Consent in Roman Choice of Law

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Abstract

No problem of Roman historiography currently draws more attention among ancient historians than the role of Roman law in the administration of the Roman Empire. In studying this role, historians have explored the techniques that the Roman jurists used to expand the application of Roman law to address the new problems that arose in provincial administration. This essay, by contrast, suggests that the jurists took equal pains to restrict the use of Roman law, preserving space for the application of non-Roman legal traditions. It does so by describing the Roman jurists’ approach to choice of law. In resolving choice-of-law problems, the jurists consistently applied what this essay calls a principle of consent: the applicable law in a given proceeding is the law to which the parties have consented by participating in its creation. The jurists’ writings on choice of law manifested a sustained effort to limit the reach of Roman law within the empire.

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The relationship between Roman law and Roman imperial power is arguably the most active field of current investigation in Roman historiography.¹ In a decade-long burst of scholarly energy, ancient historians have explored this relationship by describing the conceptual resources that Roman jurists and others developed and deployed to address problems raised by the experience of ruling a heterogeneous empire;² by revealing telling cases in which the resources of Roman law at times failed to solve these problems;³ and by showing local actors’ strategic invocation of Roman and non-Roman legal concepts to

² E.g., Clifford Ando, Law, Language, and Empire in the Roman Tradition (2011) [hereinafter Ando, Law, Language]; Clifford Ando, Roman Social Imaginaries 7-51 (2015); Julien Fournier, Entre tutelle romaine et autonomie civique (2010); Gregory Kantor, Ideas of Law in Hellenistic and Roman Practice, in Legalism 55 (Paul Dresch & Hannah Skoda eds., 2012); Clifford Ando, Pluralism and Empire: From Rome to Robert Cover, 1 CAL 1 (2014) [hereinafter Ando, Pluralism and Empire]; see also Ari Z. Bryen, When Law Goes off the Rails: or, Aggadah Among the iurisprudentes, 3 CAL 2 (2016).
³ E.g., Bryen, supra note 2; Gregory Kantor, Siculus cum Siculo non eiusdem civitatis: Litigation Between Citizens of Different Communities in the Verrines, 21 Cahiers du Centre Gustave-Glotz 187 (2010).
shape the law in furtherance of interests at times unrelated or even flatly adverse to those of Roman officials. A central theme of this literature is power—the expansion of Roman power by means of Roman law and the checks on that power created by the individual choices of local actors.

This vision of Roman law as a polyvalent instrument of empire needs qualification insofar as it concerns the writings of the Roman jurists. The purpose of this essay is to propose an account of the Roman jurists’ overall theoretical approach to one particular area of law, what we now know as choice of law. In giving this account I wish to suggest that in adapting the conceptual resources of Roman law to the requirements of imperial administration, the jurists strove as much to place principled limits on the reach of Roman law as to expand that reach. My argument is that the jurists’ writings on choice-of-law problems can be understood as the product of their efforts, dating for the most part to the second century A.D., to reconcile what I call the principle of consent—the principle that each community has its own law applicable by consent of its members only to that community—with the problems posed by the practical application of that principle. In particular, I argue that the sources offer evidence of three practical problems—the problems of *diversity of citizenship* (deciding disputes between citizens of two different communities), *knowledge of law* (knowing what the content of non-Roman law is), and *substantive justice* (squaring choice of law with basic Roman notions of substantive justice)—along with evidence of the jurists’ attempts to address these problems while still giving wide scope to the consent principle.

Specialists of conflict of laws and Roman law alike have long been interested in the body of ancient texts that deal with choice-of-law problems. Yet it has proven difficult to devise a coherent explanation for the relevant sources. Some scholars who have examined the question argue that it is inappropriate to use the terms “conflict of laws” and “private international law” to discuss the Roman sources in the first place. Others have pointed out numerous fragments of Roman juristic writing that look a lot like modern conflicts rules yet have found it difficult to assemble coherent theoretical models out of the sources. The most that can be said as a general matter is that many of the sources attempt to apply a fundamental principle of Roman political theory—namely, the principle that every political community has its own law, applicable only to members of that com-

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munity—to determine the applicable law. This essay departs from earlier work in showing that what I call here the principle of consent is a pervasive theme tying together the disparate texts in which the jurists resolve choice-of-law problems; it also stresses the degree to which the jurists seek to preserve space for the application of indigenous non-Roman legal traditions within the empire.

Two further preliminary observations are in order. One concerns the use of modern conflict-of-laws vocabulary. Rome had no concept equivalent to our “choice of law” or “conflict of laws,” and interactions between Roman and non-Roman law took place in an epistemic, political, and legal ambiance radically different from that presupposed by modern theory. Epistemically, the Roman administrative apparatus lacked the ready access to non-forum legal materials in a comprehensible form that modern choice-of-law doctrine takes for granted. Politically, there was no Roman equivalent of the modern system of notionally co-equal sovereign states. Virtually all the Roman sources that could be said to address conflicts of laws concern the law of subject communities within, not outside, the Roman Empire. Finally, Roman legal theory and practice did not consider the officials responsible for adjudication to be as strictly bound by rules of substance and procedure as modern legal systems do. Such differences have led some scholars to conclude that the conceptual categories of conflict of laws are simply inapplicable to the Roman context. While acknowledging the cogency of such criticisms, this essay nonetheless uses the conceptual vocabulary of modern conflict of laws as an analytical tool, in part because the distinctions of contemporary conflict of laws—for example, the distinction between choice of law and choice of forum—are helpful for describing more precisely the techniques by which Roman administration interacted with other legal traditions within the empire, and in part because the mismatch between ancient and modern ways of conceptualizing conflicts of laws is itself illuminating.

Finally, a word about chronology. This essay’s starting point is coterminous with the beginning of epigraphical evidence that touches on conflicts of laws: roughly, the first century B.C., a few decades before the fall of the Republic. The term inus ante quem is more exact: A.D. 212, the year in which the emperor Caracalla issued an edict, known to historians as the Edict of Caracalla or the Constitutio Antoniniana, that granted Roman

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6 Hannah Cotton, Private International Law or Conflicts of Laws: Reflections on Roman Provincial Jurisdiction, in Herrschen und Verwalten 1 (Rudolf Haensch & Johannes Heinrichs eds., 2007); Max Gutzwiller, Geschichte des Internationalprivatrechts 1-5 (1977); Kaser, supra note 1, at 202; Fritz Sturm, Unerkannte Zeugnisse römischen Kollisionrechts, in Festschrift Fritz Schwind zum 65. Geburtstag 323 (Rudolf Strasser et al. eds., 1978); Hans Lewald, Conflits de lois dans le monde grec et roman, 5 Labeo 334 (1959) = 13 Αρχειον ιδιωτικου δικα 30 (1946); Ernst Schönauer, Studien zum Personalitätsprinzip im antiken Rechte, 49 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 345 (1929); Eduardo Volterra, Quelques problèmes concernant le conflit de lois dans l’antiquité, 3 Travaux et conférences de la Faculté de droit de l’Université libre de Bruxelles 78 (1955); Gerhard Wesenberg, Zur Frage eines römischen internationalen Privatrechts, 3 Labeo 227 (1957).

7 See supra note 5.
citizenship to all freeborn inhabitants of the Empire and that thereby removed most of the theoretical bases for having choice-of-law rules in the first place.8

The remainder of this essay develops an argument in three parts. Part I describes the consent principle and the Roman jurists’ elaboration of choice-of-law rules in implicit accord with that principle. Part II presents evidence of three practical problems—diversity of citizenship, knowledge of law, and substantive justice—confronting the citizenship principle. Finally, Part III discusses the Roman jurists’ efforts to reconcile the principle of Part I with the problems of Part II.

I. The Consent Principle in Roman Choice of Law

The fundamental Roman choice-of-law norm is a citizenship-based principle: Roman citizen parties are subject to Roman law; members of non-Roman communities are subject to the laws of their respective communities. This norm is expressed most clearly in the opening words of the Institutes, a text of the second-century Roman jurist Gaius. Gaius begins: “All peoples who are governed by laws and customs apply partly their own law and partly the law common to all mankind.” These two types of law, he then explains, are the ius civile and ius gentium (“law of nations”) respectively.

Gaius’s formulation imagines the Roman Empire as a landscape of different non-Roman communities of citizens, or civitates, distinct from but structured more or less identically to Rome itself. Each civitas is thus assumed to have its own law comparable to the Roman ius civile. Implicitly, the applicable law in a given case is the ius civile of the civitas to which the parties to a proceeding belong. That law is applicable because the members of a civitas have participated in its creation: each people has “established” its law “for itself,” an act of consent that Gaius takes care to emphasize in the Latin original by using both the intensive pronoun ipse and the reflexive sibi.11

Gaius’s text restates with particular clarity a tenet of Roman political theory and provincial administration that dates back at least as far as the first century B.C. An association of law with political participation is implicit in the very name, possibly attested as

10 G. Inst. 1.1 (“Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur. nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraequque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.”) (Latin spelling modified); cf. Ando, Law, Language, supra note 2, at 2-4; Ando, Pluralism and Empire, supra note 2, at 7-11.
11 Cf. G. Inst. 1.3 (“Lex est quod populus iubet atque constituit:”) (emphasis added).
early as the end of the second century B.C.,\textsuperscript{12} that the Romans gave to the bulk of their private law: \textit{ius civile}, a term usually translated “civil law” but more literally rendered as “citizens’ law.”\textsuperscript{13} Cicero states the basic principle more directly in his \textit{De re publica}, dating from the 50s B.C., when he explains, “a commonwealth is the property of a people. But a people is not any collection of human beings brought together in any sort of way, but a coming together of a multitude of people associated by means of an agreement with respect to law and a partnership for the common good.”\textsuperscript{14} As in Gaius’s \textit{Institutes}, consent to law through political participation is fundamental to Cicero’s vision of the \textit{res publica} two centuries earlier. The members of a community bring the state into being “by means of an agreement with respect to law”; Cicero’s language evokes the physical “coming together” (\textit{coetus}) of the body of citizens to enact legislation.

It is also clear from sources beginning with Cicero that the theory was viewed as a practical tenet of imperial rule. In a private letter Cicero endorses the rule of provincial administration “that the Greeks [dwelling in a Roman province] determine disputes among themselves by their own laws,”\textsuperscript{15} and similar language from legislation applying to Sicily and Asia Minor provides that local populations be permitted to decide disputes “at home by their own laws.”\textsuperscript{16} “The principle still finds endorsement in the early second century A.D. In a letter to Pliny the Younger, then serving as a provincial governor in Roman Asia Minor, the emperor Trajan states prosaically that “what is always safest is that the law of each \textit{civitas} ought to be followed.”\textsuperscript{17}

Other passages of the jurists, all from the mid-second to early third century, work out the application of this principle to specific cases. One problem the jurists faced was that of the foreigner who later acquires Roman citizenship: which law, Roman or foreign, applies to the acts that the foreigner undertook before he became a Roman citizen? The jurists’ solution is to draw a temporal distinction between Roman and foreign law; foreign law continues to apply to events dating to before a person’s acquisition of Roman citizenship. This solution can be found in another passage of Gaius’s \textit{Institutes}:

[I]f a foreign woman conceives out of wedlock and then, having become a Roman citizen, gives birth, the child is a Roman citizen; but if she conceives by a foreigner in accordance with the laws and customs of foreigners, then, under a senatusconsult passed

\footnotesize{\textsuperscript{12} Cras. orat. = Cic. de orat. 2.225.}

\footnotesize{\textsuperscript{13} See A. Ernout & A. Meillet, Dictionnaire étymologique de la langue latine 124 (Jacques André ed., 4th ed. 1959) (\textit{cīvīlis}, -\textit{īs}, -\textit{e} = “de citoyen, civique, civil”); see also Kaser, supra note 1, at 198-202 (discussing the concept of \textit{ius civile} generally).}

\footnotesize{\textsuperscript{14} Cic. rep. 1.39.1 (“Est . . . res publica res populi, populus autem non omnis hominum coetus quoquo modo congratus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.”). The translation is based on that of the Loeb edition. Cicero, De re publica; De legibus (Clinton Walker Keyes trans., 1928) (1st c. B.C.).}

\footnotesize{\textsuperscript{15} Cic. Att. 6.1.15 (“ut Graeci inter se disceptant suis legibus”).}

\footnotesize{\textsuperscript{16} Compare Cic. Ver. 2.32 (“domi suis legibus”) with Andrea Raggi, Senatus consultum de Asclepiade Clazomenio sociisque, 135 Zeitschrift für Papyrologie und Epigraphik 73, 80 at l. 13 (2001) (“domi [legibus] suis”).}

\footnotesize{\textsuperscript{17} Plin. Ep. 10.113 (“Id . . . quod semper tutissimum est, sequendum cuiusque civitatis legem puto . . . .”).}
on the authority of the late emperor Hadrian, the child is a Roman citizen only if citizenship is conferred on the father as well.18

The basic rule in Roman law is that a child acquires the citizenship of its father at birth if the parents are married. The child acquires the citizenship of its mother if it is born out of wedlock.19 In construing this rule, Gaius explains that a foreign woman who conceives a child out of wedlock and then acquires Roman citizenship while pregnant will transmit Roman citizenship to her child when it is born. But if it turns out that the foreign woman has conceived the child by a man to whom she is deemed to be married under foreign law, the child will instead acquire the citizenship of its father at the time of birth. That Gaius’s approach had wider acceptance can be inferred from epigraphical evidence.20

The legal significance of an event that took place before the acquisition of Roman citizenship is evaluated according to foreign law.21

Another problem to which the jurists apply the choice-of-law principle of Institutes 1.1 is the law applicable for determining whether a freed slave may be re-enslaved. If a foreigner attempts to re-enslave a freedman at Rome, which law applies to determine whether re-enslavement is allowed: Roman law or foreign law? The so-called fragmentum Dositheanum, a juristic fragment of uncertain authorship dating to between the mid-second and early third centuries A.D.,22 discusses the law applicable to re-enslavement after manumission:

18 G. Inst. 1.92 (Francis de Zulueta trans., 1946) (“Peregrina . . . si vulgo conceperit, deinde civis Romana facta tunc pariat, civem Romanum parit; si vero ex peregrino secundum leges moresque peregrinorum conceperit, ita videtur ex senatusconsulto quod auctore divo Hadriano factum est civem Romanum parere, si et patri eius civitas Romana donetur.”) (Latin spelling and English translation modified).
19 Paul Frédéric Girard, Manuel élémentaire de droit romain 118 (Félix Senn ed., 8th ed. 1929).
20 For example, a grant of Roman citizenship might include the saving clause “salvo iure gentis,” which is most plausibly interpreted to mean that new citizens’ pre-existing legal relations under foreign law will continue undisturbed even after the acquisition of Roman citizenship. See, for example, the Tabula Banasitana, a North African inscription of A.D. 177 that reports the texts of several imperial rescripts referring to grants of Roman citizenship “salvo iure gentis.” AE 1971, 534. See also Ando, Pluralism and Empire, supra note 2, at 13 (discussing these saving clauses). A similar rule can be found in chapter 23 of the lex Irmitana, a piece of organic legislation for a municipality in Roman Spain. The law provides that any person who acquires Roman citizen under the terms of the statute or by imperial edict shall “have the same rights and the same position, as they would have if they had undergone no change of citizenship, over their own and their parents’ freedmen and freedwomen . . . .” Julián González & Michael H. Crawford, The Lex Irmitana: A New Copy of the Flavian Municipal Law, 76 J. Roman Stud. 147, 154, 183 (1986) (“Qui quaeue ex h(ac) l(eg)e exue edicto imp(eratoris) Caesarii Vespasiani Aug(usti) imp(eratoris) Caesaris Vespasiani Aug(usti) ciuitatem Romanam consecuta est, eis in libertos libertas suos suas paternos paternas{q}ue, qui quaeue in ciuitatem Romanam non uenerint, deque bonis correu curum et is, quae libertatis causa impo[s]ita sunt, idem ius eademque condicio esto, quae esset, si ciuitate mutati mutatae non essent.”).
21 Republican evidence for the application of this solution can be found in the lex Antonia de Termessibus. See Lex Antonia de Termessibus, in 1 Roman Statutes no. 19, col. II, ll. 18-19, at 334 (M.H. Crawford ed., 1996).
22 See generally Paul Jörs, Dositheanum fragmentum, in 5 Paulys Realencyclopädie der classischen Altertumswissenschaft 1603 (Georg Wissowa ed., 1905).
A foreign slaveowner who manumits his slave cannot bring the slave into Latin status, since the *lex Iunia*, which introduced the concept of Latin status, does not concern foreign slaveowners who manumit their slaves . . . ; however, the praetor will not allow a manumitted slave to be re-enslaved unless foreign law provides otherwise.\(^{23}\)

The passage here explains that the status of Junian Latin, usually obtained by manumitted slaves, is not accorded to slaves manumitted by foreigners. Moreover, the rule of classical Roman law prohibiting re-enslavement of a freedman in most circumstances\(^{24}\) does not apply to foreigners’ freedmen. The praetor must instead apply foreign law to determine the nature of the status that a manumitting foreigner slaveholder may confer on his slave.

The broad uniformity of the juristic sources—other passages could be adduced\(^{25}\)—speaks in part to the pervasiveness of the consent principle in Roman political theory and practice. In part, though, it is probably also a result of early second-century reforms of the law of status under the emperor Hadrian. Although direct evidence is unavailable, the absence of discussion of legal status in the surviving juristic texts dating from before Hadrian’s reign, the naming of Hadrian himself as the authority behind senate decrees concerning the acquisition of citizenship, and the fact that Hadrian is known to have undertaken reforms addressing problems created by the social legislation of the emperor Augustus more than a century earlier all suggest a concerted program of reform.\(^{26}\) The passages gathered above, although appropriately discussed from a modern perspective under the heading of “choice of law,” thus address a set of problems within the Roman law of personal status that derived from earlier imperial social legislation and that would not necessarily have been understood as being closely related to the choice-of-law problem in the provincial context—which law a provincial governor should apply in a dispute between non-Roman citizens. The careful line drawing in these passages can be explained by the perceived need to give order to an area of Roman law that had proven confusing and difficult to implement in practice.\(^{27}\)

Yet when one moves from the law of personal status at Rome to the distinct context of provincial judicial practice, the evidence shows similar consistency with the consent principle described in Gaius’s *Institutes*; the principle is implicit in both sets of sources. To be sure, the scope of the principle is limited to the *ius civile*—i.e., the law of status and the family, contract, property, delict, and inheritance. In other matters, such as criminal proceedings, the provincial governors held an unquestioned “right of the sword”

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\(^{23}\) Fr. Doss. 12 (“Peregrinus manumissor servum non potest ad Latinitatem perducere, quia lex Iunia, quae Latinorum genus introduxit, non pertinet ad peregrinos manumissores . . . . At praetor non permitte manumissum servire, nisi aliter lege peregrina caveatur.”).


\(^{25}\) E.g., UE 20.14 (applying the consent principle to determine the applicable law for testation).


\(^{27}\) See id.
over all persons present within the borders of their provinces.\textsuperscript{28} Furthermore, I say “principle” rather than “rule” advisedly.\textsuperscript{29} Non-juristic sources from both the republican and imperial periods make clear by implication that the consent principle was always subject to broader considerations of Roman policy. Roman legislation could always be extended to subject peoples, overriding their local legal regime. For example, the mid-first-century-B.C. 
\textit{lex Antonia de Termessibus} expressly permits the city of Termessus Maior to continue to apply its own law only insofar as application is consistent with the terms of the statute.\textsuperscript{30} Around a decade later, a speech of Cicero asserts that Rome reserved to itself the power to grant Roman citizenship to a citizen of a community with which it had a treaty relationship when to do so was in Rome’s interest, regardless of the interest of the treaty community.\textsuperscript{31} Outside the realm of legislation, juristic sources discussing the more regularized provincial administrative regime of the high imperial period hold repeatedly that the power of a provincial governor within the boundaries of his province was subject only to the power of the emperor, implying a power to depart from the consent principle, or almost any other principle of law, when the need arose.\textsuperscript{32}

Equally important, the Roman concept of law did not bind an adjudicating official to follow the law as stated by the jurists in the same way that a contemporary statute or the common law is thought to bind the executive and judicial powers. Some modern scholars have inferred from the ancient sources that the Roman concept of law was immanentist.\textsuperscript{33} That is to say, the rules of the \textit{ius civile} that the jurists formulated were, in Roman thinking, simply authoritative expressions of a law that was already immanent in the Roman political community; the \textit{ius civile} was already “there,” to be properly interpreted and restated. When the jurists prepared opinions concerning particular fact patterns, they were thus giving views as to the underlying, already existing law, not “making” law. A corollary of this conception is that the jurists did not necessarily have the final say on what the law was on a given question. Cicero concedes this possibility, at least as a theoretical matter, when he mentions that a jury may correctly rule on a point of law even when faced with the contrary opinion of the jurists.\textsuperscript{34}

\textsuperscript{28} See, e.g., Dig. 1.18.6 (Ulpian, Opiniones 6) (“Qui universas provincias regunt, ius gladii habent et in metallum dandi potestas eis permissa est.”).


\textsuperscript{30} See \textit{Lex Antonia de Termessibus}, supra note 21, col. I, ll. 10-11, at 333 (“quod adversus hanc legem non fiat”).

\textsuperscript{31} See \textit{Lex Antonia de Termessibus}, supra note 21, col. I, ll. 10-11, at 333 (“quod adversus hanc legem non fiat”).

\textsuperscript{32} See \textit{Lex Antonia de Termessibus}, supra note 21, col. I, ll. 10-11, at 333 (“quod adversus hanc legem non fiat”).


But for all these caveats, the provincial evidence conforms remarkably closely to Gaius’s principle of consent. Surveying the evidence from Roman Egypt, José Luís Alonso Rodríguez exaggerates only slightly when he stresses that the Roman authorities “not merely tolerated but unfailingly applied” foreign law in accordance with Gaius’s principle across almost all areas of private law, even on subjects in which local law and Roman law sharply diverged.\(^{35}\) The Roman provincial courts applied non-Roman law to non-Roman parties even when doing so led to results—for example, recognition of a marriage between siblings—flatly contrary to Roman law or social norms.\(^{36}\) The consent principle is a pervasive, if only implicit, structural feature of both legal theory and judicial practice.

II. Judicial Practice: Problems and Solutions

Even as a purely analytical matter, a choice-of-law principle such as Gaius’s raises several problems of practical implementation. The most pressing is that of diversity of citizenship: what law applies if the two parties to a proceeding are of different citizenships? Another is that of knowledge of law: what if it is impossible to determine what the applicable non-Roman law requires, perhaps because no such law exists at all, or perhaps because the applicable foreign norms exist in a form incomprehensible to Roman authorities? A final problem is that of substantive justice: what if strict application of the choice-of-law principle of Institutes 1.1 would bring about an outcome that is procedurally unobjectionable but at odds with basic Roman notions of substantive justice?

**Diversity of Citizenship.** A choice-of-law regime based on a principle of the personality of law has no principled mechanism by which one person’s law can be applied to a person subject to a different law. One possible answer is to apply the law of the ruling power in every such case. This solution is attested in early medieval law.\(^{37}\) But the underlying principle of consent in Roman legal and political theory makes such a solution undesirable. In principle, each *ius civile* is applicable solely to the members of the community who participated, through their political belonging, in the creation of that law.

That diversity of citizenship was in fact seen as a problem by the Romans themselves can be inferred from several workarounds evidenced in the sources. Perhaps the most revealing is the so-called “fiction of citizenship” discussed in Gaius’s *Institutes*. Gaius explains that a non-Roman citizen may be a plaintiff or defendant in certain causes of action even though those actions are specific to the Roman *ius civile*. He cites the *actio furti*, a

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35 José Luís Alonso Rodríguez, *The Status of Peregrine Law in Egypt: “Customary Law” and Legal Pluralism in the Roman Empire*, in Proceedings of the 27th International Congress of Papyrology 351, 352 (Tomasz Derda et al. eds., 2015); see also id. at 353 n.6 (citing the literature on Roman legal practice in Egypt).

36 Id. at 352-53.

civil action for theft, and an action brought under the *lex Aquilia*—a statute regulating delictual liability—as examples. In such cases, Gaius holds, “Roman citizenship is fictitiously imputed to the foreign party” to allow the party to participate in the proceeding. The use of a legal fiction indicates the continued normative force of the consent principle—the Roman *ius civile* could not simply be applied, as Roman law, to non-Roman parties—yet simultaneously resolves the diversity problem by avoiding the application of that principle.

Another workaround that implies an awareness of the diversity-of-citizenship problem is to evade an explicit choice of law by careful use of choice-of-forum provisions. An example is provided by Cicero’s description, from the mid-first century B.C., of the jurisdictional rules operative in Roman Sicily. The rules Cicero describes provide that if the parties to a proceeding both belong to the same *civitas*, then the law of that *civitas* applies and that *civitas* will have jurisdiction over the proceeding; and if the parties belong to different *civitates* within Sicily, the Roman praetor will appoint an *ad hoc* body of judges to hear the case in accordance with the terms of a second-century legal disposition, otherwise unknown, called the *lex Rupilia*; if a Sicilian sues another *civitas* collectively, then an unrelated third *civitas* will judge the case; and if one party is Roman and the other Sicilian, a judge will be appointed who is of the nationality of the defendant. Cicero’s description finds numerous comparanda in epigraphical evidence from elsewhere in the Roman world.

Although the *lex Rupilia* makes extensive, albeit not comprehensive, provision for the procedures to apply between different combinations of Roman and non-Roman parties, it says nothing about the substantive law that applies in each type of proceeding. I think it unlikely that, in the general run of cases, the provincial governor would have instructed the appointed judges to apply Roman substantive law. Rather, cases in which non-Romans served as judges likely applied rules of decision that, whether or not formally

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38 G. Inst. 4.37 (“... civitas Romana peregrino fingitur ...”) (Latin spelling modified).
39 Cic. Ver. 2.2.32 (“Siculi hoc iure sunt ut quod civis cum cive agat domi certet suis legibus; quod Siculus cum Siculo non eiusdem civitatis, ut de eo praetor iudices ex P. Rupilii decreto, quod is de decem legatorum sententia statuit, quam illi legem Rupiliam vocant, sortiatur. Quod privatus a populo petit aut populus a privato, senatus ex aliqua civitate qui iudicet datur, cum alternae civitates reiectae sunt. Quod civis Romanus a Siculo petit, Siculus iudex, quod Siculus a cive Romano, civis Romanus datur. Ceterarum rerum selecti iudices ex conventu civium Romanorum proponi solent.”); see also Fournier, supra note 2, at 265-67; Max Kaser, Das römische Zivilprozessrecht 167-68 (Karl Hackl ed., 2d ed. 1996).
40 See Kantor, supra note 3 (comparing Cicero’s description with epigraphical evidence from the Roman East, with extensive references to older literature).
41 See id. at 189-90 (pointing out that the *lex Rupilia* fails to provide for litigation between a Sicilian party and a non-Roman, non-Sicilian party).
42 There is debate in the scholarly literature about the form of procedure—whether formulary procedure or *cognitio extra ordinem*, or something resembling one or the other—that the provincial governor used in cases in which the *lex Rupilia* provided that he appoint judges. See most recently Lauretta Maganzani, L’editto provinziale alla luce delle Verrine: Profili strutturali, criteri applicativi, in La Sicile de Cicéron 127 (Julien Dubouloz & Sylvie Pittia eds., 2007); see also Kaser, supra note 39, at 167 n.39 (citing earlier literature); Leone Davide Mellano, Sui rapporti tra governatore provinciale e giudici locali alla luce delle Verrine (1977). I do not think that this procedural debate is dispositive of the matter discussed here.
part of the law of one community or another, would have been familiar to the parties. Roughly contemporary evidence from Roman Spain suggests that Roman officials were not unaccustomed to instructing judges to apply non-Roman law in disputes between parties of different non-Roman provincial communities.\(^{43}\) By specifying the type of judge who would be named to a proceeding while remaining silent on the applicable substantive law, the *lex Rupilia* enabled the application of norms that reflected notions of justice shared among the two litigating parties and the judges. The choice of forum thus probably served as an implicit choice of law.\(^{44}\)

Roman awareness that choice of forum could function at minimum as a means of influencing the substantive outcome of a proceeding and at maximum as an implicit choice of law is further suggested by another Republican-era text, the *senatus consultum de Asclepiade*, a 78 B.C. Roman senate decree granting a series of special privileges to Asclepiades of Clazomenae and two other inhabitants of Asia Minor in return for their service to Rome. One of these privileges is a choice of forum in any suit in which a recipient or a member of a recipient’s family is involved:

[T]hese men, their children, <their descendants> or their wives are to have the right of choice: if they wish of having the case decided in their own cities by their own laws, or before a magistrate of ours with Italian judges, or in a free city, one which has remained constantly in the friendship of the people of the Romans, wherever they may prefer . . . .\(^{45}\)

The grant of a choice of forum to Asclepiades of course does not formally disturb the Roman choice-of-law principle. But it is difficult not to see the provision as a deliberate effort at enabling Asclepiades and the two other beneficiaries to achieve favorable results in their litigation. Although the applicable law remains unchanged, the decree permits the litigant to place his dispute into the procedural ambiance most conducive to his success in that particular case. By allowing the substantive law of, say, Clazomenae to be applied in a Roman judicial forum, the choice-of-forum provision decouples forum from substantive law. Such provisions use jurisdiction to further a substantive interest—here, favoring a litigant who has done service to Rome.

*Knowledge of Law.* A second problem: what if there was no applicable law, or if the law did not exist in a form that a Roman adjudicator could understand, or if it was simply too cumbersome to use anything other than Roman law? The most direct evidence of this problem comes from a fragment of Julian, a jurist active in the mid-second century A.D.\(^{46}\) Julian allows for application of Roman law when no other source of law is available:

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\(^{44}\) See generally Marianne Constable, *The Law of the Other* (1994) (developing the idea that a choice of adjudicatory body may serve as an implicit choice of law).

\(^{45}\) Raggi, supra note 16, at 73, 80, 83 (“ei eis, leibereis, <postereis> uxoribusve eorum [potestas et] optio sit, seive domi legibus sueis vel(int) judicio certare seive apud magistratum [nostrum Italicis iudicibus seive in ceivitate leibera aliqua eareun], [queaperpetuo in [amicitia p(opuli) R(omani) manser]unt, ubei velint . . . .”).

\(^{46}\) See Kunkel, supra note 9, at 157-66.
What ought to be held to in those cases where we have no applicable written law is the practice established by customs and usage. And if this is in some way deficient, we should hold to what is most nearly analogical to and entailed by such a practice. If even this is obscure, then we ought to apply law as it is in use in the City of Rome.47

Although the original context is not entirely certain,48 the fragment at least makes clear Julian’s understanding that local Roman or non-Roman norms sometimes did not exist, were unintelligible, or were too difficult for a Roman decision-maker to access. In such cases, Roman law was available as a subsidiary, gap-filling body of norms.

Implicit Roman acknowledgment of the knowledge-of-law problem is also suggested by the *lex Irnitana*, a late first-century A.D. Roman organic statute for a mixed Roman and non-Roman community near modern Seville probably called Irni.49 The statute does not concoct entirely new norms, much less search out information about whatever legal tradition existed among the non-Roman inhabitants of the area, which would in any case have been impractical. It instead avoids the problem altogether by applying Roman law through use of legal fictions. In one clause, the statute provides that “the statute and law and position is to be as it would be if a praetor of the Roman people had ordered that matter to be judged in the city of Rome between Roman citizens . . . .”50 Notionally, Gaius’s principle is respected. The *Municipium Flavium Irnitanum* is an independent municipality with its own law—it is just that the law happens to be identical in content to that of Rome.

**Substantive Justice.** One further problem is that the choice of law that Gaius’s citizenship principle directs may conflict with the adjudicator’s notion of substantive justice, if application of the citizenship principle might lead to what the adjudicator would feel is a wrong or undesirable outcome in a given case. Gaius’s principle lacks an explicit *règle de matérialisation* to account for such situations.

One solution in such cases is for the Roman official responsible to ignore the technically correct law and instead to hand down a substantively just sentence for the case at hand. The *locus classicus* of this phenomenon is the *Petition of Dionysia* papyrus from Ox-

47 Dig. 1.3.32.pr. (Julian, Digesta 84) (D.N. MacCormick trans., 1998) (“De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens et est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet.”).

48 Otto Lenel conjectured that the section of Julian’s *Digest* from which this fragment derives addressed the circumstances under which a non-Roman person adopted pursuant to the *lex Papia*, a piece of family legislation from the reign of Augustus, would be excused from obligations (munera) owed to his community of origin. See 1 Otto Lenel, *Palingenesia iuris civilis* 480 (Leipzig, Bernhard Tauchnitz 1889). If Lenel is correct, Julian’s fragment may well represent yet another example, in addition to the fragments already discussed above, of the efforts made during the Hadrianic period to reform Augustan legislation regulating the law of personal status.


50 González & Crawford, supra note 20, at 179, 198 (“. . . siremps lex {τ} i(us) [c]ausaque esto adque[m] uti esset si eam rem- / in urbe Roma praetor p(opuli) R(omani) inter ciues Romanos judicari iussisset . . . .”).
yrhynchus, in Roman Egypt. 51 In the petition, dating to A.D. 186, Dionysia contests the right of her father, Chairemon, to dissolve her marriage at will. Such a right appears to have been granted to fathers under local law. The petition itself refers to the rule as “the law of the Egyptians,” 52 and there is evidence from other papyri that such a rule indeed existed in Roman Egypt, even if the precise signification of the phrase “law of the Egyptians” remains the subject of debate. 53 Dionysia contests both the existence of the rule and its applicability to her case. 54

It is striking, then, that the Roman prefect who decides the case never refers to any applicable legal rule or to the contentions of the parties at all. He holds instead: “What matters is at whose home the spouse wishes to reside.” 55 The text reports that the prefect had declined to follow “the inhumanity of the law.” 56 Formally, the prefect’s decision does not infringe upon or even reference the choice-of-law rule that each should be judged by his own law, or any other legal rule. The Roman official appears simply to reach what he considers to be a just substantive result without specifying the normative basis for the decision. The effect of the prefect’s reasoning is to impose Roman standards of substantive justice 57 in cases in which strict application of the usual principle of choice of law would have led to a different result. 58

There are other possible cases of deviation from the applicable norm. One arises in a case from Roman Egypt in which a Roman official refuses to hold a freed slave to an agreement with his former master, concluded in accordance with local law, to remain within a certain geographical area. 59 In another case from Egypt, the Roman official hearing a dispute over the responsibility of an heir for a liability of the decedent’s estate applies the Roman rule—that the heir is not personally liable for liabilities of the estate—rather than the local rule that the heir is personally liable. 60 Finally, in a fragment of the

51 P.Oxy. II 237.
52 Id. col. VII, l. 13 (“δ ὁ ᾿Αιγυπτίων νόμος”).
55 Id. col. VII, l. 29 (“διαφέρει παρὰ τιν ἣ πολλαπλάται ἢ ἕνεκεν ἕνεκεν”).
56 Id. col. VII, ll. 34-35 (“μὴ ἄριστα ἡμεταφυλάττεται τῇ τοῦ νόμου ἀπαθηθετή”).
57 Continuing consent of the spouses—which a parent could not countermand—was the fundamental requirement of the Roman law of marriage. See Kaser, supra note 1, at 311.
58 A tantalizing fragmentary imperial constitution from Nicomedia, in Roman Asia Minor, is a possible parallel. The fragment can be interpreted as stating that a decision under local law will be respected by Roman authorities provided that it was not made “unjustly.” See James Henry Oliver, Greek Constitutions of Early Roman Emperors from Inscriptions and Papyri no. 94, at l. 6 (1989) (“μὴ διεξάγος”).
60 See P.Oxy. VIII 102. It cannot be definitively ruled out that the defendant in this case was a Roman citizen to whom the Roman-law rule applied. See Hans Kreller, Erbrechtliche Untersuchungen auf Grund der Graeco-Aegyptischen Papyrusurkunden 43 (1919).
Digest the jurist Papinian discusses a case in which a Roman official enforced the provision of a Roman citizen’s will that named his widow guardian over their children. Ordinarily, Roman law flatly prohibited women from serving as guardians. By contrast, women were regularly named guardians under local law in Egypt. The likely factual scenario underlying this dispute is that the Roman official in effect enforced the testator’s choice of local law. Papinian, criticizing the “ignorance” of the provincial official, insists on the orthodox Roman-law rule.

III. The Jurists’ Response: Protecting the Consent Principle

The purpose of the preceding parts of this essay has been twofold. First, I have attempted to develop a working model of the Roman jurists’ theoretical approach to choice-of-law problems that centered around the principle of consent through political participation in a community, a principle expressed most clearly in Gaius’s Institutes but well attested elsewhere in diverse evidentiary contexts. I have argued that this approach manifests a high degree of internal consistency even though the jurists appear to have treated what we now call “choice of law” as two distinct sets of problems, one concerning the law of personal status as developed by Augustan reform legislation, the other concerning provincial administration. The implicit, underlying link between these two sets of problems is, I have asserted, their common adherence to the consent principle. Second, I have attempted to describe, initially as a purely analytical matter and thereafter on the basis of historical evidence ranging from the late republican through the high imperial period, three problems of practical implementation that the citizenship principle raises: diversity of citizenship, knowledge of law, and substantive justice.

My theme in this last part is that a few well-known fragments of the Roman jurists can be understood as responses to the problems motivated in Part II. They should be seen as attempts to resolve those problems in accordance with the consent principle of Gaius’s Institutes whenever possible.

The jurists’ effort to give the widest possible application to the consent principle is apparent in their principal theoretical mechanism to resolve the problem of diversity of citizenship: the ius gentium, the set of legal institutions that Roman legal theory understands to be shared by all humans. In Institutes 1.1, Gaius presents the term ius gentium immediately after defining ius civile: “[T]hat which natural reason has established among all humans.

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61 Dig. 26.2.26.pr. (Papinian, Responsa 4) (“Iure nostro tutela communium liberorum matri testamento patris frustra mandatur, nec, si provinciae praeses imperitia lapsus patris voluntatem sequendam decreverit, successor eius sententiam, quam leges nostrae non admitunt, recte sequetur.”)

62 See, e.g., Dig. 26.1.18 (Neratius, Regulae 3) (“Feminae tututores dari non possunt, quia id munus masculorum est, nisi a principe filiorum tutelam specialiter postulet.”)

63 See Paolo Frezza, La donna tutrice e la donna amministratrice di negozi tutelari nel diritto romano classico e nei papiri greco-egizi, 22 Studi economico-giuridici dell’Istituto economico-giuridico della Regia Università di Cagliari 126, 144-60 (1934) (with extensive discussion of the sources).

64 See A. Arthur Schiller, Provincial Cases in Papinian, in An American Experience in Roman Law 126 (1971) (suggesting that Papinian was being ironic).
men is observed equally among all peoples and is called \textit{ius gentium}, since all nations \textit{gentes} apply this law.\textsuperscript{65} Whereas each political community “establishes” its \textit{ius civile} for itself, “natural reason” \textit{(naturalis ratio)} provides the creative impetus that “establishes” the \textit{ius gentium} among all humans. Gaius’s use of the verb \textit{constituit} (“established”) in both definitions creates a correspondence between the constitutive processes that create each kind of law, the two differing only along the dimension of political contingency: the particularism of each individual \textit{civitas} results in a \textit{ius civile} that is unique to it \textit{(proprium civitatis)}, whereas the sameness of \textit{naturalis ratio} in all humans results in a common \textit{ius gentium}.

The specific content of \textit{ius gentium}, in the juristic sources, consists of a small number of concepts of the Roman \textit{ius civile} that in the jurists’ view are shared among all peoples, including among other things the institutions of slavery and manumission, guardianship, contracts of sale \textit{(emptio venditio)} and hire \textit{(locatio conductio)}, the \textit{stipulatio}-type contract, and the \textit{condictio} (a category of \textit{in personam} actions). In a practical sense, therefore, the \textit{ius gentium} as understood by the jurists is simply Roman law as it is applied, via Roman procedural mechanisms under the control of Roman officials, to non-Roman citizens. In theory, however, the \textit{ius gentium} both is and is not \textit{ius civile}. It consists of a set of legal institutions that in part intersects with the Roman \textit{ius civile} and with other communities’ respective \textit{iura civilia}, and in part is completely independent of any community’s \textit{ius civile} but is nonetheless shared by all political communities, for example in matters of international relations such as the \textit{ius fetiale} governing the conduct of heralds.\textsuperscript{66}

Like the concept of \textit{ius civile}, the concept of \textit{ius gentium} is undergirded by a notion of consent to law through participation in its creation. Cicero, whose descriptions\textsuperscript{67} of \textit{ius gentium} resemble those of Gaius two centuries later, refers expressly to consent \textit{(consensu, consensio)} when discussing the \textit{ius} that nature or natural reason induces all humans to follow.\textsuperscript{68} In Gaius, it is the shared word \textit{constituit} that implies the common underlying notion. Moreover, aside from its role in the definition of the general concept, a notion of consent through political participation may have factored into the jurists’ reasoning about which Roman institutions to treat under the heading of \textit{ius gentium}.\textsuperscript{69} Telling evidence is provided by Gaius’s remark that the institution of \textit{patria potestas}, a Roman \textit{pater familias}’s near-absolute legal power over the members of his household, is unique to the Roman \textit{ius civile} and not part of the \textit{ius gentium}, despite his recognition in the following sentence that an

\textsuperscript{65} G. Inst. 1.1 (F. de Zulueta trans., 1946).
\textsuperscript{66} On this latter category of “völkerrechtlich” institutions in the \textit{ius gentium} that do not belong to any particular \textit{ius civile}, see Max Kaser, Ius gentium 23-39 (1993).
\textsuperscript{67} See id. at 14-20 (discussing Cicero’s usage of the term \textit{ius gentium}).
\textsuperscript{68} See Cic. Part. 37.130; Cic. Tusc. 1.13. Cf. Kaser, supra note 66, at 18 (“Übereinstimmung”).
\textsuperscript{69} The concepts of \textit{fides} (“good faith”) and \textit{natura} (“nature”) play especially important roles in the jurists’ discussion of \textit{ius gentium} institutions. See Kaser, supra note 66, at 119-25 (\textit{natura}); Dieter Nörr, Die Fides im römischen Völkerrecht (1991) (\textit{fides}). Empirical experience of non-Roman legal traditions seems also to have contributed to the jurists’ thinking, if only desultorily. See, e.g., G. Inst. 1.55 (mentioning the Galatians). For a different approach to “consensualism” in the \textit{ius gentium}, see also Mario Talamanca, “Ius gentium” da Adriano ai Severi, in La codificazione del diritto dall’antico al moderno 191 (1998).
institution analogous to patria potestas exists among the Galatians in Asia Minor. Gaius’s insistence can be explained by the quasi-totemic function of patria potestas in Roman thought. The centrality of patria potestas to the Romans’ conception of their political community and its ordering compels Gaius to understand the institution as unique to the ius civile, even in the face of contradictory empirical evidence.

The term ius gentium first appears in the jurists only in the second century A.D. Its earliest attested use is found in a fragment of the jurist Celsus, who was active during the reign of Hadrian. Such late attestation may give reason to doubt that the concept of ius gentium could have had much practical effectiveness. By the mid-second century the term had been in use in non-jurist authors for almost two centuries: it appears in the political writings of Cicero; in Livy, who uses it to designate rules of the law of war and foreign relations; and in several other authors of the late first century B.C. Although the doctrinal history of several of the Roman institutions later labeled as ius gentium remains disputed, and in most cases is irrecoverable, it is clear that all of the rules and concepts later ascribed to the ius gentium had already been in existence for two centuries or more by the time the label first appears in the jurists. Moreover, use of the term seems to be more frequently attested in isagogic texts for students, such as Gaius’s Institutes, than in other genres, suggesting that ius gentium may have been little more than a form of legal-philosophical speculation of the sort that is often employed in the law classroom.

It should not be assumed, however, that the label ius gentium is merely a teaching tool. Grouping specific institutions of the Roman ius civile under the heading of ius gentium, and leaving others outside of it, may well have served as a check on the pure discretion of the Roman adjudicating official. A post-Constitutio Antoniniana fragment of the jurist Marcian suggests such a limiting function when it lists a series of legal institutions—locatio conductio, empiio venditio, and so forth—that, as elements of the ius gentium, continue to be

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70 G. Inst. 1.55.

71 Similarly suggestive in this respect is Gaius’s discussion of the stipulation, a contract created by a simple exchange of question and answer in something like the form, “Will you perform x obligation? I will perform x.” Gaius provides several examples of acceptable question-answer pairs and notes that the stipulation forms part of the ius gentium. But he explains that a stipulation in the specific Latin words dari spondes? spondeo is unique to the Roman ius civile; non-Roman citizens cannot use those words. Id. at 1.92-93. This peculiar assertion is probably an artifact of an earlier period of Roman law in which the exact words spondes? spondeo—and those words only—constituted a performative utterance that brought into being a valid contract. See Johannes Christiansen, Institutionen des römischen Rechts 308-10 (Altona, Johann Friedrich Hammerich 1843). Use of the concrete performative words dari spondes? spondeo is in Gaius’s understanding a specific creation of the Roman political community even if the abstract concept of a legal obligation created by question and answer is universal.

72 See Dig. 12.6.47 (Celsus, Digesta 6); Kunkel, supra note 9, at 146-47 (biography of Celsus).


74 See Kunkel, supra note 9, at 258-59.
available to a person who has been condemned to deportation and therefore lost his Roman citizenship.75

The practical, and not merely theoretical, significance of assigning one or another institution to the *ius gentium* can also be corroborated by contemporary legal developments in the second century. Evidence both from the reign of Hadrian and from later in the century suggests that jurists and Roman officials were making substantial efforts to clarify the legal framework of provincial administration in general and the place of non-Roman law in particular. References to “the law of the Egyptians” in the papyri—which at least some scholars have taken to refer to a local-law “codification” project in Roman Egypt—begin only in the early second century.76 Juristic writings concentrating on provincial governance, such as Gaius’s commentary *Ad Edictum provinciale* and Ulpian’s *De officio proconsulis*, also flourish in this period.77 But even if the use of the term served a purely propaedeutic function—classroom philosophizing to train students for legal practice—it nonetheless suggests a sustained effort to put the application of Roman legal institutions to non-Roman citizens on a firmer theoretical footing, founded on the implicit principle of consent by participation.

Outside the *ius gentium*, which at least in theory neatly resolves the problem of diversity of citizenship, it is impossible for the jurists to settle the three problems of diversity of citizenship, knowledge of law, and substantive justice in perfect conformity with their principle of consent. In the other passages that address these problems, the jurists nevertheless try to place limits on any departures from the principle. This tendency can be illustrated with one further juristic passage resolving the diversity-of-citizenship problem. I have already mentioned Gaius’s discussion of the *fictio civitatis* in the *Institutes*:

> [I]f a foreigner sues or is sued on a cause for which an action has been established by Roman statutes, there is a fiction that he is a Roman citizen, provided that it is fair that the action should be extended to a foreigner, for example, if a foreigner sues or is sued by the *actio furti*. . . . [I]f a foreigner is plaintiff in the *actio furti*, Roman citizenship is fictitiously imputed to him. Similarly an action with the fiction of Roman citizenship is granted if a foreigner sues or is sued for wrongful damage under the *lex Aquilia*.78

This passage reads at first glance as a patent endorsement of legal imperialism, at once acknowledging and violating the consent principle by extending Roman-law causes of action to non-Romans in cases of delictual liability involving one Roman and one non-Roman party. But Gaius in fact imposes a limit on this extension: the praetor, the official responsible for granting an action to the plaintiff, may do so only if it would be “fair”

75 Dig. 48.22.15.pr. (Marcian).
76 See Taubenschlag, supra note 59, at 6 & n.14 (with textual references).
78 G. Inst. 4.37 (“E civitas Romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam peregrinum extendi, veluti si furti agat peregrinus aut cum eo agatur. . . . si peregrinus furti agat, civitas ei Romana fingitur. similiter, si ex lege Aquilia peregrinus damnii iniuriae agat aut cum eo agatur, ficta civitate Romana iudicium datur.”) (F. de Zulueta trans., 1946) (Latin spelling and English translation modified).
(justum). Although the consent principle is set aside, Gaius still declines to allow the wholesale application of Roman law.

Passages of the jurists that wrestle with the problems of knowledge of law and substantive justice show similar efforts at restricting application of Roman law. I have already quoted from the fragment of the jurist Julian that instructed the Roman praetor first to apply the “applicable written law,” then, failing *leges scriptae*, to apply the rule established by “customs and usage.” Even if local custom is unavailing, Julian holds that the praetor should when possible devise a legal rule that is “analogous” to the applicable custom. Only after that solution has been tried should the Roman *ius civile* be applied in the last resort.\(^7\)

Particular subtlety is shown, too, in the solution that the anonymous *fragmentum Dositheanum* adopts to address the question of whether the freed slave of a non-Roman citizen may be re-enslaved. The consent principle is, in this case, respected: the jurist holds that the freedman may be re-enslaved if the applicable foreign law permits it, despite the contrary rule in Roman law. But the anonymous jurist also makes careful accommodation for Roman notions of justice by formulating a rebuttable presumption. By holding that “the praetor will not allow a manumitted slave to be re-enslaved unless foreign law provides otherwise,” the jurist presumes that the Roman rule will apply, in keeping with the Roman *favor libertatis*, the public policy favoring free status, in the absence of contrary proof that foreign law applies.\(^8\) The jurist’s opinion is formally consistent with the consent principle while carefully favoring the Roman rule.

**IV. Conclusion**

The practical force of the doctrinal developments described in this essay ended with the promulgation of the *Constitutio Antoniniana* in A.D. 212. By granting Roman citizenship, and thus Roman law, to all free inhabitants of the empire, the imperial constitution stripped non-Roman legal traditions of almost all legal significance. There is considerable evidence, too, that even before 212 many non-Roman subjects of the empire were already conforming their arguments in litigation proceedings and their drafting of petitions to Roman officials and local legal documents to Roman standards.\(^9\) Yet whatever the result in practice after 212, the jurists’ theoretical approach to choice-of-law problems, centered around the principle of consent to law by participation in the political community of citizens, manifests a sustained attempt to limit the application of Roman law. For the jurists, adapting Roman law to the realities of imperial administration meant both expanding the reach of the *ius civile* to cover new problems and fact patterns and hardening the boundaries between Roman law and the non-Roman legal traditions of the empire. The pervasiveness of the notion of consent in Roman choice of law is testimony of that effort.

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\(^7\) Digg. 1.3.32.pr. (Julian, Digesta 84).

\(^8\) Fr. Dos. 12.

\(^9\) See generally Ando, Pluralism and Empire, supra note 2.