THROUGH A GLASS, DARKLY: READING JUSTINIAN THROUGH HIS SUPREME COURT CITATIONS

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I. INTRODUCTION

"The vain titles of the victories of Justinian are crumbled into dust: but the name of the legislator is inscribed on a fair and everlasting monument."[1] So wrote Edward Gibbon at the beginning of his famous chapter on Roman law in his magnum opus, *The History of the Decline*

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[1] 5 EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 2578 (William Smith ed., John Murray 1862) (1788); *see also* M.H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723, 1738 (1992) (locating Gibbon's work, especially the forty-fourth chapter on Roman law, in the canon of Civilian literature as received by nineteenth century American legal scholars).

and Fall of the Roman Empire, of the Byzantine emperor Justinian's *Corpus Juris Civilis*, the oldest complete civil law "code"[2] that survives to our time, and which underlies much of the diverse civil law of Europe and the New World.[3] But to what extent is it true that Justinian's fair monument is really everlasting? And, even if so, how has that monument been received by American jurists? Has it merely furnished the "ornamental"[4] flourishes by which lawyers and judges may display their erudition, or has it been an authority on which jurists have based their arguments?

To answer these questions is to venture into the realm of classical reception theory,[5] which is an analytic paradigm, focused on an ancient text's *nachleben*: its "afterlife," or what has become of it in the time since it was released to its readerly consumers.[6] Charles Martindale, who brought reception studies to the mainstream of the Anglophone academy, advanced two theses in his seminal work on reception theory, *Redeeming the Text*. The first, his so called "weak" thesis, "is that numerous unexplored insights into ancient literature are

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[2] The word "code," as used in a legal context, is derived from the Latin word *codex*, which refers to a book with pages that may be turned, as opposed to a scroll, and may be defined as "[a] complete system of positive law, carefully arranged and officially promulgated." Peter Birks & Grant McLeod, *Introduction* to JUSTINIAN'S INSTITUTES 9 (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987) (533); *Code*, BLACK'S LAW DICTIONARY (10th ed. 2014). The bridge between the two concepts is the ancient organized collection of imperial pronouncements in book form called a codex, one of which formed part of the *Corpus Juris Civilis*, the name of which part came in time to represent the whole by synecdoche. *See infra* Part II.A.

[3] *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 9 (1969). Indeed, for better or for worse, Justinian's work by design largely supplanted all prior Roman law, so much so that "[a]lmost everything that we know about ancient Roman law derives from a compilation of legal materials made between the years 529 and 534 A.D. on the orders of the Byzantine emperor Justinian." Peter Stein, *Justinian's Compilation: Classical Legacy and Legal Source*, 8 TUL. EUR. & CIV. L.F. 1, 1 (1993) (citation omitted) [hereinafter Stein, *Justinian's Compilation*].

[4] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 475 (1897). Of all the indignities, being relegated to the status of ornament is perhaps the worst!

[5] This is not to be confused with the official "reception" of ancient sources of law as binding law. *See* MERRYMAN, *supra* note 3, at 11.

[6] HANS ROBERT JAUSS, TOWARD AN AESTHETIC OF RECEPTION 20–22 (Timothy Bahti trans., Univ. of Minn. Press 1982) (1970); Charles Martindale, *Redeeming the Text: The Validity of Comparisons of Classical and Postclassical Literature (A View from Britain)*, Vol. 1, No. 3 ARION: J. HUMAN. & CLASSICS, THIRD SERIES 45, 45 (1991) [hereinafter Martindale, *The Validity of Comparisons*].

locked up in imitations, translations, and so forth."[7] The second, his "strong" thesis,

> is that our current interpretations of ancient texts, whether or not we are aware of it, are, in complex ways, constructed by the chain of receptions through which their continued readability over the centuries has been effected. As a result, we cannot go back to any originary meaning wholly free of subsequent accretions.[8]

Under this second thesis, the meaning of any prior text that is in dialogue with a subsequent text *cannot* be understood *but* through the lens of that subsequent text, at least where that subsequent text is well known or has achieved sufficient cultural penetration. Likewise, the implicit prior step in Martindale's reasoning holds true: that the subsequent text, by its awareness of the prior, is influenced by it through that "chain of receptions."[9] The influence extends in both directions. These propositions presuppose a connection between the two texts, the "dialogue" between the prior and subsequent. Martindale exemplified his theses with the case of Homer and Virgil, which he justifies because "the Homer-Virgil opposition" is so universal in the subsequent reading of both poets that, even when a reader of Homer is not personally familiar with Virgil, the reader's interpretive eye will nonetheless be colored by a Virgilian tint imposed on the text by the broader *milieu* of the classics and the reader's acculturation to it.[10] Fortunately, in the legal context, this "dialogue" is measurable and concrete in the form of the ubiquitous legal citation, which by design invokes the prior text for the reader of the subsequent.

It is widely accepted that Roman law has long been the subject of lively scholarly interest and debate in American legal circles, and that it has permeated what M.H. Hoeflich characterized as "high legal cul-

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[7] Charles Martindale, Redeeming the Text 7 (1993) [hereinafter Martindale, Redeeming the Text].

[8] *Id.*

[9] Martindale, *The Validity of Comparisons*, *supra* note 6, at 46. This, of course, nearly brings the argument full circle from reception studies (what we can learn about the prior from the subsequent) back to the more straightforward study of influence (understanding the subsequent by its roots in the prior). *See* Ralph Hexter, *Literary History as a Provocation to Reception Studies*, *in* Classics and the Uses of Reception 23, 23 (Charles Martindale & Richard F. Thomas eds., 2006). However, in this case, demonstrating the substantive impact of Justinian's *Corpus* on American Jurisprudence could fulfill either thesis.

[10] Martindale, Redeeming the Text, *supra* note 7, at 8.

ture."[11] The Supreme Court has cited Justinian's *Corpus* sparsely but steadily since the revolution, in cases ranging from the mundane (possession of game birds with the intent to transport them out of state) to the landmark (*Dred Scott*).[12] Oliver Wendell Holmes, however, memorably accused Roman law of merely contributing "a few Latin maxims with which to ornament the discourse" and warned the aspiring lawyer off that course of study.[13] Many scholars have questioned whether Roman law in general, and the authors of its canon, including its last great exponent, Justinian, have had any substantive impact on American law, but without conclusive resolution.[14] In order to begin to answer this question, two scholars have undertaken surveys to determine exactly how often and in what contexts American judges and practitioners have cited Roman sources historically. R.H. Helmholz compiled and analyzed a list of all citations to civil law sources (including later, non-Roman sources) in all represented American jurisdictions between 1790 and 1825,[15] while Samuel J. Astorino made a survey of Roman law as cited by the U.S. Supreme Court in the twentieth century.[16] Other, older, surveys exist, but as Helmholz notes, they are

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[11] Hoeflich, *supra* note 1, at 1743. Hoeflich defines this term, as he uses it, to mean "the development of an accepted body of work and concentration upon a specific universe of issues by an educated elite." *Id.* at 1723.

[12] Geer v. Connecticut, 161 U.S. 519, 523, 527 (1896) (citing J. INST. 2.1.12, DIG. 41.1 (Gaius, Rer. Cott. 2)), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 479 (1856) (Daniel, J., concurring) (citing J. INST. 1.3–5), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

[13] Holmes, *supra* note 4, at 475–76.

[14] *See, e.g.*, Samuel J. Astorino, *Roman Law in American Law: Twentieth Century Cases of the Supreme Court*, 40 DUQ. L. REV. 627, 632 (2002) ("Was civil law used in the United States only for legal education, systematic thinking and scholarly adornment, as argued by Dean Hoeflich and Peter Stein who maintained that Roman law made no headway in the courtroom as a working component of American jurisprudence?"); R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1650 (1992) ("The question for anyone interested in the growth of American law, however, cannot rest with noting a general admiration for classical and European ideas. Instead, one must ask whether or not this habit of mind made any substantial difference in the development of American law."); Hoeflich, *supra* note 1, at 1743 (finding the influence of Roman law confined to academic and cultural circles, and not generally reaching "the practical side" of the law); Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 423 (1966) (characterizing the impact of Roman law on American practitioners as "disappointing").

[15] Helmholz, *supra* note 14, at 1651–52.

[16] Astorino, *supra* note 14, at 633 (covering the period of 1788 to 1999).

"practically devoid of reference to case law," focusing chiefly the Roman contributions to secondary and educational materials.[17]

This Article undertakes a survey of cases that is at once broader in scope as to the time period considered, and narrower in scope than either Helmholz or Astorino in that it only considers the published opinions of the Unites States Supreme Court, but considers all such published opinions, from the earliest exemplar to the present day. This Article's survey is also narrower in scope than either of the above cited in that it only considers the reception and influence of Justinian through citations to his *Corpus Juris Civilis*, while Helmholz and Astorino include all Civil authority and Roman law in general, respectively.[18]

Using the case survey, this Article seeks to answer the question of whether Justinian's *nachleben* in the U.S. Supreme Court has been substantive or merely decorative by applying Martindale's strong thesis: that Justinian's *Corpus*, because it is cited repeatedly in the reported cases of the Supreme Court, *cannot* be read *but* through that lens. Thus, to apply the inverse of the strong thesis, simply by reading and citing Justinian as it does, the Court by its act of reception cannot help but be influenced in substantive ways by Justinian. This Article accomplishes that task by identifying and analyzing a particular point of substantive law in reported Supreme Court decisions, which was drawn directly from the *Corpus Juris Civilis* of Justinian. This will show that Justinian's "afterlife" and influence on American law, and *a fortiori*, the influence of Roman law as a whole, exceeds the limits of the merely "ornamental" and has provided real substance on which centuries of American judges and lawyers have drawn.

Part II provides a brief sketch of the historical background of Justinian and the *Corpus Juris Civilis*, as well as of the contents and organization of the *Corpus*. Part III identifies and discusses a particular point of substantive law that has been the most popular basis for Supreme Court holdings of any found in the *Corpus*. Part IV briefly concludes. An Appendix containing the original research that formed the basis for this Article in tabular format follows.

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[17] Helmholz, *supra* note 14, at 1652 n.13. *Contra* Astorino, *supra* note 14, at 633 (noting several case-based works from the early twentieth century discussing Roman law, now necessarily out of date).

[18] Helmholz, *supra* note 14, at 1651–52; Astorino, *supra* note 14, at 633.

II. Background Sketch: the History and Contents of the *Corpus*

It is far beyond the scope of this Article to attempt a thorough history of the *Corpus* or a complete exposition of its contents, and thoroughly unnecessary on account of the many able treatments of the subject available.[19] However, for the reader not intimately familiar with Roman law generally, and Justinian's *Corpus* in particular, some groundwork is called for before discussing its reception.

A. *The Contents and Structure of the* Corpus

Before discussing the *Corpus*'s origins and its path through its own *nachleben*, it is necessary to introduce the work itself. As Justinian conceived it, his *Corpus* has three major divisions: the *Institutes*, the *Codex*, and the *Digest* or *Pandects* (Justinian used these names interchangeably[20]).[21] Another division, the *Novels*, would be added soon after, but was not part of the original scheme.[22] All three of the original divisions of the *Corpus* were compiled from earlier sources (appropriately redacted to reflect Justinian's legal judgments) ranging from scholarly comments to ancient imperial edicts, but all were given the force of law by Justinian's fiat in the *Constitutiones*[23] Imperatoriam Maiestatem and *Tanta*.[24] There is broad overlap between the subjects covered by each division, though they are not treated in the same order within each division.

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[19] *See, e.g.*, Barry Nicholas, An Introduction to Roman Law 38–42 (1962) (discussing the history and process of Justinian's codification project); Merryman, *supra* note 3, at i (providing a comprehensive introduction to the world of civil law, including the background and influence of Justinian's work); Birks & McLeod, *supra* note 2, at 9 (discussing the background, circumstances, and method of compiling the text of the *Corpus*); Stein, *Justinian's Compilation*, *supra* note 3, at 1 (discussing a concise history of *Corpus* and its contents).

[20] Constitutio Imperatoriam Maiestatem, 4.

[21] Stein, *Justinian's Compilation, supra* note 3, at 1.

[22] Birks & McLeod, *supra* note 2, at 9 ("[The *Novels*] were not an original part of Justinian's great plan to remake the law library.").

[23] *Constitutio* is the Latin name given to an imperial pronouncement with the force of law. Oxford Latin Dictionary 420–21 (2006) (*s.v. constitutio*, definition 5).

[24] Constitutio Imperatoriam Maiestatem, 7 (promulgating the *Institutes*, dated Nov. 21, 533); Dig. (Constitutio Tanta, 1) (promulgating the *Digest*, dated Dec. 16, 533). The *Codex* already had the force of law because it was composed of imperial *constitutiones*. Stein, *Justinian's Compilation, supra* note 3, at 2. "Justinian entirely altered the status of the material contained in the Corpus Iuris. He made the whole work his own and gave all parts of it, even the Institutes, the status of legislation enacted with his authority." *Id.*

The *Institutes* is the most attractive and accessible part of the *Corpus* for modern audiences, especially as an entrée into Roman law and the Civil canon, no doubt because Justinian intended it as an introductory textbook on Roman law, albeit one with statutory force.[25] In the *constitutio*, by which he gave this part of his *Corpus* the force of law, Justinian himself describes the purpose of the *Institutes* as follows:

> I have especially commanded that they[26] compose the Institutes with my authority and support so that it may be possible for you to learn from the original cradle of the law rather than from ancient stories and for you to seek out the law from the imperial splendor, and that your ears take in nothing useless to your mind and nothing incorrectly stated, and that you grasp the essential themes of things.[27]

The *Institutes* are themselves divided into four "books:" (1) the law of persons,[28] (2) the law of property and succession,[29] (3) more on the law of succession and the law of obligations and sales,[30] and (4) the law of private and public wrongs.[31] This fourfold division by legal principles, which Justinian inherited from Gaius's *Institutes* of some four centuries earlier, has in turn been very influential, despite the apparent lack of internal cohesion.[32]

The *Institutes* give the impression of uniformity, but even they, like the rest of the *Corpus*, are a patchwork compiled from earlier works rather than drafted new for the occasion. Justinian himself says of the sources and promulgation, that

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[25] Constitutio Imperatoriam Maiestatem, 3.

[26] Tribonian and the other commissioners. *See infra* note 51.

[27] Constitutio Imperatoriam Maiestatem, 3. All translations are the author's from the Latin as found in the critical texts of Kreuger, Mommsen, and Schoell unless otherwise stated. *See* 1 Corpus Iuris Civilis, Institutiones et Digesta (Kreuger & Mommsen eds., Berlin 1877); 2 Corpus Iuris Civilis, Codex Iustinianus (Kreuger ed., Berlin 1877); 3 Corpus Iuris Civilis, Novellae (Schoell ed., Berlin 1895). I have striven to preserve the arrangement and character of the original, not to produce elegant English. For an excellent translation, see Birks & McLeod, *supra* note 2, at 33. The original is as follows: "*[S]pecialiter mandavimus, ut nostra auctoritate nostrisque suasionibus componant [I]nstitutiones: ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere, et tam aures quam animae vestrae nihil inutile nihilque perperam positum, sed quod in ipsis rerum optinet argumentis, accipiant.*"

[28] J. Inst. 1.

[29] *Id.* at 2.

[30] *Id.* at 3.

[31] *Id.* at 4.

[32] *See* Alan Watson, *The Structure of Blackstone's Commentaries*, 97 Yale L.J. 795, 796 (1988). This influence extended to Blackstone himself, by way of Matthew Hale and Dionysius Gothofredus, and inspired the four-book structure of his *Commentaries*. *Id.* at 802.

> [the *Institutes*] were compiled from all the "institutes" of the ancients but principally from the works of our own Gaius, as much from his *Institutes* as from his *Everyday Law*, and from many other works. When the three skilled men appointed to the task presented to them to me, I read them and acknowledged them, and ascribed the fullest force of my *constitutio* to them.[33]

The *Codex* was also based on an earlier model: the *Codex* of Emperor Theodosius II, compiled about a century earlier.[34] As noted above, the Latin title of this division of the *Corpus* simply means "the Book," and in short, consisted of a compendium of *constitutiones*.[35] The C*odex* was an established genre of legal text, to which the archetype of Theodosius II and several others already in existence belonged.[36] The compilers of Justinian's *Codex* simply had to combine all the relevant *constitutiones* that had been issued between the prior official *Codex*, that of Theodosius II promulgated in the year 438, with the pre-existing *constitutiones* drawn from the earlier collections that Justinian deemed good law.[37]

The Codex contains twelve books encompassing 763 titles, each comprised of a number of *constitutiones*.[38] A typical citation to the Codex contains the number of the book cited, followed by the number of the title and *constitutio*, and occasionally a further subdivision within the *constitutio*. This is followed by the name of the emperor who issued the *constitutio* and the year (if available), thus: Code Just. 5.8.2.pr (Zeno), for the "*principio*," or introduction, to a *constitutio* of the emperor Zeno found second in the eighth title of the fifth book of the *Codex*, the date of which is unknown.[39]

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[33] Constitutio Imperatoriam Maiestatem, 6. The original is as follows: "*Quas ex omnibus antiquorum institutionibus et praecipue ex commentariis Gaii nostri tam institutionum quam rerum cottidianarum aliisque multis commentariis compositas cum tres praedicti viri prudentes nobis optulerunt, et legimus et cognovimus et plenissimum nostrarum constitutionum robur eis accommodavimus.*"

[34] See Stein, *Justinian's Compilation*, *supra* note 3, at 1.

[35] *See* Birks & McLeod, *supra* note 2, at 11. Indeed, it was this application of the new technology of turnable pages, along with the Bible (from the Greek *βιβλίον* (**biblion*), also simply meaning "Book") that led to the ultimate supremacy of the book over the scroll.

[36] *Id.* at 9.

[37] *Id.*

[38] *See* 2 Corpus Iuris Civilis, Codex Iustinianus, *supra* note 27, at vii–xiiii.

[39] The Code Just. 5.8.2.pr. (Zeno) reads: "The most unspeakable crime of marriage to the daughter of a brother or sister, which is condemned by the most hallowed constitutiones under threat of gravest punishment, I forbid in all respects following the same policy of the existing divine sanction." In the original: "*Nefandissimum scelus fratris sororisve filiae nuptiarum, quod sacratissimis constitutionibus sub gravissimae poenae interminа-*

The *Digest* may be Justinian's greatest achievement as a legislator and codifier. Certainly, it is his longest, containing fifty books and coming to approximately four times the length of the *Codex*.[40] The *Digest* contains the excerpted and categorized wisdom of centuries of classical jurists, none more recent than approximately two hundred years before Justinian's present.[41] Such a collection was totally unprecedented in Roman law.[42] It is important to note that while much of the text of the *Digest* is derived originally from what a modern reader would consider secondary sources, the *Digest* was granted the force of law, just as the *Institutes* were, by imperial fiat.[43]

As noted, the *Digest* is divided into fifty books, which together contain 432 individual titles.[44] A typical citation to the *Digest* contains the number of the book cited, followed by the number of the title and subdivision or fragment. Again, some fragments also have further subdivisions of their own. Such a citation should also contain the name of the original author of the fragment and the work in which it was found and its location within that work. For example: Dig. 28.1.4 (Gaius, Inst. 2), which indicates that the cited fragment is the fourth in the first title of book twenty-eight of the *Digest*, and was excerpted from book two of Gaius's *Institutes*.[45]

The *Novels* is a different sort of text because it was not part of the original plan for the *Corpus*.[46] It contains the *constitutiones* that Justinian issued after the completion of the *Corpus* proper, most of which are in Greek, unlike everything else we have treated so far, which has been in Latin. Much of the legal substance of the *Novels* opposes and there-

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tione damnatum est, iterato praesentis divinae sanctionis tenore modis omnibus prohibemus." See The Bluebook: A Uniform System of Citation 444 tbl.T.2.34 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015), for a description of how to properly cite Justinian Code.

[40] *See* Stein, *Justinian's Compilation*, *supra* note 3, at 1.

[41] *Id.*

[42] *Id.*

[43] *See* Constitutio Tanta, 1.

[44] *See* Birks & McLeod, *supra* note 2, at 10.

[45] "If we should ask whether a will is valid, we ought first to take notice of whether he who had made the will had the capacity to make a will, and then, if he did, we should determine if it was witnessed according to the rules of civil law." In the original: "*Si quaeramus, an valeat testamentum, in primis animadvertere debemus, an is qui fecerit testamentum habuerit testamenti factionem, deinde, si habuerit, requiremus, an secundum regulas iuris civilis testatus sit.*" Dig. 28.1.4 (Gaius, Inst. 2). See The Bluebook: A Uniform System of Citation 444 tbl.T.2.34 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015), for a discussion on how to properly cite the Digest.

[46] *See* Birks & McLeod, *supra* note 2, at 9.

fore amends the law of the *Corpus* proper.[47] The *constitutiones* in the *Novels* are numbered sequentially rather than organized by topic, and are cited as such, along with any internal subdivisions of the *constitutio* in question, followed by the year, as Nov. 22 (535).[48]

B. *The Birth and Life of the* Corpus

In the words of Gibbon,

> When Justinian ascended the throne, the reformation of the Roman jurisprudence was an arduous but indispensable task. In the space of ten centuries, the infinite variety of laws and legal opinions had filled many thousand volumes, which no fortune could purchase and no capacity could digest. Books could not easily be found; and the judges, poor in the midst of riches, were reduced to the exercise of their illiterate discretion.[49]

Faced with this reality, Justinian's grand plan was to resurrect his idea of Rome's once great jurisprudence by promulgating a complete body of law, drawing from the existing body of Roman law and at the same time superseding it.[50] This way, he could save the still-sound heartwood of the law from the decadent overgrowth that was strangling it.

While Justinian was an able administrator and legislator, he did not oversee the task himself, and instead appointed a panel of experts heading a commission. Chief among these was Tribonian, who held the office of quaestor and was put in charge of Justinian's second law commission, which was convened with the goal of compiling what would become the *Corpus*, on December 15, 530.[51] In addition to Tribonian, the commission consisted of another imperial official, Constantinus, four distinguished law professors,[52] and eleven practicing

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[47] *See, e.g.*, Birks & McLeod, *supra* note 2, at 9 n.7 (citing Nov. 22 (535), by which Justinian "thoroughly Christianized and codified" the law of marriage).

[48] *See* Birks & McLeod, *supra* note 2, at 9. Unlike the provisions of the *Codex* and *Digest*, many of which have the benefit of having been excerpted and condensed from the original source material, the *constitutiones* of the *Novels*, and even their subdivisions, generally run for pages. Thus, it would not be worthwhile to quote an example here.

[49] 4 Edward Gibbon, The History of the Decline and Fall of the Roman Empire 328 (Philadelphia, J. B. Lippincott & Co. 1875).

[50] This concept is common to subsequent codes of the civil law tradition, even when they differ in substance. Merryman, *supra* note 3, at 28.

[51] Tony Honoré, Tribonian 48 (1978) [hereinafter Honoré, Tribonian]; Constitutio Imperatoriam Maiestatem, 3.

[52] Among these scholars were Dorotheus and Theophilus, both mentioned by name as responsible for the *Institutes*, along with Tribonian in the Constitutio Imperatoriam Maiestatem. Constitutio Imperatoriam Maiestatem, 3.

lawyers.[53] The commission had a vast task before it, and it was despaired of whether it could be completed in even ten years of work.[54] Something on the order of three million lines had to be read, about twenty times the length of the finished product, just to survey the source material for the *Digest* alone.[55] However, almost miraculously, the project was completed in just over three years, with the *Digest* (the last piece to be promulgated) given the force of law effective December 30, 533.[56] So serious was Justinian about the completeness and sufficiency of the *Corpus* as a source of law, that he banned citation to other sources,[57] forbade the preparation of any commentaries on the *Corpus*,[58] and ordered burned the manuscripts that formed its source material.[59]

The period between the promulgation of the *Corpus* and the American Revolution, over twelve hundred years, saw much secondary scholarship on the *Corpus*, including a vast volume of commentary produced by several scholarly schools—no doubt to Justinian's extreme

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[53] *See* HONORÉ, TRIBONIAN, *supra* note 51, at 50.

[54] *Id.*

[55] Birks & McLeod, *supra* note 2, at 10; Stein, *Justinian's Compilation*, *supra* note 3, at 1.

[56] Constitutio Tanta, 1. Much ink has been spilled in trying to reconstruct exactly how the commissioners worked and what their methods were, especially in compiling the *Digest*. *See, e.g.*, TONY HONORÉ, JUSTINIAN'S DIGEST: CHARACTER AND COMPILATION (2010) [hereinafter HONORÉ, JUSTINIAN'S DIGEST]; David Pugsley, *On Compiling Justinian's Digest: Dates*, 20 SYRACUSE J. INT'L L. & COM. 161 (1994). Needless to say, this far beyond the scope of this Article.

[57] Constitutio Tanta, 19.

> Where laws are called for, either in court or other proceeding, let no one try to recite or present anything from books other than our same Institutes, our Digest, and our *consitutiones* which we have compiled and promulgated, lest the violator be subject to a crime of falsehood and suffer under the gravest penalty together with the judge who permits it to be heard.

In the original:

> *Nec in iudicio nec in alio certamine, ubi leges necessariae sunt, ex aliis libris, nisi ab isdem institutionibus nostrisque digestis et constitutionibus a nobis compositis vel promulgatis aliquid vel recitare vel ostendere conetur, nisi temerator velit falsitatis crimini subiectus una cum iudice, qui ei audientiam accommodabit, poenis gravissimis laborare.*

[58] *Id.* at 21.

> Let no one of those who are skilled in the law, now or in the future, dare to attach commentaries to these laws, except to the extent that he wants to translate them into Greek in the same arrangement and sequence, with the Latin appended below (this is what the Greeks call a 'foot note').

In the original:

> *[U]t nemo neque eorum, qui in praesenti iuris peritiam habent, nec qui postea fuerint audeat commentarios isdem legibus adnectere: nisi tantum si velit eas in Graecam vocem transformare sub eodem ordine eaque consequentia, sub qua voces Romanae positae sunt (hoc quod Graeci kata poda dicunt). . . .*

[59] *See* MERRYMAN, *supra* note 3, at 8.

consternation if he knew.[60] However, the conditions immediately following its promulgation were not conducive to in-depth study of the *Corpus*.[61] In the Greek-speaking world of the Eastern Empire, the Latin texts of *Corpus* were inaccessible to all but legal technocrats, and in the West, even where Latin was still well understood, Germanic invasions had rendered political conditions too unstable for sustained scholarly inquiry.[62]

The Middle Ages saw a resurgence of interest in the *Corpus*, coupled with the resources and stability needed to study them, which gave rise to successive schools of interpretation.[63] These schools all relied heavily on the received text of the *Corpus* and produced vast quantities of commentary, often at the word and sentence level, which itself assumed canonical authority.[64] The schools all rose and fell in their turn—the Glossators, the Commentators—and though they had differing philosophies and outlooks, all worked in a similarly textual mode, as their names suggest.[65] The Humanists followed, who "sought to discard the accretion of commentary which had smothered the texts, . . . like a giant creeper."[66] They focused on restoring the integrity of the original text.[67]

While the conceptual contributions of the medieval academics are significant, the dawn of modern civil law as we know it today on the European continent and elsewhere came with the promulgation of the French Civil Code of 1804, more commonly known as the Napoleonic Code, which was consciously modeled on Justinian's *Corpus*.[68] There are many noteworthy similarities between this and the promulgation of Justinian's *Corpus* some 1,270 years prior. Both works were intended as a complete and exhaustive source of law, which at once drew from and replaced older sources, and citations to other sources were pre-

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[60] Stein, *Justinian's Compilation*, *supra* note 3, at 2.
[61] *Id.* at 2–6.
[62] *Id.* at 8–9.
[63] *Id.* at 2–5.
[64] *Id.* at 2–6.
[65] *Id.* at 5–7.
[66] *Id.* at 8 (quotation omitted).
[67] *Id.* at 8–9.
[68] *See* MERRYMAN, *supra* note 3, at 10–11; Basil Markesinis, *Two Hundred Years of a Famous Code: What Should We Be Celebrating?*, 39 TEX. INT'L L.J. 561, 565 (2004).

cluded.[69] And while Napoleon did not expressly forbid commentaries on his Code, he expressed the hope that none would be prepared.[70]

Other independent codification projects based on Justinian's work would be undertaken elsewhere across Europe during the eighteenth and nineteenth centuries.[71] The modern civil law regimes of Europe, South America and elsewhere would be founded directly on these intermediaries, carrying Justinian's concept of a unified and systematic body of law into the present day.[72]

III. The Afterlife: Alluvium and Other Points of Justinian Law in Supreme Court Opinions

Having established the foundation of what Justinian's *Corpus* is and what it contains, this Article may now turn to how it has been cited in the reported decisions of the United States Supreme Court. Before examining any discrete points of law, however, some broad trends are worth acknowledging. As noted above,[73] the *Digest* is by far the most voluminous part of the *Corpus*, so it should come as no surprise that the *Digest* is the most cited part of the *Corpus*, too, with twenty-one citations to twenty provisions.[74] The *Institutes* follows with nineteen citations to fifteen distinct provisions, while the *Codex* (five citations to four provisions) and *Novels* (four citations to four provisions) trail somewhat distantly in popularity.[75] Few individual provisions are cited more than once, and only one provision is cited more than twice: *Insti-*

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[69] *See* Merryman, *supra* note 3, at 62. As a patriotic lawyer of the period allegedly declared, "I know nothing of the civil law; I know only the Code Napoléon." *Id.*

[70] See *id.* ("According to a well-worn story, his reaction when he was informed that the first commentary had been published was to exclaim: 'My code is lost.'").

[71] *Id.* at 29–31 (discussing other civil codes, such as the Prussian Landrecht of 1794).

[72] *Id.* at 32–34.

[73] *See supra* Part II.A.

[74] This tally counts the citation of J. Inst. 1.3–5 in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 479 (1856) (Daniel, J., concurring) (citing J. Inst. 1.3–5), *superseded by constitutional amendment*, U.S. Const. amends. XIII, XIV, and of J. Inst. 2.1.3–5 in *Ker & Co. v. Couden*, 223 U.S. 268, 275–76 (1912) (citing J. Inst. 2.1.3–5) as one citation each, and does not include those references to the *Institutes* that are not citations by book and number, even when the particular provision referred to is clear from context, as in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744 (1950). *See infra* Appendix. The tally also does not include citations made to the *Institutes* apparently in error, as in *Hardin v. Jordan*, 140 U.S. 371, 390 (1891) which cites to "Inst. lib. 8, tit. 3, f. 23, § 1," (expressed in modern format as "J. Inst. 8.3.23.1") which is not a valid citation to the *Institutes*, while Dig. 8.3.23.1 (Paulus, Ad Sab. 15) is valid and clearly intended in context.

[75] *See infra* Appendix.

tutes 2.1.20, which is cited four times.[76] This provision falls within the lengthy and very popular title one of book two of the *Institutes*, which is cited no fewer than ten times.[77]

Below, this Article discusses at length the substantive impact that *Institutes* 2.1.20 has made on Supreme Court jurisprudence. The idea that Roman law is at best an ornament or source of rhetorical flourishes in American courts will be dispelled by proving that this singular, but important, point of Justinian law has served as a precedential source for over a century in our highest court.

The relevant passage from the *Institutes* reads as follows:

> What the river adds to your land by alluvium becomes yours by the law of nations. Alluvium is a hidden increase. 'By alluvium' means that it only seems to be added, because it is added so slowly that you cannot make out how much is being added at any particular moment in time.[78]

This obscure point of property law has been cited more frequently than any other point of law from the entire *Corpus*.[79] Furthermore, in each of the cases that cites it, it is relied upon as at least persuasive authority and therefore serves a greater purpose than mere ornamentation.

A. *Watkins v. Holman's Lessee*

The first mention of *Institutes* 2.1.20 in Supreme Court jurisprudence is in the 1842 case of *Watkins v. Holman's Lessee*.[80] The case arose

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[76] *Id.*

[77] *Id.*

[78] J. INST. 2.1.20. The original reads: "*[Q]uod per alluvionem agro tuo flumen adiecit, iure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adici, quod ita paulatim adicitur ut intellegere non possis, quantum quoquo momento temporis adiciatur.*" *Id.* This passage from the *Institutes* of Justinian can be traced back to the *Everyday Law* of Gaius, as is shown by the extreme similarity of this passage to DIG. 41.1.7.1 (Gaius, Rer. Cott. 2), which is identical except for the grammatical person and number of the pronouns and the omission of the phrase "*Est autem alluvio incrementum latens*" ("Alluvium is a hidden increase."): "*[Q]uod per alluvionem agro nostro flumen adicit, iure gentium nobis adquiritur. per alluvionem autem id videtur adici, quod ita paulatim adicitur, ut intellegere non possimus, quantum quoquo momento temporis adiciatur.*"

[79] Ker & Co. v. Couden, 223 U.S. 268, 275–76 (1912); Jefferis v. E. Omaha Land Co., 134 U.S. 178, 192 (1890); Cty. of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 66 (1874); Watkins v. Holman's Lessee, 41 U.S. (16 Pet.) 25, 49 (1842); *see infra* Appendix.

[80] 41 U.S. (16 Pet.) 25, 49 (1842). The citation to the *Institutes* appears in the Court's extensive syllabus, but no direct citation to Justinian appears in the opinion of Justice McLean, though there is an explicit reference to it. *Id.* at 54; *see also infra* text accompanying note 90.

out of a dispute about riparian rights in Mobile, Alabama.[81] Under the law of the Spanish Empire, which immediately preceded the United States as the sovereign in possession of Mobile, the "water lots" adjacent to certain riparian lots on the Mobile River were Crown property, and thus riparian rights did not necessarily flow from the possession of such a riparian lot.[82] The possession of these water lots passed to the United States when it assumed control of Mobile, but the United States surrendered them to the owners of the adjacent riparian lots by act of Congress in May of 1824.[83] Holman owned an interest in a riparian lot in Mobile, but died in 1822.[84] In April of 1824, his estate, which was insolvent, sold the lot to Holman's out-of-state business partner, Brown, who had held the rest of the interest in the lot all along.[85] Eventually, a dispute arose between Holman's lessee, who was occupying the property, and Watkins, Brown's successor, about whether the riparian rights passed to Brown or remained in Holman's estate, and whether the occupants could adversely possess the riparian rights.[86] The Court reached the decision that "a mere intruder is limited to his actual possession; and that the rights of a riparian proprietor do not attach to him" by relying in part on *Institutes* 2.1.20.[87]

The Court rejected arguments regarding the effect of the landlord-tenant relationship and the effect of the sheriff's sale on adverse possession as distinct from the matter at hand, and noted that an en-

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[81] *Watkins*, 41 U.S. (16 Pet.) at 51–52.

[82] *Id.* at 52.

[83] *Id.*; Act of May 26, 1824, ch. 185, § 2.

> [A]ll the right and claim of the United States to so many of the lots of ground, east of Water street, and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots, known, under the Spanish government, as water lots, in [the] [sic] said city of Mobile, whereon improvements have been made, be, and the same are hereby, vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot, now designated as a water lot, or the Spanish government has made a new grant, or order of survey, for the same, during the time at which they had the power to grant the same; in which case, the right and claim of the United States shall be, and is hereby, vested in the person to whom such alienation, grant, or order of survey, was made, or in his legal representative; *Provided*, That nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual or individuals, or of any body politic or corporate.

Id.

[84] *Watkins*, 41 U.S. (16 Pet.) at 51.

[85] *Id.* at 59.

[86] *Id.* at 32.

[87] *Id.* at 55.

closure was unnecessary to establish possession.[88] The Court then proceeded to decide that an adverse possessor did not take riparian rights, commenting that "[t]he doctrines of the common law on this subject have been taken substantially from the civil law."[89] While the Court never mentions Justinian or cites to his work in its opinion, the Court's syllabus contains the following note, "The law of alluvion applies only to possession. 1 Justinian's Inst., book 2, tit. 1, par. 20," which immediately follows citations to the cases used to support the Court's conclusion on adverse possession.[90]

The relation of 2.1.20 to the subject matter of *Watkins* is tenuous, and no mention of it is made in the Justice's opinion. However, the direct citation in the syllabus coupled with the more oblique, but nonetheless clear, reference in the opinion, show that the Court had Justinian in mind when it reached its holding.[91] The observation that "[t]he doctrines of the common law on this subject have been taken substantially from the civil law" well illustrates the Court's way of thinking on this point, and functions as an overt attribution of the concept to civil law sources.[92] It is also noteworthy that while the Court discussed relevant common law precedent, it ultimately distinguished them factually and relied on the civil law rule.[93] The source of the rule is not stated in the opinion, but the direct citation in the syllabus supplies us with Justinian's *Institutes*.[94]

B. County of St. Clair v. Lovingston *and* Jefferis v. East Omaha Land Co.

The next two references to *Institutes* 2.1.20 by the Court are much more straightforward, and arise from disputes over title to the land formed by the deposit of alluvium on the banks of rivers. The first, *County of St. Clair v. Lovingston*,[95] pertains to land adjacent to the Mississippi River in Illinois, and the second, *Jefferis v. East Omaha Land Co.*,[96]

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[88] *Id.* at 53–54 (citing Jackson v. Bush, 10 Johns. 223, 223 (N.Y. Sup. Ct. 1813) (sheriff's sale); Jackson v. Hinman, 10 Johns. 292, 293 (N.Y. Sup. Ct. 1813) (sheriff's sale); Schauber v. Jackson, 2 Wend. 13, 16 (N.Y. Sup. Ct. 1828) (landlord-tenant); Ewing's Lessee v. Burnet, 11 Pet. 41, 41 (N.Y. Sup. Ct. 1837) (no enclosure necessary)).

[89] *Id.* at 55.

[90] *Id.* at 49.

[91] *Id.* at 55.

[92] *Id.*

[93] *Id.* at 58.

[94] *Id.* at 49.

[95] 90 U.S. (23 Wall.) 46 (1874).

[96] 134 U.S. 178 (1890).

which quotes *County of St. Clair*, pertains to land adjacent to the Missouri River in Iowa.[97] In both cases, surveyed riparian lots had increased in size by the action of the river, and disputes arose as to whether this new land passed under deeds that did not specifically mention the land, referring only to the original surveys, which did not account for the newly deposited areas.[98]

Both cases explicate the rule of law on alluvium in much the same way. The *Jefferis* Court begins by citing Gaius's *Institutes*,[99] but continues by immediately quoting Justinian's *Institutes* 2.1.20.[100] The Court in *County of St. Clair* opens its discussion by stating that "[t]he law in cases of alluvion is well settled," and then by quoting the relevant passage from Justinian.[101] Both cases then proceed to discuss the intermediate authorities on alluvium: Bracton, Blackstone, and several cases (including the earlier *County of St. Clair* in the case of *Jefferis*), all of which

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[97] *Id.* at 178.

[98] *See Jefferis*, 134 U.S. at 188 (explaining that the defendant's contention that accretions of greater or less extent were formed while the several successive grantees held the title, and such accretions did not pass by their respective deeds, which caused the title not to come to the plaintiff); *Cty. of St. Clair*, 90 U.S. at 62 ("Two questions are thus presented for our determination: One is, whether the river-line was the original west boundary of the surveys, or either of them? The other, if this inquiry be answered in the affirmative, is, to whom the accretion belongs?").

[99] "In the Roman law it was said, in the Institutes of Gaius, (book 2, § 70:) 'Alluvion is an addition of soil to land by a river, so gradual that in short periods the change is imperceptible; or, to use a common expression, a latent addition.'" *Jefferis*, 134 U.S. at 192. Notably, the passage from Gaius that the Court cites here is *not* the same as that cited by the Digest, which is from Gaius's work *Everyday Law;* rather, the Court in *Jefferis* quotes from Gaius's *Institutes*. *See supra* text accompanying note 79. The relevant passage reads:

> That which is added to what is ours by alluvium, becomes ours by the same law [that is, '*naturali ratione*,' by natural law]. 'By alluvium' means that it only seems to be added, because the river adds it to our land so gradually that we cannot tell how much is being added at any particular moment in time. That is, 'by alluvium' is commonly said to mean that the addition is so gradual that it deceives our eyes.

In the original:

> *[Q]uod per alluuionem nobis adicitur, eodem iure nostrum fit: per alluuionem autem id uidetur adici, quod ita paulatim flumen agro nostro adicit, ut aestimare non possimus, quantum quoquo momento temporis adiciatur: hoc est, quod uolgo dicitur per adluuionem id adici uideri, quod ita paulatim adicitur, ut oculos nostros fallat.*

G. Inst. 2.70.

[100] *Jefferis*, 134 U.S. at 192.

[101] *Cty. of St. Clair*, 90 U.S. at 66.

adopt the rule as stated in Justinian's *Institutes* 2.1.20.[102] Both courts adopt the rule found in Justinian.[103]

However, the question of whether the citations to the *Institutes* in each case were substantive or mere ornament is not resolved by the fact that the Court eventually adopted the rule, because it could rely on the more recent authorities cited to provide that. It is therefore important to consider the Court's motives in citing it, and whether the citation contributes anything beyond an air of erudition. Because *Jefferis* follows *County of St. Clair* closely and cites to a nearly identical string of authority to support the rule, and in fact quotes it, what is true for *County of St. Clair* will be true for *Jefferis*. Therefore, it is only necessary to discuss *County of St. Clair* in detail.

Justinian is positioned at the head of a litany of sources that includes other historical and persuasive authority, like the oft-cited Blackstone. In this context, therefore, the Blackstone and the rest either stand or fall with Justinian as substance or flourish. The Court attributes Blackstone's definition of alluvium to Bracton, and then cites to Sir Matthew Hale's observation in *De Jure Maris* that "Bracton followed the civil law."[104] This shows that the purpose of the chain of citations is to trace the concept back to its origin: Justinian, or Gaius as cited by Justinian. While it would have been sufficient for the court to cite to other precedent in formulating the rule on alluvion, by tracing the concept back to Rome, the Court explicates the rule by comparing the various statements of it over time. Thus, the extensive citation and quotation of ancient sources, especially Justinian (and Gaius), lend more than ornamentation to the Court's reasoning in both cases.[105]

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[102] *Jefferis*, 134 U.S. at 192–94; *Cty. of St. Clair*, 90 U.S. at 66–69.

[103] *Jefferis*, 134 U.S. at 192–94; *Cty. of St. Clair*, 90 U.S. at 68 ("In the light of the authorities[,] alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous.").

[104] *Cty. of St. Clair*, 90 U.S. at 67.

[105] The Roman law as used by the Court in both cases has percolated down to lower courts as well. *Compare* Omaha Indian Tribe, Treaty of 1854 *with* United States v. Wilson, 614 F.2d 1153, 1156 (8th Cir. 1980); United States v. Milner, 583 F.3d 1174, 1187 (9th Cir. 2009) (citing *Cty. of St. Clair*, 90 U.S. at 66–67).

C. Ker & Co. v. Couden

Ker & Co. v. Couden,[106] decided in 1912, is the most recent case within the scope of this Article to cite *Institutes* 2.1.20.[107] Unlike the cases just discussed, *Ker & Co.* arose out of a dispute over sedimentary accretions to littoral, rather than riparian, property.[108] Also unusually, it arose out of a true civil law jurisdiction—the Philippines, which was an American possession at the time.[109] No doubt because the Court found itself in the position of interpreting unfamiliar Spanish law, it turned to the Roman archetypes, noting in Spanish colonial law "the occasional intimations of the doctors of the Roman law," especially on the matter of alluvium.[110]

The Court began with *Institutes* 2.1.20, observing that because it is a clear statement of the law as to riparian accretions, if it could be extended to littoral accretions, the matter could be easily resolved.[111] "But the Roman law is not like a deed or a modern code prepared *uno flatu*," the Court continued.[112] "History plays too large a part to make it safe to generalize from a single passage in so easy a fashion."[113] The argument then takes a unique twist: the Court distinguishes *Institutes* 2.1.20 from the facts at hand in favor of a different provision of the *Corpus*.[114] Justice Holmes thus rejects one point of Roman law in favor of another, more apt point. The court states: "[W]e find that the right of alluvion is not recognized for lakes and ponds," followed by a citation to the *Digest*, "(D. 41, 1, 12)."[115]

The Court found further support for this distinction elsewhere in the *Digest*, and even paraphrased passages, lapsing in and out of Latin:

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[106] Ker & Co. v. Couden, 223 U.S. 268, 275–76 (1912).

[107] *Id.* It should not escape our notice that this opinion, with its concise but thorough exploration of several sections of the *Corpus* and general deference to Roman precedent, was authored by none other than Justice Holmes. *See supra* text accompanying note 13.

[108] *Ker & Co.*, 223 U.S. at 275.

[109] *See id.*

[110] *Id.*

[111] *See id.* at 276.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* (citing Dig. 41.1.12.pr (Callistratus, Inst. 2)). "Lakes and ponds may on occasion grow or dry up, but they retain their boundaries, and in this matter the law of alluvium ['*ius alluvionis*'] is not recognized." Dig. 41.1.12.pr (Callistratus, Inst. 2). In the original: "*Lacus et stagna licet interdum crescant, interdum exarescant, suos tamen terminos retinent ideoque in his ius alluvionis non adgnoscitur.*"

"We find further that *In* [sic] *agris limitatis jus alluvionis locum non habet.* And the right of alluvion is denied for the *agrum manu captum*, which was *limitatum* in order that it might be known (exactly) what was granted. D. 41, 1, 16."[116] The corollary point that the seashore is public property, at least as far as the waves reach, found in several places in the *Corpus*, also helped the Court to make its decision.[117]

The Court, in deciding that a sand spit formed by alluvium in Manila Bay did not belong to the owner of the abutting coast but to the state,[118] treated Justinian precedent as very persuasive, and explicated and analyzed points from the *Corpus* to a remarkable degree. The Court's reasoning runs roughly as follows: first, a basic and well-understood point on alluvium was identified.[119] This was quickly rejected because it did not match the facts at hand.[120] Then another, more obscure point of law that was more analogous to the facts at hand, though not directly on point, was raised.[121] The Court then bolstered this more indirect tack with a supporting general rule.[122] All of these points were drawn directly from (and cited to) the *Corpus*, and Latin phrases are bandied about indiscriminately.[123] Other authorities were considered, but none were examined as thoroughly or at such length.[124] Thus, *Ker & Co. v. Couden* is one of the strongest examples of direct reliance on Roman precedent in Supreme Court jurisprudence.

Of course, *Ker & Co.* arose out of the then-American possession of the Philippines, just as *Watkins* arose out of formerly Spanish territory

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[116] *Id.* (citing J. Dig. 41.1.16 (Florus, Inst. 6)). The complete section reads:

> It is settled that the law of alluvium has no place in lands that have been bounded ['*agris limitatis*']. Thus the divine Pius decreed, and Trabatius said that land, which is conceded by conquered foes in that circumstance that it comes to the state, possesses the alluvium and is not bounded. Land taken by hand ['*manu captum*'] is however bounded so that it may be known what is to be given to whom, what is to pass and what is to remain public.

Dig. 41.1.16 (Florus, Inst. 6). And in the original:

> *In agris limitatis ius alluvionis locum non habere constat: idque et divus pius constituit et trebatius ait agrum, qui hostibus devictis ea condicione concessus sit, ut in civitatem veniret, habere alluvionem neque esse limitatum: agrum autem manu captum limitatum fuisse, ut sciretur, quid cuique datum esset, quid venisset, quid in publico relictum esset.*

[117] *Ker & Co.*, 223 U.S. at 277 (citing J. Inst. 2.1.3-5, Dig. 43.8.3 (Celsus, Dig. 39)).

[118] *Id.* at 275–79.

[119] *Id.* at 275–76.

[120] *Id.* at 276.

[121] *Id.*

[122] *Id.* at 276–77.

[123] *Id.* at 275–77.

[124] *See id.* at 275–79.

on the Gulf of Mexico.[125] Thus, it would be easy to attribute the Roman influence on both decisions, and especially on *Ker & Co.* because the land in *Watkins* had come under common law jurisdiction by the date of the dispute, to the civilian jurisdictions giving rise to them and cabin off their influence accordingly. The subsequent history of these cases, however, shows that this would be a mistake. Both are cited as substantive precedent in numerous reported decisions of lower state and federal courts, showing how reliance on Justinian at the highest level has a real effect on the law as applied.[126]

IV. Conclusion

It is symbolic of the way that Justinian's *Corpus* has influenced American jurisprudence that Justice Holmes would disparage its usefulness in 1897 in *The Path of the Law*, and then, only fifteen years later, rely heavily on it in *Ker & Co.* By picking through centuries of published Supreme Court opinions for scattered references to the *Corpus*, this Article has demonstrated how, in certain discrete areas, American lawyers and jurists have turned to Justinian to answer tough questions which the common law could not solve, even though the vast majority of those using the law that this borrowing has engendered may have no idea of its roots.

Thus, the *Corpus'* influence is real—even if subtly felt in its *nachleben*. By the same token, we can therefore add one more chapter to the long history of Justinian's influence on law and legal theory throughout the world, one more chapter that we will keep in mind when reading Justinian—justifying the application of Martindale's strong thesis. The substantive influence of Justinian's *Corpus* can finally, therefore, put to rest the debate as to whether Roman law has influenced American law even at the highest levels.

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[125] *See generally U.S Territorial Acquisitions*, U.S. Hist., http://www.u-s-history.com/pages/h1049.html (last visited Mar. 20, 2015) (listing the history of the United States' territorial acquisitions).

[126] *See, e.g.*, Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002, 1004 (Okla. 1946) (citing to Watkins for the proposition that riparian rights do not attach to trespassers); State v. Balli, 173 S.W.2d 522, 542 (Tex. Civ. App. 1943), *aff'd* 190 S.W.2d 71 (Tex. 1944) (quoting *Ker & Co.* in discussing the law of accretion as applicable to sandbars).

Appendix

Codex			
Alden v. Maine	527 U.S. 706, 797	1999	Code Just. 1.4.14 (Leo)
Kaiser Aluminum & Chemical Corp. v. Bonjorno	494 U.S. 827, 855	1990	Code Just. 1.14.7 (Theodosius et Valintinianus 440)
Trustees of Dartmouth College v. Woodward	17 U.S. (4 Wheat.) 518, 578 n.7	1819	Code Just. 1.14.7 (Theodosius et Valintinianus 440)
Brewer's Lessee v. Blougher	39 U.S. (14 Pet.) 178, 197	1840	Code Just. 5.8.2 (Zeno)
Bowers v. Hardwick	478 U.S. 186, 196 (1986) *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)	1986	Code Just. 9.9.31 (Constantius et Constans 342)
Digest			
The Monte Allegre	22 U.S. (9 Wheat.) 616, 626 n.1	1824	Dig. 1.1 (Ulpianus, Inst. 1)
Alden v. Maine	527 U.S. 706, 767 n.6	1999	Dig. 1.3.31 (Ulpianus, Ad legum Iul. et Pap., 13)
Osborn v. Nicholson	80 U.S. (13 Wall.) 654, 660 n.16	1871	Dig. 2.14.77[127]
The Monte Allegre	22 U.S. (9 Wheat.) 616, 631 n.4	1824	Dig. 4.4.16.4 (Ulpian, Ad Edictum 11)
Jackson v. Ludeling	99 U.S. 513, 529	1878	Dig. 5.3.38 (Paulus, Ad Edictum, 20)
Hardin v. Jordan	140 U.S. 371, 390	1891	Dig. 8.3.23.1[128] (Paulus, Ad Sabinum 15)
New Orleans v. United States	35 U.S. (10 Pet.) 662, 710	1836	Dig. 13.5.1.pr. (Ulpianus, Ad Edictum 27)
Ralli v. Troop	157 U.S. 386, 393	1895	Dig. 14.2.1.1 (Paulus, Liber Sententiarum 2)

[127] Cited thus, but Dig. 2.14 only has 62 sections.

[128] Cited as "Inst. lib. 8, tit. 3, f. 23, § 1," however no such provision of the *Institutes* exists, and the entry in the *Digest* answering to that citation is clearly indicated by context.

Brown v. Gilman	17 U.S. (4 Wheat.) 255, 292	1819	Dig. 18.1.19[129] (Paulus, Ad Edictum 33)
Conard v. Atlantic Ins. Co. of N.Y.	26 U.S. (1 Pet.) 386, 434	1828	Dig. 22.2.1 (Modestinus, Pandectae 10)
Conard v. Atlantic Ins. Co. of N.Y.	26 U.S. (1 Pet.) 386, 434	1828	Dig. 22.2.5 (Scaevola Respons. 6)
Conard v. Atlantic Ins. Co. of N.Y.	26 U.S. (1 Pet.) 386, 434	1828	Dig. 22.2.6 (Paulus, Quaest. 25)
Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States	136 U.S. 1, 52	1890	Dig. 33.2.16 (Modestinus, Respons. 9)
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Ker & Co. v. Couden	223 U.S. 268, 276	1912	Dig. 41.1.16 (Florus, Inst. 6)
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[129] Cited as "Dig. lib. 18, tit. 1, 1. 19," which must refer to Dig. 18.1.19, from which quoted material appears in the text.

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[130] Clearly indicated by context but not cited by book and section number.
[131] Clearly indicated by context but not cited by book and section number.