."[82] On La Salle's voyage down the Mississippi in 1682, his pronouncement at a ceremony to erect a marker explicitly outlined French designs on the full length of the river and all its tributaries.[83]

The founding of forts or settlements, as MacMillan also notes for the English, could also signal inchoate, though slightly more advanced proof, of legitimate claims. This symbolism also carried across empires. When Spaniards heard rumors that La Salle had founded a settlement in an estuary somewhere along the Gulf of Mexico, they sent out multiple

80. See, for example J. H. Elliott, *Empires of the Atlantic World: Britain and Spain in America, 1492–1830* (New Haven, Conn.: Yale University Press, 2006), 31.

81. Keller et al., *Creation of Rights of Sovereignty*.

82. James Horn, "The Conquest of Eden: Possession and Dominion in Early Virginia," in *Environing an English Empire: Jamestown and the Making of the North Atlantic World*, ed. Robert Appelbaum and John Wood Sweet (Philadelphia: University of Pennsylvania Press, 2005), 31 and 33.

83. The document was drawn up on the spot and was signed by a notary and eleven witnesses. Keller et al., *Creation of Rights of Sovereignty*, 129.

expeditions to find and destroy the settlement between 1685 and 1689 precisely because of its potential importance as a marker of possession.[84] The same symbolic link explains Spanish anxiety about the fledgling settlements and simple fortifications erected by the English and Dutch at the mouth of the Amazon in the first decades of the seventeenth century; the Spanish noted the danger of allowing such footholds since "this river and its branches cross the whole mainland including Peru." Estuary settlements announced the intention to extend dominion inland.[85] It seems logical to assume that the significance attached to estuary forts and settlements reflected the wide circulation of analogies from the Roman private law for the acquisition of property through occupation.

Yet this function could easily have been attached to claims of possession rather than to title over unowned territory. Further, acts of settlement were symbolically very versatile because they were connected with functions of governance that could be associated in turn with the exercise of sovereignty. Establishing political communities, or enacting rituals showing the active presence of delegated legal authority, could simultaneously reinforce claims to possession and imply that a peaceful transfer of sovereignty had taken place. Combining the reporting of markers of possession with accounts of rituals of the transfer of sovereignty was a familiar strategy from an early date. We find Drake, for example, enacting a "turf and twig" ceremony on his 1577 voyage and then, on the coast of California in 1579, marking possession by a feast with local Indians and a ceremony in which the Indian "king" was said to have handed the captain his "crown" and "scepter." This symbolic surrender of sovereignty was significantly considered insufficient—probably because Drake understood that it was doubtful that the Indian "king" would be regarded by other Europeans as possessing sovereignty to begin with—and Drake followed it by a much more common act of possession: the erection of a wooden pillar, in this case with a brass plate engraved with the queen's name, Drake's name, and a date, with a silver coin inserted beneath it.[86] Similarly, at the same time that they belittled Spanish settlements in the Orinoco basin as unsubstantial and set up their own fledgling settlements and fortifications, the English also claimed that locals had ceded territory to them. Raleigh reported that on his first visit to the region "the Guianians … did willingly resigne all that territory to her

84. William Edward Dunn, "The Spanish Search for La Salle's Colony on the Bay of Espiritu Santu, 1685–1689," *Southwestern Historical Quarterly Online* 19 (4) (April 1916): 323–69, http://www.tshaonline.org/publications/journals/shq/online/v019/n4/article_1_print.html (accessed December 27, 2008).

85. Tyacke, "English Charting of the River Amazon," 75.

86. Keller et al., *Creation of Rights of Sovereignty*, 59.

Majesty, who by me promised to receive them, and defend them against the Spaniards."[87]

It is easy to imagine how accounts of serial ceremonies of possession and rituals marking the transfer of sovereignty might encourage a creative shorthand whereby acts demonstrating elements of sovereignty—holding trials, punishing criminals, installing subordinate royal officials, or recognizing local leaders as vassals—might be seen as signaling both possession and the acquisition of sovereignty by other means. This observation helps us to understand, for example, the royal instructions carried by Juan Díaz de Solís on an expedition of reconnaissance and settlement in the River Plate region in the early sixteenth century. Solís was ordered to take possession of new lands by making a show of legal authority: "[Y]ou shall make a gallows there, and have somebody bring a complaint before you, and as our captain and judge you shall pronounce upon and determine it, so that, in all you shall take the said possession."[88] The punishment of indigenous people before Spanish courts extended this symbolism by implying that a voluntary and peaceful transfer of sovereignty was already complete. We find Cabeza de Vaca, in trying to shore up his authority in over both Spaniards and Indians in Asunción in the 1530s, ordering a local Indian leader to be hanged as a traitor a short time after the leader had formally submitted to the Spaniards as a vassal.[89] Expedition leaders across regions seemed to have realized the value of staging trials both to signal the intent to settle and to affirm the extension of sovereign legal authority to remote places. In 1609 on his voyage up the St. Lawrence River, Champlain tried and hanged a locksmith, Jean Duval, accused of plotting to take over the tiny garrison at Quebec and hand it over to Basques in the region.[90] Duval's head was placed on a pike at a high point in the fort, an act that probably dramatized more effectively than markers or proclamations the French claim to the site of the fort and the region beyond, before an audience of Frenchmen, Spanish rivals, and Indians. Such rituals suggest that European sojourners and settlers were not making rigid

87. Sir Walter Raleigh, *The Discovery of the Large, Rich, and Beautiful Empire of Guiana*, 62, 53.

88. The instructions for Solís began by ordering him to make a clearing and erect "some small building" in the presence of an escribano and "the greatest possible number of witnesses." Keller et al., *Creation of Rights of Sovereignty*, 3f.

89. For further analysis of the context of this case, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010), ch. 2.

90. Henry Biggar, ed., *The Works of Samuel de Champlain*, vol. 2 (Toronto: Champlain Society, 1922–1936), 30.

distinctions between acts as signs of taking possession, potential markers of occupation, or symbols of sovereignty over new subjects.

Recognizing this flexibility provides us with a clearer understanding of an association long noted by intellectual historians between European rationales for empire and European ideas about civility. One variant of this account emphasizes the novelty of Locke's pairing of English rights to settle "vacant" lands with English capacity for civil society.[91] Yet since Locke wrote *after* the early colonial pronouncements that are said to reflect his blending of rights to property with the capacity for civility, we might search for broader and less singular roots to this association.[92] We see that the constitution of political communities operated from an early date as a marker of both civility and possession and that depending on the degree to which civility was taken to be a criterion of ownership, it might also be used to justify acquisition of *res nullius*. The founding of municipalities as a routine early step in establishing dominion in the Spanish empire was always potentially more than a move to consolidate authority and patronage. The emphasis on conquest as a dominant early mode of acquiring empire, particularly for the Spaniards, who are assumed to have received authorization for conquest of non-Christians from the pope, has probably led us to underestimate the degree to which Spaniards also amassed evidence in support of claims to particular regions within what was after all a sphere of influence.[93]

This point brings us back to the peculiar basis on which the debate about the role of *res nullius* or *terra nullius* in early empires has been waged. Because claims were advanced through an unsystematic assembling of signs and arguments, historians on one side or the other of the debate must necessarily engage in selective reading of available texts. Consider, for example, interpretations of writings about English dominion in early Virginia. Tuck cites a 1622 sermon of John Donne to the Virginia Company as an illustration of the English embrace of the doctrine of

91. This is a feature of Pagden's earlier discussions of *terra nullius* and of the approach of Tuck, both discussed in the second section above.

92. Corcoran, "John Locke on the Possession of Land."

93. We know that many Spaniards were very familiar with a private law doctrine of possession through the *Siete Partidas*, the thirteenth-century law code adopted in Castile, which relied heavily on Roman law sources. Owensby shows that ritual *actos de posesión* (acts of possession) were routinely used by both Spaniards and Indians in sixteenth- and seventeenth-century New Spain to announce claims in land, which might then be further supported or challenged through documentation and evidence of continuous occupation and productive use. Owensby describes acts of possession as "the public touchstone of property relations in colonial Mexico." Brian Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford, Calif.: Stanford University Press, 2008), 91, and the rest of ch. 4.

terra nullius. He is certainly not misreading Donne, who could not be clearer in stating that the right to settle in Virginia was based on the natural law principle that "a Land never inhabited, by any, or utterly derelicted and immemorially abandoned by the former Inhabitants, becomes theirs that will possesse it."[94] But Banner, too, quotes from other sermons and tracts from early Virginia to argue that despite the "theorizing about its rights to take the land, in the end the Company purchased it from the Indians."[95] In a more nuanced reading of English pronouncements on Virginia, Fitzmaurice notices that even a single author—the projector William Strachey—could shift in the same work from an argument based on the acquisition of *res nullius* to an implicit contradiction of the argument in an emphasis on trade as the foundation of sociability between Englishmen and Indians, a view extrapolated from the premise of a natural law right to trade.[96] Add to this confusing array of utterances a panoply of visual and political markers analyzed by other historians, from John Smith's map to the situating of settlements and the ceremony to "crown" Powhatan, and the collection of symbols and statements could be arranged in support of nearly any position about the essential elements of English claims to the region and the intended audience for those claims.[97]

Yet we need not give up entirely on the search for a compelling interpretation of European strategies. It is helpful to place the willingness "to employ whatever arguments suit[ed] the occasion" in the context of a broader legal culture featuring inventive referencing of often imprecisely remembered legal principles.[98] We still know too little about the connections between legal discourse in Europe and imperial legal practice. We know that more often than not, voyagers appear to have based their legal pronouncements on whatever knowledge they possessed about the law, however haphazardly obtained.[99] They reported legal actions and conflicts for a variety of reasons: in support of personal gain or the interests of sponsors, as a means of influencing ongoing legal proceedings, in order to gain or shore up patronage, and with the intent of undermining rivals. These and other goals often crowded the same tracts, but by considering the purpose of legal posturing in particular contexts, we begin to see patterns.

94. Richard Tuck, *Rights of War and Peace*, 124.

95. Banner, *How the Indians Lost Their Land*, 21.

96. Fitzmaurice, *Humanism and America*, 144–45.

97. See, for example, James Horn, "The Conquest of Eden: Possession and Dominion in Early Virginia."

98. Fitzmaurice, *Humanism and America*, 146.

99. On this "legal posturing," see Benton, *A Search for Sovereignty*, ch. 1; cf. John Phillip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, Calif.: Huntington Library Press, 1980).

Ideas about *res nullius*, combined with but also eclipsed by more prominent ideas about possession, circulated widely without gaining precision—in fact, the reverse was true as flexible ways of invoking and blending arguments to strengthen still incomplete and tenuous claims fostered more, not less, innovation. The use of these arguments was meanwhile reinforced by awareness at all levels of the need to defend claims against imperial rivals. Pragmatic responses to local conditions, in particular the relative strength of indigenous communities that might rupture the illusion of a peaceful transfer of sovereignty and encourage a reliance on physical markers of possession, also mattered. Historians find muddled and apparently conflicting evidence of the nature of claims in large part because imperial representatives were drawing not on a single playbook but on circulating notions of legitimizing actions derived from multiple sources. Perhaps the clearest conclusion we can draw is that agents "on the ground" seem to have been mainly concerned with strengthening their relative position with regard to empires, and therefore with establishing a claim to possession that would at least be judged better than other empires' claims. Absolute title based on the doctrine of *res nullius* received less importance in this context, but it also made no sense strategically to banish such arguments when the exercise of claims making required reciting any and all arguments, including promoting multiple interpretations of the same symbolic acts. Whereas the theorists analyzed in the last section were more concerned, and more familiar with, the *res nullius* doctrine in the stricter technical sense, imperial agents learned quickly to advance their own interests by repeating elements from a widely recognized symbolic vocabulary with a looser relation to Roman legal doctrine.

V. Conclusion

The debate about whether or not Europeans relied on *res nullius* and *terra nullius* as rationales for empire responds to the wrong questions. In relying on an overly simple understanding of how these doctrines sit within Roman law, the debate imagines a straightforward application to new conditions. Europeans in empire had no clear-cut reading of the doctrines to draw on, as early modern writers were themselves proposing innovative connections between public international and Roman private law. Imperial agents also had ample incentive to combine Roman, canon, and theological sources with circulating ideas about natural law in making broad and flexible arguments in support of imperial claims. Nor should we be guided in evaluating the importance of ideas about *res nullius* by simply culling pronouncements about "empty lands" or the absence of explicit mention

of *terra nullius* before the nineteenth century. Legal ideas about how best to establish claims circulated in a wide variety of forms and recommended versatile and expansive interpretations of repeating symbols and acts.

These findings take us back to Pagden's (and Elliott's) assertions with a fresh perspective in mind. The generalization that the English and French promoted *terra nullius* and, also, rights to land in response to a Spanish preoccupation with rights to people diverts attention from the shared project of a new discourse of international law developing both within Europe and at sites of imperial competition outside it. The suggestion of a relatively simple intellectual thread connecting sixteenth-century claims and nineteenth-century references to *terra nullius* also requires modification. A more helpful starting place is provided by Pagden's later observation that *res nullius* was part of a broad set of ideas and practices about attaining international recognition for the acquisition of territory. Though pointing sovereigns and their representatives towards practices designed to make inchoate claims, establish possession, and mark occupation, the invocation of Roman law still left open important questions about the array of acts and utterances that could signal these steps. The indeterminacy encouraged broader strategies to claims making, including simultaneous reporting about transfers of sovereignty, treaties, land purchases, and trade. Equally importantly, the Roman law doctrine of *res nullius* was by no means simply a tool for establishing claims to imperial expansion; quite to the contrary, more often than not it was used on the level of political and legal thought to criticize and undermine imperialist arguments. On the level of imperial *practice*, possession, rather than *res nullius*, seems to have been the Roman legal idea most often resorted to—albeit in rather intuitive, vague ways—in order to defend claims against competing empires. Roman law was more resource than road map, in other words. Rather than applying a portable doctrine, direct and indirect references to discovery, possession, *res nullius* and *terra nullius* fit within a methodology of legal analogy and recommended a set of weakly defined practices for acquiring sovereignty.