

Tradition and Power in the Roman Empire

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Contents

List of Figures and Maps IX

Notes on Contributors XI

Introduction 1

Sven Betjes and Erika Manders

PART I

Tradition in the Formation of the Augustan Empire

- 1 A Divine Right to Rule? The Gods as Legitimators of Power 11
Amber Gartrell
- 2 Closing a Highway to Heaven
Discontinuities in the Divinisation of Human Beings in Roman Times 27
Fernando Lozano and Elena Muñiz Grijalvo
- 3 Women's Mediation and Peace Diplomacy
Augustan Women through the Looking Glass 43
Elena Torregaray Pagola and Toni Naco del Hoyo
- 4 Republican Traditions, Imperial Innovations
The Representation of the Military Prowess of Augustus' Family 61
Florian Groll
- 5 Augustus and Traditional Structures in Egypt
Grand Policies or Ad Hoc Measures? 76
Livia Capponi
- 6 Between Tradition and Innovation
Place Names and the Geography of Power in Late Republican and Early Imperial Hispania 90
Sergio España-Chamorro
- 7 Paving the Route of Hercules
The Via Augusta and the Via Iulia Augusta and the Appropriation of Roadbound Traditions in the Augustan Age 110
Sven Betjes

PART 2***Tradition and Power in the First and Second Century CE***

- 8 Municipal Elections in the Roman West during the Principate
The Strength of Tradition 137
Christer Bruun
- 9 Plotina and the (Re)Invention of the Tradition of Womanhood 156
Margherita Carucci
- 10 Hadrian: *Imperator Nomothetes* – Ancient Laws for the Empire 171
Juan Manuel Cortés-Copete
- 11 Between Tradition and Change
The Imitatio Principis in the Imperial East 186
Giorgos Mitropoulos

PART 3***Tradition and Power in the Third and Fourth Century CE***

- 12 Tradition and Innovation in the Rescript Practice of the
Emperor Caracalla 211
Elsemieke Daalder
- 13 The Emperor Gallienus and the Senators
Tradition, Change, and Perception 229
Lukas de Blois
- 14 The Role of Tradition for the Negotiation and Legitimisation of Imperial
Rule in the Gallic and Palmyrene Empires 241
Nikolas Hächler
- 15 Stylites on Pillars versus Sanctuaries on Summits
*The Conquest of Traditional Cult Sites by Christian Ascetics in
Northern Syria* 260
Johannes Hahn

PART 4

The longue durée of Tradition and Power in Roman Discourse

- 16 *Mos Maiorum* and *Res Novae*
How Roman Politics Have Conceived Tradition, Transformation, and
Innovation, from the Second Century BCE to the Fourth Century CE 301
Stéphane Benoist
- 17 Justinian, the Senate, and the Consuls
A Rhetorical Memory of the Old Constitution 317
Francesco Bono
- Index of Persons and Places 333
General Index 339

Justinian, the Senate, and the Consuls

A Rhetorical Memory of the Old Constitution

Francesco Bono

In his “The constitution of the Later Roman Empire”, published in Cambridge in 1910, the historian J.B. Bury famously raised the question of the form of government of the Roman Empire.¹ From the very first pages of the essay, the Cambridge professor defined the Late Roman Empire as an example of absolute monarchy. According to Bury, the Roman Empire was theoretically a Republic from its outset and during its first three centuries. On paper, the Republican magistracies, such as the consuls, and assemblies, including the senate, were retained.² The senate in particular coexisted with the emperor and had an authority independent of him. As time went by, however, the emperor took away one by one the functions that the senate exercised. The result of this erosion was that, by the end of the third century, there was no longer a second state power.

As is easy to guess, the highest Republican magistracy, the consulate, had undergone a similar evolution during its history. The appointment of consuls had indeed become a prerogative of the emperor. Moreover, the consuls had lost many of the powers they had during the Republic, yet they continued to preside over the senate and exercise judicial functions.³ The erosion of the powers of these institutions by the emperor had caused the disappearance of the checks and balances that had kept the constitutional structure of the

1 J.B. Bury, *The constitution of the Later Roman Empire* (Cambridge 1910).

2 On the consuls: F. Pina Polo, *The Consul at Rome. The Civil Functions of the Consuls in the Roman Republic* (Cambridge 2011); H. Beck, A. Duplá, M. Jehne, F. Pina Polo, eds., *Consuls and “Res Publica”. Holding High Office in the Roman Republic* (Cambridge 2011); R.S. Bagnall, A. Cameron, S.R. Schwartz, K.A. Worp, *Consuls of the later Roman Empire* (Atlanta 1987), 1–12; G.A. Cecconi, *Lineamenti di storia del consolato tardoantico*, in: M. David, ed., *Eburnea diptycha. I dittici d'avorio tra Antichità e Medioevo* (Bari 2007), 109–127. On the senate: A. Chastagnol, *Le Sénat romain à l'époque impériale. Recherches sur la composition de l'Assemblée et le statut de ses membres* (Paris 1992); E. Gabba, ed., *Il senato nella storia I* (Roma 1998); A. La Rocca, F. Oppedisano, *Il senato romano nell'Italia ostrogota* (Roma 2016); C. Radtke, *The Senate at Rome in Ostrogothic Italy*, in: J. Arnold, S. Bjornlie, K. Sessa, eds., *A Companion to Ostrogothic Italy* (Leiden 2016), 121–146.

3 R.J.A. Talbert, *The Senate of Imperial Rome* (Princeton 1984), 21–22.

Roman Empire in equilibrium. The consequence was the inevitable transformation into an absolute and despotic state, where the emperor controlled every administrative apparatus and every political decision.

The changed paradigm of the state emerges clearly from Late Antique sources. For the age of Justinian, the absolutism of the monarchy is magnificently depicted in the dialogue *De scientia politica*, which can be described as a genuine treatise on political theory.⁴ The unknown author draws on the classical philosophical tradition, in particular Cicero, and dedicated Book 5 to the exposition of the ideal constitution. The starting principle is that imperial power has a divine origin and that the emperor has God himself as a model for his actions. The political model is therefore hierarchical because it must imitate the divine order, which has at its apex the divinity itself.

From this same time of absolutism, there are several texts in which the Justinianic legislator commemorates Rome's past, speaking of the Republican constitutional bodies in a historical perspective. This paper focuses on two of these texts: the preambles of *Novella* 62 and 105. Both texts show the emperor intervening in two official roles strongly linked to the Republican power structure. The first targets senators, the second the consuls.

While both the senate and the consuls were hallmarks of Republican power, their nature had changed considerably from the early to the late Empire. In Constantinople, a senate was created on the model of the one in Rome.⁵ The consuls retained their prestige, and the office was granted as a reward at the end of an administrative career or as a recognition for people of particularly high social origin, economic capacity, and/or political influence. For instance, Hilary of Arles in his biography of Saint Honoratus (composed around 430) could evoke the consulship as being "desirable and almost supreme in worldly reality".⁶ At the same time, the consuls only exercised honorary functions, or, as Mamertinus observed, had "honos sine labore".⁷

4 C.M. Mazzucchi, *Menae patricii cum Thoma referendario De scientia politica dialogus. Iteratis curis quae exstant in codice Vaticano palimpsesto* (Milano 2002); P.N. Bell, *Three political voices from the age of Justinian* (Liverpool 2009), 49–79, 123–188; O. Licandro, 'Il trattato περί πολιτικῆς ἐπιστήμης, ovvero del princeps ciceroniano nell'età dell'assolutismo. Concezioni e dibattito sull'idea imperiale e sulle formae rei publicae alla corte di Giustiniano (Vat.Gr. 1298)', *Iura* 64 (2016), 183–256; O. Licandro, *Cicerone alla corte di Giustiniano: 'Dialogo sulla scienza politica' (Vat. Gr. 1298): concezioni e dibattito sulle 'formae rei publicae' nell'età dell'assolutismo imperiale* (Roma 2017).

5 G. Dagron, *Naissance d'une capitale. Constantinople et ses institutions de 330 à 451* (Paris 1985), 117–210.

6 Hil., *Vita Honorat.* 4,2.

7 *Pan. lat.* (III) XI, 2.2: *Nam in administrationibus labos honori adiungitur, in consulatu honos sine labore suscipitur.* The panegyric, known as *Claudii Mamertini Gratiarum actio de consulatu suo Iuliano*, is declaimed to the Emperor Julian in Constantinople in 362 CE.

The ancient Republican power structures, even if they were maintained, were profoundly innovated, and the innovation did not stop, because it was Justinian himself who wanted to change these institutions. Therefore, two parallel planes existed in the political panorama of Constantinople at the beginning of the sixth century. On the one hand, there was the authoritative and inescapable legacy of the Roman political system. The institution of the senate was not abolished, and neither was the consulate, despite the profound changes the Roman world had seen.⁸ In 541, Anicius Basilius sat in the curule chair,⁹ but after him Justinian interrupted the old-established custom of appointing consuls.¹⁰ On the other hand, there was a substantial change in the role and functions that these ancient institutions entailed due to the power that the emperor acquired over time. The senate and the consulate were emptied almost completely of their powers and could no longer act as a check on the political initiatives of the emperor, who had in fact become an absolute ruler.

The texts that I will present therefore allow us to see how a late antique legislator, in this case Justinian, looked at these institutions, and viewed the transition from the Republic to the imperial system. It will also allow us to gauge how the same legislator, while fully conscious of the profound changes over the centuries, recalled and celebrated the illustrious past of these institutions to create a link with the present.

1 *Novel 62*

In late antiquity, the senate had ceased to be a constitutional body and started to play a consultative function. The emperor rarely resided in the West and only occasionally visited Rome. There were, therefore, few occasions when the emperor turned to the senators for their opinion. In the East, on the other hand, as the emperor lived more consistently in Constantinople, the senate

8 The consulship was abolished by law under the reign of the emperor Leo VI the Wise: see *Nov.* 94.

9 A. Cameron, D. Schauer, 'The Last Consul. Basilius and His Diptych', *The Journal of Roman Studies* 72 (1982), 126–145; M. Meier, 'Das Ende des Konsulats im Jahr 541/42 und seine Gründe. Kritische Anmerkungen zur Vorstellung eines „Zeitalters Justinians“, *Zeitschrift für Papyrologie und Epigraphik* 138 (2002), 277–299.

10 Justin II restored the tradition of assuming the consulship on the first January after his accession (566 CE). This event is attested in Corippus' panegyric (II.35): *ditabo plebes opibus, nomenque negatum | consulibus consul post tempora tanta novabo | gaudeat ut totus Iustini numere mundus.*

seemed to be more active, serving a number of roles.¹¹ First, the senate played a role when an emperor was elected¹² or when he received ambassadors. Second, it had jurisdictional powers, both as a high court of justice, as a court reserved to judge senators, and as a court of appeal.¹³ Finally, the senate appointed the *curator* if a *furiosus* was of noble origin,¹⁴ appointed the university professors in Constantinople and elected the praetors.¹⁵

Novel 62, drafted in Latin, was issued in December 537 and is the only imperial constitution that deals specifically with the senate and senators.¹⁶ Justinian decided both to increase the number of members of the *pars vacantium senatorum* and to increase their duties.¹⁷ Consequently, the emperor proceeded with an extraordinary recruitment of senators.¹⁸ Furthermore, he decided that the

11 L.P. Raybaud, *Essai sur le Sénat de Constantinople* (Paris 1963), 65–69; A.H.M. Jones, *Il tardo impero romano (284–602 d.C.) I* (Milano 1973), 404–409.

12 The senate retained the attribution of giving its consent to ensure the original arrangement of the election (*electio*) of the new ruler: Raybaud 1963, op. cit. (n. 11), 60–64; G. Dagron, *Empereur et prêtre. Étude sur le césaropapisme byzantin* (Paris 1996), 88.

13 Raybaud 1963, op. cit. (n. 11), 57–60.

14 C. 5.70.7.6.

15 C. 1.15.1 (= *CTh.* 6.21.1); C. 1.39.2.

16 On this *Novel*, F. Burgella, *Il Senato di Costantinopoli*, in Gabba 1998, op. cit. (n. 2), 398–437; P. Garbarino, *Contributo allo studio del Senato in età giustiniana* (Napoli 1992); M. Kruse, *The politics of Roman memory. From the fall of the western empire to the age of Justinian* (Philadelphia 2019) 106–107; S. Puliatti, *Innovare cum iusta causa. Continuità e innovazione nelle riforme amministrative e giurisdizionali di Giustiniano* (Torino 2021), 146–150. The *Novel* is attested in a papyrus in a fragmentary manner, PSI XIII 1346: S. Corcoran, ‘Two Tales, Two Cities: Antinoopolis and Nottingham’, in: J. Drinkwater, B. Salway, eds., *Wolf Liebeschuetz Reflected. Essays presented by colleagues, friends, and pupils* (London 2007), 193–209. Garbarino 1992, op. cit. (n. 16), 181–192 suggests that Justinian consciously chose to use the Latin language to weave a dialogue with the senate of Rome. Indeed, the war against the Goths led by Belisarius would have given rise to discontent within the senatorial ranks. Justinian therefore intended to prepare an official recognition of this institution’s role when the reconquest of Italy took place. D.J.D. Miller & P. Sarris, *The Novels of Justinian I* (Cambridge 2018), 470 n. 1 believe that the use of the Latin “was deemed most appropriate to the antiquity and dignity of the senatorial order”. The date is incomplete due to the falling number before *kal. Zachariae* (R. Schoell, G. Kroll, *Novellae* [Berolini 1912], 333) proposes to insert the number *V*, so that this *Novel* would be issued on the same day as *Novel* 105.

17 By means of this expression, the *Novella* intended to refer to those senators who were not in administrative positions. This category is contrasted with senators who were *administratores*, because they were actively engaged in the administration. The latter are in fact expressly mentioned in the *praefatio*; they had both military and civil duties: *et militiae sub eis constituerentur et cetera eorum dispositionibus oboedirent*.

18 *Nov.* 62.1.1. In particular, Justinian admitted to the senate men outstanding for their noble origin and very high repute (*homines nobilitate et summa opinione egregii*).

senators must be convened for hearing trials brought on appeal to the imperial consistory together with the *proceres*.¹⁹ At the same time, Justinian regulated the hierarchy among senators. The *praefectus urbi* was to hold the presidency of the senate and to have primacy of place that came with it; the *senatores patricii*, the *consulares*, the *praefecti*, and the other *viri magnifici illustres* come after him, in a precise order.²⁰

Justinian justified his decision by the desire to put an end to the current decay of the senate.²¹ Indeed, the portion of the senate not employed in administrative affairs had undergone a decrease in members and a major downsizing in the importance of the tasks entrusted to it.

The present poor situation contrasted with the glorious past of this institution, clearly evoked in the proem:²²

Antiquissimis temporibus Romani senatus auctoritas tanto vigore potestatis effulsit, ut eius gubernatione domi forisque habita iugo Romano omnis mundus subiceretur, non solum ad ortus solis et occasus, sed etiam in utrumque latus orbis terrae Romana ditione propagata: communi etenim senatus consilio omnia agebantur. Postea vero quam ad maiestatem imperatoriam ius populi Romani et senatus felicitate reipublicae translatum est, evenit ut

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- 19 The constitution states that such trials must be taken by both orders of the senators: [*non*] a solis senatoribus, sed ab utroque ordine, huiusmodi litibus exercendis. This means that the *senatores in quiete degentes* and the *administratores* (engaged in administrative posts) were called upon to perform these jurisdictional functions. Garbarino 1992, op. cit. (n. 16), 62–63; Puliatti 2021, op. cit. (n. 16), 148; *Nov.* 62.1.2.
- 20 *Nov.* 62.2. This section of the Novella closes with the concession to all the *illustres* to obtain the patriciate. Justinian thus repealed an earlier provision of Zeno (C. 12.3.3), which allowed only the *consulares* and the *praefectorii* to receive this title. With this in mind, the emperor decreed that previous concessions, obtained against Zeno's law, should be remedied and that there should be no consequences or prejudice against the beneficiaries. Finally, the emperor resumed the already mentioned reduction to one-third of the fees (*sportulae*) due for the concession of a high imperial office (*dignitas*), if this is conferred with the intention of allowing entry into the senate.
- 21 By contrast, Justinian's intentions are not reflected in the contemporary testimony of Procopius (*Anecd.* 14.8). Indeed, in his highly polemical tone, the Byzantine writer describes the senate meetings as a pure formality, because they were only convened to save appearances and ancient traditions. Moreover, senators did not speak on any issue. According to Procopius, the cause of this situation was Justinian's despotic power.
- 22 The first chapter of the Novella in fact speaks of *in praesenti*, while the preamble begins with *antiquissimis temporibus*.

*ii, quos ipsi²³ elegerint et administrationibus praeposuerint, omnia facerent quae vox imperialis eis iniunxisset.*²⁴

The constitution concerns the senate of Constantinople, but the *praefatio* begins by recalling the importance of the senate in the Republican period. The tone is strongly rhetorical and aims to amplify the greatness of this body: this is evident when the text states that Roman jurisdiction extends not only *ad ortus solis et occasus, sed etiam in utrumque latus orbis terrae*.

The text then speaks of the *auctoritas* of the senate that would become a true *potestas*. The first question to be asked is whether the term *auctoritas* is used in this context in a technical sense. As we know, in fact, there was the *auctoritas patrum*, which is the ratification by the *patres* of the resolutions taken by the popular assembly on the proposal of a magistrate. However, this meaning does not seem to correspond perfectly with that of *Novel* 62.

The *Novel* in fact seems to allude to an *auctoritas* in which all the constitutional prerogatives of the senate are included. For example, in addition to legislative power, which took the form of issuing *senatus consulta*, the senate had important foreign policy tasks (signing peace agreements and treaties, receiving submissions from foreign peoples; sending ambassadors to resolve disputes or make suggestions, or imposing orders). The description of the role played by the senate is therefore more linked to the image of its power, which is then reflected in its powers from a constitutional point of view. This is also confirmed by terminological research. In the Justinianic sources, *auctoritas*

23 The pronoun *ipsi* raises some difficulties in interpretation. Biener (*Geschichte der Novellen Iustinians* [Berlissn 1824], 495.3) proposes that *ipsi* is an abbreviated form of *imperatores*. However, this hypothesis meets not only the objections already pointed out in Schoell-Kroll's critical apparatus, but also the fact that from a palaeographic point of view such an abbreviation is not possible. Garbarino 1992, op. cit. (n. 16), 7–10, also suggests that the pronoun indicate the figure of the emperor, and recalls other examples of *Novellae* in which a construction according to the sense is attested (*Nov.* 53.5.1; *Nov.* 54.2pr.). Instead, M. Bretone, *Tecniche e ideologie dei giuristi romani* (Napoli 1982), 48; A. Pertusi, *La concezione politica e sociale dell'impero di Giustiniano*, in: L. Firpo, ed., *Storia delle idee politiche, economiche e sociali* 2.1 (Torino 1985), 574–575; Puliatti 2021, op. cit. (n. 16), 147–73, consider that it refers to *populus et senatus*.

24 *Nov.* 62praef. Transl. (Bono): In the most ancient times the authority of the Roman senate shone out in such force of power that by means of the governance being conducted both at home and abroad, the whole world was subjected to the Roman yoke, and Roman domination spread not only where the sun raised and set, but even to both sides of the globe: everything indeed was conducted by the common counsel of the senate. But after the legal authority of the people and the senate was transferred to the imperial majesty for the sake of the happiness of the *respublica*, it came about that those, whom they themselves had elected and had appointed to the various offices of the administration, did everything that the emperor's command required of them.

is used to indicate the emperor (*nostra auctoritas*) but also imperial officials (*illustris auctoritas*).²⁵

The *praefatio* continues by stating that the *ius* of the senate, together with that of the people, then passed to the emperor. It has been argued that “Justinian’s account of the transition from Republic to Empire is studiously vague, referring only to a transfer of the legal authority (*ius*) of the senate and people to the imperial majesty”.²⁶ However, if we look at the text more closely, the reference to the transfer of power is precisely to be found in the *lex de imperio*.²⁷ One can therefore compare the text of the *Novel* with other legal texts:²⁸

*Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.*²⁹

*Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit.*³⁰

*Cum enim lege antiqua, quae regia nuncupabatur, omne ius omnisque potestas populi romani in imperatoriam translata sunt potestatem.*³¹

These texts describe the transition of power from the people to the emperor; this takes place through a specific legal act, the *lex de imperio*. Although this law is not explicitly mentioned in the *Novel*, it is clear that Justinian’s chancery has the same procedure of power’s transmission in mind.³²

25 *Ex multis*, C. 5.13.1.5, C. 4.29.23.2, C. 5.37.28.3, *Nov.* 17pr, *Nov.* 75pr.

26 Kruse 2019, op. cit. (n. 16), 106–107.

27 Other sources mention that the emperor receives his power from a *lex*: Gai., 1.5, Cass. Dio, 53.32. 5–6.

28 F. Burgella, *Il senato di Costantinopoli*, in Gabba 1998, op. cit. (n. 2), 402; Bretone 1982, op. cit. (n. 23), 48–49; Garbarino 1992, op. cit. (n. 16), 21–23; A. Kaldellis, *The Byzantine Republic. People and Power in New Rome* (Cambridge 2015), 101 and n. 46.

29 Ulp., *lib. pr. instit.* D. 1.4.1pr.: Whatever seems good to the emperor and is approved has the force of law, for the people confer on him, and in him, all their power and authority, by the royal law that is passed on his power.

30 *I.* 1.2.6: Whatever seems good to the emperor has also the force of law; for the people, by the *lex regia*, which is passed to confer on him his power, make over to him their whole power and authority.

31 *Deo auctore* 7: All the power and the laws of the Roman people had been transferred to the emperor by an ancient law known as “royal law”.

32 Although the text of *Novel* 62 refers to the *lex de imperio*, it also adds the senate to the people, to whom sovereignty belonged in the ancient Republic. This is certainly a difference

In the light of what has been said so far, the question remains as to what emerges from this *praefatio*. A first consideration concerns the silence of the text about the other Republican magistracies, which together with the senate exercised power. However, the reason for this absence lies in the rhetorical purpose of the prologue, which serves to introduce the imperial measure on the senators. The legislator's interest is not to describe in true and faithful terms what the Roman constitutional setup was in the Republican era. In fact, the emperor only wants to introduce his decision concerning the senate alone.

Even with this limitation, the prologue makes it possible to present the emperor as the direct heir to the role previously played by the senate; the emperor's apex position has its justification and historical antecedent in the position of the senate. The legislator thus shows continuity between the past and the present, between the Republican and imperial eras. However, this continuity only serves to legitimize the current political situation, in which the emperor is now the head of the Roman state. If before it was the Republican organs that constituted the centre of political action, the advent of the emperor has indeed maintained the Republican structures but not the balance of power, since it is now the emperor who holds power.

2 *Novel 105*

We have seen that *Novel 62* distinguishes between the period before and after the *translatio* of the *ius* of people and senate to the emperor. A similar conception of time can be found in the preamble of *Novel 105*, titled *De consulibus*. Before turning our attention to this, it must be said that the consulate is also mentioned in other Novels of Justinian. *Novel 13* remembers that in ancient times the consuls presided over the highest council.³³ In *Novel 24*, the consuls become the model for the *praetor Pisidiae*: in fact, they took provinces by lot, gradually built up the Roman name, and made it so great that God did not grant this success to any other state.³⁴ *Novel 38* says that only the highest ranks, including the consulship, can be freed from the burdens of city councils.³⁵

from the legal sources referred to here. However, the mention of the senate is again justified by the argument of the imperial constitution, which concerns the senators, and not a historical reconstruction of the Roman past.

33 *Nov. 13.1.1*. On this law, see E. Franciosi, *Riforme istituzionali e funzioni giurisdizionali nelle Novelle di Giustiniano. Studi su Nov. 13 e Nov. 80* (Milano 1998); Puliatti 2021, op. cit. (n. 16), 138–146; Kruse 2019, op. cit. (n. 16), 92–96.

34 *Nov. 24.1*.

35 *Nov. 38praef.3*.

Novel 47 fixed a new system of dating official documents and legal proceedings: the consulship is preceded by the regnal date of the reigning emperor.³⁶ In *Novel* 81, after again mentioning that the consuls give their name to the year and are the only ones honoured with the *codicilli consulares*, the emperor states that the consuls *ordinarii*, who are subject to authority, become independent at the moment when that rank is granted to them.³⁷

These references to the consulship and its past are episodic, while *Novel* 105 deals explicitly with this magistracy. Specifically, the constitution regulates one of the main functions that the consul assumed from the fifth century onwards. This was the honour of providing games,³⁸ which involved contributing to the cost of their organisation.³⁹

Novel 105 was issued on 28 December 537, when the Gothic War was underway, and was addressed to Strategius, the *comes sacrarum largitionum*.⁴⁰ A copy was explicitly made for John, *praefectus praetorio* of the East, and Longinus, *praefectus urbi*. This *Novel* introduced innovations into the consulship that concerned its functions rather than its constitutional position.⁴¹ Justinian placed

36 *Nov.* 47praef.; 1.

37 *Nov.* 81praef.; 1pr.

38 Imagery of the games are very diffused on the consular diptychs of the sixth century: J. Engemann, 'Die Spiele spätantiker senatoren und Consulen, ihre Diptychen und ihre Geschenke', in: G. Bühl, A. Cutler and A. Effenberger, eds., *Spätantike und byzantinische Elfenbeinbildwerke in Diskurs* (Wiesbaden 2008), 53–77; C. Olovdotter, *The Consular Image. An Iconological Study of the Consular Diptychs* (Oxford 2005), 123–127; A. Cameron, 'The Origin, Context and Function of Consular Diptychs', *Journal of Roman Studies* 103 (2013), 179–185.

39 The costs of the celebrations could be very high. Procopius (*Anecd.* 26.12) states that those invested with the office of consul had to pay more than 2000 pounds of gold. This high sum was only covered to a small extent by one's own wealth, while the most came from the emperor. For the expenses of the consulate, A.H.M. Jones, *The Later Roman Empire 284–602. A social, economic and administrative survey* II (Oxford 1964), 539; M.H. Hendy, *Studies in the Byzantine Monetary Economy c. 300–1450* (Cambridge 1985), 192–193; Bagnall, Cameron, Schwartz, Worp 1987, op. cit. (n. 2), 9.

40 On this *Novel*, E. Stein, *Histoire du Bas-Empire* II (Paris-Bruges 1949), 461–462; Bagnall, Cameron, Schwartz, Worp 1987, op. cit. (n. 2), 10–12; Meier 2002, op. cit. (n. 9), 279–281; Ceconi 2007, op. cit. (n. 2), 123–125; M. Kruse, 'Justinian's laws and Procopius' Wars', in: C. Lillington-Martin, E. Turquois, eds., *Procopius of Caesarea: literary and historical interpretations* (Basingstoke 2017), 186–200; Kruse 2019, op. cit. (n. 16), 112–113. The *Authenticum* places the promulgation of this law at 28 December 536: Schoell, Kroll 1912, op. cit. (n. 16), 507; *PLRE* II, 1034–1036.

41 There is debate about the reasons for this law. For Bury (J.B. Bury, *History of the later Roman empire from the death of Theodosius I to the death of Justinian (a.D. 395–a.D. 565)* II [London 1923], 347), Justinian attempted to "rescue the endangered institution". For Stein (Stein 1949, op. cit. (n. 40), 461–462), the law was enacted to favour the consulship of John of Cappadocia, who assumed the magistracy on 1 January 538. The latter would have had

limits on the activities of this office. The emperor was responsible for regulating the role of the consuls in the running of the games. Justinian complained that consular subjectivism had drifted dangerously, since a competition of excessive ostentation had been created and the costs of organizing the games were now out of control. Recalling a constitution of his predecessor Marcian, who forbade consuls from carrying out *sparsiones* of money,⁴² Justinian lashed out at those who had transgressed it by being excessively prodigal when scattering money in public.

In order to draw a line under such immoderate behaviour, the emperor decreed that consuls may only celebrate their appointment through seven public appearances throughout their year of office.⁴³ The first procession was to take place on the Kalends of January, the day on which the consuls entered office; the second celebration was a chariot-race called *mappa*; the third the “theatre-hunt” of wild beasts; the fourth the so-called “one-day-only” (μονημερίον), at which men fought animals; the fifth a procession to be held in the theatre, where comedians, tragic actors, and choruses went on stage; the sixth another chariot-race; and the last the festival when the consul laid down the office.

Furthermore, Justinian decided to amend the constitution of Marcian, not only removing the ban on honouring the people with *sparsiones*, but also clarifying that the emperor was not compelling anyone to do so. The consul was free to determine if he wanted to scatter money during the celebrations of his appointment, and the amount to be distributed. In any case, the consul could only distribute gifts in silver,⁴⁴ as the emperor reserved the privilege of scattering gold for himself alone.⁴⁵

a personal interest in introducing this reform, because he would have obtained a significant reduction in the costs he had to face. Bagnall, Cameron, Schwartz, Worp 1987, *op. cit.* (n. 2), 10–11, believe that Justinian acted to counter the growing popularity of Belisarius. In fact, his consulship had been conferred after his victory over the Vandals, and had been celebrated with much munificence, as there had been distributions of gold, later banned by *Novel* 105.

42 C. 12.3.2.

43 Miller & Sarris 2018, *op. cit.* (n. 16), 690 n. 11, translate in this way the Greek word *πρόοδοι*, because, even if normally it refers to processions, in this context it indicates all kind of celebrations; *Nov.* 105.1.

44 Justinian allowed the consuls to scatter *miliaresia* (silver coins), but also *kaukia* (silver cups), *tetragonia* (square coins or hacksilver) and *mela* (whose meaning is unclear); see *Nov.* 105.2.1.

45 *Nov.* 105.2 §§1–3.

While the constitution is dealing with a particular aspect of the consuls' duties, it nevertheless features a very solemn preamble, in which the supreme authority of the consulate in ancient times is proclaimed:⁴⁶

Τὸ τῆς ὑπατείας ὄνομά τε καὶ πρᾶγμα τοῖς μὲν πάλαι Ῥωμαίοις πρὸς τὴν τῶν πολέμων ἐπενοήθη χρεῖαν, κὰν ταῖς ψήφοις, ἃς αὐτοῖς ἐπὶ τῇ χειροτονίᾳ τὸ κοινὸν ἐδίδου τῆς πολιτείας σχῆμα, διελάγγχανον [γὰρ] εὐθύς τὰς ἐπαρχίας ἐν αἷς Ῥωμαίοις πόλεμος ἦν, καὶ κατ' αὐτὰς ἐκκληροῦντο τὰς ῥάβδους ὕστερον δὲ ὁ χρόνος εἰς τὴν τῶν εὐσεβεστάτων αὐτοκρατόρων μεταστήσας τὸ πολεμεῖν τε καὶ εἰρήνην ἄγειν ἐξουσίαν εἰς φιλοτιμίαν μόνην τὸ πρᾶγμα τοῖς ὑπάτοις μετέστησε καὶ ταύτην σῶφρονα καὶ τεταγμένην καὶ τὸ μέτρον οὐκ ἐκβαίνουσαν.

Consulatus nomen et causa priscis quidem Romanis adversus hostium adinventum est utilitatem, et in decretis, quae eis in ordinatione communis dabat reipublicae figura, sortiebantur repente provincias in quibus Romani bellum habebant, et secundum has sortiebantur fasces; sequens vero tempus in imperatorum piissimorum transponens bellandi et pacificandi potestatem ad largitatem solam causam consulibus mutavit et hanc temperatam et ordinatam mensuramque non excedentem.

The emperor is well aware not only of the Republican origin of the consulship but also of its almost thousand-year existence.⁴⁷ However, in the proem the recourse to history becomes more intense. The legislator refers to the foundation of the Republic (τοῖς μὲν πάλαι Ῥωμαίοις/*prisci Romani*) and the creation of this magistracy.

The emperor states that the consul's name and activity were linked to the military sphere.⁴⁸ Now, this etymology could raise some perplexity, and a com-

46 *Nov.* 105praef. Transl. (Bono): The name and origin of the consulate were conceived by the ancient Romans for the needs of war and in the deliberations, that the shared structure of government gave them on their election, they immediately drew lots for the provinces in which the Romans were at war, and for those they received *fasces*. Later, time transferred the power of war and peace to the authority of the most pious emperors, and transformed the consuls' role into an office of honours, which was moderate, controlled and didn't exceed the limit.

47 *Nov.* 105praef.: ἐπειδὴ τοίνυν ὀρώμεν κινδυνεῦον διαπεσεῖν τὸ τῶν ὑπάτων ὄνομα, ὅπερ ἐκ χρόνων οὕτω μακρῶν καὶ εἰς χιλιεστόν σύνεγγυς ἔτος ἔλθὼν τῇ τῶν Ῥωμαίων συνήκμασε πολιτεία. Lat.: *quia igitur videmus periclitari consulum nomen, quod ex temporibus ita prolixis et ad millesimum prope annum veniens cum Romanorum republica pullulavit.*

48 The attribution of both civil and military powers during the Republican period is instead granted to the praetors. This appears in these texts, with which Justinian instituted the new governors of Pisidia and Lycaonia: *Nov.* 24praef.; *Nov.* 25praef.

parison with what John Lydus reports in his *De magistratibus* strengthens this impression.⁴⁹ The Byzantine author says: “a ‘hider of one’s thoughts’ is called *consul* from the fact that he takes forethought and is vigilant, pondering by himself on behalf of the common good”.⁵⁰ Despite this, Lydus is by no means silent about the military competence of the consuls. He mentions it when he recalls the appointment of Brutus and Publicola in the first year of the Roman Republic, but not only there.⁵¹ Lydus, in fact, identifies three different forms of government during the history of Rome: *basileia*, tyranny and the power of the Caesar (or *αὐτοκράτωρ*). Precisely when speaking of this third form, he juxtaposes the Republican magistracy and the imperial figure because both receive the title of *imperator*, which indicates command over the army.⁵² In Lydus’ vision, therefore, there is a clear evolution of the political system in Rome: the royal tyranny in the archaic age gives way to the long season of freedom of the consulate. Supreme power, or *imperium*, consists in the power to solve problems affecting the common good and to command the army in war. This power passed from consulship to the Principate, while Diocletian brought about a drastic change, assuming a despotic, if not tyrannical, attitude.

The imperial proposal of linking this magistrate to his military activity can be considered a widely diffused and common idea among the elite of Constantinople. But the connection can also be found in many ancient sources throughout Roman history, including Polybius, Cicero, and Cassiodorus. In his reflections on the Republican constitution, Polybius gives a detailed description of the consuls and their tasks.⁵³ On the one hand, they lead out their legions since they are commanders-in-chief of the Roman army; their power is almost uncontrolled as regards preparation for war and the general conduct of operations in the field. On the other hand, they exercise authority in Rome over all public affairs. Cicero says in *De legibus*: “Let there be two of them of

49 U. Roberto, ‘Giovanni Lido sul consolato. Libertà, sophrosyne e riflessione storico-politica a Costantinopoli (metà VI–inizio VII secolo)’, *Lexis* 36 (2018), 384–404.

50 Lyd., *Mag.* 1.30: καὶ κώνσουλ ὁ κρυψίνους ἀπὸ τοῦ προνοεῖν καὶ καθ’ ἑαυτὸν ὑπὲρ τῶν κοινῶν σκεπτόμενον ἀγρυπνεῖν; A.C. Bandy, ed., *Ioannes Lydus, On powers or the magistracies of the Roman State* (Philadelphia 1983), 46–47.

51 Lyd., *Mag.* 1.33; Bandy 1983, op. cit. (n. 50), 51.

52 Lyd., *Mag.* 1.4; Bandy 1983, op. cit. (n. 50), 13–15.

53 Plb., 6.12. See, on this magistracy, also: Th. Mommsen, *Römisches Staatsrecht* II (Leipzig 1887), 74–140; W. Kunkel, R. Wittmann, *Staatsordnung und Staatspraxis der römischen Republik* (Munich 1995), 311–337; A.W. Lintott, *The Constitution of the Roman Republic* (Oxford 1999), 104–107.

royal power, and let them be called praetors, judges, and consuls from leading, judging and advising. Let them have the supreme military power".⁵⁴

Military power also appears in the *consulatus formula* that Cassiodorus quotes in his *Variae*. Even if the senator at the court of Theodoric the Great claims that *consul dictus est a consulendo*, above all he describes consuls as the supreme commanders of the Roman army. For example, the consul rightly held power over all the citizens because he defended the homeland from enemies.⁵⁵ But the prosperity and the largesse of Rome also came from his right hand, which so copiously spilled the blood of the enemy.⁵⁶

The idea that connects the consuls' power with their military role would outlive the Justinianic Age itself. In a fragment of the *Historia chroniké*,⁵⁷ recovered in the Byzantine encyclopaedia known as *Suda*, John of Antioch agrees with Lydus. He sees the consulate as the guarantor of freedom, and, besides reminding that the lictors carry the *fasces* with the axe, assigns the consuls command over the army.⁵⁸

Whatever the source which the imperial chancellery used, it is important to note that the chancellery itself created a direct link between the magistracy and military power. The chancellery's formulation does not speak of the annual duration of the consul's office, it does not speak of the *sella curulis*, nor of the collegial exercise of power. Instead, it has chosen a particular aspect of *imperium*, a power that includes both military and civil command, the administration of the city and the administration of justice.

In *Novel* 105 the focus is on the *imperium militiae*. From the origins of the *Respublica*, the consuls in fact had supreme military power, which includes command in war, the formation of the army by conscription, the appointment of officers, and the imposition of taxes for the needs of war. However, declaration of war was not a direct responsibility of the consuls, because the centuriate assembly, summoned by the consuls, issued the *leges de bello indicendo*. The proem,⁵⁹ then, seems to refer to the fact that the provinces used to be

54 Cic., *leg.* 3.8: *Regio imperio duo sunt iique praeuendo iudicando consulendo praetores iudices consules appellamino. Militiae summum ius habent nemi parento.*

55 Cassiod., *Var.* 6.1.2: *Merito pridem genus habebatur imperii: merito supra omnes cives poterat, qui ab hoste patriam vindicabat.*

56 Cassiod., *Var.* 6.1.4: *Hinc tanta largitas profluebat, ut illa dextera, quae sanguinem copiose fuderat hostium, vitae auxilium civibus manaret irriguum.*

57 U. Roberto, ed., *Ioannis Antiocheni Fragmenta ex Historia chronica* (Berlin-New York 2012).

58 Sud., s.v. "Υπατοι: ὁ γὰρ νῦν ὑπὸ πελέκεσί τε καὶ ῥάβδοις δορυφοροῦ μένος καὶ στρατοπέδων ἐξηγούμενος.

59 *Nov.* 105praef.: *in decretis, quae eis in ordinatione communis dabat reipublicae figura sortiebantur repente provincias.* The verb *sortiebantur* seems to recall one of the ways by which

decreed and assigned by the senate after the election of the consuls.⁶⁰ The *praefatio*, furthermore, recalls that the consuls were to act using their *imperium* in a particular geographical area not yet pacified or where military operations are needed to be continued.⁶¹

Justinian's account focuses on the role of the consuls in situations of war but omits their domestic political services. Yet despite this choice, the constitution does not minimize the origin of this magistrate.⁶² From a rhetorical point of view, it would indeed make no sense to play down the role of this magistracy from the very beginning of the *Respublica*. In fact, the function of the Justinianic description is the opposite, namely to celebrate the important past and then allow the excesses of the present to be stigmatized.

Military power, the *praefatio* continues, then passed into the hands of the emperor, transforming the magistracy of the consuls as well. Compared to *Novel 62*, there is no mention of any *lex de imperio*. But the chronological framework is much the same: the Republican period, and then the imperial period. In this case, as in the previous one, the passage of military power from the consuls to the emperor took place in full continuity, without trauma, without upheaval. In this way, Justinian can consider himself the legitimate holder of this power.

As seen above, the same interpretation of the transition from Republic to Empire is found in Lydus. Justinian's contemporary reads imperial power as a transfer of authority from consuls to emperor.⁶³ This bureaucrat's reflection is not confined to the past. Rather, expressing his own judgement on the present, he celebrates Justinian's interpretation of his role as ruler as if he were a consul himself.⁶⁴ Now, the concept of the emperor as consul is placed also at the end of the *Novel 105*: "the Sovereign has a permanent consulship ... thus the Sovereign's consulship will also be concomitant of his sceptre".⁶⁵ In fact, both sources refer to a tradition that, from Pliny the Younger to Pacatus, admits continuity between the consulship and the imperial monarchy.⁶⁶

the provinces were assigned: *sortitio* is by lot. The other possibility is that consuls decide the province assigned by mutual agreement, *comparatio*.

60 *Ex multis*, Liv., 30.1; 32.8. The distribution of the provinces is also connected to the procedure for waging war: see Liv., 36.1.4–6; 36.2.1.

61 It is sufficient to remember what Livy says about *Sardinia*, Liv., 41.8.2: *ea propter belli magnitudinem provincia consularis facta est* (= by reason of the gravity of the war, was made a consular province).

62 Similarly so Kruse 2017, op. cit. (n. 40), 187–188.

63 Lyd., *Mag* 1.4.3–5.

64 Lyd., *Mag*. 2.8.3.

65 The translation is from: Miller & Sarris 2018, op. cit. (n. 16), 695.

66 Plin., *paneg.* 55.6 s, *Pan. lat.* (II) XII.20.5 s; Roberto 2018, op. cit. (n. 49), 399.

3 The History in Rhetoric

After reading the two texts, it only remains to make a few brief concluding remarks. *Novel* 62 and 105 provide us with an important testimony of how Justinian recovered the past of important Republican institutions, such as the senate and consuls, even when these traditional structures of power had lost their original function.

The two texts have a very similar expository structure. In both cases, the proem divides the past in two periods, a before and after. Before, there were the senate and the consuls who exercised power. Afterwards, this power passed into the hands of the emperor. In a few lines, the legislator draws a line of continuity and legitimization between Republic and Empire.

A common element in the perspective of our sources is the contrast between the honorary character of the senate and the consulship and their past history full of concrete responsibilities at a political and military level. Whereas previously the senate governed the whole world, or the consuls led the wars, now it is the emperor who holds these prerogatives.

The proems have an introductory function. In the case of *Novel* 62 and *Novel* 105, the legislator has chosen to use historical language. Among the prologues in the *Novellae*, those of a historical nature are of great importance.⁶⁷ These constitutions are reforms of the peripheral administration. Examples are *Novel* 24, *De praetore Pisidiae*, and *Novel* 25, *De praetore Lycaoniae*.⁶⁸ These *Novellae* establish new local governorships, who are given the names of ancient magistracies (*praetor* or *proconsul*), and assign them military and civil powers. These were necessary measures to counter the military threat to the northern and eastern frontiers of the Empire in the years 535–536. This is why these *Novellae* are considered a manifestation of Justinian's classicism.⁶⁹

However, as we have seen for *Novel* 62 and 105, it is a story that is told not in truthful but in rhetorical, and therefore somewhat modified, terms. The texts are doubly rhetorical. On the one hand, there is the rhetorical work that the *praefatio* is expected to do, which must introduce the imperial text and

67 H. Hunger, *Prooimion. Elemente der byzantinischen Kaiseridee in den Arengen der Urkunden* (Wien 1964), 173–179.

68 Other examples are: *Nov.* 26 *De praetore Thraciae*, *Nov.* 29 *De praetore Paphlagoniae*; *Nov.* 30 *De praetore Cappadociae*, *Nov.* 103 *De proconsole Palaestinae*, *Nov.* 104 *De praetore Siciliae*.

69 M. Maas, 'Roman History and Christian Ideology in Justinianic Reform Legislation', *Dumbarton Oaks Papers* 40 (1986), 17–31; C. Pazdernik, 'Justinianic Ideology and the Power of the Past', in: M. Maas, ed., *The Cambridge Companion to the Age of Justinian* (Cambridge 2005), 185–214; Puliatti 2021, op. cit. (n. 16), 1–14.

prepare the reader for the imperial decision. On the other hand, the content is also fundamentally rhetorical. The chancellery used historical data to describe a reality, in this case that of the senate and consuls, which has changed a great deal: they were only a vestige of the old Republican constitution.

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