The Review of Politics 70 (2008), 370–399.

doi:10.1017/S0034670508000557 Printed in the USA

Private Law Models for Public Law Concepts: The Roman Law Theory of Dominium in the Monarchomach Doctrine of Popular Sovereignty

Daniel Lee

Abstract: The essay traces the juridical origins of the modern doctrine of popular sovereignty as developed by the monarchomach jurists of the late sixteenth century. Particularly, the use of doctrines from the Roman law of property explains the sovereign right of the people to resist and reconstitute the commonwealth. Reviving the civilian concept of dominium during the French Wars of Religion and dynastic royal politics, these radical jurists articulated the claim that the people, not kings, have property rights over the commonwealth. By conceptualizing the people corporately as property-owners in this way, they were able to draw on legal arguments from Roman law to justify popular resistance as an assertion of a corporate property right. In doing so, the monarchomachs expressed an elaborate theory of state and sovereignty within the grammar of the Roman private law.

Introduction

William Barclay, the Franco-Scottish jurist whom John Locke once called "that Great Assertor of the Power and Sacredness of Kings" and "the great Champion of Absolute Monarchy," introduced the term "monarchomach" (or king-killers) into the political lexicon of early modern

I would like to thank Philip Pettit, Alan Patten, and Anthony Grafton, as well as Edward Champlin, Kathleen Davis, Julian Franklin, William Chester Jordan, Nannerl Keohane, Stephen Macedo, Sankar Muthu, Evan Oxman, Mark Philp, and the anonymous reviewers of *The Review of Politics.* I especially wish to thank the Princeton University Center for Human Values for a research grant, established by Amy Gutmann, enabling me to consult original sources.

Europe.[1] Originally, it was a label of derision used to condemn those writers such as François Hotman and George Buchanan who, in the context of the Wars of Religion,[2] advocated a program of resistance to and removal of tyrannical kings. But in a reversal of fortune and perhaps even a vindication of their moral convictions, the monarchomachs have come to occupy a place of honor in the history of political thought, leading one eminent scholar to call them the authors of "the most significant chapter in political philosophy."[3]

Certainly, this glowing appraisal of the monarchomachs must be due in no small measure to the triumph of Whig historicism, which identified monarchomach ideology as one of the principal intellectual sources that nourished the doctrines leading to the seventeenth-century English Revolution and, over the long term, the establishment of constitutional government in the Anglo-American world and beyond.[4] Indeed, this tradition of scholarship

[1]The following abbreviations are used for references to monarchomach and Roman law sources:

Cod.	*Codex*, ed. Gottfried Härtel, Frank-Michael Kauffman (Leipzig: Reclam, 1991).
Dig.	*The Digest of Justinian*, 2 vols., trans. Alan Watson (Philadelphia: University of Pennsylvania, 1985).
Francogallia	François Hotman, *Francogallia*, ed. Ralph Giesey, trans. J.H.M. Salmon (New York: Cambridge University Press, 1972), cited by page number.
Gaius	*The Institutes of Gaius*, ed. Francis de Zulueta (Oxford: Clarendon Press, 1953).
Vindiciae	*Vindiciae Contra Tyrannos*, ed. and trans. George Garnett (New York: Cambridge University Press, 1994), cited by page number.
Vindiciae 1579	*Vindiciae Contra Tyrannos* (Edinburgh, 1579), cited by page number.

[2]William Barclay, *De regno et regali potestate adversus Buchananum, Brutum, Boucherium, et reliquos monarchomachos, libri sex* (Paris: Chavdiere, 1600). John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1988), 419 (II. §232), 424 (II. §239). A recent comprehensive discussion of Barclay's views on the monarchomachs appears in Paul-Alexis Mellet, *Les Traités Monarchomaques: Confusion des Temps, Résistance Armée et Monarchie Parfaite, 1560–1600* (Geneva: Droz, 2007), 37–44.

[3]George Sabine, *A History of Political Theory* (New York: Henry Holt and Company, 1937), 372.

[4]John Neville Figgis, *From Gerson to Grotius, 1414–1625* (Cambridge: Cambridge University Press, 1907), 156: "It is no anachronism to say that this treatise [referring to the *Vindiciae*] is very Whig, if by Whig be understood that body of opinion which is expressed in the writings of Locke and reflected in the Revolution settlement." Sabine, *A History of Political Theory*, 372: "Here appeared the main oppositions of thought which were elaborated in the English civil wars of the next century." On critical discussions of the Whig historicist tradition, see Sir Herbert Butterfield, *The Whig Interpretation of History* (London: G. Bell and Sons, 1931); Christopher Hill, *Intellectual Origins of the English Revolution* (New York: Oxford University Press, 1980); Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in*

located monarchomach ideology as an essential point in that historical trajectory that the British political theorist, Harold Laski, once described as a uniform discursive pathway "from Constance to 1688.[5] But to say that the monarchomachs are important because they influenced later thinkers, even if that is true, tells us little about the monarchomachs themselves and even less about the form of their political reasoning. It is the latter which this paper takes as its subject.

Of course, this is not to say that monarchomach thought has been entirely ignored in existing scholarship. Indeed, for much of the twentieth century, the standard interpretation of the monarchomach theorists placed their writings squarely within the context of French radical politics in the Wars of Religion and a Christian theological framework, which highlighted the monarchomachs' shared identity as a persecuted religious minority.[6] Such an interpretation is certainly reasonable, given the monarchomachs' heavy

England and America (New York: Norton, 1988); J.G.A. Pocock, *Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (New York: Cambridge University Press, 1987).

[5]Harold Laski, "Political Theory in the Later Middle Ages," in *The Cambridge Medieval History*, ed. J.R. Tanner et al., vol. 8 (Cambridge: Cambridge University Press, 1911–1936), 638. This is cited, in turn, by Quentin Skinner, *Foundations of Modern Political Thought*, vol. 2 (New York: Cambridge University Press, 1978), 123. For later commentaries on this thesis, see Zofia Rueger, "On the Road from Constance to 1688: The Political Thought of John Major and George Buchanan," *Journal of British Studies* 1 (1962): 1–31; Francis Oakley, "From Constance to 1688 Revisited," *Journal of the History of Ideas* (1966): 429–32; J.H.M. Salmon, "An Alternative Theory of Popular Resistance: Buchanan, Rossaeus, and Locke," in *Renaissance and Revolt: Essays in the Intellectual and Social History of Early Modern France* (New York: Cambridge University Press, 1987); Francis Oakley, "Anxieties of Influence: Skinner, Figgis, Conciliarism and Early Modern Constitutionalism," *Past and Present* 151 (1996): 60–110.

[6]In addition to Figgis, commentators pursuing this line of thought include Pierre Mesnard, *L'essor de la Philosophie Politique au XVIe Siècle* (Paris: J. Vrin, 1951); Robert Kingdon, *Myths about the St. Bartholomew's Day Massacres, 1572–1576* (Cambridge, MA: Harvard University Press, 1988); Michael Walzer, *Revolution of the Saints: A Study in the Origins of Radical Politics* (Cambridge, MA: Harvard University Press, 1965). The thesis is challenged by Skinner, who considers the monarchomach argument not so much to be innovative as imitative of medieval radical scholastic theory. However, Skinner is not the first to offer this observation. See, for example, J.W. Allen, *A History of Political Thought in the Sixteenth Century*, 2nd ed. (London: Methuen, 1941), 313: "As political thinkers, they [the monarchomachs] were far nearer to William of Ockham than they were to Calvin." See also Sabine, *A History of Political Theory*, 372: "There was in fact nothing specifically Protestant about them. . .[footnote 2]. When the failure of the Valois line made it apparent that the Protestant Henry of Navarre would probably come to the throne, a group of Catholic anti-royalist writers adopted the argument earlier used by the Protestants."

reliance upon Scripture and especially Calvinist doctrine as chief sources in defense of popular sovereignty.[7] But the suggestion that the monarchomachs were merely religious writers advocating resistance from an exclusively Christian point of view misses what was perhaps the most interesting feature of their thought, that is, the juridical grammar and framework of Roman law or, as Donald Kelley put it simply, their "incorrigible legal-mindedness."[8] It is a major defect in the literature, which the historian Ralph Giesey once considered "the greatest weakness of scholarship on the monarchomachs up to now: an almost total ignoring of the role of Roman law."[9]

To be sure, Giesey was overreaching in his criticism. The scholarly writing of nineteenth-century political theorists and legal historians, such as Sir Ernest Barker and Otto von Gierke, had long confirmed the supreme importance of Roman law on the development of a self-standing doctrine of popular sovereignty in monarchomach thought by pointing to the Roman *lex regia* and the transfer of the *imperium* from *populus* to *princeps*.[10] This mode of argument has had many followers in the past century, foremost among them being Quentin Skinner who has suggested that "the Huguenots began to make a systematic use of radical scholastic and Roman law theories of *imperium*" to defend a new theory of popular sovereignty.[11]

[7]Especially in the *Vindiciae, Quaestiones* 1 and 2.

[8]Donald Kelley, *François Hotman: A Revolutionary's Ordeal* (Princeton: Princeton University Press, 1973), 240. One historian has recently criticized the tendency to focus on the juridical framework of the Roman law in the monarchomach tracts such as the *Vindiciae*, such as in the work of Quentin Skinner and George Garnett, and accuses them of "privileging the reading experience and ideological presuppositions of twentieth-century intellectual historians." Anne McLaren, "Rethinking Republicanism: *Vindiciae, Contra Tyrannos* in Context," *Historical Journal* 49 (2006): 31. However, I find McLaren's criticism unpersuasive, for reasons discussed in George Garnett's reply to McLaren: "Law in the *Vindiciae, Contra Tyrannos*: A Vindication," *Historical Journal* 49 (2006): 877–91.

[9]Ralph Giesey, "The Monarchomach Triumvirs: Hotman, Beza and Mornay," *Bibliothèque d'Humanisme et Renaissance* 29 (1967): 52.

[10]Dig., 1.4.1. See also Otto von Gierke, *Political Theories of the Middle Ages*, trans. F.W. Maitland (Cambridge: Cambridge University Press, 1922); Otto von Gierke, *Natural Law and the Theory of Society, 1500-1800*, trans. Ernest Barker (Cambridge: Cambridge University Press, 1934). Especially noteworthy are the introductory essays by the Cambridge translators of von Gierke.

[11]Quentin Skinner, *The Foundations of Modern Political Thought* vol. 2, *The Age of Reformation* (New York: Cambridge University Press, 1978), 321. This thesis has been expanded and restated most recently in Quentin Skinner, "Humanism, Scholasticism and Popular Sovereignty," and "From the State of the Princes to the Person of the State," in *Visions of Politics*, vol. 2, *Renaissance Virtues* (New York: Cambridge University Press, 2002).

I do not deny the importance of this conventional interpretive view, which relies on the constitutional public law theory of the Roman *lex regia* and the transfers of *imperium*, but I do question whether this is the only and exclusive explanation on how the Roman law might have influenced and shaped the modern doctrine of popular sovereignty. My view is that there is a more oblique, but conceptually rich, relationship between the Roman law and early modern political thought that relies not so much on the Roman public law concept of *imperium* as on the private law concept of *dominium*, a term that has close associations with the law of property.

In this article, I want to investigate how this private law theory of property under the Roman law might have been, in fact, a more powerful source for the monarchomach treatise writers than the conventional account based on the *imperium*. By investigating Roman private law as a source for modern political thought, we will be able to witness, as John Neville Figgis suggested over a century ago in his Birkbeck Lectures at Trinity College, Cambridge, the process of "public right shaping itself out of private rights," in the language of Roman law.[12]

There is an important reason for revising the conventional thesis in this way. Specifically, the traditional thesis about the *lex regia* and the alienation of *imperium* in the work of such writers as Gierke does not compare favorably with one of the key arguments developed in the monarchomach theory. It fails to capture the legalistic and even radical flavor of their writing.[13] One of the central features of this polemical literature was the claim made by the monarchomachs that the people as a whole, as a rights-holding *universitas*, or corporation, and not kings, were the "true proprietors" and "lords" of the commonwealth.[14] The core leitmotif in the resistance theory of this period

[12]John Neville Figgis, *From Gerson to Grotius, 1414–1625* (Cambridge: Cambridge University Press, 1907), 12.

[13]Indeed, as Skinner observes, the theory of popular *imperium* in the *lex regia* is ideologically ambiguous. As much as it is a support for populist doctrines, it is just as much a defense of imperial absolutism, and it is this attachment to princely absolutism that should raise doubts concerning the "populist" or "democratic" credentials of *lex regia*-type arguments. See also Myron Piper Gilmore, *Argument from Roman Law in Political Thought, 1200–1600* (Cambridge, MA: Harvard University Press, 1941), which treats legal dicta on the meaning of *merum imperium* and absolutist interpretations in the sixteenth century. In the conclusion to this study, Gilmore himself raises doubts on the absolutist credentials of the Roman law in sixteenth-century thought.

[14]See, for example, the *Vindiciae*, in which Mornay speaks of the "corporation of the people" (*universitas populi*), the "whole people" (*populus universus*), and the people as the "true proprietor" of the commonwealth (*populus . . . vere proprietarius*). The identification of the people as a *universitas* connects the early modern monarchomach populist doctrines with the medieval legal theory of corporatism and corporate representation, which Otto von Gierke has underscored as a central link between medieval legal theory and modern contractarian thought. Otto von Gierke, *Das Deutsche Genossenschaftsrecht*, 4 vols. (Berlin: Weidmann, 1913), especially vol. 4. Gierke's

was that the royal power held by kings and the magistrates constituting royal officialdom was only a temporary and limited grant, a delegation, of power by the people, such that the constituted rulers, in their official capacities, could only administer the state on behalf of the people as a whole, who collectively or corporately "owned" the commonwealth and could take back direct control of their property at their pleasure.[15] Unlike the classical theory of *lex regia*, the people, in this alternative monarchomach account, never alienated their sovereignty to kings as a full *translatio* because they retained their collective title of ownership, just as a landlord who leases a fee to a tenant still retains the rights of ownership. In this way, the monarchomachs' claim of popular sovereignty was articulated in the form and style of a legal proprietary claim of the people's corporate rights of ownership and lordship over the commonwealth or public property, literally, in legal Latin, the *res publicae*.[16] However, to underscore the point, this was not a claim of the people's *imperium*, as we might expect to find under the conventional thesis.

There is a vibrant anti-royalist agenda in this assertion of popular sovereignty in the juristic language of the people's corporate proprietary rights. By locating sovereignty in the people and identifying them, rather than kings, as the proprietors or owners of the commonwealth, these writers effectively stripped kings of their traditional claim of patrimonial right over their kingdoms and ownership of the royal estate, a point of conventional wisdom in medieval political thought.[17] Instead, because the people were *in loco domini* and were thought to hold a legal status as the sole corporate proprietors and owners of the commonwealth, all rights accrued completely to them,

thesis, however, has been criticized as being "vitiated . . . by ahistorical dogma." Harro Höpfl and Martyn Thompson, "The History of Contract as a Motif in Political Thought," *American Historical Review* 84 (1979): 919.

[15]As I will argue below, this proprietary and legalistic claim of the people's corporate supremacy over the commonwealth and the regalian rights attached to the crown was a commonplace in the Huguenot monarchomach literature and could be found in the political writings of Hotman, Beza, and Mornay.

[16]This usage of *res publica*, to be sure, was typically a reference to the *fiscus*, the Roman public treasury. But see Dig., 50.16.15 (Ulpian): "The goods of a community are wrongly called 'public'; for only those things are public [*publica*] that belong to the people." *(Bona civitatis abusive "publica" dicta sunt: sola enim ea publica sunt, quae populi Romani sunt.)* Here, Ulpian clarifies that even things which public choice economists today would call public goods, or *res publica*, have an owner, the *populus Romanus*.

[17]On this point, the following may be consulted. Walter Ullman, *Law and Politics in the Middle Ages* (Ithaca: Cornell University Press, 1975); Antony Black, *Monarchy and Community: Political Ideas in the Later Conciliar Controversy, 1430–1450* (New York: Cambridge University Press, 1970); Ernst Kantorowicz, *The King's Two Bodies* (Princeton: Princeton University Press, 1985).

and never to kings.[18] Kings, according to the monarchomachs, had no rights in the commonwealth from the beginning. They were the inferiors of the people who alone held sovereignty. For the monarchomachs, the people were not the subjects of royal power, but rather, the sources of royal power and authors of the law.

My goal in this article is to elucidate the connection between the juridical logic of the Roman law of property and the normative logic of popular sovereignty doctrine developed by the monarchomachs. In order to accomplish this, I shall develop my argument in three stages. I begin, in the first section, with an excursus on the concept of *dominium* in the Roman law of property and highlight, in particular, the juristic distinction between *dominium* and possession. Having outlined the essentials of the Roman *dominium*, I investigate how French jurists invoked these concepts from the law of property to conceptualize royal power and sovereignty. The theoretical writings of the royalist school set the background for the critical replies developed in the treatises of the monarchomachs. As I will argue in the third part of the paper, the monarchomachs absorbed the juridical framework of argument from the royalists and inverted the terms of the debate such that all the regal rights and powers traditionally associated with the crown were thought to be rightfully held by the people as a whole. In order to show this, I will focus closely on two treatises that were perhaps most representative of the monarchomach theory during the Wars of Religion: François Hotman's *Francogallia* (first published 1573) and the pseudonymous *Vindiciae Contra Tyrannos* (first appeared in 1579 under the name Stephanus Junius Brutus Celta, and generally attributed to Philippe du Plessis Mornay).[19] What I hope to show is the extent to which substantive legal doctrines deriving from the Roman law of property played a central role in developing the normative theory of sovereignty and resistance. I conclude with two related observations regarding the status of the monarchomachs in the development of a distinctively early modern form of political thought.

[18]Vindiciae 1579, 86.

[19]For many years, authorship of the *Vindiciae* was a principal matter of scholarly debate, narrowing down the list of candidates to Philippe du Plessis Mornay and Hubert Languet. The consensus now appears to favor Mornay, and so, I shall refer to him for shorthand references to the *Vindiciae*. Skinner, *Foundations*, 2: 305, note 3: "The best modern scholars . . . have always been inclined to accept Mornay's scholarship." For the background literature on the authorship debate, see Figgis, *From Gerson to Grotius*, 153; Franklin, *Constitutionalism and Resistance*,138–40; E. Armstrong, "The Political Theory of the Huguenots," *English Historical Review* 9 (1889): 18–19; A. Waddington, "La France et les Protestants Allemands sous Charles IX et Henri III: Hubert Languet et Gaspard de Schomberg," *Révue Historique* 42 (1890): 243; Georges Weill, *Les Théories sur le Pouvoir Royal en France pendant les Guerres de Religion* (New York: Burt Franklin, 1967), 109.

Dominium in the Roman Law

The monarchomach doctrine of popular sovereignty was, in its essentials, a Civilian doctrine derived from Civilian sources.[20] The reason for this is simple. Virtually all of the monarchomachs, such as Hotman, and Mornay, were trained as lawyers.[21] Given this common legal background, the monarchomachs were, like jurists of the royalist school, members of a professional elite. They participated in a common juridical discourse, which cut across conventional national and linguistic boundaries of Renaissance Europe.[22]

This uniform legal background in the Roman *jus civile* provided "the makings of a larger framework of social thought" linking private law together with the modern public law theory of state and offered a grammar and language within which it was possible to construct a range of various political doctrines, including some that were anti-royalist.[23] Like Aristotelian philosophy and patristic theology in the Middle Ages, Roman law in the Renaissance context provided "a common language and methodology for the discussion of critical issues in regard to monarchy."[24] Through these categories of the Roman law, then, the monarchomachs were able to develop a

[20]This reliance on the Roman law, in my view, distinguishes the monarchomachs from other Calvinist resistance theorists within the general context of the Reformation, such as the theories of Knox and Goodman. The monarchomachs did not operate within a distinctively Calvinist or Huguenot framework, as defended in Walzer in *Revolution of the Saints*. Nor were they merely reconstructing a Renaissance version of a radical scholastic theory of such writers as Ockham, Gerson, and Mair, as defended by Skinner in *Foundations* vol. 2 and, more recently, in "Humanism, Scholasticism and Popular Sovereignty," in *Visions of Politics*, vol. 2, *Renaissance Virtues* (New York: Cambridge University Press, 2002). There is a profoundly juridical framework that is unique to the monarchomachs, a thesis most persuasively made by Julian Franklin, Ralph Giesey, Donald Kelley, and J.H.M. Salmon at various places.

[21]Donald Kelley, "Civil Science in the Renaissance: Jurisprudence in the French Manner," *History of European Ideas* 2 (Oxford, 1981).

[22]Donald Kelley, *Foundations of Modern Historical Scholarship* (New York: Columbia University Press, 1970); Kelley, "Civil Science in the Renaissance: Jurisprudence in the French Manner"; Julian Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (New York: Columbia University Press, 1963). Gerald Strauss, *Law, Resistance and the State: The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton University Press, 1986).

[23]Kelley, "Civil Science in the Renaissance," 269. See more generally Manlio Bellomo, *Common Legal Past of Europe: 1000–1800*, trans. Lydia Cochrane (Washington: Catholic University of American Press, 1995). See J.G.A. Pocock's essay in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (New York: Cambridge University Press, 1987).

[24]J.H. Burns, *Lordship, Kingship and Empire: The Idea of Monarchy, 1400–1525* (New York: Oxford University Press, 1992), 7. Mornay's marginal citations, in

doctrine of resistance and popular sovereignty. What made this all possible was one of the central concepts in all of Roman jurisprudence, the concept of *dominium*.

The Private Law Concept of "Dominium"

The starting point and central organizing idea of the Roman law of property was *dominium*, which in its juridical meaning indicated a full and absolute ownership or lordship over some subjected thing, or *res*.[25] In the premodern mind, the idea of absolute ownership and control over external things, signified by *dominium*, was an unbridled and exclusive power which implied a relation of mastery and slavery, or lordship and bondage. While it can be variously translated into English as power, lordship, mastership, dominion, or domination, the idea of *dominium* in its Roman civil context primarily implied ownership of some thing, *res* [including *res publicae*, public things] and the powers and rights associated with the civil notion of ownership. *Dominium* was simply "man's total control over his physical world—his land, his slaves or his money."[26] As Buckland states in his classic treatise on Roman law, "*dominium* is the ultimate right, that which has no right behind it . . . it is a 'signoria.'"[27]

What emerged from the concept of civil *dominium* was a generalized signifier denoting an absolute proprietary power of one over another. This absolutist and totalizing conception of *dominium* was perhaps one of the central reasons why early modern critics of the reception of Roman law viewed it as a potential source of tyranny.

"Dominium" and Possession

The man who held this *dominium*, by right, was called the *dominus*, a term with linguistic association to *domus*, meaning household or estate. The

Vindiciae 1579, referred almost exclusively to Bartolus's treatise, *De Tyranno*, which made a peculiar distinction between tyrants by exercise and tyrants by usurpation.

[25]*Res* in its juristic sense simply indicates the "general name for anything which is the object of a legal act." William Smith, ed., *Dictionary of Greek and Roman Antiquities* (1870), 421. Cf. with this: "Institutionally a *res* is some element of wealth, an asset with a legally guaranteed value; it is an economic conception" (Janet Coleman, "Property and Poverty," in *Cambridge History of Medieval Political Thought, c. 350–c.1450*, ed. J. H. Burns [New York: Cambridge University Press, 1988], 611). See also Dig., 1.8.1 *et seq.* for classical treatment of *res*.

[26]Richard Tuck, *Natural Rights Theories* (New York: Cambridge University Press, 1979), 10.

[27]W.W. Buckland, *A Text-book of Roman Law from Augustus to Justinian*, 3rd ed., rev. Peter Stein (Cambridge: Cambridge University Press, 1963), 188.

dominus was the lord, owner, and proprietor of his estate and his *servi*, which, in theory, were all subject to and fully dependent upon him and his final arbitrary will. Civil *dominium* was fundamentally a relational concept, linking together an owner with his property. In this way, *dominium* always implied an asymmetrical relationship of dependence.

But not everyone who held or enjoyed property was necessarily *dominus* of that property. In fact, property quite often changed hands without *dominium* ever being transferred. As the Roman jurists taught, it was an elementary but fundamental fallacy to assume that one's possession of property necessarily entailed his *dominium* over that property.[28] The reason for this is due to perhaps the most unique feature of the Roman law of property, the classical distinction between the absolutist conception of legal ownership indicated by *dominium* and the bare fact of possession, or *possessio*.

Ownership in the civil law was not the same as possession, a category distinction that was absent in English common law and, more generally, in the Germanic customary sources of law.[29] One's *dominium* over some thing did not necessarily entail one's immediate possession of it. What this meant was that one could be in factual possession of some property without also being the *dominus*.[30] Of course, by right of ownership, a *dominus* was fully entitled (literally, had title) to the possession of some *res*, such that a *dominus* could also, at the same time, be the possessor.

But this was not a necessary connection in Roman legal theory.[31] As early as the time of the XII Tables, the earliest formal Roman code, often a *dominus* would voluntarily elect to make a conditional grant of *possessio civilis* over some *res* to another party as temporary possessor, such that *dominium* and *possessio civilis* would be decoupled between two separate parties.[32] In classical Roman law, even if another party held the factual *possessio civilis* of some thing, the *dominus* always remained the legal owner and retained a reserve fund of proprietary rights attached to and implied by *dominium*.

[28]Dig., 41.2.12.1 (Ulpian): "Ownership has nothing in common with possession."

[29]H. F. Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1952), 142–43; Andrew Borkowski and Paul du Plessis, *Textbook on Roman Law*, 3rd ed. (New York: Oxford University Press, 2005), 157, however, suggest that *dominium* might be compared favorably with the fee simple in common law.

[30]Dig., 41.2.12. As Smith explains at 422 of the *Dictionary of Antiquities*, "Every *dominus* has a right to the possession of the thing of which he is *dominus*, but possession alone, which is a bare fact without any legal character neither makes a man a *dominus*, nor does the want of possession deprive him of *dominium*."

[31]Dig., 41.2.13.pr (Ulpian): "Pomponius discusses the question whether, when stones had been sunk in the Tiber in a shipwreck and some time later salvaged, the ownership of them remained intact throughout the time that they were submerged. My view is that I remain owner of them but I do not possess them."

[32]Cod., 2.12.10. Cp. Tuck's discussion on 18ff. in *Natural Rights Theories*.

This included the ultimate right to take back the *possessio* from the temporary possessor by prosecuting his rights through the civil action called *vindicatio*. Where a *dominus* can successfully show title and prove his right to the property in question through legal process, then a possessor must yield possession, which then would revert back to the rights-holding *dominus*. Under civil law, then, possessory claims were, in theory, always inferior to the proprietary claims of ownership asserted by a *dominus* through the *vindicatio*, a point of fundamental importance to the monarchomach argument, as we shall see below.[33] Once title was shown and asserted through proper civil procedure, there were very few civil limitations on a lord's assertions of *dominium*.[34]

Roman Law and the French Theorists of Royal Power

Taken together, this civilian theory of *dominium* in the Roman law would become central to the terms of royal and dynastic politics during the French Wars of Religion.[35] As we shall see, the juristic concept of *dominium* was one of the principal devices that Renaissance jurists invoked to articulate a theory of royal power and sovereignty. By envisaging the king as a kind of civil *dominus*, the French royalist jurists subtly put forth the argument that the sovereign powers and regal rights attached to the crown belonged to the king as his own princely property, which could be passed on to his heirs by the ordinary rules of succession.[36]

To be sure, the French royalists were not alone in this appropriation of Roman law. Civilian legists in princely courts throughout Renaissance

[33]This remains valid for the Roman law of property, but legal practice provided protections of de facto possession without reference to Quiritarian right through the use of devices called possessory interdicts, institutionalized in the late Republic and the Principate.

[34]But this statement needs to be carefully qualified, since, in practice, owners under the Roman law could attach various kinds of incidents on ownership. Moreover, later Roman law under the Empire recognized inferior modes of ownership, such as "bonitary ownership." Jolowicz, *Historical Introduction*, chap. 10. Buckland, *Text-Book on Roman Law*, 188–89, Borkowski and du Plessis, *Textbook on Roman Law*, 159–60.

[35]To be sure, *dominium* was not the only civilian concept used in the royal politics of the French Wars of Religion. The jurists drew from a wide range of legal sources such as the law of persons, the law of obligations, the law of delicts, the law of debt, not to mention feudal law. The law was a common fund of ideas and concepts which could be tailored toward advancing a particular political doctrine, in this case, royal power.

[36]The Salic Law, which regulated royal inheritance by agnatic succession, was considered one of the fundamental laws of the realm which, according to the early sixteenth-century writer, Claude de Seyssel, was one of the basic "bridles" or limitations on absolute personal rulership of the king. Claude de Seyssel, *The Monarchy of France*, trans. J. H. Hexter, ed. Donald Kelley (New Haven: Yale University Press, 1981). Hotman approvingly cites Seyssel on this point in Francogallia, 293.

Europe, especially in the German states, were keenly aware that the Roman law could be programmed to provide the theoretical resources to augment princely power, a lesson that the French jurists of the royalist school mimicked in consolidating the *pouvoir royal*.[37] A popular strategy was to situate the king in the position of the Roman emperor, so that jurists could apply those absolutist civilian maxims that were traditionally attached to the Roman emperor.[38]

But these jurists used another strategy. They conceptualized the royal power as a kind of proprietary right. It was, as it turned out, one of the most effective strategies for the jurists of the royalist party.[39] At this point the royalists turned to the Roman law theory of *dominium* for elaborating a theory of royal power. Because royal power and regalian right were to be considered objects of property, they were classified legally as incorporeal things, *res incorporeales*, which belonged to the crown, as *dominius*, and thought to be fully subject to legal rules governing property ownership and succession.[40]

As one way to protect and secure the king's proprietary interests in regalian rights and prerogatives attached to the royal domain, royalist jurists in Renaissance France commonly produced treatises that enumerated and confirmed those prerogatives and regalia that belonged to the king and to no one else, especially not the princes and seigneurs of the provinces who insisted on local privileges against the encroachment of royal right.[41]

[37]Strauss, *Law, Resistance and the State*.

[38]These included such maxims as Dig., 1.3.31 (Ulpian), "princeps legibus solutus" (the prince is unbound by the law), Dig., 1.4.1 (Ulpian), "quod principii placuit legis vigorem habet" (what pleases the prince has the force of law), the view that the prince is *lex animata* (living law) and the thesis that the prince holds all law in his person, *lex in scrinio pectoris*.

[39]Figgis, *From Gerson to Grotius*, 10: "[T]he king's rights were the rights of landed proprietors." This complicated overlapping of proprietary rights and sovereign rights has been analyzed under the heading of "proprietary dynasticism" in Herbert Rowen, *The King's State: Proprietary Dynasticism in Early Modern France* (New Brunswick: Rutgers University Press, 1980).

[40]In the Roman law, rights were considered *res incorporeales* and thought to be objects of property. Gaius 2.14. Borkowski and du Plessis, *Textbook on Roman Law*, 153.

[41]Some examples in this genre, discussed by Skinner in *Foundations*, 2: 259ff. and W.F. Church in *Constitutional Thought in Sixteenth-Century France: A Study in the Evolution of Ideas* (Cambridge, MA: Harvard University Press, 1941) include Barthelemy de Chasseneuz, *Catalogus Gloriae Mundi* (Lyon, 1529); Etienne de Bourg, *Solium Regis Christianissimi Franciae in Suprema Curia Parlamenti Parisiensis, Tribunal Iudicum et Cathedra Doctorum* (Lyon, 1550); Charles Du Moulin, "Commentarii in Consuetudines Parienses," in *Opera Omnia*, 5 vols. (Paris, 1681); Jean Ferrault, *Tractatus Iura Seu Privilegia Aliqua Regni Franciae Continens*, in Du Moulin, *Opera Omnia*, vol. 2; Charles de Grassaille, *Regalium Franciae* (Lyon, 1538). This practice of enumerating regalia was not restricted to Renaissance France, but it was a common exercise of lawyers attached to courts. For example, see Kenneth Pennington's discussion of the Bolognese Doctors at the Diet of Roncaglia on whether Frederick was

Some of the jurists even took a bolder step in this direction. In order to create a more juridically unified constitutional order centered around the crown, the legists began to argue that, in fact, many of the customary local rights and feudal privileges scattered throughout provincial jurisdictions such as Languedoc, Brittany, and Normandy were, in fact and in origin, the king's property.[42] Thus, the king would have been within his rights to reclaim and vindicate precisely those local privileges and reabsorb them as prerogatives of the crown, which he did through such legal processes approximating amortization or escheats.[43]

Criticism of the Royalist School

To be sure, not everybody followed the royalists on this analysis of royal property, least of all the monarchomachs. As we shall see, it was this particular application of the juristic theory of *dominium* advanced by the royalist school to which the monarchomachs, such as Hotman and Mornay, responded in their treatises.

The main point of contention was the royalist suggestion that royal power and regal right could be regarded legally as property subject to a title similar to the *dominium* in the Roman law. But, the critics argued, royal property was not to be considered just any property. Such property was, rather, of "the royal domain," which attached not to any particular incumbent of the office of kingship, but to the permanent office of kingship itself, the crown.[44] Indeed, the critics of royal absolutism insisted that the property of the royal domain could never be regarded the personal property of the king [*patrimonium*], just as the Roman *princeps* could not confiscate the *fiscus* for his personal property and use. Thus, the king could not, like a private *dominus*, decide arbitrarily the succession to the royal estate according to the law of inheritance or alienate the domain unilaterally by his own personal will.[45] It was not his to give away in the first place.

---

dominus mundi in *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993) and the common lawyers' dicta on the *Prerogativa Regis* in the Inns of Court in Margaret McGlynn, *The Royal Prerogative and the Learning of the Inns of Court* (New York: Cambridge University Press, 2003).

[42]W.F. Church, *Constitutional Thought in Sixteenth-Century France* (Cambridge, MA: Harvard University Press, 1941), 188.

[43]Jean Brissaud, *A History of French Public Law*, trans. James Garner (New York: August M. Kelley, 1969), 333.

[44]Brissaud, *French Public Law*, 478–81 (§§435–36).

[45]The king could not disinherit natural heirs, by the rule, "non habent ab ipso patre, sed a consuetudine regni" (royal heirs succeed not by their fathers, but by the custom of the realm). Brissaud, *French Public Law*, 342.

While this argument may have been normatively attractive to opponents of absolutism, this denial of *dominium* over regal rights and powers attached to the domain raised a new theoretical problem for the jurists. This was because critics of royal absolutism simultaneously wanted to deny *dominium* to the crown, while still clinging to the concept of *dominium* in their vision of the constitution. As any Roman lawyer would have known, acknowledging *dominium* would necessitate, in theory, a commitment to the existence of some *dominus*. But if the royal domain was not to be under the *dominium* of the king, as the antiroyalists argued, then to whom did it belong as property? Who was the *dominus*, if not the king?

Roman Law and the Monarchomach Theory

The monarchomachs supplied a radical and potentially subversive answer to the question of *dominus*. The royal domain, with all the rights and powers attached to it, had to belong to the people. It was a reply that clearly indicated one of the central flaws of the royalist strategy of argument, as it was a strategy available to the opponents of royal absolutism. We must now turn to investigate the monarchomachs' reply to the royalist theory in order to reconstruct the juristic theory of popular sovereignty.

"Populus" as "Dominus"

The central claim motivating the monarchomach theory involved an ingenious verbal sleight-of-hand that inverted the juridical relationship between the king and the people. Against royalist assertions of *dominium* over the whole bundle of regal rights and powers attached to the royal domain, the monarchomachs stated that the people, rather than kings, were in fact the true lords and owners of the commonwealth.

This was, in multiple ways, a novel and startling statement. Not only did it strip and displace the traditional royal rights intrinsic to *dominium* away from kings as *domini* over the commonwealth, but the monarchomach theory simultaneously reassigned those same rights to the people as a whole, *ut universi*, as a unitary corporate agent. As Mornay put it in the *Vindiciae*, the people "all together as a whole" were to be regarded "lords of the kingdom" and the "true proprietor" over the commonwealth.[46] Hotman, similarly, denied *dominium* over the royal rights to the king, by explaining, instead, that "the ownership of that property [i.e., the commonwealth] remains with the people."[47] Thus,

[46]Respectively, Vindiciae 124 (in Latin, Vindiciae 1579, 150: *universi domini regni*) and Vindiciae 90 (in Latin, Vindiciae 1579, 10: *vere proprietarius*).

[47]Hotman, Francogallia, 255 (in Latin, Francogallia, 254): [*earum possessionum proprietas penes populum manet*].

with one strike, the monarchomachs simultaneously accomplished three tasks that would frame their normative argument for resistance and popular sovereignty: (1) they denied the absolutist doctrine of royal sovereignty implied by royalist theories of *dominium* while, at the same time, (2) crafting a distinctive corporatist concept of the people, (3) to whom the monarchomachs attributed sovereignty in the form of *dominium*.

Because the people were thought corporately [*universi*], though not individually [*singuli*], to be holders of private rights at civil law, the monarchomach jurists framed the question of the people's rights as if the people were like one private party in civil litigation, or *actiones*, seeking an appropriate legal remedy against the actions of another private party, in this case the crown.

In the monarchomach theory, this translated into the claim that the "people" was actually a "person"—specifically, a legal person at civil law, capable of being represented by the estates and orders of the kingdom. This was an extraordinarily significant statement because legal persons, like medieval corporations, were capable of effectuating all kinds of legal acts and transactions on behalf of the whole, the most important of which was the acquisition, ownership, and transfer of property and the exercise of those proprietary rights attached to ownership.[48]

The significance of this interpretation would have been clear to any reader trained in the Roman law. The people, according to the monarchomachs, was more than the many-headed hydra described by Horace that antidemocratic writers feared.[49] In fact, the people could have, by fiction, a unified voice and mind, just as any king could have, by nature, a unified voice and mind. We should thus expect to find in this civilian logic the possibility of a whole people fully capable of acting together as a united corporate person and having the power that the civil law granted to legal persons, including those actions that involve the exercise of rights. The people could acquire property and have *dominium* over it, just like any private proprietor.[50]

For the monarchomachs, this fundamental law underscored the limited scope of royal power over the commonwealth. A king could not treat his kingdom as if it were his property because ownership, in the sense of

[48]Dig., 3.4.1 *et seq*., Dig., 5.1.76, Dig., 46.3.98.8, Dig., 45.1.83.5. Although it was not a part of classical Roman law, the law of corporations was a product of medieval jurisprudence developed by scholastic glossators such as Azo and Accursius who relied on the Roman texts. The comparison of legal corporations to the people was a staple of medieval public jurisprudence, especially in the thought of Bartolus and Baldus. See J.P. Canning, *The Political Thought of Baldus de Ubaldis* (New York: Cambridge University Press, 1987).

[49]George Buchanan, *A Dialogue on the Law of Kingship among the Scots* (De Jure Regni apud Scotos Dialogus), trans. Roger Mason and Martin Smith (Burlington: Ashgate, 2004), 55.

[50]Borkowski and du Plessis, *Textbook on Roman Law*, 88–89.

dominium, did not belong to the king at all. It belonged to the people. Thus, Hotman argued that "the kingdom of Francogallia was not subject to the law of inheritance as if it were a private patrimony, but was habitually transferred by the votes and decisions of the estates and the people."[51]

If the people, however, were the *dominus* and the lords and proprietors of the commonwealth, then what sort of legal status did kings hold, according to the monarchomach theory? The short answer was that kings were anything but lords.[52]

Kings were, in fact, the inferiors of the people, of various sorts.[53] The monarchomachs invoked various titles to elucidate the nature of the kingly office such as a "trustee," "pilot," "servant," "administrator," "minister," "executor," "guardian," "curator," "promissory," and "tutor."[54] But whatever he was, the king could "by no stretch of the imagination be considered proprietary lords [*dominus proprietarius*] of the fisc, kingdom, or royal patrimony," which rightly and exclusively belonged to the people as a whole.[55] Mornay explains that "a true king is a *curator* of public affairs and an administrator of public resources, not a proprietary owner; and indeed he can no more alienate or squander the royal domain than the kingdom itself."[56]

The Argument from Possession

Of course, this radical assertion of the people's corporate proprietorship of the commonwealth ran immediately into the problem of its obvious lack of fit with the facts of royal administration in this age of absolutism, the reason

[51]Hotman, Francogallia, 247 (in Latin, Francogallia, 246): [*regnum Francogalliae antiquitus non hereditatis jure, ut private patrimonia, sed ordinum ac Populi judicio et suffragiis deferri solitum fuisse*].

[52]For an extensive discussion of Renaissance theories of French kingship, see Mellet, *Les Traités Monarchomaques*, 364–400.

[53]Vindiciae, 78 (in Latin, Vindiciae 1579, 89): [*Ut vero Populus universus Rege superior est; ita etiam hi etsi singuli Rege inferiores sint, universi tamen superiores censendi sunt*].

[54]Respectively, Francogallia, 335; Francogallia, 399 and Vindiciae, 75; Vindiciae, 74; Vindiciae, 89; Vindiciae, 104; Vindiciae, 104; Francogallia, 205, 399 and Vindiciae, 104; Vindiciae, 119; Vindiciae, 130; Francogallia, 205, 399; and Vindiciae, 158.

[55]Vindiciae, 113 (In Latin, Vindiciae 1579, 137–38): [*At certe fisci, patrimonii regalis, quod domaniu vulgate vocabulo nucupatur, proprietarii domini nulla ratione censeri possunt*]. Cp. Vindiciae 119: "In all legitimate realms the king is not the proprietary lord of the royal patrimony" (in Latin, Vindiciae 1579, 145): [*Quod autem rex in omnibus legitimiis imperiis, patrimonii regii proprietarius dominus non sit*].

[56]Vindiciae, 119 (In Latin, Vindiciae 1579, 144): [*verum regem, ut publicorum negotiorum curatorem, it et publicarum opum administratorem, non autem proprietarium dominium esse, qui quidem domanium regium non magis, quam regnum ipsum, alienare, aut dissipare possit*].

of state, and the new science of politics.[57] In what sense could the people as a corporate whole, as a *universitas*, actually be said to "own" and be the "lord" over the commonwealth, particularly when government and administration were increasingly being handled by a cadre of professional elites and crown officials in the employ of the royal courts of Europe? How could the monarchomach populist theorists situate the de facto, if not also the de jure, royal power of kings and magistrates against the monarchomachs' argument for popular sovereignty?

To reconcile this gap between de jure theory and de facto practice, the Huguenot jurists invoked the juridical language of proprietary rights in the civil law to theorize the sovereignty of the people against the absolutist claims of kings over their royal domain. The core argument was that kings and the magistrates collectively constituting royal officialdom held nothing more than a temporary possession of the rights and powers attached to the commonwealth. Kings held possession, just as a tenant held nothing more than temporary possession of the lord's fee.

But the main point was that, even though these officers possessed and used these powers, they did not own them and had no rights in them. Only the whole people (*populus universus*) held the right of *dominium* over the civil powers of the commonwealth: "The simple ownership of [the royal domain] is that of the body of the people as a whole, or of the commonwealth, while the usufruct is the king's."[58] It was the people's property and, thus, under their popular *dominium*.

In this way, thus, the populists could certainly acknowledge the de facto civil powers that kings and magistrates exercised ex officio, as a civil possession (*possessio civilis*). Hotman is even able to declare that the royal rights (*regalia* or *imperia*) attached to the royal office may be at the disposal of kings, but they never have ownership over them as a

[57]J.W. Allen, *History of Political Thought in the Sixteenth Century*; Church, *Constitutional Thought*, chap. 4; Ralph Giesey, "State-building in Early Modern France: The Role of Royal Officialdom," *Journal of Modern History* 55 (1983): 191–207; Strauss, *Law, Resistance, and the State*; Richard Tuck, *Philosophy and Government, 1572–1651* (New York: Cambridge University Press, 1993); Maurizio Viroli, *From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics, 1250–1600* (New York: Cambridge University Press, 1992).

[58]Francogallia, 255 (In Latin, 254): [*Huius nuda proprietas est penes universitatem populi, sive Rempublicam, ususfructus autem penes Regem*]. The seventeenth-century Tübingen jurist, Christopher Besoldus, appeals to this principle to articulate a German public law theory of double sovereignty. Christopher Besoldus, *Dissertatio Politica-Juridica, de Majestate in Genere* (Tübingen, 1625), 9. Mornay goes even further in the *Vindiciae*, by denying that kings are not even usufructs of the kingdom. Vindiciae 127: "Kings are only administrators of the royal patrimony, not proprietors or usufructuaries."

private patrimony: "[Whilst] it is under his government, [it is] not in his domain."[59]

By denying kings any proprietary *dominium* over the commonwealth, the populist theorists actually considered such constituted rulers to be the inferiors of the corporate whole, the *universitas*. In a variation on a medieval conciliarist theme, the populists could now claim, *rex maior singulis minor universis*.[60] As Mornay put it in the *Vindiciae*, kings are merely "seised" and "put in possession of the kingdom, by the estates of the realm . . . who represent the corporation of the people," who, as the true proprietors, only delegate and lend temporarily to the king the royal powers over which the people have an exclusive and inalienable *dominium*.[61] Moreover, since they are thought to be "seised," kings can just as easily be "disseised" and removed from power, just as, in the law, a *dominus* can disseise a tenant from his fee, which is then escheated.[62]

[59]Hotman, Francogallia, 253 (In Latin, Francogallia, 252): [*Principis esse dicuntur, sed . . . imperio, non dominio; ditione, non proprietate*]. This appears to be a direct quotation from the *Politique* Chancellor Michel de l'Hôpital who asserted, in a very different context, that kings have the right to tax because "the wealth of their subjects belongs to them [kings]. . .as the rulers, not as the lord and proprietors [imperio, non dominio et proprietate]." Church, *Constitutional Thought*, 166, note 32.

[60]Roughly, this is the notion that, while the king may be superior to individual members of the commonwealth, the commonwealth as a whole is always superior to the king. Skinner, *Foundations*, 2: 334. Mornay expresses this conciliarist commonplace at various points in the *Vindiciae*: Vindiciae 78: "Thus as the whole people is superior to the king, so also these—although as individuals taken to be inferior to the king—must altogether as a whole be considered to be superiors" (in Latin, Vindiciae 1579, 89): [*Ut vero Populus universus Rege superior est; ita etiam hi etsi singuli Rege inferiores sint, universi tamen superiores censendi sunt*]; Vindiciae, 156: "For the superior is the whole people, or those who represent it—the electors, palatines, patricians, the assembly of the estates, and the rest" (in Latin, Vindiciae 1579, 194): [*Superior vero, universus populus est, quive eum representant electors, palatine, patricii, ordinum conventus, et ceteri*].

[61]Vindiciae, 72. Harold Laski's edition of the 1689 edition of the *Vindiciae* uses the term "seised" at 123. (*A Defence of Liberty Against Tyrants: A Translation of the Vindiciae Contra Tyrannos by Junius Brutus*, ed. Harold Laski [London: G. Bell and Sons, 1924]).

[62]It is interesting to note, moreover, that monarchomachs are not alone in making this claim. Even the greatest theorist of absolute sovereignty, Jean Bodin, certainly no friend of radical populism, was pressed to conclude that kings cannot hold property in the commonwealth: "For kings and great princes have not the property of the public domains, nay not so much as the whole use and profit . . . bare use, the rest belongeth unto the commonwealth" *Six Bookes of a Commonweale*, trans. Richard Knolles, ed. Kenneth McRae (Cambridge, MA: Harvard University Press, 1962), 130. Likewise Hugo Grotius, following these theories, would later claim that kings "have no more than a tenant's right" to the royal dignity and power which are properly the *patrimonium . . . populi* and not a *dominium. De Jure Belli ac Pacis* (Paris, 1625) at

Reducing the royal power in this way to the status of a mere *possessio civilis* was an effective strategy to contest the royalist hegemony and reassert the traditional local popular rights of seigniorial and lesser jurisdictions, which, the monarchomachs thought, were being usurped by kings claiming an illegal *dominium* over the whole kingdom. Nevertheless, the monarchomach strategy of argument was still vulnerable to at least one major legal objection from the civil law. That was usucapion.

The Royalist Objection from Usucapion

Classical Roman law provided three principal methods for acquisition and transfer of property and the *dominium* attached to it among Roman citizens. Two of these methods of conveyance, *mancipatio* and *in iure cession*, were formal, even ceremonial and collusive, in nature.[63] But the third civil method, *usucapio*, literally translates, "I capture by usage." Under the method of *usucapio*, long, uninterrupted, and continuous possession and use of some property would be sufficient to effect the civil transfer of lawful ownership from the civil *dominus* to the possessor—two years in the case of immovables, and one year for movables.[64]

Of the various arguments available to them, royalists such as Bernard Du Haillan and Etienne Pasquier used this principle of usucapion to argue for the king's title to the kingdom and the royal estate.[65] Here, grounded in the Roman law, was a potentially fatal objection to the monarchomach argument. Even if kings and magistrates were merely temporary possessors of the people's power, as the monarchomachs insisted, royalists could still yet claim ownership and *dominium* on historical grounds that they "usucaped" to it by long usage. Taking their cue from Roman law, Royalists could argue that the law of property mandates that long possession activates

2.6.11: "Nam et in hoc jus majus fructuario non habent" [For an English translation, see Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund: 2005) 576: "For they have no more than a tenant's right to it."]

[63]These were sometimes called *imaginaria venditio*, or imaginary sales. Jolowicz, *Historical Introduction*, 145; Gaius, 1.119.

[64]XII Tables at Table 6.5; Gaius, 2.42–2.44. As with many features of the Roman law, usucapion had a fundamentally practical aspect, i.e., to ensure that "ownership of things should not remain uncertain for too long a time." *Peregrini*, or foreigners, who were unable to acquire property through usucapion, could, nevertheless, acquire property through a roughly similar procedure that the praetors developed for noncitizens, *praescriptio*, or prescription. Since the principle is largely the same, I treat both usucapion and prescription as a single category.

[65]On the *Researches* of these royalist legal historiographers, see Church, *Constitutional Thought*, 84, and, more generally, Kelley, "Civil Science in the Renaissance."

usucapion and prescription and the rights attached to *dominium* in favor of the civil possessor—in this case, the crown. On this royalist argument, then, the people had already lost any ancient rights in the commonwealth they might have had in the past.

But as powerful as this argument by usucapion might have been, the monarchomachs still had several strategies left open to them to handle this challenge, all of which drew support from civil remedies and legal exceptions to the rules concerning usucapion in the Roman law.

Reply to Objection: Prescription Runs Not against the People

One argument, articulated in the most complete form in the *Vindiciae*, developed the principle, "adversus populum non praescriptio" [prescription cannot prejudice the rights of the people].[66] In a lengthy section in the reply to the third *Quaestio*, Mornay argued that, even if long possession could transfer rights of ownership in the civil law, such an extraordinary transfer could never be interpreted to prejudice the rights of the people. In part, the argument relied on the medieval juristic theory of corporation as an immortal body which "never dies."[67]

Usucapion and prescription can operate only when there is a finite space of time in which long possession can be established. But since the people are immortal in this way, perpetual like the water of a flowing river, time and temporality are irrelevant considerations.[68] The people's collective rights are, like them, immortal, imprescribable, and inalienable.

Reply to Objection: One Cannot Usucape to Stolen Property

A second reply to the royalists' usucapion argument invoked the principle that possessors cannot usucape to stolen property, a basic principle of Roman law which can be traced to the XII Tables.[69] For usucapion or

[66]Allen, *History of Political Thought in the Sixteenth Century*, 312: "La prescription contre les droits du peuple est invalide" and in the Vindiciae 1579, 103: "Nihilominus tamen adversus Populu neque prescriptio, neque praevaricatio ista quidquam facit." More generally, see Cod. 41.3.18 and Dig. 7.33.1.

[67]Vindiciae, 90 (In Latin, Vindiciae 1579, 104): [*etsi moriuntur reges, populus interim, ut neque ulla alia Universitas, nunquam moritur*]. See also Dig. 5.1.76; Dig. 46.3.98.8; Dig. 45.1.83.5.

[68]Vindiciae, 90 (In Latin, Vindiciae 1579, 104): [*Ut enim perennem fluvium fluxus, ita et populum immortalem ortus et interitus vicissitudo facit*]. Cf. Aristotle *Politics* III.3, 1276a.

[69]XII Tables at Table 6.5; Gaius 2.45: In order for usucapion to be effected, the possessor had to meet what was called a *justus titulus* requirement, a precondition

prescription to be valid, possessors must be bona fides. The basic thought here was that, because tyrannical kings had somehow stolen the regalian rights and powers and had "usurped command by force and deception," they could not possibly claim to have rightful title or *dominium* to the commonwealth by way of usucapion.[70] Such kings were not legitimate rulers and not bona fides but, in fact, "usurpers" of the people's power and "infringers" on their rights.[71] Mornay simply called them "tyrants without title" and considered them to be "unjust possessors."[72]

The normative content of this legal argument is thus structurally identical to the kind of historical principles involved in Robert Nozick's entitlement theory of justice in transfers. One cannot have title and right to something that was taken from another unjustly, even with the passage of time. Thus, the prior historical injustice activates a claim of rectification, that is, "the rectification of injustice in holdings."[73]

Like Nozick's assumption, this was the normative logic of the monarchomach's reply to the Royalists. The people are "entitled" to rectify an injustice perpetrated by tyrannical kings. Tyrants had, in effect, stolen the rights and powers that were the property of the people. Thus, Mornay declares, "If someone should try to infringe this law by force or deceit, we are all obliged to resist him because he violates the society to which he owes everything."[74] Even more significantly, "it is lawful for any private person [*privatus quislibet*] to oust this sort of tyrant, were he to force his way in."[75] In this way, resistance was a lawful normative conclusion for the monarchomachs who regarded it as the proper remedy to what they saw as a delict and even a criminal offense against the people.

designed to show that the possessor who was about to usucape had a just title to original acquisition of the thing possessed. Jolowicz, *Historical Introduction*, 156. Here, the monarchomachs, especially Mornay, are claiming that tyrants are without title, *absque titulo*, and, in effect, robbers of the people's property (Vindiciae 1579, 171). The legal remedies for theft in the Roman law directly become the normative principles of resistance.

[70]Vindiciae, 140 (In Latin, Vindiciae 1579, 171): [*qui aut vi malique artibus imperium invasit*].

[71]This was a common form of political argument in Renaissance France, particularly in disputes concerning jurisdiction. For example, Du Moulin, who wrote his *Commentarii* to consolidate the rights and powers of the French Crown and its royal jurisdiction against the particularistic jurisdictions of nobles, called the seigneurs "usurpers" on the royal sovereignty (Gilmore, *Argument from Roman Law*, 69).

[72]Respectively, Vindiciae, 140 (in Latin, Vindiciae 1579, 171): [*tyrannus absque titulo*] and Vindiciae, 141 (in Latin, Vindiciae 1579, 172): [injustus possessor est].

[73]Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), 152.

[74]Vindiciae, 150.

[75]Ibid.

Of course, to execute this argument successfully, the monarchomachs would have had the burden of showing that, in fact, kings did usurp and steal those rights and powers which originally belonged to the people, and that the people were the true lords and proprietors of the commonwealth. Legal argument, therefore, had to be supplemented with a substantial degree of constitutional history, as in the work of the monarchomach humanist jurist, François Hotman, who traced the origins and development of the institutions of French kingship and law. In his *Francogallia*, a work which modern commentators describe as revisionist, "antiquarian," and a "very angry essay on the constitutional history of France," Hotman was especially concerned to emphasize the populist character of the ancient constitution of Francogallia.[76] The argument was clearly strategic and designed to undermine royalist claims to *dominium*. As Skinner notes, "if one could show that the constitution was originally populist in character, one might be able to insist that the same mechanisms of popular control ought to be maintained in operation at all times."[77]

Demonstrating this populist character of the ancient constitution of France was the chief purpose of Hotman's essay. Hotman's chief finding in the *Francogallia* was the elective, rather than hereditary, nature of kingship among the ancient Gauls and the Franks of late antiquity, as well as in the united kingdom of Francogallia. Hotman argued that kings were always elected until the late Middle Ages, a practice which he claimed to have traced back to the first meeting of both the Gauls and Franks to elect Childeric king of a united Francogallia, by a "public council of the twin peoples" [publico gemellae gentis concilio].[78] Since time immemorial, free peoples established kingdoms not through hereditary succession, but through recurrent elections, where royal powers were "conferred by the people on someone who had a reputation for justice."[79]

The upshot of this presentation was to suggest that the modern practice of hereditary succession to the French crown as indefeasible right was, in fact, a relatively recent and a constitutionally illegitimate innovation lacking historical precedent in the ancient constitutional system. The real villain, in Hotman's history, was Capet, "who had taken possession of the kingdom

[76]Allen, *History of Political Thought in the Sixteenth Century*, 309.

[77]Skinner, *Foundations*, 2: 310. Skinner, in turn, identifies Hotman's argument as part of a larger discourse on ancient constitutionalism discussed in J.G.A. Pocock's seminal work on the subject.

[78]Francogallia, 214–15. Even before the formation of Francogallia, Hotman noted that the Gallic and the Frankish peoples antecedently and independently had the custom of electing kings for themselves, [totius Gentis concilio communis] (Francogallia, 149), a custom which was observed by the classical authors such as Caesar and Tacitus.

[79]Francogallia, 155 (in Latin, Francogallia, 154): [*a populo propter justitiae opinionem deferebantur*].

without any lawful hereditary claim."[80] For Hotman, the Capetians "laid it down that those who acquired [the crown] might retain them with the legal status of a patrimony and transfer them to their children and descendants with the rest of the inheritance," contrary to the ancient practice of royal election by popular assembly.[81] Hotman had, thus, located in the Capetian kings the moment of usurpation that, in the monarchomach view, had disqualified any subsequent royalist claim to *dominium* via usucapion or prescription of royal rights.

In this way, the historical argument of the *Francogallia* was, in effect, a tacitly subversive criticism of French dynastic politics in the sixteenth century and a call for a restoration of the ancient popular constitution that, Hotman thought, was usurped by kings and now entrenched by lawyers.[82] By claiming that elective kingship by public councils of the people was the normal pattern of princely rule in Francogallia from antiquity to the late Middle Ages, Hotman contested the legitimacy of the entire foundation of the dynastic rights of the reigning Valois monarchs, whose right to rule was solely based on such principles as "indefeasible right" and *suitas*.[83] Although it was the constitutional norm in sixteenth-century France, hereditary succession to the crown was, according to Hotman, the real anomaly, which deviated from centuries of settled customary practice.

Reply to Objection: Guardians May Not Usucape to the Estate of Their Ward

The monarchomachs' third reply to the royalist objection, however, went further and denied categorically that kings even had any rights to usucapion of the commonwealth at all, despite long uninterrupted possession of those rights and powers attached to the commonwealth. This was because, as we have seen earlier, the office of kingship was not *dominus* of the commonwealth, but rather, the guardian of the commonwealth, or *curator Reipublicae*.[84]

[80]Francogallia, 377 (in Latin, 376): [*qui cum remoto herede legitimo regnum occupasset*].

[81]Francogallia, 411 (in Latin, Francogallia, 410, 412): [*constituitque ut qui eas obtinebant, patrimonii iure retinerent, atque ad suos liberos poterosque, cum reliqua hereditate, transferrent*].

[82]Hotman called the lawyers of the Parlements "pettifoggers" whose power was almost like a royal power (Francogallia, 497). In this context when the estates were being called for the first time in about a century, Hotman took direct aim at the Parlements, calling them a "plague" which infected France and usurpers of powers which rightfully belonged to the people assembled in their estates (Francogallia, 519).

[83]Figgis, *Divine Right of Kings*; Ralph Giesey, *The Juristic Basis of Dynastic Right to the French Throne* (Philadelphia: Transactions of the American Philosophical Society, 1961).

[84]Vindiciae 1579, 144.

This argument made very careful use of the civil law governing the important Roman practice of guardianship. In the Roman context, certain classes of property-owners who were *sui juris* and had *dominium* were, nevertheless, prohibited from administering their estate directly because they were legally considered "incapable persons," such as certain classes of minors and women.[85] These individuals were required to act through the guardian who, as an intermediary, would administer and protect the welfare and property of the ward under their charge.

The civil law placed very strict regulations on the acts of guardians and was designed in such a way as to favor the interests of the ward who, although legally incapable, was still a proprietor with *dominium*.[86] The law of delicts, for example, penalized *tutores* who embezzled from the ward's property.[87] Later republican legislation, moreover, provided for a formal legal action, the *actio tutelae*, to hold guardians accountable for losses and damages incurred in the administration of a ward's estate.[88]

Above all, the civil law forbade guardians to claim ownership over their ward's estate by usucapion, even though they technically held possession and, in some cases, for long periods of time. It was a principle which Cicero highlighted in the letters to Atticus, by chiding his friend for forgetting this most basic legal doctrine, that "in the case of legal wards . . . right of possession [i.e., acquisition by usucapion or prescription] does not count."[89]

Evidently, the monarchomachs found these restrictions on civil guardianship a particularly useful way of theorizing the office of kingship and undermining the potentially fatal claim that kings could usucape to the kingdom and the domain. Kings, according to the monarchomachs, were nothing more than mere guardians, like *tutores* and *curatores*, whose sole charge was to administer and keep watch over the people's property, the commonwealth. In this way, then, duties, rather than rights, were attached to the royal office of kingship in the same way that duties were attached to the Roman office of guardianship. According to the monarchomachs, then, royal claims to *dominium* on grounds of *longi temporis possessio* simply misunderstand the nature of kingship itself. At most, kingship is just an elevated type of magistracy that is itself only a limited and temporary office, fully subject to the *dominium* and

[85]Gaius, 1.9 et seq.

[86]Dig., 26.1.1 et seq., especially Dig. 26.10 on untrustworthy tutors and curators.

[87]Jolowicz, *Historical Introduction*, 175.

[88]Ibid., 249. Mornay has this sort of action in mind when he writes in Vindiciae, 119: "[I]t is clearly much more equitable that a curator of the commonwealth [1579: *curator Reipublicae*] who diverts public resources to the public ruin, or who completely overturns them, could be deprived of all administration by those whose concern and office this is, if he failed to desist after a reproof."

[89]Cicero, *Letters to Atticus*, trans. E.O. Winstedt (New York: Macmillan, 1912), 1: 17 (Letter 1.5).

"constant surveillance" of the people.[90] The true office of kingship, as Mornay would call it, was merely "a function or procuratorship" but never "an inheritance or a property or a usufruct."[91]

This last reply is especially crucial to the monarchomach argument because it provided a legal basis grounded in the civil law to show why kings are to be disqualified from making assertions of *dominium* over the commonwealth. The argument, of course, looks potentially unattractive by disparaging the independence and dignity of the people as a whole against kings and magistrates. But that would miss the larger normative purpose of the argument, which is not to disparage the status of the people by likening them to minors and other types of legal wards. Rather, the purpose here was to appeal to principles of equity that are grounded in the civil law and to apply those principles to the present case of a people as a whole acting against unlawful kings acting beyond the bounds of right.

"Vindicatio" and the People's Right of Resistance

The use of proprietary language in this manner provided a very useful analogy to model the structure of power and to activate the development of a populist political theory. But one final, and crucial, element of the law of property provided the mechanism for the radical core that made the monarchomach doctrine a fully revolutionary ideology, and not simply abstract political or legal speculation. This was the ancient action of recovery, the *vindicatio*.

To recall, Roman proprietors with *dominium* occasionally delegated possession through a limited grant conditionally to possessors, while retaining for themselves the full and undivided right to take back possession through the formal action of *vindicatio*. Through *vindicatio*, a proprietor could dispossess another man of his holdings and regain direct possessory control over the property in question for himself by asserting his ultimate right of ownership. In proprietary actions, the use of *vindicatio* was really an extraordinary and radical act, one of the most dramatic displays of the one-sided civil power of *dominium* over others.[92]

If the people can be said to have *dominium*, as the monarchomach jurists argued, then one should similarly expect the people as a whole, or *ut universi*,

[90]Skinner, *Foundations*, 2: 312.

[91]Vindiciae, 125.

[92]Dig., 6.1.1, *et seq*. For this reason, the *vindicatio* was only rarely used, in the most exceptional circumstances. One of the founders of the German historical school of jurisprudence, von Savigny, had long ago suggested that the effect of *vindicatio* was to unsettle the "public peace" by raising directly questions of ultimate right. It is to the credit of the Romans, he suggests, that they developed the various rules which avoided the occasions on which ultimate or final right had to be adjudicated.

also to have the right to execute the *vindicatio* against those, such as kings and magistrates, who held in trust, like tutors, the temporary civil possession of the people's power and their commonwealth. As the *dominus*, the people would permanently retain the reserve rights of civil lordship and ownership and could recall and revoke, by an action approximating the ancient *vindicatio*, the powers of those who acted on the authority granted by the people. In this way, the people could assert, or vindicate, their rights and, by lawful force, dispossess and disseise kings of those powers that rightfully belonged to the people as a whole.

For the monarchomach jurists, the action of *vindicatio*, forcing dispossession to allow recovery, had special significance because it provided the foundation for an authoritative legal and normative argument on the absolute rights of masters to take back their property, what was owed to them and was *suus*. Politically, this meant that people could corporately lay a claim [*vindicant*] to their rights against tyrannical kings, as *judices et vindices* [judges and defenders] just as a *dominus* at civil law could disseise his tenant and repossess or recover his property through an act of vindication in the law-courts.[93] Recovery of property was, thus, the private law model used by the monarchomachs to elucidate the mechanics of constitutional change and resistance.

In the language of vindication, as a show of ultimate right, the monarchomachs expressed the notion of resistance, revolution, and popular sovereignty. Mornay was, of course, the outstanding exemplar of this mode of argument, displayed directly in the title of his treatise. In the most radical sections of the third *Quaestio* of the *Vindiciae*, Mornay stressed that the whole people are, in principle, to "vindicate the whole kingdom from tyranny."[94] But he was not alone in invoking the model of vindication as a design for the assertion of rights. Hotman similarly recognized the necessity of constitutional offices as "a general refuge and protection to vindicate and preserve liberty from the supreme authorities."[95] The vocabulary invoked in these carefully crafted texts suggests an action that was civilian in origin. But most importantly, as Skinner has observed, the Roman law theory offered "a theory of absolute popular control, not a mere theory about the possibility of restraining a king *in extremis*."[96]

[93]Vindiciae 1579, 211.

[94]Vindiciae, 167 (in Latin, Vindiciae 1579, 207–8): [*Et illi quidem universum regnu a tyrannide vindicare debent, si possunt*]. Cp. Vindiciae 168 (in Latin, Vindiciae 1579, 210): [a tyrannide vindicare . . .]. and Vindiciae, 170 (in Latin, Vindiciae 1579, 213: [repub. Regnuq. *a tyrannide vindicare conetur*].

[95]Francogallia, 311 (in Latin, Francogallia, 310): [*a supremo dominatu vindicandae atque tuendae commune perfugium atque praesidium esset*]. Cp. Francogallia, 215, in a discussion about the constitutional origins of Francogallia, liberty itself is "vindicated": "Childeric . . . finally won freedom for Gaul from Roman servitude" (in Latin, Francogallia, 214): [*Galliam e Romanorum servitute in libertatem vindicasse*].

[96]Skinner, *Foundations*, 2: 313.

To be sure, the monarchomach appropriation of the *vindicatio* was by no means a justification of mob violence. Nor was it a general justification of private acts of resistance and disobedience.[97] Consistent with Pauline doctrine, the monarchomachs were careful to condemn such acts, precisely because they regarded them as criminal acts of private individuals [*privati* or *singuli*], not as legitimate constitutional acts of the people [*universi*].

Vindication, in a monarchomach view, was an action of the whole people and, thus, had to take place through those procedures which represented and expressed the corporate will of the whole people, not simply one individual or a part of the people. For the people to act legally, such as in a *vindicatio*, it must be done through properly constituted representatives, just as a private corporation had to act through its properly constituted representative, or *procurator*. Monarchomachs, as civilian jurists, never suggested that the assertion and vindication of popular rights was to be done on the basis of first principles. There was no need to do so. In their view, the principles were laid bare in the texts of Justinian.

To be sure, the monarchomachs' appeal to Roman procedure was not meant to be taken literally. As with other borrowings from the Roman private law, there was no presumption that Roman procedures were to be revived in toto so that the people could prosecute the *rei vindicatio* as if in front of a Roman magistrate. That was not the point. Rather, the jurists viewed this action as a classical model of the active prosecution and defense of the people's rights through the law by appealing to more general principles of equity grounded in reason.[98] Roman law was an attractive and widely respected "language" in which to articulate a theory of popular sovereignty and resistance because it was presumably neutral yet provided the authority to appeal to a broad audience that extended beyond the small community of French Huguenots who were already motivated toward radicalism by their sectarian ideology treating resistance as a religious duty.[99]

Popular resistance and revolution, thus, were thought to be fully backed by the legal and moral authority of the classical law books. This was not a case of godless sedition, as the *Politiques* Royalists may have argued,[100] but an act of a

[97]As is well known, Mornay makes one exception for private acts of resistance, in the case of a "tyrant without title." But such tyrants are not technically rulers to whom obedience is due. Thus, resistance is a justifiable act of self-defense, because "one may repel force with force"[vim vi repellere licet], Dig., 43.16.3. On self-defense, see Kathleen Parrow, *From Defense to Resistance: Justification of Violence during the French Wars of Religion (*Philadelphia: American Philosophical Society, 1993).

[98]Cf. Tuck, *Natural Rights Theories*, 42–44.

[99]Skinner, *Foundations*, 2: 335.

[100]Perhaps the most important statement of the *Politique* position against the monarchomachs is Bodin in the *Commonweale*, 1.8 at 137–38, where he speaks out against "those who have written on the duty of magistrates and other such books . . . holding that the Estates of the people are greater than the prince."

people, reclaiming rights due to them collectively as the true masters, the popular *dominus*, over their commonwealth.

Conclusion

Ralph Giesey once warned that, "To ignore or dismiss the Huguenot writers' use of Roman law is to affront their intelligence or their integrity."[101] I hope that this article would have been received with some satisfaction by Giesey and others who recognized the centrality of civilian jurisprudence for expressing substantive doctrines of political theory, and this not only for the monarchomachs but for their royalist opponents as well. Indeed, it is not, I think, an overstatement to say that the monarchomach theory of popular sovereignty and resistance could not have assumed its specific shape without the background of Roman law that supplied the basic conceptual material. The bottom line is that, without Roman law, there could not have been a monarchomach theory.

Having investigated the civilian background of the monarchomach theory and, in particular, its use of proprietary concepts associated with the *dominium*, I want to conclude this essay by making two related observations on the legacy of the monarchomachs and, in particular, the uniquely juristic manner in which they expressed their doctrine of popular sovereignty. The first general observation concerns the extent to which the French monarchomach theory was appropriated by later thinkers to advance political causes which were, in some cases, far removed from the immediate ideological context of the French Wars of Religion and the Huguenot struggle against the Gallican writers and the royalist *Politiques*.[102] The historical literature has supplied us with numerous studies charting the various intellectual influences of monarchomach thought in anti-royalist struggles across Europe including the Dutch Revolt, the deposition of Queen Mary in Scotland, and, in the seventeenth century, the English Revolution and resulting settlement.[103]

[101]Giesey, "The Monarchomach Triumvirs," 53.

[102]Some excellent studies of this are J.H.M. Salmon, "The Legacy of Jean Bodin: Absolutism, Populism, or Constitutionalism?" *History of Political Thought* 17 (1996); Martin Van Gelderen, *The Political Thought of the Dutch Revolt, 1555–1590* (New York: Cambridge University Press, 1992); Martin Van Gelderen, "Aristotelians, Monarchomachs and Republicanism: Sovereignty and *Respublica Mixta* in Dutch and German Political Thought, 1580–1650," in *Republicanism: A Shared European Heritage*, vol. 1 (New York: Cambridge University Press, 2002).

[103]Skinner, *Foundations*, 2: 338ff, especially 344, concerning the phrase "*proprie pertinet*" in Buchanan's text indicating a relationship between popular possession and ultimate control.

The ideas of Hotman, Mornay, and Beza found a particularly warm welcome in the German States of the Empire, which, due to its complicated constitutional form, were unable to integrate French theories of sovereignty into its own local circumstances.[104] Among the German heirs of this tradition outside the French context were theorists of the reformed tradition in the German States of the Empire, such as the celebrated Syndic of Emden, Johannes Althusius, perhaps the most important political thinker on the Continent at the beginning of the seventeenth century. Although he certainly cannot be described as one in sympathy with resistance theory, Althusius's pluralistic theory of *consociationes* and *symbiotica* in the *Politica Methodice Digesta* (1603) shares in common with the French jurists the suggestion that the ultimate right of sovereignty in the commonwealth resides exclusively in the highest corporation of the people, the *consociatio universalis*, as if it were like common property. Taking seriously the idea of popular sovereignty, Althusius invokes the law of persons to conceptualize the people to be "like a ward or minor" who is under the protection and guardianship of magistrates, but never the power of kings. Here, Althusius's strategy was just the same as the monarchomach strategy of Hotman and Mornay, to reduce the status of kings to that of a guardian, like a tutor or a curator in the Roman law, as one who was commissioned and entrusted with the duty to protect the people. In all this, the constitutional supremacy of the people over kings, above all, remains sacrosanct in Althusius's principle that the constituter is always greater than the one constituted [*nam constituens major est constituto*].[105]

But perhaps most remarkable was the direct appropriation of the monarchomach doctrine by Catholics who, in facing the possibility of a Huguenot king through the accession of Henry of Navarre at the extinction of the Valois line, defended the doctrine of the papal deposition of heretical kings. Like the Huguenot monarchomachs, these "ultramontane" theorists of the so-called Catholic League, which included writers such as Jean Boucher and William Rossaeus, developed theoretical defenses of resistance largely mirroring the same sort of arguments found in the monarchomach treatises.[106] In the case of Boucher's *De Justa Abdicatione Henrici Tertii* and Rosseaus's *De Justa Reipublicae Christianae Potestate*, the argument was taken almost verbatim from the *Vindiciae* to defend the notion of resistance against the prospect of a heretical non-Catholic sovereign.[107]

[104]Salmon, "Legacy of Jean Bodin."

[105]Johannes Althusius, *Politica Methodice Digesta*, ed. Carl Friedrich (Cambridge, MA: Harvard University Press, 1932), 83 (chap. 8, §55).

[106]This is a central reason why Barclay has no hesitation in regarding the Catholic Ligeur writers such as Jean Boucher to be monarchomachs as much as Mornay and Beza. Catholic resistance theorists were to be condemned equally as Huguenot resistance theorists.

[107]Figgis, *From Gerson to Grotius*, 159; J.H.M. Salmon, "Catholic Resistance Theory, Ultramontanism, and the Royalist Response, 1580–1620," in *Cambridge History of*

That such a set of doctrines as those articulated by Huguenot monarchomachs would eventually find its way into the hands of Catholic Leaguers testifies to the versatility as well as the ideological ambiguity of popular sovereignty doctrine in this period of the Wars of Religion and constitutional crisis. The reason for this must be sought in the very idea of sovereignty itself, as articulated in these juristic theories. It is here that I wish to make a second and final observation.

To say that sovereignty, even popular sovereignty, is a form of *dominium*, as the jurists of this period did, is to reduce notions of political power to a manifestly nonpolitical legal and proprietary relationship.[108] But this is positively dangerous for a political theory of the state and law. Not only does it threaten to remove the concept of the political entirely from concepts of the state and sovereignty, but it attributes to the state a totalizing power that can be just as despotic in the hands of the people as it is in the hands of kings. It is a warning that modern political theorists such as Hannah Arendt renewed and sharpened amid a world in which the modern democratic state reigned supreme.[109] While political theorists may, rightly, continue to celebrate the monarchomachs for their contributions to the rise of popular sovereignty and a distinctly modern form of political reasoning, we must exercise caution in considering the merits of their view of popular rule in the modern world.

Above all, we must resist, or at least scrutinize most carefully, the Whig historicist suggestion that the monarchomachs are to be regarded as one of the progenitors of modern constitutionalism. The reason for this is simple. Constitutionalism is a theory that defines, limits, and bridles the source of power. But the monarchomach theories do no such thing. The popular *dominium* is, in theory, as arbitrary and absolute as royal *dominium*. The purpose of a theory of popular sovereignty is not to contain or tame the public power; it only relocates it into the hands of the people, united as one body. Perhaps one solution may be to deny the theory of sovereignty as ownership altogether. But this is not the argument that we find in the monarchomach theory.

What we have inherited from the monarchomach jurists is a notion of the people holding a sovereign power over their state. It is a theory of power that masks itself in the discourse of legitimacy and, for better or ill, has become a sine qua non of our intellectual heritage and understanding of modern state-centered politics. Whether we should reflectively endorse this doctrine of popular sovereignty, of course, is an entirely different matter.

Political Thought, 1450–1700, ed. J.H. Burns and Mark Goldie (New York: Cambridge University Press, 1991).

[108]On this point, see Ken McMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576–1640* (New York: Cambridge University Press, 2006).

[109]Hannah Arendt, *On Revolution* (New York: Penguin, 1963), 76–77.