Were the People Sovereign in the Roman Republic?

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To ask the question, “Were the Roman people sovereign?”, presents an immediate problem: the word “sovereign” does not appear until 1200 years after the fall of the Republic. The term and concept are now invested with a history the Roman republic never knew: a singular God, papal authority, feudal structures, secular struggles against imperial and papal authority, and the rise of the modern state. What confounds the case even more, though, is that there are not only different, contested conceptions of sovereignty but also that these conceptions are themselves often indebted to interpretations of this Roman past. As complicated as is this conceptual past, sovereignty is invoked frequently in discussions of the Roman republic. But there exists no sustained, critical examination of how the term is employed. The result is that different usages of the term, which bring with them implicit assumptions and implications, both mislead us about the operation of Roman politics and cause scholars to talk past each other.

In this essay I will position my argument between two contending claims. For those who see sovereignty as operative in the Republic, I will identify the different ways in which sovereignty is invoked, suggesting some of the conceptual and empirical difficulties attending these notions. Although these usages touch on aspects of Roman politics, the search for an absolute sovereign will or authority ultimately flattens the historically constituted gradations and dynamics of power and authority. For those who
posit a sharp divide between Roman politics and sovereignty, there is a similar tendency to flatten the dimensions of power and authority, reading Roman politics as an alternative to sovereignty and as a version of anti-power. In contrast, I will suggest that we can identify conceptual similarities between aspects of Roman politics and later characteristics associated with sovereignty, which I will call *foundational authority*. As a quick note about language, to avoid confusion I will not use the term “sovereignty” where it does not appear in the primary texts under discussion.

1. Sovereignty as constitutional (*potestas*)

Perhaps the most influential way of understanding sovereignty in the Roman republic is as a constitutional system. Where Bodin (and later Bentham and John Austin) view law as an aspect of a sovereign’s command, constitutional approaches understand sovereignty as embedded in law.¹ The constitutional state is seen as the culmination of the evolution of the state: from sovereignty located in the body and absolute will of the individual, to the people as the sovereign body that creates a constitution, to the constitution itself that alone is “self-supportive,” “the foundation,” and the “pre-requisite of the state.”² Fundamental to views of constitutional sovereignty, as it is associated with

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the power to legislate, is that the assembly is unique, has all the powers of law-making, and this authority to legislate “is not subordinate, by constitutional or legal rule, to that of others.”

Not surprisingly, constitutional approaches to the Roman past are most influenced by a German legal tradition, articulated prominently by Mommsen, in his attempt to understand Rome as a constitutional state. Scholars have moved away from Mommsen’s conclusions, but not necessarily the assumptions that connect sovereignty to constitutional forms. Straumann, arguing theoretically about the first principles of the Roman constitution, identifies the sovereignty of the people as “the fundamental constitutional rule” that could not be changed by the people. Others looking at the operation of Roman politics see the “sovereignty of the People” as the central principle of the “Roman republican constitution” because the people were “the ultimate source of power,” including the basis of power for magistrates and the senate; possessed a

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4 For Mommsen, the citizen body is institutionalized in the popular assemblies, and thus is the legal constitutional authority of the state (T. Mommsen, Römisches Staatsrecht (Leipzig: Verlag von S. Hirzl, 1887-1888), 3/1, 127-42, 300-68; 3/2, 1030). These approaches often find recourse in Polybius who argues that it is not a particular group but the form of the mixed constitution itself that “possesses an irresistible power” (Polyb. 6.18.4). That power derives from the different groups coming together (6.18.4).

5 B. Straumann, "Constitutional Thought in the Late Roman Republic," History of Political Thought 32, no. 2 (2011): 285, drawing on Livy 7.17.12; 25.2.6; 26.18.8; italics in orig.
“sovereign will” which it was the responsibility of leaders to discern; and served as “the supreme legislature, and the final court of appeal.”

Millar has taken the argument the farthest and developed it most systematically, and probably most controversially. In identifying the operation of politics in republican Rome, Millar focuses on “key features of the system.” Although following Polybius in locating particular formal powers and rights in different institutions, Millar argues that “in a formal sense the sovereign body in the Republican constitution was the *populus Romanus*, as represented by the various forms of voting assembly, and that, at the level of interpretation, the fact of this sovereignty has to be central to any analysis of the late Republic, as a political system.” Straumann, for example, takes an example from Livy (26.18.8) to identify at least one “higher-order” norm upon which the sovereignty of the constitutional order is based, “namely that whatever the assemblies decide holds, even if

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8 Ibid., 4.
it may run counter to certain provisions provided by custom, *mos* or non-statutory *ius publicum*.“

But these distinctions between law and custom are difficult to sort out since Roman politics, like other ancient societies, is embedded in a cultural system of rules, norms, beliefs, social relations, and obligations (e.g., Cic. *De inv.* 2.22.67). Hölkeskamp points out that “*lex, ius, and mos maiorum*, ‘legal order’ and ‘social order,’ should not really be treated as opposites (neither conceptually nor heuristically).“ In short, a formal system of laws and procedures inadequately accounts for the operation of political power. Scholars, thus, have sought to broaden what is meant by a constitution to encompass moral rules, most importantly the *mos maiorum*, that were not part of the system of public law (*ius publicum*) but were recognized as socially binding and also regulated private and public laws and procedures.

But the more we attempt to accommodate the notion of a constitution to Roman politics, the further removed we are from constitutional sovereignty. I am not talking here about the extent to which the assembly has power or even whether we can meaningfully talk about a Roman constitution. Rather, I am addressing the extent to which the claims

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9 Straumann, "Constitutional Thought in the Late Roman Republic," 286.
are consistent with constitutional understandings of sovereignty. Hart, for example, identifies three types of rules that constitute a constitutional framework: rules of duty (which are legal proscriptions and prescriptions that command action), secondary rules conferring powers (which can command action as well as lead to changes in duties and obligations), and secondary rules of adjudication (in which rules define the procedures by which differences are resolved.\textsuperscript{12} What does not fit into this framework, as Mommsen himself struggled with in his understanding of Rome as a constitutional system, are extra-legal rules that are not in turn embedded in law.\textsuperscript{13} So the question is really whether political institutions and processes are so embedded in the social, religious, political, and cultural system as to blur important distinctions between the operation of formal and informal powers. Or to return to Hart, are there limits on the assembly that are sufficient to limit the primacy of their law-making power?

The formal limits on the assembly’s law-making power are numerous enough to lead scholars who talk about the sovereignty of the assemblies to modify their claims.\textsuperscript{14} Staumann’s caveat is striking: he makes clear that he is describing the “realm of political thought (as opposed to institutional reality).”\textsuperscript{15} Although seeking to retain the association of sovereignty with formal powers, Raaflaub ultimately points to the inconsistency of viewing the assemblies as having formal sovereignty: “What constituted the liberty of the Roman people was not their ability to govern and participate actively in public

\textsuperscript{12} Hart, \textit{Concept of Law}, 81, 97.
\textsuperscript{13} Mommsen interprets the Roman constitution as a \textit{dyarchia}, though he notes the difficulty of fitting the senate’s extraordinary informal powers into this constitutional scheme (Mommsen, \textit{Römisches Staatsrecht}, 3/2, 1022-36).
\textsuperscript{14} Examples of modifications of claims of sovereignty include Wirszubski, \textit{Libertas}, 32: “not complete sovereignty of the People”; Wood, \textit{Cicero's Social and Political Thought}, 169, 71, 88.
\textsuperscript{15} Straumann, "Constitutional Thought in the Late Roman Republic," 283.
deliberation but their sovereignty to make decisions in the assembly (to the extent that such authority was not limited by the powers and traditional prerogatives of senate and magistrates)." It is precisely those limits that run contrary to any notion of constitutional sovereignty.

On top of formal limits were also informal ones. Cicero’s phrase, *potestas in populo, auctoritas in senatu* (*De leg.* 3.12.28; also *Phil.* 5.8.25: *maiestas* of Roman people and *severitas* of senate) suggests that the *auctoritas* of the senate was also an important legitimating power that did not derive from the *populus*. Hölkeskamp argues that the senate, which actually possessed few formal powers, drove the political agenda. It served as the forum of debate on military policy; received and sent out embassies; addressed territorial conflict; assigned *provinciae*; and created extraordinary commands and granted *imperia* to them. That is, in both formal and informal ways popular assemblies were not unique legislative bodies. One does not see constitutional forms but more “a regulative system that serves to supply structures for the preparation, formulation, implementation, and enforcement of decisions that affect the whole society.” Within this larger cultural system, “the people could never express its ‘sovereign’ will — in any meaningful sense of the term — by independently and freely voting or electing.”

There are two questions with which we are left. First, how many formal and informal limitations have to exist on the law-making power of popular assemblies before

16 Raaflaub, *Discovery*, 266.
19 Ibid., 68.
we can no longer call it sovereign? The assemblies had real power; they even had primary power in many cases. But the formal and informal limits on the assembly were not only numerous but also significant in their impact. Political power was not adequately represented in law (a requisite of constitutional approaches). Furthermore, the electing and law-making power of the assembly could be made subordinate at critical times to both formal rules and informal norms.

This leads us to a second, and in my mind more interesting, question: What is at stake in calling this type of power “sovereignty,” rather than some other type of power? That is, why employ the term? I think the answer lies in the attempt to counter the view, which amounted to a near consensus of scholarship at one time, of Roman politics as dominated by an informal oligarchy, perpetuating itself through alliances, patronage and exclusive access to office. Far from exercising sovereignty, the people in this view were constrained to seek the protection of those with power, a concentrated elite.21

In contrast to the hidden operation of elite power (to recall Syme here), constitutions openly define the operation of power.22 “Democracy,” as Millar writes, is a “strictly constitutional concept.”23 Not surprisingly, then, one sees frequent reference to the publicness of the Roman political process in these constitutional approaches, as Millar’s first paragraph makes clear: “The first purpose of this book is to present a series

22 Syme, The Roman Revolution, 15.
of images of the Roman people: assembling in the Forum, listening to orations there, and responding to them; sometimes engaging in violence aimed at physical control of their traditional public space; and dividing into their thirty-five voting groups to vote on laws.”24 Brunt articulates the assumption underlying the connection between sovereignty and constitutionality: the people’s sovereignty was undermined by appeals to (and their own loyalty toward) personal attachments rather than the state.25 Understanding Roman politics constitutionally gave a language to counter interpretations of it as an oligarchic cabal. It unfortunately does not give us a language to capture the complex, often informal, power relationships operative in the system.

2. Sovereignty as monopoly of force (imperium)

A second approach, which can trace its theoretical origins to Max Weber’s conception of the state, associates sovereignty with a monopoly on the legitimate use of force that is aimed at “subordinating to orderly domination by the participants a ‘territory’ and the conduct of persons within it.”26 Fried provides a classic statement: “The state’s sovereignty depends on its ability to successfully enforce a monopoly of coercive force in relations to all inhabitants of its territory, against the claims of neighboring states, and against the claims of competing forms of political organization

24 Crowd, 1; also "The Political Character of the Classical Roman Republic, 200-151 B.C.," 18-19.
(e.g., tribes) within the same territory." Although there is an aspect of legitimacy in this definition, the approach departs dramatically from constitutional claims. Underlying constitutional approaches is still the Kantian sense that law arises from or is connected to a notion of right; for Weber, though, law is a “system of casuistic rules” that is one way to compel. Constitutional approaches have the objective of peace that is achieved through law; for Weber anything like peace is unattainable without the concentration of violence. For Weber, the essence of politics is an endless struggle for control; the coercive power of the state is the only means to prevent anarchic violence.

One can see this conception employed by Alföldi in connecting the Roman image of sovereignty to the spear, which carried with it two related meanings, both connected to imperium: it was a “vehicle of conquest,” but preceding that, it was the image of rule. Ando is writing in this vein when, while recognizing sovereignty as a modern concept, identifies its constituent elements in libertas and imperium. Libertas, as Ando cites Sempronius Proculus, is not being subject to the power of another people. Of particular significance, and fundamental to a Roman conception of liberty, are suffragium and provocatio, the power to elect and the right to legal protection against claims on one’s

28 Weber, Economy, 904.
31 Proculus Letters bk. 8, fr. 30 Lenel = Dig. 49.15.7.1; ibid., 73
life. The connection to imperium is essential: lacking the power to command, these other protections mean nothing.\textsuperscript{32}

It is in the international arena that one sees played out most clearly this connection of sovereignty to force. It is not just force; it is a sense of rightness in the use of this force, which rests ultimately on the uneasy tension between maintaining one’s own sovereignty while recognizing that of others. Ando contends that Rome recognized the existence of other sovereign states, owing in part to a legal tradition that required the adjudication of different claims.\textsuperscript{33} Part of the oath of surrender was a statement of the representatives of the state that the people are \textit{in sua potestate}, in their own power (Livy 1.38.2). Less important is the historical reality here than how Rome conceived these relations. As Rome encountered people with different customs and legal forms, they sought to lend clarity to diplomatic practices. The result was both to “assimilate the institutional frameworks of all foreign governments to those of each other and to those of the Romans themselves” and to assign “all foreign peoples equal status as political

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\textsuperscript{32} Also V. Arena, \textit{Libertas and the Practice of Politics in the late Roman Republic} (Cambridge: Cambridge University Press, 2012), 142 fn 299.

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collectivities.”34 The result over time was to “conceive of the world as comprised of a network of sovereign states.”35

It may be the case that this Weberian notion of sovereignty is more applicable to Rome’s external relations than its domestic politics. The limitations on the magistrate’s imperium as the ability to employ force externally but not internally points to a lack of any monopoly on the legitimate use of force.36 There were certainly attempts to control violence through law and there were different forms of social control (and no lack of force), but there is no counterpart to a contemporary police force aimed at maintaining order.37 The absence of any monopoly of force points to a Roman conception of politics that is not reducible to violence but encompasses other aspects, such as acting and governing together. As Arendt writes, when “the Romans spoke of the civitas as their form of government, they had in mind a concept of power and law whose essence did not rely on the command-obedience relationship and which did not identify power and rule or law and command.”38

There is a conceptual implication of this notion of sovereignty, one that misstates (or greatly narrows) the nature of power. Arendt defines power as “the human ability not just to act but to act in concert. Power is never the property of an individual; it belongs to

34 Ando, "Aliens, Ambassadors, and the Integrity of the Empire," 499-500; also Bederman, International Law in Antiquity, 192-93.
35 Ando, "Aliens, Ambassadors, and the Integrity of the Empire," 500; also Phillipson, International Law, 1.112-13, 1.295-96; Bederman, International Law in Antiquity, 42-43, 46-47 as part of a State system.
a group and remains in existence only so long as the group keeps together." In some sense, Arendt is attempting to recover or recast the complex notions of power and authority that had developed before all of it was "obliterate[d]," as Jennings writes, in "one single modern and rational concept for all power — sovereignty," a notion "outside any obligation to any constituent power (especially to the people, tradition, or the laws)." Thus, lost is the critical role of such notions as trust in the operation of Roman politics. Violence swirls around politics. And violence may often be a last resort. But violence by itself is exhausted without the ability to regenerate the power of people acting together. That is, in reversing the Weberian foundation of sovereignty, Arendt argues that power, as that which sustains a community, must lie behind violence, not violence behind power. To understand politics in the latter way is ultimately to end up with Schmitt, which we will take up later, where politics is violence.

3. Popular sovereignty (*populus Romanus*)

Popular sovereignty, which in classical scholarship is often conflated with constitutional sovereignty, is premised on the idea that the people "are anterior to and above the constitution." Popular sovereignty rests on a presupposition of "a people capable of action." That means two things: that the people can exercise particular powers within the constitution, such as choosing officials or assembling (which is a

39 Ibid., 143.
notion of constitutional sovereignty that we discussed earlier); and that the people have power that lies outside any constitutional framework, that is, as a unified and absolute will. Schmitt, for example, characterizes democracy “as the rule of public opinion.” The political significance of public opinion is as acclamation, without which no state could exist. All mechanisms, such as voting, are only partial ways of harnessing what is by nature the “unorganized” form of public opinion. Law, as an expression of popular sovereignty, is political rather than constitutional, which means for Schmitt that “it stems from the potestas of the people” and “is everything that the people intends.” Sovereignty means that there is “no limitation on this will.” It is the power not of law but decision.

Whether intentionally or unintentionally, this conception of popular sovereignty is frequently invoked in characterizing the Republic. Ungern-Sternberg, for example, notes that even the senate, in invoking the senatus consultum ultimum, had to recognize “public opinion,” that diffuse, unformed expression of sovereignty (to recall Schmitt), as

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45 Schmitt, Constitutional Theory, 275.
46 Ibid., 286.
necessary for its enforcement. Lintott, too, seems to invoke this notion of sovereignty (citing Nocera who cites Schmitt). Lintott characterizes the people as the “sovereign authority, if one considers that they were in theory permitted to abolish the Republic by legislation or by the conferral of extraordinary powers on a magistrate.” As Lintott notes, marking his departure from a notion of constitutional sovereignty, “popular assemblies, not the law” were “sovereign” in the Roman republic. By this Lintott means that there were no “entrenched clauses” to prevent subverting the Republic with a single statute. Nor was there anything to prevent the populus from providing powers not in the constitution, such as was done in voting powers to Caesar as dictator, in creating the triumvirate in 43 BCE, and in conferring powers to Augustus in 23 BCE. Thus, Lintott (unlike Straumann) locates sovereignty in the power to act outside the constitutional framework, including suspending or eliminating it.

But Lintott’s view of sovereignty sits uneasily with a more constitutional notion of sovereignty that is central to (in fact, the title of) his book. Lintott asks, in the language of constitutional sovereignty, “what was the authority which sanctioned a given

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48 Lintott, Constitution, 43; G. Nocera, Il potere dei comizi e i suoi limiti (Milano: A. Giuffrè, 1940), 30: “In ultima analisi, quest'assoluta libertà del potere sovrano dello stato sembra avere il suo fondamento nello stesso regime costituzionale repubblicano, in quanto da una parte il potere stesso risiede in organi che realizzano il massimo d'identità politica tra governanti e governati e dall'altra la mancanza di una Carta statutaria dà alla costituzione romana quel carattere di costituzione aperta, che la rende passibile di tutte le variazioni strutturali e formali.”
49 Lintott, Constitution, 40.
50 Ibid., 200.
51 Ibid., 40.
Answering that question leads Lintott to identify the “ultimate sovereignty of the assemblies in elections and legislation” as now, with the end of the Conflict of the Orders, the “cornerstone of the constitution.” That Lintott embeds this discussion of sovereignty in constitutionality is further suggested by his recognition of the constitutional limits on “popular sovereignty”: through “established procedures” by which the people could act “lawfully.”

The difficulty in meshing these notions of popular and constitutional sovereignty accounts for some of the inconclusiveness in Lintott’s discussion of the *senatus consultum ultimum*. Lintott is correct that the provision points to the difficulty of constitutional interpretations, especially regarding the Roman republic: it is a provision created by *mos* rather than *lex*, advisory, and allows for the legal suspension of law by the magistrate (though as Cicero discovered, one might still be held accountable). But what does one make of this power? Lintott suggests that the seemingly unlimited nature of the decree did not derive from any “absolute sovereignty” but from it being “no more than a recommendation which could only be put into force by the magistrates.” But Lintott leaves open what this means from the perspective of constitutional authority, rejecting interpretations that see it as an assertion of supremacy but not indicating what it is. We end up with an incomplete picture of sovereignty. If sovereignty is about who has authority within a constitutional framework, then the *auctoritas* of the senate upon which the *senatus consultum* arises has as much (and many would argue more) claim as does the *potestas*, or jurisdictional power, of the people. If sovereignty is about who can authorize

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52 Ibid., 2.
53 Ibid., 39.
54 Ibid., 40-41, 43.
55 Ibid., 90.
action outside a constitutional framework, then only with great difficulty can we locate that source solely with the people, who (while asserting themselves against Cicero after the fact) were unable to resist or prevent assertions of the decree.

4. Sovereignty as exception (*senatus consultum ultimum*)

One of the more challenging conceptions of sovereignty, and one that has seen a recent resurgence in scholarship, locates sovereign power not in constitutional or legitimating forms but as residing outside these structures in a particular notion of politics, whose function Schmitt associates with distinguishing between friend and enemy. The grouping is prior to any law and is decisive in deciding what is necessary to preserve the group, even if that action is outside the law. The sovereign, in Schmitt’s well-known formulation, is “he who decides on the exception.” It is “the highest, legally independent, underived power” that decides what counts as a basis for the exception (and thus what counts as normal). There are two components to this conception of sovereignty. One is the nature of the exception, which is a determination of “what constitutes public order and security, in determining when they are disturbed, and so on.” These are actions “for which the constitution makes no provision.” The second component of sovereignty is that it rests not on “the monopoly to coerce or to rule, but as the monopoly to decide.”

59 Ibid., 17.
60 Ibid., 9; also 6.
61 Ibid., 11.
law, but the sovereign “produces and guarantees the situation in its totality” because he has “the monopoly over his last decision.”

The will creates the juridical order but is never subsumed completely within that order. As Agamben writes, in drawing on Schmitt, the rule or the norm (or the law) always presupposes and establishes a relationship to the chaos from which the rule is created. This constituting power is linked to a theological conception, a miracle as Schmitt refers to it, or mythical violence as Benjamin characterizes it, or potentiality as Agamben describes it, by which something is brought into being (without anything preceding or determining it). The exception “is the originary form of law,” the primordial violence that “animates” and gives it meaning. It is the difference between the constituting power, which resides outside the constitutional order, and constituted power, which is the power of working within the constitutional order. Stated differently, law is a violent imposition on the individual that ultimately (given the fact of sovereignty as unconditional decision or will) does not have a legal or constitutional limit. The history of sovereignty is not that of legality but of the extra-legal power of life and death over citizens.

In identifying sovereignty with the power to suspend law, Agamben locates sovereignty in the senate. Agamben characterizes the Roman notion of *iusitium*, or what

62 Ibid., 13.
66 Ibid., 39-40.
Agamben translates as “standstill,” as “the archetype” of the state of exception. The *senatus consultum ultimum* which declared a *tumultus*, or emergency, “usually led to the proclamation of a *iustitium*,” or a suspension of law. The actions during the *iustitium* are neither legal nor illegal but “mere facts” in a “space without law.” To recall Agamben’s discussion in *Homo Sacer*, “It is as if the suspension of law freed a force or a mystical element, a sort of legal *mana*,” that “both the ruling power and its adversaries, the constituted power as well as the constituent power, seek to appropriate.” Agamben identifies *auctoritas* as “a force that suspends *potestas* where it took place and reactivates it where it was no longer in force. It is a power that suspends or reactivates law, but is not formally in force as law.”

Lowrie has fairly extensively identified the difficulties of the connection Agamben makes between the figure of the *homo sacer* and the power of absolute decision as lying with the senate. However paradoxically, the claims of exception point to a discourse (rather than a fact) of the nature of the exception in Roman republican politics. Cicero justified his actions by reference to the actions of the ancestors (a claim of *mos*) and the judgment of people because ultimately there was accountability. Scipio Nasica, who killed Tiberius Gracchus, went into exile. And Opimius, who authorized the killing of Gaius Gracchus, was tried and acquitted.

68 Ibid.
69 Ibid., 50-51.
70 Ibid., 51.
71 Ibid., 79, italics in orig.
72 M. Lowrie, "Sovereignty before the Law: Agamben and the Roman Republic," *Law and Humanities* 1 (2007); also Livy 2.8.2; 3.55.5-7.
73 Ibid., 39-40; also Sal. *Cat.* 29.2-3.
Schmitt’s writings emerge as a response to the failure of Weimar liberalism, calling for a dictator who can declare an emergency and rule with absolute authority, restoring normalcy to the state. In refuting Kelsen, who sought to explain how legality could be legally established through reference to a foundational norm of legality, Schmitt identifies violence. The state, as Agamben writes, is founded “not as the expression of a social tie” but as an “abandonment to an unconditional power of death.”\(^7^4\) Legality is a fiction; politics in its essence is violence; authority is embraced out of fear. We are left with a conception of politics that rests not only on a questionable, transhistorical ontology of the origin of communities but also gives to the state (in this case the dictator) the monopoly of interpretation about what counts as and how to respond to a threat. It is politics as perpetual war in which survival requires the absolutely authority of decision.\(^7^5\) Weimar may have failed just as the Republic also collapsed, but it was not because of the lack of a dictator.

5. No sovereignty (civis)

Against these attempts to identify the operation of sovereignty in the Roman republic are those who argue (often for different reasons) that the concept of sovereignty cannot be usefully applied to the Republic (or any ancient community). Sovereignty is seen as linked to the emergence of the state and the international system. Skinner, in describing the “conceptual revolution” of the modern state, attributes several features to the state: the emergence of a fictional theory of the state (attributed to Hobbes) which

\(^{74}\) Agamben, *Homo Sacer*, 90.
contended with absolutist conceptions that associated the state with an individual; political allegiance owed to the state rather than an individual; a transformation in the idea of treason from crimes against the king to actions against the state; and the replacement of charismatic with an impersonal form of authority. These state political structures are seen as essential to the idea of sovereignty because they allow for the fulfillment of particular definitional requirements: (a) the articulation of will (and limits to control by other wills) (b) within a defined territory, providing both (c) autonomy through protection against external coercion and (d) self-governance (liberty) through constitutional structures that are seen as allowing for the articulation of will. Absent the modern state, the necessary components of sovereignty are seen as missing.

Hinsley argues, for example, that the Romans went no further than the Greeks in developing a notion of sovereignty. Although the populus Romanus was the “authority in whose name the magistrates enforced the law,” it was not “the will of the Roman people so much as the higher morality which it was Rome’s duty to uphold.” Similarly, imperium “did not yet denote a political and territorial community governed by Rome.”

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78 For Davies (following Hinsley), there were not sufficiently defined structures of government separate from tribal society to see something like a supreme authority vested in the state (J. Davies, "'On the non-usability of the concept of sovereignty in an ancient Greek context'," in Federazioni a federalismo nell'Europa antica, ed. L. A. Foresti, et al. (Milano: Università cattolica del Sacro Cuore, 1994), 60).
One does not see a state, a transfer \((\textit{translatio})\) of authority to impersonal authority, but the “continued submergence of what we call the state in the total community of Roman citizens, into which leaders of conquered territories were admitted.”\(^{79}\) That is, they were missing the mechanisms for the articulation of will, a territorially defined community, and impersonal authority.\(^{80}\)

I take seriously these claims and do not want to suggest that there is a continuous discourse of sovereignty that can be traced through the medieval period back to the Romans. I will revisit what I see as some overlapping attributes of Roman conceptions of power with sovereignty in the next section. I only want to take up here what I see as too tidy of a definition of sovereignty (of which, as can be seen in the previous sections, there is no consensus among political theorists).\(^{81}\) When Loughlin seeks to correct misunderstandings of “the nature of the concept,” he freezes the concept, as though it had a “nature” rather than something continually being constructed. “Sovereignty,” as Loughlin writes, “is to be understood as a representation of the autonomy of the political, and as providing the foundation concept of the discipline of public law.”\(^{82}\) The formulation is ironic and revealing of how fluid concepts can be: the “nature” of Loughlin’s sovereignty in which power is exercised through the institutional framework


\(^{80}\) Finley rejects not only the usefulness of a taxonomy of sovereignty as residing either with one person or the citizens, but a view of sovereignty as residing with the Roman people, as nonsense (M. I. Finley, \textit{Politics in the Ancient World} (Cambridge: Cambridge University Press, 1983), 7-8; also W. J. Tatum, "The Final Crisis (69-44)," in \textit{A companion to the Roman Republic}, ed. N. S. Rosenstein and R. Morstein-Marx (Malden, MA and Oxford: Blackwell Pub., 2006), 191).


\(^{82}\) Loughlin, "Ten Tenets of Sovereignty," 56.
of the state means that Bodin, who is largely responsible for creating the term, misuses it by seeing sovereignty as what orders or creates, but is not governed by, that framework.  

What is frequently at stake in these interpretations is a view of Roman politics as an alternative to sovereignty. For Skinner, Hobbes marks a fundamental shift in the paradigm of liberty — in fact, wins the day — by defining liberty in relationship to the sovereign power: as non-interference in which liberty means not to suffer coercion of the will by another.  

If sovereignty is conceived as the concentration of unified power, then the Roman republican tradition appears as anti-power or non-domination. What Hobbes replaces is what Skinner and Pettit see as a neo-Roman conception of liberty that rests on being “free from dependence on the will of anyone else.” Roman liberty is associated not with particular rights provided by higher authorities (a sovereign form of some sort) but “with a state of civic independence” in which under elective regimes one can live “a free way of life, unconstrained by any unjust dependence or servitude.” Liberty means being a *civis*, living in a free state in which individuals are empowered “through being incorporated in a mutually protective system of laws and mores.”

It goes without saying that the modern state is different from the Roman republic. But, as I will develop in the next section, the characteristics of sovereignty that are attributed to the modern state are often less conceptually distinct or decisive than similar

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characteristics identifiable in the *res publica*. I will only point to how, in his ten tenets, Loughlin associates almost every modern tenet with a corollary in ancient Rome: “a conception of law as an instrument of command” (tenet one) that actually historically employs “Roman law maxims”; the separation of political relationships from property relationships (tenet two), which has classical roots in the distinction between *res publica* and *dominium*; the “harnessing” of public power by way of the “institutionalisation of authority” (*potestas* and *auctoritas* joined in a partnership, or *societas*) and its differentiation from private power (tenet three); the concept of office (*officium*) that draws on Roman traditions (tenet four); a concept of authority that is a product of a political relationship (tenet five), such as (as Loughlin draws on Arendt) the Roman notion of *auctoritas*; and a view of sovereignty as “an expression of public power” (tenet six), which Loughlin sees as borrowing from later Roman law maxims such as *princeps legibus solutus est* (the *princeps* is freed from the laws) and *quod principi placuit habet vigorem* (what pleases the *princeps* has the force of law) (Just. Dig. 1.3.31; 1.4.1). And in tenet eight he asserts that “classical political thought” viewed rights as objective and did not possess a concept “of a right which an individual maintained against other individuals or the collectivity.” But *libertas* emerges in Rome as, and the concept clusters around, an assertion of specific rights: the right to vote, the right to a trial, the right to appeal, among others. They are not universal moral claims; they are rights that (by Loughlin’s own definition) “are the result of certain political values being given legal

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90 Ibid., 72.
recognition, whether by legislative enactment or designation in constitutional arrangements, and protected by the governing authorities.”

I do not necessarily disagree with how Loughlin conceives of sovereignty. I will return to this idea in the next section. But what emerges is too sharp a distinction between modern sovereignty and ancient politics that results in understating the dynamics of power, searching either for the operation of an absolute will or its absence. I will suggest an alternative, one that does not view Roman power through the lens of sovereignty but rather identifies a much more complex framework of power.

6. Rethinking sovereignty

Scholars have begun noting the intractable problems of locating sovereignty in individuals, the functions of offices, or in law and constitutional forms. And we have seen some of those problems in a Roman context. In identifying sovereignty with the attributes of individuals, a collective, or an office, one runs into the conceptual and historical difficulties of associating sovereignty with will. The limitations on initiative and command by popular assemblies, magistrates, and the senate in both foreign and domestic affairs, whether acting within or outside the law, effectively preclude any continuous assertions of a superior will in the Republic. But there is a larger conceptual issue. Hannah Arendt describes the association of sovereignty and freedom with a free will, “independent from others and eventually prevailing against them,” as politically “pernicious and dangerous” because “it leads either to a denial of human freedom — namely, if it is realized that whatever men may be, they are never sovereign — or to the insight that the freedom of one man, or a group, or a body politic can be purchased only

91 Ibid., 73.
at the price of the freedom, i.e., the sovereignty, of all others.”

It is, in fact, the legacy of Bodin that this absolutism is so difficult to excise from our notions of sovereignty.

Similar problems are recognized in approaches that locate sovereignty in constitutional and legal structures. As Dworkin writes in talking about associations of sovereignty with a constitution, “Any claim about the place the Constitution occupies in our legal structure must therefore be based on an interpretation of legal practice in general, not of the Constitution in some way isolated from that general practice. Those scholars who say they start from the premise that the Constitution is law underestimate the complexity of their own theories.”

The difficulty is only heightened in the Roman context with its complex relationships between politics, laws, and mores. Laws and procedures were important in the res publica but it is “less a codified entity than a set of practices.” As Connolly suggests, one sees sovereignty operating not as a “legitimating or authorizing will” but “as a continuum of power repeatedly reauthorized in multiple sites of conflict and judgment (including in contexts not authorized by the elite).”

Facing the conceptual difficulties of these approaches, some scholars have sought to jettison the entire concept as hopelessly flawed. But others have begun to

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95 Lowrie, "Sovereignty before the Law: Agamben and the Roman Republic," 44; also Hölkeskamp, Reconstructing.
97 Maritain, "The Concept of Sovereignty"; Arendt, "What is Authority?,” 163-64, though also recasting sovereignty; S. R. Krause, Freedom Beyond Sovereignty: Reconstructing Liberal Individualism (Chicago: University of Chicago Press, 2015); L. M. G. Zerilli,
reconceptualize sovereignty, relocating it from an absolute, indivisible, authoritative will to a framework of collective discourse and action. This view rests on a different conception of the state, one that is not created from a sovereign will but, as Arendt writes, “transacted within an elaborate framework of ties and bonds for the future — such as laws and constitutions, treaties and alliances — all of which derive in the last instance from the faculty to promise and to keep promises in the face of the essential uncertainties of the future.”

Sovereignty, to the extent that one must call something sovereignty, resides not in an “identical will which somehow magically inspires them all, but by an agreed purpose for which alone the promises are valid and binding,” able to “dispose of the future as though it were the present.” Eleftheriadis, too, views sovereignty as “a public system of reasoning that is capable of guiding our actions and fixing our expectations about the actions of others.” I would add that it is not just reasoning but also affective meanings that underlie critical components of a Roman political vocabulary, such as libertas, auctoritas, and fides, and bind individuals to each other.

I am not sure to what extent it is helpful to continue to contest the already contested concept of sovereignty, particularly as it seems to obscure more than it clarifies the operation of Roman politics. When classicists employ the term sovereignty, it is to

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98 Arendt, "What is Authority?,” 164.
101 See Hammer, Roman Political Thought, 229-70.
identify a type of authority to which there is no further appeal. The mistake is locating this authority in the exercise of a particular will. We can better characterize what I will call foundational authority as a historically constituted discursive framework within which the collectivity is imagined, laws and institutions created, decisions made, and actions justified. Foundational authority is the basis on which a community imagines, organizes, and recognizes itself as indivisible and perpetual

7. Foundational authority (maiestas)

As we have seen in the Roman context laws or anything like a constitution are not isolated practices; they arise within a particular interpretative framework, not the least of which is the pervasive legalism of Roman approaches to almost every aspect of their collective life. That legalism underscores a particular way of conceiving of the res publica as something different from the sum of individuals; as itself having a corporate existence or personality that is (in a sense) publicly owned. It is the framework in which discussions of institutions occur, laws are made and interpreted, political processes created and revised, relationships understood, and power negotiated.

A quick contrast: Aristotle talks about the authenticating character (to kurion) of a polis, which is sometimes translated as sovereignty. He associates this character with the distribution of rule. In the Roman case this character is an abstraction that has an

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102 Also Urbinati, Representative Democracy, 223: “Popular sovereignty, under as an as if regulating principle guiding citizens’ political judgment and action…” (italics in orig).
103 Applying this notion to modern times, I would argue that the foundational authority of the United States lies in the phrase, “We the people.”
existence apart from any particular configuration of the people. When Nicias says that wherever you sit down you are a polis (Thuc. 7.77), he is saying something very Greek: the polis is the collection of the people. In contrast, a Roman would say, wherever you are you represent the res publica. One assumes a persona that derives from one’s relationship to the abstract entity of the res publica. As Caesar wrote of his men, and we will talk more about this later, even in harsh conditions they never spoke in words “unworthy of the maiestas of the Roman people” (Caes. BG 7.17, trans. modified).

Maiestas serves as one reference to this interpretative framework that establishes the supremacy and perpetual power of the res publica as a public possession. Some attempts have been made to locate sovereignty in maiestas, though they suffer from the difficulty of identifying sovereignty with either popular will or legal forms. Bodin, for example, locates Roman sovereignty in the maiestas of the people who have the power of enactment and ratification. Arena connects one discourse of maiestas to the “direct exercise of popular sovereignty,” contrasting it with a more abstract version used to justify senatorial and magisterial power. In what remains the most complete discussion of maiestas, Bauman gives a more legal meaning to the term: “the concept maiestas

107 Bodin, On Sovereignty, 1.10, p. 55, 58.
108 Arena, Libertas, 135, 39; also Ferrary, "Les origines de la loi de majesté à Rome," 569-70; [Gundel, 1963 #335@319.
"populi Romani" was the only relationship of *maiestas* to be recognized by Roman law and that, as such, it was a “technical legal concept” that was “distinctive and exclusive.”

I will summarize very briefly how my argument differs from each of these claims. For all the historical and theoretical reasons we have discussed, it is impossible to identify an absolute and indivisible will of the people, as Bodin suggests. Although *maiestas* varied in its meaning, the abstractness that Arena associates with a senatorial reaction to and diminution of popular power is more generally employed across the ideological spectrum. Furthermore, what Arena sees as the diluted meaning of the concept I will argue is its political strength. And *maiestas* is less a technical legal term, as Bauman suggests, and more what Dworkin refers to as an interpretive concept that does not have stable criteria for its meaning or specific criteria for its application. What I will suggest is that although *maiestas* has a range of meanings and usages, its importance lies in its ability to organize the core assumptions of Roman political relations. It is a “strategy of sense-making.” What unifies these meanings (and I am following Skinner’s characterization of the conceptual revolution of the state) is its reference as an abstract entity (an entity apart from the sum of the people) that possesses perpetuity and indivisibility over a territory and serves as a framework for law (but not captured completely in law), obligations, and political discourse.

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112 The phrase is from F. Kratochwil, "Politics, law, and the sacred: a conceptual analysis," *Journal of International Relations and Development* 16, no. 1 (2013): 13 in his discussion of the meaning of “the people.” Urbinati talks about sovereignty as not reducible to laws and procedures but residing in “the fictional world of beliefs and judgment” (Urbinati, *Representative Democracy*, 59).
(a) *Maiestas* as an abstract entity

As we have seen, an ongoing refrain among those differentiating between ancient and modern politics is that there is no abstract or fictional entity — in this case the state — that is distinct from both ruler and ruled, defined geographically, possesses supreme authority, and provides unity and gives endurance to the rights and obligations of its subjects.\(^{113}\) Skinner writes that it “proved impossible” for “beliefs about the charisma attaching to public authority to survive the transfer of that authority to the purely impersonal agency… of the modern state.”\(^{114}\) Skinner is referring to the language of king’s majesty “that serves in itself as an ordering force.”\(^{115}\) In positing a modern replacement (and mutual exclusivity) of the personal majesty of the king with abstracted authority, though, Skinner skips over the Republic, in which majesty is not located in kings but in the abstract entity of the *populus*.\(^{116}\)

Since so little evidence exists from the early Republic, it is not at all clear how the association of *maiestas* with *populus Romani* develops. Thomas locates the origins of *maiestas* in the magistracy, both as the individual and as the office in charge. He sees the association of *maiestas* with “*la souveraineté populaire*” as a later development in the Republic, beginning in an international context as a statement of Roman hegemony.\(^{117}\) That is, *maiestas populi Romani* begins as a projection outwards or what in current language might be referred to as external sovereignty. *Maiestas* was a statement of


\(^{115}\) Skinner, "The State," 125.


\(^{117}\) "L’institution de la Majesté," 348, 55.
recognition; other rulers (and Rome’s own rulers) were obligated to preserve the *maiestas populi Romani* (*maiestatem populi Romani conservanto*). In this imperial context, one sees the formula *maiestas imperii* attested in the oaths conquered territories would swear in recognition of the *maiestas* of the Roman people in Cicero and in the *Lex Gabinia Calpurnia de Insula Delo*¹¹⁹, in reference to generals (*maiestas imperatoria*) (Sen. Elder *Contro*. 9.1.8), and uses of *maiestas* attached to Roman victories and losses.¹²⁰

Whether religious connotations are originally associated with *maiestas* — and remember that what we know of archaic Rome is fragmentary — there is a later association of *maiestas* with the divine that gets read back into Roman history.¹²¹ Livy, for example, characterizes the Gauls encountering the *maiestas* of the nobles in their open houses as akin to religious awe (5.41.8). He also associates Publius Scipio’s *maiestas* with a belief by some in his descent from the gods (Livy 26.19.3-14). This awe could be

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associated with individuals, offices, groups, the gods, or nature.\textsuperscript{122} But its most frequent association is with the people: \textit{maiestas populi Romani}.\textsuperscript{123}

Livy (in Lucius Papirius’ speech against Fabius, arguing for his execution for disobedience) uses two suggestive phrases in conjunction with \textit{maiestas: imperium invictum populi} (Livy 8.34.2) and \textit{maiestas imperii perpetuane esset} (Livy 8.34.5), one suggesting the invincibility of the people’s authority, the other its perpetuity. The language closely parallels that of Bodin.\textsuperscript{124} At times this power could be expressed through particular institutional structures, such as the assemblies. In this sense, the collectivity is the expression of the popular consent of the citizen-body, as Ferrary and Arena suggest. But what is also being conveyed is the corporate nature of power: the \textit{res publica}, conceived as the \textit{maiestas} of the people, is indivisible and perpetual.\textsuperscript{125} It is, as Cicero writes, the \textit{nomen} of the Roman people (Cic. \textit{De part. orat.} 30.105: \textit{Maiestas est in imperi atque in nominis populi Romani dignitate}).\textsuperscript{126} Majesty in this sense is not divisible but is shared among corporate persons.\textsuperscript{127} Cicero seems to play upon this relationship of \textit{maiestas} to the property of the people in \textit{De leg. agr.} when asking if the

\textsuperscript{122} Individuals: Livy 7.22.9; 7.40.8; 26.19.14 (connected to the gods); 28.35.6; office: Livy 8.34.1 (senate); 9.26.19 (awe of the office of dictator); 44.41.1; consuls: Livy 2.23.14; 3.6.9; 10.24.14; groups, such as the nobility: Livy 5.41.8; the gods: Cic. \textit{De div.} 1.38.82; 2.49.101; 2.51.105; 2.65.135; or nature: Pliny Mai. \textit{Nat. Hist.} 2.41; Lucr. \textit{De rer. nat.} 5.2, 7; see Hammer, \textit{Roman Political Thought}, 133-37.

\textsuperscript{123} Thomas, "L’institution de la Majesté," 347-86; on associations of terms with \textit{maiestas}, see Drexler, "MAIESTAS,"

\textsuperscript{124} Bodin, \textit{On Sovereignty}, 1.8, p. 1.

\textsuperscript{125} On the meaning of the people as both the mass of citizens as opposed to the senate and as the whole state, see Ferrary, "Les origines de la loi de majesté à Rome," 563.

\textsuperscript{126} Ferrary sees this more abstract conception of \textit{maiestas} as introduced by opponents of Saturninus to allow for prosecutions of sedition (ibid., 570).

\textsuperscript{127} Onuf, \textit{Republican Legacy}, 126-27.
people would not rather have the territory that belongs to the Roman people remain part of their *patrimonio* rather than divided up into private lots (*De leg. agr.* 2.29.79-80).

This notion of *maiestas* corresponds with other conceptualizations of the Roman republic as a type of *societas* in which the *res publica* is conceived as a form of ownership. In fact, we can understand Schofield’s association of legitimacy and sovereignty in this context: What the people entrust to the leaders is that any policy or deliberation must be related “to the cause which generated the organization of the *populus* in the first place”: it must “be focused on the common advantage” and preserve the bond that brought the people together originally. To have ownership of the *res publica* means to have “rights over its management and use.” For a people to not have rights over its own *res* is not the difference between a good and bad form of *res publica* but of no *res publica* at all. That is, sovereignty refers to the framework by which the *res publica* is even conceived.

Bonfante offers some support for this conception of politics as a form of *societas* in his claim that the institution of *condominium*, or joint ownership, has archaic roots that parallel the “joint sovereignty” (*la sovranità commune*) of the magistrates. The original provision, *societas ercto non cito*, likely referred to the continuation of the household as it was before the death of the *paterfamilias*, “except that there were now several

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130 Ibid., 76.
persons who had equal right to perform independently the acts of administration
previously performable only by the deceased or with his authority.” 133 The ancient
consortium of *sui heredes* was likely the basis for the classical *societas omnium bonorum*,
by which through contractual agreement the assets of the *socii* and future acquisitions
were held in common. 134 It is changed from something seen as deriving from a pre-
existing natural union (the family) to something artificial and constituted by law, though
there is no different treatment in their legal effects. 135 Several aspects related to
sovereignty are worth noting in this consortium of *sui heredes*: the property is indivisible,
though there might be multiple owners (*consortes*); the union could be imagined (that is,
it was artificial) 136, a necessary condition for the notion of an abstract state; the property
(and ownership) passes on without a break or without new decisions having to be made;
and each owner can veto the actions of the other.

I have argued recently that *societas* provides a way for Cicero to understand the
*res publica* as a partnership comprised of differential responsibilities in proportion to
contributions. 137 Holding the partnership together is *auctoritas* that derives from a legal
idea of the *auctor* who ensures the validity of legal transactions. 138 Like the *auctor*’s
relationship to *societas*, so the *maiestas populi Romani* can be seen as a reference to the
framework that makes the Republic possible. Interestingly, in Ovid’s *Fasti*, *Maiestas*
(born from *Reverentia* and *Honor*) emerges from the chaos of creation to serve as

134 Ibid., 25, 30.
135 Ibid., 20, 30.
136 On the development of imaginary relationships, eventually resulting in the more
general notion of *societas*, see ibid., 31-32.
138 R. Heinze, “Auctoritas,” *Hermes* 60, no. 3 (1925): 350-55; Agamben, *State of
Exception*, 76-77; Hammer, *Roman Political Thought*, 52.
moderator of the whole world (Ovid *Fasti* 5.25). In this republican interpretation, Ovid describes how *Maiestas* is worshipped by Romulus and Numa (5.47-48) and enhances the respect of rulers, *patres*, families, and the *triumphator* (5.49-52).¹³⁹ *Maiestas* emerges as an originary framework for rule.

**b) Territory**

We turn now to whether this abstracted entity is defined territorially. Kratochwil claims that the *ager publicus*, or public domain, “had no boundaries; it ended somewhere, but this end was not specifiable by means of a legally relevant line.”¹⁴⁰ The language is that of a frontier (*limes*), not a boundary.¹⁴¹ But I am not sure how decisive the distinction is. What is important is that there has to be a sense of territorial integrity. There may have been vagueness or ambiguities about where a territory began or ended just as there was with the western frontier of the United States throughout the eighteenth and nineteenth centuries. But two quick points may suggest some notion of territorial integrity in the Republic. First, the Roman census required knowing who would count as Roman and where they were, which means that they had to know who is inside and who is outside. Second, as Ando notes, the law on *postliminium*, or “the right of return ‘beyond the threshold,’” which allowed captured or surrendered individuals to regain their citizenship

upon their return, suggests dividing lines that distinguished between inside and outside.\textsuperscript{142}

As Bederman writes, “If sovereignty is simply the power and willingness to exclude others from a national territory, ancient States were, most certainly, sovereign.” In fact, he quips, they may have had “a too-robust sense of self.”\textsuperscript{143}

c) Office

Attendant with this corporate entity, but what is often seen as a distinctly modern development, is a notion of office. Cicero talks about how a magistrate wears the \textit{persona} of the \textit{civitas} (\textit{se gerere personam civitatis}) whose duty is “to uphold its honour and its dignity, to enforce the law, to dispense to all their constitutional rights (\textit{iura}), and to remember that all this has been committed to him as a sacred trust” (\textit{De off.} 1.34.124). \textit{Persona} is the mask that the actor assumes in playing a part. But the term gets extended to include not only the role or function a person may perform (such as orating), but also to having legal rights and obligations that are connected to a position (Just. \textit{Inst.} 1.3.prooem; Just. \textit{Dig.} 1.5.1). That is the sense in which \textit{dignitas} is associated not just with personal characteristics (though it always maintains that connection) but also with upholding the \textit{maiestas} of the \textit{res publica}.\textsuperscript{144} Phillipson characterizes the ambassador as the “personification of the sovereignty and the majesty of the State he represented.”\textsuperscript{145} Thomas suggests that conferral of a triumph by the people illustrated the \textit{maiestas} not of the person but of the dignity he occupied (\textit{la victoire du triomphateur illustre la}}

\textsuperscript{142} Ando, "Aliens, Ambassadors, and the Integrity of the Empire," 503; also ibid., 504; Watson, \textit{International Law}, 41-42; Proculus, \textit{Ep.} bk. 8 = \textit{Dig.} 49.15.7.pr.-1; also Paulus, \textit{On Sabinus}, Bk. 16 = \textit{Dig.} 49.15.19.pr.-1; Livy 1.32.6; 21.2.7; 34.58.2-3; Caesar \textit{BG} 1.44.7-8.

\textsuperscript{143} Bederman, \textit{International Law in Antiquity}, 274.

\textsuperscript{144} For example, Thomas, "L’institution de la Majesté," 353.

\textsuperscript{145} Phillipson, \textit{International Law}, 1.330; also Livy 29.11.4: ambassadors sent to yet unconquered areas of Asia to win \textit{maiestas} for the Roman people.
It might be noted that a similar obligation exists to uphold the *maiestas* of the Roman people through the conduct of individuals away from Rome (see *Il Verr.* 5.10.28, 5.31.81, 5.37.96; Sen. Elder *Contro.* 9.1.8; 9.2.2; 9.2.9; 9.2.11; 9.2.13; Caes. *BG* 7.17).

The difference between personal attachments and obligations to the more abstract *maiestas* of the *populi Romani* becomes apparent in the final decades of the Republic. Caesar’s words, for example, to Deiodarus, king of the client state of Armenia minor, when he provided aid to Pompey, are illuminating. For Caesar, it is the responsibility of officials to know, in effect, who has state authority ([Caesar] *BA* 68). When Deiodarus gives aid to Pompey he is acting against the legal authority of Rome, which encompasses the people, consuls, and the senate.147

Antony is also accused of forgetting the *maiestas* of the people and the gravity of senate in besieging the loyal colony of Mutina (*Cic. Phil.* 5.25). Nor is he deterred by the *maiestas* of the consul elect, Decimus Brutus, who was trying to stop Antonius (*Cic. Phil.* 13.20). Ultimately he is charged with *maiestas imminuta* for the territorial grants of Antony to Cleopatra).148 In Cicero’s denunciations, Antony is acting outside his official capacity of conducting affairs on behalf of the *populus Romanus*. In the latter accusation, Antony had been declared a *privatus* and was no longer acting in an official capacity on behalf of the state, thus establishing the basis for *maiestas* charges against him. There is no doubt that these claims were used in a high-stakes struggle for power. What is striking is that this relationship of *maiestas* to public obligations would be employed at all.

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146 Thomas, "L’institution de la Majesté," 353.
147 Reinhold, "The Declaration of War against Cleopatra," 99.
148 Ibid., 101. It is not that an imperator could not adjust territory to client states. There was precedent for this, including by Antony before 32 BCE, particularly after the 60s.
d) **Maiestas as a framework for law**

As these examples suggest, one could be accused of acting against (or violating the trust of) this entity. *Maiestas* laws have their origins in the crime *perduellio*. Contrary to Skinner’s suggestion that part of the conceptual change brought about by the emergence of the state is a transformation in the idea of treason from crimes against the king to actions against the state, from the early part of the Republic these crimes were seen as acts of malice against the foundation of the *res publica* (Livy 6.20.11-12; Just. *Dig.* 48.4.1.3 on punishment under the Twelve Tables for stirring up the enemy or delivering a citizen to the enemy). In 103 or 100 BCE Saturninus passed the *lex Appuleia de maiestate*, which established the crime of *maiestas* (initially encompassing and in later laws replacing *perduellio*) and possibly created a permanent *maiestas* court. The law was aimed at holding consular and proconsular generals and other magistrates accountable for damaging the interests of the state through corruption or incompetence. Subsequent laws similarly addressed abrogations of the functioning and integrity of the state. As Radin writes, in suggesting the aptness of understanding *maiestas* as

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151 Sulla in 81 BCE passed the *lex Cornelia de maiestate*, which combined *perduellio* with *maiestas* laws. Although the wording of the law is lost, several offenses seemed to
capturing what is meant later by sovereignty, “Those who have maiestas are the mightier ones, they have the greater power; and the chief of state offenses – the only real offense against the sovereign – is an attempt to lessen this power – minuere maiestatem.”

But maiestas never acquires the status of a “technical legal concept,” as Bauman suggests. Recalling Schmitt’s notion that the sovereign, because it precedes law, cannot be encased in law, so maiestas, which precedes any legal formulation, is inadequately formulated in law. Maiestas laws were so broad as to not provide particularly helpful legal guidance. It may very well be the case that little could have been solved legally in the tumultuous final decades of the Republic. Moreover, and I

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fall under crimes of maiestas: leaving a province without authorization and making a private war (Pis. 21.50); affecting the loyalty of the troops (Cluent. 97, 99; later in lex Iulia in Just. Dig. 48.4.1.1); removing or diminishing monuments of Roman glory (II Verr. 4.4.8); illegally detaining prisoners (II Verr. 2.4.12); a governor not leaving his territory within 30 days of his successor’s arrival (Cic. Fam. 3.6.3); and granting territory without authorization (which is the basis of the case against Balbus [Balb. 3.6, 8] and later against Antony) (Chilton, "The Roman Law of Treason under the Early Principate," 74; ibid.,; Reinhold, "The Declaration of War against Cleopatra,; Seager, "Maiestas in the Late Republic: Some Observations,; Thomas, "L’institution de la Majesté,"; Ferrary, "Les origines de la loi de majesté à Rome,"; Bauman, Crimen maiestatis, 79-81). The law also established a permanent commission (quaestio) of consuls and magistrates to administer new laws, run the courts, and interpret the laws. Caesar would later stiffen the penalties, not only permitting death as a penalty but also establishing a procedure of interdiction by which the condemned man could only save himself by becoming a citizen of another state, thus relinquishing his Roman citizenship (and claims to property) (B. M. Levick, "Poena Legis Maiestatis," Historia: Zeitschrift für Altere Geschichte 28, no. 3 (1979): 366-67; Phil. 1.9.21-23; Ulpian in Just. Dig. 48.4.1). He might also have extended maiestas laws to cases of violence (maiestas minuta per vim), aimed at maintaining order while Caesar was in Africa (Bauman, Crimen maiestatis, 160-66).

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153 Bauman, Crimen maiestatis, 13. As Bauman notes later, maiestatem minuere “was not ‘defined’ in a lex,” though its meaning would have been clear (ibid., 88). Bauman uses the example of the phrase, “white man’s burden,” pointing out that no “definition” of “burden” would have “conveyed the special political, social, and economic values which the expression implied” (ibid., 88 n. 75). But that is not a technical legal concept.
154 Seager, "Maiestas in the Late Republic: Some Observations," 150; Cic. Fam. 3.11.3; De orat. 2.25.107-8; 2.39.164; De part. orat. 30.105.
think tellingly in suggesting the limits of capturing *maiestas* in a legal form, Cicero distinguishes between the power accorded by *maiestas* (*maiestas imperii*) and the right of law (*iure legum*) (*Vat*. 9.22), as well as between private authority (the authority in this case of the father) and the official authority of the tribune, the latter associated with *maiestas* (*Inv*. 2.17.52). Just how interconnected *maiestas* is with the broad concerns of the Republic is suggested by Cicero’s characterization of the *lex de vi* allegedly proposed by Catulus in 78 BCE that “extends to the rule, the high estate, the stability of our country, and the welfare of all” (*ad imperium, ad maiestatem, ad statum patrie, ad salutem omnium pertinet*) (*Cael*. 29.70, trans. modified). It is a type of power, but one that serves as a framework for obligations rather than containing specific criteria for law.

**e) Maiestas as a framework for discourse**

Arena credits Saturninus, when he sets up a *maiestas* court in response to the violent reaction to the introduction of the *lex frumentaria* (of which we know very little), with importing “the notion of *maiestas populi Romani*, which belonged to the domain of foreign policy, into domestic affairs.”155 What had been an expression of the superiority of the Roman people over others was now taken to mean the superiority of the Roman people over magistrates and the senate.156 Arena, drawing on Ferrary, identifies two distinct discourses of sovereignty that are associated with *maiestas*, one centered on the “direct exercise of popular sovereignty” which Arena variously translates from *potestas*

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155 Arena, *Libertas*, 134; also Ferrary, "Les origines de la loi de majesté à Rome," 558.
156 Arena, *Libertas*, 134.
populi, dominus, and maiestas, and the other around “the devolving of popular sovereignty upon magistrates.”

There were certainly variations in how maiestas and maiestas populi Romani were defined. Populus could carry the pejorative meaning of something like the masses today but also referred to the people as a whole, without class ascription. The rhetorical exercises in Rhet. ad Her. (as does Cicero later) point to different ways in which maiestas could be used. One could define maiestas by its constituent elements, namely elections and consular assemblies (Rhet. ad Her. 2.12.17: Maiestatem is minuit qui en tollit ex quibus rebus civitatis amplitudo constat). Or one could associate maiestas crimes with damage to the civitas (Rhet. ad Her. 2.12.17; 4.25.35: Maiestatem is minuit qui amplitudinem civitatis detrimento adficit). Furthermore, the uses of maiestas would also vary: meant by Saturninus to protect the tribunes with the aim of passing agrarian reform; used by Varius against factions opposed to Italian citizenship; employed by Sulla to protect against uprisings opposed to his power.

I am not sure if we can credit a dramatically new meaning of maiestas with Saturninus, particularly given the historically close association of maiestas with the res populi. There does not seem to be any expressions of surprise at how maiestas is

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158 Ferrary, "Les origines de la loi de majesté à Rome," 563.
159 Bauman, Crimen maiestatis, 89; Cic. Rosc. Am. 45.131.
160 Even in these early associations of maiestas with hegemony, there is a direct political connection to the people: treaties required the approval of the Roman people and magistrates were chosen by and acted on behalf of the people (though there seemed to be latitude for commanders: Cic. Balb. 9.24 in conferring citizenship). Adherbal, for
defined, even in the immediate aftermath of Saturninus’ law. Furthermore, these usages do not sort themselves consistently into discrete ideological traditions, though we do not have a great deal to go on. Cicero at times associates *maiestas* with actions of the consuls (*Pis. 11.24; Vat. 9.22*), though a power understood as derived from the people. He suggests as well that *maiestas* may be diminished by “mob violence to promote sedition” (*De part. orat. 30.105*). And he equates the protection of the *maiestas* of the people with the *senatus consultum ultimum* against Saturninus (*Rab. 7.20*). But Cicero also recalls Antonius’ defense of the tribune, Norbanus, who was prosecuted for overriding the veto of a tribune on behalf of the people several years (sometime after 96 BCE) after the passage of Saturninus’ *maiestas* law: “If *maiestas* be the *amplitudo* [grandeur] and *dignitas civitatis*, it was violated by the man who delivered up to the enemy an army of the *populi Romani* [i.e., Caepio], not by him who delivered the man that did it into the *potestas* of the *populi Romani* [i.e., Norbanus]” (*De orat. 2.39.164*). The connection is specifically to the jurisdictional power of the people. In fact, as Cicero recounts in *De part. orat.*, Antonius claimed that Norbanus had actually increased the *maiestas* of the people by maintaining their *potestas* and *ius* (*De part. orat. 30.105*). But it is not just a constitutional principle; the *maiestas* of the people, as Crassus recalls Antonius’ defense of Norbanus, could be defended through discord and violence (*De orat. 2.28.124*; also *Sal. Jug. 31.17*). And in his defense of the tribune, Sestio, Cicero longs for “the *maiestas populi Romani*” to “come to life again” (*Sest. 38.83*). Livy’s use of *maiestas* does not fall into one ideological camp or the other, either. Livy associates *maiestas* with the superior *vis* of the people and their supremacy over magistrates (*Livy 2.7.7; 2.57.3; 2.45.9*). Yet, example, appeals to envoys to defend him against being driven from lands given by Roman people in accord with *maiestas populi Romani* (*Sal. Jug. 14.7*).
in accord with what Arena would characterize as a more abstract notion of *maiestas* that devolves power to magistrates, Livy describes how the senate did not see the authority of Camillus as detracting from their own *maiestas* (Livy 6.6.7).161

Whatever the variations in emphasis, what is striking is the commonality of references and recourse to *maiestas*. In fact, it is the abstractness of *maiestas* that is a critical feature of republican discourse. Cicero conveys how much this association of *maiestas* with the people had become part of Roman cultural memory in his recounting of the tribune Marcus Cato defending the state, the senate and the people by the sway of *maiestas* alone, unprotected by soldiers (Cic. Sest. 5.12). Livy, reading back to early Roman history, provides a republican story of the transfer of *maiestas* from magistrates to the people. After the battle of Veii, the once popular consul Publius Valerius faced growing suspicions that he was seeking kingship. He called an assembly and ordered the fasces lowered to acknowledge the superior *maiestas* and might of the people (*populi quam consulis maiestatem vinque maiorem*) (Livy 2.7.7; also Livy 23.43.10: resources).162 This *maiestas* would be recognized in such formal powers as the right of *provocatio*, which placed the people above magistrates in the power of life and death, and the establishment of the tribunes.163 As Bauman writes, *maiestas* for the Romans “was something which permeated their entire thinking about themselves and their position in the world.”164

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162 See Drexler, "MAIESTAS," 200-1.
163 Thomas, "L’institution de la Majesté," 350-51.
f) The end of the Republic

Read as a framework of political discourse, the final decades of the Republic are not simply about the struggle to wrest control from the people; it is an undermining of the foundational authority of the system that framed interest, affection and action. The greatest dangers to this public power are not senators or magistrates but private power. Adherbal describes the actions of Jugurtha as a violation of the *maiestas* of the Roman people (*Jug.* 14.7). For Sallust the challenge to *maiestas* is the private friendships by which position is used to enhance wealth and power (*Jug.* 14.20; 15.2). Memmius records how “your *maiestas*” had been stolen (Sal. *Jug.* 31.9) so that priesthods, consulships, and triumphs are paraded before the people as if they are honors rather than stolen goods (*Jug.* 31.10). Soldiers compete not for honor but for plunder, which they then barter (*Jug.* 44.5). Moreover, the attributes that are held most dear to Roman citizens — loyalty, reputation, and piety (*fides, decus, pietas*) — are sought as a source of gain (*Jug.* 31.12). Memmius points to the transformations in political language. The common purpose that unites people into political friendship (*amicitia*) is transformed into *factio* as individuals are brought together for plunder. Gain replaces honor (31.12); servility replaces power (*imperia*) (31.11); cowardice replaces vehemence (*Jug.* 31.14, 17); and *libertas* now finds expression as unbounded passion. To the extent that the commons respond, they too succumb to hatred of the nobility and party passion rather than love of the *res publica* (*Jug.* 40.3). To return to our earlier discussion, it is in reference to *maiestas* that these claims are understood and defended.
Bauman makes an interesting suggestion, modifying Drexler, that Caesar sought to connect the *maiestas populi Romani* to his own *dignitas*. Dignitas and *maiestas* are often connected. But that *dignitas* was attached to the fulfillment of public office, not to *dominatio* (Cic. *Att.* 7.11.1). What one sees by Caesar is a subtle equation of *maiestas* with personal *dignitas*. For example, Caesar would justify the revenge for the *insignis calamitas* against the Tigurini on behalf of the public injury to the Roman people but adds, as well, the revenge for “personal wrongs” (*Caes.* *BG* 1.12.7; also *BC* 1.7.1; 1.7.7). The gap between Caesar’s *dignitas* and the *maiestas* of the people can be seen in *BC* 1.8.3 in calling for Caesar to postpone his *dignitas* on behalf of the state. It is not that Caesar did not recognize the claims of the people’s *maiestas* (e.g., *BG* 1.8.3; 7.17.3; *BC* 1.7.8; 1.9.2-3). It is that what was traditionally associated with *maiestas populi Romani* becomes the justification for personal power rather than the basis of the official exercise of power (for example, *BG* 8.6.2; 8.24.4; *BC* 1.7.7).

No group, including the people, are sovereign in the sense of possessing an absolute will; rather, what is pre-eminent is what makes the negotiation of power possible, which is the framework of *maiestas*. *Maiestas* serves as a pervasive principle and practice that, as Raz says in a different context, “permeate[s] the system and lend[s] it its distinctive character.” It serves as a foundational authority, not itself in need of justification, that provides continuity, unity, indivisibility, and the terms of political discourse. The terms of that discourse include the centrality of the people as a referent for

165 Bauman, *Crimen maiestatis*, 121-22 argues for the connection as propaganda but not evidence of change in the technical definition of *maiestas*; Drexler, "MAIESTAS," 209-10 argues for a shift in the meaning of *maiestas*.
166 Bauman, *Crimen maiestatis*, 121.
action, a public role in negotiations, the legitimating role of law and procedure, and a
notion of partnership in the ownership of the *res publica*. *Maiestas* is not a form of rule; it
is in reference to *maiestas* in the Republic that debate about rule occurs. It is in this sense
that we can understand Schofield’s claim about the continuity of the legitimating role of
the people from the regal period to the Republic. And it is because of the importance of
*maiestas* as a framing notion of authority that Augustus appropriates it in his person, still
playing lip-service to its assumptions but forever altering its republican implications.