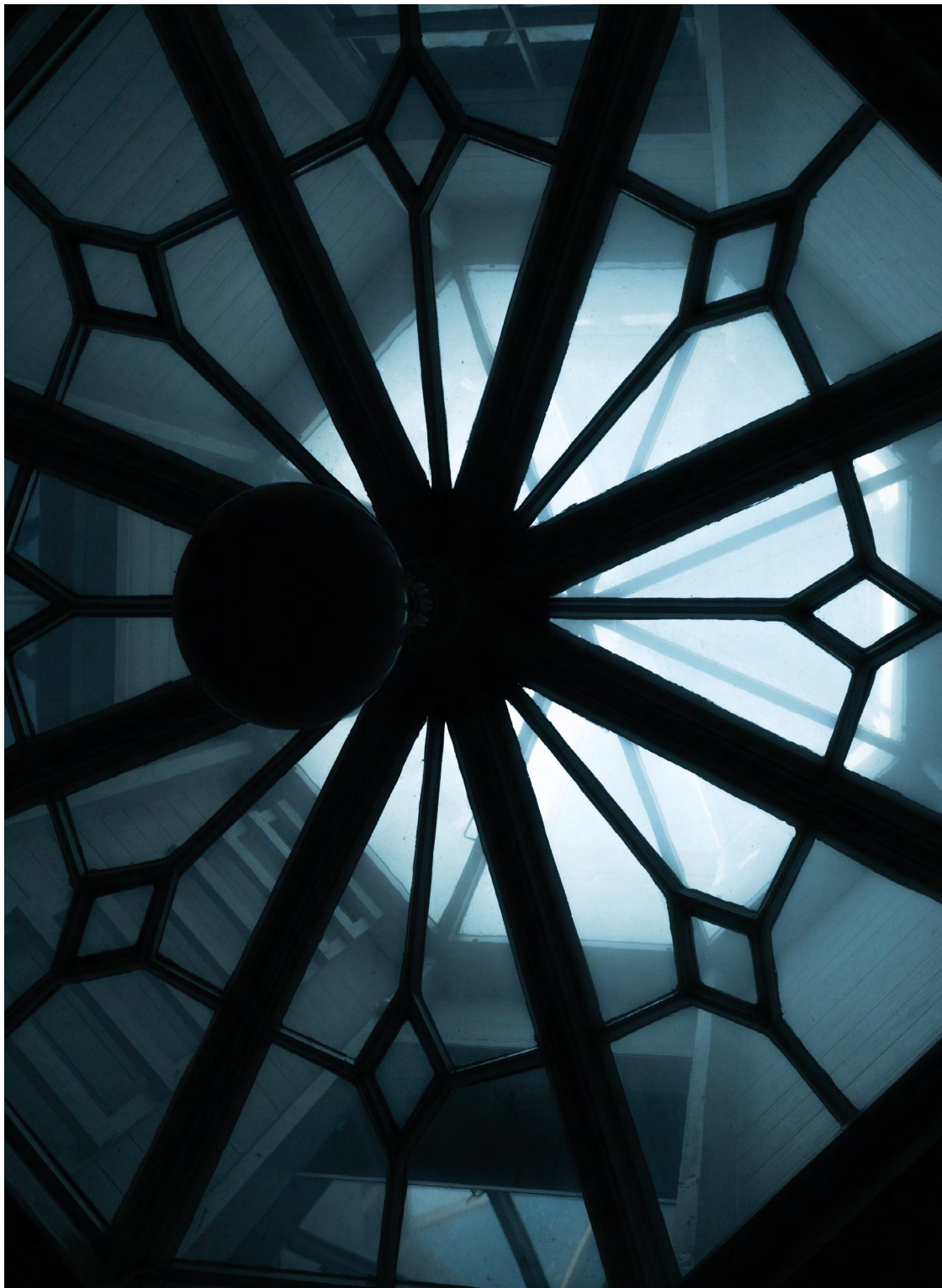




#3

Pacta sunt servanda

Kaius Tuori



Abstract

Legal maxims written in Latin are a constant in European and American legal cultures, where they have great authority due to perceived antiquity and origins in Roman law. However, sometimes these maxims are actually fairly recent, neologisms that only purport to be ancient. The purpose of this article is to explore one such maxim, *pacta sunt servanda*, agreements have to be upheld, and the cultural, political and legal connotations and contemporary significances that the phrase has. Through the convoluted history of the maxim *pacta sunt servanda*, the article explores the role of tradition and history in the making and legitimizing rules.

1. An ancient rule?¹

When lawyers wish to appear convincing, they turn to Latin. Rules and maxims of law that are considered to be self-evident, beyond discussion, tend to be expressed in Latin. One of the most famous is *pacta sunt servanda*. Agreements have to be kept.

Like in many other grand statements, a brief look at the literature shows that many of the fundamental features or even virtues of the legal world may be seen to be derived from this maxim (e.g. Paulus, 2016; Hyland, 1994; Sharp, 1941). Simply massive chunks of the legal system, from the notion of the rule of law to the protection of private ownership, let alone the system of international law, appear to hinge on this phrase, as its *Ursprungsnorm*, the Kelsenian foundational norm. As the venerable Max Planck Encyclopedia of Public International Law states authoritatively: “The *pacta sunt servanda* rule embodies an elementary and universally agreed principle fundamental to all legal systems.” (Aust, 2007)

When a maxim is expressed in Latin, the mind flies immediately to ancient Rome, whose law is the starting point of Western jurisprudence. Concepts and maxims in Latin are basic features of legal writing in Europe and the Americas, cultural references signaling authority and adherence to tradition (Benke & Meissel,

2002). *Pacta sunt servanda* is clearly something that the Romans would have said, for example Cicero (*De Officiis* 3.92) posed the question whether agreements and promises must always be kept (*pacta et promissa semperne servanda sint*). A culture founded on the virtue of *fides*, good faith and trust, ancient Romans embodied the values and ethics of duty (Atkins, 2018, pp. 73–78).

This is where the story begins to go strange. There is no Roman maxim of *pacta sunt servanda*. Even the rule itself has no correspondence in Roman law, as *pacta* or agreements were not in and by themselves enforceable in Roman legal practice (Du Plessis, 2010, p. 309). In the Digest of Justinian, a Byzantine compilation of Roman law that forms our main source of the content of Roman law, the only time that something similar can be found (Dig. 2.14.13.1, *et ideo servandum erit pactum conventum*), it is in the exceptional case when the procurator is considered to have acted as a principal. Roman law was interested in the obligations created by various causes, ranging from various kinds of contracts or delicts (Dig. 2.14.1.3, 44.7.4). In addition to the pactum not by itself creating an obligation (Dig. 2.14.7.4), the idea that it would have been binding as a matter of course would have been purely absurd. Various kinds of contracts created obligations that were valid under different conditions, thus for example a contract that was made under duress was as null and void (Dig. 50.17.166), as was a contract that did not specify a price (Dig. 18.1.2.1) or that was made of a thing that did not exist (Dig. 18.1.8pr) or, for instance, to do something that was impossible (Dig. 50.17.185). In short, there is a whole field, namely the

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Roman law of obligations, which was a negation of the categorical rule *pacta sunt servanda*. References to *bona fides* or good faith were common in Roman law and one must remember that rules such as *caveat emptor* (buyer beware) were not classical Roman law. There simply was no contract absolutism that would serve as the foundation of *pacta sunt servanda*.

While in international law, the maxim *pacta sunt servanda* was introduced by Hugo Grotius, in his 1625 *De jure belli ac pacis* (book 2.11.1) as the principle that agreements in good faith have to be kept, the first instance of the maxim being written in its current form is actually only by early modern natural law scholar Samuel Pufendorf, in his 1672 *De jure naturae et gentium* (book 3.4). In a

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slightly different wording, it was earlier written by the Pope Gregor IX in his famous *Liber Extra* (10.1 *de pactis*, 35.1) one of the key texts of medieval canon law, published in 1234. How and why this transformation from obscure Roman texts to an early modern legal maxim took place

is uncertain. The emergence of the *pacta sunt servanda* as a legal principle and its subsequent unlikely continuing role in the legal systems of the world has confounded legal scholars. Some (see Hyland, 1994, for references) have traced its emergence to the creation of the doctrine of consensual-ity in the validity of contracts, while others (such as Paulus, 2016) have suggested that its importance is slowly vanishing as the legal thinking on contracts continues to evolve.

2. Genealogy and its significance

In intellectual history, the field that I have strangely enough found myself in, there is an important approach to the development of ideas in history called genealogy. It seeks to draw a distinction between the face value of ideas expressed in texts and their meaning as part of a larger discourse involving power relations and hegemonical claims. In short, it claims that a maxim is not simply a *bon mot*, but it also operates as a vehicle to make and legitimate claims and power structures. In many of the key texts of genealogy, the stories of origin and their legitimating and power creating functions play a central role (Nietzsche, 2006, 61; Foucault, 2003, pp. 115–140).

In the case of *pacta sunt servanda*, a genealogical approach could yield interesting results. For instance, from a Marxist perspective the claim that contracts are to be respected can and has been seen as a way that law can be used to reinforce property relations and the inherent inequality therein. A strict adherence to contracts and property regimes means that

social and progressive aims, such as helping hard off people in debt become impossible. It also contributes to the preservation of structural inequality and social stagnation. Within the law of obligations, holding on to *pacta sunt servanda* without exceptions could mean that debts could not be restructured and companies would possibly go bankrupt and people lose their jobs. At the same time, *pacta sunt servanda* may be seen to have an inbuilt inequality in it, in that private persons are forced to bear their debts even though they are impossible to service, while the rich and major corporations are freed from such servitude. (argued forcefully in Piketty, 2014).

Critics of Roman law from Marx to Proudhon and ultimately to the Nazi Party in Germany presented similar accusations: Roman law supported individualistic, heartless greed disguised as equality. They argued that Roman law was, in its support of strict interpretation of contracts and the inviolability of property rights, a law for the rich and a tool for the oppression of the masses (i.a. Whitman, 2003, pp. 8–9). While authoritarian systems such as Nazi Germany have always held a dislike towards the very concept of the rule of law, the precedence of law over political expediency and the self-limitation of the state that it implies, Carl Schmitt (1940, p. 145) took the matter further, arguing that the concept of *pacta sunt servanda* breaks the unity of the state by creating contractual bonds between individuals that threaten their ethical allegiance to the state.

It has been a truism that legal and social structures have a way of influencing thought in that they create new realities and ways of knowing and are thus not in any way neutral. The intellectual construc-

tion of reality through perception and the assignment of meaning to what we perceive is socially constructed. Thereby maxims such as *pacta sunt servanda* may be seen to have a nefarious role in giving legitimacy to a fundamentally unjust system of law, one that reinforces inequality and repression.

3. The intellectual and political significance of *pacta sunt servanda*

Should *pacta sunt servanda* then be considered to be an oppressive remnant of an unequal world, where the powerful used the law to cement their hegemony?

Not completely. The principle of *pacta sunt servanda* can also be seen as a fundamental element in the making of a rule of law, a polity where agreements are respected, contracts not only between individuals but also contracts between citizens as a community in order to form a community.²

At the individual level, would we want to live in a society where contracts would have no meaning? This would be a society without trust, a society where nobody

² This is admittedly an expansive interpretation, others may prefer a more strict one. For example, in its 2016 rule of law checklist, The Venice commission of the Council of Europe (p. 19-20) maintains that the *pacta sunt servanda* principle applies primarily as part of the state's obligation to observe their international treaty obligations through the Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.

could count on being paid for their work, where not only rents and debts but also alimonies would not be paid, where the more powerful could act with impunity and not respect their own commitments. Hannah Arendt (1972, pp. 193–194) maintained that *pacta sunt servanda*, which she called “the old Roman maxim”, is the ultimate guarantee of law, that the rules of the game are the same for all.

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On a societal level, a society without *pacta sunt servanda* would be a society where officials would do their work only when being forced to or enticed to by bribes. A society where public funds would simply disappear without a trace at the hands of corrupt officials, as can be observed in all too frequent examples around the world (Bosio et al., 2020).

The reliance on contracts and the enforceability of contracts is equally a tool for the weak against unscrupulous magnates. The possibility to take someone to court over a breach of contract protects the person buying or renting against being defrauded, but even more importantly it

protects the trust within society that commitments being made are being fulfilled. Examples abound of alternatives, of workers and buyers being left unpaid and uncompensated, even in the highest political echelons of Western democracies, as the example of Donald Trump illustrates (Barak, 2022).

One of the primary ways that *pacta sunt servanda* is used today is in the law of international treaties. Both in the doctrine of international law and in the 1969 Vienna Convention on the Law of Treaties (Art. 26), *pacta sunt servanda* is one of the key components of international law: “Every treaty in force is binding upon the parties to it and must be performed in good faith.” What this in practice means is that states are not allowed to abandon a treaty that they no longer wish to follow for one reason or another (Aust, 2007). In international law, there are of course few mechanisms to compel states to do anything, but that is another matter entirely.

The bottom line is that the principle contained in the maxim *pacta sunt servanda* is a valid one, that contracts and agreements that are legally binding must be performed. It forms the foundation of trust between parties, whether they are individuals in a contract relationship or a group in partnership, state or person. The fact that you honor your commitments, even when you think that it is onerous, that you would rather not to and do not really feel like it, is the mark of a responsible adult, a rights and obligations holding person that can be trusted.

4. The uses of the past

One of the peculiarities of so called critical histories is that they seek to present narratives that are counterintuitive, that go against the grain of established beliefs and thought structures. This is, or should be, one should point out, the aim of all scientific inquiry, but more on that later. However, even critical histories subscribe to the same mechanisms of meaning as history in general.

The traditional discourse about the uses of the past revolves around themes such as the way that history has been used in nation-building, as a tool to construct a shared past and sense of community for the nation or group. They are often shaped in the form of origin stories of who we are in contrast to the outside world, narratives of past battles against formidable enemies with their necessary heroes and villains (e.g. Anderson, 1991; MacMillan, 2009).

Even when no such obvious uses are present, even self-presented critical histories subscribe to narrative conventions and typical figures of speech. They tend to rely on what could be called the drama of exposure, where the author herself takes the role of the hero, exposing the great lie that earlier studies have been constructing.

What this self-professed critical historiography sometimes forgets is that this has been the narrative of scientific history ever since Ranke. To tell things as they happened. What critical historiography in its most obvious form, that was practiced some decades ago, claimed is that this presentation of false images and false narratives sought to do was to perpetuate a false consciousness and acceptance of

repressive social norms (a typical example is Roper, 2005).

Then again, what do critical histories such as that of writing about the false belief that a legal maxim had ancient roots achieve? Very little, at least in this case, apart from the knowledge that it is false.

This is because often facts do not matter. Regardless of whether or not a maxim is of spurious antiquity, the creation of contemporary significance operates with similar mechanisms. As in

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historiography so often, ancient roots are presented as a noble pedigree. This is the logic of conservatism, where the fact that something has existed for a long time is seen as proof of its validity and acceptability (Muller, 1997, pp. 3–13). This premise is naturally false, taken *in extenso* it could be used to justify things with long histories such as racism or misogyny.

However, in the case of legitimizing a principle or maxim, tradition and *longue durée* are valid propositions, illustrating how there is a cultural continuity and custom that supports it. As we have

learned in recent years, the fact that something is not true does not stop very large groups of people in believing it. Truth does not change minds when a lie is much more convenient in supporting one's prejudices. In the same way that hearing in therapy that you have a problem does not make the problem go away, the power of exposure works only when it has been primed and reinforced by working to change the narrative, the general framework where the new information would be connected to.

At the same time, it could be claimed that even though written sources of the maxim *pacta sunt servanda* are later, from late antiquity or the middle ages, for the content of the principle there is an undisputed classical tradition. Roman law and the Roman social norms both were adamant that one should keep one's word. Oaths, the solemn *sacramentum* as the strictest, promises and other commitments were made not only to men but also towards the beyond, and punishments for fraud were severe. Already in the Twelve Tables, the archaic Roman law code from the fifth century BC, debtors who do not pay are put in chains for a month to be displayed in the Forum, while false witnesses were flung to their death from the Tarpeian Rock (*XII Tabulae* 3.3, 8.23).

Examples abound. From Livy's account (9.5) of the negotiations about treaty making after the entrapment of the Roman army in the battle of Caudine Forks to various Roman legal cases, the *exemplum* is clear: the central virtues of public life, from *fides* to *virtus* were about this steadfastness. One should enter into agreements with caution and deliberation, because they were binding on many levels.

This is in fact one of the central tenets

of invented histories: they could be true based on what we know. The plausibility of the narrative gives us license to believe that this could be something that could have happened or being said. *Pacta sunt servanda* is something that the Romans could have said, other than the part about the *pacta*, or that they meant agreements considered in good faith. The French historian Marc Bloch argued that the lie prevails in situations of crisis simply because people prefer to believe what they want to believe (Bloch, 2013).

This brings us to the role of tradition as a framework through which an individual estimates things such as plausibility of events.

5. Tradition as a tool and as a thing

The French social theorist Pierre Bourdieu argued that the nature of tradition is to be silent, most of all about itself as tradition.³ What this means is that the tradition is internalized, known and thus outside discussion.

As the silent framework through which information is interpreted, tradition creates expectations of how things should turn out. In this case, we have internalized an understanding of Romans and their legal system as one based on duty, obligation and their fulfillment. We have learned this through education and literature, but its strength is multiplied by the fact that

³ Bourdieu, 1977, p. 167: 'What is essential goes without saying because it comes without saying: the tradition is silent, not least about itself as a tradition.'

there is an element of belief involved. We believe that keeping one's word is a notion that a Roman maxim would be celebrating, because that is what we expect. For many who have been trained in the law, this is a matter of belief in another way as well. We are liable to place ourselves as heirs to a tradition, parts of a heritage, such as that of Roman law and legal tradition. It is in no small part a question of identification, of projecting virtues and seeking out from the ancient historical tradition examples of honorable and commendable behavior.

The value of antiquity as a model and as precedent is something that has underpinned the European intellectual tradition since antiquity itself. In some respects, such as with regard to Roman law, there has been considerable criticism against the direct implementation of ancient rules and structures to contemporary situation. However, as Whitman (2003) has stated, the issue is fundamentally what one takes as the lesson of antiquity to be? Roman law and Roman legal tradition contains examples and rules for all intents and purposes.

After such immediate comparisons between the application of an ancient solution to modern problems as opposed to a modern solution have more or less ended, antiquity has been allowed to ascend into a respected and unquestioned role as a source or origin, with the status that such a position allows for. When the absurdity of seeking solutions from antiquity ended, it ended also the conflicts and as a consequence, the criticism of ancient wisdom.

In other contexts this is part of what scholars have called the slow descent of Roman law into history (Frier, 2000). This

has meant that with the end of the direct applicable relevance of Roman law in contemporary legal systems, the study of Roman law may focus on its history, the law of Rome in the context of ancient Roman society. However, this is just one part of the result. The second part is that Roman law and Roman legal tradition become origin myths and legitimating devices for questionable interpretations of the past and its value today.

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However, these discussions over the value of ancient traditions are more about the current social and moral ideas and the role that an ancient precedent or at least a presumed ancient precedent has in them. The discussion about *pacta sunt servanda* is thus not primarily about Roman law, but about what significance one wishes to give to truthfulness, trustworthiness and keeping one's word. The immensely rich tradition of the Roman law of obligations and the finely calibrated doctrine of when and how an obligation is valid and binding is thus a discussion one enters after the basic premise of a lawful society is agreed upon.

The maxim of *pacta sunt servanda* is thus at the same time fundamental and an absurdity. It is a fundamental when one discusses whether one should respect a contractual obligation in general and the binds of trust that link individuals in a civil society. Within the legal discussion of the interpretation of those obligations it really makes no sense at all.

The fact that *pacta sunt servanda* emerges during late antiquity is perhaps no a coincidence. It emerges at a time when the whole binding nature of the Roman legal system began to be questioned as the Roman political regime collapsed. Roman law survived, not because there was a ruler or a political regime that would have necessarily insisted and enforced it, but rather because there was a willingness, to quote an actual Roman maxim, *ius suum cuique tribuere* (to give everyone their due).

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References

- Anderson, B. (1991). *Imagined communities: reflections on the origin and spread of nationalism*. London: Verso.
- Arendt, H. (1972) *On Violence, In Crises of the Republic*. San Diego: Harcourt Brace.
- Atkins, J. W. (2018). *Roman Political Thought*. Cambridge: Cambridge University Press. doi:10.1017/9781316227404
- Aust, A. (2007). *Pacta Sunt Servanda*. *Max Planck Encyclopedia of Public International Law*. Retrieved from <http://opil.ouplaw.com>
- Barak, G. (2022). *Criminology on Trump*. London: Routledge.
- Benke, N. & Meissel, F.-S. (2002). *Juristenlatein*. Wien: C. H. Beck.
- Bloch, M. (2013). Reflections of a Historian on the False News of the War (J. P. Holoka, Trans.). *Michigan War Studies Review*.
- Bosio, E., Djankov, S., Glaeser, E. L. & Shleifer, A. (2020). Public Procurement in Law and Practice. *National Bureau of Economic Research Working Paper Series*, No. 27188. doi: 10.3386/w27188
- Bourdieu, P. (1977). *Outline of a Theory of Practice*. Cambridge: Cambridge University Press.
- Du Plessis, P. (2010). *Borkowski's Textbook on Roman Law* (4th ed). Oxford: Oxford University Press.
- European Commission for Democracy Through Law (2016 March 11–12). The Rule of Law Checklist. Retrieved from https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf
- Foucault, M. (2003). "Society Must Be Defended": *Lectures at The College de France 1975-1976*. New York: Picador.
- Frier, B. (2000). Roman law's descent into history. [Review of the books *The Sources of Roman Law: Problems and Methods for Ancient Historians* by O. F. Robinson; *Roman Law in Context (Key Themes in Ancient History)* by D. Johnston]. *Journal of Roman Archaeology*, 13, 446–448. doi:10.1017/S1047759400019085
- Hyland, R. (1994). *Pacta Sunt Servanda: A Mediation*. Retrieved from: www.trans-lex.org/124500
- MacMillan, M. (2009) *The Uses and Abuses of History*. London: Profile Books.
- Muller, J. Z. (1997). What is Conservative Social and Political Thought. In J. Z. Muller (Ed.), *Conservatism: An Anthology of Social and Political Thought from David Hume to Present*, (pp. 3–19). Princeton: Princeton University Press.
- Nietzsche, F. (2006). *Nietzsche: "On the Genealogy of Morality" and Other Writings* (K. Ansell-Pearson, Ed.; C. Diethe, Trans.). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511812026
- Paulus, C. G. (2016). *The Erosion of a Fundamental Contract Law Principle pacta sunt servanda vs. Modern Insolvency Law. Eppur si muove: The Age of Uniform Law*. (Unidroit, Ed.). Rome: The International Institute for the Unification of Private Law.
- Piketty, T. (2014). *Capital in the Twenty-First Century*. Cambridge, Mass. The Belknap Press of Harvard University Press.
- Roper, M. (2005). Slipping Out of View: Subjectivity and Emotion in Gender History. *History Workshop Journal*, 59(1), 57–72. doi:10.1093/hwj/dbi006
- Sharp, M. P. (1941). *Pacta Sunt Servanda*. *Columbia Law Review*, 41(5), 783–798.
- Schmitt, C. (1940). *Staatslehre und pluralistischer Staat*. In *Positionen und Begriffe II*, Berlin: Duncker & Humblot.
- Whitman, J.Q. (2003). *Long Live the Hatred of Roman Law!* Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=383761



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