LEX DE IMPERIO VESPASIANI

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Few Roman documents have been more discussed than the great bronze tablet [1] which Cola di Rienzo discovered and erected in the Church of St. John Lateran, and which preserves the latter part of a grant of powers made to Vespasian by senate and people.[2] Does it relate to his tribunician power or to his *imperium*, or does it merely confer on him supplementary rights? Is the grant tralatician in character, or is it specifically designed to enlarge, or to limit, the imperial power of Vespasian? Does it explain the later juristic doctrines that the emperor could himself make law and was not bound to obey the existing laws? I shall argue that the document preserves part of the *senatus consultum* passed when Vespasian was first recognized at Rome in December 69; that with one possible exception in the final clause it is tralatician, probably going back to A.D. 37 but incorporating additional prerogatives conferred on Claudius and emperors between Claudius and Vespasian (Part I); and that it is indeed the basis of the juristic doctrines mentioned (Part II). A few remarks are appended on its relevance to the political theory by which imperial autocracy could be justified (Part III).

I. ' CUNCTA SOLITA '

The words of our document expressly describe it as a *lex*, and its final section is a *sanctio* in the enacting imperatives proper to comitial legislation. Yet all the preceding clauses are in the advisory form characteristic of *senatus consulta*, implying the senatorial ' censuere ' before ' ut ' with the subjunctive. Since 1947 we have had an exact parallel to this in the *Tabula Hebana*, a comitial enactment of A.D. 19–20 (it is explicitly termed a *rogatio*), which is also drafted, so far as extant, in senatorial ' ut ' clauses.[3] The explanation is simple. Evidently the comitial proceedings were so perfunctory that it was thought enough to embody the recommendations of the senate without change in a *lex*, which presumably contained a suitable enacting preamble, as well as a *sanctio* such as that preserved in the tablet. The draftsmen of the senatorial decree did not scruple to refer to the document as a *lex* not merely in the *sanctio* but in the final clause of the decree itself (v. 30).

Historians in antiquity seldom cared much about legal forms,[4] and in recording the accession of a new emperor they naturally ignore the routine of comitial procedure, and mention only his recognition by the senate. Of course, as the senate itself was often not a free agent, this too could be a formality. Still it symbolized something of importance: the emperor actually needed the co-operation of senators to carry on the government, whereas the *comitia*, which had long since ceased to represent the whole citizen body, had no effective role at all: its votes could hardly be said to convey the endorsement of public opinion.

However, the institutions of the Principate had developed from those of the late Republic, and it was therefore proper for the ' people ' to participate in the creation of an

[1] *CIL* VI, 930 = *ILS* 244. Theories advanced down to 1956 are reviewed by G. Barbieri, *Diz. Ep.* s.v. ' lex ', 750 f., endorsing H. M. Last, *CAH* XI (1936), 404 f., and later discussions by B. Grenzheuser, *Kaiser und Senat in der Zeit von Nero bis Nerva* (Diss. Münster, 1964), 227 f., cf 70 f.; see also F. de Martino, *St.d. Cost. rom.* IV^2 (1974), ch. XX (particularly for Part II). The studies most accessible to the English student, those of Last and M. Hammond, *The Antonine Monarchy* (1959) (see index under *lex*), are in my view in part erroneous, though they avoid the absurdities of M. A. Levi, *Riv. Fil.* LXVI (1938), 1 f. and *Athen.* XVI (1938), 85 f., and his followers. There is much good sense in B. Parsi, *Désignation et investiture de l'Empereur rom.* (1963)—the relevant criticisms of J. Bleicken, *ZSS* LXXXI (1964), 395 f. seem to be mistaken—and in Grenzheuser. *Obiter dicta* are countless. L. Homo briefly suggested in *Les instit. polit. rom.* (1970), 260 f., that a *lex* in A.D. 37 was the prototype, as I argue here. The conclusions and most of the arguments propounded below have been anticipated by individual scholars, but no full discussion known to me seems entirely satisfying. I have not burdened the notes by arraying eminent names who have taken this side or that, and have probably failed to express all my obligations to earlier work, of some of which I am doubtless unconscious; in general testimony and argument are to speak for themselves. Oswyn Murray helped me by criticizing an earlier draft. Mommsen, *StR*, is cited from the latest edition, reprinted in 1952.

[2] Rienzo's paraphrase of the *tabula*, which shows, e.g. in his confusion of ' pomerium ' and ' pomarium ', that he did not understand it, has suggested to some scholars (most recently M. Sordi, *St. Volterra* II, 303 f.) that he had before him another tablet, comprising the earlier part of the law and listing other imperial prerogatives, conveniently listed by Karlowa, *Röm. Rechtsgesch.* I (1885), 496 f.; but see de Martino, op. cit. (n. 1), 562 f.

[3] *EJ* 94 a (vv. 14; 17; 46; 49); 94 b.

[4] H. Siber, *Das Führeramt des Augustus* (1940), 13 f.; 61; 67, collected evidence for historians such as Dio ignoring the formal part played by *comitia* and sometimes by senate in ratifying decisions Augustus took in acquiring or conferring imperial powers, legislating and ' appointing ' magistrates.

emperor. According to Cicero ' omnis potestates, imperia, curationes ab universo populo Romano proficisci convenit ' (*de leg. agr.* II, 17). In the Republic it was the people that had elected the magistrates invested with *imperium* and that had conferred *imperium extra ordinem* on persons who held no office, like Pompey in 67 and 66. The Gabinian and Manilian laws of those years had also allotted to him a large province with additional, specific prerogatives. Similarly, the people could assign such a province to a magistrate for a term of years. Caesar was consul in 59 when under the Vatinian law he received Cisalpine Gaul and Illyricum for five years: he would automatically govern these provinces, retaining *imperium*, as proconsul, once his year of office had expired, for the duration of the term, or indeed till the arrival of a successor (cf. Cic., *Fam.* I, 9, 25). In these particular instances the prior approval of the senate had not been obtained, as constitutional convention demanded. Augustus and his successors could count on the compliance of the senate and afford to be more correct.

The tribunician power was granted to Augustus for life ' per legem ' (*RG* 10); we can assume senatorial consent. He says that on five occasions he sought and secured from the senate a colleague in this power.[5] As for his *imperium*, in the revolutionary conditions of 43 B.C. he first obtained it *pro praetore* from the senate alone, and then from the people under the Lex Titia constituting the triumvirate.[6] From 31 to 23 he was continuously consul. No grant of consular or proconsular *imperium* to him in January 27 was then necessary or conceivable. What he must have received was the administration of certain provinces and the command of the armies stationed in them for ten years, and it was this grant that was later renewed for further periods of five or ten years; like Caesar in 59, he initially had the *imperium* required in virtue of his consular office, but his provincial command indirectly and automatically ensured the continuance of this *imperium*, whenever he ceased to be consul. Dio records that the grant in 27 was made by senate and people, i.e. by a *lex* ratifying a *senatusconsultum*, and he observes that Augustus conducted public affairs with the more zeal, since he had now received the government from all the Romans (LIII, 12, 1; 21, 1). (Dio had good reason for regarding the *lex de provinciis* of 27 as the legal basis for the new monarchy, since it placed Augustus in command of the greater part of the army.) In 23, when he ceased to hold the consulship each year, Augustus' ' proconsular ' *imperium*, to use the term that came into use in the Principate (n. 7), was made ' maius ' as against that of proconsuls; and he was relieved of the necessity to have it renewed when he crossed the *pomerium*.[8] This may have meant from the first that he was entitled to use it within Rome itself, a right that is certainly implied by the authority granted him in 19 to have the rods carried before him everywhere; and it is evident that for certain purposes he exercised his *imperium* in the city, as did his successors.[9] It may be that the senate alone voted him such

[5] *RG* 6, 2; similarly the *laudatio Agrippae* (EJ 366 = *Zeitsch. Pap. Epigr.* V (1970), 217 f. and VI (1970), 227 f.) distinguishes the *SC* under which Agrippa received *tr. pot.* from the *lex* which defined his *imperium*. Suet., *Aug.* 37 says that Augustus co-opted his colleagues in *tr. pot.* So Mommsen *StR* I, 220; II, 1161 = *DPR* I, 251; V, 476 must be right in holding that the emperor could co-opt a colleague in *tr. pot.*, though Augustus sought the consent of the senate (cf. n. 12).

[6] *RG* 1. Augustus' possession of *imperium* from 43 B.C. is not veiled from the reader but almost everywhere patently implicit.

Brunt, *JRS* LI (1961), 237; *Zeitschr. Pap. Epigr.* XIII (1974), 165 f. Cicero refers to the consular *imperium* of proconsuls (*Flacc.* 85; *Pis.* 38; 55); the adjective ' proconsulare ' is first attested in Livy. It would have been absurd for a consul to be granted the *imperium* he already possessed.

[8] Dio LIII, 32, 5, often misconstrued as a grant of lifelong *imperium*.

[9] Dio LIV, 10, 5, which may mean only that he was now authorized to bear in Rome and Italy the insignia of the *imperium* he could already exercise there; in any event after 19 it is inconceivable that he had the insignia without the power. For his command and levying of soldiers see *Zeitschr.* cited in n. 7. EJ 282 f. illustrate his right to give commands in Italy. For his exercise of civil and criminal jurisdiction in the first instance and not only on appeal see W. Kunkel, *ZSS* LXXXI (1964), 360 f., reviewing J. Bleicken, *Senatsgericht u. Kaisergericht* (1962); Kunkel may well be correct in tracing this jurisdiction back to his right, granted in 30 and distinct from tribunician power, ἔκκλητος δικάζειν (Dio LI, 19), cf. Dio LII, 33, 1 (τὰ ἐφέσιμα), i.e. to assume jurisdiction on the request of either party; however, could the right have been fully effective, if its holder ceased to have the executive power of consular *imperium* which in 30 Augustus had as consul? Suet., *Tib.* 17, suggests that Tiberius' *imperium* was already valid in Rome on Augustus' death, cf. *Ann.* I, 7, 5. However, possession of consular *imperium* did not mean that the holder could perform functions proper to a magisterial office, e.g. conduct of elections, cf. B. M. Levick, *Historia* XVI (1967), 207 f. and A. E. Astin, *Latomus* XXVIII (1969), 863 f. on the so-called ' nominatio ' of emperors; thus Claudius had to assume a specific consular function, in order to preside over games (Dio LX, 23, 4. cf. *StR* II, 136 f. = *DPR* III, 157). So perhaps in A.D. 14 Tiberius could only convene the senate ' tribuniciae potestatis praescriptione ' (*Ann.* I, 7; Suet., *Tib.* 23).

extensions of the normal power of a proconsul, though the silence of our sources is no proof that the people did not formally endorse them, and it was certainly the senate which granted him some supplementary rights, for instance that of nominating *curatores aquarum*.[10] However, he owed his tribunician power, his *imperium* and the grant of his provincial and military commands to the suffrages of the people as well as of the senate.

When Augustus designated coadjutors and future successors, they too received *imperium*, though not tribunician power, from the people. The *laudatio Agrippae* refers expressly to a law which vested Agrippa with *imperium* in any province he visited (cf. n. 5). Tiberius must have received similar grants both before his exile and in A.D. 4, and we are expressly told of a consular law of A.D. 12, which evidently enhanced his *imperium*, making it equal with that of Augustus in all the provinces and armies.[11] On Augustus' death he already possessed in law as well as in reality the means to control the state. There was no immediate need to pass a *lex de imperio* on his behalf. Still, his position was not in all respects equal to that of Augustus. He had perhaps obtained tribunician power only for a term, whereas Augustus had been granted it for life.[12] It had perhaps never been granted him by the people (but cf. n. 12). He must surely have lacked various supplementary privileges Augustus had enjoyed, such as the so-called *ius primae relationis* (n. 42). He was not Pontifex Maximus (n. 25), and as yet lacked the appellations of Augustus and *pater patriae*, as well as the *praenomen imperatoris*.[13] Moreover, he enjoyed the powers he already had by Augustus' favour rather than in his own right. Tacitus plausibly says that he wished to seem to have been called and chosen by the commonwealth to the succession (*Ann.* I, 7). The ' relatio consulum ' (ibid. 13, 4), which must ultimately have been approved by the senate after the prolonged debate in September 14, was surely intended to give him the same position as Augustus. By extending his tribunician power for life (if this had not been done previously), by conferring on him various supplementary rights that Augustus alone had possessed,[14] by calling him Augustus (n. 13), and by electing him Pontifex Maximus, senate and people would recognize him as the new Princeps.[15]

It may be said that there is no hint of any *lex* confirming whatever decrees the senate passed. Perhaps this is not quite true: Tacitus, in describing what he regards as Tiberius' hypocritical hesitation in assuming his role as Princeps, speaks of him as ' trifling with senate *and plebs*' (*Ann.* I, 46). There is perhaps another argument. Augustus had never accepted his provinces for more than limited periods of five or ten years. Tiberius' ' aequum ius in omnibus provinciis exercitibusque ' (n. 11) cannot have been intended to outlast Augustus' own ' ius '. This was renewed for the last time in A.D. 14. But in 24 and again in 34 Tiberius asked for no renewal, though the lapse of the decennium was on each occasion thought appropriate for celebrations (Dio LVII, 24, 1; LVIII, 24, 1, cf. LIII, 16, 3). Yet he was much too addicted to constitutional correctness to have dispensed with due authorization. If he did not seek an extension, the explanation must be that it was not required. Hence, he must have taken his provinces in 14 without limit in time. According to Suetonius (*Tib.* 24), when he at last ' accepted *imperium* '—the word here must signify the government of the empire[16]—he did so with the reservation, apparently recorded *verbatim*: ' dum

[10] EJ 278 B = Front., *Aqu.* 104, cf. Dio LIV, 8, 4 (*cura viarum*). In 211 the senate had authorized a proconsul to command in the city, having ' par cum consulibus imperium ' (Livy XXVI, 9, 10). Cf. the authority granted to Pompey as proconsul in early 52; he actually received criminal charges (Ascon. 34 C). Tiberius at least was associated with Aug. in taking the census of A.D. 14 by a *lex*. (Suet., *Tib.* 21). Some sort of authorization to perform censorial duties may lie behind Suet., *Aug.* 27 and Dio LIV, 10, which cannot be accepted as they stand (cf. *RG* 6). EJ 311, III shows that Augustus was empowered by *lex* or *S.C.* to grant citizenship and immunity.

[11] Vell. II, 121, 1; Suet., *Tib.* 21, 1, cf. *Zeitschr.* cited in n. 7.

[12] Mommsen on *RG* 6 noted that the last renewal in A.D. 13 was perhaps for life. As it was still valid after Augustus' death (n. 9), it had perhaps then been confirmed by the *comitia*, and the text of *RG* 6 not revised to take account of this (n. 5).

[13] He never took the last two, but coins and inscriptions (*ILS* III p. 262) show that Suet., *Tib.* 26, 2 was wrong in stating that he used the title of Augustus only to foreign princes.

[14] Dio LIX, 3, 1 quoted in n. 18, which is only true about Gaius if we assume that Dio's ὀνόματα includes prerogatives as well as mere titles, as προσηγορίαι probably does in LIII, 18, 4.

[15] *Contra* B. M. Levick, *Tiberius the Politician* (1976), ch. V, it seems to me incredible that a formal ' relatio ' should have vaguely recognized Tiberius' succession to a ' statio paterna ', a Stoic metaphor (Brunt, *PBSR* XLIII (1975), 21).

[16] *Oxf. Lat. Dict.* s.v., 1 c, cf. n. 23 and the similar use of ' imperator ' attested by Vitruv. III *pr.*, 4. *Contra* Grenzheuser, op. cit. (n. 1), 242, this wide meaning could have developed early, few remembering the Republic (*Ann.* I, 3, 7), cf. perhaps Vell. II, 126, 5; 131, 2.

veniam ad id tempus, quo vobis aequum possit videri dare vos aliquam senectuti meae requiem '. In other words he would not commit himself to the burden for any specified period, but hoped, or pretended to hope, that he might retire early. It seems probable that as a consequence no limit was fixed to his tenure, and that therefore no renewal ever became necessary. But this in turn implies that another law was required to confirm and amend the law of 12 under which he can only have received a limited tenure.

Thus it may be that as early as A.D. 14 senate and people, for the first time, conferred the totality of imperial powers and prerogatives (in so far as Tiberius did not refuse them) on a new ruler; those which he already possessed were simultaneously confirmed, and extended in time. I shall suggest later (p. 109) that clause VII of our document goes back to A.D. 14. Whether or not this be so, it is plain that in A.D. 37 Gaius needed a comprehensive grant of legal powers, since he was a *privatus* at the time of Tiberius' death. Indeed, of the succeeding emperors up to the accession of Titus, Nero alone had any sort of legal power appropriate to an emperor, prior to the death of his predecessor.

Tiberius died on 16 March 37. In the following year and in 39 the Arval Brethren commemorated 18 March as the day on which Gaius ' a senatu impera[tor appellatus est] '.[17] In the light of this explicit formulation we must assume that sacrifices by the Brethren ' ob imperium ' in other reigns celebrate an emperor's recognition by the senate. We know also from their *Acta* that Gaius entered Rome on 28 March; it was doubtless on the next day that the senate formally voted him his powers in detail: ' ingressoque urbem, statim consensu senatus et irrumpentis in curiam turbae . . . ius arbitriumque omnium rerum illi permissum est ' (Suet., *Gaius* 14, 1). According to Dio, after an early display of ' Republicanism ', in which he was careful not to assume any of the imperial titles, he soon became most ' monarchical ', taking on one day, presumably at the session of the senate Suetonius describes, all the titles, or rather the prerogatives, that Augustus had gradually accumulated, some of which Tiberius had never accepted.[18] With no precedent to guide them outside the longueurs of Tiberius' recognition, the senate was slower than it was to be on all later occasions to do more than acclaim the new emperor; ten days passed before it formally decreed to Gaius the plenitude of imperial powers, but at least it is certain that Gaius received them all *en bloc*, whether or not any similar grant had been made to Tiberius. This was the normal practice in Dio's time (LIII, 18, 4, cf. n. 14), and seems to be attested on every subsequent occasion. I shall argue in Part II that the so-called discretionary clause (VI) of our document in particular goes back to 37, but not to 14.

Claudius too was a *privatus* on the eve of his accession. Proclaimed by the praetorians on the day of Gaius' assassination, 24 January 41, which he apparently took as his *dies imperii* (Suet., *Cl.* 11), he was acknowledged by the senate on the 25th. Dio briefly says that the senate voted him all the powers proper to his supremacy; he deferred acceptance of the title ' pater patriae ' (LX, 1, 4; 3, 2).

On Claudius' death (13 October, 54), Nero was at once saluted ' imperator ', somewhat after noon, by the praetorians; Tacitus dryly adds: ' sententiam militum secuta patrum consulta ' (*Ann.* XII, 69). From Suetonius (*Nero* 8) we learn that it was already evening when the session of the senate ended at which ' immense honours ' were loaded on him, and that pleading his youth, he refused the title of ' pater patriae ' (which he took later).[19] Obviously he obtained at least the rights that Claudius had acquired in 41 or thereafter. The Arval

[17] See edition by A. Pasoli, *Studi e Ricerche* VII (1950); the relevant extracts are conveniently printed by E. M. Smallwood, *Documents illustrating the Principates of Gaius, Claudius and Nero* (1967), ch. II and *Documents illustrating the Principates of Nerva, Trajan and Hadrian* (1966), ch. II, and by M. McCrum and A. G. Woodhead, *Select Documents of the Principates of the Flavian Emperors* (1961), ch. III.

[18] Dio LIX, 3, 1: δημοκρατικώτατός τε γὰρ εἶναι τὰ πρῶτα δόξας, ὥστε μήτε τῷ δήμῳ ἢ τῇ βουλῇ γράψαι τι μήτε τῶν ὀνομάτων τῶν ἀρχικῶν προσθέσθαι τι, μοναρχικώτατος ἐγένετο, (2) ὥστε πάντα ὅσα ὁ Αὔγουστος ἐν τοσούτῳ τῆς ἀρχῆς χρόνῳ μόλις καὶ καθ' ἓν ἕκαστον ψηφισθέντα οἱ ἐδέξατο, ὧν ἔνια ὁ Τιβέριος οὐδ' ὅλως προσήκατο, ἐν μιᾷ ἡμέρᾳ λαβεῖν. In fact Gaius no more than Tiberius assumed the *praenomen imperatoris*, and as Dio himself notes (ibid. 3, 2), it was a little later that he accepted the title of *pater patriae*, not attested on coins or inscriptions before 39. It seems then that it was not so much titles as prerogatives, possessed by Augustus but in some cases rejected by Tiberius, that Gaius accepted on 28 March. *Contra* Bleicken, op. cit. (n. 1), the significance of Suetonius' ' ius arbitriumque omnium rerum ' is not exhausted by reference to the exclusion of Tiberius Gemellus from any share in power.

[19] This title appears on occasional coin issues from 55/6 (*RIC* I, 146 f.), but is only commonly used after 64/5 (156 f.)

Acts, lost for this year, are fully preserved for 6 November to 15 December 57 and for 12 October 58 to 11 January 60, and they show that the Brethren were sacrificing annually on 13 October (as again in 66) ' ob imperium '. They thus commemorated the grant of *imperium* to Nero by the senate. There is no mention of *comitia imperii*. On the other hand, they also sacrificed annually on 4 December ' ob tribuniciam potestatem '. This was evidently the anniversary of the day of Nero's ' comitia tribuniciae potestatis ', which the *Acta* mention in connection with Otho, Vitellius and Domitian. Now under Republican practice a period including three market days (*trinum nundinum*) had to elapse between the promulgation of a legislative proposal and the voting thereon. This has been variously construed as a *minimum* interval of either 24 or 17 days; [20] whichever is correct, it could have been amply observed on this occasion.

Thus *prima facie* Nero received *imperium* from the senate on 13 October, which was never confirmed by the *comitia*, and tribunician power from the *comitia* on 4 December under a prior proposal whose adoption by the senate is not recorded. Can this be correct? It would certainly have infringed the Republican principles observed by Augustus and Tiberius.[21] Some scholars have therefore suggested that the *comitia* actually met on 13 October to ratify the senate's grant of *imperium*.[22] But to say nothing of violation of the *trinum nundinum*, it would have been simply impossible to convene the *comitia* that day: the senate itself did not break up till evening. Now it should be noted that Nero already possessed *imperium* under a grant of 51, which had invested him with proconsular *imperium* outside the city (*Ann.* XII, 41). Hence Nero did not require a grant of *imperium* in its technical sense, though he did need its extension, if he was to enjoy the power of his predecessors, whose *imperium* had been valid within the city and had been *maius* throughout the empire: he also needed the totality of imperial rights. It must then surely be in this sense (n. 16) that ' imperium ' is already employed by the Arval Brethren, the same sense as in later official references to ' dies imperii '.[23] This should include the tribunician power. And just as the senate voted all the titles and prerogatives of an emperor to Nero at once, so we may suppose that the people ratified their decrees at what were still traditionally called ' comitia tribuniciae potestatis ' (cf. p. 100).

According to Plutarch (*Galba* 7) Icelus brought news to Galba of his proclamation by the praetorians, senate and people. Since he reached Clunia from Rome in only seven days after Nero's deposition, this allusion to the people must refer to a mere popular demonstration, not to comitial proceedings. Dio-Xiphilinus (LXIII, 29, 1) describes scenes of wild enthusiasm. He also speaks of the people voting Galba imperial prerogatives. But Dio does not usually mention comitial formalities, and Zonaras (XI, 13) has probably given a more accurate account of what he wrote in stating that the senate decreed to Galba the powers appropriate to an emperor.

On the very day of Galba's murder (15 January 69) the senate met; ' decernitur Othoni tribunicia potestas et nomen Augusti et omnes principum honores ' (*Hist.* I, 47).[24] That day or the next the Arvals sacrificed, presumably ' ob imperium ' (there is a lacuna in the text). They celebrated Otho's consular *comitia* on 26 January, *comitia tribuniciae potestatis* on 28 February, election to all the priestly colleges on 5 March and to the chief pontificate on 9 March. (The *trinum nundinum* could thus have been observed on all occasions but the

[20] A. W. Lintott, *CQ* XV (1965), 281 f.

[21] It is needless to discuss Mommsen's aberration in supposing that either senate or army could legitimate the *imperium* of the Princeps. Ed. Meyer, *Hist. Zeitschr.* XCI, 417, thought that no emperor required comitial confirmation for his powers after Tiberius had transferred elections from people to senate. But even after 14 candidates ' destined ' by the senate still had to be formally returned by the *comitia* (n. 48); nor is a *lex* conferring powers on a named individual the same as an election to a magistracy. Parsi, op. cit. (n. 1), 125 rightly views the *lex curiata* of the Republic, confirming the *imperium* of an already elected magistrate, as irrelevant.

[22] e.g. Hammond, op. cit. (n. 1), 7.

[23] Thus Trajan's *dies imperii* was 28 January 98, that of Pius 10 July 137, that of Marcus 7 March 161: see *Feriale Duranum*, *Yale Cl. St.* VII (1940); in each case the date is that of ' succession ', and each had possessed *imperium* under his predecessor (Parsi, 127 f.). Cf. n. 16.

[24] Dio-Xiph. LXIV, 8, 1 says that the senate voted Otho all that pertained to *arche* (*imperium*), Plut., *Galba* 28 that they took an oath to Otho and gave him the names of Caesar and Augustus; in the Arval *Acta* he is ' imperator Otho Caesar Augustus '. (Galba too had been ' imperator ', Caesar and Augustus, as coins show; Caesar had become an imperial name with Claudius, who had no family claim to it.)

first.) Consulship and priesthoods were no essential parts of the Princeps' position, and the fact that the *comitia* met separately to confer them does not show that 'imperium' in its wide sense was not granted along with tribunician power.[25]

The news of Otho's suicide on 17 April (Jos., *BJ* IV, 548) reached Rome on 19 April, when the senate voted Vitellius *imperium*. That date is attested by the Arval Acts, though the Brethren deferred the appropriate sacrifice till 1 May; at this time only one of their number (L. Maecius Postumus) was at Rome;[26] probably a young and inexperienced man (he was not suffect consul until 98), he may well have lacked the prompt decisiveness to sacrifice as required. Tacitus says that 'in senatu cuncta longis aliorum principatibus composita statim decernuntur' (*Hist.* II, 55).[27] Again we know from the Arval Acts of *comitia tribuniciae potestatis*, held without regard to the *trinum nundinum* as early as 30 April; only part of the record of their sacrifices for May and June is extant, and nothing for the rest of the year, and this is probably why we are not informed of other *comitia* for Vitellius like those for Otho.

Nor do they provide any particulars of the accession of Vespasian. Unfortunately for us, from his reign the Brethren seem to have given up the practice adopted in Nero's time of celebrating anniversaries of the grant of *imperium* or tribunician power. In 81 they sacrificed on Domitian's accession 'ob imperium' on 14 September (the day after Titus' death) and 'ob comitia tribunicia' on 30 September (on one view of the *trinum nundinum* the proper interval could just have been kept), but the complete record of their proceedings for September 87 and 91 shows that anniversaries were not commemorated. Similarly Trajan's *dies imperii*, 28 January 98 (the record in that year is lost), was not celebrated in January of the years for which it survives (101, 105 and 117). Vespasian was recognized at Rome in late December 69, and we might expect his 'comitia tribuniciae potestatis' to have followed in January or (at latest) February 70; in the light of the subsequent practice of the Arvals, the fact that no anniversary of the latter event was celebrated early in 78, the only year of his reign when we have their *Acta* for the relevant months, has no significance.

Vitellius was killed probably on 20 or 21 December.[28] The magistrates and senators had scattered in terror, and the senate could not be convened that very day (Tacitus, *Hist.* III, 86), nor perhaps, in view of the licence allowed to the Flavian troops (IV, 1), for some days thereafter; but it was certainly before 1 January 70 (IV, 39) that it met and 'cuncta principibus solita Vespasiano decernit' (IV, 3, 3). On the same day it voted that Vespasian and Titus should be consuls for 70 and that Domitian should be praetor with consular *imperium* (3, 4), and it decided to send ambassadors to congratulate the new emperor; in this connection Tacitus refers to its decrees 'de imperio', where 'imperium' may properly be taken in its widest sense (nn. 16 and 23), denoting the totality of imperial powers (6, 3).[29]

As we have seen, Tacitus had recorded on Otho's accession the vote of the tribunician power, the *nomen Augusti* and all the honours of emperors, and on that of Vitellius the grant

[25] *Contra* Grenzheuser, op. cit.(n. 1), 240. Strictly, Otho acquired *imperium* as consul, but since 23 B.C. the consulate had come to be seen as purely ornamental for the emperor. Otho had to be chosen *pontifex* before he could become *pontifex maximus*; the electing body (17 of the 35 tribes) and the presiding officer (a *pontifex*) were not the same as at the other elections. Augustus' *comitia pontificatus maximi* (*RG* 10) were as late as 12 B.C., Tiberius' on 15 March 15 (EJ, p. 47) →

[26] This tends to confirm Tac., *Hist.* I, 88. Maecius: *RE* XIV, 237.

[27] No doubt the senate voted him the names Caesar and Augustus which both Galba and Otho had had, but he declined the first till almost the end of his reign, and postponed acceptance of the second (*Hist.* I, 62; II, 62; 90; III, 58); hence neither appears in the Arval *Acta*; 'Augustus' figures on some of his coin issues. Neither he nor Otho (unlike Galba) is known to have been 'pater patriae', a title normally offered but deferred. Unlike both Galba and Otho, Vitellius did not assume the *praenomen imperatoris* (*ILS* 243 need not reflect his wishes), which Nero had been the first emperor since Augustus to bear, and only from 66; again we must surely suppose that the senate had voted it to him. His novel title of 'consul perpetuus' (*ILS* 242 f.) illustrated, according to Suet., *Vit.* 11, his disregard for *ius*.

[28] M. Hammond, *Mem. Amer. Acad. Rome* XV (1938), 33.

[29] Dio-Xiph. LXVI, 1, 1 says that Vespasian was recognized as *imperator* by the senate, that Titus and Domitian were called Caesar and that Vespasian and Titus were designated consuls. The soldiers had already given Domitian the name of Caesar (*Hist.* III, 86); Dio here preserves a decision of the senate which Tacitus omits. Equally Tacitus does not expressly say that Vespasian received the *nomina* of clauses VII and VIII—'imperator Caesar Vespasianus Augustus', which he had in fact already usurped (p. 106).

of ' cuncta longis aliorum principatibus composita '. He surely means to record the vote of more or less identical titles and powers on each occasion, and his new formula—' cuncta solita '—is chosen merely for literary variety. It indicates, however, that in Tacitus' view, each of the prerogatives conferred on Vespasian conformed to precedent. Like Vitellius, he received the powers that had been accumulated in successive reigns, just as Gaius too had received on one day all those which Augustus had gradually secured; the formula that Tacitus employs for the grant to Vitellius implies that he was also invested with rights which emperors later than Augustus had been the first to obtain. We may compare Dio's statement that in his own day the appellations of Caesar, Augustus and *pater patriae*, which had been voted separately to earlier emperors, had come to be voted *en bloc*, and his description of the grant made to Gaius in 37.

Given the circumstances of December 69 we can believe Tacitus' statement that the powers accorded to Vespasian were all ' solita ', though perhaps we should not deny the possibility that minor adjustments were made of a kind that he could regard as of no political significance (p. 106). The alternatives are to suppose that the senate sought either to restrict or to enlarge Vespasian's powers. The first of these objectives would no doubt have been congenial to Helvidius Priscus, who took an important part in other debates of late December 69.[30] But the senate did not dare to assume the independent role that Helvidius advocated. Moreover not even Helvidius is recorded as having urged any limitation of the imperial authority. Ever since January 69 the senate had been at the mercy of military force,[31] and the conduct of the Flavian soldiery after they entered the city could not have encouraged it to try to restrict Vespasian's legal rights; nor is it conceivable that Tacitus would have failed to notice such an attempt.

Perhaps it is somewhat more plausible to imagine that the senate was disposed to heap new powers and honours on Vespasian. His pronunciamento was surely less objectionable than that of Vitellius: he had risen against an usurper, Vitellius against a legitimate emperor. According to Tacitus the senate and politically conscious equites had detested and despised both Otho and Vitellius; though Otho inspired greater fear, Vitellius too appeared unworthy of the Principate; it had only seemed certain ' deteriorem fore qui vicisset '.[32] It is true that Vitellius' brief rule had not been oppressive, and that he had manifested something of the *civilitas* that the higher orders valued in an emperor.[33] But there had been a more or less prolonged honeymoon period in the reigns of Tiberius, Gaius, Claudius and Nero, all of whom had, from the senatorial standpoint, degenerated into tyrants.[34] The power of Vitellius' freedman, Asiaticus, and his admiration for Nero augured ill; so did his personal extravagance; to fill empty coffers, rapacity could be predicted.[35] He had proved unable to control his troops in Italy and Rome.[36] The readiness of his former partisans, Caecina and Lucilius Bassus, to betray his cause suggests that they sensed that he had too little support to survive. Vespasian's own reputation was indeed dubious, and in retrospect Tacitus could say that he was the first emperor to change for the better after accession. Yet it cannot have been in doubt that he had already shown more of the qualities required in a

[30] On Helvidius see Brunt, *PBSR* XLIII (1975), esp. 28 f. The debate recorded in *Hist.* IV, 7 f. but perhaps not those of 9 f., took place at the same session as the decree *de imperio* (6, 3). It is perfectly clear from 4, 3 that Helvidius formally and no doubt, given his character, sincerely approved of Vespasian's recognition.

[31] Tacitus delineates the impotence and servility of the senate with some acerbity, *Hist.* I, 19; 35; 45; 47; II, 71; 87; 101; III, 37; 55.

[32] *Hist.* I, 50; II, 31. On Otho see also I, 71; 81. It was, none the less, of great value to Otho that in the provinces he was believed to have the authority of the senate on his side (I, 76; 84); as late as 238 the senate commanded great influence.

[33] *Hist.* II, 91; 92, 2 f.; Dio LXV, 7. Cf. also n. 27. His coins celebrate LIBERTAS and CLEMENTIA (*RIC* I, p. 224 f.); for clemency cf. *Hist.* I, 75; II, 60; 62; III, 59; 75; Dio LXV, 6; Otho too had shown it (I, 45; 71; 88) and for the same reasons: not only did it make a good impression, but each could reckon that his rival had few, if any, devoted partisans whom it might be prudent to eliminate (cf. *Hist.* I, 77; II, 60). Suet., *Vit.* 13 f. presents a very hostile picture, perhaps from biassed Flavian sources, cf. also *Hist.* II, 63 f.; III, 38 f.

[34] Hence Otho's moderation also inspired no credence, *Hist.* I, 71.

[35] *Hist.* II, 62; 94 f. Asiaticus: II, 57; 95. Cf. Suet., *Vit.* 10 f.; Dio LXV, 2–5; *Hist.* II, 71; 95; Suet., *Vit.* 11, cf. 4; Dio LXV, 7 (cf. *Hist.* I, 78 for Otho). Tacitus allows him some merit only for ' simplicitas ' and ' liberalitas ', III, 86.

[36] *Hist.* II, 56; 62; 68; 93 f. (Their demoralization is evidently exaggerated by Tacitus, following pro-Flavian writers, cf. Jos., *BJ* IV, 585 f.; so much is proved by the courage they displayed, though leaderless, in the second civil war.)

ruler than his rival.[37] The early defection to his cause of cities in North Italy is perhaps a clue to the sentiments of the better classes, who of course controlled municipal affairs.[38] It is somewhat less significant that after the battle of Cremona all and sundry openly or secretly espoused the side of the victor.[39] But this behaviour need not be ascribed to self-interest viewed in the narrowest sense. Only the elimination of Vitellius could now restore peace and order. In December 69 the senate was ' laetus et spei certus ', because the triumph of Vespasian was likely to end civil war (IV, 3, 3).

Tacitus adds that its zeal in his favour was augmented by a letter he wrote ' tamquam manente bello scriptae ', in which, none the less, he spoke ' ut princeps '. This letter must of course have been written by Vespasian when he was quite uncertain of the issue of the war, and was presumably forwarded by Mucianus with his own despatch to the senate (ibid. 4, 1). Both documents must have been read to the senate, if not before it voted ' cuncta solita ', at any rate before a drafting committee could throw its decrees into the precise legal formulae preserved in our inscription.[40] Is it then possible that Vespasian, or Mucianus on his behalf, asked for powers exceeding those which any previous ruler had possessed, or that even in the absence of such a request the senate voted such powers of its own volition? The answer is surely ' No '. Vespasian's own letter contained, according to Tacitus, ' civilia de se et rei publicae egregia '; given Tacitus' own bias, this seems to exclude the possibility that it sought an enlargement of his authority. By contrast, Mucianus' despatch gave offence, but apparently because it exalted his own services to Vespasian; there is not a hint that he demanded novel powers for the new ruler. Tacitus castigates the ' adulatio ' that the senate displayed to Mucianus and other Flavian officers, and praises Helvidius for confining himself to sincere praise of Vespasian (IV, 4), but there are none of the ironical comments we should expect from him if the senate, whose powerlessness and servility in 69 he is fond of revealing, had responded to Vespasian's studied moderation by loading him with unprecedented honours and prerogatives.

We may then conclude that in December 69 the senate did no more or less than vote Vespasian at one stroke all the usual powers of a Princeps, just as it voted such powers to Gaius, Nero, Otho and Vitellius, and, as we may infer from Tacitus' statement about the recognition of Vitellius, that these powers included not only those which had been bestowed at one time or another on Augustus but others which had first been granted to one of his successors. The question then arises whether we can identify the senatorial decree embodied in our *tabula* with the decree of December 69, or whether it represents some later grant enlarging Vespasian's rights. At this point it will be convenient for reference to transcribe the surviving clauses. It is not my purpose to comment exhaustively on details, but some remarks on the particular prerogatives will be found in the notes, where they are not discussed in the text.

[37] *Hist.* I, 50. Though contemptuous of time-servers and traitors whom pro-Flavian writers had praised (II, 101; III, 86, 2), critical of Vespasian's chief agents (esp. II, 84, 2; 95, 3) and not naturally biassed to the Flavian house after his experience of Domitian, Tacitus admitted that Vespasian's victory benefited the state and that some of his partisans had had the public welfare at heart, see II, 5, 1; 7, 2; cf. *Ann.* III, 55. His alleged bad conduct as proconsul of Africa (II, 97, 2, *contra* Suet., *Vesp.* 4) hardly counted at Rome; it was perhaps remembered against him that he had been a protégé of Narcissus, but he had been inconspicuous between Agrippina's gaining power (ibid.) and his appointment in Judaea, and such reports as reached Rome thence may have at least confirmed his merits as general. Otho and Vitellius had both been favourites of Nero, and both had been disloyal to Galba.

[38] *Hist.* III, 6 and 8.

[39] III, 57 and 59; there was indeed no unanimity among Italian towns. For the ' primores civitatis ' see III, 64. The consular legates in the Balkans at least evinced little zeal in the Flavian cause (II, 96; III, 4; 10 f.; 50), and provincial governors in the west did not declare for it until they had heard of the victory at Cremona (II, 97; III, 35; 44; IV, 31); still, the honours that Vespasian was to bestow on Tampius Flavianus in Pannonia, Aponius Saturninus in Moesia, Pompeius Silvanus in Dalmatia, C. Calpetanus Rantius Quirinalis Valerius Festus in Africa and Vettius Bolanus in Britain shows that he did not regard any of them as his opponents; for their careers after 69 see W. Eck, *Senatoren von Vespasian bis Hadrian* (1970); A. B. Bosworth, *Athen.* LI (1973), 49 f. Hordeonius Flaccus and his legionary legates on the Rhine were suspected from the first of Flavian sympathies (*Hist.* IV, 13; 19 etc.). The behaviour of senators in posts outside Italy is some guide to the sentiments of the order, hesitantly and unenthusiastically preferring Vespasian.

[40] On the drafting of *senatus consulta* after the senate had been dissolved see Mommsen, *StR* III, 1004 f. = *DPR* VII, 202 f. The interval is not recorded; the statement by O'Brien Moore (*RE* Suppl. VI, 801) that it was usual in the Republic to draft an *SC* during or immediately after the session is probable, but not warranted by the texts cited (Plut., *Mar.* 4; Cic., *Cat.* III, 13).

I [bellum pacem?] foedusve cum quibus volet facere liceat, ita uti licuit divo Aug., Ti. Iulio Caesari Aug., Tiberioque Claudio Caesari Aug. Germanico; [41]
II utique ei senatum habere, relationem facere, remittere, senatus consulta per relationem discessionemque facere liceat, ita uti licuit divo Aug. (et cet.); [42]
III utique, cum ex voluntate auctoritate iussu mandatuve eius praesenteve eo senatus habebitur, omnium rerum ius perinde habeatur servetur, ac si e lege senatus edictus esset habereturque; [43]
IV utique quos magistratum potestatem imperium curationemve cuius rei petentes senatui populoque Romano commendaverit, quibusve suffragationem suam dederit promiserit, eorum comitis quibusque extra ordinem ratio habeatur; [44]
V utique ei fines pomerii proferre promovere, cum ex republica censebit esse, liceat, ita uti licuit Ti. Claudio Caesari Aug. Germanico (cf. n. 47).
VI utique quaecunque ex usu reipublicae maiestate divinarum hum⟨an⟩arum, publicarum privatarumque rerum esse censebit, ei agere facere ius potestasque sit, ita uti divo Aug. (et cet.) fuit:
VII utique quibus legibus plebeive scitis scriptum fuit, ne divus Aug. (et cet.) tenerentur, iis legibus plebisque scitis imp. Caesar Vespasianus solutus sit, quaeque ex quaque lege rogatione divum Aug. (et cet.) facere oportuit, ea omnia imp. Caesari Vespasiano Aug. facere liceat;
VIII utique quae ante hanc legem rogatam acta gesta decreta imperata ab imperatore Caesare Vespasiano Aug. iussu mandatuve eius a quoque sunt, ea perinde iusta rataq(ue) sint ac si populi plebisve iussu acta essent.

No precedents are cited in three of the clauses. In VIII it would indeed have been hard to draft a form of words to state that Vespasian's acts prior to the date of the *lex* were to be as valid as the acts of Augustus etc. prior to such *leges* as had formally conferred like powers upon them; and, indeed, seeing that Augustus had possessed a series of legal powers from 43 B.C. onwards, it is doubtful whether there was ever any moment when such a provision would have been requisite in his case. But clauses III and IV are another matter. As no precedent is cited, does it not follow that the rights they convey were novel for Vespasian?

This inference is not warranted. The document makes no mention of Gaius, although there can be no doubt that he had enjoyed the plenitude of Augustus' powers. It must follow from this that his memory, though never formally condemned, had been allowed to lapse into oblivion.[45] But Nero, and his short-lived successors, had been formally condemned, and it was therefore altogether inappropriate to mention any of them, at least until his memory had been restored.[46] Hence, no precedent could be cited in clauses III and IV

[41] Strictly the people alone could make treaties in the Republic, but from the second century B.C. the senate arrogated the power; magistrates and promagistrates continued to require confirmation for such pacts as they made in the field (see Mommsen, *StR* III, 1158 f. = *DPR* VII, 378 f.). The *lex Iulia de repetundis* of 59 B.C. (Cic., *Pis.* 50) and the *lex Iulia maiestatis*, enacted by Caesar (J. E. Allison and J. D. Cloud, *Latomus* XXI (1962), 711 f.), repeating a provision of the Sullan law (Cic., loc. cit.), forbade them to make wars without sanction by senate and people ('iniussu principis' in *Dig.* XLVIII, 4, 3 represents a later development); hence the charge against Primus (Dio LIV, 3, 2). But Strabo XVII, 3, 25 says that Augustus πολέμου καὶ εἰρήνης κατέστη κύριος διὰ βίου, and Dio LIII, 17, 5 ascribes these rights to all emperors. Our document offers confirmation; 'foedus*ve*' implies a supplement of the kind printed above. It is true that its historic statements could be ill-informed, but this is at least unlikely for a reign so recent as Claudius '. Hence, Dio's statement (LX, 23, 6) that in 44 the senate confirmed the pacts made with British peoples by Claudius and his *legati* (the latter would perhaps not be covered in any grant to the emperor himself) should not be taken to mean that they required such confirmation. Just as Claudius chose to obtain the senate's agreement to his adlection of Gauls into the senate, though he was entitled to admit them on his own authority, so he may have welcomed endorsement of arrangements in Britain which did not legally require their consent. There is other evidence for emperors consulting the senate on wars and treaties: they wanted public approval. See Mommsen, *StR* II, 954 f. = *DPR* V, 241 f.

[42] Cf. Dio LIII, 32, 5; LIV, 3, 3 for extensions of Augustus' tribunician right to do business with the senate; see *StR* II, 896 f. = *DPR* V, 175 f. The precise technical meaning of the terms 'per relationem discessionemque facere' is controversial, but not relevant to this article, see *StR* III, 983. = *DPR* VII, 172 f.; Karlowa, *Röm. Rechtsgesch.* I, 498; B. L. Cantarelli, *Bull. Comm. Arch.* III (1890), 196 f.

[43] *StR* III 919 f. = *DPR* VII 98 f. assembles the evidence for restrictions on the senate meeting.

[44] See Levick and Astin, cited in n. 9.; Grenzheuser (n. 1), 73 f.

[45] Claudius vetoed *abolitio memoriae*, but Gaius' name, like that of Tiberius, was omitted from the list of emperors named in 'oaths and prayers' (Dio LX, 4, 5 f, cf. LIX, 9, 1); his *acta* were gradually rescinded (ibid. 4, 1 correcting Suet., *Cl.* 14). His name, however, remained in the official list of emperors who made grants of Roman citizenship, as did those of later rulers whose memory was condemned, Otho and Vitellius alone excepted; see *JRS* LXIII (1973), 86 for the *Tabula Banasitana*. It may be inferred that such grants remained valid, unlike those recorded by Tacitus, *Hist.* I, 78 → III, 55, 2.

[46] Suet., *Nero* 49, Tac., *Hist.* IV, 40; cf. last note for Otho and Vitellius.

on the assumption that no predecessor of Vespasian earlier than Nero possessed the rights that they conveyed. None could have been invoked for clause V, if Claudius had also been consigned to oblivion. Thus we have at least an alternative explanation for the lack of any precedent in these clauses. But can this alternative explanation be confirmed?

Unfortunately, there is no actual record of any specific grant of the rights concerned to any emperor after 54. For that matter the inscription alone tells us that Claudius acquired a right to extend the *pomerium* which, by implication, Augustus and Tiberius had lacked. From Tacitus and other writers we know only that he did in fact extend it, ' auctis populi Romani finibus ', as one of his inscriptions boasts (*ILS* 213).[47] They were not interested in the grant of formal authority. Our inscription also implies that no emperor earlier than Nero had a legal right to select magistrates by commendation or *suffragatio*.[48] However, it is well-known that all from Augustus onwards had backed candidates for office, who were then in practice bound to be elected (n. 44). Probably it appeared of very little significance when this power, which had once derived from *auctoritas*, was given formal validity by law. It is still less surprising that there is no record of the prerogative conveyed in clause III, which simply enabled the emperor to set aside technical obstacles to the senate meeting and reaching decisions. Thus it is not significant that there is no record that the prerogatives conveyed to Vespasian in clauses III and IV had been granted to Nero or to a successor.

However, we cannot confirm that these particular prerogatives were in fact ' solita '. On the other hand, those granted in the other clauses were certainly, in the views of the draftsmen, based on grants made to earlier emperors. If the senate voted ' cuncta solita ' in December 69, could it have failed to include these powers, and if it included them then, what reason was there to vote them once more at a later stage? Further, the final clause, in validating Vespasian's *acta* prior to the *lex*, implies that all his subsequent *acta* will owe their validity to the *lex*; hence it is the *lex*, and the *senatus consultum* incorporated therein, which has given him the totality of imperial authority; yet that was surely conferred on him in December 69.[49] This argument is not conclusive against the hypothesis that it was later felt that insufficient authority had been voted to him; a clause that validated his earlier *acta* could then have been thought necessary to provide for the contingency that he had outstepped the powers first conferred on him; but why on this view repeat grants already made?

There remains another consideration. Some scholars continue to assert that the date of our document cannot be determined.[50] But others have rightly recognized that it is almost certainly dateable very close to December 69.[51] The omission of Galba's name surely shows that the senate's decree was passed before the restoration of his memory. Now Tacitus records that the senate was convened on 1 January by Frontinus as praetor; after certain business had been transacted—among other things Tettius Iulianus was deprived of his praetorship on the ground that he had deserted a Flavian legion—Frontinus resigned in favour of Domitian. We then hear that on the day when Domitian entered the senate, a motion was passed ' eo referente ' to restore Galba's memory.[52] Apparently at the same session Tettius Iulianus was restored to office, as news had come in that he had actually fled from Moesia to Vespasian. This certainly implies that it was not on 1 January that Domitian assumed the presidency of the senate, but he would hardly have deferred doing so beyond its next appointed meeting, which should have been held on 9, or less probably, 13 January;[53] and there is no reason to think that even in this short interval Tettius'

[47] *Ann.* XII, 23; Gell. XIII, 14. Augustus' silence in *RG* shows that he did not extend the *pomerium*, cf. Sen., *Brev. Vitae* 13, 8, from which it probably follows that Claudius obtained special authorization, because he had not fulfilled the conventional precondition for an extension, ' Italico agro adquisito '. See *StR* II, 1072 f. = *DPR* V, 376 f.

[48] However, the fact that Nero and his successors commended all holders of the consulship, at least for the year 69 (*Hist.* I, 77, 2; II, 71), shows only that they were carrying the practice further than Tiberius had done at first (*Ann.* I, 81), not that they acted in virtue of a legal right which he had lacked. Clause IV implies that the imperial candidates like others still needed the votes of the *comitia*. Such formalities survived in Trajan's time (Pliny, *Paneg.* 63, 1; 92, 3), and Dio's (LVIII, 20, 4).

[49] L. Lesuisse, *Rev. Belge* XL (1962), 51 f.

[50] e.g. Parsi, op. cit. (n. 1), 120.

[51] e.g. J. Gagé, *RÉA* IV (1952), 290 f. I am not persuaded by his suggestion that some of Vespasian's coins attest his respect for Galba's memory. But he ha → nticipated the argument in this paragraph.

[52] Tac., *Hist.* IV, 39; 40, 1.

[53] Mommsen, *StR* III, 924 = *DPR* VII, 104 on Suet., *Aug.* 35 (cf. Dio LV, 3), to be corrected from the Calendar of Philocalus (*CIL* I, p. 374).

friends had not received information of his movements and destination.[54] But since the senate was evidently warmly in favour of the restoration of Galba's memory,[55] and Domitian had himself taken the initiative, his name must have appeared in any list drawn up thereafter of those emperors whose rights were to be the model for Vespasian's.

An objection arises. Suetonius tells us that the senate, as soon as it was allowed, voted that a statue should be set up to Galba in the forum, but that Vespasian annulled the decree, believing that Galba had sent assassins from Spain to take his life.[56] It could then be argued that Vespasian would not have allowed any mention of Galba to be made in our *senatus consultum*, or at any rate in the copy publicly inscribed, perhaps at some later date. On this view our document might indeed have been drafted after the restoration of Galba's memory 9 January, but was only enacted, or published, after submission to Vespasian, who could then of course have deleted Galba's name and required other alterations; alternatively, the enactment we have was much later, following Vespasian's return to Rome, and took into account his views on Galba from the first. However, it must be noted that it refers to Claudius without calling him ' divus '; this was certainly not in accord with Vespasian's settled policy; he actually rebuilt the temple to Claudius which Nero had allowed to fall into ruins.[57] Though we do not know just when Vespasian began to revive the cult of Claudius, it is awkward to assume that the inscribed draft of our *senatus consultum* belongs precisely to a point in time when he had formed an adverse opinion on Galba, which was not known to Domitian and Mucianus in early January 70, and had not yet resolved to venerate Claudius. It may be said that, if due regard was paid to the *trinum nundinum*, a *lex* that embodied the *senatus consultum* of December would have been passed after the restoration of Galba's memory, and that therefore the *senatus consultum* of our inscription cannot be that of December. But it would not have been proper to alter the terms of the *senatus consultum*, nor that of the *lex* once promulgated, in the interval before its enactment. On this ground alone it seems to me nearly certain that our *senatus consultum* antedates 9 January.

Thus it was passed at just about the time of the decree Tacitus records. Tacitus' decree comprised ' cuncta solita ': in our document precedents are cited for some of the powers conferred and they may well have existed for the rest; the fact that not all of them go back to Augustus corresponds exactly with Tacitus' account of the grant of powers to Vitellius and (with one possible exception to be considered below) Vespasian surely received a precisely similar grant. Some have supposed that our document lists prerogatives supplementary to *imperium* and tribunician power, but there is no record anywhere of any such supplementary grant on the accesssion of an emperor, and though clause IV confers a prerogative peculiar to the Princeps, and VII in part concerns dispensations from laws such as could be conferred even on private persons (Part II), clauses II and III can be interpreted as enlarging the emperor's tribunician power, and I, V and VI are connected with his *imperium*. If Vespasian received ' cuncta solita ' in December 69, there was no need to make him a later grant of prerogatives which are explicitly attributed to his predecessors (I, II, V, VI, VII); further analysis of clauses VI and VII in Part II will show that there is no reason to think that, contrary to their express language, they either enlarged or restricted the rights of Vespasian in comparison with those of earlier emperors. ' Entities should not be multiplied without necessity '. Our document is the text of part of the decree Tacitus mentions, which granted simultaneously *imperium*, tribunician power and every other imperial prerogative to Vespasian. This decree would have been ratified at the imperial ' comitia tribuniciae potestatis ', the only comitial meeting ever mentioned at an emperor's accession. As we shall see (Part II), the jurists, whose language must surely be correct, speak of a ' lex de imperio '. Hence the ' comitia tribuniciae potestatis ' also conveyed *imperium* to him. We can explain this divergence in the description of a single comitial act, if we

[54] Tettius' journey to Vespasian was slow (*Hist.* II, 85, 2) and he may well not yet have reached the emperor, but ' cognitus est ad Vespasianum confugisse ' does not imply that he had.

[55] They also voted ' ut Pisonis quoque memoria celebraretur '; Tacitus' remark that this proved ' inritum ' (IV, 40) shows that, whatever Vespasian's later attitude to Galba proved to be (n. 56), he did not annul the restoration of Galba's memory.

[56] Suet., *Galba* 23, cf. n. 55. Naturally Antonius Primus, legate of the legion Galba had raised, had acted on his own initiative in re-erecting Galba's statues in Italian towns (*Hist.* III, 7).

[57] Suet., *Vesp.* 9, 1. Cf. ' divom Claudium ' in *lex Salpensana* XXV.

remember on the one hand that Augustus had treated the tribunician power as the ' summi fastigii vocabulum ' (Tac., *Ann.* III, 56)—the practice of the Arval Brethren may reflect this conception—and on the other hand that *imperium* in its old technical sense, the power to command armies and exercise the highest jurisdiction, was so much the real basis in law of imperial authority that it came to be employed still more extensively, to denote the totality of the emperor's powers, what one might perhaps call his sovereignty (nn. 16, 23).

It is, however, conceivable that clause VIII had never appeared in any previous senatorial decree on an emperor's accession. It validates his *acta* ' ante hanc legem rogatam '. If it was tralatician, it must have been originally intended to validate imperial *acta* in the interval between a new ruler's assumption of power and the comitial *lex*. No such clause was required in A.D. 14, when Tiberius was amply armed with legal powers on the death of Augustus, and would no doubt have been careful not to exceed them. But of his successors down to 69, Nero alone had even an inadequate share in the imperial prerogatives before his accession. A legal purist might therefore have thought it necessary to cover each of them in the exercise of imperial authority in the brief interval between the day when it was assumed and the comitial proceedings. It may be observed that the first of these *termini* was until 69 the same or almost the same as that of recognition by the senate. Gaius apparently did not act as Princeps at all before such recognition; Claudius' position was in dispute for less than two days; Nero and Otho were each acknowledged on the very day of the preceding emperor's death; and Galba had purported to be only legate of senate and people until he was proclaimed at Rome (Suet., *Galba* 10, 2; 11, 1). I cannot help doubting if any necessity was seen for such a clause before the reign of Vitellius.

Vitellius was proclaimed on the Rhine on 3 January 69 and at Rome not till 19 April. In the interim he had been acting as emperor, and his *acta* during this period obviously required confirmation. If it was already normal for the ' lex de imperio ' to contain a clause like VIII, originally to cover the period between recognition at Rome and comitial enactment, it would of course (as drafted) equally have covered the period of Vitellius' usurpation. So too clause VIII covers the *acta* of Vespasian since his proclamation in the east on 1 July 69. If on the other hand legal pedantry had not introduced such a clause into the ' lex de imperio ' before 69, its necessity for Vitellius could have become clear at some date after his recognition at Rome, and it is easy to believe that, given his outward respect for the law (text to nn. 27 and 33), he wished to have his *acta* ratified. This would have been a technicality of no interest to Tacitus, who of course does not mention it. But if this provision had been recently made for Vitellius, it would have been evident from the start that it must also be made for Vespasian, and a precedent first created in the case of Vitellius *after* his recognition on 19 April would have been followed without delay at the very time of Vespasian's recognition in December.

This hypothesis would explain the fact that, whereas Vitellius counted 19 April as his *dies imperii*, Vespasian back-dated his to 1 July. Vitellius' *dies imperii* had already, we may think, been officially fixed (' statutum ') before the ratification of his previous *acta* gave his position a retrospective legitimacy from the moment of his proclamation by the legions. But under clause VIII the legitimacy of Vespasian's proclamation was implicitly recognized in his investiture at Rome.

It has always been a puzzle that Vespasian took 1 July as his *dies imperii*. *Prima facie* it commemorates the fact that he owed his power to the troops. Yet it was his gravest problem, and most remarkable achievement, to restore discipline in the army;[58] for this purpose the less he seemed to be the creature of the soldiers, the better. In general he was careful to show traditional respect to the senate. Of course he had never concealed from the first that he was acting as emperor. He had written to the senate before Vitellius' death ' ut princeps ' (*Hist.* IV, 3). He had assumed the style of ' Imperator Caesar Vespasianus Augustus' which his soldiers had offered him (Tac., *Hist.* II, 80) and which the last two clauses of our *senatus consultum* accord to him. This is now attested in a milestone from Judaea dated to 69. But the same inscription makes no mention of tribunician power.[59] That

[58] Suet., *Vesp.* 8, 1 f., cf. Tac., *Hist.* II, 82, 2.

[59] *JRS* LXVI (1976), 15 f.; the editors note that Vespasian's coins of 69 also omit the tribunician title. His first year of *tr. pot.* is attested in a diploma of March 70 (*ILS* 1989).

most civilian of imperial powers could only be granted at Rome. We now know what Suetonius had in mind when he says that Vespasian was late in taking it; obviously he received it in December 69, but he had not usurped it earlier.[60] But now that he did assume it, he back-dated it to 1 July. The retroactive clause VIII could be held to mean that he had really been the legitimate Princeps from the very moment of his pronunciamento, and no disrespect for the constitutional rights of senate and people was involved. Officially, Vitellius like Otho had never been a legitimate emperor; even their *beneficia* were expunged from the record (n. 45).

Perhaps it may be thought that the fact that no document similar to our tablet survives for any reign but Vespasian's makes against the conclusion that the *lex* we possess is wholly, or almost wholly, tralatician. It is enough to recall that not one of the bronze tablets set up at Rome, to which scores of military diplomata refer, is still extant.

The dating of our document in my view excludes any theory which presumes that its provisions, with the possible exception of the last, had been devised for the special case of Vespasian's accession. But even if this is not conceded, even if it was drafted much later than December, it can still not have been intended (as some scholars have argued) to limit Vespasian's powers by defining them. Vespasian himself had no interest in encouraging or permitting such limitation, and it is an entire misconception of the character of the senate to suppose that either in his reign or at any time since A.D. 41 it was capable of seeking to impose restrictions on the dominance of its masters. Moreover, any such interpretation of the *lex* involves a misconstruction of the meaning of clause VI, which by implication set the emperor above the laws. Even this clause in my view probably goes back to A.D. 37. This requires further treatment.

II. ' Quod principi placuit . . .'

Domitian's are the last *comitia tribuniciae potestatis* of which we hear. The literary sources still mention at most the part of the senate in making an emperor during the second century and thereafter. Pliny's vague reference to the ' senatus populique consensus ', which had confirmed by ' electio ' the ' iudicium ' of Nerva in designating Trajan as his partner and successor (*Paneg.* 10, 2), does not necessarily or probably allude to comitial proceedings. At the same time the *comitia* still met under Trajan to vote for the single list of candidates destined for the various magistracies (n. 48). Nerva seems to have passed his agrarian law through the *comitia*.[61] It is therefore unlikely that the comitial ritual was as yet neglected in the investiture of a new emperor. Nor can one divine any reason why this harmless ceremony should have been abandoned at any point in the second century. The fact that both Gaius, writing in the middle of the century, and Ulpian, early in the third century, base the emperor's quasi-legislative authority on his ' lex de imperio ' (*infra*) surely provides decisive confirmation that it continued, whatever be thought of their explanation of that authority. Gaius, in particular, sharply contrasts a *lex* or *plebiscitum* with a *senatus consultum*, and regards the right of the emperor to issue rules which ' legis vicem optinent ' as more secure than the right of the senate to do so, just because it is grounded in a ' lex '; this argument could not even have been advanced, if it had become the practice for the emperor to receive his *imperium* from the senate alone. Some scholars have indeed maintained that the texts of both Gaius and Ulpian have been altered extensively in or before the time of Justinian. But even if this general theory can be sustained,[62] the interpolators would hardly have inserted allusions to an obsolete ' lex de imperio '; their purpose would have been to bring older legal writings up to date. Long before Justinian the people had certainly ceased to take any part, however formal, in the election of a new emperor.[63] Ulpian's

[60] Suet., *Vesp.* 12: ' ac ne tribuniciam quidem potestatem . . . patris patriae appellationem nisi sero recepit '; in the lacuna left by most MSS, one inserts ' nec '; some editors read ' aut ', and Hirschfeld, probably rightly, inserted ' statim nec '. There is not sufficiently precise evidence to show whether emperors from Gaius onwards had taken the same day as ' dies imperii ' and ' dies trib. pot.', see M. Hammond, op. cit. (n. 28), 23 ff.

[61] *Dig.* XLVII, 21, 3, 1, cf. Dio LXVIII 2, 1 (who characteristically ignores the fact that there was a *lex*).

[62] See *contra* E. Diosdi, *Proc. XII Int. Congress Pap.* (1970), 113 f.

[63] A. H. M. Jones, *Later Roman Empire* (1964) 1, 322.

statement of the matter is merely fossilized in the *Institutes* of Justinian (see n. 73). It may be said that if that is true for Justinian's work, it may also be true for Ulpian's (though hardly for that of Gaius). But it is difficult to see why any ruler before Ulpian's day should have let the comitial ceremony fall into disuse; this is much more likely to have occurred in or after the anarchy of the mid-third century, when some emperors never or seldom visited Rome, and when Rome ceased in all but name to be the capital of the empire. Dio, a contemporary of Ulpian, shows how Augustus received his powers from people as well as senate (p. 96), and remarks that the authority of emperors in his own time derived from the laws and tradition (LIII, 18, 4); at least he fails to note that the forms of popular assent had ever fallen into desuetude.

From all this it does not follow that the terms of the *lex de imperio* in the time of Gaius or Ulpian were exactly the same as those enacted in 69. The jurists, as we have seen, ascribe to the emperor a quasi-legislative authority; they also assert that he was not subject to the laws. Could these imperial prerogatives be derived from the Vespasianic law, or have they some other origin, perhaps a change in the *lex de imperio* itself?

Clause VII of our document frees Vespasian from the obligation to observe those laws from which his predecessors had been freed. He was bound (it would seem) by all other laws. We actually know of particular dispensations that Augustus or his successors had obtained from the senate, whose right to grant them, usurped in the late Republic, had been regulated and implicitly confirmed by a Lex Cornelia of 67 B.C. In the early Principate emperors sometimes obtained like dispensations for members of their family.[64] By contrast, Domitian and Trajan were already conferring privileges on others, which earlier emperors had sought from the senate, and the emperor was now regarded as the only authority from whom they were to be obtained.[65]

Ulpian in his commentary on the Lex Iulia et Papia writes: 'Princeps legibus solutus est: Augusta autem licet legibus soluta non est, principes tamen eadem illi privilegia tribuunt, quae ipsi habent'. It has been observed that Ulpian's first statement need not have had a general applicability: he may have been concerned only with the marriage laws. However, Justinian cites a pronouncement of Severus and Caracalla that they would not take inheritances under wills in which the Princeps had been instituted as heir 'litis causa', or which were defective in other ways, and quotes their words: 'licet enim legibus soluti sumus, attamen legibus vivamur'. Paul says that it was dishonourable for an emperor to take legacies or *fideicommissa* under a defective will: 'decet enim tantae maiestati eas servare leges, quibus ipse solutus esse videtur.' Severus Alexander states the same principle himself: 'ex imperfecto testamento nec imperatorem hereditatem vindicare saepe constitutum est. Licet enim lex imperii sollemnibus iuris imperatorem solverit, nihil tamen tam proprium imperii est, ut legibus vivere'.[66] Dio provides confirmation that in his day the Princeps was 'legibus solutus'; he refers to the Latin formula. He actually dated this to 24 B.C., when Augustus on his return from Spain wished to give the plebs 400 HS apiece, but awaited the senate's approval; the senate then 'freed him from all compulsion of the laws, in order, as I have stated, that he might be in reality independent and supreme over both himself and the laws, and so might do everything he wished and refrain from doing anything he did not wish'.[67] (The phrase αὐτοκράτωρ ἑαυτοῦ doubtless means that the emperor was not to be bound 'ius dicere ex suis edictis', as the praetors had been by Lex Cornelia of 67,[68] and that his judicial decisions and rescripts, which had become binding on other courts, so far as generally applicable (n. 81), were not to be binding on him, just as the Supreme Court in

[64] Asconius 58 C f., cf. Mommsen, *StR* III, 1228 f. (= *DPR* VII, 456 f.); II, 883 f. (= *DPR* V 160 f.), esp. 888 (= *DPR* V, 165 f.), citing Dio LV, 2; 32; LIX, 15.

[65] Martial II, 91 f.; Pliny, *Ep.* II, 13, 8; X, 94; *Dig.* I, 3, 31. Martial III, 95 and IX, 97 suggests that Titus, perhaps Vespasian, had granted such dispensations.

[66] *Inst.* II, 17, 8; *Dig.* XXXII, 23; *CJ* VI, 23, 3. Neither these texts nor the more limited formulation of cl. VII suggest that the 'leges' concerned are only those affecting the Princeps in private law (so Arangio-Ruiz, *St. del Diritto Rom.*[7] (1968), 240 f.); it is indeed in this connection that emperors profess 'legibus vivere', whereas in criminal jurisdiction they certainly were unfettered by the laws.

[67] Dio LIII, 18, 1: λέλυνται γὰρ δὴ τῶν νόμων, ὡς αὐτὰ τα Λατίνα ῥήματα λέγει, and 28, 2 (I have quoted the Loeb translation).

[68] Ascon. 59 C. The law provided that 'praetores ex edictis suis perpetuis ius dicerent'. It does not seem to have applied expressly to other magistrates or promagistrates, but they were doubtless under a moral obligation to conform (e.g. Cic., *Fam.* XIII, 56, 3), which may have hardened into a rule under the Principate.

the U.S.A. and, latterly, our own House of Lords are not bound by their former decisions.) However, our document implies that Augustus had no such general dispensation. In 24 he was a candidate for the consulship of 23 and presumably sought relief from the law of *ambitus* which barred him from distributing money to the whole plebs.[69] Dio has evidently misconstrued this relief as a general dispensation, the more easily because in his own day the Princeps was ' legibus solutus '.

Must we then infer that in some later redaction of the *lex de imperio* a general dispensation from the laws had been substituted for the limited dispensation we have in clause VII? And if so, when was the change probably made? One might doubt if the powers granted to Domitian at his accession would have exceeded those of his father, and the emperors between Nerva and Commodus are most unlikely to have sought and obtained any formal extension of their rights. P. de Francisci (see n. 70) conjectured that Septimius Severus was the first to be formally ' legibus solutus' without qualification. However, it may not be necessary to assume that the clause was ever rewritten. Paul says that the emperor ' seems ' (' videtur ') to be dispensed from the laws (n. 66). That might mean that the principle was not expressly stated in, but only deduced from, the ' lex imperii ' to which Severus Alexander appealed.

In fact the principle was not advanced for the first time in the Severan period. Contrasting Trajan with Domitian, Pliny says: ' Quod ego nunc primum audio, nunc primum disco, non est " princeps super leges ", sed " leges super principem " ' (*Paneg.* 65, 1). This implies not merely that Domitian had in practice set the laws at nought (so Pliny held) but that he had been heard to say, or others had said on his behalf, that he stood above them. There would indeed be something odd in his dispensing others from their prescriptions (as Trajan also did), if he were subject to them himself. Furthermore, under Claudius Seneca had already written: ' Caesari . . . omnia licent ' (*ad Polyb.* 7, 2); under Nero he had expatiated on the absolute authority of the emperor (*de clem.* 1, 1).

Now clause VI of our document appears to authorize Vespasian to act as he thinks best in the public interest. I shall argue that this is not only the immediately natural interpretation of the clause but that it is correct. The *sanctio* also indemnifies any person for any action he performs ' huius legis ergo '. Clause VI by implication authorizes the emperor to act at his discretion even if this involves violation of existing laws, and the *sanctio* expressly entitles his agents to obey his commands though they may be contrary to such laws. Hence the emperor ' legibus solutus esse *videtur* '. And if this clause goes back to the investiture at which Gaius received ' ius arbitriumque omnium rerum ', it is not surprising that Seneca could avow that ' Caesar can do what he chooses '. In normal practice indeed a good emperor might prefer ' legibus vivere ', as emperors claim to do long after the Severan period; [70] it was no doubt in this sense that Trajan let it be understood that he would act on the principle ' leges super principem '.

But if this total dispensation from the laws could be deduced from clause VI, as early as Claudius and Nero, why append the more limited dispensation of clause VII? That clause is puzzling in another way too. On the most limited interpretation of clause VI Vespasian was entitled to act in such ways as Augustus had had a right to act. But clause VII then adds that he is entitled to do whatever it was proper for Augustus to do under any *lex* or *rogatio*. This provision appears to be, and is, otiose.[71] I conjecture that clause VII represents part of the enactment which assimilated Tiberius' rights in A.D. 14 to those which Augustus had enjoyed, and that when the much wider authority comprised in clause VI was added, probably in 37, it was retained with characteristic Roman conservatism, though it had become unnecessary.

[69] Mommsen, *Strafr.* 865 f. (= *Dr. pén.* III, 194 f.); the prohibition is assumed, not expressly attested.

[70] P. de Francisci, *BIDR* XXXIV (1925), 321 f., has collected numerous texts of the fourth century and later, which state the imperial *policy* of abiding by the laws; as he says, such statements are quite compatible with their having the *right* (to be used in special circumstances) to disregard them. He also notes that in Trajan's time Dio Chrysostom had presented a model of monarchy as ἀνυπεύθυνος ἀρχή (II, 9 f.; 42 f.; LXII, 3). Justinian (*Nov.* CV, 4) actually explains why the emperor is set above the laws by the conception of the monarch as *nomos empsychos*. I doubt if this had much to do with the development of the principle ' princeps legibus solutus est ' in Roman public law.

[71] Augustus of course had in addition such *iura* as flowed from his *imperium* and *tr. pot.* as such, and these could be fortified by *senatus consulta*, which it would have been easy to mention in clause VII. The *ius* conferred in clause VI is wider still.

We may now turn to the juristic statements which derive the emperor's quasi-legislative authority from the *lex de imperio*.

1. Gaius 1, 2: ' Constant autem iura populi Romani ex legibus, plebiscitis, senatusconsultis, constitutionibus principum, edictis eorum qui ius edicendi habent, responsis prudentium.' After correctly differentiating *leges* and *plebiscita* (3), he proceeds (4): ' Senatusconsultum est quod senatus iubet atque constituit, idque legis vicem optinet, quamvis fuerit quaesitum. (5) Constitutio principis est quod imperator decreto vel edicto vel epistula constituit. Nec umquam dubitatum est, quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat.' He then describes the magisterial *edicta*, of which he might clearly have said, though he does not, that they too ' vicem legis optinent ' (6), and adds that under a rescript of Hadrian the ' responsa prudentium . . . quibus permissum est iura condere ' also ' take the place of law ', if they agree; otherwise the *iudex* may follow his own judgement (7).

2. Pomponius in his *encheiridion ap. Dig.* 1, 2, 2, after reviewing other sources of law, notably *leges* and *plebiscita*, holds that as it became hard to convene popular assemblies, ' coepit senatus se interponere et quidquid constituisset observabatur, idque ius appellabatur senatus consultum ' (9); he then refers to the magisterial edicts (10) and adds that finally (' novissime ') ' constituto principe datum est ei ius, ut quod constituisset, ratum esset ' (11), with the effet (12) that ' quod ipse princeps constituit pro lege servetur '.

3. Ulpian, *Dig.* 1, 4, 1 *pr.*: ' Quod principi placuit legis habet vigorem: utpote cum lege regia,[72] quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat. (1) Quodcumque igitur imperator per epistulam et subscriptionem statuit vel cognoscens decrevit vel de plano interlocutus est vel edicto praecepit, legem esse constat. (2) Plane ex his quaedam sunt personales nec ad exemplum trahuntur; nam quae princeps alicui ob merita indulsit vel si quam poenam irrogavit vel si cui sine exemplo subvenit, personam non egreditur.'

4. Justinian, *Inst.* 1, 2, 3 f. follows Gaius' enumeration of the sources of ' scriptum ius ', but apart from verbal changes he adopts Pomponius' explanation of the reason why ' aequum visum est senatum vice populi consuli ' (5),[73] and substitutes Ulpian's words (' quod principi placuit ' etc.) for Gaius' on imperial constitutions.

5. More vaguely, Papinian had written (*Dig.* 1, 1, 7): ' ius autem civile est, quod ex legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium venit '. Here ' decreta ' is evidently used generically of all imperial constitutions; [74] it can, however, be contrasted with ' edicta ' or proclamations (cf. n. 76), or be still more narrowly confined to the emperor's judicial decisions, thus excluding both the ' epistulae ' he wrote in reply to those who had the status that entitled them to correspond with him, and the minutes (' subscriptiones ') that he appended to petitions (' libelli '), both of which may be designated ' rescripta '.[75]

[72] Most scholars think this w → ' is interpolated in accordance with later usage (e.g. *CJ* 1, 14, 5, 2 and 12, 1); Mommsen suggested that it *might* be genuine, reflecting the effect of Greek usage on a jurist from Berytus (*StR* II, 876, n. 2 = *DPR* V, 152, n. 2). For hypercritical examination of all the texts quoted, not accepted by most scholars, see Krüger, *ZSS* XLI (1920), 262 f.; Perozzi, *St. Bonfante* (1930) 1, 89 f. Perozzi *inter alia* objects to the use of the verb ' constituere ' in the text of Gaius with reference to statutes and senatorial decrees, but perhaps it was deliberately inserted to assimilate them to imperial ' constitutiones '.

[73] Perhaps Justinian claims that the senate had taken the place of the *populus*, in order to suggest that the emperor still in effect receives his power from the *populus* through the medium of a senatorial decree, which is as good as a *lex*.

[74] On constitutions see Jolowicz-Nicholas, *Hist. Introd. to the Study of Roman Law*[3] (1972), 365 f. The collection of constitutions down to 234 in G. Gualandi, *Legislazione Imperiale e Giurisprudenza* 1 (1963) does not include those in *CJ*, for which see index to Krüger's edition, p. 489 f., nor those known from non-juristic sources, for which see P. de Francisci, *Ann. Stor. Dir.* XII–XIII (1968/9), 1 f.; he seeks to explain the facts that from Hadrian (*a*) the volume of constitutions greatly increases and (*b*) they seem to have seldom taken the form of edicts. Constantine was to rule: ' contra ius rescripta non valeant, quocumque modo fuerint impetrata. Quod enim publica iura perscribunt, magis sequi iudices debent ' (*CTh.* 1, 2, 2); de Francisci, op. cit. (n. 70), explains this as referring to rescripts issued by his rivals for power. But might it be an abbreviated disclaimer of the general validity of rescripts which were o[illegible] → intended to confer privileges in particular cases, cf. *CJ* 1, 14, 2 (A.D. 420) and nn. 77 and 81?

[75] Imperial *mandata* are never classed expressly among the *constitutiones*, though they are cited by jurists at times as evidence of the law; see e.g. *Dig.* XXIX, 1, 1 *pr.* for the military will; however, in my view the section of Trajan's *mandata* quoted merely circulates to officials the rules made in another form, probably by edict. *Mandata* as such could hardly be regarded as ' taking the place of a *lex* ', as they must have been mainly administrative, often referring to a single province, and were sometimes secret (Sen., *Ep.* 83, 14).

The praetorian edict, as stereotyped under Hadrian, already implies the validity of *senatus consulta* and imperial edicts and *decreta*, placing them on a par with *leges* and *plebiscita*.[76] The classical jurists continually cite the constitutions or rescripts of emperors as deciding the law; Justinian rightly claimed that they ' constitutiones, quae ex imperiali decreto processerunt, legis vicem obtinere aperte dilucideque definiunt ' (*C*J I, 14, 12, 1).[77] Fronto, in a speech which earned approval at least for its style from Pius, was able to say that by the judicial decisions (*decreta*) of the emperor, unlike those of private *iudices*, ' exempla publice valitura in perpetuum sanciuntur '.[78] However, it was still proper to distinguish ' constitutiones ' from ' leges '.[79] Gaius asserts only that the former ' take the place of law ' and Pomponius that they are to be observed ' pro lege ', while Ulpian allows them ' the force of law '. It was a much later usage when a *constitutio* was described as a *lex*,[80] and ' legem esse constat ' in our text of Ulpian can hardly be verbally authentic. None the less, the later usage corresponded to what was the reality even in the second century.

Ulpian's dictum that the pleasure of the prince has the force of law did not of course mean that his every utterance had this effect. They might be lacking (as Ulpian notes) in the necessary generality.[81] Even edicts might concern only particular persons,[82] or particular provinces.[83] On the other hand constitutions might expressly state principles of universal validity,[84] or the jurists might see in them implications which warranted wide extension.[85] If they were to be generally applicable, they had of course to become generally known; and the necessary publicity could be secured particularly through their incorporation in the writings of the jurists or through their inclusion in the *mandata* that officials received from the emperor, appropriate extracts from which they might publish.

Many, perhaps most, of the imperial constitutions could be regarded as no more than authoritative interpretations of the existing law.[87] But others patently created entirely new rules.[88] It was once orthodox to hold that the latter at least had no validity beyond the lifetime of their authors, unless renewed by succeeding emperors. This doctrine has been refuted.[89] Unless an emperor's memory was condemned, or his acts rescinded or allowed to lapse, and sometimes even then (n. 93), his constitutions, however innovatory, remained in force until such time as they were abrogated. Thus Paul refers to the abrogation of an edict of Augustus forbidding *paterfamilias* to disinherit *filiusfamilias* serving in the army, and edicts of Trajan and Hadrian had to be repealed by Diocletian and Justinian.[90] More often, we hear of constitutions that remained in force.[91] Some of these issued from emperors of the first century. For instance, Claudius and Nero, as well as Trajan, established new ways in which Junian Latins could obtain citizenship.[92] (It is to be noted that Nero's rule

[76] *Dig.* II, 14, 7, 7; III, 1, 1, 8; IV, 6, 1, 1; XLIII, 8, 2 *pr*. Edicts alone are mentioned in XXVIII, 7, 14.

[77] But *C*J I, 14, 12, 2 (where ' legibus ' refers to jurists) shows that there had been doubts, perhaps over the generality of some constitutions; Justinian here does not distinguish those which were ' personales ' from the rest.

[78] Fronto, *ad M. Caes.* I, 6 (Naber, p. 13 f.). Cf. Pliny, *Ep.* X, 112, 3; *Dig.* XXXVI, 1, 52 (Hadrian).

[79] e.g. Gaius I, 26; Ulpian, *Dig.* X, 2, 2 *pr.*; Paul, VI, 2, 12, 4 and XXII, 3, 5; Gordian, *C*J X, 46, 1.

[80] e.g. Justinian, *C*J I, 14, 12 *pr.*

[81] Cf. Papin., *Dig.* I, 3, 1: ' lex est commune praeceptum '; Ulp., ibid. 8: ' iura non in singulas personas sed generaliter constituuntur '.

[82] e.g. *FIRA*² I 68, II; 71.

[83] e.g. *FIRA*² I 68, I, III and IV; Pliny, *Ep.* X, 65 f.; 79, 1.

[84] e.g. *Dig.* XXVI, 4, 1, 3 (Pius); in such cases jurists say that emperors ' generaliter rescripserunt ', when they should ' in omni loco valere ' (Ulpian, *Dig.* XLVII, 12, 3, 5).

[85] Thus a rescript of Pius to the *koinon* of Asia is taken to be of universal validity because it is not expressly limited to Asia, *Dig.* XXVII, 1, 6, 2. Similarly Trajan's ruling on the treatment of Christians, despite the initial reservation in Pliny, *Ep.* X, 97, 1, seems to have been applied everywhere in later reigns. Note the dictum of Javolenus under Trajan, *Dig.* I, 4, 3: ' beneficium imperatoris ... quam plenissime interpretari debemus.' *Coll.* III 3, 3 (cf. Gaius I, 52 f.) illustrates how jurists generalized from particular imperial decisions. Gualandi (n. 74) furnishes countless instances in all branches of the law. The validation of *fideicommissa* and of the ' ius codicillorum ' under Augustus (*Inst.* II, 23, 1; 25 *pr.*) are early examples of the development of general rules out of particular cases.

[87] e.g. Gaius II, 195 (Pius). It was also constantly necessary for emperors to repeat existing rules of the law: ' saepe rescriptum est ' is a juristic refrain.

[88] e.g. the *decretum* of Marcus making a new rule of law on the occasion of a particular case in *Dig.* IV, 2, 13 = XLVIII, 7, 7. For ' novum ius ' made by *senatus consulta* and constitutions see e.g. Gaius, *Dig.* V, 3, 3. And note Julian, *Dig.* I, 3, 11: ' aut interpretatione aut constitutione optimi principis '.

[89] Orestano, *Gli Editti Imperiali*, extract from *BIDR* XLIV (1937), cf. p. 115.

[90] *Dig.* XXVIII, 2, 26, *C*J VI, 33, 3; VII, 6, 1, 12; VIII, 10, 5; *Inst.* III, 7, 4. I would not cite here the cancellation of some of Gaius' measures by Claudius (Dio LX, 4, 1), since we cannot be sure that these measures were not *senatus consulta*.

[91] Orestano (n. 89) lists them, e.g. edicts of Augustus in *Fr. de iure fisci* 8; *Dig.* XLVIII, 18, 8 *pr.*, both of universal application.

[92] Other concessions to Junian Latins were made by *senatus consulta* or (under Tiberius) by the *lex Visellia*, see Gaius I, 28 f.; Ulpian, *Tit.* III.

remained valid, despite his condemnation; it was evidently impractical to reverse all the *acta* of a ' tyrant ', and unnecessary, as some might be universally approved.) [93] Claudius too amended the Cornelian law on will-making by edict. This is one instance of a common practice whereby Republican statutes were brought up to date. When the classical jurists summarize the prescriptions of such statutes, they frequently ascribe to them rules which in form or substance represent imperial amendments.[94] It is clear that the quasi-legislative authority of the Princeps was held to go back to Augustus (n. 91) although it was far more extensively used, to judge from our sources, from the reign of Hadrian (n. 74).

Gaius shows that the authority of jurists to develop the law by interpretation also rested on imperial *fiat*. Augustus had begun the practice of selecting jurists who were authorized ' ex auctoritate principis respondere '; [95] it is clearly these whom Gaius describes as persons ' quibus permissum est iura condere ', and whose agreement on a point of law was made decisive by a rescript of Hadrian.[96]

It is not always observed that the validity of *senatus consulta* as a source of law under the Principate also derived from the emperor's will. In form a *senatus consultum* was no more than a piece of advice to the magistrates. Thus in the *SC Velleianum*, probably of Nero's reign, the senate resolved ' arbitrari senatum recte atque ordine facturos ad quos de ea re in iure aditum erit, si dederint operam, ut in ea re senatus voluntas servetur '.[97] In the Republic tribunes could veto decrees of the senate and deprive them of effect; and even if they were passed without veto, magistrates could on occasion neglect to observe them. But in the Principate all senatorial decrees of substance were either initiated by the emperor or at least required his sanction; [98] and given his support, neither veto nor disobedience was practicable. In the same way it was the emperor's authority that made it possible for the senate to assume jurisdiction over life and death with no regard to the old *ius provocationis* or to the Republican statutes which had set up courts to try particular offences, and to deprive the *comitia* of free choice at elections by submitting to them a single list of candidates.

Even in the Republic senatorial decrees had had great weight. We have seen that the senate actually usurped the right to grant *privilegia*; in 67 B.C. the tribune Cornelius had to give up the attempt to deny this and content himself with regulating the procedure. Very likely optimates argued that senatorial decrees should be observed like statutes; if so, this would certainly have been contested, and rightly; the very form of the decrees shows that the contention was incorrect.[99] Gaius was surely right that it was long questioned whether they ' took the place of laws ', though one may doubt if this argument continued, or at any rate if it had any practical importance, once decrees were passed ' auctore principe '. Scholars have, on the other hand, taken offence at Gaius' statement that the validity of imperial constitutions had never been in doubt. So far as the form of imperial edicts goes, they were also sometimes couched in the senatorial language of advice.[100] But even if they issued direct commands and prohibitions, by what right did the Princeps act? Gaius' own answer has been pronounced unsatisfactory. Let this be so: it is still naive to suppose that

[93] For Domitian cf. Pliny, *Ep.* x, 60; 66; 72; *Dig.* XLVIII, 3, 2, 1; 16, 16. On *abolitio memoriae* and *rescissio actorum* see *StR* II, 1129–33 = *DPR* V, 441 f. They would not affect *senatus consulta* passed ' auctore Caesare '. The condemnation of Domitian's memory is implicit in Dio LXVIII, 1, and indeed in Nerva's letter ap. Pliny, *Ep.* x, 58, 10: ' cum rerum omnium ordinatio, quae prioribus temporibus incohatae consummatae sunt, observanda sit, tum epistulis *etiam* Domitiani standum est '.

[94] *Dig.* XLVIII, 10, 15 pr. Cf. for instance 8, 1, 3–5; 8, 4, 2; 8, 5; 8, 11; 8, 14 for extensions of the law on murder; others were made by *SC* e.g. 8, 3, 2 f.; 8, 6; 8, 11, 2; 8, 13. Cf. n. 41.

[95] *Dig.* I, 2, 2, 49. What this meant at first is far from clear, see de Martino, 492 for bibliography.

[96] Naturally imperial constitutions were normally based on juristic advice; for a clear instance see *Dig.* XXXVII, 14, 17.

[97] *Dig.* XVI, 1, 2, 1; date: D. Medicus, *Zur. Gesch. des SC Vell.* (1957) 13 f.

[98] The *SC Calvisianum*, which in effect amended the *lex Iulia de repetundis* and is a very early instance of senatorial ' legislation ' (4 B.C.), was promoted by Augustus (*FIRA*² I, 68, V). For imperial sanction Tac., *Ann.* III, 52–5; XV, 20–2 are significant.

[99] Ascon. 58 C f. For other quasi-legislative activities of the post-Sullan senate see *StR* III, 1228 f. = *DPR* VII, 458 f. A. Watson, *Law Making in the Later Roman Republic* (1974), ch. 2 is clearly right that *senatus consulta* did not possess legal force as such, but they could be just as effective, if the magistrates were disposed to obey and enforce them, and Cicero held this to be their duty (*Sest.* 139). Cf. Cicero's ideal set of laws in *Leg.* III, 6; ' (magistratus) quodcumque senatus crevit, agunto ', and 10: ' (senatus) decreta rata sunto '.

[100] e.g. ' placet ' in *FIRA*² I, 67, cf. 68, I, III and IV, but in III Augustus also says κελεύω, cf. the language of Claudius, ibid. 71 and Vespasian, ibid. 73.

any jurist or layman would have dared to impugn the validity of imperial orders. ' Nec umquam dubitatum est '; at least no doubts will ever have been expressed.

Gaius justifies imperial authority by the words ' cum ipse imperator per legem imperium accipit '. It has often been objected that Republican magistrates received *imperium* from the people by election, and some *privati* like Pompey by statute, but that this had never been taken to convey to them quasi-legislative power. But what if Gaius means ' imperium ' to be construed not in its technical sense but as the totality of imperial power granted to him by ' lex ' on his accession (nn. 16, 23)? Certainly this must be the meaning of the word in Ulpian's similar statement: the ' populus ' did not possess ' imperium ' in the narrow sense,[101] which belonged to magistrates and promagistrates; what it could *transfer* to the Princeps was its sovereignty, manifest *inter alia* in the right to make laws. Ulpian has in fact improved on Gaius' drafting, and this may be why Justinian preferred to adopt his formulation.

Thus Gaius and Ulpian found the source of the emperor's right to make law in the statute passed at his accession. I would accept the view that they are referring to clause VI of our document. Various objections have been offered.

Some think that the verbs ' agere facere ' relate only to executive acts of administration.[102] But how can the connotation of ' agere ' be narrower than that of ' acta ', which in its application to holders of *imperium* in the Republic certainly includes their general rulings? It would be absurd to suppose that the imperial *acta*, which senators swore to observe (n. 114) and which on the death of a tyrant were sometimes rescinded, excluded the *edicta* and *decreta*.

Others suppose that clause VI merely authorizes Vespasian to act at his discretion in an emergency.[103] One could think of Cicero's doctrine that for the consuls ' salus populi ' was to be ' suprema lex ', and of the extraordinary power that the senate purported to vest in magistrates by decreeing in crises that they should see to it that the commonwealth suffered no harm.[104] But if this was the draftsmen's intention, they have failed to express it.[105] Vespasian is to be entitled to act as he thinks best in the interest (' ex usu ') not only of the state but of private individuals. The phrase ' ex usu ' may remind us that ' utilitas ', both public and private, was sometimes adduced to justify innovations in the law,[106] and also of the allusion to private interests in Tiberius' avowal that it was his duty ' servire et universis civibus saepe et plerumque etiam singulis ' (Suet., *Tib.* 29); most imperial constitutions were in fact concerned with the protection of private rights and interests.

But can its scope be limited by the phrase ' ita uti divo Augusto (et ceteris) fuit '? Here there may seem to be an ambiguity. Were the draftsmen first conferring a power on Vespasian, and then claiming, whether truly or falsely, that the same power had belonged to Augustus, Tiberius and Claudius? Or were they conferring on Vespasian only such power as those emperors had legally possessed? In the first case the reference to Augustus etc. is merely historical, but in the second it is part of the very definition of Vespasian's rights. In clause III at least the intention of the words ' ita uti licuit . . .' must surely be of the second kind. In virtue of the tribunician power an emperor had the right to summon the senate and lay business before it, leading to a *senatus consultum*. There was therefore no

[101] *StR* I, 22 = *DPR* I 24. I do not, however, agree with Mommsen that where ' imperium ' is used of the *populus*, it either has a geographical sense or is ' political speculation '; it is simply ' dominion ' or ' sovereignty ' over subject peoples (*Oxf. Latin Dict.* s.v., 5), though the usage is not indeed ' technical ' as when applied to a magistrate.

[102] e.g. Arangio-Ruiz (n. 66). For ' acta ' cf. *StR* II, 906 = *DPR* V 186; Cic., *Dom.* 40 illustrates the equation of a magistrate's *acta* with ' quae egisset '. The ' acta ' of Bassus in Bithynia certainly included judicial decisions (Plin. *Ep.* X, 56, 4). Hence in cl. VIII of our document ' acta gesta decreta imperata ' is unnecessarily full, cf. the pleonasms in cl. II. ' Facere ': cf. *Ann.* IV, 37.

[103] So de Martino [illegible]2 and others he cites.

[104] Cic., *Leg.* III, 8, *Phil.* XI, 27; Sall., *Cat.* 29 etc.

[105] One might rather think of *senatus consulta* which had invited a magistrate to take such and such action ' si ei e republica fideque sua videretur ' (e.g. *FIRA*² I 32).

[106] The phrasing of the clause is odd. Strictly ' ex usu ' relates only to ' reipublicae ' and ' maiestate ' to all that follows. But ' maiestate ', while more appropriate than ' usu ' to things divine, and well suited to things public, is nonsense for things private; ' ex usu ' was surely still in the minds of the draftsmen. See Heumann-Seckel, *Handlexikon zu den Quellen des röm. Rechts* ⁹, s.v. ' utilis ', ' utilitas ', for a common *motiv* in explaining the origin of legal rules, esp. innovations, e.g. Ulp., *Dig.* I, 4, 2: ' in rebus novis constituendis evidens esse utilitas debet, ut recedatur ab eo iure, quod diu aequum visum est '. The ' novum ius ' that emperors made could be so justified.

necessity to grant this right specifically in addition to the tribunician power itself, and more must be intended: the clause vests in Vespasian the enlarged rights of doing business with the senate which had been voted to Augustus (n. 42), simply by referring to Augustus' rights. Clause VII is an even more obvious example of the way in which Vespasian's rights are defined by reference to those of Augustus. However, Clause VII itself empowers Vespasian to exercise all the powers which laws had vested in Augustus; something more must be designed in VI. And that is to be found in the word ' censebit '. It is at Vespasian's *discretion* to do what *he* thinks best, and it is added in the words ' ita uti . . .' that Augustus had had a like discretion; the addition cannot limit Vespasian's.

If Vespasian was free to do what he thought best, he was an autocrat whose power was theoretically restricted only by his own judgement. (In practice, of course, any autocrat had to bear in mind what his subjects would tolerate.) The draftsmen allege that Augustus, Tiberius and Claudius had not merely enjoyed power no less absolute but that they had the same legal authority (*ius*). This historical statement is not to be believed. Overt assumption of the right to act as he pleased would have been incompatible with Augustus' scrupulous care to offend Republican susceptibilities as little as was consonant with his retention of control over the state; he could get his way without it. His refusal of the dictatorship and of the ' cura legum et morum summa potestate ', both offered by senate and people, illustrate his caution. It is clear that this ' cura ' would have enabled him to legislate, since he adds that he took the measures the senate thought necessary ' per tribuniciam potestatem ', that is by initiating comitial legislation.[107] Dio, who loves to record and sometimes to exaggerate the powers voted to Augustus, mentions no grant of a right to do what he deemed best for public and private interests.[108]

But whatever success with contemporaries Augustus' Republican moderation achieved, he appeared as the founder of a monarchy to Dio (LIII, 17), Suetonius (*Aug.* 28) and Tacitus[109] and, still earlier, to Seneca.[110] Tacitus indeed makes out that this was recognized in A.D. 14, and by Augustus' apologists.[111] It cannot then be supposed that by citing the precedent of Augustus the draftsmen were hoping to suggest that the power of a new emperor would be restrained, as that of Augustus had been; it is relevant, for that matter, that Claudius too is cited, and he was detested for further encroachments on the authority of the old Republican organs of government.[112]

We may indeed ask how the draftsmen came to impute to Augustus a discretionary authority which in strict law he had never possessed. It is apparent that they were scrupulous elsewhere not to ascribe to previous emperors specific prerogatives for which there was no precise warrant. Augustus, Tiberius and Claudius had all commended candidates to magistracies, who were inevitably returned. But they had evidently prevailed ' auctoritate '; if, as seems probable, the prerogative was first formally granted to Nero, it was within the recollection of the draftsmen that no earlier emperor had possessed it in law. On the other hand, they also knew or believed that Augustus had done much that was at least not normally done by a man merely in virtue of proconsular *imperium* or tribunician power, and they thought it proper to grant to a new emperor the formal right to act as Augustus had acted.

It was the undoubted merit of Last's interpretation of the discretionary clause that he saw that it gave legal sanction to the activity of an emperor in matters where Augustus had been able to operate freely without such sanction, merely in virtue of his pre-eminent *auctoritas*. He noted that according to Suetonius Vespasian at his accession was deficient in *maiestas* and *auctoritas*, and he supposed that the clause was tailor-made for Vespasian. Suetonius, however, adds that Vespasian's reputed miracles in Egypt supplied the deficiency; be this

[107] *RG* 5 f. For Augustus' ' Republicanism ' (which comes out in his own designation of his position as ' princeps ' and reference to other notables as ' principes ', *RG* 12, 1) see Velleius II, 89, 3 f.

[108] *Contra* Herzog, *Gesch. u. System der röm. Verfassung* II, 151, nothing in Dio LIV, 10 (19 B.C.) can be relevant; consular power did not give the holder such discretion as cl. VI, and Dio's account of the *cura morum* is wrong.

[109] *Hist.* I, 1; *Ann.* I, 1, 1; 2, 2; 3, 1; 4, 1 etc.

[110] e.g. *Benef.* VI, 32, cf. II, 20, where he argues that liberty and the Republic were irretrievably lost by 44 B.C.

[111] *Ann.* I, 9, 4: ' non aliud discordantis patriae remedium fuisse quam ut ab uno regeretur '. Ovid's ' res est publica Caesar ' (*Tr.* IV, 4, 15) shows that contemporaries could have been so clearsighted.

[112] *Ann.* XI, 5, 1 (cf. for Aug. I, 2, 1); XIII, 4.

right or wrong (and one might doubt if they impressed Romans as much as Egyptians, ' dedita superstitionibus gens '), he knows nothing of a grant of extra legal power.[113] No ancient writer does. Last's thesis fails, if our document comprises the grant of ' cuncta solita '. Nor was Vespasian the first emperor to lack the *auctoritas* of Augustus, or even of Tiberius, whose personal services to the state made him indisputably the first citizen on Augustus' death. On accession Gaius, Claudius and Nero each possessed only that prestige which accrued to them as members of the imperial dynasty; none had any personal achievements to show, and their capacity to rule could be doubted. If it was ever felt that lack of *auctoritas* was a ground for vesting a new ruler with compensating legal power, that feeling could have existed in A.D. 37. But it is not in the least necessary to suppose that at any time there was a conscious intent to ' institutionalize ' *auctoritas*, or supply its absence by additional *potestas*. The popular enthusiasm that accompanied Gaius' accession and the servility of the senate would be sufficient in themselves to explain the conferment of legal power more sweeping than that which Augustus had obtained, and which Tiberius would certainly have rejected. It is true that clause VI legalizes autocracy, but after the oppression of Tiberius' later years, no matter where the responsibility lies for the development, no one could be in doubt that the Princeps could be as autocratic as he chose, and the best course might have seemed to be that of winning the good-will of the new Princeps by an unlimited expression of confidence in his wisdom and benevolence. Nothing forbids us to date clause VI to A.D. 37.[114]

No doubt on this interpretation clause VI made every other clause in the *lex* logically redundant, and whereas it may seem natural that specific powers vested in emperors before the date at which the discretionary clause was first embodied in the ' lex de imperio ' should have been repeated, however unnecessary, one might ask why additional specific prerogatives were inserted later, e.g. clauses III, IV and (if the discretionary clause goes back to 37) V. We may recall, however, that the general prohibition in *repetundae* legislation against the enrichment of officials (except as specifically sanctioned) was not thought to make it unnecessary to set out with increasing precision the principal modes of illegal enrichment for which charges would lie. Similarly an emperor could still be specifically authorized to exercise his discretion in certain ways. These authorizations were of political value to him in that they conveyed, or purported to convey, public approval for his taking actions of a given kind.

The hypothesis that the prototype of our document dates to 37 may explain why the name of Tiberius appears in it, though he was not among the *divi*. Although there were hostile demonstrations against his memory on his death (Suet., *Tib.* 75) and his will was immediately set aside (idem., *Gaius* 14; Dio LIX, 1, 2), and although from 38 the senate ceased to swear observance of his *acta* (Dio LIX, 9, 1), Gaius initially professed to honour him (Suet., *Gaius* 15; Dio LVIII, 28, 5; LIX, 3, 7); his name could then not have been omitted from a ' lex de imperio ' passed in 37; it would have been natural if it had then been transcribed in each successive act of investiture.

Clause VI is in itself sufficient justification for the juristic doctrines that the emperor was ' legibus solutus ' and that his constitutions ' took the place of *lex* '. None of his actions could be questioned, so long as he was emperor, even though they might be contrary to existing laws. Clause VIII also suggests the kind of formula that could have been used when the senate swore to observe the *acta* of a past emperor.[115] Together these provisions explain why imperial constitutions made law and why unlike, for instance, the edicts of

[113] Suet., *Vesp.* 7, 2; Tac., *Hist.* IV, 81. The Flavian quasi-monopoly of the ordinary consulship, and the absurd number of their imperatorial acclamations, no doubt reflect Vespasian's desire to compensate for his ' novitas '.

[114] Dio XLVII, 18, 3; LVII, 8, 4; LIX, 9, 1; LX, 10, 1.

[115] For magisterial edicts see *StR* I, 634 f. = *DPR* II 306 f. Orestano, op. cit. (n. 89), was right that this limitation came not to apply to imperial edicts (nor constitutions in general), but the explanation is surely not that they were not magisterial in principle (as he thinks) but that given above. Orestano maintains that magisterial edicts only announced rules by which the magistrate would be guided in exercising his own powers, whereas emperors prescribed rules for others to follow. But rules of the first kind indirectly determined the proper conduct of the citizens, and not all magisterial edicts consistently conformed to Orestano's model. Cf. the aedilician edict, esp. 5 f. (*FIRA*² I, p. 390 f.), and occasional formulae in the praetorian edict like ' ne quid in loco publico vel itinere fiat ' (ibid. 377); also Cic., *Quinct.* 84 with his paraphrase, 89. See also for instance Cic., *Verr.* II, 3, 36; *Qu. fr.* I, 1, 26; *Fam.* III, 8, 3 f.; Livy XXXIX, 14, 7 f.; XLI, 9, 9–12; XLIII, 14, 5. f.; *FIRA*² I, no. 52–4.

magistrates, they remained valid after their authors had ceased to hold office.[116] The confirmation of an emperor's *acta* by oaths provided an *additional* sanction.

On the views here advanced, no such clause justified legislation by Augustus or Tiberius. However, the oath taken by senators to observe the *acta* of Augustus would have given posthumous validity to any legislative changes he made; during his own life-time we can assume that no one ventured to challenge them. The attitude of Tiberius, who avowed that he respected all Augustus' deeds and words ' vice legis ', must have reinforced the oath, but perhaps it can also be connected with it. Tiberius, at least in the early part of his reign, was scrupulous in observing constitutional forms, and this strong statement, which he made in the senate, was only unobjectionable if the senate was bound by oath to regard Augustus' *acta* as ' perinde iusta rataque ac si populi plebisve iussu acta essent '.[117] In any case the long lapse of time in which Augustus' *acta* were enforced, during his own reign and that of Tiberius, would have tended to give them the sanction of custom.[118] Tiberius' *acta* were not confirmed in the same way, and in fact are hardly ever cited later. But, as we have seen, even when the *acta* of an emperor were allowed to lapse or actually rescinded, this did not mean in practice that those rules he had made which were acceptable were treated as altogether devoid of authority: they might stand on their merits and on the force of custom; the very length of time for which Nero and Domitian ruled was relevant.

III. Emperor and *Res Publica*

' Deo auctore nostrum gubernantes imperium, quod nobis a caelesti maiestate traditum est ': these are the opening words of the constitution in which Justinian explains his project of compiling the *Digest*. He is emperor by the grace of God. It would be easy to trace this concept of monarchy back to Hellenistic philosophy (cf. n. 70), and to point out its influence in the adulatory language of Roman poets and panegyrists (e.g. Sen., *Clem.* I, 1) or in imperial propaganda. Yet at the same time there persisted the concept of the state as ' res publica ',[119] which, as Cicero rightly held (*Rep.* I, 39), was equivalent to ' res populi ', the property, affairs and interests of its citizens. In the second century Julian, in discussing the validity of custom, can write: ' inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum; nam, cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes.' Similarly statutes can fall into desuetude ' tacito consensu omnium '. This doctrine was reconciled by jurists with the absolute power of the emperor by reference to the ' lex de imperio '. Even in the late empire the emperor was in principle elective, just as the kings had been, and at his election the people, or eventually the senate as its representative, invested him with all its own sovereignty. Magisterial *imperium* had always had a discretionary element, but in the Republic the right of its holders had been limited not only by the moral obligation to act ' e republica fideque sua ' (n. 105) but by the equal powers of other magistrates, and by the prospect that on demitting office they might be brought to account. The emperor had no equals, and he could only be brought to account by assassination or insurrection. Still, his powers had their lineage in Republican precedents, not in Hellenistic practice or theory. King Ptolemy was himself the state: Imperator Caesar was the representative of the *res publica*. His authority was unlimited, but he was supposed to exercise it ' ex usu reipublicae '. In theory at least he was not irresponsible; he could be condemned, if he misbehaved and had been overthrown. How much difference these refined distinctions made to the welfare of his subjects is another matter.

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[116] *Ann.* IV, 37. The substantial authenticity of this speech is guaranteed by its incompatibility with Tacitus' comments (38, 5). Cf. generally Syme *Tacitus* (1958), 700 f.

[117] For custom making law see Watson, op. cit. (n. 99), ch. 13; Jolowicz-Nicholas, op. cit. (n. 74), 353 f. upholding *Dig.* I, 3, 31 as genuine. (It is surely wrong to say that ' the Romans do not invoke the idea of custom ' in constitutional law, see e.g. Cic., *Sest.* 137, *Rep.* III, 41. Dio LIII, 18, 4 rightly based the position of the Princeps on custom. Like Great Britain, Rome never had a written constitution, and any distinction between ' constitutional ' and ' customary ' is unsound.)

[118] Justinian says: ' statum rei publicae sustentamus ' (*Deo Auct.* 1).

[119] *Dig.* I, 3, 31 (n. 117).